

**CRIMINAL JURISDICTION OF THE VISITING SADC ARMED FORCES
OVER THEIR MEMBERS DURING PEACE TIME: A CASE STUDY OF THE
REPUBLIC OF SOUTH AFRICA AND THE REPUBLIC OF BOTSWANA**

by

MADILA ASIEL NGOAI

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Supervisor: Mrs Polina Finney

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Student number: 36246697

I declare that ***Criminal jurisdiction of the visiting SADC Armed Forces over their members during peace time: A case study of the Republic of South Africa and the Republic of Botswana*** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

SIGNATURE (MR)

30 June 2014

DATE

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ABSTRACT

The study aims to investigate criminal jurisdiction of the visiting SADC armed forces during peace time focusing only on the Republic of Botswana and the Republic of South Africa. Since the adoption of the Declaration and Treaty of SADC, the armed forces of both Botswana and South Africa at times find themselves on each other's territory. Once in each other's territory the question of criminal jurisdiction becomes imperative. The two countries seem not to agree on the content of status of force agreements while cooperating in terms of the SADC Treaty. The contentious point is that the death sentence is still a competent sentence for certain offences under certain circumstances in terms of Botswana laws, whereas in South Africa the death sentence was declared unconstitutional. In the absence of any agreement, South African armed forces may face a death sentence while in Botswana and Botswana authorities might not be able to carry out a death sentence over their members for offences committed while in South Africa. In trying to answer the question of criminal jurisdiction while on each other's territory during peace time, a study of the evolution of jurisdiction is undertaken. The laws of both countries are considered, especially the application and protection afforded by their respective constitutions. The approach followed by the UN in sending a peace-keeping force to conflict areas is analysed. A micro-comparison of agreements concluded by selected countries, more especially the NATO agreement, is undertaken. Treaties as a source of international law are analysed to show that rights can be extended and be limited by agreement.

The study concludes by recommending that concurrent criminal jurisdiction with certain qualification seems to be the accepted norm and compromise amongst the international community, and that the two countries may consider this approach as the basis for such agreement.

Key words: Botswana, South Africa, BDF, SANDF, armed forces, state sovereignty, criminal jurisdiction, exclusive jurisdiction, limited jurisdiction, SoFA.

TABLE OF ABBREVIATIONS

AMIB:	Memorandum of understanding between the Government of Republic of South Africa and African Union Contributing Resources to the African Union Mission in Burundi
BDF:	Botswana Defence Force
CMA:	Court of Military Appeal
CILJSA:	Comparative and International Law Journal of Southern Africa
CMJ:	Court of Military Judge
CODH:	Commanding Officer Disciplinary Hearing
CSMJ:	Court of Senior Military Judge
DRC:	Democratic Republic of Congo
ECOWAS:	The Economic Community of West African State
GA:	General Assembly
ICC:	International Criminal Court
ICTR:	The International Criminal for the Prosecution of Person Responsible for Genocide and Other Serious Violation of International Humanitarian Law Committed in the Territory of Rwanda
MINUSMA:	UN Multidimensional Integrated Stabilization Mission in Mali
Model SoFA:	Draft model Status of Forces Agreement between the United Nations and host country
MONUSCO:	United Nations Organisation Stabilization Mission in the Democratic Republic of Congo

MDSMA: Military Disciplinary Measures Act

MDC: Military Disciplinary Code

NATO SoFA:

Agreement between the Parties to the North Atlantic Treaty regarding the Status of Forces Agreement

PCIJ: Permanent Court of International Justice

South Africa-Zimbabwe Air Force MoU:

Memorandum of understanding between the Government of Republic of South Africa and Government of Republic of Zimbabwe concerning the Secondment of the Air Force of Zimbabwe Personnel to the South African Department of Defence

SADAIT: Memorandum of Understanding between the government of Republic of South Africa and the Democratic Republic of Congo on the Practical Assistance on the Integration of their Armed Forces

SADCLJ: Southern African Development Community Law Journal

SADC: South African Development Community

SADC MoU: South African Development Community Memorandum of Understanding

SADCBRIG: South African Development Community Standby Brigade

SANDF: South African National Defence Force

SANDU: South African National Defence Union

SC: Security Council

SoFA: Status of Forces Agreement

- SRSG:** The Special Representative of the Secretary-General
- UN DFS:** UN Office of Chief of Conduct and Discipline UNIT, Department of Field Support
- UNOMOZ:** Agreement between the United Nations and the Government of Mozambique
- UNOSOM II:** United Nations Mission in Somalia
- UN:** United Nations
- UNAMID:** Agreement between the United Nations and African Union and the Government of Sudan concerning the status of African Union/United Nations Hybrid Operation in Darfur
- UK:** United Kingdom
- USA:** United States of America

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CRIMINAL JURISDICTION OF THE VISITING SADC ARMED FORCES OVER THEIR MEMBERS DURING PEACE TIME. A CASE STUDY OF THE REPUBLIC OF SOUTH AFRICA AND THE REPUBLIC OF BOTSWANA

CHAPTER 1

INTRODUCTION

1.1 Background

It is generally accepted under customary international law, based on the principle of state sovereignty,¹ that states have criminal jurisdiction over crimes committed on their territory either by citizen or foreign nationals.² Before the Nuremberg Trial,³ states could exclusively exercise their sovereign rights; *i.e.* sovereign equality and territorial integrity, but the Nuremberg Charter pierced the veil of state sovereignty,⁴ by holding those who committed atrocities during World War II within their territory responsible.⁵ During peacekeeping operation conducted under the UN, the sending state retains exclusive criminal jurisdiction over its forces for all crimes committed on the receiving state's territory.⁶

There seems to be uncertainties as to who would exercise criminal jurisdiction during peacetime where states enter into bilateral and/or regional agreements in which members of their armed forces are sent to member states for the purpose of conducting training and force preparations exercises. The sending state would like to retain exclusive criminal jurisdiction for administration and discipline purposes over its members, whereas the receiving state would like to assert its sovereignty by retaining exclusive criminal jurisdiction over all

¹ Sovereign Equality, Territorial Integrity and Exclusive Criminal Jurisdiction.

² Reisman (ed) *The Library of Essays in International Law: Jurisdiction in International Law* (1999) at 32.

³ Military Tribunal established by the Allied Forces to try Germany Nazi Leaders for Atrocities committed during World War II. Available at <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm> (Date used 05/11/12).

⁴ Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) at 21.

⁵ The Allied Forces held Nazi Germany leaders responsible for atrocities committed on German citizens (mostly Jews) and non-citizen (civilians and prisoners of war) especially for those crimes committed in the concentration camps on German territory.

⁶ UN (General Assembly) 45th session: Comprehensive review of the whole question of peace keeping operations in all their aspects: Model status-of-force agreement for peace-keeping operations (hereinafter Model SOFA) par 47(b). Available at www.ilsa.org/jessup/jessup09/basicmats/UNsofa.pdf (Date used 05/11/12).

people within its territory. The receiving and the sending state will normally regulate each other's relationship in what is generally referred to as the Status of Forces Agreement.⁷ Currently there is no status of force agreement amongst the Southern African Development Communities (hereinafter SADC) states as envisaged in the Declaration and Treaty of SADC, hence the important of this research.⁸

In furtherance of Chapter III, Article 52 of the UN Charter,⁹ Southern African countries adopted the Declaration and Treaty of SADC¹⁰ (hereinafter the SADC Treaty) wherein their relationship with each other was established. In terms of Article 5(1) (c) of the SADC Treaty one of the objectives of SADC is to promote and defend peace and security. Pursuant to the SADC Treaty; Protocol on Politics, Defence and Security in the Southern African Development Community Region¹¹ (hereinafter the SADC Protocol) was adopted to give effect to the SADC Treaty on matters of politics, defence and security.

The preamble to the SADC Protocol states that the Heads of State agree to recognise and affirm the principles of strict respect for sovereignty, sovereign equality, territorial integrity, political independence, good neighbourliness, interdependence, non-aggression, and non-interference in internal affairs of other states. Further Heads of States are determined to achieve solidarity, peace and security in the region through cooperation in matters of politics,

⁷ *Ibid.* The Model SoFA regulates relationship between the UN and host nation during UN peace keeping operation in the host country's territory. Where states enter into bilateral/regional agreements during peace time for training and force preparation purposes, the legal status of the members is regulated in subsequent status of force agreement.

⁸ See *n* 10 and 23 *infra*.

⁹ Article 52 of the UN Charter: The Charter encourages the establishment of Regional Treaties/Agreements and the settlement of dispute in that particular region via these Treaties/Agreements before being referred to the UN. The purpose of these Regional Treaties/Agreements should be in line with the principles of United Nations. Available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> (Date used 21/10/12).

¹⁰ SADC Treaty was adopted in 1992 and came into force in 1993. Member states are: Republic of South Africa, Republic of Botswana, Democratic Republic of Congo, Kingdom of Lesotho, Republic of Madagascar, Republic of Malawi, Republic of Mauritius, Republic of Mozambique, Republic of Namibia, Kingdom of Swaziland, United Republic of Tanzania, Republic of Zambia and Republic of Zimbabwe. Available at <http://www.chr.up.ac.za/undp/subregional/docs/sadc8.pdf> (Date used 23/10/12).

¹¹ Protocol on Politics, Defence and Security (hereinafter the SADC Protocol) was adopted in Malawi (Blantyre) on 14 August 2001. Available at http://www.sadc.int/files/3812/9916/0245/sipo_en.pdf (Date used 23/10/12).

defence and security.¹² In terms of Article 2 of the SADC Protocol, the general objective of the Organ shall be to promote peace and security in the region, to promote regional and coordination and cooperation on matters related to security and defence and to establish appropriate mechanism to achieve this end.¹³

Subsequent to the aforesaid, a Memorandum of Understanding Amongst the Southern African Development Community Members State on the Establishment of Southern African Development Community Standby Brigade¹⁴ (hereinafter SADC MoU) was signed wherein member states agreed that a SADC Standby Brigade (hereinafter SADCBRIG) should be established. In terms of Article 8 of the SADC MoU, member states shall contribute military, police and civilian personnel to the SADCBRIG. Article 13 of SADC MoU provides that training of personnel and units for the SADCBRIG is the responsibility of each member state. It further provides that the required level of training proficiency for personnel and units assigned to the SADCBRIG shall be achieved by the standardised training objectives and common training standard. The training shall include training at national and multi-national level.¹⁵

In fulfilment of the SADC Treaty, the SADC Protocol and the SADC MoU, member states schedule and participate in multi-national exercises on any of the member state's territory¹⁶ and/or sent individual or small groups of soldiers to attend training-related developmental courses on any of the member state's territory. If we take the Republic of Botswana (hereinafter Botswana) and the Republic of South Africa (hereinafter South Africa), the two countries always

¹² Preamble to the SADC Protocol.

¹³ Article 2(1) and (2)(d) of the SADC Protocol.

¹⁴ Memorandum of Understanding on the Establishment of the SADC Brigade (hereinafter the SADC MoU) came into effect in August 2007. Available at <http://www.paxafrica.org/areas-of-work/peace-and-security-architecture/peace-and-security-architecture-documents/mou-on-the-establishment-of-the-sadc-brigade> (Date used 23/10/12).

¹⁵ Article 13 of the SADC MoU.

¹⁶ Exercise Golfinho (SADC peace support operation field training exercise) from 1-26 September 2009 conducted in SA Army Combat Training Centre, Lohatla in the Northern Cape Province. Available at <http://www.dod.mil.za/media/media2009/Movement%20of%20troops%20and%20vehicles%20for%20Exercise%20Golfinho.pdf> (Date used 13/09/2012).

send individual or groups of soldiers to attend training-related courses and/or exercises on either country, in order to achieve a common training standard.¹⁷

South Africa and Botswana are signatories to the Southern African Development Community Protocol on Extradition (hereinafter the SADC Extradition Protocol).¹⁸ In terms of the SADC Extradition Protocol, member states agree to co-operate in the prevention of crime and to increase easy access to free cross border movement. The offences covered under the SADC Extradition Protocol are those that are punishable under both state parties by imprisonment of one year and more. The SADC Extradition Protocol provides that extradition will be refused if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law.¹⁹ It further provides that extradition shall be refused if the person whose extradition is requested would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment.²⁰

In terms of the *Defence Act 42 of 2002* (hereinafter the SA Defence Act) the South Africa National Defence Force (hereinafter the SANDF) is mandated to participate and cooperate in regional and international peace and security initiatives. The SA Defence Act further states that any agreement between South Africa and any other state or international institution must provide for the legal status of members of the SANDF and the legal status of the foreign military personnel who are deployed in South Africa.²¹ The SA Defence Act further provides that the foreign military personnel have authority over their members in matters concerning discipline and administration, provided that no cruel, inhuman or degrading punishment may be meted out or administered

¹⁷ *Ibid.*

¹⁸ The Southern African Development Community Protocol on Extradition (hereinafter SADC Extradition Protocol) was ratified on 14 April 2003 and came into force on 1 September 2006. Available at http://www.sadc.int/files/3812/9916/0245/sipo_en.pdf (Date used 23/10/12).

¹⁹ Article 4(c) of the SADC Protocol on Extradition.

²⁰ Article 4(f) of the SADC Protocol on Extradition. Other grounds for refusal to grant includes but not limited to, where judgment was rendered in absentia, where there is final judgment rendered against the person and where request for extradition is based on race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons (Article 4 of the SADC Protocol on Extradition).

²¹ Section 92(a) of the SA Defence Act.

by a military court or other authority while in South Africa.²² The SA Defence Act therefore authorise members of SANDF and Foreign Armed Forces to participate and cooperate in international and regional training initiatives and exercises, however it (SA Defence Act) left the legal status of members of SANDF to be regulated by future agreements. It further provides for limited exclusive jurisdiction for the visiting foreign armed forces.²³

In terms of section 6 of *Botswana Defence Act 13, 1977* (hereinafter Botswana Defence Act) the President may order that the whole or any part of Botswana Defence Force (hereinafter BDF) be employed out of or beyond Botswana. Furthermore, the President may order members of BDF to undergo training or for duty or employment outside Botswana²⁴ or be placed at the disposal of other military authorities of any country.²⁵ Section 116(4) further provides that military authorities shall have the right to exercise jurisdiction in relation to offences under Botswana Defence Act at all times when the person alleged to have committed an offence against this Act is serving outside Botswana. This means that Botswana will retain criminal jurisdiction for offences committed outside Botswana. By further including the words 'at all times' appears to suggest that Botswana intends exercising exclusive jurisdiction irrespective of the location or the type of offence committed by a BDF member.

1.2 Problem statement

In light of the legal framework discussed above, the question arises as to which of the member states will exercise criminal jurisdiction in the absence of any agreement if a soldier commits a crime. If we adhere to strict respect for sovereignty,²⁶ and use Botswana and South Africa as a case study, then the receiving state has jurisdiction, (whether jurisdiction is exclusive or limited will be analysed in later chapters) it means:

²² Section 97(1)(a) of the SA Defence Act.

²³ *Ibid.*

²⁴ Section 7(1) of Botswana Defence Act.

²⁵ Section 7(2) of Botswana Defence Act.

²⁶ *Ibid n 1 supra.*

- a. A South African soldier who is in Botswana is going to be tried by the Botswana court under Botswana law. If for example the said soldier is convicted of murder he/she might face capital punishment.
- b. If a Botswana soldier commits the same crime (murder) while in South Africa and he/she is tried in South Africa under South African law he/she is protected from capital punishment.
- c. Therefore, a Botswana soldier is more protected than his/her South African counterpart if he/she commits a crime in South Africa, while a South African soldier is in a worst situation if he/she commits a crime in Botswana.

The SADC Treaty, the SADC Protocol, the SADC MoU and the SA Defence Act do not provide for the legal status of their personnel. They left the question open to be addressed by future agreement. Currently there is no agreement between member states as to which state will exercise criminal jurisdiction.²⁷ However, it appears that there is consensus amongst the SADC member states that a sending state has limited criminal jurisdiction where an offence is committed by a member of a sending state in the course and scope of performing official duties.²⁸ The contentious point is as follows: Which state will exercise criminal jurisdiction where a member of a sending state commits an offence outside the scope of his/her duties – is it the sending or the receiving state?

In trying to answer the aforementioned questions, an analysis of (amongst others) the SADC Treaty, the SADC Protocol, the SADC MoU, the Draft SADC SoFA, the agreement entered into by the government of South Africa and Zimbabwe, the agreement entered into by South Africa and the African Union in sending troops to Sudan and Burundi, the agreement between the

²⁷ There is no consensus between Botswana, South Africa and Zambia (Minutes of the SADC Attorney General's meeting from the Republic of Botswana, South Africa and Zambia dated 11 July 2012: Department of Defence International Relations) (South Africa's position is that South Africa should retain exclusive jurisdiction. Legal opinion provided by Department of International Relation and Cooperation, Office of the Chief State Law Advisers (International Law) dated 10/07/2012).

²⁸ Article 5 of draft agreement regarding the status of SADC standby force or their armed forces deployed within the region for the purpose of training, exercise and humanitarian assistance. The agreement is not yet finalised due to lack of consensus on some of the articles specifically on jurisdiction (hereinafter Draft SADC SOFA [Soft law]). (Department of Defence International Relations).

United Nations and the Government of Mozambique on the Status of the United Nations Operation in Mozambique (hereinafter ONUMOZ)²⁹ and United Nations Mission in Somalia (hereinafter UNOSOM II)³⁰ will have to be undertaken.

The evolution of state sovereignty focusing on sovereign equality, territorial integrity and criminal jurisdiction will be looked at, the approach adopted by the UN in sending peacekeeping force in conflict areas will be analysed and by analogy try and adopt the same approach.

A comparative study with Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (hereinafter NATO SoFA),³¹ the UK, and the USA will be undertaken. The SA Defence Act, Military Discipline Supplementary Measures Act 16 of 1999, the SADC Extradition Treaty, Botswana Defence Act and Botswana Penal Code will be analysed. Lastly, the aforesaid will be measured against the Constitution of the Republic of South Africa, 1996 (hereinafter SA Constitution 1996), specifically against the supremacy of the Constitution,³² the right to life,³³ the right not to be treated or punished in a cruel, inhumane or degrading way³⁴ and the Constitution of Botswana³⁵, specifically the right not to be deprived of the right to life intentionally except in the execution of a sentence of court in respect of an offence under the law in force in Botswana.³⁶

²⁹ Botswana contributed troops to this UN peace keeping mission. Mozambique facts and figures. Available at <http://www.un.org/en/peacekeeping/missions/past/onumozF.html>. (Date used 31/07/13).

³⁰ UNOSOM II was established in accordance with Security Council resolution 814 (1993) of 26 March 1993, to take over from the Unified Task Force (UNITAF). Botswana contributed troops to this mission. Available at <https://www.un.org/en/peacekeeping/missions/past/unosom2mandate.html>. (Date used 01/08/13).

³¹ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (hereinafter NATO SoFA) of 19 June 1951. Available at http://www.nato.int/cps/en/natolive/official_texts_17265.htm (Date used 13/10/12).

³² Section 2 of the SA Constitution 1996.

³³ Section 11 of the SA Constitution 1996.

³⁴ Section 12 of the SA Constitution 1996.

³⁵ The Constitution (summary) of Botswana was adopted in September 1962. Available at http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf (Date used 29/10/12).

³⁶ Section 4(1) of the Constitution of Botswana.

1.3 Hypothesis

There is a need for regional cooperation between the SADC states in matters of defence and security as manifested in the signing of the SADC Treaty. An agreement detailing the legal status of a deployed soldier specifically in respect of criminal jurisdiction has to be drafted in order to settle the question and give certainty to the sending state and the soldier concerned. The legal status of deployed soldiers who commit offences has to be settled specifically with regard to criminal jurisdiction as this can result in serious human rights violation for the soldier concerned.

1.4 The framework of the dissertation

The dissertation will consist of eight chapters divided into various topics in the following format: Chapter 1 will be an introduction. In Chapter 2 the nature and evolution of criminal jurisdiction will be analysed. I will focus on sovereign equality, territorial integrity and criminal jurisdiction as a sub-species of state sovereignty.

Chapter 3 will be the discussion of Chapter III, Article 52 of the UN Charter, the Convention on Privilege and Immunities of the United Nations, the Model for Status of Force Agreement for Peace-keeping Operations, SADC Treaty, The Protocol, Memorandum of Understanding between the Government of the Republic of South Africa and the Government of Republic of Zimbabwe concerning the Secondment of the Air Force of Zimbabwe Personnel to the South African Department Of Defence,³⁷ Memorandum of Understanding between the African Union and the Government of the Republic of South Africa contributing Military Resources to the African Union Special Task Force in Burundi,³⁸ Memorandum of Understanding between the African Union and

³⁷ Memorandum of Understanding between the Government of the Republic of South Africa and the Government of Republic of Zimbabwe concerning the Secondment of the Air force of Zimbabwe Personnel to the South African Department Of Defence (Memorandum was signed on 17/11/05 and aim is to train South African Air Force Pilot). Available at <http://196.14.41.167/dbtw-wpd/images/20051117ZimbabweMOUAirForce.pdf> (Date used 27/11/12).

³⁸ Memorandum of Understanding between the African Union and the Government of the Republic of South Africa contributing Military Resources to the African Union Special Task Force in Burundi (Memorandum was signed in 05/05/04). Available at <http://196.14.41.167/dbtw->

the Government of the Republic of South Africa contributing Military Resources to the African Union in the Sudan³⁹ and the Draft SADC SoFA (soft law) specifically on matters of jurisdiction.

Chapter 4 will be the analysis of legislation regarding status of armed forces and/or personnel abroad, the Defence Act 42 of 2002, Military Discipline Supplementary Measures Act 16 of 1999, the Extradition Act No 67 of 1962, the Southern African Development Community Protocol on Extradition⁴⁰ and Botswana Penal Code.⁴¹ Case law will also be analysed.

In Chapter 5 the constitutions of South Africa and Botswana will be analysed. The following rights will be discussed (in addition to the issue of constitutional supremacy)⁴² the right to life,⁴³ the right not to be treated or punished in a cruel, inhumane or degrading way⁴⁴ and the right not to be deprived of the right to life intentionally except in the execution of a sentence of court in respect of an offence under the law in force in Botswana.⁴⁵ Case law regarding the aforementioned rights will be analysed.

The study will concentrate on Botswana and South Africa as the two countries seem not to agree on the content of Article 5 of the Draft Status of SADC⁴⁶ and the right to life⁴⁷ is protected without any qualification in South Africa even

wpd/images/20040505BurundiMOUAfricanUnionMissioninBurundi(AMIB).PDF (Date used 27/11/12).

³⁹ Memorandum of Understanding between the African Union and the Government of the Republic of South Africa contributing Military Resources to the African Union in the Sudan (Department of International Relation and Cooperation) (Date 27/11/12).

⁴⁰ *Ibid n 18 supra*.

⁴¹ Botswana Penal Code. Available at http://www.vertic.org/media/National%20Legislation/Botswana/BW_Penal_Code.pdf (Date used 25/11/12).

⁴² Section 2 of the SA Constitution 1996.

⁴³ Section 11 of the SA Constitution 1996.

⁴⁴ Section 12(e) of the SA Constitution 1996.

⁴⁵ Section 4(1) of Botswana Constitution.

⁴⁶ *Ibid n 28 supra*. The agreement is not yet finalised due to lack of consensus (specifically amongst the Republics of South Africa, Botswana and Zambia) on some of the articles specifically on jurisdiction (hereinafter Draft SADC SOFA [Soft law]). (Department of Defence International Relation, minutes of the Meeting of the Attorney General from Republics of Botswana, South Africa and Zambia, dated 11 July 2012).

⁴⁷ *Id n 43 supra*.

to non-citizens illegally in the country⁴⁸, whereas in Botswana a person might face capital punishment.⁴⁹

Chapter 6 will be a micro-comparison of status of force agreements concluded by countries abroad, specifically focusing on NATO countries, the UK and the USA bilateral agreements concluded with the receiving states. The NATO agreement is chosen as it is widely accepted beyond the North Atlantic Alliance and it is just short of being a rule of customary law.⁵⁰ The UK and the USA have been chosen as the two countries are having more of their armed forces stationed abroad.⁵¹

Chapter 7 will be the argument in favour of limitation on state sovereignty and the emerging trend that state sovereignty is not absolute. I will further interrogate the argument in favour of and against exclusive jurisdiction using examples of some of the crimes committed by armed forces abroad.

Chapter 8 will be the concluding chapter where shared jurisdiction and some guarantees will be the most probable solution where sovereignty of states will still be protected and the individual soldier's legal status will be certain.

1.5 Methodology

The research involves a literature study of books, treaties, journal articles, legislation and case law. The study is primarily a study of the SADC agreement (focusing on relations between Botswana and South Africa). The approach will be from an international law perspective, looking into treaties, regional agreements, bilateral and multilateral agreements, analysis of foreign status of force agreement, analysis of legislation of both countries and lastly measuring the aforesaid against the constitutions of both countries. The recommendation will be made to both the representatives of South Africa and Botswana.

⁴⁸ *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Others v Tsebe and Others* 2012 SA (16) (CC).

⁴⁹ *Bosch v The State* (Criminal Appeal No. 37 of 1999) 2001 BLR 71 (CA). Available at <http://www.saflii.org/bw/cases/BWCA/2001/4.pdf> (Date used 13/11/12).

⁵⁰ Fleck *The Handbook of the Law of Visiting Forces* (2001) at 7.

⁵¹ *Id n 50 supra* at 23.

CHAPTER 2

ORIGINS OF SOVEREIGNTY

2.1 Historical overview of sovereignty

One of the fundamental principles on which international law is founded is the principle of state sovereignty. The word *sovereign* originally derive from the French word *souverain* which literally means: A supreme ruler not accountable to anyone, except perhaps to God.⁵² The concept sovereign is equally captured in the Latin adage: *Summa in cives ac subditos legibusque solute potest* which literally translate into: Sovereign is the supreme power over citizen and subordinates and which supreme power is not subject to law.⁵³ Originally the concept sovereignty referred to the absolute supremacy of the ruling monarch.⁵⁴

As times evolve the precise meaning of the term sovereignty became ambiguous and the following definitions (amongst others) have been offered:

Sovereignty is the most extensive form of jurisdiction under international law. In general terms it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein.⁵⁵

⁵² Fowler *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (1996) n 20 at 4. See also Maogoto *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) at 8.

⁵³ Maogoto *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) at 9.

⁵⁴ *Id* n 52 *supra* at 11.

⁵⁵ Bodley 1993 *N.Y.U.J. Int'l LP* at 419. MacCormick *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999) at 127 provides the following explanation of the term "sovereignty" by distinguishing between legal and political sovereignty. "[W]hereas as a 'merely a legal conception', sovereignty is 'the power of law-making unrestricted by any legal limit', by contrast 'that body is "politically" sovereign or supreme in a state the will of which is ultimately obeyed by the citizen of the state'. Power without restriction is on this view the key idea. Power of one kind, normative power or 'authority', is conferred by law. This may be a power of law-making in a certain territory conferred by a certain constitutional order that is effectively observed in that territory. Sovereign power is that which is enjoyed, legally, by the holder of a constitutional power to make law, so long as the constitution places no restriction on the exercise of that power... If the constitution then confers such power but contains no limit upon the power (other than the discretion and judgement of those who exercise the power) we may say that sovereignty is vested in the holder of the law-making power. But what of political sovereignty? By parallel reasoning, one will be inclined to define it as political power unrestrained by higher political power.... Political power is interpersonal power over the condition of life in human community or society. It is the ability to take effective

Nagan and Hammer while holding that the term sovereignty may have different meaning in jurisprudence, political science, history, philosophy and other related fields, however, in the final analysis the term includes the following; sovereignty as personalised monarch (real or ritualised), as absolute or unlimited control or power, as political legitimacy, as political authority, as legal immunities, as jurisdictional competence to make and/or apply law, and as basic governance competencies.⁵⁶

The term originally referred to the absolute supreme powers of the ruling monarch, but over time the term came to represent the independence of state. Internally states were not subjected to any powers. Externally they were free from any interference. The term is both a legal and a political expression. Only a sovereign state can be admitted into the international arena, in fact sovereignty is a prerequisite for admission. By virtue of being recognised as sovereign state, a state will qualify to be the holder of certain fundamental rights on the international arena, for example those relating to expropriation, to diplomatic and sovereign immunity and to jurisdiction over matters at home. Currently, the presence or absence of sovereignty determines the status of particular political entity.⁵⁷

Krasner⁵⁸ offers the following four meanings of the term sovereignty:

- Domestic sovereignty, which refers to the organisation of public authority within a state and the level of effective control exercise by those holding public authority.
- Interdependence sovereignty, which is the ability of those holding public authority to control movement across the border.

decision on whatever concern the common well-being of the members, and on whatever affects the distribution of the economic resources available to them.” MacCormick comes to conclusion that sovereign power is territorial in nature and is power not subjected to limitation by higher or coordinate power. See also Ferreira-Snyman *The erosion of state sovereignty* n 3 at 2.

⁵⁶ Nagan and Hammer 2004 *Columbia Journal of Transitional Law* at 143-145.

⁵⁷ *Id* n 52 *supra* at 11-12. See also Fassbender “Sovereignty and constitutionalism in international law” in Walker (ed) *Sovereignty in Transition* (2003) at 155. See further Ferreira-Snyman *Erosion of state sovereignty* *Id* n 55 *supra* at 2-3 and n 7.

⁵⁸ Krasner *Sovereignty: Organised Hypocrisy* (1999) at 9.

- International legal sovereignty, which is the capacity of state to interact with other states. The state is treated at the international level similarly to the individual at the national level.
- Westphalian sovereignty, which is understood as an institutional arrangement for organising political life and is based on two principles, namely territorial and the exclusion of external factors from domestic structures of authority. Westphalian sovereignty is violated when external factors influence or determine the domestic authority structures. This form of sovereignty can be compromised through intervention as well as through invitation, when a state freely subjects internal authority structures to external constraints.⁵⁹

According to Fassbender the term sovereignty embodies internal and external sovereignty. Internal sovereignty may be defined as the powers to exercise the function of a state within the national borders freely. External sovereignty refers to the legal independence of a state from all foreign powers, thus protecting the state territory against foreign interference.⁶⁰ In *Island of Palmas Case*⁶¹ Max Huber defined external sovereignty as:

Sovereignty in the relation between States signifies independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State.⁶²

While the concept sovereignty is contentious and sometimes it is invoked selectively and self-servingly; in the end it is about a claim to ultimate authority made on behalf of society as a political society or as a polity.⁶³ The term sovereignty encapsulates two concepts: political sovereignty which is the

⁵⁹ *Id n 58 supra* at 1–25. See also Ferreira-Snyman *Erosion of state sovereignty Id n 55 supra* at 2.

⁶⁰ Fassbender “Sovereignty and constitutionalism in international law” in Walker (ed) *Sovereignty in Transition* (2003) at 117. See also Ferreira-Snyman *Erosion of State Sovereignty Id n 55 supra* at 3–5.

⁶¹ *Island of Palmas Case* 2 RIAA 829 (1928). Available at http://untreaty.un.org/cod/riaa/cases/vol_ii/829-871.pdf (Date used 23/03/13).

⁶² *Id n 58 supra* at 38.

⁶³ Walker (ed) *Sovereignty in Transition* (2003) at 17.

power that enact laws and legal sovereignty which is the law that restrains power.⁶⁴

2.2 The traditional meaning of sovereignty

2.2.1 Jean Bodin (1530–1596)

The term ‘sovereignty’ was introduced into political science in 1576 by Jean Bodin in his celebrated book, *Les Six Livres De La Republique*.⁶⁵ He defined sovereignty as the absolute and perpetual power vested in commonwealth without any restriction except by the laws of God and nature. Bodin’s further exposition of the notion of sovereignty signified the absolute and sole original competence of law-making within the territorial boundaries of the state and that it will not tolerate any other law-creating agent over and above itself. No constitution could limit sovereignty and therefore a sovereign is above positive law.⁶⁶

Thomas Hobbes defined the concept of sovereignty to mean absolute power. In his work, the *Leviathan*, he maintains that a sovereign was not bound by anything and had a right over everything, even over religion.⁶⁷ Pufendorf is of a different view, he dismissed the idea that sovereignty embodies omnipotence. According to him sovereignty is the supreme power of a state, but not absolute power and sovereignty may well be constitutionally restricted.⁶⁸

2.2.2 Hugo Grotius

Grotius’ writing about a half century after Bodin’s ground-breaking work and in the middle of the 30 Years War, adopted Bodin’s thinking that sovereignty

⁶⁴ *Id n 52 supra* at 19. Walker avers that the term is adaptable or evolving. He refers to these changes as late sovereignty. The fact that the concept is adaptable does not mean it must be discarded. See also *n 52 supra* at 11.

⁶⁵ Bodin 1.8 at 23.

⁶⁶ *Id n 65 supra* at 25. See also Maogoto *State Sovereignty and International Law: Versailles to Rome* (2003) at 8-10. See also Ferreira-Snyman *Erosion of state sovereignty Id n 55 supra* at 15.

⁶⁷ Hobbes 6.3. at 12–5. See also Ferreira-Snyman *Erosion of state sovereignty Id n 55 supra* at 6.

⁶⁸ Pufendorf 7.6.1 See also *n 53 supra* at 12. See also Ferreira-Snyman *Erosion of state sovereignty Id n 55 supra* at 6.

consisted of the exclusive power of legislation within the body politic.⁶⁹ He distinguished between natural law which governs the relationship between state and law of nations which has received an obligatory force from the will of all nations or of man. His international legal system rested on the twin normative system of state sovereignty and *pacta sunt servanda*, meaning agreement is to be observed.⁷⁰ According to Grotius the universal and binding (obligatory) natural law is the primary source of international law. He maintained that the laws governing relationship among states must first safeguard the sovereignty of states themselves holding that rules preventing interference in another state's affairs will safeguard this sovereignty.⁷¹

2.2.3 Westphalian sovereignty

The concept of state sovereignty emanated from the Peace of Westphalia of 1648,⁷² which ended the 30 Years War of religion between the Protestant and Catholic States in Europe. Westphalian sovereignty enshrined the internal and external autonomy of the state. It further enshrined political independence and territorial supremacy, thus forbidding an exercise of jurisdiction by any state over issues and individuals within another state's territorial boundaries.⁷³ The Peace of Westphalia finally buried the theory of unity of the civilised world under the Catholic Church. Many recognised independent states formed an international community on the basis of equality.⁷⁴ The sovereign state, which emerged after the 30 Years of War, was unassailable both externally and internally. Externally it was free from the influence of other states.⁷⁵

2.3 The UN Charter on sovereignty

The UN Charter acknowledges and affirms the concept of state sovereignty. Article 2(1) provides that the Charter is based on the principle of sovereign equality. Article 2(7) further provides that:

⁶⁹ *Id n 53 supra* at 20.

⁷⁰ Grotius 1.1. at 162–3. See also Ferreira-Snyman *Erosion of state sovereignty Id n 55 supra* at 8.

⁷¹ *Id n 70 supra* at 259–260. See also *Id n 53 supra* at 18.

⁷² Peace of Westphalia was concluded in two different treaties, the Treaty of Münster and the Treaty of Osnabrück.

⁷³ *Id n 53 supra* at 7. See also Krasner *Sovereignty: Organised Hypocrisy* (1999) 1–25.

⁷⁴ *Id n 53 supra* at 19.

⁷⁵ *Id n 53 supra* at 20.

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁷⁶

The Charter treats all member states as equals and thus discourages any member states or the United Nations from interfering in the internal affairs of another state. Matters that fall within the domestic jurisdiction of the state should not be referred to the United Nations, but should rather be dealt with in terms of municipal laws. States have the limited freedom to deal with internal matters as they see fit, provided that their actions are not a threat to peace, breaches of peace or acts of aggression or put differently, their actions are not against international law.

2.4 Declaration and Treaty of SADC

The SADC Treaty follows the language of the UN Charter. Article 4(a) of the Declaration and Treaty of SADC acknowledges and obliges member states to act in accordance with the principle of sovereign equality. After the conclusion of the SADC Treaty; Protocol on Politics, Defence and Security was concluded by SADC member states to give effect to the SADC Treaty specifically on matters of politics, defence and security. The SADC Protocol takes the concept of state sovereignty even further by providing in the preamble that:

We, the Heads of State of Government of... Recognising and reaffirming the principles of strict respect for sovereignty, sovereign equality, territorial integrity, political independence, good neighbourliness, interdependence, non-aggression and non-interference in internal affairs of other states;

⁷⁶ Chapter VII deals with enforcement action to threat of peace, breaches of peace and acts of aggression.

The SADC Protocol is more precise with regard to the concept of sovereignty, it attempts in the preamble to define the concept in terms of its so called classical Westphalian meaning⁷⁷ and its contemporary meaning.

However, it seems as if strict respect for sovereignty and non-interference in the internal affairs of another state (classical Westphalian meaning) is strictly observed amongst the SADC states as manifested in the *Campbell case*⁷⁸ wherein the Republic of Zimbabwe (hereinafter Zimbabwe) stated categorically that it is not bound by decision of the SADC Tribunal.⁷⁹ It relied on its sovereignty and asserted that its municipal laws take precedent over regional treaties (international law).⁸⁰

Subsequent to Zimbabwe denouncing the ruling of the SADC Tribunal, the SADC summit failed to renew the tenure of judges and resolved that a review of the powers of the Tribunal should be undertaken thus, effectively suspending the Tribunal. From the position taken by Zimbabwe and the subsequent actions of the SADC summit, it can be inferred that SADC members are not willing or are not yet ready to relinquish some of their sovereign rights to some supranational regional body, and in so doing entrenching the principle of strict respect to state sovereignty and non-interference in the internal affairs of another member state (Westphalian sovereignty).⁸¹

From the aforesaid sketch of history of the conception of sovereignty as a fundamental and necessary characteristic of statehood, even though there

⁷⁷ "An institutional arrangement for organizing political life and is based on two principle namely territoriality and the exclusion of external factors from domestic structures." Krasner *Sovereignty: Organised Hypocrisy* (1999) at 1–25. See also Ferreira-Snyman *Erosion of state sovereignty* *Id n 55 supra* at 2.

⁷⁸ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) 2008 SADCT 2 (28 November 2008). In this case the applicant, Mike Campbell (Pvt) Ltd brought in an urgent application at the SADC Tribunal restraining the respondent (The government of Republic of Zimbabwe) from removing them from their agricultural lands, in terms of Zimbabwe municipal laws. The application was granted and earlier ruling of the Tribunal was confirmed. Available at <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf> (Date used 06/05/13).

⁷⁹ The SADC Tribunal was established on 03 October 2002 in terms of SADC Treaty, to hear disputes between member state, and between natural person or legal person and member state. Available at http://www.sadc-tribunal.org/docs/Protocol_on_Tribunal_and_Rules_thereof.pdf (Date used 07/05/13).

⁸⁰ Ndlovu 2011 *SADCLJ* at 75. Available at <http://www.saflii.org/na/journals/SADCLJ/2011/3.pdf> (Date used 06/05/13).

⁸¹ *Ibid n 78 supra*.

was never unanimity regarding the exact bounds of this conception, traditionally one thing was clear – sovereignty intrinsically embodies the supreme authority of a state within its territorial sphere excluding dependence on any other authority, in particular another state. In essence, sovereignty is independence. It is internal independence with regard to freedom of action within the state borders. Sovereignty comprises the power of state to exercise supreme authority over all persons and things within its territory; it is in fact territorial supremacy. However, it has always been doubtful whether these powers were ever absolute. These powers, it seems, were always limited by the rights of other states (sovereign equality) and other higher norms (natural law).⁸²

2.5 Judicial jurisdiction (Criminal trials)

2.5.1 Territorial principle

The concept of state sovereignty intrinsically embodies the principle of territorial sovereignty,⁸³ which denotes that a state has ‘exclusive competence with regard to its own territory’.⁸⁴ In fact, for a state to exist and be recognised by the international community, it has to own a particular piece of territory on the globe.⁸⁵ Therefore, territory plays an important part in international law, resulting in territory being regarded as a cornerstone in which jurisdiction in international law is based. A state while exercising its sovereign rights has a right to legislate and enforce its laws within its territory. Jurisdiction denotes the exercise of power by a state over events, person and property.⁸⁶ States have jurisdiction over all persons, citizens, aliens and things within their

⁸² *Id n 58 supra* at 14. See also Ferreira-Snyman *Erosion of state sovereignty Id n 55 supra* at 9.

⁸³ Territorial sovereignty covers all land, internal waters, territorial sea and its subsoil; the airspace above the state, territory has been extended to 200 miles exclusive economic zone. Aust *Handbook of International Law* (2010) at 32.

⁸⁴ *Island of Palmas Case*, award of 4 April 1928, *United Nations reports of International Arbitral Awards (RIAA)*, Vol.II, p 838. Available at http://untreaty.un.org/cod/riaa/cases/vol_ii/829-871.pdf (Date used 09/05/13. See also Williams and de Mestral *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada* (1987) at 108.

⁸⁵ Aust *Handbook of International Law* (2010) at 3.

⁸⁶ *Id n 84 supra* at 123. Bassiouni *International Criminal Law* (2013) offers the following definition: “Jurisdiction may be defined as the authority to affect legal interest – to prescribe rules of law; to adjudicate legal questions; and to compel, induce compliance or take any other enforcement action...” at 88.

territory. This right to exercise jurisdiction is a manifestation of state sovereignty.⁸⁷ Thus in the *Greenland* case the Permanent Court of International Justice (hereinafter PCIJ) held that, jurisdiction is a sovereign right.⁸⁸

For a state to exercise jurisdiction, it must be able to prove that the constituent element of the offence occurred in its territory. The PCIJ in the *Lotus* case⁸⁹ enunciated the following principles:

- (1) Jurisdiction is territorial; it may not be exercised outside state territory, except by virtue of permissive rule of international law either by custom or treaty.
- (2) International law does not prohibit a state from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissive rule of international law.
- (3) The territoriality of criminal law, therefore, is not absolute; states have discretion to apply their laws outside its territory.⁹⁰

Article 3 of Harvard Research⁹¹ describes the territorial principle as follows:

A state has jurisdiction with respect to any crime committed in whole or in part within its territory.⁹²

Thus in terms of the Harvard Research, territorial principle entails that a state should be able to claim jurisdiction only if the offence occurred wholly or in

⁸⁷ *Id n 76 supra* at 127.

⁸⁸ *Legal Status of Eastern Greenland Case*, PCIJ Series A-B (1933) 48. Available at http://www.icj-cij.org/pcij/serie_AB/AB_53/01_Groenland_Oriental_Arret.pdf. (Date used 07/05/13). See also Inazumi *Universal Jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crime* (2005) at 17.

⁸⁹ A collision on the high seas between the French steamer, *Lotus* and Turkish steamer, the *Boz-kourt* in 1926 resulted in the sinking of the Turkish vessel and the death of eight Turkish nationals. When the French vessel reached Constantinople (Instabule) the Turkish authorities instituted criminal proceedings against the French officer on watch-duty at the time of collision (Lieutenant Demons). The Turkish court overruled Demons objection that Turkey had no jurisdiction and after a trial sentenced him to 80 days imprisonment and a fine of 22 pounds. The French government challenged Turkey's action as violation of international law and demanded reparation. Available at http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf (Date used 09/04/13).

⁹⁰ *Id n 84 supra* at 18-19. See also Inazumi *Universal Jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crime* (2005) at 23. See also Dugard *A South African Perspective* (2011) at 149-150.

⁹¹ Grant and Barker 1966 *Harvard Research in International Law: Original Materials* at 275.

⁹² *Id n 91 supra* at 439. See also Bassiouni *International Criminal Law* (2013) *Id n 86 supra* at 97.

part (either commenced or completed) within its territory.⁹³ Sometimes it happens that an offence is committed partly in one state and partly in another. The classical example is firing a gun over a frontier and in turn committing a crime. The question then arises as to which state has jurisdiction. Some writers argue in favour of conferring jurisdiction on the state in which the crime was initiated, some argue in favour of conferring jurisdiction on the state where the crime was completed.⁹⁴

2.5.1(a) *Subjective territoriality principle*

This principle gives jurisdiction over crimes committed in the state where the offence commenced. If we used the aforementioned example of shooting over a frontier and assume that X, while in state A, shoots and injures Y who is standing in state B. Y is taken to hospital in state C where he later dies from his injuries. Then state A will have jurisdiction as the said offence commenced in state A.⁹⁵ The same principle has been applied by the PCIJ in the *Lotus* case, wherein an act or omission done within the jurisdiction of one state (the crime was commenced within France's 'territory') produced unintended effects (it was completed in Turkey's 'territory') within the jurisdiction of another state.⁹⁶

2.5.1(b) *Objective territoriality principle*

This principle denotes that the state where the offence was completed or where the effect or result of criminal conduct impacts on, that state has jurisdiction to try the offender. If we again use the aforementioned example of shooting over the frontier, then state B and C will have jurisdiction to try the offender as the offence was completed or the effect or the result of the

⁹³ *Ibid.* See also Grant and Barker 2007 *Harvard Research in International Law Contemporary Analysis and Appraisal Article* at 487. See also Inazumi *Universal Jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crime* (2005) n 90 *supra* at 25. See also *Id n 87 supra* at 97.

⁹⁴ *Id n 86 supra* at 484–487. See also *Id n 76 supra* at 128. See also *Id n 89 supra* at 101. See also *Id n 2 supra* at 32. See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 152.

⁹⁵ *Id n 86 supra* at 487–494. See also *Id n 77 supra* at 128. See also *Id n 89 supra* at 101. See also *Id n 2* at 32–33. See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 152.

⁹⁶ *Id n 84 supra* at 71. See also *Id n 89 supra* at 488.

criminal conduct was felt within their territory.⁹⁷ Where all states claim jurisdiction, *i.e.* A, B and C, concurrent jurisdiction will be the most logical solution as there is no basis for preferring one state over the other.⁹⁸

Sometimes the territorial principle is taken further by using the device of continuing offence like theft whereby a thief who steal goods in state A and brings them into state B could be prosecuted in either state.⁹⁹

Some states have claimed jurisdiction over offences committed abroad which merely produce effects on their territory, even if those effects were not a constituent element of the crime. This was the basis upon which Turkey exercised jurisdiction in the *Lotus* case. The effect of the collision was felt on the Turkish territory (ship).¹⁰⁰ In terms of effect doctrine, jurisdiction can only be claimed by states where the primary effect is felt.¹⁰¹

Two factors must be taken into consideration when determining whether the effects are primary or secondary:

- (1) Are the effects felt in one state more direct than the effects felt in another state?
- (2) Are the effects felt in one state more substantial than the effect felt in another state? This test limits the number of states which may exercise jurisdiction and prevents the exercise of jurisdiction by states with no legitimate interest.¹⁰²

Under the 'effect factor' directness is required to prevent jurisdiction being based on economic effects of a crime on the victim's creditors, dependants, *et*

⁹⁷ *Id n 89 supra* at 100–101. See also *Id n 2 supra* at 32.

⁹⁸ *Id n 2 supra* at 32.

⁹⁹ *Id n 2 supra* at 33. See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 151.

¹⁰⁰ Section 1(5) of the [English] Perjury Act, 1911, which provides that perjury by a person giving evidence before British in foreign countries for the purpose of judicial proceeding in England shall be treated as if the perjury were in England (*Id n 60 supra* at 33). See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 152.

¹⁰¹ *Ibid.* See also *Id n 89 supra* at 105: In a U.S. decision of *Strassheim v. Daily* 221 U.S. 280 (1911) in which Mr Justice Holmes stated: “[A]cts done outside a jurisdiction, but *intended to produce and producing* detrimental effects, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”

¹⁰² *Id n 2 supra* at 34. See also Aust *Handbook of International Law* (2010) *Id n 85 supra* at 45–46.

cetera.¹⁰³ The requirement that the effect must be substantial, will prevent jurisdiction being exercised by every state which the effect was felt even if it was of a trivial nature. Thus in the *Lotus* case, Turkey was allowed to assume jurisdiction under the objective territorial principle over a crime of which negligence was an element.¹⁰⁴ The primary effects approach provides a better means of keeping the jurisdiction of states within reasonable bounds than the constituent elements approach.¹⁰⁵

2.5.2 *Protective principle*

Under the protective principle a state may exercise jurisdiction over aliens who have committed acts abroad that are considered prejudicial to its safety and security.¹⁰⁶ In terms of Article 7 and 8 of the Harvard Research the protective principle is meant to protect the security, territorial integrity or political independence of the state.¹⁰⁷ The focus of the principle is the nature of the interest that may be injured; the place where the injury or the conduct took place is irrelevant. In most acts of terrorism and crimes against humanity, the state concerned will find jurisdiction based on protective principle.¹⁰⁸ In order to limit its abuse, this principle is limited in the same way as the 'effect doctrine'¹⁰⁹ so that a state can claim jurisdiction only if the primary effect of the alien was to threaten that state. Furthermore, aliens tried in this way must

¹⁰³ The United State legislation notably the Sherman Act of 1890 (*Id n 2* at 33) and [English] Perjury Act of 1911 (Dugard *A South African Perspective* (2011) *Id n 90 supra* at 152).

¹⁰⁴ *Id n 89 supra* 3 at 480.

¹⁰⁵ *Id n 2 supra* at 35.

¹⁰⁶ *Id n 77 supra* at 130. See also *Id n 89 supra* at 109: In *United State v. Pizzarusso* 388 F.2d F 2d 8 (2d Cir), *cert. denied*, 392 U.S. 938 (1968) the court defined the protective principle as "[the authority to] prescribe a rule of law attaching legal consequences to conduct outside [the state's] territory that *threatens* its security as a state or the operation of its governmental function, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal system."

¹⁰⁷ *Id n 86 supra* at 543 and 488. See also *Id n 60 supra* at 38. See also *Id n 87 supra* at 108.

¹⁰⁸ *Id n 89 supra* at 113 and at 108-9: In the Pizzarusso case *Id n 106 supra*, Bassiouni *International Criminal Law* the distinction was made clear that where an alien was convicted of knowingly making false statements under oath in a visa application to a U.S. consul in Canada. The fact that the accused ultimately entered the U.S. was not an element of the offence. The court was careful to point out the violation of 18 U.S.C. Section 1546 took place entirely in Canada. The crime's effect on U.S. sovereignty supported the prosecution under the protective principle. See also Inazumi *n 90 supra* at 25. See also *Id n 77 supra* at 130.

¹⁰⁹ For the discussion of primary effect doctrine see *n 63 supra*.

at least have some connection with the threatened state, for example residence.¹¹⁰

2.5.3 Nationality principle

Under nationality principle a state has jurisdiction over crimes committed by its national abroad. Jurisdiction based on the nationality of the perpetrator is generally accepted under international law. In terms of the Harvard Research a state has jurisdiction with respect to a crime committed by a natural person who was a national of that state when the crime was committed.¹¹¹

The application of the nationality principle differs from country to country. Countries within the common law tradition are reluctant to base jurisdiction on nationality hence it is only applied in certain circumscribed offences such as those threatening national security and trafficking in narcotics.¹¹² However, civil-law countries prosecute and punish their own nationals for offences committed abroad. Most require that the offence be punishable in the place where it was committed as well.¹¹³

Sometimes jurisdiction is based on some personal link between the accused and the state claiming jurisdiction. For example Denmark, Norway, Sweden and Liberia claim jurisdiction over crimes committed abroad by their permanent residence.¹¹⁴ States often claim extraterritorial jurisdiction over members of their armed forces and civilian components in connection with crimes committed in the course of their duties.¹¹⁵

2.5.4 Passive personality theory

The theory provides a state with the competency to prosecute and punish perpetrators of criminal conduct that is aimed at or harms the nationals of the asserting state. Here the determining factor is the nationality of the victim.¹¹⁶

¹¹⁰ *Id n 59 supra* at 154. See also Dugard *A South African Perspective* (2011) *Id n 90* at 154.

¹¹¹ *Id n 86 supra* at 519. See also *Id n 88 supra* at 116. See also *Id n 2 supra* at 36.

¹¹² *Id n 94 supra* at 116. See also *Id n 2 supra* at 36. See also Dugard *A South African Perspective* (2011) *Id n 90* at 154.

¹¹³ *Id n 94 supra* at 117.

¹¹⁴ *Id n 2 supra* at 36.

¹¹⁵ *Id n 88 supra* at 539–541. See also *Id n 2 supra* at 37.

¹¹⁶ *Id n 89 supra* at 121. See also *Id n 77 supra* at 129–130.

Historically Anglo-American countries were opposed to jurisdiction based on this theory, especially the United States. The *Restatement (second) of the Foreign Relation Law of the United States* provides in sub-section 30 that:

[A] state does not have jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.¹¹⁷

However, in recent times the passive-personality theory has been gaining recognition in international law and is now gradually being accepted by states which traditionally oppose it. It is accepted mainly as a means to try and curb the threat of international terrorism.¹¹⁸

2.5.5 Universal jurisdiction

When a national court exercises jurisdiction not based on any link with the crime committed, *i.e.* either on territorial principle, nationality principle or other accepted contacts with the offender it is exercising universal jurisdiction.¹¹⁹ It is exercising jurisdiction because these offences are condemned by virtually

¹¹⁷ *Id n 89 supra* at 123: In the *Cutting* case, (1887) For. Rel 751 (1888) (*reported in* John B. Moore, *International Law Digest* 232–40. (1906) *Cutting*, a U.S. national, was seized by Mexican authorities during a visit to that country. He was jailed pending prosecution for criminal libel allegedly perpetrated in Texas against a Mexican national. The U.S. Secretary of State protested the assertion of jurisdiction, arguing that the passive personality theory was improper under traditional principle of international law. See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 155–6.

¹¹⁸ *Id n 215 supra*. In the *United States v Yunis* 681 F. Supp. 896 (D.D.C. 1988), appeal docketed, No. 89-3208 (D.C. Cir. Nov.30, 1989) the United States prosecuted a Lebanese for hijacking a Jordanian airplane in the Mediterranean in June 1995. The only link between the hijacking and the United States was the presence of the US national on the hijacked plane. The U.S has since enacted laws that suggest passive-personality theory: The Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 Pub L No 99–399 1202(a) 100 Stat 853 (1986) (s 1202, inserting ch. 113A into U.S.C as s 2331: “(a) Homicide.- Whoever kills a national of the United States while such national is outside the United States [and] (c) whoever outside the United States engages in physical violence – (1) with the intent to cause serious bodily injury to a national of the national of the United States...”). See McCarthy 1989 *FILJ* at 311. Available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1242&context=ilj>. (Date used 05/10/13).

¹¹⁹ Inazumi *Universal jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crimes* (2005) at 25. The Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences presented to the International Law Association describe the concept as follows: “Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceeding in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim”. See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 157. See further *Id n 89 supra* at 355.

all state domestic laws. The national court is acting on behalf of the international community as a whole, because the said crime is against all mankind.¹²⁰

Originally the crime of piracy was the only crime which was recognised as an international crime and thus nations had universal jurisdiction to try the crime.¹²¹ With regard to war crimes, there was uncertainty as to whether these crimes were subjected to the same jurisdictional rules as ordinary crimes. Some nations thought that they could only exercise jurisdiction if the crime was committed either within its territory or against its nationals or against its national interest, meaning there should be at least some connection between the crime and the nation concerned.¹²² On the other hand, allied nations tried war crimes committed on foreign territory by foreign nationals against the nationals of other allied nations and even against the nationals of enemy states.¹²³

Currently, the following crimes are recognised either under customary international law or through convention as international crimes: piracy, slave-trading, crimes against humanity, war crimes, hijacking and sabotage of civil aircraft, genocide, apartheid and torture, thus conferring universal jurisdiction on states to try the offenders, notwithstanding the absence of any link.¹²⁴ The reason why the state could exercise universal jurisdiction was because at the time, there was no permanent¹²⁵ international criminal court where all those recognised international crimes could be referred to.¹²⁶

In 17 July 2002 the International Criminal Court (hereinafter the ICC) was established. In terms of the statute establishing the Court, the Court can only

¹²⁰ *Id n 89 supra* at 124. See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 157. See further *Id n 115 supra* at 64.

¹²¹ *Ibid.* See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 159. See further *Id n 2 supra* at 40. See also *Id n 115 supra* at 49-52.

¹²² *Id n 2 supra* at 40. After the Second World War the Netherlands' courts held that international law authorized a state to try war crimes only if committed in its territory, against its national or against its national interest. See also *Id n 115 supra* at 55-7 and 94-5.

¹²³ *Id n 2 supra* at 40. See also *Id n 115 supra* at 55-7.

¹²⁴ *Id n 88 supra* at 124-7. See also Dugard *A South African Perspective* (2011) *Id n 90 supra* at 157 and *n 59*.

¹²⁵ Courts were established on an ad hoc basis as a reaction to some atrocities during conflict committed for example Nuremburg Military Tribunal *supra* at *n 2 supra*.

¹²⁶ Dugard *A South African Perspective* (2011) at 156.

try certain specified crimes committed within the territory or by nationals of states that are parties to the Statute.¹²⁷ In essence the Rome Statute does not *per se* confer true universal jurisdiction on the Court as only signatory states can prosecute or extradite¹²⁸ the person accused of the specified crime, and only if that person has a link with the state concerned, *i.e.* is a national or happen to be present in the territory of signatory state.¹²⁹

This matter will not be pursued any further as it falls outside the scope of this dissertation.

2.6 Conclusion

After the signing of the Peace of Westphalia new states were born. Concomitant with the emergence of these states, the concept of state sovereignty was born. The concept originally denoted that states were free from any external influence. After the Peace of Westphalia states had unlimited freedom to do as they wished within their territory (territorial integrity) to the exclusion of other states. However, as the globe became smaller the need for cooperation became necessary. The need for interaction between states challenged the Westphalian sovereignty, the freedom of other states encroached upon the Westphalian state. The very idea of unlimited freedom (absolute state sovereignty) was challenged and questions were raised as to whether these freedoms were ever absolute.

With the need for cooperation becoming more pertinent and boundaries becoming smaller, nationals/citizens of one state found themselves on another state territory. Through cooperation (in the form of treaties) it came to be accepted that the rights of states are not absolute, they are limited by rights of others. The converse is also true: because rights had to be protected, treaties were concluded. By entering into agreement, the state limited their rights. The state could no longer rely on territory alone to confer jurisdiction. Other criterions have to be devised to confer jurisdiction. Currently, together

¹²⁷ *Id n 122 supra* 157. See also Aust *Handbook of International Law* (2010) *Id n 85 supra* at 259–260.

¹²⁸ *Id n 87 supra* at 35–45. The enforcement in international law is premise on the principle *Aut Dedere Aut Judicare*. See also *Id n 126 supra* at 156 and *n 45*.

¹²⁹ *Id n 2 supra* at 42–3.

with territoriality, the protective, nationality and universal principles are accepted as criteria that could confer jurisdiction on states. And while exercising their sovereignty, states can extend or limit these rights through conventions. So the question of criminal jurisdiction for visiting forces during peace time will be answered by either applying the aforementioned principles or by consulting the relevant agreements between the states concerned.

CHAPTER 3

INTERNATIONAL AGREEMENTS CONCLUDED BY SOUTH AFRICA AND BOTSWANA IN SENDING THEIR ARMED FORCES ABROAD

3.1 Background

One of the sources of international law is treaty or convention.¹³⁰ Article 2(1)(a) of the Vienna Convention on the Law of Treaties defined a treaty as:

An international agreement concluded between states in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Treaties are founded on one of the fundamental principle of international law, *pacta sunt servanda*.¹³¹ As sovereigns, states are free to enter into written agreement with one another to regulate their relationships. In so doing they can limit or extend their sovereign rights. Treaties may be bilateral thus creating relations between two states or multilateral and creating relations between many states.¹³² Furthermore, treaties may be regional¹³³ or global¹³⁴ in nature.

In terms of Chapter VIII Article 52(1) of the United Nations Charter (hereinafter the UN Charter),¹³⁵ states are encouraged to establish regional arrangements (treaties) in order to deal with matters relating to international

¹³⁰ Article 38(a) of the International Court of Justice. Available at http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_II. (Date used 05/10/13).

¹³¹ Article 26 of the Vienna Convention on the Law of Treaties. In terms of this principle, every treaty in force is binding upon the parties to it and must be performed by them in good faith. Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (date used 08/06/13). See *Id n 126 supra* at 414.

¹³² *Id n 126 supra* at 414.

¹³³ For example, The Economic Community of West African States (ECOWAS) is a regional group of 15 countries, founded in 1975. Its mission is to promote economic integration in “all fields of economic activity, particularly industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, social and cultural matters...” Available at http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (Date used 08/06/13).

¹³⁴ For example, the United Nations is an international organisation founded in 1945 after the Second World War by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Currently it is having 193 member states. Available at <http://www.un.org/en/aboutun/index.shtml> (Date used 08/06/13).

¹³⁵ Chapter VIII Article 52(1) of the United Nation Charter. Available at <http://www.un.org/en/documents/charter/chapter8.shtml>. (Date used 05/10/13).

(regional) peace and security. It is further required that these regional agreements should be consistent with the purpose and principle of the UN.¹³⁶ Member states that enter into these regional agreements are encouraged to settle regional dispute through these agencies before referring them to the UN Security Council.¹³⁷ It further encourages development of peaceful settlement of regional dispute through these agencies either on the initiative of the states concerned or by referral from the Security Council.¹³⁸ Article 52 of the UN Charter realises the importance of regional treaties (taking into account the time it might take the Security Council to intervene in regional dispute) as the parties to these treaties are suitably located to deal with any dispute that might arise in their region. By further requiring that the intention of these regional agencies should be to further the purpose and principles of the UN, it can be argued that action by the UN translates into action being taken by regional powers/member states for and/or on behalf of the UN.¹³⁹ The UN does not have a permanent standby force; it depends on member states/regional powers to contribute personnel.¹⁴⁰ Authority has to be granted by the Security Council before any action can be taken by member states in respect of any regional intervention. If authority cannot be obtained prior to the intervention, activities undertaken or contemplated should be reported to the Security Council immediately thereafter.¹⁴¹

¹³⁶ Article 52(1) of the UN Charter. Available at <http://www.un.org/en/documents/charter/chapter8.shtml> (Date used 10/06/13).

¹³⁷ Article 52(2) of the UN Charter.

¹³⁸ Article 52(3) of the UN Charter.

¹³⁹ In Bosnia-Herzegovina the UN made use of NATO to enforce 'no fly' zone and to protect 'safe areas'. Furthermore SC Res. 1244 (1999) annexure 2 at para 4 authorised an international security presence mainly with NATO participation. Available at <http://www.nato.int/kosovo/docu/u990610a.htm>. (Date used 04/07/13). See also *Id n* 126 *supra* at 493.

¹⁴⁰ UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) was established following SC Res 2100 (2013). It is a UN peace operation; its force composition is mainly from ECOWA's countries. Available at http://www.un.org/en/peacekeeping/missions/minusma/documents/mali%20_2100_E_.pdf. (Date used 04/07/13).

¹⁴¹ Article 53 of the UN Charter stipulates that no enforcement action may be undertaken under regional agreements or by regional agencies without the authorisation of the Security Council. Article 54 requires the Security Council to be fully informed of activities undertaken or contemplated under regional arrangement or by regional agencies. Both Article 53 and 54 reinforce that the primary responsibility for the maintenance of international peace and security rest with the Security Council, and that the relationship between the Security Council and regional arrangements and agencies is that of cooperation to improve collective security. See also Oswald, Durham and Bates *Documents on the Law of UN Peace Operation* (2010)

The question of criminal jurisdiction arises every time the UN intends sending personnel to conflict areas:¹⁴² Who must exercise criminal jurisdiction if a member of the UN commits a crime while in the host country; is it the personnel contributing state or the receiving state? The most contentious point in respect of criminal jurisdiction is the prosecution of those serious offences for example murder, rape and culpable homicide that obviously falls outside the personnel scope of work. In trying to answer the question of criminal jurisdiction the UN has adopted and promulgated the Convention on the Privileges and Immunities of the United Nations in order to address the question of jurisdiction in respect of the UN officials who find themselves in host countries,¹⁴³ The Draft Model Status of Force Agreement between the United Nations and host countries mainly to address criminal jurisdiction of members of armed forces,¹⁴⁴ and Memorandum of Understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation] to regulate relations between the resource contributing state and the UN.¹⁴⁵

at 24. Contrary to Article 53 and 54 the military intervention in Lesotho by South Africa and Botswana (on behalf of SADC) in 1998 was not authorised by Security Council nor was the matter reported immediately thereafter. The intervention was therefore in direct violation of Article 53 and 54. Dugard at 515. See also Hadebe "South African military intervention in Lesotho". Available at

http://academia.edu/1330315/South_African_military_intervention_in_Lesotho_-_A_critical_overview (Date used 03/7/13).

¹⁴² O'Brien 2012 *International Journal of Law: Crime and Justice* at 224. Available at http://www.academia.edu/1528562/Protectors_on_trial_Prosecuting_peacekeepers_for_war_crimes_and_crimes_against_humanity_in_the_International_Criminal_Court. (Date used 05/10/13).

¹⁴³ The Convention on the Privileges and Immunities of the United Nations was adopted by UN General Assembly on 13 February 1946. Available at <http://www.un.org/en/ethics/pdf/convention.pdf>. (Date used 05/10/13). See also Oswald, Durham and Bates, Documents on the Law of UN Peace Operation *Id n* 141 *supra* at 314.

¹⁴⁴ The Status of Force Agreement between the United Nations and the Government of the Republic of Sudan concerning the United Mission in South Sudan ("SOFA") was established in accordance with SC Res 1996 (2011) of 08 July 2011. Available at <http://unmiss.unmissions.org/LinkClick.aspx?fileticket=gpHXyf3LQ0k%3D&tabid=5100&language=en-US>. (Date used 05/10/13).

¹⁴⁵ Available at <http://www.un.org/en/peacekeeping/sites/coe/about.shtml#MOU>. (Date used 05/10/13).

3.2 UN and Regional Agreements

3.2.1 *Convention on the Privileges and Immunities of the United Nations*¹⁴⁶

The question of immunity granted in terms of the provision of a treaty emanated from Article 7(4) of the Covenant of the League of Nations which gave the representative of the Member State and the League Officials the same privileges as diplomats.¹⁴⁷ This in turn was followed by Article 104 and 105 of the Charter of the United Nations which accords particular status, immunities and privileges to the UN and its officials whilst on official functions. This ultimately resulted in the creation and adoption of the Convention on the Privileges and Immunities of the United Nations (hereinafter the UN Privileges Convention).¹⁴⁸

In terms of Article V Section 18(a) of the UN Privileges Convention officials¹⁴⁹ of the UN shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Section 20 of Article V provides that these privileges and immunities are to be exercised in the interest of the UN and not for personal interest. Furthermore, the Secretary General is mandated to waive the immunities of any official, if in his/her opinion, the immunity will be detrimental to the proper administration of justice and the interest of the UN will not be prejudiced. In the *Brzak* case the United States Supreme Court held that the UN enjoys absolute immunity and the decision, whether to waive or not to waive the immunities of any official is for the Secretary General to make, and further that the decision cannot be

¹⁴⁶ *Id n 143 supra*. See also Oswald, Durham and Bates *Documents on the Law of UN Peace Operation* (2010) *Id n 141 supra* at 314.

¹⁴⁷ Reinisch 2009 *A Convention on the Immunities and Privileges of the United Nation* at 1. The Covenant of the League of Nations of 28 June 1919 merely provided for “diplomatic” privileges and immunities of its employees and the inviolability of its property. Only a subsequent agreement with the League’s host State, the so-called *modus vivendi*, stipulated that the League possessed international personality and capacity and that it could not “in principle, according to the rules of international law, be sued before the Swiss Courts without its consent.” Available at http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf. (Date used 05/10/13).

¹⁴⁸ *Ibid.*

¹⁴⁹ The Secretary General of the UN will specify the categories of officials for which the provision of Article V and Article VII apply.

challenged in the US courts.¹⁵⁰ However, in the same period there had been concerns based on the atrocities committed by UN officials and experts on UN missions.¹⁵¹ The General Assembly held a discussion on 8 October 2010 whereby renewed efforts to prosecute criminal misconduct were explored.¹⁵² The renewed efforts were prompted by ‘atrocities’ committed by the officials and experts in the Democratic Republic of Congo (hereinafter DRC).¹⁵³ The UN Privileges Convention protects all those people who are clearly identified, defined and their details are compiled and recorded by the Secretary General who at the time is in service of the UN.¹⁵⁴

¹⁵⁰ *Cynthia Brzak et al v The United Nations et al Supreme Court of the United States* June 1 2010. Briefly the facts were as follows: Mrs Brzak, a US citizen, was in the employ of the UN. She alleged that the UN High Commissioner for Refugees, Mr Lubber, indecently assaulted her. She followed internal grievance procedures and laid a complaint. She did not exhaust all internal processes as she felt that the then Secretary General, Mr Kofi Annan, was protecting the alleged perpetrator. She approached US courts claiming the UN does not enjoy absolute immunity and that the powers of the Secretary General are not absolute. The matter was dismissed in the lower courts until she petitioned the Supreme Court. Available at <http://www.unjustice.org/Brzak%20v%20UN%20et%20al%201%2006%202010.pdf>. (Date used 02/07/13).

¹⁵¹ In the 64th session the General Assembly stressed the need for accountability over criminal conduct by the UN personnel on mission. ‘Zero Policy’ was applauded but concern over impunity and other problems prompted calls for consideration of international convention. Available at <http://www.un.org/News/Press/docs/2009/gal3366.doc.htm>. (Date used 05/10/13).

¹⁵² *Ibid.*

¹⁵³ The legal committee was told about the alleged abuse of ‘Diplomatic Immunity’ to cover sexual offences. The degree of damage caused by these allegations was palpable and the UN needed to take some action to address the matter. In the same discussion the representative of the DRC recalled that the “United Nations mission in his country had so “excelled” in criminal activity that any benefits were wiped away. A six year old girl, as one example of numerous others, had been raped in a widespread epidemic of such incidents. The official responsible was never held accountable, but simply returned home. In sum, the events in his country had been so horrific as to prompt the United Nations to adopt a “zero-tolerance” policy against sexual abuse. Six years later, however, the officials who had committed those crimes in this country had still not been brought to justice”. All the representatives were unanimous in that atrocities such as the aforementioned should not go unpunished and that officials and experts should not hide behind ‘Diplomatic Immunities’. Available at <http://www.un.org/News/Press/docs/2010/gal3388.doc.htm> (Date used 02/07/13). The distinction between cases of Brzak and the DRC is the former involved an alleged offence committed by a UN employee against another UN employee and question was mainly whether powers of Secretary General to waive are exclusive or not, whereas the latter was on how to hold UN personnel who commit offences accountable. Before the legal committee meeting, the question on how to hold UN peacekeeping personnel accountable was raised during General Assembly meeting of 24 March 2005. This was prompted by a report compiled by UN GA, A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operation, U.N. Doc. A/59/710 (Mar. 24, 2005) (*prepared by* Prince Zeid Al-Hussein) (hereinafter Zeid Report). Available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/SE%20A%2059%20710.pdf>. (Date used 28/07/13).

¹⁵⁴ Section 17 of the Convention on Privileges.

Section 18(a) of Article V of the UN Privileges Convention does provide immunity to UN personnel from laws of host country nationals, however, that protection is not absolute as section 20 confers powers on the Secretary General to waive those immunities if administration of justice so requires. Therefore, in certain circumscribed cases a UN official might be prosecuted by the host state under its own municipal laws provided that the prosecution is not prejudicial to the UN.¹⁵⁵ UN officials are therefore protected only if their action or what they say is in the interest of the UN or, put differently, they are protected only when what they do or say is in the official execution of their UN duties and functions. Committing criminal offences, especially serious common law offences like murder, rape and culpable homicide, will not fall within the interest and principles of the UN, nor will they qualify as official execution of UN duties. Therefore, UN officials are not for all intents and purposes absolutely immune from criminal jurisdiction; they might still be prosecuted by the host country if they commit crimes outside their scope of work.¹⁵⁶ The UN Privileges Convention only covers those officials identified and their details are recorded by the Secretary General. With regard to Peacekeeping Forces the UN and the host state will normally regulate their relationship with what is referred to as Status of Force Agreement (hereinafter SoFA).¹⁵⁷ The relationship between the UN and participating state contributing resources to UN is regulated by memorandum of understanding between the UN and that contributing state.¹⁵⁸

¹⁵⁵ However, where a host state's legal system is dysfunctional, the Secretary-General is unlikely to waive a peacekeeper's immunity from criminal prosecution and this will result in impunity. The question of accountability of United Nation staff and expert on mission was raised in: The UN Secretary-General 2006 UN Doc. A/60/980. Available at <http://www.undemocracy.com/A-60-980.pdf>. (Date used 28/07/13). See also Defels 2008 *WUGSLR* at 195. Available at http://law.wustl.edu/WUGSLR/Issues/Volume7_2/Defeis.pdf. (Date used 28/07/13).

¹⁵⁶ Ladley 2005 *Edinburg University Press* at 85. The issue of immunity arose during the UN mission in East Timor when a Finnish civilian staff member killed a 72-year old Timorese woman in a hit-and-run car accident. The initial refusal of the United Nations to waive immunity was met with dismay by local Timorese and the man's immunity was eventually lifted, although he was subsequently released and allowed to return to Finland. Available at <http://www.isil.ir/PDFSS/PEACEKEEPERABUSEIMMUNITYANDIMPUNITY.pdf>. (Date used 15/06/13).

¹⁵⁷ *Ibid* n 144 *supra*.

¹⁵⁸ Oswald, Durham and Bates *Documents on the Law of UN Peace Operation* (2010) at 35.

3.2.2 *Draft Model Status of Forces Agreement between the United Nations and host country*¹⁵⁹ (hereinafter *Model SoFA*)

Before sending peace-keeping force(s) to conflict areas the UN will negotiate a formal agreement with the host country which will define the legal status of both the peace operation and the individual peacekeepers. The status-of-force agreements are the crucial documents that grant facilities, outline rights, including the privileges and immunities, required by peacekeepers to perform their duties.¹⁶⁰ The Model SoFA is premised on the provision of the UN Privileges Convention and the 1956 UN SoFA.¹⁶¹ The Model SoFA is intended to serve as a basis for the drafting of an individual agreement between the UN and the host countries. The parties are allowed to modify the Model SoFA to suit their individual and specific needs; however, the Model SoFA remains the starting point. In the absence of any agreement, or during the negotiation of a specific SoFA, the Model SoFA remains the applicable document.¹⁶²

The question of criminal jurisdiction is regulated by Chapter VI of the Model SoFA. Paragraph 46 of the Model SoFA provides that:

All members of the United Nations peace-keeping operation including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity...

The above paragraph accords with immunity given to officials in terms of section 18(a) of the Convention discussed above. Therefore, members of the UN peace-keeping operation are only protected (immune) if what they do is in the official execution of their duties. The Special Representative of the Secretary-General (hereinafter SRSG) is the one to determine whether

¹⁵⁹ GA resolution 44/49 (1990) requested the Secretary-General to prepare a Model Status of Force Agreement (hereinafter SoFA) between the UN and host countries and to make it available to Member States. The "Report of the Secretary-General on the Model Status of Force Agreement for peace-keeping operation", (UN Doc. A/45/594, 9 October 1990) included the model SOFA. *Id n 158 supra* at 34.

¹⁶⁰ *Id n 155 supra* at 34. See also Siekmann *Basic Document on United Nations and Related Peace-Keeping Forces* (1989) at 7.

¹⁶¹ Clark 2012 *Victoria University of Wellington Law Review* at 83. Following the 1956 invasion of Egypt by Israel, France and the United Kingdom, a more sophisticated enterprise was created, the First United Nations Emergency Force (UNEF I). A feature of this was the first United Nations Status of Forces Agreement (UN SoFA), negotiated with Egypt, where the UNEF I was stationed.

¹⁶² *Id n 145 supra* at 34.

actions falls within the definition of official duties or not. The determination of SRSG is crucial because once he/she waives immunity the person alleged to have committed the offence will be prosecuted by the local courts.¹⁶³ The UN has made it clear that it does not accept responsibility for acts carried out in 'unofficial capacity'.¹⁶⁴

Criminal offences are covered by paragraph 47 of the Model SoFA. This paragraph distinguishes between crimes committed by the civilian component and the military component of the peacekeeping force. If a civilian member of the force is alleged to have committed a crime, the SRSG shall conduct an inquiry and if satisfied he/she shall agree with the host government whether or not criminal proceedings should be instituted against that civilian member. If there is no agreement between the SRSG and the host government the matter is dealt in terms of paragraph 53 of the Model SoFA.¹⁶⁵ The general position is that civilian members are subjected to criminal jurisdiction of the host countries for offences committed, however the SRSG may refuse to give permission if concern is raised in respect of the human rights standard of host country or proper functioning of their justice system. If the SRSG refuses to give permission, the person might go unpunished as the UN does not have prosecutorial powers.¹⁶⁶

In terms of paragraph 47(b) of the Model SoFA military members of the military component of the peacekeeping operation are subjected to the

¹⁶³ *Id n 156 supra.*

¹⁶⁴ UN Juridical Yearbook 1986, 300–1 on the "*Liability of the United Nations for claims involving off-duty acts of members of peace-keeping forces – Determination of "off-duty" versus "on-duty" status*" OLA (UN Office of Legal Affairs) stated: We consider the primary factor in determining an "off-duty" situation to be whether the member of the peacekeeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation. Available at http://untreaty.un.org/cod/UNJuridicalYearbook/html/volumes/1986/dtSearch/Search_Forms/dtSearch.html. (Date used 08/07/13). See also the UN Secretary-General 2006 U.N. Doc. A/60/980 *Id n 155 supra* at 35–6.

¹⁶⁵ Paragraph 47(a) of Model SoFA. Paragraph 53 of the Model SoFA deals with establishment of a tribunal of arbitrators to settle dispute between the UN and the host government.

¹⁶⁶ International law does require contributing state to prosecute their repatriated civilian. GA Res 62/63 (2007) is trying to close the gap by strongly urging Member States to take appropriate steps to ensure that crimes by officials and expert on mission are punished. Available at <http://www.undemocracy.com/A-RES-62-63.pdf>. (Date used 10/07/13). See also *n 155* at 36 *supra*.

exclusive criminal jurisdiction of their respective contributing state in respect of any crime committed on the host country's territory. This paragraph does not distinguish between 'official capacity' and 'unofficial capacity',¹⁶⁷ therefore the contributing state has exclusive criminal jurisdiction in respect of any criminal act committed by military member, the reason being that members of the armed forces are subject to their own military system while serving on peace operations.¹⁶⁸ In addition to exercising exclusive criminal jurisdiction, the contributing state is required to give assurance to the Secretary-General of the UN that they will indeed exercise criminal jurisdiction if any of their nationals commit an offense during a peace operation.¹⁶⁹ In most of the agreements concluded between UN and host countries, the Model SoFA served as the basis and in some cases the Model SoFA was copied verbatim.¹⁷⁰

3.2.3 Agreement between the United Nations and the African Union and the Government of Sudan concerning the status of African Union/United Nations Hybrid Operation in Darfur (hereinafter UNAMID).

South Africa contributed troops to the mission in Darfur.¹⁷¹ The UNAMID¹⁷² follows the language of the Model SoFA discussed above. Paragraph 50 of

¹⁶⁷ See *n* 164 *supra* for a discussion of the terms.

¹⁶⁸ *Id n* 155 *supra* at 36. In terms of section 3(1) of Military Disciplinary Supplementary Measures Act 16 of 2002, this Act applies to any person [SANDF members (reserve force and permanent force)] subject to the Code irrespective whether such person is within or outside the Republic. In terms of section 172(2) of Botswana Defence Act, the Act shall apply to the persons subject thereto as well outside as within Botswana; notwithstanding their attachment under section 7 of Botswana Defence Act. Available at [http://www.icrc.org/ihi-nat.nsf/a24d1cf3344e99934125673e00508142/aa3071dc073984c6c125775200312bdd/\\$FILE/46443107.pdf/Botswana%20-%20Defence%20Force.pdf](http://www.icrc.org/ihi-nat.nsf/a24d1cf3344e99934125673e00508142/aa3071dc073984c6c125775200312bdd/$FILE/46443107.pdf/Botswana%20-%20Defence%20Force.pdf). (Date used 28/07/13).

¹⁶⁹ In terms of Article 7(22) of MONUSCO military members and any civilian members subjected to national military law are subjected to exclusive jurisdiction of South Africa in respect of any crimes or offences that might be committed by them while they are assigned to the military component of MONUSCO. In the period of June 2013 about six Note Verbale from the Office of Chief Conduct and Discipline Unit, Department of Field Support (hereinafter UN DFS) were received by Military Advisor Permanent Mission of South Africa to the United Nation, wherein UN DFS requested confirmation on what action was taken with regard to repatriated soldiers who were alleged to have committed offences during MONUSCO. (Department of Defence Operational Legal Support, Note No: 262/2013).

¹⁷⁰ See para 3.2.3 and 3.2.5 *infra*.

¹⁷¹ UNAMID facts and figures. Available at <http://www.un.org/en/peacekeeping/missions/unamid/facts.shtml>. (Date used 06/08/13).

¹⁷² UNAMID was established in accordance with the UN Security Council resolution 1769(2007) of July 2007 and the Communiqué of the 79th Meeting of the African Union Peace and Security Council held on 22 June 2007. Available at <http://unamid.unmissions.org/Portals/UNAMID/UNAMID%20SOFA.pdf> (Date used 08/06/13).

UNAMID provides that all members, including locally recruited personnel, are immune from legal process in respect of words spoken or written or acts performed by them in their official capacity. It further distinguishes between civilian and military members of the military component. If the crime is alleged to have been committed by a civilian member, the Joint Special Representative will conduct an enquiry and if satisfied that indeed an offence has been committed, he/she will allow the government of Sudan to institute criminal proceeding(s). If there is no agreement between the government and the Joint Special Representative the matters might be sent for arbitration in terms of paragraph 57. If the parties agree that the government of Sudan should prosecute it should do so in accordance with international norms and standard of justice. Civilian members of the military component of UNAMID are therefore subjected to laws and courts of Sudan.¹⁷³ This is in line with the Model SoFA discussed above.

Military members of the military component of UNAMID are subject to exclusive criminal jurisdiction of their respective contributing state in respect of any alleged criminal offence committed by them while in Sudan. Again there is no distinction between acts committed in official capacity and acts committed in unofficial capacity, the contributing state enjoys exclusive criminal jurisdiction.¹⁷⁴ The reason being that military members are always subjected to their own military justice system during peace operations irrespective of the place they are.¹⁷⁵ They cannot be prosecuted by the Sudanese government under Sudanese laws. This again is in accordance with paragraph 47(b) of the Model SoFA discussed above.

3.2.4 Memorandum of understanding between the Government of Republic of South Africa and African Union Contributing Resources to the African Union Mission in Burundi (hereinafter AMIB).

¹⁷³ Paragraph 51(a) of UNAMID.

¹⁷⁴ Paragraph 51(b) of UNAMID.

¹⁷⁵ *Ibid* n 168 *supra*.

Article 7 of AMIB¹⁷⁶ provides that:

South Africa shall have exclusive criminal jurisdiction in respect of offences committed by its members. However, South Africa shall prosecute, in conformity with its national laws, any of its members who has committed an offence in the territory of Burundi and which has led to repatriation. South Africa shall inform the AU of the outcome of legal actions taken against such member through the official channels.

The above Article does not distinguish between the civilian component and the military component of the peacekeeping force. South Africa enjoys exclusive criminal jurisdiction in respect of all its members, therefore all members (civilian and military) are immune from the laws of the host country (Burundi). This is in contrast with the Model SoFA discussed above wherein civilians are not absolutely immune from the jurisdiction of the host country. Further, South Africa undertakes to prosecute any of its members who commit a crime in accordance with its own national laws. These accords with paragraph 48 of Model SoFA which requires the Secretary General to obtain assurance from the contributing state that it will indeed exercise jurisdiction if any of its members commit a crime while in the host nation.

In the incident of Venter,¹⁷⁷ a South African soldier on peacekeeping mission in Burundi was charged with rape and murder of a Burundian girl,¹⁷⁸ South Africa retained exclusive criminal jurisdiction. The accused was tried by a

¹⁷⁶ The memorandum was signed pursuant to a Ceasefire Agreements of 7 October and 2 December 2002 and in accordance with the decision by the 7th Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Heads of State and Government level on 3 February 2003 and as mandated by the Ninety-First Ordinary Session of the Central Organ at Ambassadorial Level on 2 April 2003.

¹⁷⁷ In the SA Air Force case in Burundi, Sergeant Flippie Venter was charged with the murder and rape of a Burundian teenaged prostitute, 14-year old Therese Nkeshimana on the night of September 2004. This was the first case in which a South African court tried a South African citizen for murder outside the country's borders. At the time of the commission of the crime Sgt Venter was working as a protector as part of UN Operation in Burundi. The accused was found guilty and sentenced to 24 years in jail by the military court. Available at <http://www.npa.gov.za/UploadedFiles/24%20years%20jail%20for%20killing%20Burundi%20ten.pdf>. (Date used 16/07/13). See also Kalwahali *The Crimes Committed by UN* at 29.

¹⁷⁸ Otto H "SA soldier facing murder charge in Burundi". Available at <http://www.iol.co.za/news/africa/sa-soldier-facing-murder-charge-in-burundi-1.267660#.UebomGb8Jdg> (Date used 17/07/13).

South African military court under South African military law.¹⁷⁹ Due to the nature of the offence and the resultant tension it created, especially among the Burundians, the sitting of the court was partly in South Africa and partly in Burundi. However, in all the sittings the presiding officers were all South Africans and the law which was applied was South African.¹⁸⁰

Jurisdiction in the Venter case was decided in accordance with the agreement establishing AMIB with necessary adaptation. The case shows the difficulty which a state may face with regard to criminal jurisdiction, especially in respect of serious offences. Such difficulties include the securing of witnesses, distance between the place where the crime took place and the place where the trial must take place, language barriers, etc.¹⁸¹ Further the relation between the countries can be permanently damaged.¹⁸²

3.2.5 Legal status of the Botswana Defence Force during United Nation Operation in Mozambique (hereinafter ONUMOZ)

The UN operation was established pursuant to a Security Council Resolution 797 (1992) approving the deployment of political, military, electoral and humanitarian elements in Mozambique to monitor ceasefire agreement.¹⁸³ Subsequent to the resolution, an agreement between the United Nations and the Government of Mozambique on the Status of the United Nations

¹⁷⁹ Information provided by Joint Operational Division (Department of Defence): Legal Division (SANDF).

¹⁸⁰ *Ibid.*

¹⁸¹ Otto H "Murder fuels anger in Burundi". The case has dissipated much of the goodwill towards South Africa. Locals have threatened to rape South African women and have threatened white South African men especially, South African sources here have said. Their anger has even been directed at a court interpreter who has been performing the difficult task of translating testimony between English, French and the local-language Kirundi interpreter. A local radio station allegedly claimed she was interpreting in favour of the accused. The following days she did not arrive for work, fearing for her life, and had to be replaced. Available at <http://courtinterpreternews.blogspot.com/2006/03/murder-fuels-anger-in-burundi.html>. (Date used 17/07/13).

¹⁸² *Ibid n 179 supra*. The SANDF kept Sergeant Venter in custody in Burundi for five months in order to defuse the tension between South Africa and Burundi and to assure the Burundians that indeed he will be prosecuted.

¹⁸³ The Security Council passed the resolution after adopting the report of the Secretary General on Mozambique. The report dealt with the possible role of the UN in Mozambique after the cease-fire agreement between the Government of Mozambique and Resistência Nacional Moçambicana (hereinafter RENAMO) following 14 years of civil war. Available at <https://www.un.org/en/peacekeeping/missions/past/onumozFT.htm#General>. (Date used 31/07/13).

Operation in Mozambique (hereinafter ONUMOZ) was signed outlining the terms and conditions of the operation.¹⁸⁴

Botswana was part of ONUMOZ and contributed troops to the mission.¹⁸⁵ In terms of Article 5 of ONUMOZ members of the peace-keeping force are immune from any legal processes in respect of words spoken or written and all acts performed by them in their official capacity. It further differentiates between civilian and military components of the mission. If a crime is suspected to have been committed by a member of the mission, the SRSG should be informed and be presented with the necessary evidence. If the member is a civilian, the SRSG will decide if immunity has to be waived or not.¹⁸⁶

The military component of ONUMOZ is subjected to the exclusive jurisdiction of their participating state. There is no distinction between official and non-official capacity, meaning that military members cannot be tried by the host state. Therefore, Botswana armed forces could only be tried in Botswana and under Botswana (military) law.¹⁸⁷ This is in accordance with paragraph 47(b) of the Model SoFA discussed above.

Botswana has participated in a limited number of UN peacekeeping missions ONUMOZ being one of them. In 1992 and 1993, a BDF contingent participated in UNOSOM II.¹⁸⁸ The mandate of UNOSOM II was to take appropriate action, including enforcement measures, to establish a secure environment for humanitarian assistance¹⁸⁹ throughout Somalia. All troop contributing states during UNOSOM II retained exclusive criminal jurisdiction over their armed forces, therefore BDF armed force were subjected to

¹⁸⁴ United Nations Juridical Year Book (1993) Part 1: *Legal status of the United Nations and related intergovernmental organizations* at 36. Available at <http://untreaty.un.org/cod/UNJuridicalYearbook/pdfs/english/ByChapter/chpVI/1993/chpVI.pdf>. (Date used 31/07/12).

¹⁸⁵ ONUMOZ: Mozambique facts and figures. Available at <http://www.un.org/en/peacekeeping/missions/past/onumozF.html>. (Date used 31/07/13).

¹⁸⁶ Article 46(a) of ONUMOZ. See also *Ibid n 164 supra*.

¹⁸⁷ Article 46(b) of ONUMOZ.

¹⁸⁸ United Nations Mission II in Somalia.

¹⁸⁹ UNOSOM II. Available at <http://www.un.org/Depts/DPKO/Missions/unosom2b.htm>. (Date used 19/10/13).

Botswana (military) law.¹⁹⁰ BDF also participated in 'Operation BOLEAS'¹⁹¹, a SADC military intervention in Lesotho in 1998. The two operations discussed above were more of an intervention and Botswana retained exclusive criminal jurisdiction over her forces.¹⁹²

3.2.6 SADC Treaty, SADC Protocol, SADC MoU, SADC Defence Pact¹⁹³ and Draft SADC SoFA

In furtherance of Chapter III, Article 52 of the UN Charter (discussed above) Southern African countries adopted the Declaration and Treaty of SADC wherein relationships amongst member states were established.¹⁹⁴ One of the objectives of the SADC Treaty is to promote and defend peace and security in the SADC region.¹⁹⁵ In fulfilment of its mandate it will be required of SADC member states to send personnel or staff to another member state territory.¹⁹⁶ The question of criminal jurisdiction will arise every time member states send personnel to another state's territory.

In order to address the aforementioned issue article 31(1) of the SADC Treaty provides:

SADC, its institution and staff shall, in the territory of each Member State, have such immunities and privileges as are necessary for the proper performance of their functions under this Treaty and which shall be similar to those accorded to comparable international organizations.

¹⁹⁰ UNOSOM II was established in accordance with SC Res 814 (1993) to take over from the Unified Task Force (UNITAF). Available at <https://www.un.org/en/peacekeeping/missions/past/unosom2mandate.html>. (Date used 01/08/13).

¹⁹¹ The military intervention was at the request of the Kingdom of Lesotho, under the auspices of SADC in accordance with the SADC Treaty. The aim of the intervention was to restore stability as quickly as possible and to withdraw from the Kingdom of Lesotho as soon as this was achieved. This intervention was not sanctioned by the UN Security Council. Available at http://www.info.gov.za/speeches/1998/98a01_boleas9811173.htm. (Date use 01/08/13).

¹⁹² *Ibid n 6 supra*.

¹⁹³ The SADC Defence Pact was signed in compliance with the directive of the Summit of the SADC Heads of State and Government, and with the provisions of the SADC Protocol on Politics, Defence and Security, requiring them to conclude a Mutual Defence Pact; held in Gaborone, Botswana, on 28 June 1996. SADC BRIG was established pursuant to Mutual Defence Pact. Available at <http://www.issafrica.org/uploads/PROSPECTSAPPENDG.PDF>. (Date used 06/08/13).

¹⁹⁴ *Ibid n 11 supra*.

¹⁹⁵ *Ibid n 13 supra*.

¹⁹⁶ *Ibid n 15 supra*.

The aforementioned paragraph accords with Article 104 and 105 of the UN Charter and the UN Privileges Convention discussed above. It means that SADC personnel/staff are immune from the criminal jurisdiction of the host member state. Because of the requirement that such immunities should be similar to those accorded to comparable international organisations, SADC personnel will most probably be immune from legal processes for words spoken or written, and all acts performed by them in their official capacity. However, the actions or words should be in the interest of SADC and not for personal gain; otherwise the immunities will most likely be waived.

Paragraph 2 of Article 31 of the SADC Treaty provides that immunities and privileges conferred by this Article shall be prescribed in a Protocol. The Protocol on Politics, Defence and Security in the Southern African Development Community Region (SADC Protocol) was signed to give effect to the SADC Treaty on matters of politics, defence and security.¹⁹⁷ However, the SADC Protocol does not address the question of immunities and privileges. It rather refers extensively to the UN Charter, the Organisation of African Unity and international law.¹⁹⁸ The SADC Protocol will therefore be interpreted in accordance with international law.¹⁹⁹

The SADC MoU and the SADC Defence Pact are silent on the question of criminal jurisdiction. In terms of the Draft SADC SoFA, it appears that the SADC member states are unanimous that a sending state should exercise criminal jurisdiction where a national of a sending state commits a crime in the course and scope of his or her work, while in the host country.²⁰⁰ The contentious point involves a situation where a member commits crime outside

¹⁹⁷ *Ibid n 11 supra.*

¹⁹⁸ Article 11 of the SADC Protocol.

¹⁹⁹ The SADC Protocol is an international agreement (treaty). Article 2(1)(a) of the Vienna Convention defines a treaty as an international agreement concluded between States in written form and governed by international law... Available at http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. (Date used 18/10/13).

²⁰⁰ Article 5 of the draft agreement regarding the status of SADC standby force or their armed forces deployed within the region for the purpose of training, exercise and humanitarian assistance. The agreement is not yet finalised due to lack of consensus on some of the articles specifically on jurisdiction (hereinafter Draft SADC SoFA [Soft law]). (Department of Defence International Relations).

his or her scope of work. Currently there is no agreement in respect of the latter.

In the absence of any agreement in respect of criminal jurisdiction the legal status of the visiting soldier remains uncertain. In almost all the SADC agreements discussed above reference is extensively made to international instruments and international law. It can therefore be inferred that the agreements will most likely be interpreted in accordance with international law.²⁰¹ This means that the individual concerned might be accorded the immunities and privileges conferred under international law.

3.3 Bilateral agreements

3.3.1 Memorandum of understanding between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe concerning the Secondment of the Air Force of Zimbabwe Personnel to the South African Department of Defence (hereinafter the South Africa-Zimbabwe Air Force MoU)

In terms of Article 5 of the South Africa-Zimbabwe Air Force MoU, members of the Zimbabwean Air Force remain members of their air force while in South Africa. They are accorded the status, immunities and privileges equivalent to those provided to members of the administrative and technical staff of the High Commission of the sending State in the Host State under the Vienna Convention on Diplomatic Relations, 1961.²⁰²

If we read the South Africa-Zimbabwe Air Force MoU together with the Vienna Convention on Diplomatic Relations, we may conclude that Zimbabwe Air Force personnel are immune from South African municipal law in respect of

²⁰¹ *Ibid.*

²⁰² Article 37 Vienna Convention on Diplomatic Relations provides that members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35 except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. Article 31 provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. Available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf). (Date used 29/10/13).

crimes committed, meaning that they will be tried by a Zimbabwean court and under Zimbabwean law, thus Zimbabwe retains exclusive criminal jurisdiction.²⁰³

3.4 Conclusion

In all the UN peacekeeping operations two principles are clear: Firstly, civilian component and expert on mission are protected under the UN Privileges Convention. They enjoy limited immunity. They are only protected from the host nation's criminal jurisdiction if what they say or do is in the official execution of their duties. If what they say or do is not in the interest of the UN the Secretary General or SRSG will have the power to waive the immunity. If the Secretary General decides to waive the immunity the alleged perpetrator will be tried by the host nation under its own domestic laws. When deciding on the question of whether to waive immunity or not, the Secretary General or SRSG will take into consideration the human rights history and the effectiveness of the justice system of the host nation. As most host nations have weak justice systems and a bad record of human rights,²⁰⁴ the Secretary

²⁰³ Section 45(2) of Zimbabwe Defence Act 27 of 1972 (as amended) provides that a prescribed officer may, subject to such conditions and restrictions as may be prescribed, try and punish any member, whether inside or outside Zimbabwe, for an offence in terms of this Act. Available at http://www.parlzim.gov.zw/attachments/article/97/DEFENCE_ACT_11_02.pdf. (Date used 27/07/13). In terms of the memorandum of understanding between the government of the Republic of South Africa and the Democratic Republic of Congo (DRC) on the Practical Assistance on the Integration of their Armed Forces of the DRC in accordance with terms of condition of Defence Cooperation Agreement signed between them (hereinafter SADAIT), South Africa retain exclusive jurisdiction. Article 7 of SADAIT provides that members of the SADAIT shall be subject to the exclusive jurisdiction of the Sending State in respect of any military or criminal offences which may be committed by them in the territory of the Receiving State, provided that the Sending State may waive its exclusive jurisdiction. Available at <http://196.14.41.167/dbtw-wpd/images/20040618DRCMOUArmedForces.pdf>. (Date used 28/07/13).

²⁰⁴ International Report on DRC 2012. "Impunity for crimes under international law continued in the Democratic Republic of the Congo (DRC), despite some limited progress. Government security forces and armed groups committed scores of human rights violations in eastern DRC. Nine soldiers from the Congolese armed forces, including a lieutenant colonel, were convicted of crimes against humanity, notably rape, committed on 1 January in the town of Fizi, South Kivu. They were sentenced to jail in February in a rare example of perpetrators being promptly brought to justice. However, investigations stalled into other cases of mass rapes committed by the national army and armed groups. The general elections were marred by many human rights violations, including unlawful killings and arbitrary arrests by security forces. Human rights defenders and journalists faced intimidation and restrictions on the freedoms of expression and association." Available at <http://www.amnesty.org/en/region/democratic-republic-congo/report-2012>. (Date used

General or SRSG will most likely refuse to waive immunities resulting in the perpetrator going unpunished.

Secondly, the armed members of a peacekeeping force are protected under a SoFA agreement. They are subjected to the exclusive criminal jurisdiction of their sending state. No attempt is made to distinguish between “official” and “non-official” duties. They are immune from the criminal jurisdiction of the host nation for all (allegedly committed) offences. Further, the troop-contributing states have to assure the Secretary General or SRSG that they will indeed exercise criminal jurisdiction if their members commit offences.

In all the agreements concluded between the UN, South Africa and Botswana respectively, South Africa and Botswana retained exclusive criminal jurisdiction over all their respective armed forces. Civilian components and experts on mission were covered under the UN Privileges Convention, thus South Africa and Botswana had limited criminal jurisdiction. The only agreement which was *sui generis* was AMIB in that it did not distinguish between the civilian component and armed forces. All South African members in this mission were subjected to exclusive jurisdiction of South Africa.

In most bilateral agreements entered into by South Africa and other African countries, all members (civilian and armed forces) were subjected to the exclusive jurisdiction of their sending state. Botswana seems to be reluctant to send its troops abroad recently, (especially in unstable conflict areas) and it only participated in fewer missions and has signed fewer bilateral agreements with other African countries.²⁰⁵

The approaches enunciated above will most probably lay the foundation for future agreements which both South Africa and Botswana might conclude with other states in sending their armed forces abroad during peace time. The sending states (South Africa and Botswana) will most likely retain exclusive criminal jurisdiction over its armed forces for all crimes committed while

06/08/13). See also Amnesty International Report 2012 on Sudan. Available at <http://www.amnesty.org/en/region/sudan/report-2012>. (Date used 21/10/13).

²⁰⁵ Tebele “Botswana plans peacekeeping support in DRC.” Available at http://www.southerntimesafrica.com/news_article.php?id=8110&title=Botswana%20plans%20peacekeeping%20support%20in%20DRC&type=83. (Date used 06/08/13).

stationed in the host country.²⁰⁶ Together with the right to exclusive criminal jurisdiction, it might further be required that the sending state gives assurance to the host nation that it will indeed prosecute its nationals for any offence committed while in the host nation.²⁰⁷

The civilian component of the mission might be subjected to the criminal jurisdiction of the host nation if the alleged conduct is not adjudged to be within the official execution of duties.²⁰⁸ In some cases the civilian component of the delegation might be subjected to exclusive criminal jurisdiction of the sending state for all criminal offences.²⁰⁹ A clause might be inserted into the agreement requiring the sending state to waive its right to exercise criminal jurisdiction (in circumscribed cases) over its nationals in favour of the host nation.²¹⁰

Before concluding any agreement with any state Botswana and South Africa have to take their domestic laws into cognisance. The main legislations for BDF are *Botswana Defence Act* and *Botswana Penal Law*, for South Africa is *Defence Act 42 of 2002*, *Defence Act 44 of 1957* (as amended) and the *Military Disciplinary Supplementary Measures Act 16 of 1999*. The aforementioned pieces of legislation prescribe and proscribe what the two countries can or cannot do with regard to their armed forces.

²⁰⁶ Article 47(b) of the Model SOFA. See also article 7 of AMIB. See further *Ibid n 174*, *Ibid n 188* and *Ibid n 199 supra*.

²⁰⁷ Article 7 of AMIB. See also *Ibid n 169 supra*.

²⁰⁸ *Id n 155* and *163 supra*. See also para 47 of the Model SOFA.

²⁰⁹ Article 7 of AMIB. See also article 7 of SADAIT. See further *Ibid n 205 supra*.

²¹⁰ Article 7 of SADAIT.

CHAPTER 4

LEGISLATION RELEVANT TO CRIMINAL JURISDICTION OF SOUTH AFRICA BOTSWANA ARMED FORCES

4.1 Introduction

The SANDF is established in terms of section 199(1) of the Constitution of the Republic of South Africa, 1996.²¹¹ The SANDF is the only lawful military force in the Republic²¹² and it is structured and regulated by national legislation.²¹³ The primary role of the SANDF is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principle of international law.²¹⁴

Together with the protection of the Republic the SANDF may further be employed to fulfil an international obligation.²¹⁵ While fulfilling an international obligation, members of the SANDF are required to observe customary international law and international agreements binding on South Africa.²¹⁶ The relevant statutes giving effect to these constitutional imperatives are the *Defence Act 44 of 1957 (as amended)*, *the Defence Act 42 of 2002* and the *Military Disciplinary Supplementary Measures Act 16 of 1999*.

Botswana Defence Force (hereinafter BDF) is established in terms of section 4(1) of *Botswana Defence Act 13, 1977* (hereinafter Botswana Defence Act). The Botswana Defence Act provides that the BDF may be employed outside or beyond Botswana.²¹⁷ It further provides that members of the BDF may undergo training outside Botswana.²¹⁸

²¹¹ Hereinafter SA Constitution 1996.

²¹² Section 199(2) of the SA Constitution 1996.

²¹³ Section 199(4) of the SA Constitution 1996.

²¹⁴ Section 200(2) of the SA Constitution 1996.

²¹⁵ Section 201(2)(c) of the SA Constitution 1996.

²¹⁶ Section 199(5) of the SA Constitution 1996.

²¹⁷ Section 6 of Botswana Defence Act.

²¹⁸ Section 7(1) of Botswana Defence Act.

4.2 South African Legislation

4.2.1 Defence Act 42 of 2002

The Defence Act 42 of 2002 (hereinafter the SA Defence Act) was enacted to give effect to the SA Constitution 1996.²¹⁹ The Act applies to all members of the SANDF whether posted or employed inside or outside South Africa.²²⁰

Section 93 of the SA Defence Act gives the SANDF the legal mandate to render service in fulfilment of an international obligation. This international obligation results in members of SANDF being employed outside South Africa. This, in turn, is in line with section 200(2)(c) of the SA Constitution 1996 discussed above. In practical terms this results in SANDF members forming part of SADC, the African Union or UN peacekeeping or enforcement forces.²²¹ While being in service of such an international obligation (outside South Africa) members of SANDF are subjected to SA Defence Act.²²²

Section 94(1)(a) of the SA Defence Act further provides that the Minister [of Defence] may temporary attach to the SANDF any member of a force of another country or international body who is placed at the disposal of the Minister. It further provides that the Minister may equally place a member of the SANDF at the disposal of the military authorities of another country.²²³ This means that members of foreign forces may be attached to the SANDF and members of the SANDF may too be attached to other foreign forces not in fulfilment of an international obligation but as part of bilateral or multilateral cooperation.²²⁴

²¹⁹ *Ibid n 185 supra.*

²²⁰ Section 3(a) of SA Defence Act.

²²¹ *Ibid n 159 and 163 supra.*

²²² Section 3(1)(a) and (b) of the SA Defence Act provides...this Act applies to all members of the Defence Force and any auxillary service, and all employees, whether they are posted or employed inside or outside the Republic.

²²³ Section 94(3) of the SA Defence Act.

²²⁴ For financial year 2012/13 the SANDF have sent one member to the Tanzanian Defence Force, two to the Zambia Defence Force, two to the Zimbabwe Defence Force, eight to BDF and one to Namibia Defence Force. During the same period eight BDF members and one Mali Defence Force member was attached to the SANDF. Information supplied by Chief Cooperate Service SA Army Level 2 (Foreign Relation), dated 16/08/13. An international obligation will be performed under or with the authorisation of the UN or will be reported immediately thereafter to the UN. During the fulfillment of this international obligation the

When members of the armed forces are placed at each other's disposal they are subjected to the law applying to those defence forces *i.e.* they are subjected to the military laws²²⁵ of the host nation.²²⁶ The question arises what exactly 'subjected to military laws' of the host nation means. Does this only apply to questions of discipline and administration or does it apply to all situations *i.e.* if a member commits a serious offence, will he/she be subjected to the host national (military) laws meaning that he/she will be tried by the host (military) courts applying their own domestic (military) laws?

The Act further stipulates that any agreement either in fulfilment of an international obligation or as part of cooperation with other countries must provide for the legal status of members of the SANDF and if a visiting force is attached to the SANDF its legal status must too, be provided.²²⁷ This implies that before the SANDF can be placed at the disposal of an international organisation, an agreement between the government of South Africa and that international organisation must be signed outlining the legal status of the SANDF while on such service.²²⁸ Furthermore, before the SANDF can visit another state or before a foreign force can visit South Africa an agreement

SANDF will form part of either the UN or the African Union or the SADC force. These international obligations manifest themselves in the form of peacekeeping/enforcement operations (see chapter 3 paras 3.2.3, 3.2.4, 3.2.5, and 3.2.6 *supra* for a discussion) and will mostly fall under Article 52(1), 53 and 54 of UN Charter (see para 3.1 *supra* for a discussion). Bilateral cooperation on the other hand may be undertaken for reason other than peacekeeping, for example, South Africa-Zimbabwe MoU (para 3.3.1 *supra*) was for the purpose of training South African Air Force pilots. SANDF BDF Health (para 4.2.1(a)) was concluded for the purpose of cooperation in health matters. Bilateral/cooperation is mostly for purpose of training or capacity building (see *id n 16 supra*). Bilateral/multilateral cooperation will not necessarily be regulated by the aforesaid articles.

²²⁵ In terms of s 3(a) SA Defence Act the Act (Military law) applies to all members of Defence Force, auxiliary service and employees. The Act defines 'member' to mean any officer and other rank. The MDSMA applies to Permanent Force, Reserve Force, auxiliary services and any person attached to SANDF. In *Minister of Defence v Potsane and Another the Constitutional Court* held that military justice system/law/courts is concerned with the maintenance of discipline as required by s 200(1) of the SA Constitution 1996 that the Defence Force must be structured and managed as a discipline force and not with punishing crime or maintaining and promoting law, order and tranquility in society. Base on the aforesaid military law can be defined as laws applicable to members of the armed forces and persons attached thereto in order to maintain discipline.

²²⁶ Section 94(2)(a) of the SA Defence Act provides ...a member of a force of any other country or international body who is attached temporarily to the Defence Force is subjected to the law applying to that portion of the Defence to which he or she is attached and must be treated, and has the same power of command and punishment over members of the Defence Force, as if he or she were a member of that force of rank equivalent to the held by him or her as a member of the force of the country or international body from which he or she came.

²²⁷ Section 92(a) and (b) of the SA Defence Act.

²²⁸ *Ibid n 158 supra*.

must be signed outlining the legal status of the SANDF or that visiting force while in either state's territory. This means that the SANDF cannot fulfil an international obligation, or cooperate with another country, or that a visiting force cannot be attached to the SANDF before the signing of an agreement detailing the legal status of such an obligation or cooperation between the SANDF and that visiting force. The Act uses the word 'must' meaning it is mandatory for an agreement to be signed before such an obligation or cooperation. It seems the requirement that any agreement should provide for the legal status of members suggests that 'subjected to military laws' (discussed in the preceding paragraph) does not *per se* confer exclusive legal jurisdiction on the host state over the visiting force, thus the legal status may be varied by an agreement.

In all the international obligations, *i.e.* UN/AU peacekeeping missions, in which the SANDF took part, the deployments were preceded by the signing of memorandums of understanding with the UN and/or African Union or the host nation which outlined the terms and conditions of such missions.²²⁹ The question of criminal jurisdiction was answered as required by section 92(a) and (b) of the SA Defence Act (this matter was covered in chapter three *supra* and will not be pursued any further).

Where members of armed forces are placed at each other's disposal in terms of section 94 of the SA Defence Act, an agreement must be signed outlining the terms and conditions of the cooperation. South Africa has signed quite a number of bilateral agreements with other states in fulfilment of section 92 of the SA Defence Act allowing members of SANDF to be attached to foreign armed forces and concomitantly allowing members of foreign armed forces to be attached to the SANDF.²³⁰ The few chosen bilateral agreements concluded by Botswana, South Africa and other states will be analysed with emphasis on the question of criminal jurisdiction in particular.

²²⁹ For a discussion of these Memorandums of Understanding see chapter 3, para 3.2.3, 3.2.4 and 3.2.5. In these agreements legal status of members of SANDF were enunciated particularly on criminal jurisdiction.

²³⁰ Paragraph 3.3.1, *Ibid n 203 (SADAIT) supra* and *Ibid n 231 and n 235 infra*.

4.2.1(a) *Technical arrangements between the South African National Defence Force and the Botswana Defence Force concerning Military Health Service Cooperation*²³¹ (hereinafter *SANDF/BDF Health Cooperation*)

The question of criminal jurisdiction is not directly addressed by the SANDF/BDF Health Cooperation. In terms of Article 2 of the SANDF/BDF Health Cooperation the parties to the agreement are not obliged to take any action in terms of this agreement if such action will be contrary to their domestic law or their constitution. Further, the parties waive all claims against each other for injury or death suffered by patients while in either party's hospital.²³² Article 9 further provides that any disputes arising from the interpretation or the implementation of the agreement shall be resolved amicably through consultation or negotiation.

In terms of this agreement, the laws of both parties will be respected and no party will try to impose its laws on another party or its members, so by implication members of either party will be subjected to their own domestic laws while in the host country. By further waiving all claims it can be inferred that in case of a criminal offence being committed, the right to exercise jurisdiction will most probably be waived by the host state to the sending state. This is in line with the principle of international law where sovereign states are free to limit or extend their rights through convention.²³³ If the dispute cannot be resolved legally, political intervention will most probably be the route to take, in fact the latter might even precede the former.²³⁴

4.2.1(b) *Protocol between the government of the Republic of South Africa and the government of the Republic of Angola on Defence Cooperation (hereinafter South Africa/Angola Protocol)*²³⁵

²³¹ SANDF/BDF Health cooperation was signed on 02/03/11 in South Africa mainly to facilitate referral of patients and persons accompanying them from either country, between military hospitals of both countries. Information supplied by Chief Cooperate Service SA Army Level 2 (Foreign Relation) dated 16/08/13. Information also available on SANDF internal website (intranet) at *dod.mil/80/80*.

²³² Article 5(1) of the SANDF/BDF Cooperation.

²³³ For a discussion of this principle see para 2.6. *supra*.

²³⁴ Article 9 of SANDF BDF Cooperation.

²³⁵ The Protocol was signed on 17 February 2005 in South Africa establishing defence cooperation between the two countries. Amongst areas of cooperation is education and

The South Africa/Angola Protocol is not clear with regard to jurisdiction. Article 7 which is titled "Jurisdiction" holds that:

The visiting Party shall respect the domestic law, custom and traditions of the host Party and shall comply with the disciplinary laws and instructions of the military institutions of the host Party.

The above coincide with section 94 of the SA Defence Act (discussed above) wherein attached members of the foreign armed forces are subjected to the laws of the host country while attached thereto. However, the question of jurisdiction is not clear or fully addressed wherein a member attached fails to comply with the afore-mentioned provision. To put it differently: Who will exercise jurisdiction if the member breaks the domestic laws or fails to comply with disciplinary laws and instructions of the military institution and as a result commits a serious criminal offence?

Article 8 of the South Africa/Angola Protocol provides that disputes which may arise between the two countries during implementation and/or interpretation shall be resolved amicably through consultation and negotiation. So if a matter of criminal jurisdiction arises it will most probably be resolved politically through consultation and negotiations as Article 7 discussed above and does not *per se* solve the question of jurisdiction.

In the above bilateral agreements the question of criminal jurisdiction is not clear. However, the opinion of the South African government is that South Africa should retain exclusive jurisdiction over its armed forces stationed.²³⁶ Botswana's attitude is that Botswana too should retain exclusive jurisdiction over its armed forces stationed abroad.²³⁷

training. Information supplied by Chief Cooperate Service SA Army Level 2 (Foreign Relation) dated 16/08/13. Information also available on SANDF internal website (intranet) at *dod.mil/80/80*.

²³⁶ *Ibid n 27 supra*.

²³⁷ Opinion provided by the Office of Attorney General Chambers Gaborone Botswana. (Date 09/09/13).

4.2.1(c) *Visiting forces*

Section 97 of the SA Defence Act deals with discipline and internal administration of the visiting forces while in the country. Section 97(1)(a) of the SA Defence Act provides that:

subject to paragraph (b), a military court or other authority of a visiting force may in matters concerning discipline and internal administration of that force, which may include the administration of property or the estate of the of the deceased member of that force, within the Republic exercise all such powers as are conferred upon such court or authority by the law of that country.

The above section confers some form of jurisdiction on the military court or authority of a visiting force. However, the powers are limited to matters of discipline and the internal administration of that force only. This is the first limitation contained in the section. If a matter is adjudged not to be a disciplinary matter or is not for internal administration of that force, the military court or authority will not exercise jurisdiction as this will fall outside their legal mandate. Exactly what is meant by disciplinary and administrative matters is debatable. Committing a serious military offence like mutiny will most definitely fall under this category. However, it is questionable that serious civilian criminal offences like rape, murder or culpable homicide will fall within this mentioned category. Therefore, a visiting military court or authority might not have jurisdiction to try serious civilian offences committed by their members while inside the Republic.

Section 97(1)(b) provides:

No cruel, inhuman or degrading punishment contemplated in section 12(1)(e) of the Constitution may be meted out or administered by a military court or other authority in terms of paragraph (a) while in the Republic.

This is the second limitation placed upon the military court or other authority of the visiting force. So, while adjudicating on matters of discipline and administration (for example mutiny) a visiting military court may not hand out punishment which is cruel, inhuman or degrading. This section is in fact a

restatement of section 12(1)(e) of the Constitution and it will most probably be interpreted and applied as such.²³⁸

The right not to be subjected to cruel, inhuman or degrading punishment firstly came before the court in the leading case of *Makwanyane*²³⁹ which was heard under the Interim Constitution Act 200 of 1993 (hereinafter Interim Constitution 1993). The facts were briefly as follows: The two accused in this matter were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts.

The decision was confirmed on appeal by the Appellate Division of the Supreme Court. The courts postponed the hearing of appeals against the death sentence until the constitutional issues were decided by the Constitutional Court. Two issues were raised: The constitutionality of section 277(1)(a)²⁴⁰ of the Criminal Procedure Act, and the implications of section 241(8)²⁴¹ of the Interim Constitution 1993.²⁴²

Thus, the question before the Constitutional Court was whether the death penalty was consistent with the provisions of the Interim Constitution 1993²⁴³ specifically section 11(2) which prohibit cruel, inhuman and degrading treatment or punishment.²⁴⁴ In answering the question the Constitutional

²³⁸ Section 12(1)(e) of the SA Constitution 1996 provides that everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.

²³⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 144. Available at <http://www.saflii.org/za/cases/ZACC/1995/3.pdf> (Date used 03/08/13). See also *Id n* 207 at 274.

²⁴⁰ Section 177(1)(a) of the *Criminal Procedure Act 52 of 1977* which prescribed that death sentence is a competent sentence for the crime of murder.

²⁴¹ Section 241(8) of the interim Constitution 1993 provides that all proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.

²⁴² *Id n* 239 *supra* at para 3.

²⁴³ *Id n* 239 *supra* at para 5.

²⁴⁴ *Id n* 239 *supra* at para 8.

Court referred extensively to the founding values of the Constitution²⁴⁵ and held that the right to dignity is central to the Constitution.

The Constitutional Court further held that the right to dignity is one of the relevant factors that must be considered in determining whether punishment is cruel, inhuman or degrading.²⁴⁶ The right to dignity is at the centre of the right not to be tortured or to be treated or punished in a cruel, inhuman or degrading way. The court held that section 277(1)(a) was inconsistent with section 11(2) of the interim Constitution 1993 (currently section 12(1)(e) of the Constitution, 1996). Thus, capital punishment violated the right not to be subjected to cruel, inhumane or degrading punishment.²⁴⁷

4.2.2 *Military Discipline Supplementary Measures Act 16 of 1999*²⁴⁸

In terms of section 3 of *Military Disciplinary Measures Act 16 of 1999* (hereinafter MDSMA) the Act shall apply to any person subjected to the Code²⁴⁹ (hereinafter MDC) irrespective of whether such person is within or outside the Republic. This section is in conformity with section 3(a) of the SA Defence Act. This means the section read together with the MDC will confer jurisdiction on the military court to try any member of SANDF who commits an MDC or SA Defence Act or a common law offence while outside the country.

Section 5 of MDSA provides:

²⁴⁵ Section 10 of the interim Constitution 1993. See also Currie and de Wall *The Bill of Rights Handbook* (2005) at 272.

²⁴⁶ *Id n 239 supra* at para 111. See also *Id n 207* at 276.

²⁴⁷ *Id n 239 supra* at para 146. See also Currie and de Wall *The Bill of Rights Handbook* (2005) *Id n 245 supra* at 305. In *S v Williams* the Constitutional Court, dealing with the constitutionality of section 294 of the *Criminal Procedure Act* and while referring to punishment in general Langa J held that: "measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment" further held that the basic concept underlying the prohibition of cruel, inhumane or degrading punishment is the 'dignity of man' and the 'common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity' (at para 35 and 77). Available at <http://www.saflii.org/za/cases/ZACC/1995/6.pdf> (Date used 09/09/13).

²⁴⁸ The Act commenced on 28 May 1999 to provide for a new system of military courts with a view to improve enforcement of military discipline; and to provide for incidental matters. The MDSMA repealed First Schedule and amended Second Schedule of the SA Defence Act 44 of 1957 (to the extent indicated in the Act). The SA Defence Act 42 of 2002 repealed the Defence Act 44 of 1957 save for section 104, 105, 106, 108, 109, 111 and 112 and the First Schedule. So the First Schedule is still applicable *mutatis mutandis*.

²⁴⁹ Code means the Military Disciplinary Code (hereinafter MDC) referred to in section 104 (1) of the SA Defence Act 44, 1957. It is the first schedule to the SA Defence Act, 1957.

Whenever this Act [MDSMA] is enforced outside the Republic, any finding, sentence, penalty, fine or order made, pronounced or imposed in terms of its provision shall be as valid and effectual, and shall be carried into effect, as if it had been made, pronounced or imposed in the Republic.

This implies that a South African military court may sit outside the Republic to hear cases which were committed outside the Republic by members subjected to the MDSMA/MDC/Defence Act.²⁵⁰ Further the law, which is going to be applied, is by implication the South African (military) law. The verdict too will be enforced in South Africa and in case of incarceration; it will be served in South Africa. The foregoing means the South African (military) court has jurisdiction to try a matter involving members of the SANDF which happens outside South Africa.

Section 7 provides that the Minister of Defence shall appoint a Court of Military Appeals (hereinafter CMA)²⁵¹ to try treason, murder, rape, culpable homicide and sections 4 and 5 MDC offence²⁵² committed outside the Republic. This means the CMA has jurisdiction to try members of the SANDF for those specified crimes committed outside South Africa. Further the CMA may sit at any place within or outside the borders of South Africa.²⁵³

The Court of Senior Military Judge (hereinafter CSMJ) has jurisdiction to try any person subjected to the MDC for any offence whether committed within or outside South Africa, the exception being murder, treason, rape or culpable homicide committed within the Republic.²⁵⁴ A Court of Military Judge (CMJ) has jurisdiction to try any person subjected to the MDC, other than an officer of field rank²⁵⁵ or higher rank for any offence, other than murder, treason, rape

²⁵⁰ Section 3 of MDSMA and *Ibid n 219 supra*.

²⁵¹ The Court of Military Appeals (hereinafter CMA) is established in terms of section 6 of MDSMA and it is the highest military court. It has full appeal and review competencies (section 8(1) of MDSMA). CMA is followed by Court of Senior Military Judge (hereinafter CSMJ), Court of a Military Judge (hereinafter CMJ) and the Commanding Officer's Disciplinary Hearing (hereinafter CODH), section 6(1) of MDSMA.

²⁵² Sections 4 and 5 of MDSMA involve offences of endangering safety of forces and offences by a person in command of troops, vessels or aircraft.

²⁵³ Section 7(4) of MDSMA.

²⁵⁴ Section 9(2) read with section 3 of the MDSMA.

²⁵⁵ Section 1 of MDC field rank means any rank not lower than that of major or equivalent rank.

or culpable homicide, or an offence under section 4 and 5.²⁵⁶ This means that both the CSMJ and the CMJ has jurisdiction to try an offender subjected to the MDC in those specified offence whether committed within or outside South Africa.²⁵⁷

If the jurisdiction of the aforementioned courts is taken together, it results in South Africa (military courts) having jurisdiction over its armed force for any offence committed while stationed outside South Africa. This gives effect and is in conformity with sections 3(1) of MDSMA and 3(1)(a) of SA Defence Act discussed above.

4.3 Botswana legislation

4.3.1 *Botswana Defence Act 13, 1977*

4.3.1(a) *BDF outside Botswana*

Botswana Defence Force is established in terms of section 4(1) of the *Botswana Defence Act 13, 1977* (hereinafter Botswana Defence Act). The primary role of the BDF is to defend Botswana and to perform any other task as may be determined by the President. The President may at any time order that the whole of BDF or part of BDF be employed outside of Botswana.²⁵⁸ While employed outside of Botswana members of BDF will be subject to Botswana laws.²⁵⁹ Members of BDF were employed outside Botswana during ONUMOZ, UNOSOM 11 and BOLEAS in fulfilment of the mentioned section. During these operations members of BDF were subjected to Botswana laws.²⁶⁰

Section 7(1) authorises the President to order any member of BDF to undergo training or employment outside Botswana. Further the President may place any member of BDF at the disposal of military of another country for the

²⁵⁶ Section 10(2) of the MDSMA.

²⁵⁷ *Ibid n 224 supra.*

²⁵⁸ Section 6 of Botswana Defence Act.

²⁵⁹ Section 172(1) and (2) of Botswana Defence Act. Available at [http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/aa3071dc073984c6c125775200312bdd/\\$FILE/46443107.pdf/Botswana%20-%20Defence%20Force.pdf](http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/aa3071dc073984c6c125775200312bdd/$FILE/46443107.pdf/Botswana%20-%20Defence%20Force.pdf) (Date used 14/0913).

²⁶⁰ For a full discussion see para 3.2.5 *supra.*

purpose of attachment to that armed force.²⁶¹ The BDF has participated in multinational exercises with defence forces of neighbouring countries especially SADC forces either in Botswana or outside Botswana.²⁶²

In terms of the aforementioned sections the BDF is mandated to be employed outside Botswana either to undergo training or for the purpose of attachment to other military authority. During the detachment or training outside Botswana the BDF are subjected to Botswana (military) laws. If during the said attachment or training, a BDF member commits a crime (as prescribed in Part VII of the Botswana Defence Act) he/she will be prosecuted under Botswana law meaning Botswana will exercise jurisdiction in the absence of any agreement to the contrary. Botswana Military Courts have the right to exercise jurisdiction under the Botswana Defence Act at all times for offence committed outside of Botswana.²⁶³

Certain offences like mutiny if committed by the BDF under the Botswana Defence Force carries the death sentence.²⁶⁴ In fact section 68 of the Botswana Defence Act provides that death is an appropriate sentence which can be handed down by the court martial of the BDF.²⁶⁵ So if BDF members commit mutiny while undergoing training in for example South Africa and they are tried under Botswana military law by Botswana military court they might be sentenced to death.

A military court of Botswana will be acting within its powers when trying a member of the BDF for an offence committed in South Africa.²⁶⁶ The action of

²⁶¹ Section 7(2) of the Botswana Defence Act. See also *Ibid n 196 supra*.

²⁶² Exercise "Thokgamo" was a SADC exercise conducted in June 2005 in Botswana. BDF also participated at the multi-national SADC Brigade peace keeping exercise code-named Exercise "Golfinho" (see also *Ibid n 16 supra*). Available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Botswana-Defence-Force-BDF/Community-Relations1/Duties-of-the-BDF/>. (Date used 16/09/13).

²⁶³ Section 116(4) of Botswana Defence Act.

²⁶⁴ Section 34(1)(a) and (b) of Botswana Defence Act. Section 28(1) provides that any person subject to this Act who, with intent to assist the enemy, communicates with or gives intelligence to the enemy shall, on conviction by court martial or by the High Court, be liable to suffer death or any punishment provided by this Act. Section 27(1) further provides that any person who subject to this Act who with intent to assist the enemy... harbours or protects an enemy not being a prisoner of war, shall, on conviction by court martial or by the High Court, be liable to suffer death...

²⁶⁵ Section 68(2)(a) of Botswana Defence Act.

²⁶⁶ *Ibid n 229 supra*.

a Botswana military court in South Africa will be in line with section 97(1)(a) of the SA Defence Act which provides that in matters of discipline and internal administration of that force the court or military authority of the visiting force may exercise all such powers as are conferred by the law of that country.²⁶⁷ Committing mutiny will most probably fall within matters of discipline, meaning a Botswana military court will have jurisdiction to try the offence.

As a crime of mutiny carries the death sentence, a Botswana military court will be limited in its sentencing. It can only sentence a member of the BDF who has committed mutiny in South Africa to a sentence which is not cruel, inhuman or degrading. Therefore, the Botswana military court will not be able to sentence a BDF member to death sentence while sitting in South Africa for an offence of mutiny committed in South Africa.²⁶⁸ This is the requirement of section 97(1)(b) of the SA Defence Act which provides that no cruel, inhuman or degrading punishment as contemplated in section 12(1)(e) of the SA Constitution 1996 may be meted out or administered by a military court or other authority (as discussed above) while in South Africa.

4.3.1(b) *Visiting force in Botswana*

The visiting force in Botswana is regulated by section 11 of the Botswana Defence Act. The section is not clear with regard to the legal status of the visiting force. It does not *per se* deal with the legal status but more with the command of the visiting force. It provides that a member of the visiting force has the same powers as a member of the BDF of equivalent rank and should be treated as if it is a member of the BDF while in cooperation with the BDF.²⁶⁹ Further the President (of Botswana) may decide the question of command where a whole or part of the BDF is required to act with another military force.²⁷⁰

Accepting that the question of the legal status of a visiting force while in Botswana is not directly or explicitly dealt with by the Botswana Defence Act,

²⁶⁷ For a discussion on section 97(1)(a) see para 4.2.1(c) *supra*.

²⁶⁸ For a discussion and application of section 12(e) of SA Constitution 1996 see para 4.2.1(c) *supra*.

²⁶⁹ Section 11(1)(b) of Botswana Defence Act.

²⁷⁰ Section 11(2) of Botswana Defence Act.

it can be argued that if a member of a visiting force (e.g. SANDF) commits an offence, for example together with BDF members takes part in mutiny²⁷¹ while attached to the BDF, he/she will be dealt with in terms of the Botswana Defence Act. If tried by a Botswana military court, the SANDF member might face a death sentence as death sentence is an appropriate sentence for mutiny.

It is not a requirement under the Botswana Defence Act that an agreement outlining the legal status of the visiting force should precede the cooperation. However, by agreeing on cooperation it could be expected (by implication), that states (Botswana and South Africa) will be prepared to compromise on some of their sovereign rights.²⁷²

4.3.2 Botswana Penal Code Law 2, 1964 (hereinafter Botswana Penal Code)

Where a member of a visiting force (SANDF) commits an offence which does not qualify as official duty in terms of the Botswana Defence Act or the SA Defence Act, for example murdering a civilian while off-duty, he/she will most probably²⁷³ be prosecuted under Botswana Penal Law. If found guilty and there are no extenuating circumstances he/she might be sentenced to death by a Botswana civilian court.²⁷⁴

In the case of *Kobedi*,²⁷⁵ the applicant was convicted on a number of offences including murder and was sentenced to death. He applied for the review of the trial in the Court of Appeal on a number of constitutional grounds notably the constitutionality of sections 203(1), (2) and (3) of the Botswana Penal Code which made death sentence obligatory where there are no extenuating

²⁷¹ The definition of mutiny in section 34 (3) (a) and (c) of Botswana Defence Act envisage that mutiny may be committed while cooperating with other armed forces.

²⁷² *Ibid* n 82 *supra*.

²⁷³ *Ibid* n 27 *supra* legal opinion provided by the Department of International Relations. The position is that members of the SANDF should be subjected to exclusive jurisdiction of South Africa. Where South Africa cannot retain exclusive jurisdiction and the death penalty is an appropriate sentence in the host state (Botswana), South Africa should seek assurance first from the host nation that the death penalty will not be imposed or if imposed it will not be carried out. It means South Africa will take precautionary measures before sending its troops to Botswana.

²⁷⁴ Section 203 of Botswana Penal Code.

²⁷⁵ *Kobedi v The State* (Criminal Appeal No. 25 of 201) 2003 BWCA 22 (CA) (19 March 2003). Available at <http://www.saflii.org/bw/cases/BWCA/2003/22.pdf>. (Date used 27/09/13).

circumstances,²⁷⁶ and section 26(1) which prescribed that when any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead. The court held that apart from fundamental rights to life contained inside section 3 of the Botswana Constitution, section 4(1) provides:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

The court held that the Botswana Penal Code is law in Botswana meaning the death sentence and its method of carrying it out are part of, and are enshrined in, the Constitution by section 4(1) of the Botswana Constitution and cannot, therefore, be said to be inconsistent with the same Constitution. The argument that execution by hanging amounts to torture or inhuman and degrading punishment was saved by section 7(2) of the Constitution (Botswana) which authorised any punishment which was lawful before the coming into operation of the Constitution. The appeal was therefore dismissed.²⁷⁷

4.4 Southern African Development Community Protocol on Extradition (hereinafter SADC Extradition Protocol)

South Africa²⁷⁸ as well as Botswana are signatories to the SADC Extradition Protocol. The main purpose of the SADC Extradition Protocol is to cooperate in the prevention and suppression of crime, as increased easy access to free cross-border movement enables offenders to escape arrest, prosecution,

²⁷⁶ *Id n 275 supra* at 8–9.

²⁷⁷ Botswana Penal Code came into effect in 1964. Botswana Constitution came into effect in 1966. Section 7(2) of Botswana Constitution provides: Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution. So Botswana Constitution preserved Botswana Penal Code meaning death by hanging is not inconsistency with the constitution. For a criticism of this judgment see Bojosi 2005 *CILJSA* at 304–313. Available at <http://www.jstor.org/stable/23252299>. (Date used 02/11/13.

²⁷⁸ South Africa has incorporated the SADC Extradition Protocol into law by Government Gazette of 25 May 2012 meaning the SADC Extradition Protocol is law in South Africa.

conviction and punishment.²⁷⁹ Further, every state party agrees to extradite to another state party within its jurisdiction any person who is wanted for prosecution or enforcement of sentence in the requesting state for an extraditable offence.²⁸⁰ The offences or sentences covered under the SADC Extradition Protocol are those punishable under both states by imprisonment of one year or more or sentences of six months or more.²⁸¹

Furthermore, extradition shall be refused if the offence for which extradition is requested constitutes an offence under military law and is not an offence under ordinary criminal law²⁸² if the person whose extradition is requested has been, or would be, subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment and if that person would not receive the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and Peoples Rights.²⁸³

In addition, the state may refuse extradition if the offence for which extradition is requested carries a death penalty under the law of the requesting state. Extradition in this case can only be executed if the requesting state gives assurance to the requested state that the death penalty will not be imposed or, if imposed, will not be carried out.²⁸⁴

4.4.1 BDF in South Africa and the application of SADC Extradition Protocol

While in South Africa, BDF members will be subjected to the Botswana Defence Act and Military Courts or Authority of Botswana in matters of internal discipline and administration of their force.²⁸⁵ Mutiny is one of the offences which most probably will fall under matters of discipline and administration.²⁸⁶

²⁷⁹ Preamble to SADC Extradition Protocol.

²⁸⁰ Article 2 of the SADC Extradition Protocol.

²⁸¹ Article 3(1) of the SADC Extradition Protocol. The rest of the paragraph in Article 3 deals with what constitutes a crime, for the purpose of this paper only those well-known crimes i.e. murder and mutiny will be considered.

²⁸² Article 4(c) of the SADC Extradition Protocol.

²⁸³ Article 4(f) of the SADC Extradition Protocol. Article 7 of the African Charter on Human and Peoples Rights deals with the right to fair trial. Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf. (Date accessed 21/09/13).

²⁸⁴ Article 5(c) of the SADC Extradition Protocol.

²⁸⁵ *Ibid n 256 supra* read with section 97(1)(a) of the Defence Act 42.

²⁸⁶ *Ibid.*

It is an offence in terms of the Botswana Defence Act, but not an offence in terms of Botswana Penal Law.²⁸⁷

One of the mandatory reasons for refusal to extradite in terms of SADC Extradition Protocol is when a crime constitutes a crime under military law but not under ordinary criminal law.²⁸⁸ The question therefore arises as to what will happen if BDF members commit mutiny while in South Africa as this crime is only a crime under military law.²⁸⁹

So in terms of the SADC Extradition Protocol members of visiting BDF will not be extradited back to Botswana to face prosecution if they commit mutiny while in South Africa as this offence is a military offence²⁹⁰ and not an offence under Botswana Penal Law.²⁹¹ This means Botswana will not be able to rely on SADC Extradition Protocol to extradite and try BDF members who commits mutiny while in South Africa.

If while in South Africa as part of a visiting BDF force, members of the BDF commit offence which constitutes an offence in terms of both the Botswana Defence Act and the Botswana Penal Law, for example incitement to mutiny, these members may be extradited back to Botswana to face trial.²⁹² Incitement to commit mutiny is an extraditable offence in terms of Article 3(5) of the SADC Extradition Protocol. It further carries a life sentence in terms of

²⁸⁷ In terms of the Botswana Penal Law, section 34, a civilian person can only incite mutiny. So if Botswana Penal Law and the Botswana Defence Act are read together mutiny is a military offence and it can only be committed by members of armed forces.

²⁸⁸ *Ibid n 285 supra.*

²⁸⁹ Section 34 of the Botswana Defence Act provides that in this Act "mutiny" means a combination of between two or more persons subject to this Act...

²⁹⁰ *Ibid.*

²⁹¹ In terms of the Botswana Penal Code sections 42 and 43 only offences of inciting to mutiny and aiding members of the force in acts of mutiny can be committed under this Act. Article 2 of the SADC Protocol provides that state parties agree to extradite in accordance with the Protocol and their respective domestic law, any person within its jurisdiction....for an extraditable offence. It is not a requirement that the alleged offence should be committed within the requesting state territory.

²⁹² Section 42 of Botswana Penal Code and section 34(1)(b) of Botswana Defence Act read with Article 4(c) of the SADC Extradition Protocol.

the Botswana Penal Code²⁹³ and may carry a death sentence in terms of the Botswana Defence Act.²⁹⁴

The aforesaid means that armed members of visiting BDF might face death the sentence under the Botswana Defence Act if extradited back to Botswana for the offence of incitement to mutiny committed while stationed in South Africa. However, in South Africa the death penalty constitutes cruel, inhuman or degrading treatment or punishment.²⁹⁵ And if this interpretation is accepted, this will in turn trigger Article 4 (f) of the SADC Extradition Protocol which provides that extradition must be refused if the person whose extradition is requested would be subjected to torture or cruel, inhumane or degrading treatment or punishment in the requesting state. This means that a member of the BDF will not be extradited, because the death sentence constitutes torture or cruel, inhuman or degrading treatment or punishment in terms of South African law. This in turn can be classified as a mandatory ground for refusal to extradite, meaning that a BDF member will not be extradited back to Botswana to stand trial.²⁹⁶

Another ground where a state may refuse to extradite is where the requested person may face the death penalty if convicted. Article 5 of the SADC Extradition Protocol provides that extradition may be refused:

If the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.

²⁹³ Section 42 of Botswana Penal Code.

²⁹⁴ Section 34(1)(b) of Botswana Penal Code. The reason why incitement to mutiny carries a death sentence under the Botswana Defence Act and not under the Botswana Penal Code might be that high standard of behaviour is expected from members of the armed forces as compared to the civilian population.

²⁹⁵ *Ibid n 239 supra*. In recent times the attitude of the international community seems to suggest that the death penalty constitutes torture or cruel, inhuman or degrading treatment or punishment. Since 2007 the General Assembly has adopted four resolutions calling on the States to establish a moratorium on the use of the death penalty with a view to its abolition. Today about 150 of the UN's 193 Member States have either abolished the death penalty or no longer practice it. Available at <http://www.un.org/apps/news/story.asp?NewsID=45305&Cr=death%20penalty&Cr1=#.Uj-1f2b8Jdg>. Amnesty International views death penalty as violating the right not to be subjected cruel, inhuman or degrading treatment or punishment. Available at <http://www.amnesty.org/en/death-penalty/international-law>. (Date used 23/09/13).

²⁹⁶ Article 4 (f) SADC Extradition Protocol.

Therefore, the government of South Africa may refuse to extradite a member of the BDF because incitement to mutiny carries a death sentence in Botswana.

It is required of South Africa to do so in terms of its own national laws. Section 2 of the Constitution 1996 provides that it (the Constitution) is the supreme law of the country and any law or conduct inconsistent with it is invalid. Therefore, extradition has to be done in accordance with the law (Constitution 1996). In this case a member of the BDF will only be extradited to Botswana for an offence of incitement to commit mutiny if that member will not be subjected to the death penalty. It was held in South Africa that the death sentence is inconsistent with the Constitution 1996.²⁹⁷ The South African government can do this by seeking assurance from the Botswana government that the death penalty will not be imposed or, if it is imposed, it will not be carried out.²⁹⁸

The matter came before the court in the *Mohamed* case.²⁹⁹ The facts were briefly as follows: The South African immigration officials acting in cahoots with their American counterparts and removed Mr. Khalfan Mohamed from South Africa. Mr. Mohamed was indicted for his alleged involvement in the bombing of the American embassies in Kenya and Tanzania. On arrival in New York he was charged with various offences related to the bombings and he was formally notified that if convicted he faced the death penalty.³⁰⁰

The main question before the court was the validity of the deportation or extradition of Mr. Mahomed involving the possibility of capital punishment.³⁰¹ The court found that whether the conduct was deportation or extradition was irrelevant. The most pressing and prevalent obligation placed on South Africa

²⁹⁷ *Ibid* n 247 *supra*.

²⁹⁸ Currie and de Wall *The Bill of Rights Handbook* (2005) at 285. In terms of section 7(2) of the Constitution 1996 the state must respect, protect, promote and fulfil the rights in the Bill of Rights. The right to life translates into both negative and positive duties. The negative duty entails the duty not to take someone's life as discussed in the Makwanyane case. The positive duty can be interpreted as placing a duty on the state to protect the lives of its inhabitants.

²⁹⁹ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC). Available at <http://www.saflii.org.za/za/cases/ZACC/2001/18.pdf>. (Date used 24/09/13).

³⁰⁰ *Id* n 299 *supra* at para 27. See also *Id* n 298 *supra* at 286.

³⁰¹ *Id* n 299 *supra* at para 28.

by the SA Constitution 1996 when deciding whether to deport or extradite is to protect the fundamental rights of the person. In the present case the right to human dignity, the right to life and the right not to be treated or punished in a cruel, inhuman or degrading way were paramount. The South African government could have done this by securing an undertaking from the United States authorities that a sentence of death would not be imposed on Mohamed, before removing him to that country.³⁰² This means that before South Africa can deport or extradite any person to a country where death sentence is practice, it is obliged to seek assurance first from that state that that person will not be sentenced to death.

In the matter of *Tsebe and Others*³⁰³ the issue before the Constitutional Court was to determine whether or not the government had the power to extradite or deport or in any way surrender a person, including an illegal foreigner, to another country to stand trial on charges which carry the death penalty even if that requesting country is not prepared to give the requisite assurance that that person will not be executed.

The court confirmed the principle laid down in *Mohamed*³⁰⁴ and held that:

In terms of section 7(2) of the Constitution the Government is under an obligation not to deport or extradite Mr. Phale or in any way to transfer him from South Africa to Botswana to stand trial for the alleged murder in the absence of the requisite assurance. Should the Government deport or extradite Mr. Phale without the requisite assurance, it would be acting in breach of its obligations in terms of section 7(2), the values of the Constitution

³⁰² *Id n 299 supra* at para 38. See also *Id n 298 supra* at 286.

³⁰³ *Ibid n 48 supra*. This was an appeal from the High Court's decision that the government had no power to extradite, deport or surrender Mr. Tsebe or Mr. Phale to Botswana in the absence of the requisite assurance. The facts were briefly as follows: In July 2008 Mr. Tsebe, a national of Botswana, was accused of murdering his wife or romantic partner in Botswana. A similar accusation was made against Mr. Phale in relation to his girlfriend or wife in October 2009. The killings were alleged to be brutal. When the police in Botswana tried to arrest Mr. Tsebe and Mr. Phale in separate incidents and at separate times, they fled to South Africa. They were arrested in South Africa and faced deportation; they brought in an urgent application in the High Court for an interim interdict restraining South Africa from deporting or extraditing them. The interim interdict was granted in the High court. The court interdicted the government from extraditing or deporting Mr. Tsebe or Mr. Phale to Botswana. The court dismissed the Justice Minister's and Government's counter application. The government took the matter to Constitutional Court. Meanwhile, Mr. Tsebe passed away on 27 November 2010 before the High Court could hear his application.

³⁰⁴ *Id n 48 supra* at para 71.

and Mr. Phale's right to life, right to human dignity and right not to be subjected to treatment or punishment that is cruel, inhuman or degrading.³⁰⁵

The court further reasoned that South Africa acted in accordance with the Extradition Treaty between itself and Botswana³⁰⁶ and in accordance with the SADC Extradition Protocol in insisting on the requisite assurance from the government of Botswana before it could extradite Mr. Tsebe. The appeal was therefore dismissed and the decision of the High Court (South Africa) confirmed meaning that Mr. Tsebe could not be extradited to Botswana without South Africa seeking the necessary assurance from the Botswana government that if convicted (in Botswana) he (Mr. Tsebe) will not be hanged.

The cases of *Mahomed* and *Tsebe* have laid down a principle that South Africa is obliged and in fact must seek assurance before it can extradite, deport or in any way surrender any person (citizen and alien alike) to a requesting state where that person might face the death penalty. Applying this to BDF members stationed in South Africa means that BDF members will not be deported or extradited or in any way surrendered back to Botswana without the necessary assurance that if convicted for a crime like incitement to mutiny they will not be hanged.³⁰⁷

³⁰⁵ *Id n 48 supra* at para 74. Further the court referred to Article 5(c) of the SADC Extradition Protocol which both South Africa and Botswana are signatories which provides: "if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out."

³⁰⁶ Article 6 of the Extradition Treaty between the Republic of South Africa and the Republic of Botswana provides that extradition may be refused if under the law of the requesting party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the law of the requested party. The treaty was signed in 1969 and it is still valid. Available at <http://196.14.41.167/dbtw-wpd/images/19690227BotswanaExtradition.pdf>. (Date used 25/09/13). See also *Id n 48 supra* at para 31.

³⁰⁷ Where a member of BDF commits a serious offence outside the scope of work or not in official capacity, for example commit murder against a civilian populace or fellow BDF member the principle will most probably be the same. If there is no agreement the BDF member will be tried under South African law and the question of death sentence will not come into play (*Ibid n 293 supra*). If South Africa and Botswana agree that the person must be tried in Botswana the principle discussed in *Mahomed Ibid n 301* and *Tsebe Ibid n 48 supra* will apply *mutatis mutandis*.

4.4.2 SANDF in Botswana and the application of Botswana laws and SADC Extradition Protocol

A SANDF member who commits a military offence while in Botswana in which only South Africa has interest will be immune from Botswana laws as this will most probably fall under the internal discipline and administration of SANDF. This will result in that soldier being tried under South African (military) law as members of SANDF are subjected to South African laws while on duty outside the Republic.³⁰⁸ Where Botswana and South Africa agree that a person must be tried in South Africa the question of death penalty will not arise as it was declared invalid in *Makwanyane*.³⁰⁹

The contentious point is where member/s of the SANDF commit/s crimes (military or civilian criminal offences) which are punishable by death³¹⁰ while attached to the BDF, and Botswana asserts its right to exercise jurisdiction and refuses to hand over members of the SANDF to South African authorities. In the absence of any agreement (dealing with criminal jurisdiction) as envisaged by section 92 of the SA Defence Act (discussed above) or an agreement implicit in terms of section 7 and 11 of the Botswana Defence Act, members of the SANDF will most probably be subjected to Botswana laws (Military or Botswana Penal Law) based on the territoriality principle³¹¹ and if found guilty they might face the death penalty.³¹²

³⁰⁸ Sections 3(1)(a) of the SA Defence Act and 3(1) of MDSMA 1999.

³⁰⁹ *Ibid n 239 supra*.

³¹⁰ For example together with BDF members participate in mutiny, inciting members of the BDF to take part in mutiny or where members of the SANDF commits crimes which falls outside their military functions for example a murdering member of a civilian not in the performance of any official duties. Section 203(1) of Botswana Penal Code provides that subject to the provisions of subsection 2, any person convicted of murder shall be sentenced to death. Subsection 2 provides that where a court in convicting a person of murder is of the opinion that there are extenuating circumstances, the court may impose any sentence other than death.

³¹¹ Keadiretse F "Botswana, SA extradition treaty under spotlight". The Extradition Treaty between Botswana and South Africa came into the spotlight in the Bail application of Thabo Stimela and Aubrey Nkuna; the two were South Africa citizens accused of murdering a Botswana citizen. The prosecutor cited Article 6 of the Extradition Treaty with South Africa that extradition may be refused if under the law of the requesting state death penalty may be imposed. He said if the two are granted bail they will most probably escape to South Africa where they will not have to face a murder trial. He further said South Africa will refuse to extradite the accused to a country where there is a death penalty. On the question of Botswana as a state he said: "With the treaty existing, all accused persons would be willing to

4.5 Conclusion

The relevant legislation of both South Africa and Botswana realised the importance of cooperation hence it authorises members of their armed forces to cooperate with other forces. The question of jurisdiction is not fully covered; however, all legislation gives some form of authority over armed forces to the sending state. In all the bilateral agreements analysed great care is taken not to encroach upon another contracting party's sovereignty.

Both South Africa and Botswana are unequivocal in asserting their sovereignty especially in the application and the upholding of their domestic laws as manifested in the difference cases. In *Tsebe* extradition or deportation was refused by South Africa unless Botswana gave assurance that its own citizen will not be executed. Equally so Marriette Sonjaleen Bosch who was a citizen of South Africa was hanged notwithstanding the pressure put on Botswana by different groupings.³¹³

Based on the aforementioned analysis, the question of jurisdiction can only be resolved through compromise and agreement by the states concerned.

leave for South Africa where they will be protected by the law, and can only be released under the affirmative that a death sentence would not be imposed on them. We are a republic, not a province of South Africa and we are not going to be put under control of another sovereign state in order to apply our laws." He further said that the accused are facing a very serious crime of murder, which carries a severe punishment in Botswana. Where no extenuating circumstances are found, the court handling the case is duty bound to return a death sentence. The prosecutor concluded his submissions by stating the difficulties Botswana government has faced in the past when trying to extradite murder fugitives from South Africa, saying there are currently seven murder suspects who escaped to South Africa after being charged with murder in Botswana. Available at <http://72.167.255.126/index.php?sid=1&aid=88&dir=2011/July/Wednesday6>. If the prosecutor's comments can be taken to represent those of the Botswana government South Africa might find it difficult to get members of the SANDF back in South Africa if they commit serious offences while stationed in Botswana (Date used 03/10/13). For a discussion of territoriality principle see para 2.5.1 *supra*.

³¹² *Ibid n 49 supra*. The facts were briefly as follows: Marriette Sonjaleen Bosch was found guilty of murdering Maria Wolmarans in the High Court of Botswana. She was sentenced to death as no extenuating circumstances were found. She appealed to the Appeal Court of Botswana. The appeal was dismissed and the sentence of the High Court was confirmed. Available at <http://www.saflii.org/bw/cases/BWCA/2001/4.pdf>. (date used 04/10/13). The death sentence of Marriette Bosch and Kobedi (*n 245 supra*) was in fact carried out. Available at http://www.ditshwanelo.org/bw/death_penalty.html. (Date used 04/10/13).

³¹³ Amnesty International appealed to President Mogae to grant clemency to Bosch. Available at <http://www.amnesty.org/en/library/asset/AFR15/002/2001/en/692ec538-d965-11dd-a057-592cb671dd8b/afr150022001en.html>. (Date used 04/10/13). The case received huge publicity in the South African media and also in the press in other English-speaking countries. Available at <http://www.capitalpunishmentuk.org/bosch.html>. (Date used 04/10/13).

When entering into agreement with each other in terms of their national (defence) laws, Botswana and South Africa will be guided by their respective Constitutions. In general the Constitution of a state is the guiding document which stipulates which actions can be taken and which actions cannot be taken. Failure to adhere to one's Constitution might render the actions taken invalid.³¹⁴

³¹⁴ Section 2 of the SA Constitution 1996 provides that the Constitution is the supreme law of the country; law or conduct inconsistent with it is invalid.

CHAPTER 5

THE CONSTITUTIONS OF SOUTH AFRICA AND BOTSWANA IN RESPECT OF THEIR ARMED FORCES

5.1 Introduction

5.1.1 *The Constitution of the Republic of South Africa, 1996*³¹⁵

The SA Constitution 1996 was signed into law on 10 December 1996 and came into effect on 04 February 1997.³¹⁶ The SA Constitution 1996 ushered in a society based on democratic values and fundamental human rights. It laid the foundation for a democratic society in which every citizen is equally protected by law.³¹⁷

The society envisaged by the SA Constitution 1996 is one founded on the following values (amongst others): human dignity, advancement of human rights, the supremacy of the Constitution and the rule of law.³¹⁸ Chapter Two of the Constitution contains the Bill of Rights. The Bill of Rights is a cornerstone of democracy; it enshrines the rights of all people in the country.³¹⁹

The SANDF is established in terms of section 199(1) and (2) of the SA Constitution of 1996. The primary role of the SANDF is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and principles of international law.³²⁰ The SANDF can also be employed in fulfilment of an international obligation.³²¹

³¹⁵ Hereinafter SA Constitution 1996.

³¹⁶ The SA Constitution 1996 was signed by President Nelson Mandela at Sharpeville; he brought to a close a long and bitter struggle to establish democracy in South Africa.

³¹⁷ Overview and Preamble to the SA Constitution 1996.

³¹⁸ Section 1(a) and (c) of the SA Constitution 1996.

³¹⁹ Section 7(a) of the SA Constitution 1996.

³²⁰ Section 200(2) of the SA Constitution 1996.

³²¹ Section 201(c) of the SA Constitution 1996.

5.1.2 *The Constitution of the Republic of Botswana 1966*³²²

The Constitution of the Republic of Botswana came into effect on 30 September 1966 after Botswana became a sovereign and independent state. The Constitution blended most of the traditional features of the British Westminster Parliamentary model³²³ with other features imported from elsewhere.³²⁴ Chapter II of the Botswana Constitution contains the fundamental rights and freedom of an individual. The Botswana Constitution is silent on the question of supremacy, the question whether it is the supreme law of the country or not, is not answered within the text.

Furthermore, the Constitution is silent on the question of the establishment of the Botswana Defence Force. The Botswana Constitution only talks about the command of the armed forces.³²⁵

5.2 **The applicable sections of the South Africa Constitution 1996**

5.2.1 *Section 2: Supremacy of Constitution*

Section 2 of the Constitution provides that:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The aforementioned section means that all laws and conducts (Department of Defence included) in South Africa are subjected to the Constitution. Sections 198,³²⁶ 199³²⁷ and 200³²⁸ of the SA Constitution reaffirms the supremacy of

³²² Hereinafter Botswana Constitution. Available at http://www.botswanaembassy.org/files/constitution_of_botswana.pdf. (Date used 03/11/13).

³²³ The model works on the basis of parliamentary supremacy, a system in which parliament is allowed to change any law and its legislation cannot be challenged in the courts. This results in parliament having a great deal of power. Available at <http://ourgoverningprinciples.wordpress.com/the-uks-westminster-system/>. (Date used 06/11/13).

³²⁴ Botswana has an executive president who holds all executive powers in contrast with the Westminster model which have a prime minister as the holder of these executive powers. Available at <http://www.parliament.gov.bw/about-parliament/history>. (Date used 03/11/12).

³²⁵ Section 48 of Botswana Constitution.

³²⁶ Section 198(b) of SA Constitution 1996 provides that the principle governing national security is: "The resolve to live in peace and harmony precludes any South African citizen

the Constitution in relation to the security services. The aforementioned sections impose a duty on the SANDF to observe and act in accordance with the Constitution.

In *South African National Defence Union v Minister of Defence*³²⁹ Sachs J while dealing with section 198, 199 and 200 of the SA Constitution 1996 had this to say:

These provisions clearly contemplate conscientious soldiers of the Constitution who can be expected to fulfil their constitutional duties more effectively if the values of the Constitution extend in appropriate manner to them and infuse their lives in the armed forces.³³⁰

This means that the SANDF as an organisation is subjected to the Constitution and members of the SANDF enjoy most of the rights enshrined in the Constitution and, furthermore, members are expected to act in accordance with the Constitution.

In *South African National Defence Union v Minister of Defence and Others*³³¹ the constitutionality of certain regulations³³² promulgated in terms of the SA

from participating in armed conflict nationally or internationally except as provided for in terms of the Constitution or national law.”

³²⁷ Section 199(1) provides that “the security service of South Africa consists of a single defence force... established in terms of the Constitution.” Section 199(5) provides that “the security service must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”

³²⁸ Section 200(2) provides that “the primary object of defence force is to defend the Republic... in accordance with the Constitution and the principles of international law regulating the use of force.”

³²⁹ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC). This case concerns the question whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions. On 25 November 1998, the High Court made an order which in substance declared section 126B of the Defence Act, 44 of 1957, to be unconstitutional and invalid to the extent that it prohibits members of the South African National Defence Force from participating in public protest and from joining trade unions. The order was referred to the Constitutional Court for confirmation.

³³⁰ *Id n 329 supra* at para 47.

³³¹ *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC). The case concerns dispute regarding collective bargaining (as provided for in section 23 of the SA Constitution 1996) that arisen between the South African National Defence Union (hereinafter SANDU) and SANDF. It originated in five separate applications, each launched by SANDU in High Court. The applications were consolidated into three hearings in which three judgments were handed down by three different judges of the High Courts. All three were appealed to the Supreme Court of Appeals which handed down two judgments in which SANDU approached the Constitutional Court.

Defence Act were challenged. The Constitutional Court found that regulation 8(b) is inconsistent with the Constitution and was declared invalid. Regulations 25 and 27 were declared unconstitutional to the extent that they limit the right to fair labour practice. Regulation 37 was found to be constitutional as the regulation ensured that the SANDF was able to fulfil its constitutional mandate.

This above analysis shows that the SANDF as an organisation is subjected to the Constitution and its members enjoy the rights enshrined in the Constitution. When passing regulations or contemplating any action in terms of the SA Defence Act, the SANDF has to comply with constitutional requirements, failure to do so will render the conduct invalid. By analogy, when negotiating defence cooperation agreements in terms of section 92(1) of the SA Defence Act with another country, for example Botswana, the SANDF has to take cognisance of the constitutional imperatives. It means when the SANDF intends sending its armed forces abroad the agreement authorising the action is expected to pass constitutional scrutiny. Failure to adhere to these constitutional imperatives will render the agreement invalid. The members of the SANDF remain part of South African society with obligations and rights of citizens.³³³

5.2.2 Section 3 Citizenship

Section 3(2)(a) of the SA Constitution 1996 provides that all citizens³³⁴ are equally entitled to the rights, privileges and benefits of citizenship. Section 7(2) of the SA Constitution further provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 7(2) may be interpreted to impose both positive and negative duties on the state. In the case of rights of citizens³³⁵ to life,³³⁶ this means the state has both a legal duty

³³² Amongst the regulations challenged were; regulation 8 insofar as it imposes limits on protest action by members of the SANDF, regulations 25(a) and (b) and regulation 27, to the extent that they prohibit military trade union representatives from representing their members in respect of grievance and disciplinary proceedings, but only permit them to “assist” their members, regulation 37 to the extent that it imposes a complete ban on the activities of a military trade union during military training and operations.

³³³ *Ibid n 332 supra.*

³³⁴ *Ibid.*

³³⁵ Section 3(2)(a) of the SA Constitution 1996.

not to take life as well as a legal duty to protect its inhabitants from possible death.³³⁷

This positive legal duty was relied upon in the case of *Carmichele v Minister of Safety and Security*³³⁸ wherein in the course of a discussion of section 8(1) of the SA Constitution 1996 stated the following:

It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.³³⁹

If we adopt the approach followed by the Constitutional Court in *Carmichele* and by analogy we take a situation where South Africa lawfully sends its armed forces to another country, it means that the South African government will be under a legal obligation to ensure that its armed forces are protected from a potential death sentence.³⁴⁰ It can protect its armed forces by insisting in any agreement it signs with another country that the death sentence will not be carried out.

³³⁶ Section 11 of the SA Constitution 1996.

³³⁷ *Id* 298 at 285. Ngcobo J in *Kaunda* (see *id n* 341 *infra*) while dealing with section 7(2) of SA Constitution 1996 with regard to citizens had this to say: "What section 7(2) does on the other hand is to bind the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Here it must be borne in mind that the right to citizenship is constitutionally entrenched in the Bill of Rights. It is clear from section 3(2)(a) that, in addition to certain rights, there are benefits and privileges to which South African citizens are entitled. In this sense, sections 3(2) and 7(2) must be read together as defining the obligations of the government in relation to its citizens". According to the afore passage the court does not take the alleged offence or circumstance surrounding the alleged or the motive of the offence into account, South Africa is under legal obligation to discharge its constitutional obligation and to protect its citizen by virtue of them being citizen, if the rights in the Bill of Rights are to be realised (at para 176).

³³⁸ *Carmichelle v Minister of Safety and Security* 2001 (4) SA 938 (CC). The case involves a serial offender who was released on bail pending his trial. He went on to commit crime while out on bail. The applicant sued the state in that it failed in its legal duty to protect her. Available at <http://www.saflii.org.za/za/cases/ZACC/2001/22.pdf>. (Date used 27/11/13). See also *Id n* 298 *supra* at 285.

³³⁹ *Id n* 338 *supra* at para 44. Further, in the course of discussion of the common-law duties of the state to protect life, the court adopted the positive dimension of Article 2(1) of the European Convention on Human Rights and held at para 45: It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provision... It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from criminal acts of another individual [or acts of another state].

³⁴⁰ *Ibid n* 337 *supra*. Members of armed forces are citizens with rights enjoyed by all citizens.

In the case of *Kaunda*³⁴¹ Chaskalson CJ writing for majority had this to say:

... The applicants were not removed from South Africa by the government, or with government's assistance. They left South Africa voluntary and now find themselves in difficulty... Their arrest in Zimbabwe, the criminal charges brought against them there, and the possibility of them being extradited from Zimbabwe to Equatorial Guinea are not the result of any unlawful conduct on the part of the government or of the breach of any duty it owed to them.³⁴²

The inference which can be drawn from *Kaunda* is that where a person is removed from South Africa by or with the consent of the government, the government is under a constitutional obligation to ensure that that person's rights are protected. The government can do this by seeking assurance from the requesting state before delivering/sending that person that he/she will not be sentenced to death.³⁴³ Once the person is removed from South Africa the SA Constitution 1996 no longer applies.³⁴⁴

If the inference drawn from *Kaunda* case is applied to the SANDF, it will follow that South Africa is under a constitutional obligation to protect the rights of members of the SANDF. If, for example, it considers sending members of the SANDF to Botswana, it must take positive steps to ensure that these members are protected from possible death sentence. These positive steps

³⁴¹ *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC). The applicants were arrested in Zimbabwe on 7 March 2004. On 9 March 2004, a group of 15 men were arrested in Malabo, the capital of Equatorial Guinea, and accused of being mercenaries and plotting a coup against the President of Equatorial Guinea. The majority of the detainees were South African nationals. The applicants feared that they were going to be extradited from Zimbabwe to Equatorial Guinea and put on trial with those who were arrested there. They contended that if that happened they were not going to get a fair trial and, if convicted, they stood the risk of being sentenced to death. Available at <http://www.saflii.org.za/za/cases/ZACC/2004/5.pdf>. (Date used 16/11/13).

³⁴² *Id n* 341 at para 50. See also *ibid n* 332 *supra*.

³⁴³ *Id n* 299 *supra* at para 61. The Director of the Constitutional Court in *Mahomed* case was ordered to deliver the copy of the judgment to US Federal Court in New York.

³⁴⁴ *ibid n* 341 *supra*. The court accepted that the state has an obligation under section 7(2) of the SA Constitution 1996. However, that does not mean that the rights in nationals have under the constitution attach to them when they are outside of South Africa or that the state has an obligation under section 7(2)... which extend beyond its borders (*Kaunda* para 32). With regard to extra-territoriality of the constitution the court held: The starting point of enquiry into extraterritoriality is... In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights... on which reliance is placed... Clearly, they lose the benefit of that protection when they move beyond our borders. Does section 7(2)..., and attaches to them when in foreign countries (para 36)? Section 7(1)... The bearers of rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders (para 37). See further para 44.

may be in the form of terms and conditions which are included in an agreement which it considers signing with Botswana.

In peacekeeping operations in which South Africa sent its armed forces, the sending of armed forces were preceded by agreements in which the question of criminal jurisdiction was addressed. In all those agreements South Africa retained exclusive criminal jurisdiction, meaning its armed forces were protected from foreign legal systems and therefore meaning their rights were protected *i.e.* they were not exposed to possible death sentence. It means that the South African government discharged its constitutional obligation in terms of section 7(2) of the Constitution wherein it is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.³⁴⁵ In fact, this is the attitude of the South African government in sending its armed forces abroad.³⁴⁶

5.2.3 Section 8: Application of the Bill of Rights

Section 8(1) of the SA Constitution 1996 provides that the Bill of Rights applies to all laws, and binds the legislature, the executive, the judiciary and all organs of state. Therefore, the Department of Defence as an organ of state³⁴⁷ is bound by the Bill of Rights because it is performing a function in terms of the Constitution.³⁴⁸ In most of the cases where the SANDU took the SANDF to court the disputes involved allegations of not complying with constitutional obligations especially the rights enshrined in the Bill of Rights.³⁴⁹ This shows that the Bill of Rights applies equally to the SANDF.

³⁴⁵ For a discussion of the peacekeeping operations agreements see paras 3.2.3 and 3.2.4. *supra*. Once members of the SANDF are in Botswana the rights in the SA Constitution 1996 cannot be enforced in Botswana or invoked in Botswana court. However, South Africa is under constitutional obligation to assist its citizens through international relations. Exactly how the assistance must be is the question for the executive to decide. See *Id n* 2298 at 63–4 and 287.

³⁴⁶ *Ibid n* 27 *supra*.

³⁴⁷ In terms of section 239 of the SA Constitution 1996 an organ of state means any department of state or administration in the national provincial or local sphere of government or any functionary or institution exercising a power or performing a function in terms of the constitution or a provincial constitution.

³⁴⁸ The South African National Defence Force was established by section 224(1) of the Interim Constitution, 1993 and continues to exist. See also section 11 of the SA Defence Act.

³⁴⁹ *Ibid n* 332 and 333 *supra*.

5.2.4 Section 9: Equality

Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) further provides that:

The state may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.³⁵⁰

The aforesaid section means the state, (including the SANDF), may not discriminate against anyone on any of the listed grounds. In the case of the SANDF it means it may not unfairly discriminate against any of its soldiers on any of the listed grounds.³⁵¹

The dispute regarding the application of section 9(3) of the SA Constitution 1996 in the SANDF came before the court in case of *SA Security Forces Union v Surgeon General*.³⁵² The basis of this application involved the constitutionality of certain health requirements (policies) of the SANDF regarding the recruitment, deployment and promotion of HIV positive soldiers. In brief, the challenged requirement stated that an HIV positive person could not be recruited into the SANDF³⁵³ and HIV positive soldiers could not be

³⁵⁰ Section 105 of the SA Defence Act has a similar provision. It provides that any member of the Defence Force... whose verbal or physical conduct denigrates, humiliates or shows hostility or aversion to any other person on the grounds of that person's race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth, is guilty of an offence... Clause number nine of the Code of Conduct for Uniformed Members of the South African National Defence Force provides: "I will treat all people fairly and respect their rights and dignity at all times, regardless of race, ethnicity, gender, culture, language or sexual orientation." The aforementioned section and clause give effect to section 9(3) of the SA Constitution.

³⁵¹ *Ibid.*

³⁵² *SA Security Forces Union v Surgeon General* 2008 SA 217 (GNP). Available at <http://www.saflii.org/za/cases/ZAGPHC/2008/217.pdf>. (Date used 20/11/13). In this case the respondent (SANDF) and the applicants (SA Security Forces Union representing SANDF members and an aspirant member) agreed that the HIV testing policy and its implementation were unconstitutional. They sought an order of the court confirming their agreement. The disputed point was whether the HIV positive recruit (third applicant) must be allowed entry into and be a member of the SANDF. The court held that his case is *sui generis* and ordered the SANDF to immediately employ the HIV recruit. The SANDF was further ordered to consider the second applicant for external deployment and/or promotion.

³⁵³ The third applicant was requested by the SANDF to apply for recruitment into the SANDF because he was a well qualified musician and a trumpeter. He then went through all medical tests and everything was in order until the SANDF found out that he was HIV positive. Based on his HIV positive status, he was refused entry and membership of the SANDF.

deployed externally as part of UN missions and therefore not promoted. The court held that the testing policy was unconstitutional in that it unreasonably and unjustifiably infringed aspirant and current HIV positive SANDF members' rights not to be unfairly discriminated against in terms of section (9)(3) of the SA Constitution of 1996.³⁵⁴

The above analysis shows that members of the SANDF enjoy the rights in the Bill of Rights, they cannot be unfairly discriminated and they enjoy equal protection of the law. The courts are not hesitant to order the SANDF to comply with the Constitution.

5.2.5 Section 10: Human Dignity

Section 10 of the SA Constitution 1996 provides that everyone has inherent dignity and the right to have their dignity respected and protected. Human dignity is one of the founding values of the Constitution.³⁵⁵ In *Makwanyane* the Constitutional Court described the right to human dignity and the right to life as the most important human rights,³⁵⁶ and that the right to dignity is intrinsically linked to all other human rights.³⁵⁷

According to the Constitutional Court the right to human dignity is central to all other human rights. It is also a value that informs the interpretation of many, possibly all, other rights.³⁵⁸ It is the most important of all the rights. It is one of the non-derogatory rights; exceptional circumstances must exist before such derogation can be justified.³⁵⁹

³⁵⁴ The other rights which were infringed by this testing policy were; the right to privacy in terms of section 14, the right to dignity in terms of section 10, the right to fair labour practice in terms of section 23 and the right to just administrative action in terms of section 33.

³⁵⁵ Section 1(a) of the SA Constitution 1996. The other founding values are equality, human rights and freedoms. In *Carmichele* *Id n 338 supra* at para 56 the Constitutional Court held that: "Society's notions of what justice demand might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution." Available at <http://www.saflii.org/za/za/cases/ZACC/2001/22.pdf> (Date used 27/11/13). See also *Id n 298* at 272 and *n 1*.

³⁵⁶ *Id n 239 supra* at para 144. See also *Id n 298 supra* at 273–4.

³⁵⁷ *Id n 239 supra* at para 328. See also *Id n 298 supra* at 274.

³⁵⁸ *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC). Available at <http://www.saflii.org/za/cases/ZACC/2000/8.pdf>. (Date used 27/11/13).

³⁵⁹ Section 37(5)(c) of the SA Constitution 1996.

In the *SA Security Forces Union*³⁶⁰ case it was held that the testing policy of the SANDF was unconstitutional in that it unreasonably and unjustifiably infringed aspirant and current HIV positive SANDF members' rights to human dignity.³⁶¹

From the above analysis it means members of the SANDF must at all times be treated with human dignity. When issuing any regulation or contemplating any action, the SANDF must ensure that the dignity of its soldiers is protected. Human dignity is one of the founding values and source of all other personal rights, it is almost impossible to justify the limitation of this right.³⁶² If for example the SANDF intends sending its armed force to Botswana as part of a cooperation agreement with that country, it must ensure that the dignity of its members will be protected at all times.³⁶³

5.2.6 Section 11: The right to life

Section 11 of the SA Constitution 1996 provides that everyone has the right to life. The right to life in the SA Constitution is textually unqualified. In *Makwanyane* the Constitutional Court used this to support an argument that the right to life is given stronger protection in the SA Constitution of 1993.³⁶⁴ The right to life in the SA Constitution 1993 was contrasted with the corresponding constitutions of other jurisdictions in which the right to life is qualified.³⁶⁵ The state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights.³⁶⁶ In the case of the right to life, this translates into both negative and positive duties. The right to life can also be interpreted

³⁶⁰ *Ibid n 352 supra.*

³⁶¹ *Ibid n 353 supra.*

³⁶² *Ibid n 358 and 357 supra.*

³⁶³ *Ibid n 345 supra.*

³⁶⁴ *Id n 239 supra* at para 85.

³⁶⁵ *Id n 239* at para 86. Article 2(1) of the European Convention on Human Rights provides that everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf. (Date used 28/11/13). Article 6(1) of the International Covenant on Civil and Political Rights provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. Available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. (date used 28/11/13). See also *Id n 298* at 281.

³⁶⁶ *Ibid n 340 supra.*

positively as placing a duty on the state to protect the lives of its citizens.³⁶⁷ In *Makwanyane* the Constitutional Court held that the state is obliged to take action to protect human life.³⁶⁸

If we apply the above analysis to the SANDF it means the SANDF is obliged to protect the lives of its members.³⁶⁹ If the SANDF intends sending its armed forces for example to Botswana, it (the SANDF) must take positive steps to ensure that its members are not exposed to possible death sentence.³⁷⁰ In fact South Africa does not have any other option; it must ensure that no SANDF member will be hanged in Botswana.

5.2.7 Section 12: The Right to Freedom and Security of a Person

Section 12(1)(e) provides that everyone has the right to freedom and security of the person which includes the right not to be treated or punished in a cruel, inhuman or degrading way.³⁷¹

5.3 Selected sections from the Botswana Constitution

5.3.1 Supremacy of the Botswana Constitution

The Botswana Constitution does not contain any explicit provision stating that the Constitution is the supreme law. However, it can be inferred from the decision of the courts that the Constitution is the supreme law of the country.³⁷² In *Clover Petrus and Another*,³⁷³ the constitutionality of section 2³⁷⁴ of the Botswana Criminal Procedure and Evidence (Amendment) Act of 1994

³⁶⁷ *Ibid n 340 and 341 supra.*

³⁶⁸ *Id n 239 supra* at para 117.

³⁶⁹ *Ibid n 344 supra.*

³⁷⁰ *Ibid n 345 and 346 supra.*

³⁷¹ For an analysis of this section see sub-heading 4.2.1(c) para 4 *supra*.

³⁷² Nsereko N *Constitutional Law in Botswana* (2004) at 36.

³⁷³ *Petrus and Another v The State* 1984 BLR 14 (CA). Amongst the questions before the court was whether certain forms of punishment violated section 7 of Botswana Constitution which provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. Available at <http://www.elaws.gov.bw/displaylrpage.php?id=1834&dsp=2>. (Date used 30/11/13). See also *Id n 368 supra* at 36.

³⁷⁴ This section amended section 301(3) of the Botswana Criminal Procedure and Evidence Act of 1984. The said section provided that where a person is sentence under sections 235, 297, 298 and 305 to 308 of Botswana Penal Law, that person must undergo specified corporal punishment which must be meted out in specified quarters during the term of imprisonment.

was challenged. The court found that the said section was inconsistent with Section 7 of the Botswana Constitution in that the infliction of delayed repeated corporal punishment to be inhumane “destitute of natural kindness or pity; brutal, unfeeling, barbarous, cruel.”³⁷⁵

With regard to the assertion made by the state that in Botswana the National Assembly is supreme, thereby implying that there is not much the courts can do once the National Assembly has passed a piece of legislation, the Botswana Court of Appeal³⁷⁶ had this to say:

This is of course, erroneous; it is a misconception of the powers of this court in regard to legislation which is being challenged as being *ultra vires* the Constitution. Under a written Constitution such as we have in the Republic of Botswana, the National Assembly is supreme only in the exercise of legislative powers. It is not supreme in the sense that it can pass any legislation even if it is *ultra vires* any provision of the Constitution. I believe it is clear, and this point must be strongly made, that every piece of legislation is subject to the scrutiny of the courts at the instance of any citizen, or indeed

³⁷⁵ *Ibid n 374 supra*. In the case of *Attorney-General v Dow* 1992 BLR 119 (CA). The facts of this case were: Unity Dow, a female citizen of Botswana who was married to Peter Nathan Dow, an American citizen, brought the action. She applied for an order declaring sections 4 and 5 of the Botswana Citizenship Act of 1982 as *ultra vires* the Constitution on the grounds that they violated section 3, guaranteeing equal treatment under the law, and section 15 granting protection against discrimination. A child was born to them in 1979, prior to their marriage in 1984. Two more children were born to them subsequent to the marriage. In terms of sections 4 and 5 of the *Citizenship Act of 1982*, the first-born child was a citizen of Botswana, whereas the last two born during the marriage were not. Unity Dow challenged the constitutionality of these provisions, contending that they discriminated against her and other women in similar circumstances. The discrimination lay in the fact that while male citizens married to foreign women could pass their Botswana citizenship on to the children of their marriage, a female citizen married to a foreign male could not do the same. The Attorney-General, on behalf of the Government, argued *inter alia* that the word ‘sex’ is not mentioned among the identified categories in the definition of ‘discriminatory’ treatment in section 15(3); that this omission of sex was intentional and was made in order to permit legislation in Botswana which was discriminatory on grounds of sex; and that discrimination on grounds of sex must be permitted in Botswana society as the society is patrilineal and therefore male-oriented. The principle of *inclusio unius exclusio alterius*, to which effect is given in section 33 of the Botswana Interpretation Act, was also invoked. By a majority of three to two, the full bench of the Botswana Court of Appeal held that section 4 of the Citizenship Act of 1982 violated Sections 3 and 15 of Botswana Constitution and was therefore *ultra vires*. Available at <http://www.elaws.gov.bw/displaylrpage.php?id=2692&dsp=2>. (Date used 30/11/13). See also Fombad “Botswana introductory notes” *University of Pretoria, South Africa*. Available at [http://web.up.ac.za/sitefiles/file/47/15338/Botswana\(1\).pdf](http://web.up.ac.za/sitefiles/file/47/15338/Botswana(1).pdf). (Date used 30/11/13).

³⁷⁶ The Botswana Court of Appeal is the apex court, the highest and final court in the land. The court is the final arbiter of all legal matters in Botswana. Available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/Administration-of-Justice-AOJ/About-AOJ1/The-Hierarchy-of-the-Courts/> (Date used 30/11/13).

in an appropriate case at the instance of a non-citizen living in the country... to challenge the constitutionality of the legislation.³⁷⁷

Based on the above analysis it can be concluded that the Botswana Constitution is the supreme law of the country and any law inconsistent with it will be declared invalid. This conclusion means that the BDF is subjected to the Botswana Constitution and any action it considers must be in line with the Constitution. If the BDF contemplates entering into an agreement with another country, for example South Africa, it must do so within the prescript and ambit of the Botswana Constitution.

5.3.2 Section 4: Protection of right to life

Section 4(1) of Botswana Constitution provides that:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

The above section does not protect the right to life in positive terms. It protects this right in negative terms by merely preventing the intentional deprivation of life.³⁷⁸ Furthermore, the aforementioned section does not wholly protect the right to life, it limits the right (“save in”) by authorising the death sentence in certain circumscribed situations.³⁷⁹ Offences which carry death

³⁷⁷ *Ibid.*

³⁷⁸ *Id n 372 supra* at 252. See also Tshosa “The death penalty in Botswana” at 3. Available at http://www.biicl.org/files/2216_tshosa_death_penalty_botswana.pdf. (Date used 30/11/13). Most of international instruments and domestic constitutions cast the right in a positive. Article 3 of the Universal Declaration on Human Rights holds that: Everyone has the right to life, liberty and security of a person. Available at <http://www.un.org/en/documents/udhr/index.shtml>. Article 6(1) of International Covenant on Civil and Political Rights provides: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. Available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>. (Date used 30/11/13). Section 9 of the SA Constitution 1996 provides that everyone has the right to life. The reason for Botswana casting this right in a negative form might be that it assume that the right to life is a given. Instead it focuses on corresponding obligation of other people, including the state to respect the individual’s right to live by not taking his/her life or causing his/her death intentionally.

³⁷⁹ The exception where life can be limited are; sentence of death passed by a Botswana court, for the defence of any person from violence or for the defence of property, to effect a lawful arrest or to prevent the escape of person from lawful custody, for purpose of suppressing a riot, insurrection or mutiny or in order to prevent the commission by that person of a criminal offence.

sentences in Botswana are *inter alia* murder, treason, piracy, mutiny and failure to suppress mutiny.

The constitutionality of the death sentence came before the Botswana Court of Appeal on a number of occasions. In *Mosarwana v State*,³⁸⁰ the appellant was convicted of murdering the deceased for calling him a thief. The High Court of Botswana sentenced him to death in accordance with section 203(1) of the Botswana Penal Code. It also found that there were no extenuating circumstances and in accordance with section 26(1) of the Botswana Penal Code ordered that the appellant be hanged.

On appeal to the Botswana Court of Appeal, the appellant argued, *inter alia*, that section 203(1) of the Botswana Penal Code permitting the death penalty was *ultra vires* the Constitution since section 4 prohibits the intentional taking of life. The court held that section 203(1) of the Botswana Penal Code prescribing the death penalty was not inconsistent with the Botswana Constitution. The Court noted that, while there was international sentiment, as reflected at the United Nations, to abolish the death penalty, it could not rewrite the Botswana Constitution in order to give effect to such sentiment. Its function in the interpretation of the Botswana Constitution was adjudicatory and not legislative.³⁸¹

In the case of *Ntesang v The State*³⁸² the first question before the court was whether the death sentence was *ultra vires* the Constitution. The second question was whether the method of carrying it out *i.e.* by hanging, constitute torture, inhuman and degrading punishment, therefore unconstitutional. The first question was answered applying section 4(1) of Botswana Constitution which provides that:

³⁸⁰ *Mosarwana v State* Criminal Appeal No. 56/1994 (CA) (unreported). Information on this case see Tshosa *Id n 378 supra* at 4.

³⁸¹ *Ibid.*

³⁸² *Ntesang v The State* (Criminal Appeal No. 57 of 1994) 1995 BLR 151 (CA). This case was an appeal from the High Court of Botswana. The appellant was convicted of murder and as no extenuating circumstances were found, he was sentenced to death by hanging in terms of the Botswana Penal Code. He appealed *inter alia* the sentence and the method in which the sentenced was carried out. Available at <http://www.saflii.org.za/bw/cases/BWCA/1995/12.pdf>. (Date used 01/12/13).

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

The court reasoned that the sentence was in line with section 4(1) of the Botswana Constitution as the sentence was handed by a Botswana court.³⁸³

The second question was answered by applying section 7(1) of the Botswana Constitution which authorised any punishment which was lawful before Botswana became independent. Death by hanging was a lawful punishment in the former Protectorate of Bechuanaland. On the submission by the defence council on the progressive movement taking place over the death sentence in particular by hanging, and the Resolution of the United Nations as to the abolition of the death penalty, the court held it has no power to re-write the Constitution. This, the court held, is the work for the legislature.³⁸⁴

From the above analysis it is clear that the death sentence is a competent verdict for certain specified offences under specified circumstances.³⁸⁵ If we apply the aforesaid analysis to members of the SANDF who are sent to Botswana for the purpose of training it means that if SANDF members commit a specified offence which carries the death sentence, they might be sentenced to death in the absence of any agreement to the contrary. Botswana will be acting *intra vires* its Constitution.

5.4 Conclusion

It has been shown from the analysis of the Constitutions of the two countries (South Africa and Botswana) that both countries zealously apply their Constitutions. The courts of both countries do not hesitate to order the other branches of government to comply with the Constitution. The Constitutions of both countries are supreme and any law or conduct which is inconsistent with these Constitutions is invalid.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

In South Africa members of armed forces enjoy all the rights enjoyed by citizens. The government is obliged to take positive steps to protect members of the SANDF. The government cannot expose members of the SANDF to a possible death sentence. In Botswana members of BDF enjoys most of the rights enshrined in the Constitution.

The contentious point with regard to the application of the constitutional provision of both countries is that in South Africa the death sentence is unlawful and in Botswana the death sentence is an appropriate sentence for certain offences. Both countries jealously protect their sovereignty by applying their laws. So if the two countries assert their sovereignty it will end in a deadlock. However, by agreeing to cooperate they should be willing to compromise on some of their sovereign rights.

Before compromising on some of their sovereign rights during the conclusion of defence cooperation agreements, the two countries might look to other developed countries to see how these countries have approached the question of criminal jurisdiction over their armed forces that are stationed abroad.

CHAPTER 6

ANALYSIS OF AGREEMENTS ON THE STATUS OF FORCES CONCLUDED BY SELECTED COUNTRIES/ORGANISATIONS

6.1 Introduction

The question of immunity of foreign armed forces stationed on foreign territory was firstly developed for warships visiting foreign harbours where they were presumed to be exempt from the host country's authorities.³⁸⁶ Thus in the *Schooner Exchange v. Mcfaddon*³⁸⁷ the US Supreme Court accepted that jurisdiction of a nation within its own territory is exclusive and absolute, however, national war ships entering the port of friendly power with the consent of that friendly power, are considered to be exempted from its jurisdiction.³⁸⁸

During World War I the principle of the law of the flag dominated.³⁸⁹ The rationale was that jurisdictional competence could not be separated from matters of disciplinary powers as both are an essential part of any military organisation.³⁹⁰

³⁸⁶ Brownlie *Principle of International Law* (1990) at 325-6. See also *id n 50 supra* at 12. Foreign naval vessels frequently called into the ports of friendly states to replenish supplies or for repairs and this too brought commercial advantage to receiving states.

³⁸⁷ *The Schooner Exchange v. Mcfaddon and Others Supreme Court of the United State* (1812) 11 U.S. 116; 3 L. Ed. 287, 7 Cr. 116. The case was brought before the court by a US citizen whose vessel was confiscated by France. Available at <http://www.scsl.org/scsl/Public/SCSL-03-01-Taylor/SCSL-03-01-I-032/SCSL-03-01-I-032-IV.pdf>. (Date used 11/12/13).

³⁸⁸ *Id n 387 supra* at 136 and 146. The dictum in *Schooner* did not envisage a situation where foreign forces were stationed for a long period in the host country, the case dealt with criminal jurisdiction during passage. See also *Id n 50 supra* at 12. See also Lazareff *Status of Military Forces under Current International Law* (1971) at 13-15. See further Stanger *International Law Studies 1957-1958 Criminal Jurisdiction over Visiting Armed Forces* (1965) at 112-113.

³⁸⁹ Lazareff *Status of Military Forces under Current International Law* (1971) at 19-23. The agreement of 14 August 1914 between Belgium and France provided that "every force retain its jurisdiction as to the offences liable to bring prejudice to it, whatever territory it is stationed on, and whatever the nationality of the offender". The agreement of 15 December 1915 between France and United Kingdom too recognised the exclusive jurisdiction of the tribunals of their respective forces over their members in whatever territory and of whatever nationality the accused may be. Equally so, the agreement between the United States and United Kingdom of 1918 provided for exclusive jurisdiction of the sending state. However, the United Kingdom had always insisted on territorial sovereignty. See also Stanger *International Law Studies 1957-1958 Criminal Jurisdiction over Visiting Armed Forces* (1965) at 115-119.

³⁹⁰ *Ibid.*

During World War II the status of forces was modified. Most of the Allied Forces were stationed in the forward zone, *i.e.* United Kingdom, and were regulated by the Allied Forces Act (3 and 4 Geo VI, ch. 51). The Act gave jurisdiction to the Allied Military Courts only for questions of discipline and administration regarding the members of the forces meaning the sending and the receiving states had concurrent jurisdiction.³⁹¹ The only state which has always tried to claim exclusive jurisdiction was the United States while the United Kingdom favoured territorial sovereignty.³⁹²

The need, after World War II, for a multilateral as opposed to bilateral agreements on the status of forces arose. This need manifested itself in the signing of the Treaty of Brussels.³⁹³ For the implementation of a collective security system, the treaty was followed by the signing of the Agreement on the Status of Members of the Armed Forces of the Signatory Powers of the Treaty of Brussels.³⁹⁴ This agreement laid the foundation for the later signing of the Status of the NATO Forces.³⁹⁵

6.2 United States of America

6.2.1 Criminal Jurisdiction under Agreements entered into by the United States of America and other States prior to the conclusion of NATO SoFA

³⁹¹ Lazareff *Status of Military Forces under Current International Law* (1971) 23–24.

³⁹² When the US declared war against Germany it claimed exclusive jurisdiction over all criminal offences committed in the UK by members of its armed forces who were stationed in the UK. The UK reluctantly obliged as it was in a weak bargaining position (The Home Secretary, introducing the United States of America (Visiting Force) Bill, *Hansard*, H.C. Available at http://hansard.millbanksystems.com/commons/1942/aug/04/united-states-of-america-visiting-forces#column_877. (Date used 12/12/13). See also *Id n 50 supra* at 15–28). See also Stanger *International Law Studies 1957–1958 Criminal Jurisdiction over Visiting Armed Forces* (1965) at 129–131. See further *Id n 391 supra* at 24–26.

³⁹³ The Treaty was signed in Brussels on the 17 March 1948. Member states were Belgium, France, Luxembourg, the Netherlands and the United Kingdom. The main purpose was to organise collective security. Available at http://www.nato.int/cps/en/natolive/official_texts_17072.htm. (Date used 14/12/13). See also *Id n 391 supra* at 45.

³⁹⁴ *Id n 391 supra* at 45–47. The agreement was signed on 21 December 1949 in London. On the question of territorial sovereignty and jurisdiction it provided that: Territorial sovereignty was paramount, it encouraged members to respect the laws in force in the receiving state. Secondly the receiving state enjoyed an exclusive right of jurisdiction only when the offence against its laws was not at the same time punishable under the law of the sending state. Thirdly if the offence was punishable under both the law of both the sending and the receiving state both state could exercise jurisdiction. The sending state never enjoyed exclusive right of jurisdiction.

³⁹⁵ *Id n 50* at 101.

The US legislation and agreements in respect of the status of their armed forces were heavily influenced by the *Schooner Exchange* case.³⁹⁶ The facts of the case were briefly as follows: The Schooner “Exchange” owned by two American citizens was seized by French man-of-war. She was assigned to the French fleet even though France and America were not at war. The former American owners filed a libel in the US against the schooner, alleging that they were the true owners.³⁹⁷ The case ended up in the US Supreme Court. The decision of the court seemed to clearly enunciate the principle of the law of the flag.³⁹⁸ The court held that the jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible to no limitation, not imposed by itself.³⁹⁹

After noting the immunity of jurisdiction Chief Justice Marshall went on further and held:

A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions... The grant of a free passage... implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.⁴⁰⁰

This dictum by Chief Justice Marshall was followed in the US to mean that visiting friendly forces are absolutely immune from the jurisdiction of the receiving state.⁴⁰¹

³⁹⁶ *Ibid n 387 supra*. See also *Id n 391 supra* at 13.

³⁹⁷ *Ibid n 387 supra*. See also *Id n 391 supra* at 13–4.

³⁹⁸ *Id n 391 supra* at 14.

³⁹⁹ *Id n 387 supra* at para 136. See also *Id n 391 supra* at 14. The court further reason that this absolute an exclusive right to jurisdiction could be limited by consent either express or implied.

⁴⁰⁰ *Id n 387 supra* at para 139. See also *Id n 391* at 14. See further Baxter 1958 (7) *The International and Comparative Law Quarterly* at 72. Available at <http://www.jstor.org/stable/755648>. (Date used 18/08/12).

⁴⁰¹ *Id n 391 supra* at 15. See also *Id 391 supra* at 12. For an analysis and misconception created by the Schooner case see Baxter 1958 (7) *The International and Comparative Law Quarterly Id n 400 supra* at 72–3.

6.2.2 *The Agreement between the USA and the UK of 1942*⁴⁰²

In the UK the presence of the American forces was mandated by the United States of America (Visiting Forces) Act, 1942.⁴⁰³ The Act did not *per se* address the question of criminal jurisdiction of American forces while stationed in the UK. The question of criminal jurisdiction was addressed in the notes annexed to the Act.⁴⁰⁴ The annexure provided that:

Subject as hereinafter provided, no criminal proceeding shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America.⁴⁰⁵

In terms of the aforementioned paragraph the American forces were subjected to the exclusive criminal jurisdiction of the American authorities while stationed in the United Kingdom during World War II.⁴⁰⁶

6.3 United Kingdom

6.3.1 *Criminal Jurisdiction under Agreements entered into by the United Kingdom and other States prior to the conclusion of NATO SoFA*

The United Kingdom has been consistent in asserting its territorial sovereignty. As early as 1917 it has insisted that the only right of jurisdiction that could be granted would relate to the offence committed within visiting

⁴⁰² The agreement was concluded as a result of US declaring war on Germany (World War II). This necessitated American troops to be stationed in the UK. Thus the question of criminal jurisdiction over American Forces came up hence the agreement.

⁴⁰³ *Hansard*, HC (series 5) Vol. 382, vol 877 (4 August 1942). Available at http://hansard.millbanksystems.com/commons/1942/aug/04/united-states-of-america-visiting-forces#column_877. (Date used 14/01/14). See also Baxter 1958 (7) *The International and Comparative Law Quarterly* *Id n* 400 at 73.

⁴⁰⁴ Based on its traditional approach the US claimed exclusive right of jurisdiction over the members of its forces. See also *Id n* 386 *supra* at 24. See also the notes of Secretary of State for the Home Department introducing the United State of America (Visiting Forces) Bill, *Hansard*, HC (series 5) Vol. 382, vol 877 (4 august 1942). Available at http://hansard.millbanksystems.com/commons/1942/aug/04/united-states-of-america-visiting-forces#column_877. (Date used 14/01/14). See also *Id n* 50 *supra* at 15 and 100.

⁴⁰⁵ *Ibid*. See also Baxter 1958 (7) *The International and Comparative Law Quarterly* *Id n* 400 *supra* at 73.

⁴⁰⁶ The concession was considered as to be a considerable departure from the traditional system and practice (territorial sovereignty) of the United Kingdom. The concession was made due to the weak UK bargaining position at the time (*Id n* 386 *supra* at 24–5 and *Id n* 50 *supra* at 15).

forces establishment.⁴⁰⁷ However, at times it was willing to apply the law of the flag.⁴⁰⁸

The presence of the Allied Forces in the UK was authorised by the Allied Forces Act of 1940. The Act gave jurisdiction to the Allied Military Courts only on matters of discipline and administration of that force. Concurrent jurisdiction was conferred over offences punishable under the law of both the sending state and the receiving state. However, crimes of murder and rape were subjected to the exclusive criminal jurisdiction of the United Kingdom courts.⁴⁰⁹

6.4 Criminal Jurisdiction under Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (hereinafter NATO SoFA)⁴¹⁰

The status of force agreement was signed to give effect to the North Atlantic Treaty which was signed in Washington on 4 April 1949. The treaty envisaged the fact that forces of one party may be sent by arrangement to serve in the territory of another party.⁴¹¹ It was thought prudent to formalise this arrangement in a multilateral status of forces agreement as opposed to bilateral agreements.⁴¹² The agreement followed the Brussels Treaty and the conditions prevailing in Western Europe at that time that territorial principle should control these agreements and the visiting forces should not enjoy blanket immunity.⁴¹³ The NATO SoFA defines the status of NATO forces while stationed in the territory of another NATO contracting party.⁴¹⁴

⁴⁰⁷ *Id n 391 supra* at 21.

⁴⁰⁸ The agreement of 15 December 1915 between the United Kingdom and France recognised the exclusive jurisdiction of the tribunals of their respective forces over their members, in whatever territory and of whatever nationality the accused may be.

⁴⁰⁹ *Id n 391 supra* at 24.

⁴¹⁰ *Ibid n 31 supra*.

⁴¹¹ *Id n 50 supra* at 21.

⁴¹² *Id n 391 supra* at 63.

⁴¹³ *Id n 391 supra* at 45.

⁴¹⁴ Preamble to NATO SoFA. Available at http://www.nato.int/cps/en/natolive/official_texts_17265.htm. (Date used 14/12/13).

Criminal jurisdiction is regulated by Article VII.⁴¹⁵ Article VII(1)(a) of NATO SoFA provides:

The military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.⁴¹⁶

This paragraph serves the purpose of stating certain general rules between the sending and the receiving state;⁴¹⁷ it does not *per se* address the question of the right to exercise criminal jurisdiction.

Article VII(1)(b) of NATO SoFA provides:

The authorities of the receiving State shall have jurisdiction over the members of a force... with respect to offences committed within the territory of the receiving State and punishable by the law of that State.⁴¹⁸

The aforementioned sub-paragraphs recognise the right of receiving state to enjoy broad jurisdiction by virtue of its prerogatives as a territorial sovereign.⁴¹⁹ Both sub-paragraphs (a) and (b) of the aforesaid article contemplate that a state whose law has been violated would have exclusive jurisdiction.⁴²⁰

Article VII(2)(a) of the NATO SoFA provides that:

⁴¹⁵ *Ibid.* See also *Id n 391 supra* at 133. The objective of this article is to assure the orderly disposition of criminal offences committed within the territory of the receiving state by the member of the force.

⁴¹⁶ Article VII(1)(a) of NATO SoFA. See also *Id n 386 supra* at 133–134. The word “military authorities of the sending state” have a broad meaning and include military courts as well as authorities of the sending state that exercise administrative and disciplinary powers. See further Baxter 1958 (7) *The International and Comparative Law Quarterly Id n 400 supra* at 74

⁴¹⁷ *Id n 391 supra* at 133. The general rule is the right of the sending state to exercise certain authority over its armed forces (enforcement of discipline) outside of its territory and the right of the receiving state to enjoy broad jurisdiction in its territory by virtue of its prerogative as a territorial sovereignty.

⁴¹⁸ Article VII(1)(b) of NATO SoFA. See also *Id n 386 supra* at 133. See also Baxter 1958 (7) *The International and Comparative Law Quarterly Id n 400 supra* at 74.

⁴¹⁹ *Ibid n 391 supra.*

⁴²⁰ *Id n 391 supra* at 133. Only the military authorities of sending state will have some form of jurisdiction to try specified offences. If the members of visiting force commit a crime which the receiving state has jurisdiction they will be tried under normal domestic criminal procedures and courts.

The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.⁴²¹

In terms of the aforesaid sub-paragraph the military authorities of the sending state have exclusive jurisdiction over its armed forces as it is the only state which has an interest in the matter *i.e.* the purported action will not be injurious to the receiving state. The rationale behind this exclusive jurisdiction might be that each military force has an inherent right to manage and enforce discipline within its ranks.⁴²² Only persons subjected to military law⁴²³ of the sending state will be prosecuted and only for certain offences.⁴²⁴

Article VII(2)(b) of the NATO SoFA provides:

The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force... with respect to offences, including offences relating to the security of that State, punishable by its law, but not by the law of the sending state.⁴²⁵

If a member of the sending force commits an offence which is only an offence in terms of the receiving state law, he/she will be tried by the receiving state only. In this case the receiving state is the only state which is having an interest.

Where the alleged conduct constitutes at the same time an offence in terms of the law of both the receiving and sending state, these give rise to co-existing

⁴²¹ *Id n 391 supra* at 152. See also *Id n 50 supra* at 109. See further Baxter 1958 (7) *The International and Comparative Law Quarterly* *Id n 400 supra* at 74.

⁴²² *Ibid n 386 supra*.

⁴²³ States normally apply own rules with regard to who is subjected to military law and for what offences. Military personnel are in most cases subjected to military jurisdiction. Civilian are as a general rule not subjected to military jurisdiction (*Id n 386* at 138–9 and 152). See also *Id n 50 supra* at 109 and *n 60–1*. See further *Ibid n 220 supra*.

⁴²⁴ Offences which are normally subjected to exclusive jurisdiction are those referred to as *inter se* and on-base offences. The concept of *inter se* offences is necessarily dual. The attitude is if the relationship of both the accused and the victim to the sending state is sufficiently close as opposed to the receiving state, it is appropriate to give the sending state exclusive or primary jurisdiction. The concept of on-base offences are those committed within but not outside the visiting force quarters or camps (Stanger *International Law Studies 1957-1958 Jurisdiction over Visiting Armed Forces* (1965) at 185 and 197–8).

⁴²⁵ *Id n 391 supra* at 152. See further *Id n 50 supra* at 109. See also Baxter 1958 (7) *The International and Comparative Law Quarterly* *Id n 397 supra* at 74.

jurisdiction. In order to resolve the problem of concurrent jurisdiction, the NATO SoFA sets up a system of primary and secondary jurisdiction.⁴²⁶ Article VII(3) of the NATO SoFA provides:

1. In case where the right to exercise jurisdiction is concurrent the following rules shall apply:
 - a. The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
 - i. offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependant;
 - ii. offences arising out of any act or omission done in the performance of official duty.⁴²⁷

In terms of the aforementioned paragraph both states have the right to exercise jurisdiction. To break the deadlock (concurrent jurisdiction) the agreement firstly looks at the states' interests by applying a system of priorities. Once it has been established which state has greater interest *i.e.* the offence involves its personnel, property *et cetera*, then that state is conferred with primary right to exercise jurisdiction.⁴²⁸

Secondly, all offences committed in the performance of official duty are prioritised in favour of the sending state. The reason being, the soldier in the performance of official duty is seen to be carrying out instructions received from the sending state and that the sending state may not be brought before the courts of the receiving state.⁴²⁹

⁴²⁶ *Id n 50 supra at 110.*

⁴²⁷ *Id n 391 supra at 161. See also Id n 50 supra at 110. See Baxter 1958 (7) The International and Comparative Law Quarterly Id n 400 supra at 74.*

⁴²⁸ *Id n 391 supra at 170. See also Id n 50 supra at 110. See further Baxter 1958 (7) The International and Comparative Law Quarterly Id n 400 supra at 74.*

⁴²⁹ *Id n 391 supra at 17–8 and 170. The determination of whether an offence arises out of performance of official duty is decided by firstly designating (in the SoFA) who makes the determination and where provision is not included in the SoFA, through the acceptance by the*

Where the offence is not solely against the personnel or property of the sending state or where the offence has not been committed in the performance of official duty the authorities of the receiving state shall have the primary right to exercise jurisdiction.⁴³⁰ In this instance the receiving state has more interest or put differently, the right to exercise jurisdiction is prioritised in favour of the receiving state, hence the primary right to exercise jurisdiction.⁴³¹

Where the state having primary right to exercise jurisdiction decide not to exercise jurisdiction, it must notify the authorities of the other state of their intentions as soon as possible. Furthermore, the other state can request the state which holds the primary right to jurisdiction to give up its right to primary jurisdiction in favour of the former.⁴³² In all the cases where a state has the primary right to jurisdiction it can waive that right in favour of the state which is not entitled to the primary right to jurisdiction.⁴³³

With regard to sentencing the NATO SoFA holds that where a person is convicted by the sending state in the territory of the receiving state, a death sentence shall not be carried out by the authorities of the sending state if legislation of the receiving state does not provide for such sentence in similar

host nation of a sending state certificate as to the official duty (in *Wilson v. Girard*, 354 US Supreme Court 1957 case the Japanese authorities did not accept the US authorities certificate that the incident involving a US serviceman, Girard arose out of the performance of official duty). Secondly, by judicious use of the waiver provision of the agreements (*id n* 391 *supra* at 111). See also Baxter 1958 (52) *American Society of International Law* at 175. Available at <http://www.jstor.org/stable/25657410>. (Date used 20/12/13).

⁴³⁰ Article VII(3)(b) of NATO SoFA. See also *id n* 391 *supra* at 161 and 193–4. In this case jurisdiction will be based on the principle of territorial sovereignty.

⁴³¹ *Ibid n* 412 *supra*.

⁴³² Article VII(3)(c) of NATO SoFA. The state with primary right to jurisdiction shall give sympathetic consideration to the request by the other state.

⁴³³ *Ibid*. See also *id n* 391 *supra* at 194–5. See further *id n* 50 *supra* at 112–3 and 126. This procedure is called waiver and it allows flexibility that may be necessary in certain circumstances. The waiver may be obtained either by way of general agreement or by negotiations on a case by case basis. *United States Treaties and Other International Agreements*, Volume 6, Part 1 (University of Michigan Libraries 1955) at 106 annex. Para 3. provides that the Netherlands authorities, recognising that it is the primary responsibilities of the United States authorities, to maintain good order and discipline where person subjected to United States military law are concerned, will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities.

cases.⁴³⁴ This provision does not however preclude the authorities of the sending state from executing the death sentence in its own territory.⁴³⁵

Cases which are contentious with regard to the death sentence are the so-called *inter se* offences which only involved personnel of the sending state, for example a sending state soldier brutally murdering a fellow sending state soldier. In this case the sending state has the primary right to jurisdiction. If the death sentence is a competent verdict in terms of the sending state's legislation it might be carried out or pronounced in the territory of the receiving state.⁴³⁶ This will in turn trigger the provision of Article VII(7)(a) of NATO SoFA which prohibits the death sentence in the territory of the receiving state by the authorities of the sending state if legislation of the receiving state does not provide for such sentence in similar cases.

6.5 Agreements entered into between the United States of America and other States after the conclusion of NATO SoFA

The USA has concluded quite a number of bilateral agreements with other states after the coming into effect of NATO SoFA.⁴³⁷ Its attitudes seem to treat the NATO SoFA as an acceptable minimum in respect of criminal jurisdiction. It tries to keep exclusive jurisdiction over its armed forces most of the times.⁴³⁸

The Agreement between the United States and the Netherlands⁴³⁹ provides:

The Netherlands authorities... will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities...⁴⁴⁰

The above paragraph seems to suggest that the Netherlands authorities will try cases in exceptional circumstances only. Cases will be prioritised in favour

⁴³⁴ Article VII(7)(a) of NATO SOFA.

⁴³⁵ *Id n 391 supra* at 243. See also *Id n 50 supra* at 125–7.

⁴³⁶ *Id n 50 supra* at 125–6.

⁴³⁷ *Id n 50 supra* at 47.

⁴³⁸ *Id n 391 supra* at 74.

⁴³⁹ Stanger *International Law Studies 1957–1958 Criminal Jurisdiction over Visiting Armed Forces* (1965) at 277. See also *Id n 391 supra* at 75.

⁴⁴⁰ *Ibid.*

of the US authorities.⁴⁴¹ However, in the final analysis the US does not have an exclusive right to jurisdiction, this right is shared (concurrent) with the Netherlands.

The agreement between the United States and Greece⁴⁴² is similar to the Netherlands agreement.⁴⁴³ Article II provides:

The Greek authorities... will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, paragraph 3(c) of that Agreement, except where they determine that it is of particular importance that jurisdiction be exercised by the Greek authorities...⁴⁴⁴

The conclusion which can be reached from the aforementioned paragraph tend to suggest that the Greek authorities, like their Netherlands counterparts, will only exercise jurisdiction in exceptional cases; however, that does not mean that the United States has exclusive right to jurisdiction either.⁴⁴⁵ The two countries have the right to exercise concurrent jurisdiction.⁴⁴⁶

6.6. Attitude of the United Kingdom towards Status of Force Agreement after the Conclusion of NATO SoFA

The United Kingdom has been consistent in its assertion of the right to territorial sovereignty.⁴⁴⁷ Equally so it recognises the right of other states to territorial sovereignty. Thus the Select Committee on the Armed Forces Bill 1995/96 in the UK was informed that the UK's aim in negotiating a status of force agreement was:

⁴⁴¹ *Id n 391 supra* at 75.

⁴⁴² Agreement between the United States and Greece implementing the NATO Agreement of 7 September 1957. Available as appendix IV to Stanger *International Law Studies 1957–1958 Criminal Jurisdiction over Visiting Armed Forces* (1965) *Id n 439 supra* at 279.

⁴⁴³ *Id n 391 supra* at 75.

⁴⁴⁴ *Id n 439 supra* at 279.

⁴⁴⁵ *Ibid n 439 supra*.

⁴⁴⁶ *Id n 391 supra* at 75. Lazareff holds that even if states proclaim that NATO SoFA govern their agreements, they in practice enter into agreements which deviate from NATO SoFA, especially the United States which appears to use its powerful bargaining power to obtain concession which are more favourable to it. The less powerful states like to strictly adhere to NATO SoFA as this protects their territorial sovereignty.

⁴⁴⁷ *Ibid n 405 supra*.

Normally to secure arrangements which allow the UK service authorities to exercise exclusive jurisdiction over UK personnel, but this cannot always be achieved, either because the receiving state cannot make such concession for legal reason or because the authorities are not prepared to do so. As a minimum we would aim to secure concurrent jurisdiction, as in the NATO SoFA, but there have been variation which allowed exclusive UK jurisdiction in military exercise areas or over offences committed in the course of duty.⁴⁴⁸

In terms of this report the UK will try to secure Status of Force Agreements which will confer exclusive jurisdiction over its armed forces, however, the NATO SoFA (concurrent jurisdiction) will always be the basis for those agreements. The UK will never go below the protection afforded by NATO SoFA.

6.7 Conclusion

During World War I the law of the flag dominated *i.e.* the sending states had exclusive jurisdiction over their armed forces.⁴⁴⁹ In the United States this was heavily influenced by the interpretation or rather misinterpretation given to the *Schooner* case.⁴⁵⁰ However, the United Kingdom insisted as early as 1917 that the territorial principle should govern these agreements.⁴⁵¹

During World War II concurrent jurisdiction came to be accepted as the acceptable arrangement as the right of the receiving state to territorial sovereignty and the right of the sending state to exercise disciplinary authority over its forces were recognised.⁴⁵² The only state which was reluctant was the United States. However, it too conceded that concurrent jurisdiction was the only acceptable arrangement.⁴⁵³

With the signing of the NATO SoFA the principle of concurrent jurisdiction became entrenched.⁴⁵⁴ Later the NATO SoFA became the basis for future

⁴⁴⁸ *Id* n 50 *supra* at 28 and n 117.

⁴⁴⁹ *Ibid* n 391 *supra*.

⁴⁵⁰ *Ibid* n 396 *supra*.

⁴⁵¹ *Ibid* n 407 *supra*.

⁴⁵² *Ibid* n 391 *supra*.

⁴⁵³ *Ibid* n 391 *supra*.

⁴⁵⁴ *Ibid* para 6.4 *supra*.

bilateral agreements. Another observation is that the powerful nations seem to use their bargaining powers to secure more favourable concessions from the weaker nations.⁴⁵⁵

State sovereignty, especially territorial sovereignty, plays a crucial role in international law. States jealously protect this right. Any interference by external forces in the internal affairs of another state is viewed as a violation of this right and normally is met with fierce criticism and resistance. However, states have come to realise that the need for cooperation is inevitable. During this cooperation the need to balance conflicting rights will arise.

⁴⁵⁵ *Ibid* para 6.5 *supra*.

CHAPTER 7

BALANCING OF CONFLICTING RIGHTS OF STATES (LIMITATION OF STATE SOVEREIGNTY) DURING PEACEFUL MILITARY COOPERATION

7.1 Introduction

It is an established principle of international law that sovereignty is fundamental and a necessary characteristic of statehood.⁴⁵⁶ Sovereignty intrinsically embodies the supreme authority of the state within its territorial sphere excluding dependence on any other authority, in particular another state.⁴⁵⁷

The concept of sovereignty is closely related to the Treaty of Westphalia. After the signing of this Treaty, the principle of state sovereignty became entrenched and was understood to be absolute.⁴⁵⁸ The rationale, at that time, in entrenching the absoluteness of state sovereignty was to try and prevent future wars.⁴⁵⁹ However, peace was never restored as manifested later by the French Revolution, followed by World War I and later World War II. After these wars the whole of the international community was almost unanimous in questioning the absoluteness of state sovereignty as most of these wars were waged in the name of state sovereignty.⁴⁶⁰

7.2 Limitation of State Sovereignty during the period 1530–1596

According to Bodin and Hobbes' exposition of sovereignty, the concept of sovereignty as absolute power was mainly focused on issues related to domestic affairs.⁴⁶¹ Their writing was mainly influenced by religious wars which were fought during that time in France and Britain. Their main purpose was to establish a basis for order in the two countries and to discourage any challenge to authority.⁴⁶² However, in the final analysis Bodin conceded that this absolute power might well be limited by both the divine and customary

⁴⁵⁶ *Ibid n 52 supra.*

⁴⁵⁷ For a full discussion on sovereignty see chapter 2 *supra*.

⁴⁵⁸ *Ibid* sub-para 2.2.3 *supra*.

⁴⁵⁹ *Id n 53 supra* at 16-7.

⁴⁶⁰ *Id n 53 supra* at 20–1.

⁴⁶¹ *Id n 53 supra* at 11.

⁴⁶² *Ibid.*

laws of the political community.⁴⁶³ Equally so Hobbes admitted that a government would lose its legitimacy if it failed to protect its subjects.⁴⁶⁴ It can therefore be concluded from the writings of these two authors that sovereignty was never absolute, it was limited.

According to Pufendorf sovereignty was never absolute; it was always limited by positive law.⁴⁶⁵ Grotius too argued that state sovereignty was limited by natural law and by agreements entered into with other sovereign states.⁴⁶⁶ Again, it can be concluded from these two writers that sovereignty was never absolute; it was always subjected to some limitation *i.e.* by both positive and treaty law.

7.3 Limitation of state sovereignty prior to and during World War I

Peaceful military occupation was practically unknown before 1914. Before this time it was only the passing through or the brief stationing of allied or friendly forces on a given territory.⁴⁶⁷ For example, Prussian territories were not contiguous, Prussian forces had, in order to go from one garrison to another, pass through foreign territories. In order to regulate the condition of passage and the status of its forces, an agreement was then signed.⁴⁶⁸

The question whether there was, in the period around World War I, a rule of customary international law in respect of which visiting forces were subjected to exclusive jurisdiction of their sending state while in the territory of the receiving state, was unclear;⁴⁶⁹ Barton thought that there existed a rule of international law according to which members of visiting forces were, in principle, subjected to criminal jurisdiction of the local courts.⁴⁷⁰ Lazareff, after studying the decisions of the Permanent Court of Arbitration in the

⁴⁶³ James Key *Concept in International Relation: Sovereign Statehood: The Basis of International Society* (1986) at 4. See also *Id n 65 supra* at 26 and 3.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid n 68 supra.*

⁴⁶⁶ *Ibid n 70 supra.*

⁴⁶⁷ *Id n 391 supra* at 7–8. Mostly in these agreement jurisdiction was exclusive in favour of the sending state.

⁴⁶⁸ *Id n 391 supra* at 7–8. Mostly in these agreements jurisdiction was exclusive in favour of the sending state.

⁴⁶⁹ *Id n 50 supra* at 13.

⁴⁷⁰ Barton 27 *Brti. Y. B. Int'l L.* 186 (1950) at 234. Available at <http://heinonline.org/HOL/License>. (Date used 01/02/14). See also *Id n 50 supra* at 13.

Casablanca,⁴⁷¹ *Schooner Exchange*,⁴⁷² the *Coleman v Tennessee*,⁴⁷³ *Tucker v Alenxendroff*⁴⁷⁴ and *Panama*⁴⁷⁵ cases, agreed with Barton that there was no absolute right of immunity of jurisdiction of a peaceful occupation force over its members. According to Lazareff, the decisions in the aforementioned cases did not *per se* confer exclusive jurisdiction to the sending state, the waiver of the right by the host nation implied only offences against the discipline of that force, the territorial sovereign in all these cases reserved to himself the right to exercise his sovereignty whenever an offence had been committed against territorial law.⁴⁷⁶ Stanger too holds that the decision in the *Schooner Exchange* case did not lay down a principle of international law conferring absolute immunity to the visiting forces, the decision in this case was based on military exigency at the time.⁴⁷⁷

Wijewardane on the other hand, after a detailed study of agreements entered into during the period around World War I,⁴⁷⁸ concluded that there was a customary rule of international law that members of visiting forces are immune from criminal jurisdiction of the host state in respect of offences committed in the territory of the host state.⁴⁷⁹

From the above analysis it cannot be concluded that there was a rule of international law conferring exclusive criminal jurisdiction on the sending state over its forces in the territory of the receiving state during peace time.⁴⁸⁰

In the absence of any rule of international law with regard to criminal jurisdiction of forces stationed abroad during peace time, the admission of a force in the territory of the receiving state will be regulated by agreement.

⁴⁷¹ The *Casablanca* Arbitration 1909 (7) *the Advocate of Peace* at 152–153. Available at <http://www.jstor.org/stable/20665758>. (Date used 14/04/2014).

⁴⁷² *Ibid* n 385 *supra*.

⁴⁷³ *Coleman v Tennessee* 97 U.S. 509 (1878). Available at <http://supreme.justia.com/cases/federal/us/97/509/case.html>. (Date used 14/04/14).

⁴⁷⁴ *Tucker v Alenxendroff* 183 U.S. 424 (1902). Available at <http://supreme.justia.com/cases/federal/us/183/424/> (Date used 14/04/14).

⁴⁷⁵ *Republic of Panama v Schwartzfinger*, 21 *A.J.I.L.* 182.

⁴⁷⁶ *Id* n 391 *supra* at 14–7.

⁴⁷⁷ *Id* n 439 *supra* at 83.

⁴⁷⁸ *Ibid* n 391 *supra*. During World War I the law of the flag dominated *i.e* the sending state had exclusive jurisdiction over its armed forces.

⁴⁷⁹ Wijewardane 41 *Brits Y.B. Int'l.* 122 (1965–1966) at 125–6. Document available at <http://heinonline.org/HOL/License>. (Date used 01/02/14). See also *Id* n 50 *supra* at 13.

⁴⁸⁰ *Id* n 439 *supra* at 188–9.

When states enter into agreements to station their forces in either country, the basic principle of territorial sovereignty comes into play.⁴⁸¹ The full application of this principle would result in the receiving state having a general right of jurisdiction over members of visiting forces on the assumption that a sovereign state could not accept not to punish an offence committed on its territory, lest it will be a violation of its sovereignty.⁴⁸² Furthermore, a sovereign state could not allow a foreign jurisdiction to exercise its competence within its territory. However, this approach of absolute right to territorial sovereignty was never accepted.⁴⁸³

The decision to admit a foreign force is normally embodied in an agreement referred to as a status of force agreement which defines the rights and obligation of the visiting force.⁴⁸⁴ Agreements entered into during World War I were dominated by the principle of the law of the flag⁴⁸⁵ *i.e.* the sending states had exclusive jurisdiction over their forces who were stationed abroad.⁴⁸⁶ Therefore, the principle of territorial sovereignty was limited in that the foreign forces could exercise exclusive jurisdiction over their forces in the territory of the receiving state.⁴⁸⁷ The receiving state had no authority over visiting things and persons in its territory.

⁴⁸¹ *Id n 391 supra* at 8.

⁴⁸² *Id n 391 supra* at 17.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Id n 391 supra* at 8.

⁴⁸⁵ *Id n 391 supra* at 22. Even though the law of the flag dominated it was not applied by all. The British position was always in favour of territorial sovereignty. What further influences the law of the flag was that during World War I the forces ruled over a determined zone in the field and contact with the locals was minimal as most of the time the civilian populations were evacuated. See also *Id n 439 supra* at 119. Another reason which might have influenced the law of the flag was military exigencies at the time and furthermore some of the states were in a poor bargaining position (*Id n 50 supra* at 15).

⁴⁸⁶ *Ibid n 391 supra.*

⁴⁸⁷ *Id n 391 supra* at 19–21. The agreement between Belgium and France of 14 August 1914 its key provision holds that: Every force retains its jurisdiction as to the offence liable to bring prejudice to it, whatever territory it is stationed on, and whatever the nationality of the offender. The Franco-American agreement of 14 January 1918 holds that: ...that under the principle of international law members of the American Expeditionary Forces were answerable only to American tribunals for such offences as they commit in France. See also *Id n 439 supra* at 115–6.

7.4 Limitations of state sovereignty by agreements entered into during World War II and agreements concluded immediately thereafter

During World War II the Allied Forces were stationed in the UK until “D” Day. Their presence in the UK was regulated by the Allied Forces Act.⁴⁸⁸ The Act departed from the position established by World War I in that it gave concurrent jurisdiction to both the sending and the receiving states. The principle of territorial sovereignty gained ground in that the sending states could only exercise authority in matters concerning discipline and internal administration of that force, in all other matters the receiving state had jurisdiction.⁴⁸⁹ The Allied Act balanced the conflicting rights of both the sending and the receiving by on the one hand recognising the right of the receiving state to territorial sovereignty and on the other hand the right of the sending state to exercise some form of authority over its armed forces. Therefore, in this case state sovereignty was also limited and extended by agreement.

The only agreement which departed from the position established by the Allied Forces Act was the agreement between the USA and the UK.⁴⁹⁰ This agreement conferred exclusive jurisdiction to the United States over its armed forces.⁴⁹¹ Again in this case, state sovereignty was limited and extended by agreement *i.e.* the UK’s right to territorial sovereignty was limited, it could not exercise criminal jurisdiction over things and persons in its territory whereas the USA extended its laws (sovereignty) beyond its borders.⁴⁹²

⁴⁸⁸ 3 and 4 Geo VI, ch. 31. See also *Id n 391 supra* at 23–4. See further *Id n 439 supra* at 128.

⁴⁸⁹ *Ibid.* The scale seems to be tilted more in favour of the host nation. The crimes of murder and of rape were subjected to the exclusive jurisdiction of British courts. Furthermore, the visiting forces did not have jurisdiction over offences concerning question of “discipline and administration” when the case had already being tried by the British court.

⁴⁹⁰ The Anglo-Czech agreement of 25 October 1940 conferred concurrent jurisdiction over the host and the sending state: Article 2 provides that “Acts or omission constituting offences against the law of the United Kingdom shall be liable to be tried by the civil court in the United Kingdom.” The Czech military authorities had only jurisdiction over administrative and disciplinary offences. See also *Id n 439 supra* at 128 and *n 44*.

⁴⁹¹ *Id n 391 supra* at 24. See also *Id n 439 supra* at 129. See further *Id n 50 supra* at 15–8. The United State has always claimed exclusive jurisdiction over its forces.

⁴⁹² *Ibid.*

With the signing of NATO SoFA, the principle established by the Allied Forces Act became entrenched. Concurrent jurisdiction became the accepted norm.⁴⁹³ Even the USA which initially favoured exclusive jurisdiction, reluctantly accepted this arrangement.⁴⁹⁴ Territorial sovereignty was observed in that the receiving state could exercise some form of jurisdiction over things and persons in its territory. Equally so, the sending state could exercise some form of jurisdiction over its forces in the territory of the receiving state.⁴⁹⁵ Again in this case, state sovereignty was limited and extended by agreement.

7.5. The Limitation of state sovereignty as result of atrocities committed during World War II and thereafter

Due to the atrocities committed⁴⁹⁶ and the palpable destruction caused by World War II, the Westphalian system of state sovereignty came under critical criticism and was finally laid to rest.⁴⁹⁷ After the war the Major Allied Powers took a decision to establish tribunals to try those who committed the worst kind of atrocities in the history of civilised mankind.⁴⁹⁸ This resulted in the establishment of both the International Military Tribunal at Nuremberg⁴⁹⁹ (hereinafter the Nuremberg Tribunal) and the International Military Tribunal for the Far East⁵⁰⁰ (hereinafter Tokyo Tribunal) to try major identified war criminals for crimes committed within their territory and beyond.

⁴⁹³ Article VII of NATO SOFA.

⁴⁹⁴ *Id n 391 supra* at 74–5.

⁴⁹⁵ For an analysis of NATO SOFA see para 6.4 *supra*.

⁴⁹⁶ Twenty seven million combatants were killed, 17 million wounded, nearly 20 million captured or missing and number of civilians who lost their lives is still controversial. Even before World War II, Nazi Germany was busy with a systematic violation of human rights. The atrocities continued during the war with the incarceration of individuals, both German and foreign, citizens of both friendly and enemy countries alike. Hitler ordered the extermination of the Jew nation resulting in six million being killed (*Id n 53 supra* at 76–7).

⁴⁹⁷ *Id n 53 supra* at 76.

⁴⁹⁸ *Ibid*.

⁴⁹⁹ *Ibid n 3 supra*.

⁵⁰⁰ 60 *Int'l L. Stud. Ser. US Naval War Col.* 312 1979. The International Military Tribunal for the Far East (hereinafter Tokyo Tribunal) which sat in Tokyo for the trial of the major Japanese personalities charged with war crimes was established by proclamation of the military commander in Occupied Japan, the Supreme Commander for the Allied Powers (SCAP), General of the Army Douglas MacArthur of the USA, who simultaneously issued an order promulgating the Tribunal's Charter. He acted pursuant to the general authority delegated to him by the Moscow Conference Agreement of 26 December 1945. 3 *Bevans* 1341. Available at (<http://heinonline.org>). (Date used 09/02/14).

The Nuremberg and the Tokyo tribunals were land mark events in the development of international law. They pierced the veil of state sovereignty in that claims of absolute state sovereignty gave in to the international community's claim of peace and justice.⁵⁰¹ The trials marked a major turning point for the Westphalian notion of state sovereignty, clipping its all-encompassing principle of political independence and territorial sovereignty.⁵⁰² The trials buried the notion of national sovereignty as recognised at Westphalia; states were now subjected to international norms and standards, universal claims for peace and the inviolability of human rights.⁵⁰³

More recently the principles established by the Nuremberg and the Tokyo tribunals were invoked and applied to prosecute those who committed atrocities in former Yugoslavia⁵⁰⁴ and Rwanda.⁵⁰⁵ Persons who committed atrocities in their territories could not rely on territorial sovereignty to avoid prosecution.⁵⁰⁶ These international penal processes represent a shift in the authority from states to international community.⁵⁰⁷

⁵⁰¹ *Id n 53 supra* at 71.

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.* The Nuremberg and the Tokyo tribunals further extended the universal jurisdiction to cover several offences other than piracy and slave trading. The doctrine of universal jurisdiction limits the reach of national sovereignty while extending the reach of international law. The Nuremberg charter principle that the defendants would be tried anywhere for what they had done certainly does not respect national sovereignty (*id n 53 supra* at 111–2).

⁵⁰⁴ International Tribunal for the Prosecution of Person Responsible for Serious Violation of International Humanitarian Law in the Territory of Former Yugoslavia (War Crimes). The agreement was signed at the Hague on 5 October 1994 pursuant to Security Council Resolution 827 of 1993. The agreement entered into force on 14 February 1996. Available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf. (Date used 11/01/14). See also *Id n 53 supra* at 145.

⁵⁰⁵ The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter ICTR). Available at <http://www.unictt.org/Portals/0/English%5CLegal%5CResolutions%5CEnglish%5C955e.pdf>. (Date used 11/01/14). See also *Id n 53 supra* at 199–200.

⁵⁰⁶ *Ibid n 84 supra*. See also Walker *The International Library of Essays in Law and Legal Theory: Relocating Sovereignty* (2006) at 387–8.

⁵⁰⁷ *Id n 53 supra* at 223. See also Walker *The International Library of Essays in Law and Legal Theory: Relocating Sovereignty* (2006) at 387–8.

With the establishment of the International Criminal Court (hereinafter the ICC)⁵⁰⁸ the circle that began with the creation of the post-World War II *ad hoc* international military tribunals has been completed.⁵⁰⁹ Sovereignty has been limited from both within and outside the state. The concept of international penal process has been increasingly recognised as a triumph over the right of a state to hold sole rights in the exercise of certain prerogatives.⁵¹⁰

7.6 The limitation of state sovereignty under the UN Charter and the Declaration and Treaty of SADC of 1992

The UN Charter⁵¹¹ recognises the principle of state sovereignty. Article 2(1) provides that the Charter is based on the principle of sovereign equality. It further holds that the UN and member states should refrain from interfering in the internal affairs of another state.⁵¹² However, if actions of states are adjudged to be a threat to peace or acts of aggression, the UN will interfere, and thus limit the principle of state sovereignty.

Article 2(1) was recently invoked to adopt the UN Security Council Resolution 1973 (2011) which authorised the Security Council to take enforcement action against the Libyan government. The resolution authorised by the UN to take all necessary measures to protect civilians under threat of attack by the Qadhafi regime and its supporters.⁵¹³ In this case, the actions of the Libyan government were adjudged to be *inter alia* a threat to international peace, thus in direct violation of Article 2(1) of the UN Charter. In this case the right of Libya to territorial sovereignty was therefore limited by the rules of international law.

⁵⁰⁸ The court was established in terms of Rome Statute of the ICC. The Statute entered into force on 1 July 2002, paving the way for the establishment of the ICC. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf. (Date used 11/01/14). See also Walker *The International Library of Essays in Law and Legal Theory: Relocating Sovereignty* (2006) at 233 and *n* 35.

⁵⁰⁹ *Id n* 53 *supra* at 283.

⁵¹⁰ *Id n* 53 *supra* at 284.

⁵¹¹ *Ibid n* 9 *supra*.

⁵¹² *Ibid n* 76 *supra*.

⁵¹³ *Ibid*. The UN SC Res 1973 (2011) further approved a “no-fly zone” over Libya airspace for specified type of aircraft. Regional powers were mandated to enforce this no fly zone. Available at <https://www.un.org/News/Press/docs/2011/sc10200.doc.htm>. (Date used 14/04/14).

Another factor which limits the principle of state sovereignty is the human rights regime. The human rights regime consists of overlapping global, regional, and national conventions and institutions.⁵¹⁴ There is a tendency in most human rights agreements that a legitimate state must be a state that upholds certain core democratic values.⁵¹⁵ By insisting on certain core democratic values these human rights agreements places governments under a new system of legal regulations which is inconsistent with the Westphalian conception of sovereignty.⁵¹⁶ For example, the African (Banjul) Charter of Human and People's Rights (hereinafter the Banjul Charter) authorises a state to draw the attention of another state which it reasonably suspects of violating the Charter and to simultaneously report the matter to the secretary and the chairperson of the OAU [African Union].⁵¹⁷ Equally so the European Convention for the Protection of Human Rights and Fundamental Freedoms was designed to take steps towards collective enforcement of human rights.⁵¹⁸ This means that member states of these two agreements will interfere if they reasonably suspect that there are serious human rights violations in one of the member states.

The above analysis means the international community will interfere in the internal affairs of states if states fail to protect and/or violate certain

⁵¹⁴ Walker *The International Library of Essays in Law and Legal Theory: Relocating Sovereignty* (2006) at 389. At global level human rights are firmly entrenched in UN Declaration of Human Rights of 1948, Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights and Convention on the Elimination of Discrimination against Women (amongst others). At regional level human rights are entrenched in (amongst others) the American Convention on Human Rights, the European Convention for the Protection of Human Rights and the African (Banjul) Charter of Human and People's Rights.

⁵¹⁵ Article 25 of the 1966 UN International Covenant on Civil and Political Rights provides: Every citizen shall have the right and the opportunity, without... unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (c) to have access, on general terms of equality, to public service in his country. Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. (Date used 16/01/14). See also *id n* 497 *supra* at 389–391.

⁵¹⁶ *Ibid.*

⁵¹⁷ Article 47 of African (Banjul) Charter of Human and People's Rights. Available at http://www.unisa.ac.za/contents/faculties/law/docs/Charte%20Africaine%20Droits%20de%20l'homme%20peuples_en.pdf. (Date used 15/04/14).

⁵¹⁸ Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf. (Date used 15/04/14). See also *Id n* 512 *supra* at 391. The Banjul Charter and the European Convention draws heavily from International Bill of Human Rights of 10 December 1948.

fundamental human rights of citizens. One of the reasons why the UN intervened in the Libyan case was the gross and systematic violation of human rights of citizens by the Qadhafi regime.⁵¹⁹ By intervening the international community was in fact prescribing to Libya how it must treat its own citizens. Again in this instance the action (sovereignty) of Libya was limited by international law (human rights regime).

The SADC Treaty⁵²⁰ is not explicit with regard to limitation of state sovereignty; it only obliges member states to act in accordance with sovereign equality.⁵²¹ The SADC Protocol⁵²² on the other hand purports to define sovereignty in terms of its traditional Westphalian meaning.⁵²³ Subsequent to the signing of the SADC Protocol a memorandum of understanding (SADC MoU) was signed enabling SADC member states to schedule and participated in multinational exercises as part of the SADC Standby Brigade.⁵²⁴ During these exercises all the SADC countries, except for Botswana and South Africa, agreed that the sending and the host state will share criminal jurisdiction, *i.e.* the sending state had jurisdiction on the so called “on duty offences” and the host nation had jurisdiction on all other offences.⁵²⁵ In all these multinational exercises sovereignty was limited and extended by agreement.

Also by reaffirming the principle of good neighbourliness and interdependence is by implication an indication that SADC member states will be prepared to limit some of their sovereign rights. They will refrain from actions which might damage their good neighbourliness and interdependencies.⁵²⁶ Furthermore, the SADC Treaty is an international instrument and it is signed in furtherance

⁵¹⁹ *Ibid n 513 supra*. Violation included the arbitrary detentions, enforced disappearances, torture and summary executions of citizens.

⁵²⁰ *Ibid n 10 supra*.

⁵²¹ Article 4(a) of the SADC Treaty.

⁵²² *Ibid n 11 supra*.

⁵²³ *Ibid n 77 supra*.

⁵²⁴ Exercise “Golfinho” held in Angola and South Africa in 2009. Exercise Thokamo in Botswana 2005. Exercise “Welwitschia” in Namibia in 2013.

⁵²⁵ Information provided by Directorate Operational Legal Support (SANDF Level 2) dated 16/04/14. Botswana and South Africa do not agree on this arrangement mainly because of the death penalty in terms of Botswana laws (hence this research project). The problem arises only when these multinational exercises are held either in Botswana or South Africa and the two countries participate.

⁵²⁶ Preamble to the SADC Protocol.

of Chapter III, Article 52 of the UN Charter,⁵²⁷ which means it is international law by its very nature. Therefore, during the application of the SADC Treaty, SADC member states' sovereignty will be limited by international law *i.e.* their action cannot be a threat to peace, breaches of peace and acts of aggression.⁵²⁸

7.7 Conclusion

The concept of state sovereignty emanated with the signing of the Treaty of Westphalia.⁵²⁹ It was conceived at the time to mean absoluteness *i.e.* states had the right to do as they wish within their territories; they will not tolerate any outside interference. At that time it made sense as Europe had just experienced one of the most brutal wars.⁵³⁰ The signatories to the Treaty thought that by entrenching the principle of absolute state sovereignty, peace will prevail amongst states.⁵³¹

During the period 1530–1596 there was never unanimity amongst the authors with regard to the exact ambit of state sovereignty, some argued that state sovereignty was absolute while others thought not.⁵³² However, in the final analysis, even the proponents of absolute state sovereignty conceded that state sovereignty might be limited in certain exceptional circumstances.⁵³³

During World War I the rights of the receiving state to territorial sovereignty was limited in that the sending state could exercise exclusive criminal jurisdiction within the territory of the receiving state. The receiving state could not try members of foreign armed forces who committed offences within their territory.⁵³⁴ During World War II the sending and the receiving state had concurrent criminal jurisdiction. The sending state had jurisdiction over offences which were only related to the discipline and internal administration of that force. The receiving state exercised the right to criminal jurisdiction in

⁵²⁷ *Ibid n 9 supra.*

⁵²⁸ Chapter VII of UN Charter deals with enforcement action.

⁵²⁹ *Ibid n 458 supra.*

⁵³⁰ *Ibid n 459 supra.*

⁵³¹ *Ibid.*

⁵³² *Ibid n 462,463 and 464 supra.*

⁵³³ *Ibid n 462 and 463 supra.*

⁵³⁴ *Ibid n 485, 486 and 487 supra.*

all other offences.⁵³⁵ Thus, in this case too, sovereignty was limited and extended.

After World War II states could not rely on their sovereignty to avoid external interference. Those who committed serious atrocities within and outside their territory were held responsible by *ad hoc* international criminal tribunals. The Westphalian notion of state sovereignty was finally buried.⁵³⁶ Furthermore, after World War II the institution of human rights gained ground and states were obliged to guarantee certain inviolable fundamental rights. This process eroded the Westphalian notion of state sovereignty even further.⁵³⁷

With the signing of the NATO SoFA, concurrent criminal jurisdiction became the accepted minimum norm. Some stronger nations tended to try and obtain exclusive criminal jurisdiction over their forces, however, at the end they too conceded that the principle established by NATO SoFA was the acceptable arrangement.⁵³⁸ Again in this case state sovereignty could be extended and limited by agreement.

The UN Charter recognises and acknowledges the principle of sovereign equality. State sovereignty is observed provided it is not against the principles of international law. If the actions of the state threaten peace or are acts of aggression the UN will intervene and thus limit state sovereignty.⁵³⁹ The SADC Treaty and Protocol purport to support absolute state sovereignty. However, the SADC Treaty is an international instrument and furthermore it was concluded in furtherance of Chapter III, Article 52 of the UN Charter meaning it cannot be a threat to peace or act of aggression in its application.⁵⁴⁰

From the above analysis it can be concluded that state sovereignty was never absolute; it could be limited and extended by treaty law and customary law. Furthermore, there is no principle of international law dealing with criminal

⁵³⁵ *Ibid n 489 supra.*

⁵³⁶ *Ibid n 502 and 503 supra.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid n 495 supra.*

⁵³⁹ *Ibid n 512 and 513 supra.*

⁵⁴⁰ *Ibid n 526, 527 and 528 supra.*

jurisdiction of visiting forces during peace time. When the concept of state sovereignty is applied to the stationing of forces during peace time, the following conclusions can be reached; firstly during World War I the sending state had exclusive jurisdiction over its armed forces; secondly during World War II and immediately thereafter, concurrent jurisdiction became the accepted norm.

CHAPTER 8

CONCLUSION

The principle of state sovereignty is closely related to the signing of the Treaty of Westphalia. It was understood to confer absolute power on the state. States were free from any external interference; they could do as they wished within their territories. Authors of that time were never unanimous with regard to the exact ambit of state sovereignty; some argued that sovereignty was absolute while others thought not.

Intrinsically linked with the principle of state sovereignty is the right of states to exercise criminal jurisdiction. Five principles are recognised under contemporary international law on which states could exercise criminal jurisdiction namely: territoriality principle, nationality principle, passive personality theory, protective principle and universal jurisdiction. The state has the right to exercise criminal jurisdiction based on the aforementioned principles by virtue of it being sovereign.

When peace could not be maintained through the principle of absolute state sovereignty, the principle started losing its traditional meaning. Its absoluteness was questioned; the freedom of states to do as they wished in the name of sovereignty could no longer be tolerated by the international community. The international community was almost unanimous in that there should be some higher norms (natural law) in which all nations should conform.

After World War II and the consequential atrocities committed, the victors established *ad hoc* military tribunals to try those they have identified to have committed war crimes. The establishment of *ad hoc* military tribunals and more recently the ICC was the final nail into the Westphalian notion of state sovereignty.

The principle of sovereignty is equally captured by the UN Charter. However, the UN (and by extension the SADC Treaty) never understood the concept of state sovereignty to be absolute; it was always limited by international law.

Furthermore, the international community has come to accept that there are certain fundamental human rights of which all nations should adhere to. These human rights regimes further eroded the state-centric notion of sovereignty. As it stands the concept of state sovereignty is not understood to be absolute, it is limited by international law and the rights of other states.

Botswana and South Africa are sovereign states; they have the right to territorial integrity. In their exercise of territorial integrity they can decide to hang or not to hang their citizens. They are free to enter into agreements with other states. They can limit or extend their sovereign rights by agreement. However, their freedom of action is not absolute if it is limited by the rights of other nations and agreements entered into with other states, furthermore their actions must not be a threat to the peace, breaches of peace and acts of aggression *i.e.* their actions should not be against international law.

One of the main reasons why states enter into agreements is the need for peace and security. The need for international (regional) peace resulted in the formation of the UN (SADC). The UN is currently the epicentre of the maintenance of international peace. Generally, the UN operates in unstable and conflict areas. In pursuit of this international peace, the UN is sometimes called upon to send troops to conflict areas.

Legislation of both Botswana and South Africa authorises the two countries to enter into agreements in fulfilment of an international obligation. Botswana and South Africa are signatories to the SADC Treaty (in furtherance of the purpose of the UN) with the purpose of fulfilling their international obligations. With the signing of the SADC Treaty, it was inevitable that the armed forces of both South Africa and Botswana will find themselves in the territory of one another during peace time. Once in the territory of another the question of criminal jurisdiction becomes critical. Who will exercise criminal jurisdiction if a soldier of either Botswana or South Africa commits a serious offence, like murder, while in the territory of the receiving state (taking into account that Botswana still practices the death sentence)?

Any agreement between the two countries is by its very nature an international instrument. It should reflect the sentiments of the international community or rather the sentiments of the international community should lay the basis for such an agreement. The international sentiments with regard to visiting forces during peace time are mainly captured in customs, the UN SoFA for Peace Keeping Operation, agreements signed before and after the end of both World Wars in relation to stationing of armed forces abroad and the writings of distinguished scholars of international law.

Agreements entered into during and after World War I but before World War II were dominated by the law of the flag. The exigencies of war combined with the power balances at that time necessitated exclusive criminal jurisdiction in favour of the sending state. Since the end of World War I circumstances have changed and it will not be prudent for Botswana and South Africa to follow this approach. It made sense then, but will not necessarily make sense now. Furthermore, this approach was never accepted as being a rule of international law and some states always insisted on their right to territorial sovereignty.

Agreements entered into just before and during World War II conferred concurrent criminal jurisdiction on both the sending and the receiving state. Two principles became clear during these agreements, firstly the right of the sending state to exercise jurisdiction only in matters of discipline and administration of the force, secondly the right of the receiving state to territorial integrity, *i.e.* the right to exercise jurisdiction in all other matters. The approach followed in these agreements was widely accepted by many states.

If Botswana and South Africa intend to sign an agreement, the aforesaid approach may lay the foundation for such an agreement as it was widely accepted. If the principles enunciated in those agreements are applied to Botswana and South Africa it will translate into the following: If the SANDF is sent to Botswana during peace time it will be able to exercise authority only in matters of discipline and administration of the force. Botswana will be able to exercise jurisdiction in all other matters. The same applies to the BDF while in South Africa. Exactly what will constitute matters of discipline and

administration of the force can be explained within the agreement. Serious criminal offences, for example rape or murder of a civilian, will definitely not fall within “discipline and administration” and thus the receiving state will have the right to exercise criminal jurisdiction.

The UN SoFA for Peace Keeping Operations (hereinafter PKO) is an agreement concluded between the UN and the receiving state prior to the UN sending troops to that receiving state. The receiving state during PKO is generally in a weaker bargaining position to assert its territorial sovereignty, hence the PKO. As an incentive to contribute resources to the UN PKO, troop contributing states retain exclusive criminal jurisdiction over their armed forces. Botswana and South Africa participated in quite a few UN PKOs and in these operations they retained exclusive criminal jurisdiction.

If Botswana and South Africa want to sign an agreement with regard to the stationing of their armed forces on each other’s territory during peace time, the UN SoFA will not be an appropriate basis for such an agreement. Both Botswana and South Africa are stable and their criminal justice systems are functional and both countries apply their domestic laws meticulously. There is no basis in international law for the two countries to claim exclusive criminal jurisdiction over their forces while they are in each other’s territory during peace time. Furthermore, they are in a good bargaining position to assert their sovereignty; in fact exclusive criminal jurisdiction will tend to assail the principle of territorial integrity.

Agreements signed after World War II, notably the NATO SoFA, entrench the approach which prevailed during World War II. Concurrent jurisdiction became the accepted norm. Another innovation with regard to the NATO SoFA is that where states had concurrent jurisdiction a system of priorities was introduced. The state which the action is more injurious to has the primary right to exercise criminal jurisdiction and the state which the action is less injurious to has a secondary right to exercise criminal jurisdiction. Furthermore, the state which has the primary right to criminal jurisdiction may waive that right in favour of the state not having that primary right to jurisdiction.

The NATO SoFA seems to be widely accepted beyond NATO countries. Botswana and South Africa can seriously consider this agreement as the basis for future agreements. If they do consider this agreement it will translate into the following: Firstly, if (for example) a SANDF member commits a serious offence such as the murder of a fellow SANDF member while being stationed on a SANDF base in Botswana, both Botswana and South Africa will have concurrent jurisdiction to try that person. However, jurisdiction can be prioritised in favour of South Africa as this offence is against a SANDF member, committed by a SANDF member on a SANDF base, put differently the SANDF (South Africa) has the right to primary jurisdiction. Secondly, if the said SANDF member (for example) rapes and murders a Botswana civilian, both Botswana and South Africa will have concurrent jurisdiction to try the member. However, jurisdiction will be prioritised in favour of Botswana as the said offence is more injurious to Botswana than South Africa, *i.e.* it is against a Botswana civilian, in Botswana territory and Botswana therefore has the primary right to exercise jurisdiction. Furthermore, both countries can waive their right to primary jurisdiction in favour of another, and both can be encouraged to give sympathetic consideration to such requests.

With regard to sentencing the NATO SoFA holds that the death sentence should not be carried out in the territory of the receiving state if the laws of the receiving state do not provide for that sentence. If we apply this principle to BDF and SANDF it will translate into the following: If for example a BDF member while in South Africa commits mutiny and he is tried by a Botswana military court in South Africa, and is found guilty and sentenced to death, he will not be hanged in South Africa; however, nothing prevents (BDF) Botswana from hanging its own member back home.

Closely related to sentencing, South Africa may try to obtain favourable concession (assurance) from Botswana especially with regard to the death sentence. It may request Botswana that if a SANDF member gets convicted of, for example murder, while in Botswana, he/she will not be sentenced to death or if sentenced to death the penalty will not be carried out. South Africa will have a strong case in this regard as there is a strong movement among

the international community towards the abolition of (and/or moratorium on) the death sentence.

From the above analysis it has been shown that state sovereignty plays a pivotal role in international law even though the exact meaning of the concept remains elusive. Treaty law remains one of the important sources of international law as manifested in different agreements. Furthermore, states are required to observe and act in accordance with international norms and standards. Botswana and South Africa are sovereign states and both states play crucial roles within the SADC region. Cooperation between the two countries is inevitable.

Strict application of domestic laws by the two countries will not solve the question of criminal jurisdiction over armed forces in the territory of one another during peace time. The question of criminal jurisdiction over BDF and SANDF in each other's territory during peace time can only be answered by agreement. As in any agreement, concessions have to be made. In order to answer and settle once and for all the question of criminal jurisdiction over their armed forces while in each other's territory during peace time, Botswana and South Africa can take a leaf from other agreements concluded by developed countries especially the NATO countries with regard to their armed forces abroad during peace time.

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