

## COMMENT ON THE PROHIBITION OF MERCENARY ACTIVITIES AND PROHIBITION AND REGULATION OF CERTAIN ACTIVITIES IN AN AREA OF ARMED CONFLICT BILL, 2005 ("THE BILL")

- The appropriate regulation of the private security industry in areas of armed conflict is obviously desirable. The way the Bill attempts to do this may, however, have serious adverse practical and legal implications.
- The Bill regulates much more than so-called mercenary activity, ie "combat for private gain in an armed conflict". It also:
  - regulates "assistance or service in an area of armed conflict" by any person; (the way in which the Bill does this, however, criminalises it, subject to obtaining authorisation from the National Conventional Arms Control Committee ("the NCACC"));
  - prohibits South Africans from enlisting in "foreign armed forces" without authorisation; and
  - prohibits any person from taking part in "humanitarian assistance in an armed conflict" unless authorisation is granted.
- On an international level, the Bill will criminalise essential activities in conflict zones, including humanitarian aid. Activities are criminalised even if there is no link to South Africa whatsoever and the activities are entirely legal where they take place.
- There is no basis in international law for the criminal jurisdiction the Bill asserts over the nationals of other states in connection with activities which are perfectly legitimate.
- The Bill's authorisation requirements are tantamount to the forced global licensing of private security services and humanitarian aid organisations (among many others) in areas of armed conflict.
- The Bill's exemption for "assistance or service" in furtherance of a struggle for national liberation or against colonialism or occupation by foreign or alien forces is problematic. The application of this exemption will inevitably be extensively contested and will mire South Africa's courts in insoluble interpretative difficulties. It may also, inadvertently, encourage activity that is contrary to international law.
- As a result of the Bill's overbreadth and vagueness, the Bill infringes the constitutional rights to freedom and security of the person, equality, freedom to choose a trade, occupation or profession, property, and fair trial rights.
- It is also contrary to established constitutional principles, such as the principle of legality. The principle of legality requires that the legislature must pass legislation that is reasonably clear and precise. The Bill, however, fails to provide proper guidance to the NCACC on the criteria for granting authorisations.
- The NCACC, as a body of senior politicians, lacks the expertise to make the complex legal judgments which the Bill requires. x
- The Bill does not contain procedural safeguards to preserve administrative justice, such as an appeal mechanism and time limits within which authorisation applications must be decided.
- As a result of its unconstitutional features, the Bill may inhibit rather than advance criminal prosecutions.
- In addition, the Bill or its enforcement could amount to unfair and inequitable treatment of UK investments in South Africa, or constitute an expropriation (widely defined) of such investments, resulting in a breach of the 1994 UK-South Africa bilateral investment treaty.
- The Bill seems to have been developed without any input from intergovernmental organisations, NGOs, x humanitarian agencies, private security companies and other stakeholders.
- The Bill should therefore be withdrawn for further discussion, in order to accomplish legitimate objectives, but do so in a way consistent with basic principles of domestic and international law. x



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