Regional Collective Self-Defence: A Case Study of Southern Africa Development Community (SADC) Military Intervention in the Democratic Republic of Congo (DRC)

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Declaration

I Andreas Nelumbu, declare that this study is a true reflection of my own research and that this work or part thereof has not been submitted for a degree on any other institution of higher learning.

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Dedication

This study is dedicated to my wife Mrs. Monika Ndeshipanda Nelumbu, my son, Shitaleni, and my two daughters; Kamushiisheni and Tuwilika.

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Abstract

Debates have raged on when and how a foreign State should intervene in the affairs of others. Many argued that before any foreign military intervention take place in a given State, such intervention, must first be authorized by the United Nations Security Council and its subordinate bodies such as the AU(OAU) and SADC, while some argued that right to self-defence exist until the United Nations Security Council has taken measures necessary to maintain international peace and security.

The dissertation examines the 1998 SADC military intervention in the Democratic Republic of Congo's war in response to the rebellion and the foreign aggressors, led by Rwanda, Uganda and Burundi. This intervention took place despite the fact that Nelson Mandela, the then the Chairman of SADC objected and challenged the authority by the three SADC member states to send troops to DRC on behalf of SADC.

The study sets out to analyse the motives, causes and legality of military interventions in the DRC in 1998 to 2001. In analyzing these interventions, the study borrows extensively from the work of dominantly theorists who conceptualise international relations. The purpose of this analysis is to determine the legality of military interventions in the DRC, the extent to which these interventions were conducted on the protection of legitimate government grounds and to investigate the degree to which or not intervening countries were spurred by their national interests.

Regardless of the perspective taken, there are no clear articulated criteria or policy to use in determining when the World and Regional Bodies should intervene in the affairs of another state and not in another

The study found that SADC has a responsibility to support its member state which may face an external aggression, either diplomatically or militarily.

The study found that an integrated approach is necessary to address these conflicts.

Abbreviations

ADF	Allied Democratic Forces
AFDL	Alliance des Forces Democratiques pour la Liberation du Congo/Zaire
ADF	Alliance of Democratic Forces
ALIR	Army for the Liberation of Rwanda
APR	Rwanda Patriotic Army
AU	African Union
DDR	Disarmament, Demobilisation and Reintegration
DRC	Democratic Republic of Congo
EU	European Union
FAC	Forces Armees Congolaises
GA	General Assembly
ICJ	International Court of Justice
IDP	Internal Displaced People
IHL	International Humanitarian Law
ISDSC	Inter-State Defence and Security Committee
ICISS	International Commission on Intervention and State Sovereignty
ICRC	International Committee of the Red Cross
JMC	Joint Military Commission
LRA	Lord Resistance Army
MDP	Mutual Defence Pacts
MLC	Movement for the Liberation of Congo
MONUC	United Nations Mission in the Democratic Republic of Congo
NALU	National Army for the Liberation of Uganda
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
OPDS	Organ of Politics, Defence and Security
OAU	Organisation of African Unity

OSLEG	Operation Sovereign Legitimacy
RCD	Congolese Rally for Democracy
RPA	Rwanda Patriotic Front
SADC	Southern African Development Community
SC	Security Council
UN	United Nation
UNHCR	United Nation Human Commission for Refugees
UNITA	National Union for the Total Independence of Angola
UPDF	Uganda People's Defence Forces
UNSC	United Nations Security Council
USA	United States of America

Chapter 1

1.1. Introduction

In August 1998, Zimbambwe, Angola and Namibia signed a Mutual Defense Pact (MDP) in Victoria Falls in Zimbambwe as a response to the rebellion and the foreign aggressors in the Democratic Republic of Congo (DRC), led by Rwanda, Uganda and Burundi.

The fact that only some members of SADC and not all had participated in the military operations spiced up the debate in the region. There were claims of an intense rivalry in the sub-regional grouping and views that the survival of the grouping was critically threatened[1].

The aim of this paper is to examine the decisions taken by some of the major actors in SADC in respect of the conflict in the DRC, following the distress call by Laurent Kabila's government. The paper seeks to analyse the legal implications of the decisions relating to sub-region cohesion, both then and in the future.

The paper includes in its coverage of the various policy positions in the military intervention, the implications of these positions for selected players in the regional structure itself. The selected players include Angola, Namibia and Zimbambwe as the group of the states that formed the allies' and send troops to the DRC in response to the request by the DRC government; South Africa as a sub-regional powerhouse which did not send troops to the trouble central African state; Tanzania as a SADC state sharing the longest border with the DRC but apparently preferring to remain neutral in the entire affair; and Zambia, another state sharing a fairly long border with the DRC and opting to take a mediation role[2].

Briefly, the paper seeks to analyse the foreign military intervention by Angola, Namibia and Zimbambwe in the Democratic Republic of Congo with a view to determining whether or not

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[1]Naison, N (Lt. Col. Rtd). 2004. *A critical review of the SADC military intervention in the DRC, p. 1*

[2]Ibid: p. 3

such involvement were in line with International law.

Thus, the research strives to address two main issues, namely:

(1) Responsibility to protect the legitimate government under the United Nations Charter paradigm and the Customary International Rule on the use of force, (2) Whether the military intervention in the DRC by Angola, Zimbambwe and Namibia was justifiable to protect the Kabila government?

To this end, The UN Charter provisions, SADC Protocols on Defense and Security Cooperation provisions, the customary international Rules, the ICJ jurisprudence, the UN General Assembly Resolutions and the writing of legal scholars on the use of force will be explored extensively

1.2. The background of the Research

1.2.1. The Genesis of the conflict

International intervention involves a contest of two fundamental principles: State sovereignty and the responsibility to protect lives. In some cases, government have consented to the presence of foreign military forces under the United Nations (UN) mandate that authorized them to protect civilians, whereas in others, intervention has been undertaken with the United Nations Security Council approval, but without the consent of the government concerned. The main problem arises where the intervention take place without the approval of the United Nations. Many have asked whether such interventions are appropriate and effective, and also legally permissible.

The conflict in the DRC may be traced to the period of the colonisation of the country and, later, to failed international efforts to bring peace to the severely troubled country. This paper attempts to capture a small but significant period in the traumatic history of this country because of its ramifications for the region in general and for the Southern African Development Community in particular[3].

[3] Ibid:p.3-4

Participation in inter-state relations, particularly in a period of conflict, is a crucial issue of foreign policy whose formulation places an enormous burden on the policy makers. Therefore, when the DRC requested military assistance from SADC (which it had only recently joined as a member) to contain an invasion of its territory by some of its former compatriots, seemingly supported by the Rwandan and Ugandan governments, the decision taken by the governments of the sub-region was promptly arrived at despite the complexity of the situation and the obviously relatively poor state of the economies in the sub-region. The conflict in the Congo took a particularly vicious turn in the early years of independence, with the assassination of the country first Prime Minister, Patrice Limumba, in 1960, and the death of the United Nations Secretary General, Dag Hammarskjold in an aircraft accident in Zambia en route to the Congo on a UN mission to bring peace to the region in 1961.

By 1996, the war and genocide in neighbouring Rwanda had spilled over to the DRC. Rwandan militia forces (Interahamwe) who fled Rwanda following the ascension of a Tutsi-led government were using Hutu refugee camps in Eastern Zaire as bases for incursions against Rwanda[4]. In October 1996, Rwanda troops (RPA) entered the DRC with an armed coalition led by Laurent-Desire Kabila, known as the Alliance des Forces Democratiques pour la Liberation du Congo-Zaire (AFDL). With the goal of forcible ousting Mobutu Sese Seko, the AFDL, supported by Rwanda and Uganda, began military campaign towards Kinshansa. Following peace talks between Mobuto and Kabila in May 1997, Mobuto left the country, and Kabila marched into Kinshasa on 17th May 1997 and declared himself president on the same date. President Kabila later renamed the country Democratic republic of Congo, introduced a new flag, new national anthem and the Congolese Franc that replaced the heavily inflated Zaire. RPA units continued to operate with the DRC's military, which was renamed the Forces Armees Congolaises (FAC).

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[4]Congo Civil War, 2006, on http://www.globalsecurity.org/military/world/congo.htm. accessed on 05 April 2011

Congolese Tutsi, as well as the Governments of Burundi, Rwanda, and Uganda, all relied on the Rwandan military presence in DRC for the protection against hostile armed groups operating from the eastern part of the DRC. These groups were:

- The Interahamwe militia of ethnic Hutus, mostly from Rwanda, which fought the Tutsi-dominated Government of Rwanda;
- Hutu members of the former Rwanda Armed Forces, believed to be responsible for the 1994 genocide of Tutsi in Rwanda, which also fought the Government of Rwanda;
- The Mai Mai, a loose association of traditional Congolese local defense forces, which fought the influx of Rwanda immigrants;
- The Allied of Democratic Forces (ALD), made up of Uganda expatriates and supported by the Government of Sudan, which fought the Government of Uganda; and
- Several groups of Hutus from Burundi fighting the Tutsi-dominated Government of Burundi.

Laurent-Desire Kabila is a retired revolutionary involved in cross-border business ventures, and among the Congolese Tutsi, who were fighting for recognition of their citizenship. Kabila had no political or social base at home, nor have the kind of military organization capable of defeating the otherwise weak demoralized army of Field Marshal Mobuto Sese Seko[5].

President Laurent Kabila began his rule under the tutelage of Rwanda and Uganda. James Kabarebe, the current head of the Rwandan armed forces, served as a Chief of Staff of the Congolese army. Congolese Tutsi with close ties to the RPF regime of Paul Kagame occupied senior positions in Kabila administration, including those of foreign minister, personal secretary to the President, and secretary-general of the regime's political organization, AFDL.

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[5]George, N. N. 2003. *The International Dimensions of the Congo* Crises, Washington *D.C.*p.1-2

Uganda stationed a full battalion of its army in the Congo, presumable to stop the incursion of of Uganda rebels back into their country. As President Kabila sought to assert himself as the supreme leader of a sovereign State, this tutelage by Rwanda and Uganda became more and more cumbersome. On the 28th July 1998, President Kabila ordered all foreign troops includes Uganda and Rwanda troops who were in command of the alliance army that put him into power to leave DRC. Most refused to leave. On 2th August 1998, Rwanda troops flew to Bas-Congo, with the intention of marching on Kinshasa, ousting Laurent Kabila, and replace him with the newly formed Rwanda-backed rebel group called the Rassemblement Congolais pour la Democratie (RCD)[6].

The 1998 war in the Democratic Republic of the Congo (DRC: formely called Zaire under President Mobuto Sese Seko) is the widest interstate war in modern African history. The DRC became an environment in which numerous foreign players were involved, some within the immediate sub-region, and some from much further afield. That only served to complicate the situation and to make peaceful resolution of the conflict that much more complex. The war, centered mainly in eastern Congo, had involved nine (9) African nations and directly affected the lives of approximately fifty (50) million Congolese[7].

The Rwandan campaign was thwarted at the last minute when Angolan, Zimbambwean, and Namibian troops intervened on behalf of the DRC Government[8].

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[6]Congo Civil War, 2006, on http://www.globalsecurity.org/military/world/congo.htm. accessed on 05 April 2011

[7]Ibid.

[8]Ibid.

Chapter 2: Rule on the non-use of force under International law

2.1. Rule on the non-use of force under International law

The principle of sovereign equality of State is enshrined in Article 2.1 of the UN Charter whereas the corresponding norm for non-intervention is articulated in Article 2.7.

Article 2.1[9] state that, t*he organization is based on the principle of the sovereign equality of all its Members*, while Article 2.7 states that, *nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of the enforcement measures under Chapter V11*[10].

In international law, a sovereign State has the right to exercise exclusive and total jurisdiction within its territorial borders. Other States have the corresponding duty not to intervene in the internal affairs of a sovereign State. If that duty is violated, the victim State is empowered to defend its territorial integrity and political independence[11].

In the conflict of the Democratic Republic of Congo, Dugard noted that, unlike self-defence, which is authorized in modern international law, reprisals remain illegal *de jure* in view of Article 2(4) of the United Nations Charter. Even if the argument of hot pursuit and self-defence or anticipatory self-defence could stand by default, it would not hold. Hot pursuit or self-defence cannot be invoked to acquire title to the territory of a foreign state.

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[9] *United Nations Charter* 1945, Article 2.1

[10] *UN Charter 1945*, Article 2.7

[11] Dan, K. 2002. *The use of force and Human Rights, Some thoughts and some insights,* p. 9

Nor can it be used to justify the occupation of the Congolese territory, the exploitation of the Congolese natural resources, the commission of human rights violations and the establishment of the puppet government in Kinshasa under the false pretence of helping the Congolese people establish democracy[12].

The current legal regime on the prohibition of use or the threat of force by states is based upon the United Nations Charter. This regime can only be understood if the antecedents and other precursor events thereto are fully appreciated. In this respect, one of the most important and relevant antecedents is the" *General Treaty for the Renunciation of War*", often ferred to as the *Kellogg-Briand Pact*, which was concluded in 1928. The main provisions in the *Kellog-Brian Pact* were as follows:

The High Contracting Parties solemnly declared in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another[13].

The High Contracting Parties agree that the solution or the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means[14].

The above treaty was almost of universal obligation since only four states in the international society as it existed before the Second World War were not bound by its provisions. One of the prominent international jurists argues that the Kellog-Brian Pact immensely contributed to the formation of customary law in the period prior to appearance of the United Nations Charter, as it was the foundation of state practice in the period of 1928 to 1945[15].

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[12]Andr, M. B. 2003. *African Human Rights Law Journal, The Conflict in the DRC and the protection of rights under the African Charter,* p. 4

[13]*Kellog-Brannd Pact*, 1928, Article 1

[14]Ibid: Article 2

[15]Ian B, 2003. *Principle of Public International Law*, 6th Ed, p. 698, Oxford

Thus, the General Treaty of Renunciation of War of 1928 was seen as a realistic and comprehensive legal regime on the prohibition of use or threat of force by States. It is this legal regime which was the actual precursor of the current provisions on the use of force in the UN Charter.

2.1.1. The United Nations Paradigm

In the spring of 1945, the delegates of forty-nine states met in San Francisco to draft the Charter of the UN. In this Charter, the delegates pledged their determination to "*save succeeding generations from the scourge of war, which (twice) in their life time [had] brought untold sorrow to mankind*[16]. The UN Charter was not only an institution-creating document, but also and more importantly it was a norm-creating document. This is so because the said Charter set forth specific rules intended to regulate the behavior of states, especially with respect to the use of force. Considering the fact that the Charter creating the UN was drafted just after the Second World War, one of the main tasks given to the UN was the maintenance of international peace and security[17].

The most important provisions to this topic are contained in *Article 2 of the UN Charter* which read as follows:

3. *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*
4. *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.*

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[16] *UN Charter*, Preamble

[17] Ibid: Article 1

[18] Weldock, B. 1963. *The Law of Nations*, 6th Ed. P. 414

Legal scholars have described Article 2(4) of the UN Charter as the corner-stone of the Charter system[18]. For instance, Anthony C. Arend and Robert J.Beck argued that Article 2(4) establishes a general proscription on both the actual use of force and the threat to use such force[19].

Some authors further contend that this provision outlaws not only recourse to war, as did the Kellog-Briand Pact of 1928, but also any use of force (or threat) that is against the territorial integrity or political independence of another state or that is otherwise inconsistent with the purpose of the UN.

The prohibition of the use of force as contained in Article 2(4) of UN Charter has been accepted in customary international law, and indeed regarded as a peremptory norm of international law *(jus cogens)* by most states, legal scholars and bodies of the UN viz. the SC, GA, and the ICJ. Thus, numerous GA Resolutions have endorsed Article 2(4). One of the most notable is the *1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN (GA Res. 2625)*. The very first principle in this Declaration is almost the verbatim reiteration of Article 2(4), read as follows:

Every State has the duty to refrain in its international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purpose of the UN. Such a threat or the use of force constitute a violation of international law and the Charter of the UN and shall never be employed as a means of settling international issues[20].

The international Court of Justice, the judicial body of the UN, had also upheld the rule on the prohibition of use or threat of force as provided for in *Article 2(4) of UN Charter*.

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[19]Anthony C, A. and Robert J, B. 1993. *International Law and the use of force*, Routledge, p. 31,

[20]*UN GAOR Supp. GARes*. 2625 (No. 28) 25:121:UN Doc. A/8028 (1970).

In its decision in the *1986 Nicaragua case*, the honourable court held that the principle of Article 2(4) were not only treaty law, but the substance of customary international law as well[21]. It is therefore the author's view that *Article 2(4)* binds all states, be they members of the UN or not. The binding character of this provision derives from both treaty law and customary international law. Corollary to the rule on the prohibition of use or threat of force, as contained in Article 2(4) of the UN Charter, is the Principle of Non-Intervention.

2.1.2. The Principle of Non-Intervention

This principle is provided for in *Article 2(7) of the UN Charter* as stated above. Whether this principle is part of contemporary international law, this issue was considered by the ICJ in the famous case of *Nicaragua*[22]. In casu, the World Court found that: *'The principle on non-intervention involves the right of every sovereign State to conduct its affairs without outside interference, though examples of trespass against this principle are not frequent, the Court consider that it is part and parcel of customary international law.'*

In support of the above argument, the ICJ relied on its findings in *Corfu Channel case*[23] and various UN GA Resolutions. In Corfu Channel case, the Court had previously held that the doctrines of Sovereignty and the rule on non-intervention are the pillars of international peace and security. On the lawfulness or otherwise of intervention by states in internal conflict of another state in support of opposition (armed or not), the Court's conclusion was unambiguous: *no such general right of intervention in support of an opposition within another state exists in contemporary international law. Acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involves the use of force, constitute a breach of the rule on the prohibition of the use or threat use of force in international relations, i.e. Article 2(4) of the UN Charter*.

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[21] *Nicaragua v USA*, ICJ Report, 1949, [1986],14

[22] Ibid: Par. 205

[23] *Corfu Channel, UK v Albania*, ICJ Report, 1949, par. 4

The findings in the above cases are supported by academics' writing. Thus, Professor O. Schachter[24] wrote that any intervention in a sovereign state is illegal and located outside the premises of the UN Charter. Professor Schachter further stated that that neither human rights, democracy, or self-determination are acceptable legal grounds for waging wars, nor for that matters, are traditional just cause or righting wrong wars.

The principle of Non-Intervention as discussed above is an essential shield to the doctrine of sovereignty under which all states are viewed as autonomous units co-existing in international relations. Between independent states, respect for territorial sovereignty is an essential foundation of international relations, observed the ICJ in Corfu Channel case as stated above. The notion that because a regime is detestable, foreign intervention is justified and forcible overthrow legitimate, such view is extremely dangerous that could ultimately jeopardize the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgment of neighbours[25].

When the then Organisation of African Unity (OAU) now African Union (AU) was created in 1963, its members sought to protect their independence not only from the West, but from one another as well. The "purposes", and "Principles" enumerated in Article II and Article III of the OAU Charter places a premium on sovereignty territorial integrity, and non-interference in member States internal affairs. The Charter does not provide for collective security[26].

Notwithstanding the foregoing, it is the author's view that the principle on non-intervention is in sharp contradiction with the new emerging norm of responsibility to protect[27].

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[24]Schechter O, 1984, *The Right of States to use armed force*, 82 Michigan Law Review, p. 1620

[25]France Statement before the UNSC, 34 UNSC, Mtg 12 January 1979, par. 36

[26]Eric G. B and Katie E. S. 2000. *Peacekeeping in Africa*: Capabilities and Culpabilities, p. 45

[27]The responsibility to protect, supplementary volume to the report of International Commission on intervention and state sovereignty, International Development Research, 2001

Applying these two customary international rules, the prohibition on the use of force and the Non-intervention principle, to the SADC military intervention in DRC, the inescapable conclusion would be that such intervention was contrary to, and a *prima facie* violation of international law, unless it either:

(i) falls within the UN Charter exception to Article 2(4), or

(ii) can be justified under customary international law that has evolved independently of, and consistently with, the UN Charter. In the following Chapters we will examine the exceptions to Article 2(4) with the view to determining whether the SADC Allied Force military operations in DRC could be justified under such exceptions.

Chapter 3: Exception to the Non-Use of Force Rule

3.1. Exception to the Non-Use of Force Rule

At the beginning of the twenty-first century, the adoption of new standards of conduct for states in the protection and advancement of international human rights has gradually led to a shift from a culture of sovereign impunity to a culture of national and international accountability and recognition that concepts of security must include people as well as states. The doctrine of international intervention recognizes as lawful the use of force by states to stop maltreatment of by a state of its own nationals when the conduct is brutal and large-scale as to shock the conscience of other nations[28].

In the UN Charter, there are three explicit main exceptions to the prohibition on the use or threat of force as provided for in Article 2(4), namely:

(a) Force used in self-defence (Article 51),
(b) Force authorized by the UNSC under Chapter VII,
(c) Force undertaken by the five major powers before the SC is functional (Article 106).

It is however, noteworthy that only exceptional a, Article 51, concerns our discussion in this paper. Hence, Article 2(4) of the UN Charter has to be read in conjunction with Article 51 which is the major exception to the rule on the non-use of threat or force by states in solving international issues. Article 51 of the UN Charter provides as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the SC has taken measures necessary to maintain international peace and security.

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[28]Dan, K. 2003. *The Use of Force and Human Rights. Some thoughts and Some insights,* p. 6

Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the SC and shall not in any way affect the authority and the responsibility of the SC under the present Charter to take at any time such action as it deems necessary in order to maintain and restore international peace and security.

The International Commission on Intervention and State Sovereignty (ICISS) in its report entitled the Responsibility to Protects has indicated that policy makers should focus on the *Responsibility to Protect* rather than on the right to intervene so that the rights of affected persons rather than the interests of states should determine the decision to intervene. The report indicates that the primary responsibility to protect individual at risk falls on their own state; but where states are unable or unwilling to provide protection from serious abuses, it falls on the other states to do so. The responsibility to protect does not only include the duty to react but also the duty to prevent abuses from occurring and, after intervention, the duty to rebuild. In this regard, the responsibility to protect is a linking concept that bridges the divide between intervention and sovereignty[29].

The Constitutive Act of the African Union is precise in Article 4(h), which provides for the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances of war crimes, genocide and crime against humanity. A common yardstick for a legitimate intervention is therefore to save individuals at risk from atrocities[30]. External factors contributed to the Congolese conflict. The conflict in the Congo was externally driven and involved troops of several other African countries, siding with either the rebels or the DRC government, all providing official justifications for their interventions, but acting on common hidden agenda[31].

Rwanda and Uganda referred to international law and justified their cross-border raids and intervention in the DRC as 'hot pursuit'.

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[29] Ibid: p. 09

This was, however, an unfortunate misuse of the term. The right to hot pursuit belongs to the law of the sea. According to Dugard, if a state wishes to justify cross-border raids, it must do so in terms of the right of self-defence or, possibly reasonable reprisal action[32].

In August 1998, three SADC members, Angola, Namibia and Zimbambwe, intervened in the DRC conflict to dislodge Ugandan/Rwandan backed rebels who were threatening to topple Kabila's government. In justifying their intervention in the DRC, they argued that they were supporting a fellow member of SADC which was facing external aggression. They further claimed that their actions were in accordance with the OAU Charter and the UN[33]. They reacted by sending troops or providing some kind of assistance to President Kabila in an attempt to restore regional balance of power and help maintain their own influence in the region. For Angola, these interests were basically twofold. First, Angola needed to protect its petroleum and diamond exploitation zones, particularly the oil-rich area from its north-west to Cabinda, which is partitioned by a slice of Congolese territory.

The occupation of the DRC by the anti-Kabila alliance in August 1998 was a clear and present danger for Luanda, in view of the alleged collaboration between the alliance and UNITA, the rebel movement led by the late Jonas Savimbi.

Second, Angola government feared that Savimbi would once again use an unstable Congo as a rear base for his rebellion, as he did during the Mobuto regime. Thus, Angola has an evident security interest in the stability of the DRC, a country with which it shares a long land border of 2,511 kilomtres[34].

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[30]Ibid: p. 10

[31]Andr,M.B.M. 2003, *African Human Rights Law Journal, The conflict in DRC and the protection of rights under African Charter,* p.6

32Dugard, J. 2000. *Public International Law: A South African Percespective*, p. 421

Sam Nujoma, the then President of Namibia stated unequivocally that Namibian intervention, like that of Angola and Zimbambwe, was strictly geared towards defending the DRC's political sovereignty and the territorial integrity of the Kabila regime in Kinshasa. Among other reasons, Nujoma cited Namibia future security interests, proclaiming that Namibian troops were in DRC because the peace and stability that the country enjoyed today was not going to last forever. As far as security were concern, Namibia's government argued that national security justify its intervention, especially because UNITA was using the Caprivi, which is Namibian soil, as a base for its operations. They contended that UNITA was also assisting the people of Caprivi to secede from Namibia and as such, Namibian intervention in the DRC on the side of both Kinshasa and Luanda in this war would directly boost their security interests against the Caprivi separatists.

At an Organ of Politics, Defence and Security (OPDS) meeting in Luanda in September 1998, Zambia's Army Commander, General Solomon Mumba, declared that any threat to a member of SADC could justify intervention by its allies: "If such intervention took place in some countries, he saw no reason why it should not occur in others"[35]

This was clearly in line with the thinking of President Robert Mugabe who, when defending Zimbambwe's position in the conflict, drew parallels with the European approach to the Balkan problem: "*If it was right for the European countries (EU) to get involved in Bosnia and to think of getting involved in Kosovo, why should it not be right for us?*[36]

The SADC Alliance in its Policy Positions stated as follows:

A prolonged struggle in our region that destabilizes the principle of the region and principles of democracy that destabilization must be resisted.

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[33]Fako, J.L. 2006. *African Military Intervention in Africa Conflicts: Analysis of Military Intervention in Rwanda, the DRC and Leshoto, p. 125 -140*

[34]George, N.N. 2004, *The International Dimensions of the Congo Crises,* p. 3

[35]Segaren, N. 1998. *Rebel without a pause: Diplomacy in the DRC conflict*, in SAJIA Vol. 6. No.1 p. 15

What is a threat to your neighbour is a threat to you, how long were we in Mozambique? More than seven years, but at the end of the day we got peace and now we are comfortably live in good neigbourliness[37].

The justification of the choice by Zimbambwe to send troops to the DRC is premised on the distress calls from the DRC regime sent through the Angolan and Namibian presidents to Mugabe, as the Chair of the SADC OPDS. President Mugabe has therefore argued that his government "responded to a call for assistance by the DRC government following the invasion by the Uganda and Rwanda. President Mugabe further stated that: *as the Command in Chief, I took the necessary action to come to the aid of an aggressed neighbour and fellow SADC. Ours was a respond to an urgent appeal by the Congo to the SADC OPDS. I did so conscious of the inherent dangers and problems including the death of our troops. It is an honourable act of enlightened self-interests*[38].

According to Dugard, there are circumstances were interventions by foreign governments to support a friendly incumbent government are permissible under international law. This is the case, for instance, when the rebels are supported by another or other states and such support is sufficiently substantial to amount to an armed attack or an aggression[39].

At an unscheduled meeting of SADC Heads of State on 2 September 1998, Mandela who strongly opposed to the SADC military interventions unexpectedly toned down his strong rheotic against Mugabe and announced that SADC unanimously supported the three SADC countries' military intervention in DRC. The meeting was held in Durban during the NAM Summit. Eleven of the 14 SADC countries were present, nine at the Heads of State level. Kabila, Mugabe and Namibian President Sam Nujoma did not attend and were not represented. Mandela said,

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[36]Naison, N, (Lt. Col. Rtd), 2004, *A critical review of the SADC military intervention in the DRC*, p. 10

[37]DRC: Green light given to SADC to flush out rebel, http://www.oneworld.org/ips2/oct98/17_48_074.html. accessed on 20 July 2011

"It is quite reasonable when a legitimate leader says 'I have been invaded' and asked for support and it is quite reasonable for countries to respond to that."[40]

The coalition was placed under the operational command of Zimbambwe. The Deputy Force Commander has always been a Namibian, and Angola has always provided the Chief of Staff.

Luanda provided the bulk of the logistical support required to deploy the three nation inter-African force. Besides airlifting its own troops, The Angolan Air Force transported Namibian and Zimbambwean soldiers to DRC as well as tanks and armoured vehicles. It also ferried FAC contingents within the country. Harare provided Alouette helicopters and Casa light transport aircraft.

3.1.1. The Reigning Paradigm

Since the past decade, there has been a dramatic shift in approach to the protection of human rights to the effect that the military has been called upon to protect civilians in situations of gross human rights violations and grave breaches of IHL la by way of international interventions. Thus, military forces are declining to be instrument for pursuing power policy, but are increasingly becoming guarantors of foreign policy primarily aimed at stability and peacekeeping, which is pursued by the states, coalitions and the UN[41].

3.1.2. Use of force in extreme cases only

Resort to military force should be the last option exercised only in extreme and exceptional cases. The practical difficulty lies in determining when, in fact, all non-military options have been explored in good faith and exhausted. The general expressed view is that exceptional circumstances must be cases of violence which so genuinely shock the conscience of mankind

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[38]DRC: Demands to withdraw troops anger Zimbambwe and Namibia, world news, http://www.one world.org/ips2/sept98/17_25_088 html, accessed on 21 June 2011

[39]Dugard, J. 2000. *Public International Law: A South African Perspective*, p. 426 – 428

or which present such a clear and present danger to international security, that they require military intervention.

Generally, large-scale loss of life actual or apprehended and large scale ethnic cleansing have been held to justify a military intervention. These include war crimes, situations of state collapse that expose the population to mass starvation or civil war and overwhelming natural catastrophes. Emphasizing the need for large scale loss of life in order to justify military intervention, however, Responsibility to protect indicates that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing. Without this possibility of anticipatory action, the international community would be placed in a moral untenable position of being required to wait until genocide begins, before taking action to stop it[42].

The UN Charter stipulates that the mission of the UN is to save succeeding generations from war and to proclaim the dignity and equality worth of the human person. The SC is mandated to maintain international peace and security. In order to succeed in meeting this challenge, the establishment of preventative peace mission is therefore, a proper way to avert war and maintain peace.

3.1.3. The relevance of Article 51 of the UN Charter

It has been stated by the Chairman of the Special Committee on the Definition of Aggression, that most members thought that in defining armed aggression they were also providing a definition of armed attack in Article 51.

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[40]Eric G. B and Katie E. S. 2000. *Peacekeeping in Africa: Capabilities and Culpabilities*, p. 178 – 179

[41]Daniker G, 1997, *The Guardian Soldier: On the nature and use of armed force*, UNIDIR, Geneva

[42]White, N.D. 1993. *Keeping the international peace: The United Nations and the maintenance of international peace and security*, p. 45 - 54

Analysing Article 51 of the UN Charter, it is quite clear that the Charter admits only two exceptions to the use of force in international law, first the right to self-defence in response to an armed attack, and secondly an authorization of the use of military measures by the SC under Chapter VII of the UN Charter in response not only to aggression but to a wider situations that threaten or breach international peace. It follows that it is important to determine the relationship between the two exceptions in the case of an armed attack or armed aggression occurring against a State[43].

The truncation of the Council's powers signified that there was no real or potential overlap between the two exceptions during the Cold War. The military option was only used once in the Cold War period in response to an armed attack, in the case of the North Korean invasion of the South in 1950. This illustrates how close the two exceptions are on occasions in that the USA sent troops to the aid of the South immediately, an action obviously in collective self-defence although not stated as such. This response was then transformed into a UN operation by the Security Council recommendation, in the absence of the USSR, that States assist the South to resist the attack. Collective self-defence became collective security in this instance[44].

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[43]Ibid: p. 55

[44]Ibid: p. 55

Chapter 4: SADC Protocols on Collective Self-Defence and Collective Action

4.1. SADC Protocols on Collective Self-Defence and Collective Action

The significant phrase in Article 51 in this context, is the requirement that the right of self-defence exists until the Security Council (SC) has taken the measures necessary to maintain international peace and security. Article 51[45] was inserted at a late stage at San Francisco in order that action in collective self-defence by regional organizations should not require SC authorization under what was to become Article 53 of the UN Charter. However, the delegates were not prepared to allow a completely decentralized right of self-defence and so the phrase was inserted that would permit self-defence until the SC took over the role of combating the aggression. The provision of Article 51effectively removes action taken in collective self-defence from being vetoed, at least at the outset of the action.

Article 53 of the UN Charter[46] state as follows:

(1) The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of the measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Government concerned, be charged with the responsibility for preventing further aggression by such a state.

(2) The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

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[45] *UN Charter 1945*, Article 51

[46] Ibid: Article 53

It is essentially to note that under the Charter of the United Nations, there is no assurance that in the event of aggression or invasion an action will be taken automatically in every conflict that threatens or breaks out in some part of the world. In each instance, the Security Council must determine that a threat to the peace, breach of peace or an act of aggression does exist.[47]

The Security Council is perceived as a responsible body not only in identifying threats to international peace and security but in dealing with them. It is the level of consistency that the Council maintains in this regard, which will enable it to project an appropriate image.

The word "aggression" was defined by Bolivia[48] and could be ascertained by acts such as invasion by armed force of a foreign territory, declaration of war, aid lent to armed bands for the purpose of invasion, refusal to comply with a decision pronounced by International Court of Justice. The purpose was to ensure automatic action by the Council. The proposal of the definition aggression by the Bolivia was rejected by the Sponsoring Governments of the San Francisco Conference, particularly the USA were opposed on the grounds, that it would be impossible to cover all possible forms of aggression.

The provision of Article 53 means that the Security Council retains supremacy over the matters coming within Chapter VII. Regional blocks designed primarily to enhance the defence and military capabilities may only undertake enforcement action, once they are authorized by the Security Council.[49]

The primary decision in respect of the SADC states on the war in the DRC has been over providing military support to the DRC regime. It has been argued by Zimbambwean President Robert Mugabe that the DRC was being invaded by the two Great Lakes states, Uganda and Rwanda. For, this reason, he urged a regional response to the aggression on a sovereign state.

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[47]Anjali V.P. 2003,Price and Reward of Being Around the Table, United Nations Security Council, p 88

[48]Ibid: p. 55 - 56

For its part, the SADC alliance signed a Mutual Defence Pact as a way of harmonizing their military aid to the DRC regime. It is further argued that it is not only the members of the MDP that have been affected by the decision to participate in the conflict, but also SADC, being the regional institution with a mandate to resolve conflicts in the region[50].

On 8 August 1998, in Victoria Falls, Zimbambwe, the first meeting of Regional Heads of State and Government was held to address the war. Those who were in attendance include the leaders of Angola, DRC, Namibia, Rwanda, Tanzania, Uganda and Zambia. Mugabe announced at that meeting that a four-nation committee of representatives from Namibia, Tanzania, Zambia and Zimbambwe would be created and charged with helping secure a cease-fire. Upon receiving the recommendations of this task force, Mugabe forwarded the proposals to an ISDSC meeting in Harare on 18 August 1998[51].

Both Angola and Namibia followed Zimbambwe in advocating a military role for SADC in DR Congo. Zimbambwe took the initiative in making their intervention a collective defence action against external threat through SADC "Organ for Politics, Defence and Security", then chaired by President Mugabe. Following a meeting of the defence ministers of Angola, Namibia and Zimbambwe in Harare on 17 to 18 August 1998, the three countries agreed that the government of Laurent-Desire Kabila required the full support of the SADC to guarantee its survival. On the 19 August 1998, a MDP was signed by four SADC member states such as Angola, Namibia, Zimbambwe and the DRC.

The Defence Ministers of these countries declared that their countries would come to the assistance of fellow SADC member DRC's. Speaking in his capacity as head of the SADC OPDS,

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[49]White, N.D. 1993. *Keeping the international peace: The United Nations and the maintenance of international peace and security*, p. 22 – 23

[50]Naison,N, (Lt. Col. Rtd), 2004, *A critical review of the SADC military intervention in the DRC*, p. 4

[51]Eric G. B and Katie E. S. 2000. *Peacekeeping in Africa: Capabilities and Culpabilities*, p. 177

President Mugabe announced that the meeting had agreed that military aid should be sent to secure Kabila' s position[52]. Mugabe claim of unanimous support within SADC for his decision to intervene on behalf of Kabila was disingenuous. Mandela, the SADC Chairman, challenged Mugabe's authority to send troops on behalf of SADC.

4.1.1. SADC Mutual Defence Pact

Article 6 of the SADC MDP[53] deals with the collective self-defence and collective action and its provisions states as follows:

(1) An armed attack against a State Party shall be considered a threat to regional peace and security and such an attack shall be met with immediate collective action.

(2) Collective action shall be mandated by Summit on the recommendation of the Organ.

(3) Each State Party shall participate in such collective action in any manner it deems appropriate.

(4) *Any such armed attack, and measures taken in response thereto, shall immediately be reported to the Peace and Security Council of the African Union and the Security Council of the United Nations*.

Namibia, Angola and Zimbabwe implemented the decision to intervene militarily in the DRC after the failure of the diplomatic efforts to reach amicable solution to the DRC conflict. The three SADC alliance signed a Mutual Defence Pact (MDP) as a way of harminising their military aid to the DRC regime. It is further argued that it is not only the members of the MDP that have been affected by the decision to participate in the conflict, but also SADC, being the regional institution with a mandate to resolve conflict in the region.

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[52]Ibid: p. 176 – 177

[53]SADC Mutual Defence Pact. 2003. Dar es Salaam, Tanzania

The purpose of the MDP signed by the SADC allies was to protect fellow SADC countries from foreign aggression and to respond to threats to national sovereignty in the region.

Article 6 of the SADC MDP creates a number of international obligations, binding the states to each other.

Chapter 5: The Legality of SADC military involvement in DRC

5.1. The Legality of SADC military involvement in DRC

Whether or not SADC Allied Forces acted legally in response to the aggression on a sovereign state of DRC by Rwanda and Uganda, this issue can only be appropriately addressed after an analysis and understanding of *the right to self-defence* as provided for both in the UN Charter and customary international law. The reading of Article 51 clearly shows that it constitutes an explicit escape to the rule on the prohibition of threat or use of force as contained in Article 2(4). It is for this reason that same Article had been subject of most fundamental disagreement both among states and legal scholars. It is submitted that the disagreement mainly lies in the scope of self-defence, this is to say, whether *anticipatory self-defence*, *protection of nationals*, and in some instances *response to terrorism* are part of the right to self-defence as contained in Article 51. In a nutshell the controversy turns on the interpretation of the two phrases in this article, namely: "*armed attack"* and *"inherent right" (*in French*: droit naturel).*

Ordinarily construed, Article 51 means that notwithstanding the provision in Article 2(4), if a state experiences an "armed attack", that state retains an "inherent right" to defend itself by using force against the attacking state until the SC is able to take necessary action. This right may be exercised either individually or collectively.[54]

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[54] *UN Charter 1945*, Preamble

As we have mentioned in the preceding paragraphs, the meaning or rather the construction of Article 51 has created some disagreements among states and international jurists. The interpretation difficulties in this respect may be summarised as follows: firstly, what constitute an "*armed attack?"* One author has argued that the notion of "armed attack" is related to the rule set out in Article 2(4) of the UN Charter[55]. Thus, an armed attack, being one of the forms of use of force against the territorial inviolability and political independence of another state, constitutes a violation of the obligation stipulated in Article 2(4).

Consequently, self-defence becomes a remedy or a means of implementing sanctions against that particular breach of international law.[56] Secondly, is an "armed attack" the only circumstances giving rise to self-defence? Some writers have submitted that since Article 51 refers to self-defence as an "inherent right", the purpose of the Article was not to restrict the pre-existing customary rights only to cases of armed attack, but rather to make it clear that in cases of armed attack, such an inherent right to self-defence would definitely occur. This School of thought therefore submits that at the conclusion of the Charter, there was a wide customary right to self-defence and such a right could not have been taken away by the Charter without express provisions. On the other hand, the restrictionist theory or Modern School contends that Self-defence, being an exception to the prohibition on the use of force in Article 2(4), should be narrowly construed. Moreover, same School submits that the limits imposed on this right in Article 51 would become meaningless if a wider customary right to self-defence survives unfettered by these restrictions.[54] Despite the above disagreements among legal scholars and academics, it is worth noting that they all agree on the requirements to be met by any state in the exercise of its right to self-defence. These requirements are *Necessity* and *Proportionality*.[57]

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[55]Kolesnik, D.N. 1989. *The development of the right to self-defence in the non-use of force in international law,* p. 155

[56]Ibid.

[57]Bowett, D. 1954. *Self-Defence in international Law*, p. 184 – 193

On more than one occasion, the International Court of Justice (herein the ICJ) was called upon to deal with, and adjudicate on the issue of self-defence as contained in Article 51 of the UN Charter.

In the ensuing paragraphs, our debate focuses on the findings of the ICJ in the much celebrated cases of *Nicaragua V USA* [58].

In the latter case, the Court reiterated that '*for the right of self-defence to arise, there must be a pecific armed attack for which the state against whom the victim state is responsible*.' In as far as the "armed attack" is concerned; the Court relied on its findings in the Nicaragua case where it held as follows:

The sending by, or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to inter alia, an actual armed attack conducted by regular forces, or its substantial involvement therein could be an armed attack.[59]

In the opinion of the Court, not every use of force does trigger the right to self-defence; an armed attack must involve a significant amount of force. The court went further and held that less grave forms of the use of force do not amount to armed attack. Thus assistance to rebels in the form of provision of weapons, logistical, or other support does not amount to an armed attack, though this could be illegal intervention.

5.1.1. ***Necessity and Proportionality as requirements for Self-defence*.**

A review of academic writings clearly demonstrates that these two requirements have been accepted by customary international law.

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[58] *Nicaragua v USA*, ICJ Report, 1949, [1986],195

[59] Ibid.

[60] Ibid.

In Nicaragua case (supra), the ICJ made it clear that a rule "whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it", is a well established rule in Customary International law.[60]

In the preceding paragraphs, it was mentioned that all academics and legal scholars do agree on the above conditions of necessity and proportionality.

It is noteworthy en passant that these two requirements are traced back to the *1837 Caroline Incident* which involved a pre-emptive attack by the British forces based in Canada against a ship manned by Canadian rebels planning an attack from the United States of America.[61] Following this incident, the then US Secretary of State, Mr. Webster, in a note to his British counterpart, Lord Ashburton, stated what were and still are the requirements of any action taken in self-defence. The note urged Britain to show: '*a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation. For an act to be justified by the necessity of self-defence, such an act must be limited by that necessity and kept clearly within it.'*

As to the requirement of *proportionality*, D. Bowett submits that measures taken by defending states must be in *proportion* to the danger and must never be *excessive* or go beyond what is strictly required for the repel or halting an armed attack. Thus whether a particular action taken in self-defence is lawful or otherwise, this will be decided upon consideration of the factors of necessity and proportionality.[62]

Put differently, the two factors of necessity and proportionality discussed above constitute a minimum test by which to determine that a use of force does not constitute self-defence. For instance, in the Security Council debates on this topic, states do not go into doctrinal disputes,[63] they rather simply say that the use of force was not necessary or proportionate and therefore

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[61]Bowett, D. 1954. *Self-Defence in international Law*, p. 85

[62]Christine G. 2001, *International Law and the use of force*, Oxford, p. 107

[63]Bowett, D. 1954. *Self-Defence in international Law, p. 85*

unlawful.

Moreso, necessity and proportionality are crucial in the rejection by states of the legality of prolonged occupation of territory under the umbrella of self-defence. Thus, Israeli presence in South Lebanon from 1978 to 2000 and South Africa's occupation of a buffer zone in Angola from 1981 to 1988 were both claimed to be justified as self-defence. They were however both repeatedly and universally condemned as not necessary and proportionate.

5.1.3. SADC Military Intervention: Was it a Collective Self-Defence or not?

In 1950, military option was used in the Cold War period in response to an armed attack, in the case of the North Korean invasion of the South Korean. The USA sent troops to the aid of the South Korean immediately after the invasion of the North Korea, an action obviously in collective self-defence although not stated as such. This response was then transformed into a UN operation by the SC recommendation, in the absence of the USSR, that States assist the South Korea to resist the attack. Collective self-defence became collective security in this instance.[64]

The significant phrase in Article in this context, is the requirement that the right of self-defence exist until the Security Council has taken measures necessary to maintain international peace and security. Article 51 was inserted at a later stage San Francisco in order that action in collective self-defence by regional organisations should not require Security Council authorization under what was to become Article 53 of the Charter. However, the delegates were not prepared to allow a complete decentralised right of self-defence and so the phrase was inserted that would permit self-defence until the Security Council took over the role of combating the aggression.[65]

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[64]Ibid.

[65]White, N.D. 1993. *Keeping the international peace: The United Nations and the maintenance of international peace and security,* p. 55

It is of cause a moot point that the international community regards the UN as an appropriate organ to deal with issues of conflict. The community also feels free to ignore it in the prefence of other selected organs such as the NATO in its attempts to remove regimes it considers undemocratic. In this regard, the unrepresentative government in the DRC must be left to fall even if its predecessor, aligned to the USA and the West, was allowed to exist for decades.

Article 5 of the Northern Atlantic Treaty Organisation (NATO),[66] the document states that an armed attack against one or more of the parties shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the UN Charter, will assist the Party or Parties so attacked by taking forthwith, individually or in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the Northern Atlantic area. In addition, any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council.

Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

At this stage, we are now in better position to argue whether or not the action taken by the SADC allies to defend the DRC regime against the aggressors was a collective self-defence. To this end, the cardinal issues to be addressed are: i) *was there any foreign invasion or armed attack against the DRC government*? If the answer to this question is in negative, *caedit questio*, this is to say, there was no ground for collective self-defence.

Nonetheless, if the answer to the same question were in affirmative, then the next step would be to apply the requirements of *necessity* and *proportionality.*

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[66]Engelbrecht, L. 2009. SADC Mutual Defence Pact creates new defence market, p. 1

[67]UN Charter (GA Res 2625(xxx) 1970) and OAU Charter, Article 3(b), 4(a),(b)

It is the author's opinion that there was an armed attack against the DRC government by Rwanda and Uganda. The conflict involved a complex mix of ethnicity, politically alienated militia and foreign troops that were not easily distinguishable from the rebels they supported.

The involvement of Rwanda and Uganda could be depicted as a kind of invasion to the DRC. It was an aggression and as such a fragrant violation of universal and African international law.[67]

In this regard, the findings of the ICJ in Nicaragua case (supra), as to what may constitute 'an armed attack' are relevant and helpful. The World Court has held that:

The sending by a state of armed bands, groups, irregulars, or mercenaries who carry out acts of armed force against another state, of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein could be an armed attack.[68]

The reasoning of the ICJ on this issue is in fact a reflection of the academic writings. In this regard, Ian Brownlie writes as follows: S*ince the phrase 'armed attack' strongly suggests a trespass, it is very doubtful if it applies to the case of aid to revolutionary groups and forms of subversion which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of armed attack*. The same learned author however submits that 'a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would amount to an *armed attack*.

In the light of the foregoing and applying the authorities to the instant study, it is not disputable that there was an armed attack against the government of DRC and the latter was entitled to take action in self-defence in order to repel said attack.

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[68]Nicaragua v USA, ICJ Report, 1949, [1986], 195

5.1.1. SADC military intervention: Was it a collective self-defence or not?

The next issue to be tackled is whether the SADC allies, when they exercised their right to collective self-defence, had complied with the conditions of necessity and proportionality. In this debate we have convincingly demonstrated that these two requirements are well rooted in customary international law. It was also shown that both state practice and ICJ jurisprudence have used these criteria to determine the lawfulness or otherwise of the action taken by states under the umbrella of self-defence.

In order to decide whether SADC allies complied with these two requirements when it sent its troops to support DRC regime, it will depend on how reasonable and proportionate were their actions. As discussed above, SADC Allied Forces, contended that they had militarily intervened in the DRC to defend the legitimate government and a fellow SADC member State against the aggressors.

The SADC allies argued that their intervention had been based on the SADC Treaty, Article 4, read in conjunction with the objective of the SADC Organ for Politics, Defence and Security, in response to hostile action by foreign states that require a defensive response by SADC. There is a view that the involvement of in the conflicts of the SADC states was motivated by their desire to protect their economic interests in the embattled country.[69]

It was nevertheless clear as to what motivated the military intervention: adherence to the principles of SADC, which espoused state sovereignty, solidarity, peace and security; human rights, democracy and the rule of law; and mutual benefit and peaceful settlement of disputes. The group also argued that genuine peace in an environment was only possible when that peace spread to the entire sub-region, a situation that called for a collaborative arrangement. Time was regarded as inconsequential as long as peace and security is achieved in the end. Regional cohesion was therefore regarded as a critical consideration.[70]

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[69]Naison, N, (Lt. Col. Rtd), 2004, *A critical review of the SADC military intervention in the DRC*, p. 4

Although the argument about keeping in power the late Laurent Kabila, whose own entry into power may have been suspect or known to have been undemocratic, could have received some sympathetic hearing, its legal standing shrivelled from the moment that SADC accepted the DRC regime into its regional community, a move that gave its legitimacy.

Therefore, even the economic arguments presented about the links between the DRC regime and members of SADC allies, such as that relating to OSLEG over the mining and selling of diamonds as well as the exploitation of coffee, timber and agricultural products in the country as a way of defraying some war costs for the Allied Forces, could be viewed as bilateral activities, unless there is some justification of taking any other view.

In as far as proportionality is concerned, it is a rule of customary international law that measures taken by defending states must be in proportion to the danger and must never be excessive or go beyond what is strictly required for the repel or halting an armed attack. Under the circumstances, the inescapable conclusion is that the military action taken by SADC allies to support the DRC government in collective self-defence did meet the requirements of necessity and proportionality, hence, apart from neighbourliness, their action was legally and in conformity with SADC Treaty, the OAU's Harare Declaration, the spirit of African solutions to African problems[71], as well as both customary law and international law. Another justification advanced by the SADC Allied Forces is that, Members of the regional organisation must surely count for something when one state's survival is at stake.

As stated above, in 1950 the USA sent troops to the aid of the South Korean immediately after the invasion of the North Korea, an action obviously in collective self-defence although not stated as such. This response was then transformed into a UN operation by the SC recommendation, in the absence of the USSR, that States assist the South Korea to resist the

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[70]Ibid: P. 4

[71]Ibid: P. 6

attack.

Similarly, diplomatic effort within the SADC, OAU/AU and the UN culminated in the signing of the Lusaka Agreement and the holding of the inter-Congolese political negotiations that ended with the adoption of the global Agreement and an interim Constitution for the DRC. Eventually, Resolution 1279, establishing a UN force for the DRC under the code name of MONUC.

It is therefore, the view of the author that the transformation of USA military intervention into a UN in the South Korea is similar to the SADC military response to defend the DRC regime which was transformed into UN under the name code of MONUC.

6. Conclusion

This paper has focused on the 1998 SADC allies military intervention in DRC with a view to determining its legality or otherwise under International Law. To this end the author has explored the genesis of the Congolese conflict and the justifications advanced by SADC Allied Forces for its 1998 military involvement in DRC.

Essential to this discussion were the analysis and understanding of the Rule on the prohibition of the use or threat of force by states. In this regard, the author has examined the content and interpretation of Article 2(4) of the UN Charter. Most of the legal scholars, state practice, and ICJ jurisprudence regard the above Article as a codification of customary international rule on the prohibition of the use or threat of force by states. Another principle which is closely related to the rule on the prohibition of the use or threat of force, namely: the Non-intervention rule has formed part of our discussion. Article 2(4) cannot be fully understood if taken out of the UN Charter paradigm. This is why the analysis of Article 51 of the UN Charter and Article 6 of SADC MDP, as an exception to the Rule on the Non-Use of force, was equally relevant to our debate.

After weighing the justifications advanced by SADC Allied Forces (Angola, Namibia and Zimbambwe) against well established principles of International Law, the ICJ authorities on the topic, the writings of academics, and GA Resolutions, the author has come to the unavoidable conclusion that SADC allies military involvement in DRC could be tolerated on the ground of collective self-defence, hence its military presence on the Congolese territory was lawful in the face of international law.

In justifying their intervention in the DRC, they argued that they were supporting a fellow member of SADC which was facing external aggression.

These arguments were supported by Dugard, when he stated that: *there are circumstances were interventions by foreign governments to support a friendly incumbent government are permissible under international law.*

This is the case, for instance, when the rebels are supported by another or other states and such support is sufficiently substantial to amount to an armed attack or an aggression.

The ensuing war that started in 1998 opposed Kabila to his former regional backers and became known as the 'First African War', because of the number of countries that were involved. In 2000, the war had evolved into a military and political stalemate, as none of the coalitions had the necessary capacity or political strength to win.

With the development of Mutual Defence Pact, the sub-region has shown its maturity in recognising the value of collaborative security and will therefore provide the UN with a valuable partner in the search for sustainable peace and security in the DRC.

The adoption of the Global and inclusive Agreement and an interim Constitution with a Bill of Rights for the DRC was a step forward in the right direction and should be welcomed by all those interested in the promotion of human and peoples' rights on our continent. Peace, democracy and development are human and peoples' rights and constitute the future of man all over the world, including in the DRC and the rest of the African continent.

True peace is impossible without democracy, respect for human's rights and the rule of law. To paraphrase and borrow once more from Pope Pau VI's *Populorum Progressio,*democracy and human rights[72] are prerequisites for enduring peace and development. Although conflicts and wars are inherent to social life in any society, the best way to save our peoples from these scourges, which brought untold sorrow and misery, is to unreservedly embark on the road to democracy, constitutionalism and human rights.

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[72]Andr, M. B. 2003. *African Human Rights Law Journal, The Conflict in the DRC and the protection of rights under the African Charter,* p. 235.

Finally and more importantly, Congolese people should be given an opportunity to be the masters of their own destiny; viz. neither Rwanda nor Uganda or any western power is entitled to dictate a system of government for Congolese people.

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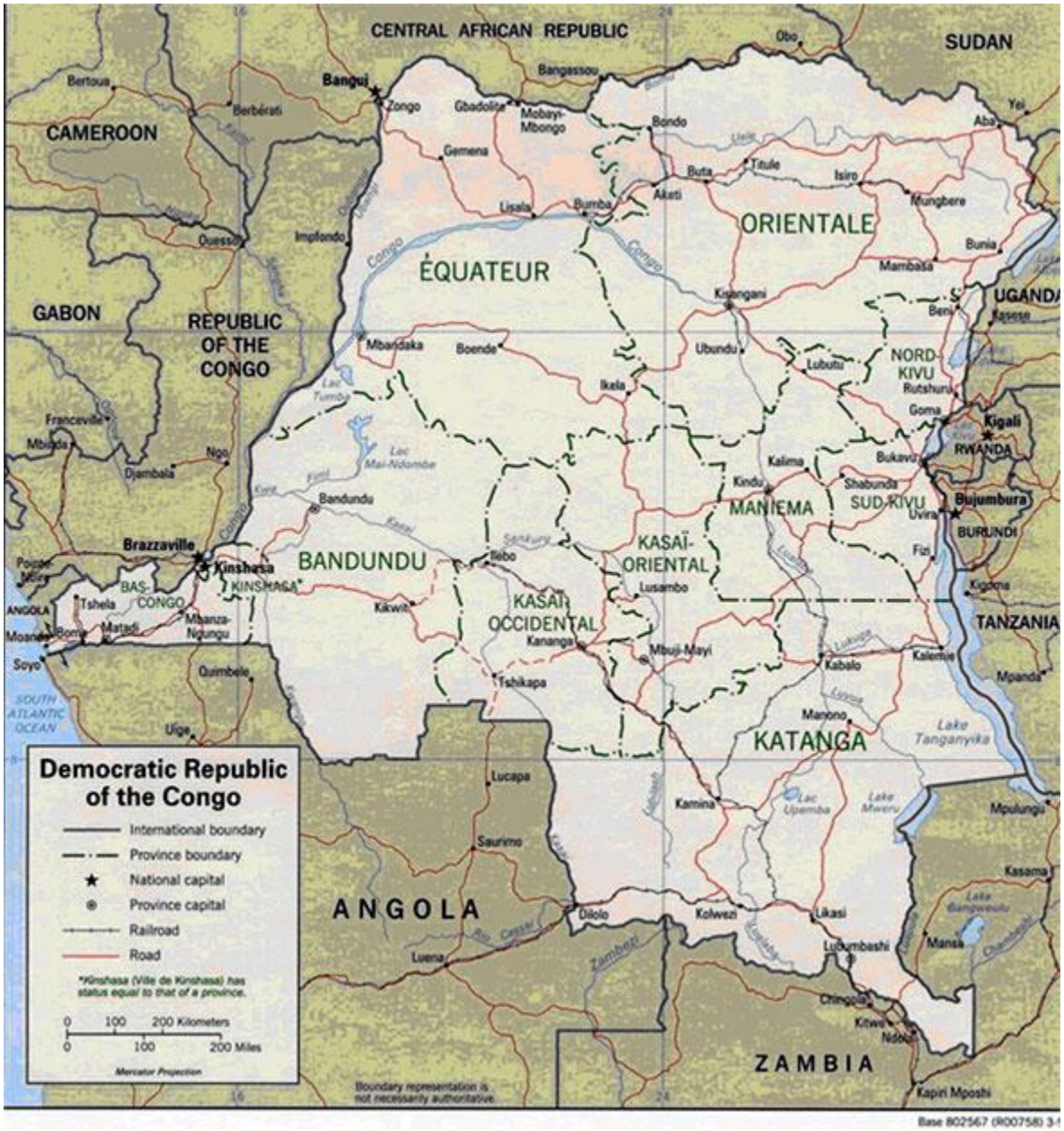
Appendix A

Map of Africa

Appendix B

Map of DRC



Appendix C

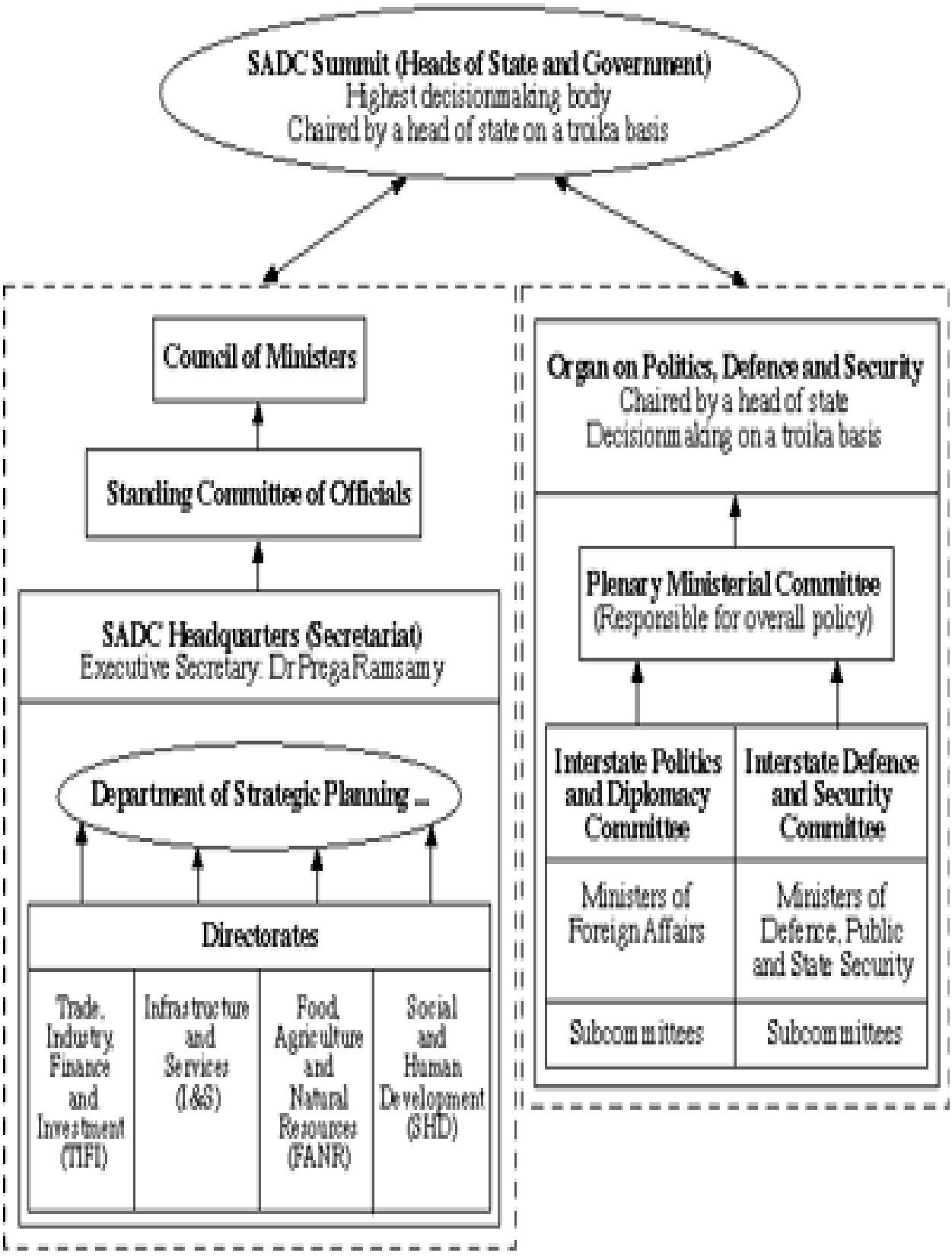
Map of DRC's depicting red areas that were affected by war

Appendix D

World Map

Appendix E

Structure of SADC



Appendix F

Map of SADC Member States