

## Brief Legal Commentary on PMSCs in South Africa

### Introduction

The Republic of South Africa held its first democratic elections in 1994. This marked the birth of “a new South Africa”. Prior to 1994 the prevailing *Apartheid* system resulted in gross human rights violations, primarily committed by some members of the then South African Police Services (SAPS) and the South African Defence Forces (SADF).<sup>1</sup> Shortly prior to and immediately after the democratic elections in 1994, many South Africans emigrated, fearing civil war (a trend that has accelerated recently as a result of the high crime rate and political instability of the ANC government). Some South Africans, previously members of the SAPS and SADF, feared that they would have no opportunity for employment under the auspices of the laws being promulgated in the new South Africa. Thus the transformation of the old SADF into the South African National Defence Forces (SANDF) in 1994 resulted in a mass exit of highly skilled military personnel.<sup>2</sup> Some of these military personnel, whose future seemed bleak in the SANDF, capitalized on a market for their expertise and knowledge beyond the borders of South Africa. Therefore it came as no surprise when about 67 alleged mercenaries working for the company Logo Logistics were arrested in Equatorial Guinea and Zimbabwe in March 2004. Of those arrested, at least 27 were former members of the SADF.<sup>3</sup>

### The Foreign Military Assistance Act of 1998

In an attempt to address the problems arising out of Logo Logistics’ activities, South Africa passed the Foreign Military Assistance Act.<sup>4</sup> The aims of the FMA Act were two-fold. Firstly it banned mercenary activity. Secondly it aimed to regulate the provision of military assistance outside South Africa.<sup>5</sup> South Africa is one of only a few countries that have enacted legislation to control the activities of PMC’s and mercenaries. For example, any person intending to provide foreign military assistance is required to obtain authorization and approval from the

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<sup>1</sup> Hereinafter SAPS and SADF respectively. After 1994 the SAPS kept its name, but the SADF became the South African National Defence Force (hereinafter referred to as SANDF).

<sup>2</sup> Contributing to this ‘exodus’ of SADF employees was the fact that equality legislation was passed in parliament resulting in partial exclusion of white males in the workforce.

<sup>3</sup> This was the case when Mr Horn and Mr Carlse were arrested on March 7, 2004 at Harare International Airport along with Simon Mann, a principle in the former mercenary [according to international definitions, EO was not a ‘mercenary’ company] outfit Executive Outcomes, as they arranged to load weapons onto a plane carrying 67 other men allegedly heading for Malabo.

<sup>4</sup> Act 15 of 1998. Hereinafter referred to as the FMA Act. Executive Outcomes (EO) activities include allegedly working for UNITA against the Angolan government [I don’t believe that claim has ever been taken seriously], prior to being contracted by the MPLA government to fight against UNITA in 1993.

<sup>5</sup> Article 2, FMA Act.

government's National Conventional Arms Control Committee.<sup>6</sup> The FMA Act, though short lived, had its weaknesses. For example:

- It lacked a comprehensively sufficient system for parliamentary and public scrutiny and accountability of the activities of PMSC's;
- Even though the FMA Act provided for extra-territorial jurisdiction, the enforcement of this provision proved to be rather difficult in practice; and
- The enforcement of the FMA Act also proved to be a huge challenge. There have not been many prosecutions under the FMA Act.
- The FMA act was largely understood to be unconstitutional and thus all convictions under the act were plea bargains for fines with no jail time allowing the accused to end the legal process with a minimum of cost. The new law was created to correct this problem.
- The professional staff at the NCACC were fired after it was discovered they were giving licenses based on the letter of the law instead of the political concerns of the committee.

### **The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2007**

12 November 2007 marked the birth of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.<sup>7</sup> Some definitions in the Mercenary Act seem to indicate that in some instances, this Act is wider in its application than its predecessor, the FMA Act. 'Persons', for example include foreign citizens. Further, the Mercenary Act does not have application in countries of un-proclaimed conflict, except in instances of participation of armed forces, dissidents and rebel forces in any combination.<sup>8</sup> Any person or organisation wanting to provide military assistance is required to apply to the NCACC for authorization in terms of Section 7 of the Mercenary Act.<sup>9</sup> South African Humanitarian agencies are also required to register with the

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<sup>6</sup> Hereinafter referred to as NCACC. See Article 3, FMA Act.

<sup>7</sup> Act 27 of 2006. Hereinafter referred to as the 'Mercenary Act'. The Act was assented to and signed by the State President of South Africa on 12 November 2007. The legal basis for the promulgation of the Act is embedded in Section 198(2) of the Constitution of the Republic of South Africa Act 108 of 1996, which is only enforceable upon the enactment of national legislation. To date, the Act is not yet operational as the State President is yet to proclaim in the Government Gazette the date upon which the Act shall come into operation.

<sup>8</sup> Seminar Report on the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006. Compiled by N Ahmedou and S Gumedze, 22 May 2008, p5.

<sup>9</sup> s7 of the Mercenary Act. Although lacking any significant permanent staff, the NCACC is charged to ensure that those entering such a country are not enlisting in a foreign army, negotiating or offering assistance in an armed conflict; providing any assistance or rendering any service to a party to a conflict; recruiting, using training, supporting or financing a person to provide or render any service to a party to an armed conflict; or performing any other act that has the result of furthering the military interests of a party to an armed conflict.

NCACC.<sup>10</sup> The Mercenary Act, having been promulgated, and taking into account aspects of international law, is not without controversy. Some concerns about the Act include the following:

- The scope of the legislation might be too broad and could potentially be at odds with the South African foreign policy and the Constitution of the Republic of South Africa;
- It is possible that the Mercenary Act might restrict PMC's to such an extent that even legitimate operations might be prohibited;<sup>11</sup>
- The Mercenary Act makes it difficult for South African nationals to export their services overseas, including humanitarian services to the UN ;
- The wider definition of 'armed conflict'. A country of armed conflict includes one in which conflict between armed groups occurs, even where such a country is not declared as such by proclamation of the President;<sup>12</sup>
- The issue of enlistment in foreign armed forces. South Africans employed in foreign armed forces faces the uncertainty of obtaining authority, and if obtained, the possibility of the cancellation thereof under certain circumstances and will come into direct conflict with Commonwealth rules;<sup>13</sup>
- 'Mercenary' as defined in the OAU Convention is not the same as defined in the Mercenary Act, which focuses on the individual rather than the actions;<sup>14</sup>
- 'Humanitarian assistance' is not defined as a concept in the Mercenary Act. This could make it difficult to draw a clear distinction between those organisations who provide such assistance and those who do not; and
- The punitive nature of the Mercenary Act provides no incentive for compliance.<sup>15</sup>
- A constitutional lawyer itemized scores of flaws that will likely render the act illegal when challenged.

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<sup>10</sup> International organisations, such as the ICRC, are exempt from this. Only South African organisations registered in South Africa fit into this category.

<sup>11</sup> Hypothetically, one might consider the recent xenophobic attacks (May and June 2008) in South Africa, and the migration from neighbouring Zimbabwe. PMC's might have been useful in the establishment of border controls or setting up of camps where foreign nationals displaced by the attacks could be temporarily housed.

<sup>12</sup> Events in Iraq and Somalia might fall within this definition. However, a more liberal interpretation might include Kenya and Sudan.

<sup>13</sup> Whether an individual was granted authorization or not, it is clear that once one engages in a regulated country, one still remains a mercenary under the Act. Even where one changes and becomes a foreign citizen to South Africa, the Act remains applicable. This causes concerns around extra-territorial jurisdiction under s11(2) of the Act. See note 8 above.[Far better than the original version that allowed the South African government to arrest *anyone of any nationality or residence* who worked in an area of conflict as defined by South Africa's president. It was a clause sure to cut back on foreign tourism to Kruger and Cape Town . . .]

<sup>14</sup> *Supra* note 8. An example is that those participating in the recent xenophobic attacks in South Africa potentially fall under threatening the constitutional order of the state and thus could qualify as mercenaries under the Mercenary Act, though not under the terms of the OAU Convention.

<sup>15</sup> The NCACC regulates compliance with the Mercenary Act.

## **Conclusion**

The Mercenary Act is designed to remove any form of South African involvement in conflict zones abroad, including humanitarian assistance, without government authorization. The Mercenary Act should be seen as an ambitious effort towards curbing mercenary activity, even though arguably it was instituted to address domestic concerns regarding ex South African Army operatives' role in the destabilisation of other countries.

Many are concerned the net has been cast too far, and the British government has specifically expressed significant reservations regarding the hundreds of South African serving in their armed forces that will need specific permission from the NCACC to serve in Afghanistan, Iraq, Sierra Leone, Cyprus or any other area of conflict or international peace operations.

What about the way forward? The Act is not yet operational. Security is the State's responsibility and without appropriate forethought privatization can have a negative affect. It can also have a positive effect of supporting the State as can be seen in South Africa's own vast utilization of private security for everything from commercial sites to police stations. One must also take into account the potential for weak states versus strong states to outsource security. The latter can afford it; the former cannot, especially given the weakness of the authority putting them in more danger of losing control over security. Using PMC's in weak states presents challenges for those weak states, and such initiatives to control them in weak states appear to be a positive action.<sup>16</sup>

Finally, it remains to be seen if the NCACC will be given the resources to provide timely responses to the license applications from NGOs, humanitarian organizations and private firms. Those South Africans working for the UN and relief operations abroad, as well as the smaller number providing security, demining or medical services in Iraq or Afghanistan, need to take a hard look at this law and determine for themselves if their livelihoods and humanitarian projects are worth the risk of criminal prosecution and prison time on returning home to South Africa.

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<sup>16</sup> *Supra*, note 8 at p 12.