05/PROHIP MERCENARY B/D24

MEMORANDUM

FROM: OMEGA INTERNATIONAL ASSOCIATES LP

TO: PORTFOLIO COMMITTEE ON DEFENCE (NATIONAL ASSEMBLY)

RE: PROHIBITION OF MERCENARY ACTIVITY AND PROHIBITION AND REGULATION OF CERTAIN ACTIVITIES IN AN AREA OF ARMED CONFLICT BILL, 2005 (CONDENSED SUBMISSION)

INTRODUCTION TO OMEGA:

Omega was established by a group of men and women who are experts in providing intelligent integrated security solutions with customers on a national and international front. Omega is established in:

South Africa,
Saudi Arabia,
Mozambique,
Angola,
The Democratic Republic of the Congo,
Gabon,
Nigeria

Omega is an ISO 9001/2000 registered company and they provide services in accordance to the ISO standards. (International Standards Organisation)

Omega was/is active in Iraq since 2003 and has provided services over the past two years to the following companies:

- Kellog Brown and Root
- Kellog Brown and Root International
- Laguna Construction Company
- Famarco
- Global Positioning
- Babylon Gates

FUNCTIONS:

The functions that we as a company are executing on contracts as mentioned above, are of a commercial security nature and consist of the following:

- Management of Central Control Centers, from where all activities are coordinated and information disseminated to our customers.
- Guarding services which include
  - access and egress control;
  - foot patrols;
  - vehicle patrols;
  - observation;
  - Explosive detection services. This we do through the deployment of well trained dog handlers and explosive detection dogs.

- Personal protection services (PSD);
- Occupational Health, Safety and Environmental protection services;
- Basic First Aid;
- Basic Fire Protection.

POLICY:

Omega follows a policy of registration in each country according to the laws of that country and the company is also an official member of the Private Security Company Association of Iraq (PSCAI), striving to work within the Iraqi law and legislation as was provided by the former interim Iraqi Government and currently the new Iraqi Government through the PSCAI.

INTRODUCTORY PART PREAMBLE:

Omega is well aware of the necessity to regulate the rendering of foreign military assistance and to eradicate mercenary activities and wish to state from the outset that the company supports, and will support in the future any such policies aimed at achieving the aforesaid goal.

The legislation (Prohibition of Mercenary Activity and Prohibition and Regulation of Certain Activities in an Area of Conflict Bill, 2005) in its preamble refers to section 198(b) of the Constitution and continues to state that it is necessary to prohibit and criminalize mercenary activity in order to give effect to the values in the Constitution as well as to meet the international obligations.

What is of concern to us however, is the fact that security services are now included in terms of the Bill to form part and parcel of mercenary and military activities.

When considering the first three introductory paragraphs to the preamble against the backdrop of Section 198(b) of the Constitution, the third paragraph of the preamble in our view, by including security services and humanitarian assistance, is somewhat in contrast to the initial intention of the Bill and values of the Constitution.

We believe it essential that the concept of mercenary, private military company and commercial/private security company should be carefully scrutinized and distinguished from one another. Emphasis should also be placed on **what,** in the case of the private security companies is the nature of the services that they render instead of **where** these services are in fact rendered.

Private security companies are sourced by not only peace keeping organizations, but various commercial companies that operate in conflict areas on a total *bona fide* basis to ensure their safety and the security of their property and equipment.

The Bill, as we understand it, in its present form will prohibit the rendering of the said security services and will most definitely influence the business activities of the re-constructors within a conflict area.

It is for this reason that we believe that emphasis should be placed on what the nature of the security service is and that one should move away from the environment in which the service is rendered.

THE BILL:

DEFINITIONS:

When dealing more specific with the Bill, we find that security services are clearly defined, but the primary object which the Bill seeks to prohibit being mercenary activities is not found within the definitions under Section 1 of the Bill and we believe it essential that mercenary and/or mercenary activities should be defined so as to clearly distinguish between mercenary activities and security services.

The definition of acts of "assistance or service" is so widely defined that it casts the net over acts and conduct that ought not to be regulated by means of criminal sanction. It is submitted that the prohibition of basic security services which includes but is not limited to, access and egress control, foot patrols, vehicle patrols, observation, explosive detection services, personal protection services, Occupational Health, Safety and Environmental protection services, basic First Aid and basic Fire Protection as well as giving advice and training in connection therewith is an inappropriate use of the criminal system. None of these services prejudice society in general and whether same is rendered in a conflict area or otherwise, this cannot have the effect of being lawful in the one instance and unlawful in the other.

We further submit that the rendering of humanitarian assistance as well as to the rendering of security services should not be included under mercenary activities. Humanitarian services/assistance is normally required in high risk areas as a result of armed conflict. The services are equally non-damaging to society and should not be criminalized. These services, (security and humanitarian assistance) are normally of high priority in these areas in order to stabilize the areas and promote the normality within such areas.

SECTION 1:

An extraordinary element of the Bill is that the prohibitions on the rendering of impugned service or assistance become *pro non scripto* when the service or assistance is rendered to a liberation movement involved in an armed conflict for self determination. As a consequence, a party to an armed conflict acting for instance under security council authorization, is treated differently and less favourably, from a party involved in a liberation struggle and this distinction in turn can render a service legal or illegal, or subject to authorization depending on who the receiver of the service is.

In terms of Section 36 of the Constitution it will be difficult to show that this distinction is rationally connected to the overall purpose of the Bill; or why other forms of legitimate use of force, for instance in terms of the UN Charter, should be differently situated with different legal consequences for service providers. (i)

SECTION 3,5,7 & 9:

A service contemplated in the Bill may only legally be rendered to a party to the conflict once authorized by the National Conventional Arms Control Committee (Clauses 3 to 5 and 7 read with 9) In authorizing the service in question, the Committee must consider the criteria spelled out in clause 9. However, in clause 12(1)(b) the President is empowered to make regulatios relating to "the criteria to be taken into account in the consideration of an application for an authorization in terms of Section 7(2)". The question is thus whether this provision foresees the enactment of criteria other than and different from those already listed in clause 9. If other criteria are indeed considered, why not spell them out in the Bill itself? (ii)

The lack of clarity may lead to serious difficulties. It appears that the committee is required to make a decision regarding the authorization of assistance or service based on factors that are not objectively ascertainable thus resulting in arbitrary decision making without sufficient guidance as to how to exercise the powers conferred on it.

A further concern is the fact there is no time constraint on the granting of authorizations to an application (delaying effect on obtaining of business) and further that the application may be refused without giving adequate reasons. These concepts fly in the face of the *audi alterem partem* rule and those concerned about the erosion of their legitimate rights and interests through the application of the proposed regulatory system should find some comfort in the provisions of Section 33 of the Constitution read in conjunction with the Provision of the Promotion of Administrative

Justice Act 3 of 2000. The decisions taken by the Committee will qualify as administrative decisions and will be subject to the right to administrative action that is lawful, reasonable and procedurally fair. (iii)

SECTION 15:

Section 15 of the Bill vaguely deals with transitional provisions but lacks guidelines pertaining to established companies that launch an application which is refused. Such companies could find themselves in a position where their conduct was legitimate prior to the application having been submitted and once same had been refused they are subject to criminal prosecution.

- These business engagements are regulated by contracts. Is it now expected of a company whose application was refused to breach the contract and expose itself to whatever damages may flow forth from such a breach?

CONSTITUTIONALITY:

A further question to be considered is whether the Bill is compatible with the Bill of Rights and particular the right to choose and practice a trade entrenched by Section 22 of the Constitution. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life...

Although economic necessity or cultural barriers may unfortunately limit the capacity of individuals to exercise such choice, legal impediments are not to be countenanced unless clearly justified in terms of the broad public interest. (iv)

It would appear that the Bill in its current form unjustifiably infringes the right of South African citizens to choose their trade, occupation or profession, and infringes their right to practice their trade, occupation or profession.

The above emphasizes in our opinion, the necessity, to thoroughly research the topic of prohibiting mercenary/military activities that are unlawful and to make sure that these activities are not combined with lawful activities (security services, humanitarian aid) resulting therein that the lawful activities are tarnished. South Africa for the last ten years, has become a player in an international environment and its citizens now have the opportunity to participate on international levels.

CONSIDERATIONS IN CONCLUSION:

In the 2002 report by the British House of Commons on the regulation of private military companies, it was clearly stated that a regulatory system only has a chance of working if the security sector as a whole believes that regulation was in their interest and if the system itself is viewed as fair and reasonable, and by not participating, they would be putting themselves on the margins of

the sector and that their reputation would suffer as a consequence. (v)

An outright ban on military activity abroad faces many enforcement problems which usually derive from definitional ambiguity, problems with collection of evidence in foreign countries, and the possible interference with individual liberties and legitimate business interests. Weak but legitimate governments may also be deprived of much-needed assistance. (vi)

In the House of Commons report referred to above prior licensing was considered as a viable regulatory option. This could take the form of either requiring companies or individuals to obtain a license for a specific kind of service contract or by issuing licenses for companies that provide a wide range of services. In the latter instance the licensing regime could provide for certain standards and requirements an applicant company must comply with in order to obtain a license. (vii)

The success of the Bill's regulatory system will stand and fall with the authorization process contemplated in clause 7. If this is going to be ineffective, like the regulatory system under Act 15 of 1998, or is going to lack objectivity and transparency, or perceived as such, or used for ulterior purposes, or cause unnecessary delays, we will once again sit with a useless peace of legislation. With this in mind it might not be wise to make the NCACC, all of whose members are appointed by the President, responsible for the authorization process. (viii)

FOOTNOTES:

(i), (ii), (iii), (v), (vi), (vii) & (viii) – Prof Hennie Strydom, Department Public Law University Johannesburg.

(iv) – Ngcobo J, Constitutional Court

Compiled by:

OMEGA INTERNATIONAL ASSOCIATES LP