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The Regulatory Context of Private Military and Security Services in South Africa

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Regulating privatisation of "war": the role of the EU in assuring the compliance with international humanitarian law and human rights

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The Regulatory Context of Private Military and Security Services in South Africa

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INTRODUCTION

The spheres of private security, private military and safety and of security in general have, in the last few years, undergone dramatic changes in South Africa. However, such changes have generated little legislation and case law on the subject. The *Constitution of the Republic of South Africa* of 1996[1] (*Constitution*) constitutes the main source of law that applies to the provision of military and security services in South Africa. It is supplemented with a number of enactments, regulations and codes of conduct which subject different aspects of military and security services to strict scrutiny.

Two broad categories of PMSCs' activities are subject to regulation; namely, the provision of security services domestically, which is allowed and regulated; and the provision of assistance, military or security services abroad, as well as the exercise of mercenary activity, which are prohibited and criminalized. The activities of both the military and security industries are overseen by various control or regulatory organs or committees. This integrated regulatory scheme makes South Africa a country that has taken one of the strictest anti-"market for force" stances in the world by criminalising the export of private military and security services and by opting for an outright prohibition on mercenary activity. However, its incapacity to enforce its legislation effectively and to crack down on the private supply of foreign conflict zones with military and security materials and personnel, has highlighted the challenges inherent in regulating the activity of PMSCs. The aim of this report therefore, is to give an account of South African laws and regulations applicable to private military and security services. Part I of this report briefly presents the general legal framework applicable to South African PMSCs. Part II focuses on the specific regulatory regimes to which the military and security services are subjected, and highlights the problems related to their enforcement. Part III deals with the implication of labour law in the procurement of security services whereas the last part addresses issues of criminal responsibility.

I. GENERAL LEGAL FRAMEWORK FOR PMSCs

1.1 The 1996 Constitution

The *Constitution* sets the basic principles governing national security and the participation of South African citizens in armed conflict. It provides in this respect that:

> The resolve to live in peace and harmony precludes any South African citizen from participating in an armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.[2]

It also provides for a single national defence force, – the South African National Defence Forces – and establishes the general legal framework for the establishment, structuring and conduct of security services. Pursuant to Section 199 of this instrument:

> (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
> (2) The defence force is the only lawful military force in the Republic.

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1 Act 108 of 1996.

2 Section 198 (b).

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.
(4) The security services must be structured and regulated by national legislation.
(5) The security services must act, and must teach and require their members to
act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
(6) No member of any security service may obey a manifestly illegal order.
(7) Neither the security services, nor any of their members, may, in the performance of their functions:
(a) prejudice a political party interest that is legitimate in terms of the Constitution; or
(b) further, in a partisan manner, any interest of a political party.
(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees, have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

In the years following the adoption of the *Constitution* two pieces of legislation were adopted, which govern the activities of private military forces and prohibit the use of mercenaries. The first is the *Regulation of Foreign Military Assistance Act 15* of 1998 (*RFMA*). It was subsequently replaced by the second, namely the *Prohibition or Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27* of 2006 (*Mercenary Act*), in order to correct a number of definitional flaws as well as other deficiencies inherent in the *RFMA* text. It is perhaps worth mentioning at this point that the South African National Defence Force is particularly regulated by the *Defence Act 42* of 2002. Private military and security forces do not fall within the ambit of this Act.

As far as the activities of the private security sector are concerned, it shall be noted that in the very last years of the apartheid regime, the legislature passed the *Security Officers Act 92* of 1987, which established a regulatory body called the Security Offers Board. An important part of this Act was repealed in 2001 by the *Private Security Industry Regulation Act 56*. This new Act, generally referred to as the *PSIRA*, established the Security Industry Regulating Authority (SIRA), which controls the registration of private security providers and sets up national standards for recruitment, training, etc. on a national level.

II. REGULATING THE MILITARY AND SECURITY SERVICES

Three aspects of the activities of the private military and security industry are particularly regulated in South Africa. They are: the provision of "assistance or service", the use of firearms, and the import and export of military and security services.

2.1 "Assistance or service"

The provision of "assistance or service" is subjected to an authorization and registration regimes.

2.1.1 Authorization regime

At the outset, the *Mercenary Act* prohibits and criminalises mercenary activities.[3] It then goes on to provide for a regulatory framework of what it defines as "assistance or service", which includes "security services".[4] Unlike the *RFMA*, its predecessor, the *Mercenary Act* defines "security services" with reference to a variety of acts including guarding and protection services, security advisory services and training, installing, servicing or repairing security equipment, and monitoring signals or transmissions.[5] This definitional approach is also adopted in the *PSIRA*. "Assistance or service" also includes any form of military or military-related assistance, service or activity, or any form of assistance or service to a party to the armed conflict by means of advice or training, personnel recruitment, medical or paramedical services or procurement of services.[6] Moreover, this Act prohibits the provision of certain assistance or services in a country of armed conflict or regulated country,[7] and the enlistment of South Africans in any armed forces other than the Defence Force unless authorisation has been granted to that extent.[8]

Any person who applies for authorisation provided for in Section 3 (1) (a) to (e) or Section 4(1)[9] of the Act must submit an application for authorisation to the National Conventional Arms Control Committee (NCACC) in the prescribed form and manner.[10] The NCACC is the licensing authority for all arms exports including foreign military assistance, established under Section 2 of the *National Conventional Arms Control Act* 41 of 2002. Authorisation may be granted, unless it is in conflict with South Africa's legal obligations under international law; would result in the infringement of human rights and fundamental freedoms in the territory where the assistance or service is to be rendered; endangers the peace by introducing destabilising military capabilities into the region or territory where the assistance or service, or humanitarian aid, is or is likely to be, provided or rendered; would contribute to regional instability or negatively influence the balance of power in such region or territory; in any manner supports or encourages any terrorist activity or terrorist and related activities; contributes to the escalation of regional conflicts; in any manner initiates, causes or furthers an armed conflict, or a coup *d'état*, uprising or rebellion against a government; or prejudices the Republic's national or international interests.[11] The NCACC must keep a register of all authorisations issued.[12]

2.1.2 Registration regime

As stated earlier on, Security Industry Regulatory Authority (SIRA) was established under the *PSIRA* and was entrusted with the responsibility of, amongst other

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3 Section 2.

4 Section 1.

5 *Ibid.*

6 Section 3.

7 Section 3; a "regulated country" is defined in Section 6 (1) as any country in which an armed conflict either exists or is imminent.

8 S 4 (1).

9 To be discussed later on.

10 Section 7.

11 Section 9.

12 Section 8.

things, receiving, considering and suspending or withdrawing applications for, or renewal of, registration, from the security service providers. The SIRA is also required to gather information regarding registration and to protect security officers/employees who may be exploited within the industry. The main enforcement mechanisms at the SIRA's disposal include inspections conducted by inspectors who have been given peace officer status so as to effectively enforce its regulations. Accordingly, directives may be given to non-complying security service providers and, if not followed, their application may be rejected. Consequently, they could no longer operate for not being registered with the SIRA.[13] Improper conduct is also dealt with by the SIRA which may impose fines or other penalties, and companies legally registered may see their registration suspended or withdrawn.[14]

In addition, the *Private Security Industry Levies Act*[15] (*Levies Act*) makes provision for the imposition of levies by the SIRA, and establishes a framework for the management and payment of levies as well as the consequences of non-payment. The *Levies Act* also makes provision for the assessment of the SIRA's performance with regard to decisions made.[16] Since stricter levies(and stricter criteria for registration) are imposed, any person wishing to establish a security company to make a quick profit (so-called fly-by-night companies) would possibly be deterred by the strict regulations and levies or perhaps not even qualify to register at all due to the financial and regulatory implications.[17]

2.2 Use of firearms

Provisions are made for the use of firearms in the context of armed conflict, and in that of the provision of security services domestically.

2.2.1 Armed conflict situations

The *Mercenary Act* does not expressly regulate the use of firearms, but its scope of application in this respect is determined by the interpretation given to the expression 'armed conflict' contained in its text. However, any interpretation thereof must take into consideration the *Constitution*, which constitutes the legal basis for, and provides a general legal framework of interpretation to, all South African legislation. As regards foreign military assistance, the stipulation of Section 198 (b) of the *Constitution* to the effect that "the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the *Constitution* or national legislation", may be interpreted as making it illegal for South African citizens to use firearms in situations of armed conflicts to which South Africa is not a Party. Section 1 (1) of the *Mercenary Act* defines "armed conflict" as including any:
(a) situation in a regulated country proclaimed as such in terms of Section 6; and

13 Section 34 (3) (a) of the *PSIRA*.

14 Sections 4 (g) and 26 of the *PSIRA*.

15 *Act* 23 of 2002, this Act was assented to on 24 July, 2002 but has not yet come into force.

16 Section 7.

17 Berg J "The Private Security Industry in South Africa: a Review of Applicable Legislation" 2003 16 *South African Criminal Journal* (2003), p.189.

(b) armed conflict in any country which has not been so proclaimed, between-
(i) the armed forces of such country and dissident or rebel armed forces or other armed groups;
(ii) the armed forces of any states:
(iii) armed groups;
(iv) armed forces of any occupying power or dissident or rebel armed forces or any other armed group; or
(v) any of the entities referred to in subparagraphs (i) to (v).

This definition is not exhaustive. It implies that in addition to the ordinary meaning of "armed conflict" under international law it includes other situations such as those proclaimed by the President as an armed conflict in terms of Section 6 of the Act, and armed conflict between entities mentioned in paragraphs (i) to (v) above. A view is held that the definition will ensure that in the proclamation of "regulated countries", the exercise of discretion by the National Executive would have to remain within the legal framework of international humanitarian law and what is legally regarded as "armed conflict" under international law.

2.2.2 Provision of security services

The use of firearms by the security industry is subject regulations passed by the Minister for Safety and Security in terms of the *PSIRA*. In 2002, the *Private Security Industry Regulations*[18] (*Security Regulations*) was drafted in order to regulate the possession and use of firearms. Of relevance to the present theme is Section 13(5) and (6) of these *Regulations* whereby a security officer may not use his/her own firearm, whilst employed by a security company, since it is the company's responsibility to provide the weapon. This prohibition constitutes a break with past practices which allowed security officers to use their own weapons whilst on duty. The requirement that security guards be supplied with firearms by their employers may prove problematic in the South African security context in that it may contribute to increase the number of weapons already in circulation in South African streets.

Of particular significance for the provider of security services is the *Firearms Control Act* 60 of 2000, which sets the conditions for the issuance, limitation and use of firearms. This Act states that a competency certificate is required before a firearm is issued. Such a certificate ensures that those in the security industry needing a firearm are trained at an accredited training facility.[19] The Act places a limitation on persons capable of using firearms by allowing only those aged 21 and older to be issued a firearm.[20] In addition, the issuance of certain categories of weapons is prohibited in all situations; this prohibition applies to automatic firearms and to any military-type weapons.[21] Security companies, which are in fact the actual license holders for weapons transferred to their employees, may lose their licence if such weapons were to be given to incompetent individuals such as intoxicated persons, unstable, or mentally ill persons, or persons known for inciting domestic violence, etc.[22]

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18 Regulations adopted in application Section 35 of the *PSIRA* of 2001.

19 Section 4 (1).

20 Sections 20, 102, 103 and 28(1)(c).

21 Section 4 (1).

22 Sections 20,102,103 and 28 (1)(c).

Another important stipulation of the *Firearms Control Act* is that the carrying of a firearm must be completely concealed in a holder or something similar. Any conviction immediately disallows the carrying of a firearm. The Act also makes provision for the prohibition of firearms in so-called firearm-free zones.[23] Firearm-free zones are areas declared by the Minister of Safety and Security to be firearm-free. However, on-duty South African Police Service officials, security officials and certain security officers may be exempt from this restriction.

2.3 Import and export of military and security services

As stated at the outset, the *RFMA* was passed in 1998 to give effect to Section 199 of the *Constitution*. It dealt in part with questions relating to the import and export of military and security services.

2.3.1 The RFMA

The enactment of this Act aimed primarily at curbing the destabilising activities of apartheid-era soldiers and security personnel in foreign countries, through PMSCs such as Executive Outcomes. The declared purpose of the *RFMA* was to ban mercenary activity outright, and to regulate the provision of military services abroad.[24]

a) Content and scope

The *RFMA* addressed issues of mercenarism, PMSCs, as well as important aspects of conventional arms control. It defined mercenary activity as involving "direct participation in armed conflict for private gain", and logically banned it outright. It went on to stipulate that no person within South Africa or elsewhere may recruit, use or train persons for, or finance or engage in, mercenary activity. However, the provision of foreign military assistance was not prohibited under this Act; it was rather strictly regulated as it still is under the *Mercenary Act*. Like in the latter document, the application of the *RFMA* was triggered, in most cases, by the existence of an armed conflict.

The *RFMA* established a two-step process for anyone wishing to offer military assistance abroad: first, any such person was required to apply for authorization with the NCACC. Second, it required subsequent scrutiny and approval of each and every agreement reached after the authorization has been granted. The NCACC is an organ of the executive branch of the State chaired by a State minister having no direct link with the defence industry. Its decisions are subject to the *Promotion of Administrative Justice Act* and must conform to international law including human rights law.

The regulatory framework of the *RFMA* contained a number of specific flaws, some of which are identified by Singer.[25] First, the broad definition of military and security services constituted the key weakness of the Act, rendering many of its provisions inapplicable. It was believed to be too vague and to try to regulate activities that are not military *per se*, thus resulting in considerable legal uncertainty and arbitrariness. Second, the licensing power vested in the NCACC exclusively, thereby

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23 Section 140.

24 Holmqvist, C. "Private security companies – The case for regulations", *SIPRI Policy Paper No. 9* (2005), p. 52.

25 Singer P. "War, profits, and the vacuum of law: Privatized military firms and international law", 42 *Columbia Journal of Transnational Law* 2 (2004), 521ff, 540.

granting the executive branch of the State wide discretionary powers, without any possibility of parliamentary oversight. The *RFMA* was further criticised for excluding "humanitarian and civilian activities aimed at relieving the plight of civilians in an area of armed conflict"; and attempts to enforce its provisions encountered difficulties relating to the collection of evidence abroad, as the few cases summarized below will demonstrate. Nevertheless, a brief look at the *Mercenary Act* reveals that most of the deficiencies of the *RFMA* have survived the new enactment.

b) Prosecution under the *RFMA*

- *Ivory Coast Case*

The first prosecution under the *RFMA* was brought against François Richard Rouget, a former French soldier naturalized South African, who was tried for an attempt to recruit mercenaries in South Africa to participate in the civil war in Ivory Coast. His participation in the Ivorian conflict consisted in militarily assisting the Ivory Coast government in terms of logistical support and equipment, and training of pilots or infantrymen. He was convicted in late 2003 in the Pretoria regional court after pleading guilty on a charge of recruiting mercenaries to fight in Ivory Coast.[26] After considering the serious nature of mercenary activity, the Pretoria court held that such activity is an embarrassment to the country and should be discouraged. However, due to Rouget's guilty plea and full disclosure of his involvement, the court finally imposed a very light sentence (75, 000 Rand-fine) fine as a deterrent measure against future mercenary activity. Rouget was subsequently reported to be active in Iraq as many other South Africans who continued to be recruited by foreign private military companies to provide military and security services in areas of armed conflict.[27]

Another case of mercenary activities in Ivory Coast is that of Carl Alberts, a former South African Defence Force pilot who was sentenced by the Swellendam Magistrate's Court to two years in jail or a 20,000 R fine.[28] The sentence was later suspended and Alberts was released after paying 10,000 Rand. The guilty plea and fine formed part of a plea bargain agreement between the Alberts and the South African National Prosecuting Authorities.[29] In both cases, negotiating a plea bargain agreement was necessary because the prosecution could not produce convincing incriminating evidence to secure an appropriate sentence against the accused.

- *Zimbabwe/Equatorial Guinea Case*

On 7 March, 2004 70 persons including several South African citizens and Simon Mann, a former British SAS officer, were arrested in Harare where they had allegedly stopped, en route to Equatorial Guinea, to collect weapons. Subsequently they were accused by the Zimbabwean government as being mercenaries on their way to overthrow the government of Equatorial Guinea with the assistance of foreign Powers. The accused rejected the charge and claimed to be on their way to the Democratic Republic of the Congo to honour a private security contract. They were nevertheless tried by a Harare Court for breaching Zimbabwe's firearms and security legislation, as

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26 *Rouget v S* (2006) JOL 15962 (T) Case No. A 2850/03, Judgment of 20 May, 2005.

27 Clamo A. "Republic of South Africa" *Corpwatch* 6 March 2005; 30000 Private security experts were deployed in Iraq, of which it was estimated that 5000 to 10000 were South Africans. South Africa was regarded as one of the top three suppliers of personnel for private military/security companies such as Erinys International, Meteoric Tactical Solutions, Sailor Services and Dyncorp.

28 "Ivory Coast hired gun in court", *News 24.com*, 4 February, 2004; "Mercenary activities land pilot in the dock" *Independent Online*, 13 February, 2004.

29 "South Africa: Authorities target alleged mercenaries", *IRIN News*, 4 February, 2004.

well as immigration and aviation laws. 67 of them were convicted either of immigration offences or of aviation offences and were subsequently sentenced to prison terms ranging from 12 to 18 months. Simon Mann was convicted for trying to purchase weapons and sentenced to seven years imprisonment, whilst 2 of the men were acquitted. These sentences were later reduced on appeal. In the course of the proceedings in Harare it became clear to the accused that they might be extradited to Equatorial Guinea where they would face death penalty if convicted for the alleged offences. In order to avoid extradition to Equatorial Guinea, the South African members of the group urgently sought diplomatic protection from the South African authorities. In their application they requested the competent court to compel the South African government to seek their extradition back to South Africa.[30] Among the plaintiffs, 20 had served in the former 32 Battalion, an apartheid-era notoriously brutal special operative branch of the National Defence Force under the apartheid regime, whereas two others were involved in a PSC that had lucrative contracts in Iraq in contravention of the *RFMA*. On completion of their sentences in Zimbabwe, some of the plaintiffs were charged, on their return in South Africa, for violating the provisions of the *RFMA*. With the exception of two of them who were fined 75,000 Rand each, subsequent to a plea bargain agreement, none of the former detainees has been convicted under the *RFMA*. Again, the plea bargain agreement played in favour of the accused for lack of evidence. Simon Mann and some of his accomplices were later extradited to Equatorial Guinea where he was charged for plotting a coup to topple the established government. He acknowledged knowingly taking part in the attempted coup against the Equatorial Guinea's government, but argued that he was a secondary player. Nevertheless, he was sentenced in 2008 by the competent Equatorial Guinea court to 34 years in prison and a payment of a fine and compensation of about £14,6-million, and was subsequently held in the notorious Black Beach prison in Malabo. Mann and his accomplices were finally freed on 03 November, 2009 as a result of a "full pardon for humanitarian reasons" granted them by the President of Equatorial Guinea.[31]

- *Equatorial Guinea Case*

On 8 March, 2004 15 foreign nationals suspected of attempting to overthrow the government of Equatorial Guinea were arrested in Malabo and Bata. Eight of them were South Africans, including Nick du Toit the alleged ringleader of the plot and director of Triple Option Trading, a South African PMSC. They were subsequently tried in Malabo for crimes against the Head of State and the form of government. Those found guilty were sentenced to terms of imprisonment ranging from 16 months to 65 years.[32] Meanwhile, Sir Mark Thatcher, son of former British Prime Minister Margaret Thatcher, appeared before a South African court on charges of breaching the *RFMA* in relation to the same attempted coup in Equatorial Guinea. Reports state that Thatcher had interests in a company called Logo Logistics run by Simon Mann, via a South African company called Triple A Aviation, which was operated as Air Ambulance

[30] For more details on this case, see *Kaunda and Others v. President of the Republic of South Africa and Others*, Case No. 12967/2004, 2004 (5) SA 191 (T); also *Kaunda v. President of the Republic of South Africa* 2005 (4) SA 235 (CC), Case No. CCT 23/04.

[31] *Mail & Guardian* Online article of 3 November, 2009 "Simon Mann freed on humanitarian grounds", available at www.mg.co.za/article/2009-11-03-simon-mann-freed-on-humanitarian-grounds.

[32] See Case 14/2004; also Amnesty International "Equatorial Guinea – A trial with too many flaws", AFR, 24 May, 2005.

Africa by Crause Steyl.[33] Thatcher was finally arrested in August 2004 and charged for breaching the *RFMA*. He subsequently entered a guilty plea, admitted to a lesser charge by conceding that his conduct might have recklessly but unwittingly contributed to the financing of the coup d'*état* in Equatorial Guinea. He finally received a 3 million Rand-fine and was requested to continue to collaborate with the national prosecuting authorities of South Africa and Equatorial Guinea.

The foregoing few cases have brought into light a number of difficulties encountered in the implementation of the *RFMA*, which may be summarized as follows. The definitional flaws in respect of mercenaries and PMSCs have made it difficult to distinguish between these two entities and between the categories of services each of them provide. In addition, the difficulty of gathering evidential materials in foreign countries to secure convictions has forced the prosecuting authorities to opt for a plea bargain agreement with the accused, the consequence of which is the imposition of lighter sentences that do not serve any deterrent purpose. Finally, the enforcement of certain provisions of the *RFMA*, such as those relating to extraterritorially, has proved to be rather difficult in practice.

Despite a relatively reduced number of prosecutions under the *RFMA*, the *Act* could still be regarded as having reached one of its main objectives to the extent that it has succeeded in forcing Executive Outcomes to move its activities outside South Africa. This relative success, however, did not stop the continuing recruitment of mercenaries from South Africa, or the active involvement of South African citizens in various theatres of armed conflict in Africa,[34] Iraq and elsewhere in the world in violation of the *RFMA*. This embarrassing state of affairs prompted Mr. Thabo Mbeki, the then President of South Africa, to signal the government's intention to "… review the Foreign Military Assistance Act in order to discourage, for their own good and for the good of the country, those who seek to profit from conflict and human suffering such as in Iraq."[35] The *Mercenary Act* was subsequently adopted in replacement of the *RFMA*, with the declared intention to correct the latter's deficiencies.

2.3.2 The Mercenary Act of 2006

a) Enlistment in foreign armed forces

Unlike the *RFMA* which is silent on the issue of enlistment of South Africans in the armed forces of other States, the *Mercenary Act per* Section 4 prohibits such enlistment if performed without an authorisation from the NCACC. Any person who contravenes or fails to comply with section 4 is guilty of an offence and liable upon conviction to a fine or to imprisonment, or to both a fine and imprisonment.[36] Even if such authorisation is granted, it may be revoked by the NCACC if the holder thereof takes part in an armed conflict as a member of an armed force other than the National Defence Force of the Republic, of if it turns out to contravene any of the criteria listed

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33 *State v Steyl and Another* , Regional Court, Pretoria, case no. 14/0339/2004; also *State v Mark Thatcher* High Court of South Africa, Cape Provincial Division, 5 December, 2005 (Unreported); and Hollingsworth, M. and Halloran, P. *Thatcher's Fortunes – The Life and Times of Mark Thatcher*, Edimburgh, Mainstream Publishing, 2005.

34 P.C. Jacobs "South Africa's new counter mercenary law*"*, 30 *Strategic Review for Southern Africa* 1 (2008), p. 87.

35 State of the Nation Address of February 2005.

36 Section 10 (1) of the *Mercenary Act*.

in Section 9 of the *Mercenary Act*.[37] Section 4 thus gives effect to Section 198 (b) of the *Constitution*.

For persons already enlisted with foreign armed forces, the *Mercenary Act* criminalises continued enlistment if a citizen of the Republic fails to apply to the NCACC for the required authorisation within six months from the commencement of the Act as provided for in section 15 (2). Once such an application is filed, the citizen may remain enlisted until the application is decided.[38]

b) Provision of humanitarian assistance in country of armed conflict

Section 5 of the *Mercenary Act* provides that no South African humanitarian organisation may provide humanitarian assistance in a country where there is an armed conflict or in a regulated country, unless such organisation has been registered with the NCACC for that purpose. However, Section 13 allows the President, as Head of the National Executive to grant exemption from this requirement in order to facilitate the rendering of humanitarian aid without delay, to relieve the plight of civilians in armed conflict. Any person who fails to comply with the conditions defined in section 13 is guilty of an offence and liable upon conviction to a fine or to imprisonment, or to both a fine and imprisonment.[39] The distinction between humanitarian non-profitable organisations and corporations working for pecuniary gain is unfortunately being blurred by private military and security companies. Such companies do not hesitate to hide behind humanitarian objectives when advertising their criminal activities.[40]

III. LABOUR LAW

Sections 22 and 23 of the *Constitution* are particularly applicable to the private security industry. Section 22 guarantees the freedom of trade, occupation or profession, which may be regulated by law. Section 23 deals with the issue of labour relations[41] and would also be particularly applicable to the private security sector in that it protects the rights of workers and employers regarding unionisation and fair labour practices.

The *PSIRA* greatly extends the scope of its application by defining the expression "security service providers" as including both officers and businesses. Reference is made to previously excluded security service providers such as locksmiths, private investigators, security training or instruction providers, manufacturers, importers and distributors of monitoring devices, installers of security equipment, labour brokers, those who monitor electronic security equipment and those who manage or control the rendering of security services, that is, managers of companies.[42]

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37 Under Section 9 of the *Mercenary Act*, an authorization may be revoked, for example, if it conflicts with South Africa's obligations under international law, if it would result in the infringement of human rights and fundamental freedoms where the assistance or service is to be rendered, etc; see section 2.1 above for other criteria.

38 Section 10 (2).

39 Section 10 (1).

40 P.C. Jacobs "South Africa's new counter mercenary law", 30 *Strategic Review for Southern Africa* 1 (2008), p. 88.

41 Subsections (1) to (6) especially.

42 These security service providers had to be registered with the SIRA by 1 March, 2003 and have their applications in by 1 December, 2002.

3.1 General obligations of PSCs

Under the enforcement mechanisms available to the SIRA, private security companies must, in order to qualify for the provision of security services and remain eligible as active security service providers, register or renew their registration with the SIRA, and train their employees. They must also fulfil certain financial obligations, be expected to comply with all relevant legislation, and must allow for the inspection of their premises and documentation.

Moreover, obligation is made to security service providers to adhere to a code of conduct as stipulated by the *PSIRA*.[43] The Code of Conduct[44] as adopted on 1 March, 2003 places the SIRA under an obligation to be co-operative and accommodating in performing its duties. It must also fulfil a certain number of obligations towards the State and State security services, towards the public and towards the private security industry itself. The Code is, in essence, designed to promote the stability, status and efficiency of the industry, while endeavouring to prevent crime and promote public and client interests. It directly addresses certain categories of security service providers, such as locksmiths, private investigators, those providing training and so forth. The Code imposes a variety of duties on the security service employer; namely general duties, duties relating to the verification of the background and status of security officers, and similar matters, duty to keep security officers informed, and duties regarding discipline and penalties for improper conduct.[45] The Improper Conduct Enquiries Regulations[46] spells out the procedure to be followed when conducting an enquiry into the conduct of a security service provider.

3.2 Legal discipline on training

One of the most important functions of the SIRA consists in ensuring that a certain standard of training is maintained within the security industry. In this respect, the Training Regulations[47] adopted in application of Section 32 (1) of the *Security Officers Act 92* of 1987 sets the criteria governing the training of security employees. These Regulations basically regulate two aspects of the functions of the Security Officers' Board; namely the delivery of accreditation certificates to the security employer, and the issuance of training certificates to those security personnel who have completed training to a satisfactory standard at an accredited training institution. Moreover, the Regulations establish the procedure to be followed in case of expiry or withdrawal of accreditation certificates. They also provide for a series of prohibitions, penalties and offences which are related to the provision of security services by non-trained or inappropriately trained personnel.

4. CRIMINAL RESPONSIBILITY

4.1 Prohibition of military activity abroad

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43 Section 28 (1) of the *PSIRA*; as regards delictual liability under the *PSIRA*, see generally *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 3 SA 643(D); *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1992 4 SA 425 (ZS).

44 Code of Conduct for Security Service Providers of 2003.

45 See generally *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W).

46 Adopted on 1 March, 2003 in terms of Section 35(1) (h) of the *PSIRA*.

47 Security Officers' Board Training Regulations of 1992.

The *Mercenary Act* prohibits and criminalises certain military activities performed by South African citizens or residents within countries in which there is an armed conflict. The *Act* also aims at military activities which are capable of being performed in peace time in foreign countries. Such activities include participating as a combatant for private gain in an armed conflict; directly or indirectly recruiting, using, training, supporting or financing a combatant for private gain in an armed conflict; directly or indirectly participating in any manner in the initiation, causing or furthering of an armed conflict, or a coup *d'état*, uprising or rebellion against any government; directly or indirectly performing an act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a State.[48] Moreover, the *Act* provides for a redrafted offence prohibiting mercenary activity.[49] This offence contains elements of the previous definition of "mercenary activity" and of "foreign military assistance" already present in the South African criminal law system as classical mercenary activities.

4.2 Extraterritorial prosecution of illegal military activity abroad

The exercise of military activities abroad by South African citizens may be prosecuted in South Africa under the *Mercenary Act*, the *International Criminal Court Act*,[50] and the *Terrorist Act*.[51]

4.2.1 The Mercenary Act

The *Mercenary Act* has extraterritorial application in that an alleged offence in violation of its provisions, committed outside the Republic by a South African citizen, a person ordinary resident in the Republic, a company incorporated or registered as such in the Republic, and any body of persons, whether corporate or incorporate in the Republic, may be prosecuted by a competent South African court, which may convict and sentence the accused, if found guilty.[52] The definition of "person" in the *Act* is restricted in its meaning to a citizen, a permanent resident, a juristic person registered or incorporated in the Republic, or any foreign citizen who contravenes the provisions of the *Act* within the border of South Africa (an example would be a foreign person who recruits, trains or finances mercenaries in South Africa.) Therefore, a South African citizen who recruits or trains mercenaries either within or outside the Republic may be prosecuted in a South African court, but a foreign citizen may be prosecuted in a South African court only if such recruitment, training, or financing took place in South Africa.

4.2.2 The ICC Act

The Rome Statute of the International Criminal Court[53] establishes an International Criminal Court (ICC), having jurisdiction over cases of war crimes, genocide and crimes against humanity. Should mercenaries or employees of private

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48 Section 2.

49 See also *Criminal Law Amendment Act 105* of 1997.

50 *Implementation of the Rome Statute of the International Criminal Court Act 27* of 2002, (hereinafter, the ICC Act).

51 *Protection of Constitutional Democracy against Terrorist and Related Activities Act 33* of 2004, (hereinafter *Terrorist Act*).

52 Sections 11 (a)-(d) and 2 (a)-(b).

53 Text available at http//www.icc-cpi.int/about.html.

military and private security companies commit crimes falling within the jurisdiction of the ICC, they could be prosecuted for those crimes in the ICC. Although mercenary activity is not mentioned specifically as falling within the jurisdiction of the ICC, mercenary status may prove to be an aggravating factor when an offender is sentenced.[54] South Africa is a Party to the Rome Statute, and has incorporated its provisions into its domestic legal system by adopting the *ICC Act*. This legislative enactment outlaws any conduct giving rise to genocide, crimes against humanity and war crimes. It also provides for the prosecution in South African courts of persons accused of having committed such crimes in South Africa and beyond the borders of South Africa in certain circumstances; the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; and for co-operation with the ICC in realising the objectives of the Court's Statute.

4.2.3 The Terrorist Act

There is no doubt that mercenarism and terrorism share certain commonalities, at least as far as the criminal nature of their acts is concerned. However, the basic difference between terrorist acts and mercenary acts lies in the motive. The terrorist's motive usually is of a political, economic or religious nature, whereas the mercenary is motivated solely by private gain.[55] The 1997 International Convention for the Suppression of Terrorist Bombing establishes a universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of public places, irrespective of the motive. The basic terms of this instrument are reiterated in South African *Terrorist Act* which criminalises terrorist activities. The *Terrorist Act* creates a possibility for mercenary activities committed in or from South Africa, to fall simultaneously within its own ambit and within the ambit of the *Mercenary Act*.

4.3 Criminal Procedure Act

The South African *Criminal Procedure Act*[56] is particularly relevant to the private security industry in that it grants them certain residual powers that are necessary to perform their security duties without infringing upon the public police officers' powers of arrest, search, and seizure. Thus, instead of being strictly regulatory, this *Act* rather enables the private security sector to function within the realms of the prescribed law. Section 42 (3) of this *Act* states for instance that "the owner, lawful occupier or person in charge of land" may arrest a person believed to have committed any offence or who is in the process of committing an offence. Therefore in order for a private security company to arrest a person on somebody else's property the client simply has to allow the private company to take lawful responsibility for the property and security officers may therefore arrest persons committing offences on that particular property.[57]

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54 United Nations, "The impact of mercenary activities on the right of peoples to self-determination", Fact Sheet No 28, undated, para. 7 (c) 21.

55 P.C. Jacobs "South Africa's new counter mercenary law", 30 *Strategic Review for Southern Africa* 1 (2008), p. 76.

56 *Act 51* of 1977.

57 J. Berg "The private security industry in South Africa: a review of applicable legislation" 2003 16 *South African Criminology Journal* (2003), p. 194.

Criminal prosecution is a means of effectively enforcing the *PSIRA*. Managers of private security companies may be held criminally liable under the *PSIRA* if they fail to comply with its provisions requiring them, for instance, to renew their registration periodically or to inform the SIRA of any change of the company's name and so forth.[58] An interdict may also be granted against an offending company to ensure discontinued operation.[59] Information regarding non-compliant security services providers may be made public in order to prevent clients, in terms of Section 38 (3) (g), from continuing to use that provider's services. This is a form of "shaming" mechanism that may discredit the defaulting company. Otherwise, security service consumers are legally obliged to ensure that the companies they are using are registered with the SIRA, that all their employees are also registered, that the security officers in the company are in possession of training certificates from accredited training institutions, that they adhere to the industry's Code of Conduct and that the security officers are paid the minimum statutory wage according to the Sectoral Determination 6.[60]

CONCLUSION

There is as yet no clear-cut legislation in South Africa specifically governing the provision of services by PMSCs in armed conflict areas. However, decisive steps have been taken by the South African Government to regulate the activities of PMSCs through the implementation of the *RFMAt* of 1998, the *PSIRA* of 2001 and the *Mercenary Act* of 2006. These legal instruments constitute therefore the main sources of South African legislation in this regard.

The *Mercenary Act* improves the *RFMAt* in many respects: the definition of "armed conflict" contained therein raises no doubt as to the context in which the *Act* shall apply. The possibility to proclaim regulated countries will make it easy to define with certainty when the *Act* begins to apply to a specific conflict situation. Unlike the *RFMA*, the *Mercenary Act* defines with more clarity what constitute "security services." In addition, a clear distinction is operated between mercenary activities and the rendering of security, military and intelligence services in armed conflict situations. Moreover, the provisions related to the enlistment of South Africans in foreign armed forces and to the provision of humanitarian assistance in armed conflicts have are improved. Furthermore, the provisions on extraterritorial jurisdiction are brought in line with similar provisions in the *Terrorist Act*. Finally, minimum penalties for the offences of engaging in mercenary activities and of illegally providing assistance or services in areas of armed conflict are prescribed. It may perhaps be interesting to specify that the applicability of the *Mercenary Act* can be swiftly activated to deal with urgent situations. In this regard, provision is made for the proclamation of an "imminent" armed conflict, which can be justified in cases of a rapid build-up of armed forces in a conflict situation, or in circumstances were genocide or gross human rights violations are committed, thus requiring the application of international humanitarian law.

The *Mercenary Act* is supplemented by the *PSIRA* which attempts to ensure that private security officials and companies operating within South Africa adhere to a certain number of standards as required by the South African constitutional democracy; namely, the basic democratic principles of human rights and fundamental freedoms as

58 See Sections 20 and 38.

59 Section 27 (1) (a) of the PSIRA.

60 Sectoral Determination 6*:* Private Security Sector South Africa, published in terms of the *Basic Conditions of Employment Act 75* of 1997, text available in GG R 1250 dated 30 November, 2001.

enshrined in the *Constitution*. It also sets a series of licensing and working standards that shall direct the security industry in the recruitment, training and use of their personnel. Finally, it attempts to standardise the industry and improve its working conditions, as well as the conditions of the private security employees.

It is clear that the South African regulatory scheme (especially that of the *RFMA*) has plainly exposed the conceptual, practical, legal, political, moral, and economic difficulties inherent in the regulation of the activities of PMSCs. It has also tried its best to address such issues in a subsequent enactment (the *Mercenary Act*). In sum, the South African approach shows that any serious national regulatory scheme must consider and integrate the transnational element of the private military and security industry and business. It is hope that the South African experience will influence the ongoing debate on the possibility for the EU to adopt regional guidelines applicable to PMSCs.