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CONSTITUTIONAL ASSEMBLY

Theme Committee 6.4

SECURITY APPARATUS

8 May 1995

Large Auditorium, 120 Plein St

08:45 - 17:30

DOCUMENTATION:

**Papers and notes from the technical
advisors**

**Workshop:
Defence and the Constitution**

CONSTITUTIONAL ASSEMBLY

WORKSHOP

THEME COMMITTEE 6.4

SECURITY APPARATUS

MONDAY, 8 MAY 1995

Attached please find the following documentation as background material to Theme Committee 6.4's workshop on defence.

1. List of possible questions to the speakers at the workshop prepared by the technical advisors. (page 1-6)
2. Background reading: The Department of Defence and the final constitution (page 7-23)
3. Synopsis of SANDF presentation (page 24-25)
4. Paper: A disciplined part-time military force is essential to South Africa's national security - Mr S J Macintosh (page 26-32)
5. Paper: Rights and duties of a soldier in a democracy - Mr P B Mertz (page 33-44)

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REPUBLIC OF SOUTH AFRICA
CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 6.4
SECURITY APPARATUS**

WORKSHOP : 8 MAY 1995

VENUE: LARGE AUDITORIUM, 120 PLEIN ST

DEFENCE AND THE CONSTITUTION

08:45 Registration and tea

09:00 Opening and Welcome

Ms Jenny Schreiner, Chairperson Theme Committee 6.4

09:15 **The interim Constitution and a brief comparative audit of other constitutions**

Speaker: Prof Deon Fourie, Unisa

09:35 Discussion

10:00 **Role and functions of the Defence Force: overview**

Speaker: Mr Fana Hlongwane, Ministry of Defence

Respondent: Mr Gavin Cawthra, Military Research Group

10:40 Discussion

11:00 Tea

11:20 **Role and functions of the Defence Force: The Part time Forces and personnel procurement**

Speaker: Brig Joan van der Poel, SANDF

Respondent: Mr S J Macintosh, Editor of African Armed Forces

Respondent: Mr Richard Steele, Conscientious Objector Support Group

- 12:00 Discussion
- 12:20 **Civil/military relations: national security doctrine**
- Speaker: Mr Laurie Nathan, Centre for Conflict Resolution
- 12:40 Discussion
- 13:00 Lunch
- 14:00 **Civil/military relations: The Defence Secretary as a mechanism of civilian control and chain of command**
- Speaker: Brig Jack Grundlingh, SANDF
- Speaker: Col Johan Lizamore, SANDF
- 14:40 Discussion
- 15:00 **Civil/military relations: mechanisms and civilian control**
- Speaker: Mr Geoff Brown, Idasa
- 15:20 Discussion
- 15:40 **Rights and duties of members of the defence force**
- Speaker: Mr Fana Hlongwane, Ministry of Defence
- Speaker: Mr Paul-Bolke Mertz, Military Research Group
- 16:00 Tea
- 16:20 Discussion
- 16:40 **Arms industry and arms trade**
- Speaker : Mr Krish Naidoo, Armscor
- Respondent : Dr Peter Batchelor, Centre for Conflict Resolution
- 17:00 Discussion
- 17:30 **Closure**

"SHOPPING LIST": DEFENCE CONSTITUTIONAL PROVISIONS

As instructed, the list was prepared as a series of questions for the speakers at the workshop. The questions are not exhaustive nor necessarily presented in order of importance. Since some questions are broad, possible subordinate questions, alternative phrasing, and references are included.

1. What should be/not be included in the constitution?

How specific should the constitution be regarding the military? Broadly enabling or more specific?

How wide should be the discretion allowed to Parliament in writing the new defence act?

Basic perspectives on the military?

Background: First, regarding broadly enabling-view, the Canadian presentation (Dr Bland) argued that a constitution mainly spells out the relations among institutions, for example, who is accountable to whom or who is an instrument of whom. These relations are in tune with general constitutional principles; the principles may be repeated but should not be rephrased. ¹

Second, regarding the more specific-view, in general militaries tend to be very literal and generous-to-themselves in interpreting assignments. The military tends to be the strongest state agency and, more than other state agencies, is imbued with a sense of self-importance. Hence the need of carefully circumscribed roles, even if it involves detail.

Third, regarding African countries' constitutions, Robin Luckham's recent survey notes that one of three constitutional perspectives prevail: (i) the control-perspective (stressing civilians', the constitutional, or legislative supremacy); the development-perspective (stressing the military as a leader of or ally in modernisation); or the order-perspective (stressing the military's domestic policing role). Although in the abstract complimentary, in terms of the constitution the perspectives are contradictory (for example, giving the military a developmental agenda may challenge civilian supremacy). Thus constitution-makers must choose. ²

¹ Douglas Bland, The Administration of Defence Policy in Canada 1947 to 1985 (Ontario: Ronald Frye & Co., 1987)

² Robin Luckham, "The Military, Militarization and Democratization in Africa: A Survey of Literature and Issues", African Studies Review Vol 37, No 2 (September 1994).

2. What items of the Interim Constitution can/should be/ought not be changed?

What items not relating to general constitutional principles does the speaker wish to have changed and why?

Identification of the specific political compromises included in the Interim Constitution?

Background: The Interim Constitution includes specific political compromises of 1990-1994 period, for example the commitment to maintain a SANDF that is a "balanced, technological..." force. Should these be preserved?

3. What are the legislature's powers in approving/ratifying the use of the SANDF in a state of National Defence and SOE?

If the President has the power to declare both a State of National Defence and Emergency, how soon must the legislature be informed and given the chance to approve/disapprove when in sitting?

How does the notification and chance of approval/disapproval work when the legislature is not in sitting?

Should the procedures and time-frames be the same for a State of National Defence and Emergency?

Background: First, the democratic ideal is for all wars to be "people's wars"; that is, the majority of the citizens, through their legislative representatives, support the non-routine deployment of the military. The executive has discretion but the people must be consulted as soon as possible.

Second, in the case of an SOE, the same counts but there also is an additional need for money to be released. Thus SOEs also are "people's SOEs".

4. What are the judiciary's powers regarding the declarations of State of National Defence and Emergency?

Can the judiciary declare the actions of the legislature and/or the President unconstitutional?

Should the courts be left with the discretion about what is constitutionally correct?

Who has jurisdiction over security agencies' actions during an SOE? The civil courts?

Who has jurisdiction over civilian crimes committed by soldiers?

Background: First, in countries that practise constitutional democracy, the judiciary's powers are greater than in countries practising parliamentary supremacy.

Second, even when the judiciary's powers are not spelled out, wars and SOEs usually lead to a flurry of court cases (for example, insurance disputes and conscientious objection). Hence the need to be specific about the judiciary's powers. ³

5. What are the issues, benefits, problems etc associated with the SANDF's "backup role" of the SAPS?

Should the SANDF's backup role remain very broad (assisting when any of the essential services provided by the SAPS are interrupted)? More specific, for example, only when certain kind of essential services are interrupted?

Are the procedures used in the backup role adequate? For example, must the SAPS request it or should someone not in the SANDF and SAPS invoke the deployment?

Background: The backup role traditionally poisoned relations between the SADF and the SAP (the latter, in effect, having to request the help of the SADF) and discouraged the police's professionalism (the SADF always being available in cases of failure).

6. What are the issues, problems, costs, benefits, etc associated with various views of the SANDF's duties?

Background: (Views of contemporary militaries' duties are difficult to summarise but for purposes of discussion)

Minimalist views could be described as that a military's main functions relate to address coercive/military challenges originating outside the country's territory/from non-citizens. These views usually do not assign domestic

³ See Robin Higham (ed), Bayonets in the Streets: The Use of Troops in Civil Disturbance (Lawrence: University of Kansas, 1969) and Robert Rankin, When Civil Law Fails (Durham: Duke University Press, 1939).

duties, except for temporary support of the police force's public order duties and during states of emergency.⁴

Broader views could be described as that a military's functions include addressing, in a determined order of importance, military and non-military challenges originating from citizens and non-citizens. These views often say the coercive/external duties remain primary but make possible domestic duties beyond temporary public order and emergency situations.⁵

For SA, what should be the order of importance in military duties? For example: (a) coercive foreign challenge; (b) non-coercive foreign challenge; (c) domestic backup of SAPS; and (d) domestic backup of agencies other than the SAPS?

Should separate provisions and procedures exist for (a) through (d)? For example, in the case of (a), ongoing involvement and primary operational status for the SANDF? In the cases of (b), (c) and (d), SANDF involvement on civilians request only? Ongoing SANDF involvement but within narrow scope?

Problems that do not fit neatly into any state agency's field, for example, non-coercive challenges along edges of territory on land (immigration/border security/refugee) and at sea (violations of the economic zone)? Should the SANDF carry primary responsibility for these? Be involved only at civilians agencies' request? Excluded?

7. What are the issues, problems, costs, benefits, etc associated with the Department of Defence?

In terms of money requested, should the DOD have a primary/determining role in the SANDF's identification of its financial needs? A more secondary role, for example, assisting the SANDF in identifying financial needs?

⁴ Samuel Huntington's The Soldier and the State (New York: Vintage Books, 195) remains the bible of this view. Critics note that most contemporary threats are (a) only partly military in nature and (b) straddle the dividing line between external and domestic.

⁵ For the broad view, see Barry Buzan, People, States and Fear: The National Security Problem in International Relations (Chapel Hill: University of North Carolina Press, 1983). Reception of this book has been mixed, with critics noting that Buzan (a) underestimates the coercive challenges facing contemporary militaries and (b) legitimates military involvement in developmental affairs which disempowers civilian supremacy in the developmental process.

In terms of money spent, the DOD's and SANDF's accountabilities?

In terms of expertise, the DOD's contribution to or role in the SANDF operations?

Background: First, historically the SADF and DOD fought a long battle, mainly over their different views of budgetary demands. In 1966 the DOD finally lost its say in drawing up the budget. Second, the SADF over time developed an acute hostility to civilians' contribution to defence issues. The prevailing view - reflected from the Military Academy down to promotions - is that operational military experience overrides civilian skills (like educational qualifications).

8. The general consistency of the SANDF's internal procedures with the Constitution?

Besides questions relating to the Ombudspersons and the Security Commission(s):

Consistency with or justifiable deviation of soldiers' code of conduct from the Constitution's provisions and other relevant legislation?

Consistency with or justifiable deviation of internal disciplinary procedures from the Constitution's provisions? Constitutional specifications regarding the SANDF's recruitment, appointment, promotion and dismissal?

Background: The SADF developed into an institution many have described as "traditionalist"; that is, strictly hierarchical, command- rather than management-oriented, and with too great a differentiation from civilian professions. The disciplinary system supporting this hierarchy has been described in print as "jungle justice".⁶

9. Military powers of provinces or the position of provinces in the military system

Positive and negative aspects of provinces' control over any assets of the first tier/central military (for example, the reserve)?

Background: First, provinces' control over assets usually flow from a confederal military history (independent states, each with own military).

⁶ African Defence Review Issue No 17 (July 1994) contains most articles on these issues.

Second, from the efficiency viewpoint, centralisation is preferred, especially over the activation of the reserve forces. Decentralisation delays mobilisation.

Third, despite the mythology surrounding them, the combat performance of reserve forces usually is quite low. Even in COEs, the reserve's performance is lower than the central military.⁷

10. Military powers of provinces during a state of emergency.

Should the provinces be able to use, without central/~~first~~ tier consent, military assets during a state of emergency?

Background: A great deal depends on how an SOE is defined. If not made by humans, the disaster rarely would stop at a provinces boundaries. Earthquakes, floods, droughts, hurricanes and cyclones rarely stop and start at provincial boundaries.

Annette Seegers
4 May 1995

⁷ Juan Williams, Eyes on the Prize (Harmondsworth: Penguin, 1987) and the various US Government Commissions on the riots of the 1960s and later are unanimous on this issue. In the recent Gulf War, not a single reserve unit was assigned combat duty, despite extensive and rapid training.

THE DEPARTMENT OF DEFENCE AND THE SOUTH AFRICAN FINAL CONSTITUTION

Dr. Jakkie Cilliers, Director, Institute for Defence Policy

Appendix A: An extract from the Interim Constitution relating to the military

Appendix B: A summary of proposed measures to be included in a Final Constitution

SCOPE

The scope of my presentation will be as follows:

- what is civilian control of the military;
- why is this necessary;
- how is this achieved;
- the South African Constitution of the future;
- conclusion on problematic issues.

WHAT IS 'CIVILIAN CONTROL OF THE MILITARY'?

In the study which IDP undertook towards the recent establishment of a Defence Secretariate, we defined **civilian control** as a condition to be achieved which ensures that the military operates in accordance with the constitution and the wishes of Parliament.¹ But while the armed forces should be under firm political control, this does not totally exclude them from participation in the debate on national security issues. Military involvement in political decision making is both desirable in certain instances (typically those related to national security) and cannot be avoided. The challenge facing democracies is therefore that of placing appropriate limits upon the level and scope of such involvement. We should be very clear that **civilian control implies civilian accountability**. If parliament decides to reduce the defence budget below certain levels, it is parliament which accepts the risk.

Military force, in particular, is not an end in itself but the primary means that the civilian authority can use in defence of the country. Armed Forces are an instrument of state policy, particularly foreign policy. Civilian and more particularly constitutional and parliamentary control measures of the Security Forces should not usurp or interfere in technical matters and the military chain of command or authority. They are aimed at the integration of the Security Forces into a democratic society, strengthening mutual trust between the public and these agencies and promoting a sense of honour within the Security Forces in serving a democratic, constitutional state.

WHY IS PARLIAMENTARY AND CONSTITUTIONAL CONTROL NECESSARY?

There are two fields of tension which exist in a democratic state as regards the military and which have to be reconciled:

- the power concentration of military assets, which makes a defence force efficient and powerful, *versus* the restriction of power required by democratic control; and
- the freedom/rights of the individual, *versus* the requirements of authoritarian-type military discipline and order.

* Paper delivered at a seminar The Security Forces and the Constitution, hosted by the Institute for Defence Policy for Theme Committee no 6 of the Constitutional Assembly, 14-15 February 1995, Cape Town

¹J. Cilliers & B. Sass, *Proposed DoD and SSD Structures for the Future South African National Defence Force*, in the African Defence Review, no 16, April 1994, pp. 1-16

Because of its proximity to the center of political decision-making power, the military is in an excellent position to influence the policy-making process through its chief executive and hierarchical command structure. The military is, in fact, unique among bureaucratic interest groups regarding access to political resources. It enjoys:

- a high degree of organizational and logistic autonomy;
- a formidable pool of managerial skills; and
- has a monopoly on the employment of the state's instruments of coercion.

An effective democracy therefore requires civilian control of the military since military forces have been and always will be susceptible to manipulation by political groupings whose purpose it may be to use these forces to control, capture or replace Parliament. Equally, individual military commanders may abuse their authority to turn the forces against the government and Parliament and thus seize power. Such control exemplifies the principle that military force is not an end in itself but a means that the civil authority may use to bring about political objectives. As a result, in parliamentary democracies the Parliament, as supreme authority of the people, should decide on the allocation of resources for defence as well as the control thereof.

As an additional set of measures, the planning for defence and responsibility for the provision of resources for defence at the highest level is designated to civilian administrative authorities, as opposed to only military persons. This form of control is more precise, direct and quantitative. It translates political and civilian control into practice. It is for this reason that we have pushed so hard for the establishment of a civilian Defence Secretariate.

The problem of armed forces in a democracy, therefore, is **how to limit the power of the central executive, on the one hand, and of military commanders on the other**, thus ensuring that the forces serving the nation fulfill only their intended purpose.

HOW IS CIVILIAN CONTROL OF THE MILITARY ACHIEVED?

Civilian control of the military is the end result of national tradition and a complex set of measure, both formal and informal, within government, in civil society and the military themselves. Collectively they set out the parameters within which the military operates within any particular society. For our purposes these can be divided into three categories:

- The first category are those measures which could either be contained in or be derived from international law, the constitution or normal legislation (typically the defence act). It is possible to categorize these in terms of the legislature, the executive and the judiciary.
- The second category are those elements which falling outside the ambit of the formal state, i.e., in civil society. Typical of these would be the role of the media, independent academic institutes, the political traditions of the country, and so forth.
- Finally, and very important, are those elements related to the military itself - its culture, the nature of the military disciplinary system, recourse to channels of restitution, the role and tasks of the military (such as its internal involvement, etc.)

These categories are represented schematically in Figure 1.

It is important to note that civilian control is the collective result of all of these measures. The absence of one or more category, such as the absence of an institutionalized professional apolitical culture does not mean that lawyers or politicians can compensate for this deficiency with a greater degree of formal control measures, additional acts, etc. In South Africa, because of the perception of a lack of civilian control of the former SADF, the interim constitution has bent over backwards to include within it any and all constraints that the various negotiators at Kempton Park could think about. As a result there is considerable duplication, and excessive constraint placed on the military - something which provided an additional degree of security for some who feared the resurgence of military involvement in politics, but which we should carefully reconsider when drafting a final constitution. This is a theme to which I will return.

The implication of effective civilian control is that the military is not only subservient to political leadership, but that its leadership may also have to countenance intervention in what it may consider to be professional military matters, insofar as these affairs have political implications or ramifications.

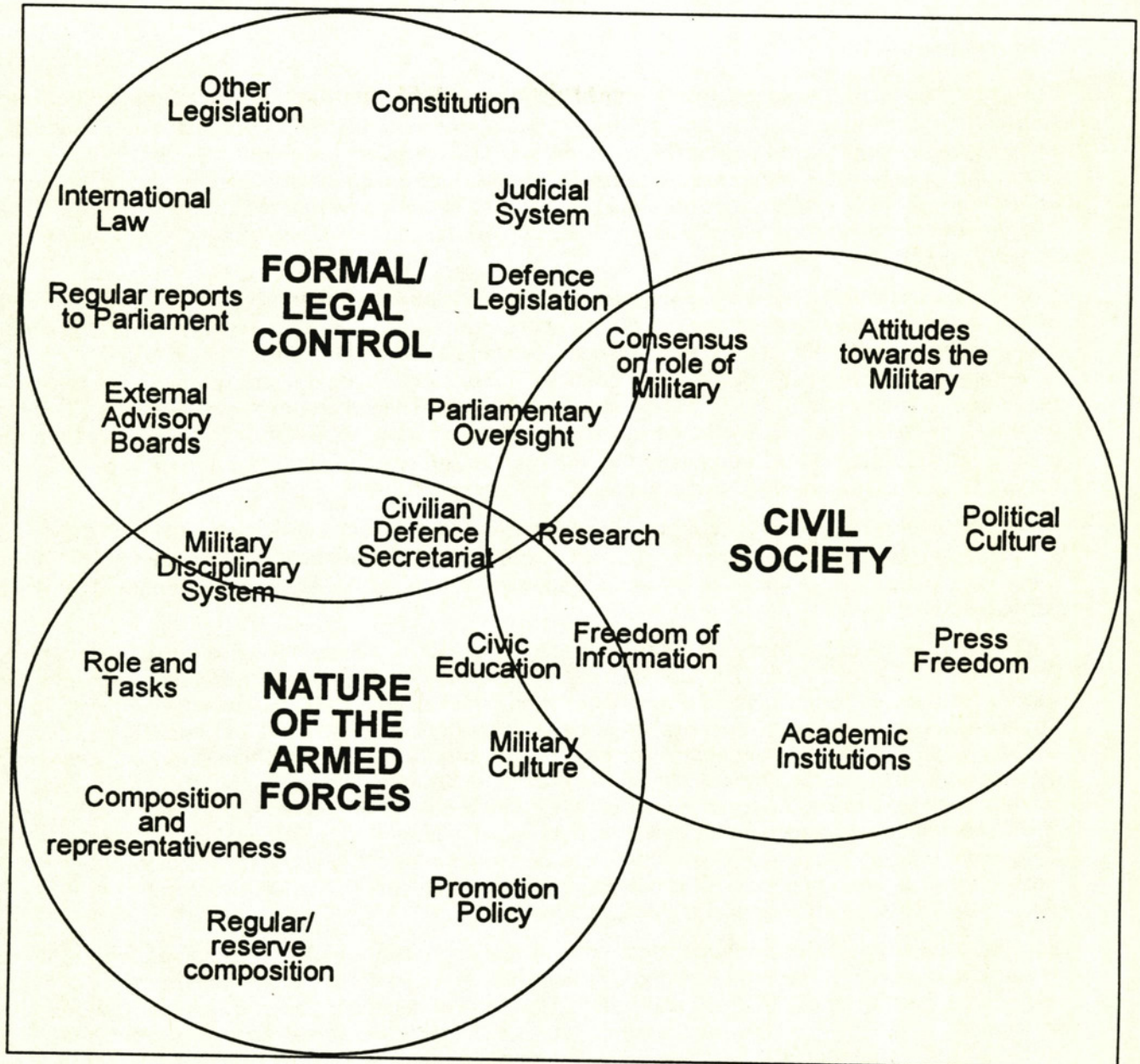


Figure 1: Civilian Control of the Military

Obvious aspects in this regard include the role and mission of the military, its manpower policies, force structure and armaments. Such control then, is wide-ranging and pervasive. Indeed, the principle of civilian control is a requirement of military professionalism in a democracy.

Such control does not, however, imply interference in the tactical decision-making of military operations in the field. These must be left to the appropriate military commanders, though civilian control will ensure a closer linkage between military operations and political objectives.

Legal Control

The legal basis for the armed forces should be provided by **international law**², the **constitution**, **national defence acts** (such as the Defence Act, No. 44 of 1957) and **other legislation**.³ The content of these four determines the position of the military and its members internationally, within the state and within the armed force themselves. Legal knowledge and understanding of this should be part of virtually all non-technical training and should be debated at every level thereof. This is the reason why this type of training, generally known as **civic education**, should be an integral part of all military training at every level.

One classical method of ensuring civilian control of the armed forces is to allocate the responsibility for broad defence policy and provision of resources for defence at the highest level to **civilian administrative authorities** (such as a Defence Secretariate) within the Ministry of Defence (as opposed to purely military bodies). As a result, detailed defence planning to satisfy such defence policy requirements is characterized by close co-ordination between civilian and military authorities. This form of control is more precise, direct and quantitative than an internal military alternative. It translates political and civilian control into practice⁴ in accordance with what Clausewitz referred to as 'preparing for war', a civilian responsibility, and 'war itself', a military responsibility.

An additional mechanism adopted in countries such as Sweden, Finland, Norway, Germany, Portugal, Australia and Namibia is the creation of the office of a **military ombudsman**⁵. The purpose of such an office is to ensure fair treatment of citizens engaged in military service and the treatment of the general public by the military.

While the Institute for Defence Policy has been at the forefront of calls for the institution of such a post in South Africa, a word of warning is appropriate. Whereas the office of a military ombudsman has proven successful in stable democracies, the record of the ombudsman in emerging democracies (particularly in Africa) has been disappointing. Examples close to home are those of Swaziland, Zimbabwe and possibly even Namibia. At the end of the day the question of a separate office of an ombudsman on defence can only be judged by looking, inter alia, at the other mechanisms that any final constitution will contain, such as a Public Protector, etc. Too excessive a degree of overlap and too complex a system of checks and balances can in themselves detract rather than add to effective civilian control. Military Ombudsmen are at their most effective if there is a system of compulsory conscription. By the very nature, all-volunteer armed forces experience much less problems in requiring systems of recourse for persons who do not wish to be part of the armed forces.

Regular, open reports to parliament are an essential control mechanism. Examples are the annual defence budget, the report of the auditor general, regular defence white papers, reports by the ombudsman on defence (if applicable), reports and investigations by the various parliamentary committees which deal with related aspects, etc. Of these the defence budget is clearly the most important for it subsequently determines or influences the manpower, force structure and objectives of the forces. As a result it should be discussed in public and approved by parliament.

The parliamentary institutions may also include other **external advisory boards and councils** which assist the defence force in certain aspects such as training and development and further integrate the military into civilian society and entrench accountability to civil society. Typically such boards could deal with broad defence policy issues, research advice, etc.

²See Botha, N., *The Role of Public International Law in the South African Interim Constitution Act 100 of 1993 and its effect on the South African Defence Act No 44 of 1957*, in Cilliers, J.K. (ed.), Revision of South African Defence Legislation, Institute for Defence Policy, Halfway House, September 1994, pp. 1-8.

³In South Africa this last category would, until recently, have included the Security, Intelligence and State Security Council Act, No 64 of 1972; the Protection of Information Act, No 84 of 1982, the Security Services Act, No. 56 of 1978; the Security Services Special Account Act, No. 81 of 1969, the National Key Points Act, No. 102 of 1980; the Defence Special Account Act, No. 6 of 1974; the Armaments Development and Production Act, No. 57 of 1968; and the Security Forces Board of Inquiry Act, No. 95 of 1993. See Cilliers, J.K. *An outline to effect Defence Related Legislative Reform*, in Cilliers, J.K. (ed.), *ibid.*, pp. 11-17.

⁴See Cilliers & Sass, *op. cit.*

⁵See Watters & Partners, *The Military Ombudsman*, in Cilliers, J.K. (ed.), *op. cit.*, pp. 114-116 and P. Mertz, *The road to mutual trust: the office of an Ombudsman on Defence*, in the (South) African Defence Review, no. 1, 1992.

Ideally the armed forces and national security policy should be placed above party politics and the military should be **controlled by parliament** and not simply by the majority political party or coalition. It is for this reason that most parliamentary defence committees (such as those of Germany and indeed of our interim constitution) have wider membership than most other committees.

The Nature of the Armed Forces

In a democracy the conflicting requirements of the constitutional rights and duties of the individual on the one hand and the requirements of service within the autocratic armed forces demand a careful balance. The soldier, whatever his or her rank, must be protected from abuse by his seniors and have **recourse to effective and impartial channels of restitution**. This impinges on how military discipline is applied and on the content of any military disciplinary code. In effect the **military disciplinary system** forms an integral part of civilian control of the armed forces. In South Africa, our MDC (Military Disciplinary Code) is very much an outdated version of the British Queens Regulations, although some adaption and development to suit local conditions have occurred. Given the probable nature of our final constitution there is little doubt that an early start will have to be made to redraft this Code in its entirety. Such a redraft should lay the foundation to ensure the maintenance of discipline in the armed forces, in time of peace and war, for generations to come.

Other factors which affect the 'match' between the armed forces and the broader society can be listed as follows:

- the military personnel composition which should ideally reflect the broader population without perpetuating social cleavages within the military (this is most readily achievable through conscription, although obviously unfeasible in South Africa at present);
- no undue political interference in the promotion policies and appointments of military officers;
- a larger reliance on reserve rather than full-time forces;
- institutional socialization within the armed forces which stresses the rights and responsibilities of all citizens, including basic human rights (i.e. civic education and non-formal culture transfer and communication);
- the functional training of military leaders is supplemented by liberal education; and
- if there is sufficient vertical and/or lateral socio-economic mobility for military personnel

None of this is possible unless you have a **highly professional military**, based on careful **leadership selection** and uncompromising **standards of selection and promotion**. Nor is it possible if the armed forces are not part of a broader political culture of democracy and respect for individual rights.

Relationship between the Military and Civil Society

The same requirement for care applies with regard to **secrecy and the legitimate need of an open society for information**. A balance is required between what is in the interests of the security of the state and what the public has a right to know in a democratic society. There is, in fact, a very small area in defence work which is really sensitive. An open, free and democratic society is characterized by a free flow of different and contradicting opinions and pursuit of interests. The armed forces are part of this society and should not be allowed to divorce themselves from it. The defence force and its soldiers (as individuals) should therefore participate in public discussions with self-confidence and on their own initiative. In similar vein, there should be no restriction on members of the armed force (or the police service) to become members of any legal political party, but there is a case to be made for some restriction on the degree and manner to which the soldier can exercise his/her political and labour rights.

The establishment of **civilian/expert advisory boards and social research organisations** is a crucial area which the Institute for Defence Policy and similar organisations/institutes/NGO's, have an obvious vested interest.⁶ By allowing research and comment, the relationship between the armed forces and society are strengthened.

Vitally important is a clear definition of the (limited) role of the military and a broad consensus between soldiers and society that this role is just and appropriate. To many defence analysts this is a major

⁶See IDP submissions to CODESA Working Groups 1, 2, 3 and 4, dated 2 March 1992 and 8 May 1992.

concern in South Africa at present. There is simply no consensus on our national security policy or any element thereof. There is no elite consensus and there is no general consensus. Perhaps the most classical is the future of our defence industry, which the President publicly supports at one level, but which we are destroying bit by bit on the other.

CONSTITUTIONAL CONTROL OF THE SOUTH AFRICAN MILITARY

Introduction

I now come to the topic under discussion today and of relevance to Theme Committee 6 and subcommittee no 4 specifically namely those measures which should be included in any final constitution regarding the armed forces.

In a constitutional democracy the constitution is supreme. As we have seen earlier, **legislative control** can typically be divided into that contained in the constitution and that in other legislation. The former is typically entrenched, the latter not - and much of the deliberations of Theme Committee 6 will, I suspect, focus on finding the balance between these two. Our Interim Constitution (Act no 200 of 1993) reflects a very developed form of constitutional control over the military. Appendix A contains an extract of all those clauses in the present Interim Constitution which impact upon the military. It is apparent that there is some duplication and repetition.

The Interim Constitution also contains a number of peculiarities related to the transition, i.e. a number of clauses which one would not find in the typical liberal and democratic constitution. In fact, the typical liberal constitution is substantially less prescriptive than that of the present South African Constitution. Given the South African context the continuation of such an arrangement, possibly slightly reduced, would be beneficial so as to entrench nation building and reconciliation. It would also provide other countries with some degree of confidence that the South African armed forces (in particular) are under firm parliamentary control and pose no threat to them, but serve to protect South African sovereignty and interests.

At present the Interim Constitution provides the legal constitutional basis for the (South African) National Defence Force (SANDF) in sections 224 - 228 (Chapter 13) as well as in a number of other Chapters. In the sections which follow, I discuss those elements which I believe should form part or be included in any final constitution. This is summarized in Appendix B.

The Supremacy of the Constitution and Fundamental Rights

The constitution must be the supreme law of the Republic, binding on all legislative, executive and judicial organs of government. Only the declaration of a state of emergency or national defence/war should lead to some regulated suspension of the fundamental individual rights. The Armed Forces are part of the executive branch of Government and must therefore be bound by that supremacy. They should not be used, nor should they demand to 'defend or protect the constitution'. That is the task of parliament and the judiciary who should ensure that the military act in accordance with the letter and spirit of the constitution.

The Interim Constitution presently provides that the fundamental rights may be suspended only in consequence of the declaration of a state of emergency (where the security of the Republic is threatened by war, invasion, general insurrection of disorder or at a time of national disaster) and only to the extent necessary to restore peace or order. Section 34 provides for a State of Emergency to be proclaimed by Act of Parliament and could provide special powers to members of the National Defence Force. The interim constitution does not provide for the definition of a separate state of national defence/war (this apparently being seen as included under the provisions providing for a state of emergency). Yet in terms of section 82(b)(i) the President may, with the approval of Parliament, declare such an undefined state of national defence. It is not clear what the situation would be should Parliament not be able to convene because of an attack, disaster, etc. Clearly provision needs to be made for this eventuality since the country could in effect be left in limbo. We submit, therefore, that a state of emergency and the provision contained in Section 34 should apply only for the following: general insurrection or disorder, natural disaster or if necessary to restore peace or order. We further submit that separate provision be made for the declaration by the President of a state of war or national defence, subject to ratification by Parliament within 7 or 14 days, and that such a state of war/national defence may only be declared upon an attack originating from outside the borders of the Republic of South Africa. Obviously the President must be provided with certain powers in this regard including the suspension of fundamental rights.

Finally we recommend that consideration be given to a crisis or emergency Parliament of a reduced number which could, in time of crisis through natural disaster or war and at a time when the President has been incapacitated, declare an immediate state of emergency or state of national defence/war subject to ratification by the full parliament within say 14 or 21 days.

The new Constitution should allow legally enforceable military conscription should Parliament so legislate. Whilst it is, at present, difficult to foresee any eventuality which would require such a drastic measure, the Final Constitution must be able to cater for even the most unlikely situation.

Finally, members of the Security Forces (defence, police and intelligence agencies) and the Correctional Services should not have the right to strike, assemble and/or demonstrate. No party-political activity should be allowed on premises occupied or under the control of the Security Forces. Regular members of the Security Forces should not be allowed to stand for election to public office.

The South African National Defence Force

The National Defence Force should, subject to the Constitution, be employed: for service in defence of the Republic, for the protection of its sovereignty and territorial integrity; for service in compliance with the international obligations of the Republic with regard to international bodies and other states; for service in the preservation of life, health and property; for service in the provision or maintenance of essential services; and for service in the upholding of law and order in the Republic in co-operation with the South African Police Service where the Police Service is unable to maintain law and order on its own; and for service in support of any department of state for the purpose of socio-economic upliftment.

A word of caution. There is a fair degree of consensus internationally amongst students of civil-military relations that the semi-permanent involvement of the armed forces in internal law and order duties (such as that in which the SADF and now the SANDF has been involved in since the late seventies) and/or in socio-economic tasks (such as involvement in support of the Reconstruction and Development Programme) as we are now planning inevitably leads to the politicization of the military, it undermines professional standards and lowers morale. South Africa will be no exception to this general rule.

These sections dealing with the relationships between the head of state and the National Defence Force which are discussed below are in line with internationally accepted principles. They outline the position of the Head of State as the Commander-in-Chief of the armed forces. As the Commander-in-Chief his/her command is recognised in the Military Disciplinary Code and forms part of the military chain of command. This relationships between the President and the National Defence Force is one of the aspects making the force different to any other department or the rest of the public service.

The Interim Constitution includes the following provisions on conduct and accountability, most of which are standard international practice and which should be retained in any Final Constitution.

- The President is the Commander-in-Chief of the SANDF.
- The President appoints the Chief of the SANDF.
- The Chief of the SANDF exercises military executive command of the armed forces subject to the directions of the Minister of Defence and, during a state of national emergency and/or defence/war, the President. Although the constitution provides for the appointment of a Deputy Minister (of Defence), such a Deputy Minister should not be part of the executive command chain between either the President and the Chief of the SANDF (in time of emergency or national defence/war) or between the Minister of Defence and the Chief of the SANDF in all other times. Nor should any person (such as a Deputy Minister of a Defence Secretary) be appointed in the executive command chain above the Chief of the SANDF. The command chain from the President and Minister of Defence should be kept as clear and unambiguous as is possible.
- The establishment of a civilian Defence Secretariate could be dealt with either in the Constitution or in the Defence Act but should clearly stipulate the responsibilities of this office such as financial accountability.
- The President must be able, with the approval of Parliament, to declare a state of national defence/war or a state of emergency. Arguably any partial state of emergency, within a particular province, for example, should only be declared after consultation with the Premier of that province.

- The President must be able to employ the SANDF in accordance with its functions and subject to the accountability outlined below but must inform Parliament forthwith of his/her reasons for the employment of the SANDF. Parliament should, of course, be able to terminate any such employment by resolution.
- The Minister of Defence must be accountable to Parliament for the SANDF.

The Interim Constitution specifically provides for a joint standing committee of Parliament on defence, consisting of members of all political parties with more than 10 seats in the National Assembly and willing to participate in the committee and with powers to investigate and make recommendation on the budget, functioning, organisation, armaments, policy morale and state of preparedness of the SANDF, and to perform such other functions related to parliamentary supervision of the force as may be prescribed by law. In terms of Section 58 the Constitution the National Assembly or the Senate may make separate or joint rules and orders in connection with the conduct of its business and proceedings, including the establishment, constitution, powers and functions, procedures and duration of committees of Parliament.

- At present, in terms of its Section 58 powers on rules and procedures, Parliament has created a portfolio committee on defence. This potentially creates complexity, duplication and even conflict between the two committees of the National Assembly.
- This aspect should perhaps be revisited. The final constitution could merely provide for the establishment of a (single) Multiparty Standing Committee on Defence of the National Assembly with, amongst others, the powers to deal with defence related bills (including money bills) and monitor, investigate inquire into and make recommendations relating to any aspect relating to the Department of Defence. This committee should also have the power to convene itself (or a part of itself) as a commission of inquiry into any matter related to the Department of Defence. Membership of the Defence Committee should be as inclusive as is practically possible. Further regulation of this committee should occur in terms of the rules and orders of Parliament. The National Assembly should not, therefore, establish other Portfolio Committees on Defence.

Other elements in the present Interim Constitution which should be retained in some form are as follows:

- The SANDF shall perform its functions and exercise its powers solely in the national interest, under the directions of the Government and in accordance with the Constitution and law. The important element contained in this section is the emphasis on the national as opposed to Government interests.
- The references, in the Interim Constitution, to the obligation that the SANDF should conform to international law on armed conflict and international customary law [section 227(2)(d) and (e), for example] are laudable, but merely serve to repeat section 231(4). As such they are superfluous.
- Members of the SANDF shall be entitled to refuse to execute any order where such execution would constitute an offence.
- The establishment, organisation, training, conditions of service and other matters concerning all members of the SANDF should be provided for by a separate Act of Parliament.
- Parliament must annually approve the defence budget.

A separate office of a Military Ombudsman/person should also be considered. In deciding upon this the Theme Committee should look closely at the powers and scope of the Public Prosecutor and Human Rights Commission, if retained in a final constitution, so as to reduce overlap and duplication. At the same time clear provision should be made to provide for sufficient recourse of complaint by both members of the National Defence Force and the public.

We do not believe that the SANDF should be constitutionally restricted to a defensive brief to the degree that is done within the Interim Constitution. At present the relevant sections [Section 227(2)(f) and (3)] essentially read that the National Defence Force shall be primarily defensive in the exercise or performance of its powers and functions as regards employment for service, training, organisation and deployment.

The final Fundamental Rights should provide for the right to access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or

protection of any of individual rights. [Section 23] There should be a freedom of information act to support this right.

The Defence Act and other Acts of Parliament also have a bearing on the control and accountability and will have to be revised in the light of the new constitution.

Finally, a separate **Security Forces Commission** which would perform the same functions as the Public Service Commission should be established to regulate the service and other conditions of these departments. All members serving within the Departments of Defence, Safety and Security, intelligence agencies and Correctional Services should fall under the jurisdiction of this Commission which shall have the same competencies as that of the present Public Service Commission [Chapter 13 in the Interim Constitution]. The Public Service Commission would therefore lose its powers and functions over the persons in government employment in these departments. We wish to emphasize the inclusion of all employees of the mentioned elements, not only so-called 'members in uniform', although the Security Forces Commission would obviously distinguish between the different categories of persons in service within the various departments (such as administrative, combat and police functionaries). This recommendation could obviously affect the present Section 212(8) of the interim constitution which includes the permanent force of the SANDF as part of the public service.

CONCLUSION: ISSUES AND PROBLEMS

In this final section I wish to simply list a number of related issues which will impact upon the debate regarding the future control and accountability of the armed forces. Some of these issues may be politically sensitive therefore I do not wish to comment upon them apart from expressing our view that these are issues that require some attention.

The first issue I wish to raise relates simply to **the intensifying crisis in law and order**.

Since about mid-1994 IDP has started warning that a crisis is building up with regard to the police and the military. A crisis of low morale, reduced effectiveness versus a culture of entitlement in large areas of the disadvantaged population threaten to engulf our society with police shooting at police, swearing at one another and racial tension bursting into the open. A recent Financial Mail article on '*Changing the guard*'⁷ concisely summarizes our concerns in this regard:

Racial feuding, mutinies and indiscipline in the police threaten not only the service but law and order throughout society and ultimately the prosperity of the entire nation. If the police cannot behave as police, crime will flourish, political violence will escalate, social upliftment will stall and what hope there is of attracting foreign investment will wither.

Earlier we warned that '*The challenge facing the SAPS in transition is ... massive. ... there appears to be little chance of the Government being able to reduce its reliance upon the military to support the police in large areas inside the country despite the uniform unpopularity that this role engenders amongst military commanders and analysts across the spectrum. An unemotional analysis would indicate the support for the SAPS in internal law and order duties will remain a semi-permanent task of the SANDF for many years to come. ... Given this analysis, the greatest danger is that we could 'overload' the SANDF and thereby set the scene for presently unimaginable developments. In particular the rapid unionization of that organisation, a massive decline in operational standards, breakdown in discipline and the effective (if not actual) disintegration of the military within a matter of years.*'⁸ To be very blunt, if neither the police nor the military can maintain law and order, then who will? There is a crisis developing which we dare not ignore. More than any other government department, the transition of the armed forces and the police should be dealt with carefully and conservatively.

A second issue is the problem of **responsibility for public order policing and possibly also that of border security/border control**. In terms of the Interim Constitution the National Police Commissioner is responsible for both:

- according to Section 218(1)(j) the commissioner is responsible for '*such functions relating to border control and the import and export of goods as may be assigned to the Service by law*'; and

⁷ 10 February 1995, p. 24

⁸ J. Cilliers, *Rethinking South African security Architecture*, in the African Defence Review, No. 20, December 1994, pp. 18-19

- in terms of Section 218(1)(k) for 'the establishment and maintenance of a national public order policing unit' to be deployed in support of and at the request of the Provincial Commissioner. The President may, however, in consultation with the Cabinet, direct the National Commissioner to deploy the unit in circumstances where the Provincial Commissioner is unable to maintain public order and the deployment of the unit is necessary to restore public order.

There is considerable proof that the poor image of the Internal Stability Division (ISD) of the SAPS is detrimentally affecting the image and acceptance of the police as a whole. Some members of the police would like to rid themselves of the ISD function. At a minimum the new National Commissioner is committed to revamping the ISD in its entirety. Some analysts even argue for the abolition of such a function in its entirety. This, in my estimation, would be a grave mistake, necessitating yet further involvement of the SANDF in support of internal law and order functions.

Although political protest has declined in South Africa, non-political violent protest is on the rise. Given the culture of entitlement rampant in our society, violent demand-negotiations appears to be on the increase. As the local government elections draw nearer, we need to ask ourselves who will break up taxi blockades once intransigence sets in, who will evict persons from illegally occupied buildings and land, who will end the illegal plundering of marine and other resources, and who will release hostages taken in support of wage and other negotiations? Even the most legitimate, community-oriented police service in South Africa will require a public order unit to call upon once a situation spirals into violence, property is destroyed or people are injured. Without labouring the point, there are three options with regard to any future public order police organisation:

- they stay as part of the SAPS, but as a very distinctive and separate force;
- we create a separate organisation for public order policing which is neither part of the police nor the military (such as the German Bundesgrenzschutz); or
- the task of public order policing is given to the military. In this case we have suggested that the functions of public order policing be combined with border security and control or with rural policing (following the Gendarmerie example).

There is a difference, you will be told, between border security (a military related function) and border control (a police function). I believe they can be collapsed into one, but space precludes any detailed discussion on these issues.

The issue of border security/control, illegal immigration and the rising tide of xenophobia in most border provinces is a subject which will require extensive policy debate and impartial analysis. Allow me only to point to the proven interrelationship between illegal immigration and a whole host of problems such as illegal cross border trade, particularly weapons, drugs, vehicles, etc. The problem is not the movement of people *per se*, it is the absence of any control of such movement and of these people once they are inside South Africa. In any case, it is probably impossible to effect tight border control between South Africa and its neighbours, even would that be politically desirable or feasible, without this being elevated to the primary function of the SANDF.

Whichever option is chosen with regard to the functions of border security/control and public order policing, this will certainly have legal implications. These may, of course, not be constitutional implications (depending how much detail we wish to include in a Final Constitution, of course).

The SADF and more recently the SANDF have been deployed for many years inside the country in support of the police, particularly in townships. In many areas such as the East Rand this has become a semi-permanent role. Given their lack of resources the police have come to depend upon such assistance. This support is, however, essentially of an *ad hoc* nature and not strategically planned since it is not a primary function of the military. Nor is there clear budgetary provision made for this role. One cannot overemphasize the long-term undesirability of this situation. The nature and ethos of the military and the police are, and should be, different. A blurring of roles between the two leads to competition, politicization of the armed forces, lowering of military professionalism, etc. If we require more emphasis on the internal law and order situation and less to counter any external threat - and we are sure that this is virtually a permanent situation - then rather take resources away from the military and give them to the police than using the military as policemen.

A very similar area of concern is the emphasis that is being placed within parliament, civil society and within the military, of the use of the SANDF in support of the RDP. Members of parliament should

excuse analysts outside of parliament for tending towards the view that the only interest shown in defence issues are those relating to integration and the support of the military for the RDP. Armed forces to not exist for socio-economic reasons. They exist to ensure safety from external aggression, as a foreign policy tool and as a crisis management asset.

A final issue which will severely impact upon this debate is the **degree of control over the military that is given to the provinces**. The extent to which provinces have control over the deployment of regular troops from the national level inside their territories is bound to be a controversial topic. Yet it is a system well established in a country such as the United States. What are we going to do in this country? Will the premier of a province have to give permission for the mobilization of those reserve forces which fall within his territory (either for training and/or deployment)? Will there, in fact, be provision for 'national' and 'provincial' reserves? If so, who will sanction what when it comes to the use of these forces within the borders of the country?

Appendix A: The provisions in the Interim Constitution

THE CONSTITUTION INCLUDING FUNDAMENTAL RIGHTS

The supreme law of the Republic, binding on all legislative, executive and judicial organs of government [4; 7] Fundamental rights may only be suspended in consequence of a state of emergency. [34(4)]

LEGISLATIVE BRANCH

PARLIAMENT

Declares state of national defence [82(4)];
 Annually approves a budget for defence [228(2)];
 Provides by Act for establishment, organisation, training, condition of service, etc. of the permanent force [226(2)];
 Provides by Act for the establishment, organisation, training, state of preparedness, calling up, obligations and conditions of service of the part-time reserve component [226(3)];
 Establishes a joint standing committee competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of the NDF and any other parliamentary supervision prescribed by law [228(d); 58];
 May terminate employment of NDF by President for functions in 227(1)(a), (b) or (e) [228(4)];
 Ratifies or accedes to international agreements negotiated and signed by the President [231(2)];
 Regulates, by an Act, the procurement of goods and services for defence through the appointment of independent and impartial tender boards. Tendering shall be fair, public and competitive. Tender boards shall on request give reasons for decisions to interested parties. [187]

EXECUTIVE BRANCH

PRESIDENT

Commander-in-Chief of the NDF [82(4)];
 Confers and cancels permanent commissions [82(4)];
 Negotiates and signs international agreements [82(2)];
 Appoints Chief of the NDF [225];
 Declares state of national defence with Parliamentary approval [82(4)]
 Directs Chief of the NDF during state of national defence [225];
 May employ NDF for service subject to post facto parliamentary approval [228(4)];
 Must inform Parliament of reasons for employment of NDF forthwith [228(4)]

MINISTER OF DEFENCE

Accountable to parliament [also 228(1)], cabinet and President, acts within cabinet policy [92];
 Directs Chief of the NDF except during state of national defence [225]

DEPUTY MINISTER OF DEFENCE

If appointed, powers and functions determined by President [94]

CHIEF OF THE NDF

Exercises military executive command of the NDF subject to directions of Minister or President (during national state of defence) [225]
 The head of the department or organisational component shall be responsible for the efficient management and administration thereof. [212(2)]

NATIONAL DEFENCE FORCE

The NDF may be employed for:

- defence of RSA
- service in accordance with international obligations
- preservation of life, health or property
- provision or maintenance of essential services
- upholding of law and order in co-operation with Police when Police unable on its own
- service in support of any department of state for socio-economic upliftment

No member of the permanent force may hold office in a political party or organisation [226(6)];

Refrain from furthering or prejudicing party-political interests [227(2)]

Members entitled to refuse to execute an order which would create an offence [226(7)];

Members entitled to refuse to execute an order in breach of international law on armed conflict binding on RSA [226(8)]

May not breach international customary law binding on RSA relating to aggression [227(2)]

Must comply with obligations under international customary law and treaties binding on the RSA during armed conflict [227(2)]

Must be primarily defensive in the exercise or performance of its powers and functions as regards employment for service, training, organisation and deployment. [227(3)]

PUBLIC PROTECTOR

Investigates maladministration, abuse of power, use of state funds, etc. and reports to Parliament [112]

HUMAN RIGHTS COMMISSION

Promotes the protection of human rights and reports to the legislature [116]

COMMISSION ON GENDER EQUALITY

Promotes gender equality [119]

AUDITOR-GENERAL

Audits and reports on all accounts and financial statements, conducts performance audits on request [193]

PUBLIC SERVICE COMMISSION

Investigate and recommend upon organisation, administration, conditions of service, personnel practices, efficiency, etc. of public service and servants. [210] Accountable to parliament. [209]

The public service includes the permanent force of the National Defence Force. [212(8)]

JUDICIAL BRANCH

CONSTITUTIONAL COURT

Interprets Constitution [98]

SUPREME AND OTHER COURTS

Interprets other laws [101;103]

ATTORNEY GENERAL

Institutes criminal proceedings on behalf of State [108]

STATUS OF INTERNATIONAL LAW

Once the President has negotiated and signed an international treaty and Parliament has ratified or acceded to it, such international agreement is binding on the Republic and is part of the law of the Republic. [231]

The rules of customary international law binding on the Republic shall be part of the law of the Republic. [231(4)]

Appendix B: Suggested provisions for inclusion in a Final Constitution

THE CONSTITUTION INCLUDING FUNDAMENTAL RIGHTS

- The constitution should be the supreme law of the Republic, binding on all legislative, executive and judicial organs of government.
- Only the declaration of a state of emergency or state of war/national defence would lead to the regulated suspension of fundamental rights.
- Parliament should be able to introduce compulsory military conscription.
- Employees of the Departments of Defence, Safety and Security and Intelligence Agencies should not have the right to strike and to assemble and demonstrate. Disputes should be referred for compulsory arbitration.
- No party-political activity should be allowed on premises under the control or occupied by of the military, police services or intelligence agencies.
- Regular members of the armed forces, police services or intelligence agencies should not be allowed to stand for public office.

LEGISLATIVE BRANCH

PARLIAMENT

- Declares states of national emergency (in the case of general insurrection or disorder, natural disaster or to restore internal order) or war/defence (in case of foreign attack, imminent foreign attack).
- Annually approves a budget for defence, intelligence and policing.
- Provides, by Act, for the establishment, organisation, training, conditions of service, etc. of the armed forces, the intelligence agencies and police services.
- Establishes a Multiparty Standing Committee on Defence of the National Assembly with the powers to deal with defence related legislation (including money bills) and monitor, investigate, inquire into and made recommendations relating to any aspect of the Department of Defence. The Committee should be able to convene itself as a commission of inquiry into any related matter. Membership should be as inclusive as is possible but the details of this Committee should be dealt with either as separate legislation or in terms of the rules and orders of Parliament.
- May terminate the employment by the President, for any purpose, of the SANDF.
- Declares states of emergency or war/national defence by Act of Parliament.
- Provision should be made for a meeting of a reduced parliament to act as legislature in time of national crisis.

EXECUTIVE BRANCH

PRESIDENT

- Commander-in-Chief of the SANDF.
- Confers and cancels permanent commissions.
- Negotiates and signs international agreements, which Parliament must ratify/agree.
- Appoints the Chief of the SANDF.
- Declares states of national emergency (general insurrection or disorder, natural disaster or to restore internal order), subject to parliamentary approval within 7 days.
- Declares state of war/national defence (foreign attack, imminent foreign attack) with parliamentary approval or unilaterally with subsequent parliamentary approval within 7 days.
- Directs Chief of the SANDF during state of war/national defence and/or during state of emergency.
- May employ SANDF for any service in terms of the constitution subject to *post facto* parliamentary approval at the earliest opportunity.
- Must inform Parliament or the Defence Committee of the reasons for the employment of the SANDF forthwith.

MINISTER OF DEFENCE

- Accountable to Parliament for the SANDF.
- Directs the Chief of the SANDF, except during a state of war/national defence.

DEPUTY MINISTER OF DEFENCE

- If appointed, his/her powers and functions are determined by the President.

CHIEF OF THE SANDF

- Exercises military executive command of the SANDF subject to directions of Minister of Defence or President (during national state of defence/war).
- The Defence Secretary is the financially accountable officer for the Department of Defence and responsible for both policy and administration.

SOUTH AFRICAN NATIONAL DEFENCE FORCE

- SANDF may be employed for:
 - * defence of RSA
 - * service in accordance with international obligations
 - * preservation of life, health or property
 - * provision or maintenance of essential services
 - * upholding of law and order in co-operation with Police when Police unable on its own
 - * service in support of any department of state for socio-economic upliftment
- Members are entitled to refuse to execute an order which would constitute an offence.
- The SANDF shall perform its functions and exercise its powers solely in the national interest, under the directions of the Government and in accordance with the Constitution and law.
- The SANDF shall adopt a defensive posture.

PUBLIC PROTECTOR

- Investigates maladministration, abuse of power, use of state funds, etc. and reports to Parliament.

HUMAN RIGHTS COMMISSION

- Promotes the protection of human rights and reports to the legislature.

COMMISSION ON GENDER EQUALITY

- Promotes gender equality.

AUDITOR-GENERAL

- Audits and reports on all accounts and financial statements, conducts performance audits on request.

SERVICE COMMISSION FOR THE SECURITY FORCES

- Investigates and makes recommendations in terms of organisation, administration, conditions of service, personnel practices, efficiency, etc. of all employees of the Departments of Defence, Safety and Security, Intelligence Agencies and possibly Correctional Services.
- Accountable to parliament.
- The members of these departments and agencies are therefore excluded from the rest of the public service.

JUDICIAL BRANCH**CONSTITUTIONAL COURT**

- Interprets Constitution.

SUPREME AND OTHER COURTS

- Interprets other laws and the Constitution.

ATTORNEY GENERAL

- Institutes criminal proceedings on behalf of the State.

STATUS OF INTERNATIONAL LAW

- Once the President has negotiated and signed an international treaty and Parliament has ratified or acceded to it, such international agreement is binding on the Republic and is part of the law of the Republic.
- The rules of customary international law binding on the Republic shall be part of the law of the Republic.

SUBMISSIONS TO THEME COMMITTEE 6.4 OF THE CONSTITUTIONAL ASSEMBLY REGARDING DEFENCE : SUBMISSIONS BY THE SANDF

ISSUES REQUESTED BY TC 6.4

1. A short briefing on the Part-time Forces of the SANDF. [Presented by Brigadier Joan van der Poel]
2. A briefing on the Defence Secretary as a mechanism of Civilian Control. [Presented by Brigadier Jack Grundlingh]
3. A briefing on the chain of command, particularly as regards the Defence Secretary and the Chief of the SANDF. [Presented by Lieutenant General W. Kritzinger]

OTHER CONSTITUTIONAL ISSUES

PRESENTER : MR FANA HLONGWANE

4. Limitations to fundamental rights with regard to Sec 16 and Sec 17 of the Constitution. Synopsis: The right to assembly, demonstration and petition, as well as the right to belong to labour unions, leads to fragmentation in a service where teamwork and cooperation are both essential elements in the development of a combat team. Should these rights be curtailed in the case of uniformed members of the SANDF, a substitute should be provided to allow collective grievances to be addressed.
5. Functions, duties and responsibilities. Synopsis: The functions, duties and responsibilities of the following are briefly discussed with a view of entrenching them in the constitution:
 - a. The President.
 - b. The Minister of Defence.
 - c. The Joint Standing Parliamentary Committee for Defence.
 - d. The Chief of the SANDF.
 - e. The Defence Secretary.
6. Liability of Citizens to render National Service. Synopsis: It is argued that all citizens may be called upon by Law to render National Service in a State of National Defence.
7. Provincial Powers with regard to the SANDF.

PRESENTER : BRIGADIER JOAN VAN DER POEL

8. Change of nomenclature "permanent force" to "regular force.
Synopsis: Currently the various terms of service leads to confusion as to the status of members serving.

9. Military Pensions. Synopsis: The requirement to pay a special social pension to war veterans who pass a means test to qualify for such a pension.

(Draft)

A DISCIPLINED PART-TIME MILITARY FORCE IS ESSENTIAL TO SOUTH AFRICA'S NATIONAL SECURITY: Mr SJ MacIntosh

As the Interim Constitution sets out in section 226 sub section 1, provision is made for the employment of Part-time Forces; however, it does not spell out any of the vital requirements for a loyal, dedicated and well trained part-time element, a force which has formed the foundation of the whole defence structure. In recent times, the SADF/SANDEF has been unable to rely on the law to maintain the numbers to justify its fulltime element and top structure. A system which now appears to be on the point of collapse.

For members of the part-time forces, both those under compulsion and the volunteer element, their service generally can be regarded as a second job, at bargain basement rates, but usually in the category of 'overtime' employment.

Benefits for them have virtually been nil, with rates of pay being in the vicinity of 60% of their fulltime counterpart - this has only recently been partly adjusted - with their periods of service placing their fulltime employment in jeopardy.

Consideration should now be given to the formulation of a part-time forces Act which will clearly establish their role and whether they will continue to be used in policing duties as part of a multi-purpose force. Their main task, and a task for which they are trained and for which they will volunteer, is that of National Defence, and not roles such as social upliftment. There is no need to mention the dislike amongst these South Africans for what is

called Township duties. Whether such roles should be funded by the Defence Budget is also open to question.

What is the real role of the part-time element of the SANDF? It is a very cost-effective military force and a force that, if nurtured and well trained, can play a major role in ensuring national defence and security. And in this respect, we only have to look at the Reserve Forces of the United States and many of the NATO countries, such as Norway. It is not generally known that perhaps the most combat-worthy, and the unit with the best record in the recent Gulf conflict, was a US Marine Corps' Reserve Tank Unit.

In addressing the needs of the future Part-time Forces, it is the strategic requirements that need attention, the tactical requirements are the function and responsibility of the SANDF which will work within the parameters set down by Parliament and, if possible, working through a bureau/command structure consisting of members drawn from the Part-time elements. It is not possible for any force to imagine that it is responsible to two masters. The chain of command starts and ends with the Head of State.

At present, announcements are made and, perhaps, rumours, that the question of the Part-time Forces, their conditions of service, etc., are being addressed and that changes are in the pipeline. But nothing has been done: if anything has been accomplished in this regard, have any announcements of these changes and improved conditions been made? In the meantime, the standard of morale drops even lower, and it can be expected that in the event of a call-up, the results will be even worse than April 1994. This lack of action is difficult to accept as the detailed information as to how the NATO countries manage their PTF's is readily available. Let us look at some of these.

The Gulf conflict is perhaps the best yardstick to use as to the military value of motivated and trained part-time forces, as mentioned earlier. And of the participants in that campaign, as far as I know, the only sizeable element of PFT's to be employed was that of the United States. How did they achieve the standards that enabled the Pentagon to be confident that these 'Saturday Soldiers' were of a sufficiently high standard to be placed in a situation that was expected to be "the mother of all wars"? In all, some 228,000 Part-time force members being activated, usually a figure in the high 90% often 100% answered the call. The option being a very heavy penalty, a jail term.

Was it professionalism and training, with a resultant high morale that produced both discipline and loyalty. The retention rate of the Reserve force members with less than 6 years service is between 69.2% and 89.4%. Funding is not lost on the training and what can be a losing cycle.

When all members of an armed service are treated as equals in respect of pay and benefits: this is something that can be both demanded and expected.

It is obviously a system that works, as is indicated by the fact that in the Air Force 25% of the aerial refuelling tankers are flown by the Reserve forces, as is 60% of the tactical Reconnaissance missions. In the Army, 53% of the Field Artillery Battalions and 51% of the Mechanised Infantry Battalions are also drawn from Reserve elements.

The benefits of Reserve (Part-time) formations to any Defence Budget are evident in the savings in emoluments, and the fact that paid periods of Annual Leave, Medical Costs, Sick Leave and Housing are not borne by the State. However, it is the degree of

professionalism that is required and obtained by these forces that is impressive. Promotions in the Reserves are based on qualifications; a battalion commander will not acquire the rank of Lt-Colonel until he has passed 50% of the staff course and will be in a temporary position for two years until he has become staff qualified. To obtain the rank of Captain in the Army National Guard as from October 1995, will require a BA degree. How is this achieved? Surely it is something that requires immediate attention and implementation.

I would like to be able to give you a few details on the Reserve Officers' Association of South Africa, but before I do so, there is something that is worrying me. I might be wrong in my interpretation, but Section 34 of the Constitution - I think it is Section 5c - states that the "right to life is supreme". What bearing will this have on any act during a state of war?

(Draft)

*A SHORT RESUME OF THE RESERVE OFFICERS' ASSOCIATION OF SOUTH AFRICA
ITS ACHIEVEMENTS TO-DATE*

In 1988, interest began to develop in what was then known as the Reserve Officers' Association of the United States, and it was only after investigation that it was found that it was an affiliate of a massive organisation with some 800,000 members, spread across some 14 nations which make up the NATO organisation and France. These organisations, both in their individual capacity and under the umbrella of the CIOR (Interallied Confederation of Reserve Officers), work in close co-operation with NATO and, in fact, have a liaison office at NATO. The Chief Executive of the CIOR is elected every two years, with the office rotating between the member nations. At present this office is held by France. When the South African contact was firmly established in 1992 with the USA, things began to happen, with the Secretary General and a small team of ROAUSA members visiting South Africa on a briefing visit in 1993. That same year seven Part-time Force members were invited to attend their National Congress in Nashville, USA.

Since that time, and the fledgling ROASA came into being. Excellent relations have also been established with the French, British and German associations. With the result that an invitation has been received from the British Reserve Forces Association for a team of three Part-time Force officers to attend their NATO-type Military Competition in the UK next month. Like its counterpart, ROASA is not able to accept funding from foreign sources to achieve its aims and objectives and will endeavour to follow the means adopted by other ROA's to maintain its independence.

Maybe as a result of isolation and other factors, it is sometimes difficult to appreciate the broad spectrum of influence that these Reserve Force organisations have. In the words of a previous Secretary General of NATO: "The simple truth is that security is a concept which does not recognise artificial divisions between civilian and military responsibilities - security is the responsibility of all of us citizens, soldiers, and citizen soldiers."

While the idea that resulted in the forming of CIOR can be traced back to efforts made by Part-time force members in Belgium and the Netherlands, it was in 1922 that the ROAUSA came into being, with one of the founders being a Captain Harry Truman, later President Harry Truman who, as President in 1950, signed the Act in Congress that established the objective of the ROAUSA.

It is also interesting to note - which further establishes the credibility of the US organisation and something which spills over into the other members of CIOR - that many of the senior US politicians, such as Senator Strom Thurmond, Chairman of the Senate Armed Service Committee, is a retired Part-time Force Major-General and an ex-President of the American ROA; another is the respected Congressional member and Democrat, GV 'Sonny' Montgomery, a retired National Guard Major-General.

It is largely due to the efforts of ROA's French and US friends that the South Africa has been accorded the degree of recognition that it has received, and the invitation from the UK stems from this relationship. Some months back the Constitution of the ROASA was submitted to the CIOR; this Constitution is a fairly lengthy document which is very much in line with those of similar ROA's; too lengthy to present, but the stated objectives are concise and self-explanatory: "To support a national security policy for the

Republic of South Africa that will provide for adequate national security in the Republic of South Africa and to prosecute the development and implementation of such a national security policy".

The association with these long-established powerful and independent opinion forming organisations cannot be over-valued. The acceptance of ROASA by this foundation of military culture will enable it to project its image into the corridors of NATO. A capability that is understood by the Defence Forces of the NATO Alliance and France and which is appreciated as a means of achieving national support for their strategical and national defence policy.

As an independent association with a broad-based membership, it has divorced itself from any possible accusations of forming part of some private agenda or influenced by commercial interests.

To sum up, we have here an organisation that, through individual effort, has to-date achieved a breakthrough into the international military family - breakthroughs that started in 1994. ROASA as an independent, non-aligned organisation, is able to draw from the knowledge and experience of its membership and its international relationships to assist in the formulation of policies aimed at ensuring national security. And without breaking any confidences, there are strong indications that other developments are expected to be in the pipeline.

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RIGHTS AND DUTIES OF THE SOLDIER IN A DEMOCRACY.

ETHICAL, CONSTITUTIONAL AND LEGAL ASPECTS OF MILITARY PROFESSIONALISM.

Evidence-briefing before the 'Committee for
Security'(6/4) of the Constituent Assembly of South
Africa, in Capetown, 21.April 1995.

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1. INTRODUCTION: Problems of Change.

Recent history let us witness the end of the Cold War, the fall of totalitarian regimes and the demise of the ideologies on which they were based. Many of these countries in Europe and here in Africa take democracy as the basis of their political, social and economic life. Still the legacy of the past remains strong. And although the challenges and opportunities are encouraging, there are also serious problems and disappointments. A new, better world order is not in sight.

The aspirations of peoples freely to determine their internal and external political status have led to the spread of democracy, most impressively in South Africa because of its peaceful transfer, and to the recent emergence of a number of sovereign States. These changes led to the manifested commitment of many of these states to respect human rights and fundamental freedoms.

The transition and development of democracy and market economy, as promising as it may appear, is however threatened by instability and insecurity. Amongst many other threats worldwide and in Southern Africa, gross violations of human rights and fundamental freedoms pose the greatest threat to the peaceful development of emerging democracies.

Summarising the lessons from these problems of change:

- * Social justice can only be achieved by eliminating poverty.
- * Freedom and tolerance as well as responsibility and selfdiscipline must be taught, experienced and practised in all spheres of life including the military.
- * Civic education becomes a priority, also for the armed forces.

The application and implimentation of these lessons is a long and cumbersome process. To begin with it has to be based firmly on a constitution and a law, which establishes and conceptualise the new value system for defence and security policy and military professionalism.

The serious problems we witnessed with the integration of former guerrilla forces and other forces into the SANDF overshadowed unfortunately the real issue of shaping a new defence force in a democratic dispensation.

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The great chance to motivate all partners for this new service was missed. And although the integration process went considerably easier with the SA Navy and SAAF, the SA Army which had to take care of the majority of men and women in uniform, showed considerable deficiencies in leadership, attitude and morale. It became quite obvious that the SANDF has not yet been able to present a convincing concept which integrates the armed forces in the democratic society, enhances readiness and willingness for military service, and balances disciplinary standards with values and accountability of a democratic state.

SCOPE

This presentation is dealing with the following subjects:

After introducing you to the changing image of the soldier in the present situation and pointing out the necessary ethical and moral aspects of military service in a democracy, I concentrate on the constitutional principles for defence policy, rights and duties of the soldier and aspects of military professionalism in a democratic state.

2. THE CHANGING IMAGE OF THE SOLDIER: From the MILES BELLICOSUS towards the MILES PROTECTOR.

The image of a soldier in a democratic society is exemplified by his service for the common good. His most prominent mission is to protect the sovereignty and territorial integrity of the state and its citizen, to respect the human dignity, and to respect and defend the democratic values of the constitution.

** Military service is not meant to satisfy economic interests or to achieve materialistic profits. Its gain is of a political nature: It is the preservation or restoration of peace in freedom. (Genl U de Maiziere)*

The dramatic increase of UN controlled peace keeping and peace enforcement operations since the end of the cold war era indicates the gradual change of the self-image of the soldier and the nature of military service. Today the United Nations are challenged with famine and refugee disasters, ethnic violence and civil war. International political crisis management requires more and more the services of the

military. And the role of the soldier to protect the human dignity is no longer an isolated national mission but a request of the international community. Previously the primary role of armed forces was to defend national sovereignty, today and tomorrow armed forces will be increasingly deployed in war prevention operations and in activities to shape the peace.

The soldier must be willing and capable to fight not only in the service of his own country but also in the service of the international community. The protection of human dignity, which constitutes the core of military service today, cannot be performed on a purely national basis. The days are gone, when military power was seen as a deterrence against an aggression, as counteraggression against 'total onslaught, as the previous administration defined the protection of own sovereignty. To relief people and nations of need and danger, to rebuild destroyed states and to put troublemakers in their place are missions, which require international mandate and for the execution multinational forces.

Thus the image of the soldier is changing from that of the *MILES BELLICOSUS* towards the *MILES PROTECTOR*. (Genl G Däniker)

Service in multinational force structures requires a high degree of tolerance and willingness to co-operate under foreign commanders, to accept strange cultures and to adapt to new dimensions of thinking. The deployment in violent, crisis ridden regions requires a firm conviction of the own values, good negotiation skills and highly disciplined combat readiness. Physical and mental threat of the own existence may not prevent the soldier to execute his duties.

The boundaries between peacekeeping and peace-enforcement often fluctuate. There may be no clear separation between self defence and combat operations to get humanitarian aid through. The task of the modern South African soldier 'to serve in the defence of the RSA for the protection of its sovereignty and territory' (Art 227/1 a) is to be supplemented by the mission of providing protection, furnishing aid and helping to build a base for humanitarian operations and peace missions. The most professional attitude of a soldier, courage, is still his most important character trait, in combat situations as well as in peace keeping operations.

3. ETHICAL ASPECTS: Integrity and Accountability.

Evidently despite the changes of the aim and role of military service the ethical values remain still the same as those acknowledged in history: They can be summarised as the ideals of integrity, competence, duty, and courage.

These values are timeless and they are relevant for any society which respects human dignity and life. However if these principles are legitimised in the constitution, as is the case in many modern democratic dispensations, then they have a direct legally binding power for the soldier, who is serving and defending this constitution.

The notion of moral integrity is at the center of a military leader's effectiveness. It suggests that failing in his moral standards the leader loses the trust of his men and destroys the basis of command: mutual confidence. Accountability in this respect means that the leader is prepared to accept responsibility for the mission assigned to him, the orders he issues or passes on in pursuance of the mission and the execution of the operation. In all these actions he will always know, guided by his conscience, what is right and wrong. In fact *'he will know very well, that there are just some things that are not done'*.

4. CONSTITUTIONAL ASPECTS: Respect for Human Dignity and the International Law, collective Defence and Security Policy.

The principles of the 'Charter of the United Nations' and the code of values as laid down in Chapter 3 of the Interim Constitution form together the guidelines for South African security policy.

Cornerstones of this security architecture should be the constitutional mandate to safeguard peace in freedom, to settle conflicts by peaceful means and to work towards a regional system of collective security. For these reasons the republic establishes and maintains armed forces for the ultimate purpose of defence. (Art 224 In Con).

Fundamental rights as formulated in Ch 3 art 9 and 10 are binding citizen and soldier equally. The fundamental right to respect and protect the human dignity and the right to live is to form the main principle of military professionalism in a democracy. It is the noble duty of the soldier to defend this fundamental right. This article also

forms the principle guideline in leadership development.

Good leadership is best performed in an environment where human dignity is respected. Officers who respect human dignity believe that individual differences of race, gender, ethnicity and religion are to be valued:

These are the constitutional values and principles on which the law in the defence act, will have to spell out the rights and duties of the soldier. This value is the foundation on which the defence force has to define its concept for leadership development, training, education and motivation. The concept will balance or harmonise the principles of freedom, dignity and rights of the citizen with the principles of duties, order and function that armed forces have to observe. The concept referred to as a 'Citizen in Uniform' (according to its German model) should be firmly anchored in the relevant article (Art 226 of the In Con) of the constitution.

The concept stands for the citizen, who is prepared to defend his country as a combat ready soldier and who assumes responsibility for the freedom and human dignity of others. The concept serves as a yardstick for leadership, motivation, education and training.

The respect for International law and human rights are major components of the constitutional values. They form the basis for the simple laws on which a soldier's obligation to be obedient is legally founded and limited by a still to be amended defence act.

The new constitution of a democratic South Africa must make in no uncertain terms sure, that the decisions taken by the executive ie the MoD and Chief SANDF, are lawful, accountable to Parliament and open to public scrutiny and judicial review. Any orders the soldier receives from his superiors must be within the law. He must be sure his operational or other activity is not abused but is based on a sound legal reason for such action. Also in a democracy combat will remain the 'Ultima Ratio regis'. Fear and danger to life and limb must not, however, prevent a soldier from doing his duty.

5. LEGAL ASPECTS: Rights and Duties of the Soldier, Restrictions under the Rule of Law.

We have emphasised that the code of constitutional values are applicable to both the citizen and soldier. In fact they are the distinguished difference between the professionalism of a party - army soldier (ie Soviet, East German Army) or a mercenary and a military professional in a democracy.

Certain fundamental rights however, are limited or restricted by law for a soldier in order to retain military function and orderly mission accomplishment.

The limitations must be clearly spelled out in the defence act, not in the military penal law, in order to promote a positive understanding within the military community and the public at large.

The following is a list of those fundamental rights which should be limited for members of the armed forces. It is in my view not necessary to go further than these suggestions:

a. Freedom of Expression (Art 15 In Con). This right is restricted by the obligation and duty of the soldier to protect and defend the constitution, to respect the human dignity, to maintain combat readiness and comradeship within his military environment, to set an example as a leader and superior, to maintain discipline, to keep confidentiality and secrecy on certain official matters.

b. Right to Demonstration, Assembly and Petition (Art 16) These freedom rights are restricted by the duty to defend and protect the constitution, to maintain combat readiness, to set an example as a leader, to maintain discipline and comradeship. The restriction does not apply for the establishment or joining of political parties (Art 21) or other professional or labour organisations or engaging in political activity as long as these associations are not unconstitutional or hostile towards the democratic dispensation and the activities are not exercised during duty performance.

The right of petition should only be limited as far as this right is open for a community, because it can quickly be misinterpreted as mutiny. Certainly the individual soldier has the right for a petition, but he should first exhaust his military channels such as redress of wrongs and the application to the parliamentary ombudsman, once properly established.

c. Political activity (Art 21) is only restricted as far as the duty for the protection and defence of the constitution is concerned. Party-political activity should not be permitted within the military unit and barracks. The right and restrictions for freedom of expression are applicable.

d. Freedom of Movement and Choice of Residence (Art 18,19)
These rights are restricted by the duty of the soldier to live in barracks or garrison according to the military/operational necessity.

6. MILITARY PROFESSIONALISM: The duty to obey orders, the legal limitation and the duty to accept responsibility.

Military obedience is a professional norm and duty .

"*The soldier must obey his superiors*" is first par in the German Military Law. This legal command binds everybody, from private to general. In the German case the law also prescribes the way as to how orders must be executed: "*to the best of ones abilities, completely , conscientiously and immediately*". The South African MDC has a similar phrasing. Disobedience of a soldier can have disciplinary and even penal consequences.

Why are soldiers subjected to such strict disciplinary rules ?

There are military and political reason for it.

a. Military reason.

As a fighting machine, which has to operate efficiently in rapidly changing situations, the force must be a reliable tool in the hand of its leaders. In modern mobile and combined arms warfare, command has to rely on quick decision making procedures, information and reliable co-operation. All this requires competence in leadership and reliability in the execution. High mobility , wide dispersion of weapon systems, quickly changing points of main effort makes it necessary to delegate command powers and to promote initiative.

Modern combat efficiency therefore needs mutual trust at all levels and echelons of command.

* Discipline is the key to combat efficiency and a prerequisite for teamwork and co-operation. Maintaining discipline makes things easier and is a benefit for all.

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Discipline ensures that missions are accomplished even under great stress and danger.

* Disregarding the rules and principles of international military law and tolerating injustice vastly undermines discipline and fighting morale of the troops.

* Military professionalism requires from the commander and from any officer in charge of an operation to take immediate action against any violation of the law and slackening of discipline. Regular forces involved in guerrilla warfare are specifically tested in this respect and the tendency is to justify abandoning the rules of the Geneva Convention for landwarfare with the argument to succeed in an unruly if not criminal operational situation.

But the surrender of ethical values, which the army is to protect and honour, is too high a price paid for doubtful operational success.

Military forces who disregard the precepts of humanity are not worthy and capable of defending humanity !

Respect for the rule of law ,national and international must be maintained in peace and in war.

b. Political reason.

The lethality of weapons and the structure of centralised control provides military leaders with a considerable amount of power , which may become a temptation for abuse. Modern history shows that particularly emerging democracies are threatened by a frustrated and isolated military.

Integration of the military into the democratic society is one way to avoid this temptation. Another way is the observation of the principle of primacy of politics, by effectively implementing parliamentary control and by applying a balanced system of transparency and public communication.

Limitations.

Modern democratic constitutions and the national law derived from them make all provision for limitations and restrictions in the enforcement of authority, and that includes the legal demand to obey military orders.

These limits are derived from

- * the unimpeachable human dignity
- * the aim of military service as manifested in the constitution and
- * the adherence to the law, national and international.

Any orders which demand from the soldier to commit a crime ie killing of unarmed civilians, harassment, rape ,plunder, torture of prisoners, refusing to render medical assistance are illegal and must be refused both on moral and legal grounds.

In cases as such both the military superior who issues the order and the soldier who follows the order are fully held responsible, provided they are aware of committing a crime!

Equally accountable for the misconduct of the members of the armed forces are the military authorities, who are in control of the armed forces. *Responsibility is indivisible and the burden of command is a heavy one.*

Irrespective of the capacity within which troops are deployed, they must always operate within the law.If the conflict or the operation is international, the international law / rules of engagement must be observed.If the operation falls short of international armed conflict then the national internal law of the state must be followed together with any provisions of the international law.(16)

These moral and legal limits to what is known as 'unconditional obedience' are not restricting combat efficiency of the forces.These limitations can be manifested in legal terms as is the case in Germany or laid down in a code of honour /conduct as is the case in France. Whatever the case may be it is generally accepted that these norms are actually a strong tie which maintains the cohesion of the unit/regiment. The motivating effect is higher than the punitive effect of unconditional obedience.

" The soldier's final master is the law, national and international" so Sir Micheal Quinlan ,former assistant secretary of defence in the UK, " - not his military commanders, nor even his political leadership.He owes powerful loyalties and duties to these , but they are not the ultimate authority!"

**APPENDIX A : SUGGESTION FOR
AMENDMENT OF THE DEFENCE ACT.**

**RIGHTS AND DUTIES OF THE SOLDIER AND SUPERIOR, TO BE INCLUDED
IN THE DEFENCE ACT.**

*(The terminology should not be legalistic but as simple and close
to military terminology as possible.)*

1. Art.: The soldier enjoys the same fundamental rights as any other citizen of the the RSA and as listed in the constitution Chapter 3.

a. Certain rights and duties are restricted in the interest of military service. These are :Art 15,16,18,19,and 21.

2. Art.: The soldier has the duty to protect the human dignity, to defend the constitutional order of the country with courage, to respect and stand up for the democratic value system with confidence and to respect the rule of law all the time.

3. Art.: It is the duty of the soldier to obey orders of his superiors to the best of his ability, completely, conscientiously and immediately. It is his duty to maintain discipline.

a. He is obliged to refuse to obey orders , which are violating the international law (Geneva Convention) or national law, which committ or lead to the committment of a crime, and which violate the human dignity.

b. He can refuse orders which are not given in the course of his military duties.

c. He is fully responsible for the execution of legal orders, mission and tasks.

d. He accepts responsibility for the execution of illegal orders as far as he is able to recognise the illegality of it according to the circumstances.

4. Art.: Duties of the Officer / Superior of all Ranks.

a. Officers and superiors of all ranks must set an example in attitude and in execution of their duties.

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b. Superiors of all ranks have the duty to maintain discipline.

c. Superiors of all ranks accept the responsibility for the orders they issue and their execution.

d. Superiors may give orders only for the purpose of military duty, and within the framework of the international law, national law and the military regulations.

e. Superiors of all ranks have the duty to care for their subordinates.

f. Officers / superiors of all ranks acknowledge that the authority vested in them is legally restricted and that they do not qualify for personal privileges of any kind.

g. Officers/superiors of all ranks acknowledge that political expressions in public may cause controversy and therefore exercise their right of free expression with sensitivity and care.

Note : There is no need to stipulate in the defence act special behaviour or constraint in the use of military power, because details for combat and other operational deployment are laid down in the international law or in the internationally agreed upon rules of deployment.