

**PROHIBITION OF MERCENARY
ACTIVITIES AND PROHIBITION
AND REGULATION OF CERTAIN
ACTIVITIES IN AREAS OF ARMED
CONFLICT BILL**

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No. 28163 of 24 October 2005)
(The English text is the official text of the Bill)*

(MINISTER OF DEFENCE)

[B42-2005]

ISBN 0 621 35874 6

BILL

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; to provide for offences and penalties; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Constitution of the Republic of South Africa, 1996, provides in section 198(b) 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 the Constitution or national legislation;

AND WHEREAS it is necessary to prohibit mercenary activity in order to give effect to the values in our Constitution and our international obligations;

AND WHEREAS it is also necessary, in the interest of promoting and protecting human rights and fundamental freedoms, universally, to prohibit the enlistment of South African citizens and permanent residents in foreign armed forces and to prohibit or regulate 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,

B E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions and interpretation

1. (1) In this Act, unless the context indicates otherwise—

"armed conflict" includes any armed conflict—

- (a) in a regulated country or area, proclaimed as such in terms of section 6;
- (b) in any other country or area which has not been so proclaimed, between—
 - (i) the armed forces of a foreign state and dissident or rebel armed forces or other armed groups;
 - (ii) the armed forces of foreign states;
 - (iii) armed groups within a foreign state;
 - (iv) armed forces of any occupying power and dissident or rebel armed forces or any other armed group; or
 - (v) any other combination of the entities referred to in subparagraphs (i) to (iv);

"assistance or service" includes—

- (a) any form of military or military-related assistance, service or activity;
- (b) any form of assistance, service or activity by means of—

- (i) advice or training;
- (ii) personnel, financial, logistical, intelligence or operational support;
- (iii) personnel recruitment;
- (iv) medical or para-medical services; or
- (v) procurement of equipment; or

(c) security services;

"Committee" means the National Conventional Arms Control Committee, established in terms of section 2 of the National Conventional Arms Control Act, 2002 (Act No. 41 of 2002);

"intergovernmental organisation" means an international organisation established by the governments of states;

"international organisation" means an international organisation of states, and includes an intergovernmental organisation;

"prescribed" means prescribed by regulation;

"register" means the register referred to in section;

"regulated country or area" means a country or area contemplated in section 6;

"security services" means one or more of the following services or activities:

- (a) Protection or safeguarding of an individual, personnel or property in any manner;
- (b) giving advice on the protection or safeguarding of individuals or property;
- (c) giving advice on the use of security equipment;
- (d) providing a reactive or response service in connection with the safeguarding of persons or property in any manner;
- (e) providing security training or instruction to a security service provider or prospective security service provider;
- (f) installing, servicing or repairing security equipment;
- (g) monitoring signals or transmissions from security equipment;
- (h) making a person or service of a person available, directly or indirectly, for the rendering of any service referred to in paragraphs (a) to (g); or
- (i) managing, controlling or supervising the rendering of any of the services referred to in paragraphs (a) to (h); and

"this Act" includes the regulations.

(2) Despite this Act or any other law, no act may be construed as assistance or service if such act is—

- (a) committed during a struggle waged by peoples in the exercise or furtherance of their legitimate right to—
 - (i) national liberation;
 - (ii) self-determination;
 - (iii) independence against colonialism; or
 - (iv) resistance against occupation, aggression or domination by foreign nationals or foreign forces; and
- (b) 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.

Prohibition of mercenary activity

2. (1) No person may within the Republic or elsewhere—

- (a) participate as a combatant for private gain in an armed conflict;
- (b) directly or indirectly recruit, use, train, support or finance a combatant for private gain in an armed conflict;
- (c) directly or indirectly participate in any manner in the initiation, causing or furthering of—
 - (i) an armed conflict; or
 - (ii) a coup, uprising or rebellion against any government; or
- (d) directly or indirectly perform any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.

(2) Any person who contravenes subsection (1) is guilty of an offence.

Prohibition against providing certain assistance or rendering of services in area of armed conflict

3. (1) No person may within the Republic or elsewhere—
- (a) negotiate or offer to provide any assistance or render any service to a party to an armed conflict, unless such a person has been granted authorisation in terms of section 7 to negotiate or offer such assistance or service;
 - (b) provide any assistance or render any service to a party to an armed conflict, unless such assistance is provided or such service is rendered in accordance with an agreement or arrangement authorised in terms of section 7;
 - (c) recruit, use, train, support or finance any person to provide assistance or render any service to a party to an armed conflict, unless such a person has been authorised in terms of section 7 to recruit, use, train, support or finance such a person;
 - (d) recruit, use, train, support or finance any person to provide assistance or render a service to a party to an armed conflict unless such a person is recruited, used, trained, supported or financed in accordance with an agreement or arrangement authorised in terms of section 7; or
 - (e) perform any other act that has the result of furthering the military interests of a party to an armed conflict, unless such a person has been authorised in terms of section 7.
- (2) Any person who contravenes subsection (1) is guilty of an offence.

Prohibition and regulation of enlistment of South Africans in foreign armed forces

4. (1) No South African citizen or permanent resident may enlist with any foreign armed force, including an armed force of any state, unless he or she has been authorised in terms of section 7.
- (2) Any authorisation referred to in subsection (1) automatically terminates if the person to whom it has been granted takes part in an armed conflict as a member of such foreign armed force.

Prohibition and regulation of humanitarian assistance in area of armed conflict

5. 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.

Proclamation of regulated country or area

6. (1) The Committee must inform Cabinet whenever it is of the opinion than—
- (a) an armed conflict exists or is imminent in any country or area within a country; and
 - (b) such a country or area should be proclaimed to be a regulated country or area.
- (2) After the Committee has informed Cabinet as contemplated in subsection (1), the President, as Head of the National Executive, may, by proclamation in the Gazette, proclaim a country or area within a country as a regulated country or area.
- (3) Every proclamation issued under subsection (2) must be tabled in Parliament for its consideration.
- (4) This Act applies in a regulated country or area, regardless of whether an armed conflict is taking place in such country or area or not.

Application for authorisation

7. (1) Any person who applies for an authorisation referred to in section 3(1)(a) to (e), 4(1) or 5 must submit to the Committee an application for authorisation in the prescribed form and manner.
- (2) The Committee must consider any application for authorisation submitted in terms of subsection (1), and, subject to section 9, may—
- (a) refuse the application; or
 - (b) grant the application subject to such conditions as it may determine; and
 - (c) at any time withdraw or amend an authorisation so granted.

- (3) No authorisation granted in terms of this section is transferable.
- (4) The prescribed fees in respect of an application for authorisation must be paid before the Committee makes its decision known.
- (5) If an application is filed with the Committee for an authorisation referred to in section 5, the chairperson may, after consultation with one other member, grant an interim authorisation.
- (6) An application in terms of subsection (5) must be ratified by the Committee—
 - (a) within 30 days after receipt thereof; or
 - (b) if the period referred to in paragraph (a.) has lapsed, at the first meeting of the Committee following upon the expiry of that period.
- (7) Any interim authorisation granted in terms of subsection (5) remains valid until the Committee has made a final decision in the manner contemplated in subsection (6).

Register of declarations, authorisations and exemptions

- 8. (1) The Committee must maintain a register of any—
 - (a) authorisation issued by the Committee in terms of section 7(2);
 - (b) proclamation made by the President in terms of section 6; and
 - (c) exemption granted by the President in terms of section 13.
- (2) The Committee must submit quarterly reports to the National Executive and Parliament with regard to the register.

Criteria for authorisation or exemption

- 9. An authorisation in terms of section 7(2), or an exemption in terms of section 13, may not be given if it—
 - (a) is in conflict with the Republic's obligations in terms of international law;
 - (b) 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;
 - (c) 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;
 - (d) would contribute to regional instability or negatively influence the balance of power in such region or territory;
 - (e) 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, 2004 (Act No. 33 of 2004);
 - (f) contributes to the escalation of regional conflicts;
 - (g) in any manner initiates, causes or furthers an armed conflict, or a coup, uprising or rebellion against a government; or
 - (h) prejudices the Republic's national or international interests.

Offences and penalties

- 10. (1) A person who contravenes section 4(1) or 5, or fails to comply with a condition determined in respect of an application in terms of section 7(2)(b) or section 13, is guilty of an offence and liable upon conviction to a fine or to imprisonment, or to both a fine and imprisonment.
- (2) A person referred to in section 15(2) who fails to apply for the authorisation within the period referred to in that subsection and remains so enlisted is guilty of an offence and liable, upon conviction, to a fine or to imprisonment or to both a fine and imprisonment.
- (3) The court may, when convicting any person of an offence under this Act, declare any armament, weapon, vehicle, uniform, equipment or other property or object in respect of which the offence was committed or which was used for, in or in connection with the commission of the offence to be forfeited to the State in the manner contemplated in section 35 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

Extra-territorial jurisdiction

11. (1) Any act that constitutes an offence under this Act and that is committed outside the Republic by—

- (a) a citizen of the Republic;
- (b) a person ordinarily resident in the Republic;
- (c) 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;
- (d) a company incorporated or registered as such under any law in the Republic;
- or
- (e) 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.

(2) (a) Any act that constitutes an offence under this Act and that is committed outside the Republic by a person, other than a person contemplated in subsection (1), must be regarded as having been committed in the Republic if that person is found in the Republic.

(b) A person contemplated in paragraph (a) 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.

(3) Any offence contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, regarded as having been committed at—

- (a) the place where the accused person is ordinarily resident; or
- (b) the accused person's principal place of business.

(4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after the fact, the offence is regarded as having been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or in the case of an omission, should have acted.

Regulations

12. (1) The President, as Head of the National Executive, may make regulations relating to—

- (a) any matter which is required or permitted in terms of this Act to be prescribed;
- (b) the consideration of an application for an authorisation in terms of section 7(2);
- (c) the maintenance of the register; and
- (d) generally, any other ancillary or incidental administrative or procedural matter which it may be expedient or necessary to prescribe for the proper implementation or administration of this Act.

(2) A regulation may prescribe a penalty of a fine or of imprisonment for a period not exceeding five years, or both a fine and such imprisonment, for any contravention thereof or any failure to comply therewith.

Exemptions

13. The President as Head of the National Executive may, subject to section 9 and 45 upon request in the prescribed form and manner, exempt any international, intergovernmental or humanitarian aid organisation from the provisions of section 5 of this Act, if such exemption would facilitate the rendering of humanitarian aid, without delay, in respect of a particular event or situation, in order to relieve the plight of civilians in an armed conflict, and subject to such conditions as he or she may determine.

Amendment and repeal of laws

14. (1) The Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), is hereby amended to the extent set out in the Schedule.

(2) The Regulation of Foreign Military Assistance Act, 1998 (Act No. 15 of 1998), is hereby repealed.

Transitional provisions

15. (1) Any authorisation or approval granted in terms of the Regulation of Foreign Military Assistance Act, 1998 (Act No. 15 of 1998), remains in force and effect until withdrawn or amended or until expiry of the term for which it was granted .

(2) A citizen of the Republic or a person ordinarily resident in the Republic who, at the time of the commencement of this Act, had already been enlisted in a foreign armed force must, within six months of the date of commencement of this Act, apply for authorisation in the manner required by section 4(1).

(3) All formal hearings and court proceedings instituted, prior to the commencement of this Act, in terms of the Regulation of Foreign Military Assistance Act, 1998, and that have not been concluded before the commencement of this Act, must be continued with and concluded as if this Act had not been passed.

Short title and commencement

16. This Act is called the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Act, 2005, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

SCHEDULE**(Section 14)**

No. and Year of Act	Short Title	Extent of Amendment
No. 105 of 1997	Criminal Law Amendment Act, 1997	1. The addition to Part 1 of Schedule 2 of the following item: "Any offence referred to in section 2 of the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Act, 2005;" 2. the addition to Part 2 of Schedule 2 of the following item: "Any offence referred to in section 3 of the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Act, 2005."

**MEMORANDUM ON THE OBJECTS OF THE PROHIBITION OF
MERCENARY ACTIVITIES AND PROHIBITION AND REGULATION
OF CERTAIN ACTIVITIES IN AREAS OF ARMED CONFLICT BILL,
2005**

1. BACKGROUND

Although the Regulation of Foreign Military Assistance Act, 1998 (Act No. 15 of 1998), has been in operation for a considerable time, very few prosecutions have been instituted in terms of that Act. In most cases a conviction followed only after a plea bargain was entered into between the prosecution and the accused.

The recent arrest of a number of South African citizens, allegedly involved in a planned coup d'etat aimed at overthrowing the Government of Equatorial Guinea, demonstrates that mercenary activities are undertaken from within the borders of the Republic. There is a continuation in the recruitment of South Africans by so-called private military companies from outside the Republic, to provide military and security services in areas of armed conflict (such as Iraq).

It is evident from the small number of prosecutions and convictions under the Regulation of Foreign Military Assistance Act, 1998, that that Act inadequately combats mercenary activities and fails to provide for the regulation of certain forms of assistance in armed conflicts effectively.

It is proposed that the Regulation of Foreign Military Assistance Act, 1998, be repealed and replaced with the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill, 2005 (hereinafter referred to as "the Bill").

2. OBJECTS OF BILL

The Bill proposes to:

- (a) Prohibit mercenary activity in order to give effect to the values contained in the Constitution and to the international obligations of the Republic;
- (b) exclude legitimate armed struggles, including struggles waged, in accordance with international humanitarian law, for—
 - national liberation;
 - self-determination;
 - independence against colonialism, or
 - resistance against occupation, aggression or domination by foreign nationals or foreign forces,from assistance or service for which authorisation is required.
- (c) regulate the enlistment of South Africans and permanent residents in foreign armed forces, provision of humanitarian assistance and of certain forms of assistance, such as military and related services and security services. Authorisation to enlist in a foreign armed force shall lapse once the person to whom it has been granted participates in an armed conflict;
- (d) empower the President, as head of the National Executive, to proclaim a country or area as a regulated country or area;
- (e) provide for extraterritorial jurisdiction in respect of persons who are citizens or permanent residents of the Republic or where a person has committed an offence contemplated in the Bill outside the borders of the Republic;
- (f) authorise the provision of humanitarian aid under certain circumstances to relieve the plight of civilians in an area where there is an armed conflict;
- (g) provide for penalties which are aligned with the seriousness of the offence.

3. OTHER DEPARTMENTS/BODIES/PERSONS CONSULTED

All Departments represented in the International Relations, Peace and Security Cluster were consulted. These include Departments with a direct interest in the Bill, such as Safety and Security, Intelligence, Justice and Constitutional Development and Foreign Affairs.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department of Defence are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.