'If you can't be with the one you love, love the one you're with': A critical analysis of the latest South African anti-mercenary legislation

Introduction

Throughout the history of conflict and warfare mercenaries have been both glorified and vilified. Termed the 'second oldest profession in the world', mercenarism developed from the use of entire 'armies for hire' in antiquity, the early private military companies of the 15th and 16th centuries (the Italian *condottieri*), the 'soldiers of fortune' of the sixties and seventies, to the modern private military companies of the nineties and the new millennium. Mercenaries featured in B-grade Hollywood movies, paperback novels and multilateral international treaties. Paradoxically, mercenaries were the villains during the era of decolonisation (and still are, at least in theory), but some of these same decolonised (and recently-failed) states now use security companies – the 'new age' mercenaries – as palace guards, military training consultants and so on, to keep corrupt and unpopular regimes in power.[1]

Formally and theoretically, mercenaries are outlawed under international law.[2] Many countries have criminalised mercenary activities through specific domestic legislative measures. South Africa is no exception: the Regulation of Foreign Military Assistance Act 15 of 1998 was adopted to curb the growing numbers of South Africans involved in private military companies such as Executive Outcomes. These private military companies or international security firms, had assumed greater roles in conflict areas such as Angola, Sierra Leone and Iraq, guarding installations, delivering logistical supplies and operating aircraft, as well as providing medical support. The activities of this burgeoning industry raised a range of concerns. These firms are not accountable to international bodies, human rights abuses were committed by some and, in instances, their operations were alleged to have led to increased levels of conflict and even military coups.

Events in 2004 prompted the South African government to introduce the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain

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[1]See Cilliers and Mason (eds) *Peace, profit and plunder? The privatisation of security in war-torn African societies* (1999), Botha 'From mercenaries to "private military companies": The collapse of the African state and the outsourcing of state security' (1999) 24 *SAYIL* 133-148, and De Freitas and Ellis 'Mercenarism and customary international law?' 2006 *African Yearbook on International Humanitarian Law* 17-41.

[2]Amongst others, by art 47 of 1977 Additional Protocol I to the Geneva Conventions, the 1977 OAU Convention for the Elimination of Mercenarism in Africa, and in 1989 the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

Activities in Areas of Armed Conflict Bill 42 of 2005. In 2004 some seventeen mercenaries were arrested in Equatorial Guinea when an attempted plot to topple President Teodoro Obiang was thwarted. Their leader has been sentenced to thirty-four years in prison, with most of the others receiving heavy jail sentences. A further seventy mercenaries whose plane, flying out of South Africa, was stopped in Zimbabwe have also been jailed – although with much lighter sentences – after pleading guilty to arms trafficking. In both instances, a number of the mercenaries were South African nationals.

The Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill

This *reason d'etre* of the Bill is expressly spelt out in its preamble, long title and explanatory memorandum. The aim of the Bill is to replace the Regulation of Foreign Military Assistance Act since very few prosecutions have been instituted in terms of the 1998 Act. In terms of its long title, the Bill intends to prohibit mercenary activity; to prohibit, subject to exceptions, the provision of assistance or service of a military, security or other nature in an area of armed conflict; to prohibit, subject to exceptions, the enlistment of South African citizens or permanent residents in foreign armed forces; to regulate the provision of humanitarian aid in an area of armed conflict; to provide for extra-territorial jurisdiction for the courts of the Republic with regard to certain offences; and to provide for offences and penalties. This should be read with the preamble, which states that the prohibition of the enlistment of South African citizens and permanent residents in foreign armed forces, and the prohibition or regulation of the provision of military and related assistance or services, and security services, including humanitarian assistance, by South African juristic persons, citizens, persons permanently resident in the Republic and, in certain circumstances, foreign citizens, is necessary to promote and protect universal human rights and fundamental freedoms. Furthermore, the preamble reiterates South Africa's international obligations and its fundamental constitutional values.

The explanatory memorandum stresses the necessity for more effective legislation with regard to the regulation of mercenary activities, and highlights the planned *coup d'etat* aimed at the government of the Equatorial Guinea. This Bill is aimed at providing the legal powers to curtail and control these activities more effectively than the 1998 Act, and as a result the new Bill will repeal and replace the current Regulation of Foreign Military Assistance Act of 1998.

Section one of the Bill defines an 'armed conflict' to include any armed conflict in a regulated country or area, proclaimed as such in terms of section 6, or in any other country or area which has not been so proclaimed, between the armed forces of a foreign state and dissident or rebel armed forces or other armed groups; the armed forces of foreign states; armed groups within a

foreign state; armed forces of any occupying power and dissident or rebel armed forces or any other armed group; or any other combination of the entities referred to earlier. It furthermore defines 'assistance or service' to include any form of military or military-related assistance, service or activity; any form of assistance, service or activity by means of advice or training; personnel, financial, logistical, intelligence or operational support; personnel recruitment; medical or para-medical services; or the procurement of equipment; or security services. The net is cast even wider through the definition of 'security services', which include one or more of the following services or activities: protection or safeguarding of an individual, personnel or property in any manner; giving advice on the protection or safeguarding of individuals or property; giving advice on the use of security equipment; providing a reactive or response service in connection with the safeguarding of persons or property in any manner; providing security training or instruction to a security service provider or prospective security service provider; installing, servicing or repairing security equipment; monitoring signals or transmissions from security equipment; making a person or service of a person available, directly or indirectly, for the rendering of any service referred to above, or managing, controlling or supervising the rendering of any of the services referred to above.

Section 2 of the Bill prohibits 'in the Republic or elsewhere' any mercenary activities, which are defined as participation as a combatant for private gain in an armed conflict; the direct or indirect recruitment, use, training, support or financing of a combatant for private gain in an armed conflict; the direct or indirect participation 'in any manner' in the initiation, causing or furthering of an armed conflict, or a *coup*, uprising or rebellion against any government; or the direct or indirect performance of any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.

However, to bedevil this 'definitional thicket' even more, the inevitable 'liberation movement' exclusion – which in essence also appears in the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 – also features in the Bill. No act committed during a struggle waged by peoples in the exercise or furtherance of their legitimate right to national liberation, self-determination, independence from colonialism; or resistance against occupation, aggression or domination by foreign nationals or foreign forces; and in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, will not be construed as assistance or service.

Section 3 prohibits – in similar broad terms – the provision of a wide range of assistance or the rendering of services in area of armed conflict. However, sections 4-6 of the Bill are more problematic and disconcerting. Section 4 prohibits and regulates the enlistment of South Africans in foreign armed forces. No South African citizen or permanent resident may enlist in any foreign armed force, including an armed force of any state, unless he or she has been authorised in terms of section 7. Any such authorisation will be terminated if the person to whom it has been granted takes part in an armed conflict as a member of such a foreign armed force.

Furthermore, in terms of section 5 of the Bill no person may provide humanitarian assistance in an area where there is an armed conflict, unless that person has been authorised to provide such assistance in terms of section 7. Although section 5 expressly refer to 'no person' – which should exclude humanitarian organisations such as the ICRC and *Medecins Sans Frontiers*, but not necessarily individual members of such organisation – humanitarian assistance is not defined in the Bill, and in the discretion of the National Conventional Arms Control Committee it could mean anything, anywhere.

In terms of section 6 of the Bill the National Conventional Arms Control Committee must inform cabinet whenever it deems an armed conflict exists or is imminent in any country, or area within a country; and such a country or area should be proclaimed a regulated country or area. After the NCAC has informed cabinet, the President, may, proclaim a country or area within a country as a regulated country or area. Such a proclamation must be tabled in parliament for its consideration. The Bill applies in a regulated country or area, regardless of whether an armed conflict is taking place in such country or area, or not.

Sections 7-9 of the Bill deal with the application for authorisation; register of declarations, authorisations and exemptions; the criteria for authorisation or exemption; and offences and penalties. Authorisation will, in terms of section 9, not be granted if is in conflict with the Republic's obligations in terms of international law; it would result in the infringement of human rights and fundamental freedoms in the territory where the assistance, service or humanitarian aid is to be rendered; it endangers the peace by introducing destabilising military capabilities into the region or territory where the assistance, service or humanitarian aid is, or is likely to be, provided or rendered; it would contribute to regional instability or negatively influence the balance of power in such region or territory; it in any manner supports or encourages any terrorist activity or terrorist and related activities, as defined in section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act of 2004; it contributes to the escalation of regional conflicts; it in any manner initiates, causes or furthers an armed conflict, or a

coup, uprising or rebellion against a government; or prejudices the Republic's national or international interests. All of these are, of course, subject to the 'national liberation movement' exemption referred to earlier.

The broadest provision of all is saved for last. Section 11 provides for the Bill's extra-territorial application. Any act that constitutes an offence under the Bill committed outside the Republic by a citizen of the Republic; a person ordinarily resident in the Republic; a person who was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed; a company incorporated or registered as such under any law in the Republic; or any body of persons corporate or unincorporated in the Republic, must be regarded as having been committed in the Republic, and the person who committed it may be tried in a court in the Republic which has jurisdiction in respect of that offence. However, once again the net is cast as wide as possible: any act that constitutes an offence under this Act and that is committed outside the Republic by a person, other than a person contemplated above, must be regarded as having been committed in the Republic if that person is found in the Republic, and such a person may be tried for such an offence by a South African court if there is no application for the extradition of the person, or if such an application has been refused.

Since the Bill will repeal and replace the Regulation of Foreign Military Assistance Act of 1998, section 15 deals with a number of transitional arrangements. Any authorisation or approval granted in terms of the Regulation of Foreign Military Assistance Act will remain valid until withdrawn, amended or expired. A citizen of the Republic, or a person ordinarily resident in the Republic who, at the time of the commencement of the new Act, has already been enlisted in a foreign armed force must, within six months of the date of commencement of the Act, apply for authorisation as prescribed. In a restatement of the general principle, (s 12(2) of the Interpretation Act 33 of 1957) all formal hearings and court proceedings instituted 'prior to the commencement of the Act' in terms of the Regulation of Foreign Military Assistance Act 1998, and which have not been yet concluded before the commencement of the new Act, must be continued with and concluded as if the new Act had not been passed.

In summary, the Bill aims to:
- Prohibit mercenary activity;
- exclude an act if performed in accordance with international law and/or section 199 of the Constitution;
- regulate the enlistment of South African citizens and permanent residents in other armed forces. and regulate the provision of military and military-related services;
- empower the President to proclaim a country as a regulated country;

- provide extraterritorial jurisdiction in respect of persons who are citizens or permanent residents of the Republic, or where a person has committed an offence in terms of the Bill outside the borders of the Republic;
- authorise the provision of humanitarian aid under certain circumstances;
- provide for penalties aligned with the seriousness of the offence;
- the prohibition of South Africans enlisting in foreign armed forces, unless authorised by the NCACC; and
- persons involved in humanitarian assistance need to register with the NCACC.

Criticism

The Bill does not accept the reality that many private military companies in the past successfully assisted in international peace and stability operations. Furthermore, the South African government's designations of 'areas of conflict' – in terms of the Bill – must be based on clear and objective rather than arbitrary criteria. South African companies and citizens, as well as international governments and companies that legitimately employ South Africans, must have clear guidelines as to which humanitarian and peacekeeping operations they will be allowed to participate in.

From an international perspective, the Bill is drafted in over-broad terms, which may well have negative repercussions far beyond its aim to eradicate mercenary activities from the Republic. The Bill's extraterritorial application could have a negative effect on peace operations and would severely limit South Africa's efforts to provide an efficient base for international peace efforts on the continent.

South Africans enlisted in foreign armed forces (especially the United Kingdom) could now find themselves on the wrong side of the law. No government will enlist a person knowing that if that soldier were needed for operational deployment, he or she might have to give up South African citizenship, or risk being branded a criminal in terms of the Bill. Between 4 000 and 20 000 South Africans are currently estimated to be working for private security companies, including at least 2 000 in Iraq.

The Bill intends to regulate much more than 'traditional' mercenary activity. South African humanitarian organisations (which are undefined by the Bill) wishing to take part in 'humanitarian assistance in an armed conflict' will be forced to register with the National Conventional Arms Control Committee. It is still unclear – and verges on the absurd – whether, for example, the ICRC's mission in Pretoria would be considered a South African humanitarian organisation and whether it staff would need to register with the South African authorities.

South African citizens or permanent residents will be required to obtain authorisation to enlist in a foreign state's armed forces, and that authorisation may be revoked should they take part in an armed conflict as part of that foreign armed force. While this is an improvement on one of the earlier drafts of the Bill – which provided for automatic revocation of authorisation – the authorisation may still be revoked in a number of ill-defined circumstances: if the authorisation is deemed to be in conflict with South Africa's obligations in terms of international law; if the authorisation would contribute to the escalation of regional conflicts; or if the authorisation would prejudice South Africa's national or international interests. Since these grounds for revocation of authorisation are couched in vague terms – to be interpreted and applied by politicians – the NCACC could well in future use this power to revoke the authorisation of South African members of the British armed forces deployed in Iraq or Afghanistan.

The Bill's definition of 'armed conflict' is also over-broad. A person (as defined in the Bill) may in one instance be involved in legitimate and legal security operations in a generally peaceful part of a foreign country without contravening the Bill. When hostilities occur in another part of that same country, the person in question may automatically, without his or her knowledge, commit a criminal offence under the Bill.

The regulation of security services in countries where there is an armed conflict is one of the Bill's aims, but in the process the Bill would seem to overreach its initial aims. While parties providing other forms of 'service or assistance' now require authorisation only if such service or assistance is 'to a party to an armed conflict', no similar amendment was made to the original definition of 'security services'. Accordingly, the Bill leads to the ridiculous situation where all security services in a country where an armed conflict exists must obtain authorisation, whether or not they are in any way involved in the conflict. This means that individuals and companies providing security services in a country which could become a future area of armed conflict under the Bill, face significant legal uncertainty.

Conclusion (at least for the time being)

The general aim of the Bill is laudable and its timing is understandable. Whatever the reasons for the proliferation of private military companies – the phenomenon of failed African states, down-sizing of armed forces, organised crime, etcetera – the resulting privatisation of armed conflict and military power is disconcerting. Not only are some of these PMC's in Africa paid with long-term oil and diamond concessions, but in some cases they are openly contracted by certain Western states for proxy operations. Unfortunately this Bill will not eradicate the new generation of mercenaries. Unemployed soldiers

– in particular former members of elite special forces – will always be in demand in the Bosnias, Iraqs, Sierra Leones and Angolas of the future. Furthermore, the new legislation will unfortunately not curb the rumoured use of unemployed ex-soldiers from north of the border by organised crime syndicates operating in South Africa – the Bill is over-broad, but paradoxically, not broad enough. In a country being strangled by violent crime, corruption and a general disregard for the rule of law, cynics may well argue that this is a typical example of political smoke and mirrors: if you cannot control the overwhelming wave of domestic crime, you vigorously stamp out the trickle of South African mercenaries, and then some. It seems, at least in South Africa, that mercenaries are viewed as a greater threat to world peace than the oppressive regimes in Myanmar and Zimbabwe.

At the time of writing the parliamentary process was reported to be complete. The Bill was submitted to the president for signature into law, and its subsequent publication and commencement.

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Reflections on the rule of law in international law: The Security Council, international law and the limits of power

The issues

In 2006 the General Assembly of the United Nations approved a new agenda item under the title 'The Rule of Law' and decided to allocate the agenda item to the Sixth Committee of the United Nations General Assembly. During the deliberations of the Sixth Committee the agenda item was discussed and debated in October 2006. In one of the discussions, on 23 October 2006 at the Meeting of the Legal Advisers of Foreign Ministries, divergent views were expressed on the relevance of the impact of the rule of law on Security Council powers.

Of course, academics have been concerned with questions of the rule of law in international law for some time now and, in that sense, the United Nations lags somewhat behind developments. In 1995 Thomas Franck produced a book, *Fairness in international law,* in which he postulated that because international law had matured to a 'post-ontological' phase, international lawyers were now free to consider the fairness of international law.[3] Needless to say, the question of fairness is an important aspect of the rule of law. In 2004, Erika de Wet came out with a book in which she argued that the International Court Justice

[3]Franck *Fairness in international law and international institutions* (1995).