

1. The Defence Act, No. 44 of 1957 must be seen in the context both of South African Society, the development of the repressive machinery of the South African regime, and the activities of a group in power who are determined to retain that power at all costs including the lives of the citizens of the Republic of South Africa.

2. The Defence Act is really one aspect or branch of the notion of public safety. This notion of public safety is generally associated with the maxim salus populi suprema lex - the safety of the people is the highest law. The security which this maxim seeks to protect is that of the people and its original sphere of operation within the field of battle. It goes back as far as CICERO who was speaking of the Royal Magistrates and he declared "in the field they shall hold supreme military power; they shall be subject to no-one; the safety of the people shall be their highest law". In modern versions the word "populi" is commonly replaced by "rei publicae" which makes the object of protection the State rather than the people. In South Africa this change has been accompanied by a shift in focus from the safety of the people to "national security" and, more drastically, to "state security". More and more I think that there is a tendency for this concept to evolve into "government security".

3. The State has established and developed to a highly sophisticated degree its own definition of "public safety", legislation which is meant to preserve and protect it, bodies and authorities with enormous powers which are meant to implement the regime's notions

of public safety. / ...

of public safety.

4. And so we find:-

- (a) The Ministry of Law and Order (which includes the Police);
- (b) The Ministry of Defence;
- (c) The Internal Security Act, which is a virtual code of security law, and which falls under the Minister of Law and Order;
- (d) The Police Act which entrusts public safety powers to the South African Police Force;
- (e) The Defence Act contains numerous provisions concerned with public safety and these measures can be invoked either by the State President or the Minister of Defence. For instance the Defence Act explicitly declares that the South African Defence Force may be employed for the prevention of suppression of terrorism or in the prevention or suppression of internal disorder (Section 3(2)). This power of mobilisation is vested in the State President with the Minister enjoying only temporary powers to call-up the Defence Force;
- (f) Powers of a public safety character are allocated to the Minister of Defence under the Civil Defence Act and the National Key-Points Act;
- (g) The Public Safety Act rests in the State President the power to place the country or parts of it under Emergency Rule;
- (h) Apart from the Ministries of Law and Order and of Defence there are also three institutions which are particularly concerned with public safety:
 - (i) the National Intelligence Service falling Directly under the State President and headed by the Director General;
 - (ii) the State Security Council;
 - (iii) the Parliamentary Internal Commission;

The main functions of the NIS (formally BOSS) are to collect, evaluate and interpret national security intelligence and to formulate security estimates and overall policy for the State Security Council. The State Security Council is to advise the Government on National Security policy and strategy and to determine Intelligence priorities.

The Parliamentary / ...

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The Parliamentary Internal Commission is to investigate internal security matters referred to it by the State President and it can subpoena and examine witnesses. It doesn't seem that this has yet been used..

(i) National Key Points Act
(j) Armaments Dev + Prod Act.

DEFENCE ACT

1. It was only after the formation of the Union of South Africa that a Defence Act was enacted in 1912. Ever since that time there has been a permanent South African Force as opposed to the original Commando System of the Republic and the garrison of the British Army.
2. The Defence Act of 1957 principally determines the legal position of the South African Defence Force and its members. This Act consolidates the law relating to the military defence of South Africa, confirms the existence of the permanent and citizen forces, provides for a new military discipline code and the establishment of a system of commandos, it also, and most importantly, constitutes the statutory authority for the existence of the Defence Force. The Act is supplemented by General Regulations which have been published in the Government Gazette as well as certain Defence Force Orders which are issued by the chiefs of the Defence Force and the Army, Navy and Airforce. These are not published in Government Gazettes.

3. The Defence Act is furthermore supplemented by Regulations relating to nursing services, the Public Service Act, Moratorium Act, the Defence Special Account Act, the Military Pensions Act and so on.

4. The Defence Act itself is divided up into a number of main chapters and I will just mention these before going on to look at specific aspects of the Defence Act. These main chapters would deal with the following:

- (a) The liability of certain persons for training and service in the South African Defence Force. I won't deal with this;
- (b) The Composition Organisation of the Defence Force into components such as the Permanent Force, a Citizen Force, the Commandos, the Reserves and the Cadets;
- (c) Conditions of employment of members of the South African Defence Force;
- (d) Registration and selection of persons for allotment to the different branches of the Defence Force and procedures for granting of exemptions from all or a particular kind of Military Service. I won't deal with this at all;

(e) / ...

(e) The general powers of the State President, the Minister of Defence and officers in the Defence Force;

(f) Discipline in the Defence Force, certain legal procedures and offences created in terms of this Act.

EMPLOYMENT OF SADF

1. To me, the most important Section of the Defence Act and from which my entire argument tonight flows is Section 3(2) which states that:-

"The South African Defence Force or any portion or member thereof may -

- (a) At any time be employed -
 - (i) On service in the defence of the Republic;
 - (ii) On service and the prevention of suppression of terrorism;
 - (iii) On service and the prevention of suppression of internal disorder in the Republic;
 - (iv) On service in the preservation of life, health of property or the maintenance of essential services;
- and
- (b) While employed as contemplated in paragraph (a), be used on those police functions

mentioned in / ...

mentioned in Section 5 of the Police Act as may be prescribed.

2. We can see that the Defence Force and those persons conscripted into it can then be employed when and in what manner that our Lords and Masters decide that the Republic needs to be "defended", or that "terrorism" is ready to pop out of a paper bag or that a state of "internal disorder (presumably not the kind of disorder created by the Apartheid Regime)" exists.
3. The Act does define "operations in defence of the Republic" and these would be military operations either in a time of war or in connection with the discharge of obligations arising from agreement between the Republic and another State or for the prevention or suppression of armed conflict outside of the Republic which, in the opinion of the State President, is or may be a threat to the security to the Republic.
4. I find it difficult to think of an example where the South African Defence Force has carried out military operations which comply with this definition. Our Defence Force is extremely active or has been in Namibia, Angola, Lesotho, Swaziland, Mozambique, and ^{Zambia} Zimbabwe. Yet there is no formal declaration of war. We have no agreement between ourselves and any other state which require us to carry out military operations. And I know of no armed conflict outside the Republic (except perhaps for Angola) which is not of the creation of the South African

Defence Force. Of course, once the South African Government or it's Defence Force has created this armed conflict then it is acting in terms of the law to try and prevent that armed conflict when the State President has decided that this is a threat to the security of the Republic. There of course we rely upon his correctly and intelligently formed opinion.

5. If you want to know when the Defence Force can be employed to prevent or suppress terrorism you will find that the Act defines "terrorism" as "terroristic activities in the Republic or directed against the Republic or any authority or inhabitant of the Republic". Presumably the State President is an expert on these matters and will make the decision for us.
6. What these preliminary observations about the employment of the Defence Force raises is the following:
 - (a) We know that the Defence Force has been used as an army of occupation and oppression in many black townships in South Africa. For some people they are reminiscent of the armies that occupied Hungary, *Czechoslovakia* Poland, France, Belgium and the Netherlands during the period 1940 to 1945.
 - (b) We know that the South African Defence Force has carried out bombing raids on Maputho, infiltration and attack raids on Lesotho, Swaziland, Zimbabwe, Zambia and Angola.

We learnt after the event that the South African Defence Force had invaded Angola some 11 years ago and that it has remained there ever since. We know, because we learn after the event, that the South African Defence Force trains and supplies armies of foreign nationals to foment civil wars in Mozambique and Angola. We suspect that it may have done so in Lesotho and Zimbabwe.

(c) And so a number of questions are raised for us, whether we are conscriptive soldiers, friends of soldiers, ordinary citizens and these are:-

(i) can one refuse to obey a command to participate in any of these activities?

(ii) can one disclose any of the information which one learns about these things?

(iii) can one participate in any political activity to stop these things?

7. I want to look very briefly at the Defence Act to see what the answers to these three questions are.

DISOBEDIENCE OF / ...

DISOBEDIENCE OF LAWFUL COMMANDS

1. Section 19 of the Military Defence Code makes it a serious offence for any person to disobey a lawful command in wilful defiance of authority.
2. If the offence is committed by the person while on service the penalty is imprisonment for a maximum period of 5 years otherwise it is imprisonment for a period not exceeding 2 years. The Section requires that the lawful command must be given personally by his superior officer in execution of his duties.
3. The question arises what is lawful and who is to decide?
 - (a) The Nuremberg trials gave us some direction. We learnt from those trials that certain actions constitute "crimes against humanity" and that morality does play a part in the prosecution of a declared war.
 - (b) Prior to those trials, a Boer War case R -v- Smith (1900) 17 SC 561 found that:

"if a soldier honestly believes he is doing his duty and obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private

soldier would / ...

soldier would be protected by the orders of his superior officer"

In other words, the private soldier can commit an unlawful act if his superior officer's orders did not manifestly appear legal.

- (c) Does the private soldier in the South African Defence Force today believe that his superior officer's orders to shoot seven year old children are illegal? Does he believe that his superior officer's orders are illegal when he is told to throw grenades into a house where two sleeping women lie in Gaborone, Botswana? Does he believe that the order to fire two tear-gas canisters into a house in Kimberley where a family is praying over the coffin of it's dead son is illegal?
 - (d) It doesn't really help us to look at South African definitions of legality to decide whether occupation of townships is illegal or ~~aided~~ into foreign countries is illegal.
4. In international law the question of the extent to which a state is allowed to use force in the conduct ^{of} its international relations is riddled with a confusion of politico-legal answers. Article 2(4) of the United Nations Charter provides that all members of the organisation shall refrain

in their / ...

in their international relations from the threat or use of force against the territorial integrity or political independence of any state. There is added to this a prohibition on the use of force in any other manner inconsistent with the purposes of the United Nations. Article 51 of the Charter preserves the inherent right of self defence if an armed attack occurs against a member of the United Nations.

- 5. The organ which has the primary responsibility for the maintenance of international peace and security is the Security Council. This has the power in article 39 of the Charter to determine the existence of any threat to the peace, breach of peace, act of aggression and to make recommendations or decide what measures shall be taken to maintain or restore international peace and security. South Africa has never been particularly concerned about international rule, the United Nations or world opinion.
- 6. But writers on international law, amongst them Bowett, have stated:-

"self defence operates to protect essential rights from irreparable harm in circumstances in which alternative means of protection are unavailable; its function is to preserve or restore the legal status quo, and not take on remedial or repressive character in order to force legal rights".

7. / ...

7. It does not seem to me that:-

- (a) The South African Defence Force raids are concerned with self defence;
- (b) We are protecting essential rights other than the rights for a minority to continue to dominate and exploit a majority;
- (c) Alternate means of protection are unavailable or even necessary;
- (d) That, ~~without doubt in Namibia~~, we have no legal status quo ^{in Namibia where} we have a situation determined by the International Court of the ^{in the} ~~the~~ ^{at} ~~to~~ be an unlawful occupation of foreign territory.

8. There is also the interesting international law argument that there is the right of a state to provide military assistance to an established foreign government if "rebels" are unrecognised. But it is also established that once the rebellion has reached a state of war, that is once the rebels are sufficiently organised within a particular area to be considered as insurgency, a state has no right to interfere.

So I must ask: what are we doing fighting SWAPO and what are we doing aiding and abetting UNITA?

9. The question of the occupation by the Defence Force of the townships is somewhat more difficult to argue on legal grounds. There is the Public Safety Act. A State of Emergency was declared. Legislation allows the Defence Force to carry out duties within the townships. It all looks quite legal and lawful. But. This is all based on the hypothesis that :-

- (a) The South African regime is a lawful government and not a regime imposed upon the majority of the people by the might of a gun;
- (b) The legislation enacted by that regime complies with generally accepted principles of natural justice, democratic rule and morality;
- (c) The orders given to specific soldiers in specific situations are lawful, not only by reason of the Defence Act/Internal Security Act/Public Safety Act but by reason of the fact that they relate to the defence of the country as a whole and not the political considerations of a small minority.

10. These are difficult questions. I do not have the answers.

PARTICIPATION IN POLITICAL ACTIVITIES

1. Section 72H provides that a person who has been classified as a religious objector or who is liable to render community service shall not participate in any political activities other than those which have been prescribed. Such objector is not precluded at an election or at a referendum.
2. The General Defence Force Regulations allow members of the Defence to attend public political meetings while dressed in civilian clothes. But no member of the Defence Force who is dressed in uniform or who is performing duties or who is undergoing training may participate in any meeting, demonstration or procession for party or political activities. Neither, in terms of the General Defence Force Regulations, may he take part in activities for the furtherance of the interests of a political party etc etc.
3. So, the Defence Act prohibits the objector or the person performing community service from participating in political activities while the General Defence Force Regulations prevent a person undergoing training from any political activities. A member of the permanent force may attend party political meetings.
4. The rationale behind these Regulations is probably quite acceptable. A Defence Force is meant to be a neutral body. It is meant to be a body of professional persons who are placed at

the disposal / ...

the disposal of the government of the day to defend the interests of the country. The Defence Force is not meant to be associated with any particular ruling party or ideology. It may be that the British Army and the United States Army are always more conservative than the general population but they serve the Conservative Party and the Labour Party, the Republicans and the Democrats alike. They endure through changes of Government.

5. But South Africa is somewhat different. The South African Defence Force has only ever served the interests of a white government. Since 1948, which is my entire lifetime, it has only ever served the interests of the ruling national party. I would venture to suggest that all armies whether South African or based in South Africa have only ever served the interests of pre 1948 segregation and post 1948 apartheid. The neutrality in this context is a farce and I would suggest that it would do nobody any harm if members of the South African Defence Force were to be seen attending political meetings as they choose.
6. This would mean that the conscript would also be entitled to participate in political activities however broadly or narrowly one may define them. In the broad sense ECC mobilises around political issues and the conscript should be lawfully entitled to participate in those activities.

INFORMATION / ...

INFORMATION

1. What happens if you learn that units or individuals or the Defence Force as a whole is in another country or is in a township or is doing certain things?
2. I am ignoring the Protection of Information Act which took over from the old Official Secrets Act and I am only looking at the Defence Act. But thats enough.
3. Section 101 of the Defence Act provides that :

"the State President may during operations in the defence of the Republic or for the prevention or suppression of terrorism or for the prevention or suppression of internal disorder in the Republic by a Proclamation in the Gazette or in such other manner may establish and provide for censorship over all postal telegraphic, telephonic, radio matter or communications passing within, into or from the Republic and over all or any descriptions of letters, written or printed matter, parcels, pictures, drawings, sketches, photographs or gramophone records addressed or intended to be delivered or conveyed to any person".

4. That is how I learnt, when I went outside South Africa in 1975, that the South African army had invaded Angola. The South African newspapers could not publish that news and you could not read it.
5. Section 118 of the Act provides that no persons shall publish any information relating to the composition, move-

ments or dispositions / ...

ments or dispositions of the Defence Force. And you also cannot publish any statement, comment or rumour calculated directly or indirectly to convey such information.

6. Section 118 goes on to say that any statement, comment or rumour relating to a member of the Defence Force or any activity of the Defence Force which is calculated to prejudice or embarrass the government in its foreign relations or to alarm or depress members of the public is prohibited.
7. The Section furthermore says that no person shall publish in any manner whatsoever any secret or confidential information relation to the defence of the Republic.
8. Just in case you were worried as to when something is secret or confidential you needn't. Section 118(5) provides that it shall be presumed, until the contrary is proved that any information relating to the defence of the Republic is secret or confidential. You would have to prove that it is not.
9. The penalty on conviction will be a fine not exceeding £500,00 or for imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

10. / ...

10. Our law has, in the Internal Security Act and other Acts, defined publication as being disclosure to any other person. *but du plain text — make public / personally known*
11. So it is clear that if you disclose to another person any information about the composition movements or disposition of the Defence Force or you tell them a rumour which is indirectly about the Defence Force you could be guilty of an offence.
12. But who is to decide when a statement, comment or rumour relating to the Defence Force would be calculated to prejudice or embarrass the Government in its foreign relations. Will it embarrass the Government in its foreign relations if South Africans were to know that the South African Defence Force was training, supplying and assisting the Mozambique Resistance Movement in Mozambique. Mozambique knew it. The rest of the world knew it. Prof Van Zyl Slabbert raised the question in parliament and he was told that it amounted to treason to suggest such a thing. Yet two years later Foreign Minister Pik Botha announced that it was only natural we had done so and of course we had done it. This leads me to think that where it is only South Africans that are ignorant of what the government is doing then the government will not be embarrassed in its foreign relations because foreigners know what the Defence Force is doing.
13. ~~But I am alarmed and depressed when I consider what statements,~~

comments or rumours / ...

- what about alarm & depression.*
~~comments or rumours about the Defence Force would alarm~~
~~or depress members of the public.~~ I have been extremely alarmed and depressed by statements made by the Commissioner of Police/the Minister of Defence/Foreign Minister Botha/State President Botha/Brig Coetzee in Soweto and various persons. When I am told that the South African Army bombs other countries, kills people in foreign countries, destabilises other countries then I am alarmed. When I learn that the South African Defence Force carried on activities as an army of occupation in parts of South Africa then I am more than depressed.
14. But these were not offences because the Minister of Defence had authorised publication of these facts. So it would seem that alarm and depression is defined by what would alarm and depress the Minister. If one were seriously concerned as to what would alarm and depress members of the public, I think it would be open to argument that:
- (a) The majority members of the public of this country know a great many things about the Defence Force and to publicise these things is not going to alarm or depress them any more than they already are;
 - (b) Where the Minister of Defence has ordered certain operations or actions to take place, it must be presumed that these are done in good faith and for

the benefit of the country as a whole, and publication thereof is hardly going to alarm or depress anyone;

(c) If your activity is calculated to achieve something then you must have a real and objective test. ~~The person or organisation accused would be able to show that the result of publication was to inspire people to positive action in the best interests of the~~ country. The prosecution would have to show that the reasonable and likely result of publication would be to alarm and depress members of the public. I would even go so far as to suggest that publication of news that an army was loosing or had lost a battle would not fall within the prohibition of Section 118(1)(b) if it was coupled with a call to some positive action. If this positive action was to give people hope that the war was at an end I would think that would cheer and excite members of the public rather than alarm and depress them.

cf. John Meinert

15. What is secret and confidential information relating to the defence of the Republic must obviously remain secret and confidential.

16. State -v- Hunter and Two Others Transvaal Provincial Division, Nov 1954.

16. State -v- du Plessis 1981(3) 382 AD. There were several charges, including charges under the old Internal Security Act, and under Section 118(1) of the Defence Act. Here, the accused had been a journalist in Rhodesia and had commenced writing a book about Rhodesia covering the period after UDI and with special reference to the war. He wrote a letter to a publisher in London and in the letter he said that much of the material had not been published before and that "the entire project has been completed in secret because, obviously, some of the material is sensitive insofar as both the Rhodesian and South African Governments are concerned". It so happened that publisher Jonathan Ball of Johannesburg decided to publish the book but copies of the book were seized by the Defence Force and they even recalled from New York. The portion of this Judgment which is relevant to the Defence Act is whether or not Mr du Plessis had "published" statements relating to activities of the Defence Force. The Learned Judge of Appeal found that the meaning "to make publicly or generally known" was the meaning which "publish" bears and so the Court found that publication to a person or a firm or a limited number of people was not publication in this particular case. On appeal, du Plessis was not found to have published and so the Court did not deal with what constituted prejudice or embarrassment to the Government in its foreign relations.

17. Minister Van Verdediging -v- John Meinert (EDMS) Bpk & Another 1976(4) 113 SWA

This case is interesting and useful from a number of aspects:-

- (a) It seems from the Judgment that an article was published in the newspaper called *Algemine Zeitung* in 1976. The article said that members of the *Police* Reserve had been called up over the weekend and pointed to the fact that "terrorists" had apparently been successful in the north of the country and that they were now operating further in the south of the country.
- (b) There was a prosecution in terms of Section 118 of the Act.
- (c) The Judge decided that "calculated" means that there must be a reasonable probability that the statement or rumour would alarm the public or cause it to be dejected.
- (d) The Judge commented on the fact that it was known to everybody in the vicinity that terrorists were in the area of South West Africa and that the readers of this newspapers would know that these terrorists were doing everything in their power to come as far south as possible. But the Judge said that the article went further. Because if it was read by its entirety members of the public would certainly get the impression that

terrorists had now entered the nearby localities that the ordinary police could no longer control the situation and that that was why it was necessary to call up the Reserves. In other words, a serious situation had now arisen and that was why it was necessary to call up the Reserves.

- (e) The Judge therefore found that there was a reasonable probability that the article would alarm or depress the public when they read it.
- (f) However, the Learned Judge found that the activities referred to the activities of the Reserve units of the police force and so it could not be said that the article referred to the activities of the Army. Accordingly the publishers were acquitted.

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