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MERCENARIES AND MISCHIEF: THE REGULATION OF FOREIGN MILITARY ASSISTANCE BILL

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INTRODUCTION

Morally, there can be no doubt as to the repugnance of mercenary activity, or any form of private activity which makes a direct contribution to igniting or prolonging violent armed conflict. The decision to intervene and to take sides in an armed conflict is a political one, whether it is made by an international organisation, a regional organisation, a coalition of states, or a single state. When private individuals and companies are allowed to make such decisions, the concept of international law loses all meaning. Privatised soldiers and gun-runners operate in a secretive world. They recruit in an underworld, one shared by international drug cartels, terrorists, and dealers in endangered species.

On 30 April 1997, the South African Cabinet approved the Regulation of Foreign Military Assistance Bill [B54-97][1] pending submission and approval by Parliament during the 1997 session. This legislation is co-sponsored by the ministers of Defence, Justice, and Foreign Affairs, with the chairperson of the National Conventional Arms Control Committee (NCACC), Minister of Water and Environmental Affairs, Professor Kader Asmal, as the driving force behind the Bill. The legislation aims to prevent South African companies and citizens from rendering military or military-related services abroad without the Government's authority – particularly those services which may fall within the ambit of the new style of mercenary activity (such as the much publicised exploits of Executive Outcomes in Angola, Sierra Leone and its proxy involvement in Papua New Guinea). This curbing of mercenary activities is sure to be welcomed by peace loving South Africans everywhere. However, serious questions arise from the Bill (in its present form) since it casts its net to include much wider activities unrelated to 'military' matters in the conventional sense. At the same time, the Bill subverts parliamentary oversight and accords Minister Asmal extensive discretionary powers more reminiscent of the apartheid era, than of Mandela's Government.

The problem with banning or controlling mercenary activity is firstly one of definition and secondly, one of proof. According to the 1949 Geneva Conventions, a mercenary is a person who:

- is specially recruited in order to fight in an armed conflict;
- actually takes part in the hostilities;
- is motivated essentially by the desire for private gain and is paid or promised a much higher remuneration than comparable soldiers in the conflict; and
- is not a member of the armed forces of a party to the conflict.

At the time, the purpose of this strict definition was to exclude mercenaries from the basic humanitarian protection offered by prisoner of war status, and not to ban or control 'soldiers of fortune'.

But in the realm of control, it is extremely difficult to prove most of the elements of such a definition. The solution for the drafters of the Foreign Military Assistance Bill, was to cast the net as widely as possible by seeking to control all forms of foreign military or security services, including advice and training and certain forms of humanitarian assistance by non-

government actors, to "...*parties to an armed conflict*." This, Professor Asmal admitted, would include individuals, universities, NGOs involved in conflict prevention and dispute resolution, workers for aid agencies – potentially even South Africans working for the International Committee of the Red Cross (ICRC)!

If the primary purpose of the Bill is to curtail South African involvement in 'mercenary activities' (participation in or fuelling of an armed conflict in a foreign country), then it should indeed succeed in this aim – if it survives legal challenge. The primary concern of organisations such as the Institute for Security Studies (ISS), and indeed, by implication, of a whole gambit of conflict resolution groupings, such as the Centre for Conflict Resolution, the African Centre for the Constructive Resolution of Disputes (ACCORD), the South African Institute of International Relations (SAIIR), Human Rights Watch, universities and colleges, etc., is the Bill's potential for collateral regulation of bona fide activities which have nothing to do with mercenary activities, but which may fall under the very wide umbrella of 'foreign military assistance'. Such regulation may indeed be contrary to the "*interest of promoting and protecting human rights and fundamental freedoms universally*", as indicated in the preamble to the Bill – and there is more than a suspicion that the Bill has been drafted in a deliberately wide manner on the insistence of the intelligence community for exactly this purpose.

THE OBJECTIVES OF THE BILL

According to the Memorandum on the Objects of the Regulation of Foreign Military Assistance Bill, 1997: "...*The Bill ... is intended to give effect to the constitutional provisions by regulating the provision of military assistance by individuals or juristic persons. The Bill expands the present functions of the National Conventional Arms Control Committee by including the regulation of all forms of military-related assistance abroad by South African individuals or juristic persons by the imposition of strict control measures to give effect to the Government's stated policies and the Constitution's requirements.*

... 'Foreign military assistance' ... includes engaging in armed conflict or providing military advice, training or co-operation, various forms of support, recruitment, medical or paramedical services, procurement of equipment and also providing security services for individuals or in respect of property. The Bill empowers South African courts to adjudicate upon any such acts committed outside the country. The Bill will apply not only to citizens of the Republic, but also to persons permanently resident therein and to all juristic persons registered or incorporated in the country.

... Individuals or juristic persons who wish to provide military-related services abroad will in future be obliged, firstly, to obtain approval from the Government to market these services and, secondly, to receive authorisation to enter into a contract with a third party to provide such services. These steps are broadly in line with the present two-stage control system used by the National Conventional Arms Control Committee in respect of arms transfers. The Minister of Defence, acting on the recommendations of the Committee, has been empowered by the Government to decide on such authorisation.

... South African citizens who wish to provide any form of foreign military assistance will in future encounter the same comprehensive regulatory procedures and rigorous control measures that arms transfers are subjected to..."

Individuals or organisations who wish to provide the type of services prohibited by the Bill must therefore first seek approval from Government to market such services (registration) and, secondly, receive approval to enter into a contract with a third party to provide such services (authorisation).

In his evidence before the Portfolio Committee on Defence, Professor Asmal[2] stated that the intention of the Bill was to deal with the "*merchants of death*", which he characterised as the sellers of military and security services to foreign countries. It is in the "*national interest*", he argued, to control such activities which enrich "*generally unsavoury characters*." The problem, according to Asmal, is not one of mercenary activity *per se*, but rather one of "*mischief*." It is the description of 'mischief' which provides clear cause for concern since Asmal considers this as "...*activities which are not in the national interest*." Since the Bill leaves it to the

Minister to determine the criteria for such regulation, the intentions smack of much more than mercenary control.

When questioned as to precisely where the line will be drawn – between mercenary activity and *bona fide* 'foreign military assistance' – Asmal replied that the intention is to "*keep the gateway as narrow as possible*" by, for example, prohibiting even an offer to provide the type of services specified in the Bill without due authorisation. According to him, the Bill closes all loopholes and he is explicit in arguing that universities and research institutes which engage in the realm of 'foreign military assistance' must comply with the authorisation procedure, since "*such institutions may easily provide a cover for mischief*." The definition of 'foreign military assistance' therefore becomes crucial, as will be argued below.

PREAMBLE TO THE BILL

According to its Preamble, the South African Constitution is the primary motive for the drafting of the Bill. Indeed, it has been said that the same rights enjoyed by South Africans should also be enjoyed by other countries, and that the regulation of foreign military assistance will make a major contribution in this regard. Yet, the preamble mentions only Section 198 (b) of the Constitution of the Republic of South Africa, dealing with the fact 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*." The stated purpose of the Bill is to "*implement aspects of this provision*" and to promote and protect "*human rights and fundamental freedoms, universally*." However, this should obviously not impact negatively on the rights and freedoms of South African citizens. For example, the Constitution also guarantees "...*freedom of trade, occupation and profession*" (Section 22), although these "... *may be regulated by law*."[3]

Based on these extracts and without (for the moment) arguing the morality of the issue, it would appear as if the Bill could be challenged in court – particularly as it stands at present – given the wide application to both the objects and subjects of regulation, and the absence of compulsion on the Minister to explain, report, etc. (see below).

DEFINITIONS

While the Bill does not attempt to define 'mercenaries' or 'mercenary activity', International Law is quite specific in this regard. For example, according to Article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries which was adopted and opened for signature and ratification on 4 December 1989 during the 72nd plenary meeting of the General Assembly of the UN:

"1. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

The Convention also prohibits very specific activities in terms of this definition, as follows:

"*Article 2*

Any person who recruits, uses, finances or trains mercenaries as defined in Article I of the present Convention, commits an offence for the purposes of the Convention.

Article 3

A mercenary, as defined in Article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence as the case may be, commits an offence for the purposes of the Convention.

Article 5

1. States Parties shall not recruit, use finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.

2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self determination, as recognised by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose."

By contrast, the definitions provided in Section 1 of the Foreign Military Assistance Bill are extremely vague, particularly those relating to "*armed conflict*" and "*foreign military assistance*." According to the Bill [1(i)], "*armed conflict*" includes:

"*... any armed conflict between*:

a) the armed forces of foreign states;

b) the armed forces of a foreign state and dissident armed forces or other armed groups; or

c) armed groups."

Subsection 1(i)(a) is clear. Subsection (b) however, would include many countries which are in desperate need of conflict resolution initiatives which may involve South Africans. Aside from obvious countries such as Republic of Congo and Central African Republic, the following examples serve as clear illustrations:

- The Ugandan Government is engaged in armed conflict with the Lords Resistance Army, the West Nile Bank Front and the Allied Democratic Forces.
- The Kenyan Government is using armed force to suppress political dissent among its own citizens.
- The Angolan Government is engaging UNITA forces in armed conflict.
- The Burundian Government is using armed force against opposition forces.
- In Senegal, government forces are fighting rebels belonging to the Movement of Democratic Forces of Casamance (MFDC), who have been pressing for the independence of the southern region of Senegal through an armed struggle since 1982.

- The Sudan, where South Africa's President Mandela is involved in high-level mediation efforts much against the wishes of surrounding countries, is supporting insurgency in Egypt, Tunisia, Saudi Arabia, Eritrea, Ethiopia, Somalia and Uganda. The National Islamic Front of Colonel Omar-al-Bashir is further suspected of involvement in the World Trade Centre bombing and the assassination attempt on President Mubarak, and it protects Carlos the Jackal in Khartoum – apart from its support to the Lords Resistance Army and the West Nile Bank Front.

Taken to its logical conclusion, subsection (c) may include just about every country in Africa – including Lesotho, Zambia, Zimbabwe and Malawi.

The definition of "*foreign military assistance*" [1.(iii)] in the Bill further includes:

"*(b) military assistance to a party to the conflict by means of -*

(i) advice or training; ...

(iv) medical or para-medical services; ...

(c) security services for the protection of individuals involved in armed conflict or their property;

(d) any other action that has the result of furthering the military assistance of a party to the armed conflict."

When read in conjunction with Section 1(i), this means that persons or organisations who engage in the following type of activities would, in terms of Section 2, probably have to apply for authorisation as prescribed in sections 3 to 6:

- conducting or speaking at seminars involving government officials and/or members of the armed forces;
- working for international aid agencies such as the ICRC, the UN High Commissioner for Refugees, the UN Development Programme and MSF (Doctors Without Borders);
- human rights and election monitoring;
- procurement of equipment for water sanitation, medical supplies, etc. for a humanitarian organisation;
- service within the civilian component of a peace operation; and
- provision of security services as provided by the domestic private security industry.

With the widening of the concept of peacekeeping to include such tasks as humanitarian assistance, election monitoring, demobilisation and integration of former combatants, peace operations are no longer the sole preserve of governments and the military. Indeed, there is world-wide recognition of the ascendancy of the civilian component (including aid agencies and NGOs) in the conduct of contemporary peace operations. This has led to international recognition of the 'new peacekeeping partnership', and of the necessity to establish joint training programmes for military and civilian personnel. Civilians play a key role in such training, and a number of regional outreach programmes are conducted by South African NGOs (such as ISS, Institute for a Democratic South Africa (IDASA) and ACCORD), consisting of seminars aimed at bringing civilian and military people together to deliberate on the challenges of new generation peace operations. The ISS also runs a project aimed at curbing the flow of illegal firearms and the culture of violence in the Southern African region. These programmes demand interaction with the armed forces and civilian officials of a number of countries which may be regarded as 'parties to armed conflict' as defined in the Bill. Such interaction may consist of facilitation, the presentation of seminars, workshops and educational programmes, and the provision of consulting services. All this, according to the Bill, may be regarded as 'foreign military assistance'. If subjected to the envisaged bureaucratic regulation, these programmes and projects will lose a great deal of flexibility and impact, with deleterious effects on the new peacekeeping partnership.

Collective security also implies the harmonisation of civil-military relations throughout the region, and the subjugation of the military to the principle of civil and political supremacy. Such values can only be instilled through interaction with civilians at the appropriate academic level. Indeed, the University of the Witwatersrand has been running a highly

successful Defence Management Programme, which involves the local and foreign joint training of civilian and military people in the dynamics of higher defence management and civil-military relations.

AUTHORISATION, APPROVAL AND EXEMPTION

Many of the issues identified above, pertaining to the object and subject of regulation as provided in the Bill, would not be so pertinent if the authorisation and approval procedure could be regarded as simple, efficient and inexpensive – i.e. if it did not pose a potentially unreasonable obstacle to the viability and conduct of *bona fide* forms of 'foreign military assistance' – an unfortunate term in this context. If, for example, the procedure and time-frame was akin to that required to obtain a visa to visit a foreign country, then the whole issue of the scope of regulation is reduced to a minor inconvenience for those actors whose business is above board. But the nature of regulation envisaged in the Bill is such that it reinforces concerns about the scope, particularly given the level at which approval must be sought, and the wide discretionary powers allocated to the Minister.

The Bill intends to regulate the rendering of 'foreign military assistance' in two distinct stages:

- ministerial authorisation (in principle) of applications by an individual or organisation to offer such services (Section 3); and
- ministerial approval of applications by an authorised party to provide such services in terms of specific agreements or arrangements (Section 4).

In both instances, the regulation process is preceded by a period in which the NCACC is to consider the relevant applications and formulate recommendations for the Minister regarding authorisation/approval. In no case, however, is the Minister under any obligation to accept such recommendations. According to Section 3(3), for example, "*[t]he Minister, acting upon the recommendation of the Committee, may refuse an application for authorisation referred to in subsection (2), or may grant the application subject to such conditions as the Minister may think fit*." And, in terms of Section 4(3), "*[t]he Minister, acting upon the recommendation of the Committee, may refuse an application for approval referred to in subsection (2), or may grant the application subject to such conditions as the Minister may determine*."

There is also no obligation on the Minister to respond within a given time – he can bureaucratically delay any application without really having to justify or explain himself. Likewise, the NCACC process of consideration and recommendation may have an unintended delaying effect, causing commercial (or diplomatic prestige) loss in the process.[4]

The financial implications of applying for authorisation and approval are also unknown. Sections 3(5) and 4(5) stipulate that "*the prescribed fees must be paid in respect of an application*" for both authorisation and approval, but the Bill imposes no limits on the nature of such fees. Asmal has indicated that such fees should be sufficient to cover the costs to the state of administering the prescriptions of the Bill. Although he has also intimated that NGOs and universities may be exempt from such fees, there is no obligation in this regard. According to the letter of the legislation, the minister can levy any fee, making certain services unaffordable and therefore circumvent/subvert the true intent of the Bill – whether intentionally or not.

Although not expressly stated in the Bill, it appears that application fees will not be refunded where authorisation or approval is not granted. Indeed, it is apparent that the Minister is under no obligation to provide any reason for denying approval. Although Section 6(2) provides that "*[a] person whose application for an authorisation or approval in terms of section 3 or 4 has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision*", this right to request is meaningless, without an obligation to respond. Nor will the criteria provided in Section 6, for the granting or refusal of authorisations and approvals provide sufficient justification for refusal, as most are based on an assumption of predictive powers which do not exist. For example – relating to (1)(b) – one cannot reasonably predict if an authorisation "...*would result in the infringement of human rights and fundamental freedoms*..." unless the activity concerned has a patently nefarious nature.

While the Bill provides a number of (problematic) criteria for refusal or acceptance of applications, there is no attempt to provide criteria for exemptions from the need to obtain

authorisation and approval. In terms of Section 10, exemption may be predicated solely on the Minister's likes or dislikes. Moreover, exemption may be granted only for "*a particular event or situation*." This means that any persons engaging or intending to engage in anything that could be remotely conceived of as 'rendering military assistance' would be obliged to apply for both authorisation and approval, for fear of being exposed to the penalties stipulated in Section 7, namely: "...*liable on conviction to a fine not exceeding one million rand or to imprisonment for a period not exceeding ten years, or to both such fine or imprisonment*."

These maximum penalties are excessive, especially if imposed for non-compliance, as a result of misunderstandings arising from the ill-defined concept of 'foreign military assistance', with the proposed authorisation procedures by the provider of a *bona fide* service. Compare, for example, the maximum penalties for heinous crimes such as murder, rape, armed robbery and serious assault.

In short, the authorisation procedure, involving both the NCACC and the Minister of Defence, is cumbersome and open to misuse. When combined with the extremely broad definition of 'foreign military assistance', this may result in the severe curtailment of South African non-governmental activity in support of good governance, peace and security in Africa. This can hardly be in the interest of a democratic South Africa, or of *"promoting and protecting human rights and fundamental freedoms universally*." However, the situation may be rectified by a few amendments to the Bill, as proposed below.

SUGGESTED AMENDMENTS

Note: Additions are made in bold and inserted between square [] brackets; deletions are inserted between normal () brackets.

DEFINITIONS

Because the concept of 'armed conflict' is central to the definition of 'foreign military assistance', it needs to be more accurately defined. It is therefore recommended that Section 1(i) be amended as follows:

(i) "armed conflict" includes any armed conflict between –

(a) the armed forces of foreign states;

(b) the armed forces of a foreign state and dissident armed forces or other armed groups; or

(c) armed groups [where such conflict has been identified as a source of international concern through a resolution of the United Nations Security Council or any other inter-governmental body which is competent to do so in accordance with Chapter VIII of the UN Charter]."

The scope of the subjects and objects of regulation needs to be narrowed down, or at least better defined, in order to avoid the untenable situation where mercenaries and humanitarian aid workers are subjected to the same regulatory procedures and penalties for non-compliance. It is therefore suggested that Section 1(iii) be replaced with the following:

"foreign military assistance" means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of –

(a) direct combative participation in armed conflict;

(b) military assistance to a party to the armed conflict by means of –

(i) advice or training [which involves the use of arms and/or is related to combat proficiency];

(ii) personnel, financial, logistical, intelligence or operational support [to belligerent parties];

(iii) personnel recruitment [for the purpose of supporting or enhancing the combat effectiveness of one or more belligerent parties];

(iv) medical or paramedical services [other than those provided for bona fide humanitarian purposes]; or

(v) procurement of equipment [for utilisation by belligerents];

(c) [armed] security services for the protection of (individuals involved in armed conflict) [belligerents] or their property;

(d) any other action that has the result of furthering the (military interests) [combat capabilities] of a [belligerent] party (to the armed conflict)."

AUTHORISATION FOR RENDERING OF FOREIGN MILITARY ASSISTANCE

In order to streamline the authorisation procedure, to ensure that the Bill does not lead to a situation where intentional or unintentional delays harm the interest of applicants, and to guard against the financial exploitation of applicants, the following amendments to Section 3 are suggested:

"(2) The Committee must consider any application for authorisation submitted in terms of subsection (1) and must make a recommendation [within seven days of receipt of such application] to the Minister that such application be granted or refused.

(3) The Minister, acting upon the recommendation of the Committee, [and within seven days of receipt of such recommendation] may refuse an application for authorisation referred to in subsection (2), or may grant the application subject to such conditions as the Minister may think fit.

(5) (The) [Any] prescribed fees [may not exceed an amount which may reasonably cover the pro-rata administrative costs of processing the application and] must be paid in respect of an application for authorisation granted in terms of subsection (3)."

APPROVAL OF AGREEMENT FOR RENDERING OF FOREIGN MILITARY ASSISTANCE

Similarly, the approval procedure would be more reasonable and fair if the following amendments were made to Section 4:

"(2) The Committee must consider an application for approval submitted to it in terms of subsection (1) and must make a recommendation [within seven days of receipt of such application] to the Minister that the application be granted or be refused. [If, in the opinion of the Chairperson, the application pertains to bona fide services of an urgent nature, the application may be forwarded directly to the Minister with a recommendation to the Minister that the application be granted or be refused, provided that an explanation for such action be provided to the Committee.]

(3) The Minister, acting upon the recommendation of the Committee [or Chairperson], [and within seven days of receipt of such recommendation] may refuse an application for approval referred to in subsection (2), or may grant the application subject to such conditions as the Minister may determine.

(5) (The) [Any] prescribed fees [which may not exceed an amount which may reasonably cover the pro-rata administrative costs of processing the application] must be paid in respect of an application for approval granted in terms of subsection (3)."

REGISTER OF AUTHORISATIONS [,] (AND) APPROVALS [, EXEMPTIONS AND REFUSALS]

In order to provide for more effective oversight by the legislature, to ensure a greater degree of transparency and to provide for meaningful conditions for exemption, it is suggested that

Section 5 be amended as follows:

"(1) The Committee shall maintain a register of [applications,] authorisations (and)[,] approvals[*,* exemptions and refusals] issued [or denied] by the Minister in terms of sections 3 (and)[,] 4 [or 10].

(2) The Committee must each quarter submit reports to the National Executive and to the Portfolio Committee on Defence of the National Assembly with regard to [reasons for authorisations, approvals, exemptions and refusals contained in] the register."

CRITERIA FOR GRANTING OR REFUSAL OF AUTHORISATIONS (AND)[,] APPROVALS [AND EXEMPTIONS]

In order to limit the extensive discretionary powers of the Minister, it is suggested that Section 6 be amended as follows:

"(1) An authorisation (or)[,] approval [or exemption] in terms of sections 3 (and)[,] 4 [or 10] may not be granted if it (w)[c]ould [reasonably be foreseen to] –

(a) be in conflict with the Republic's obligations in terms of international law;

(b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;

(c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;

(d) support or encourage terrorism in any manner;

(e) contribute to the escalation of regional conflicts;

(f) prejudice the Republic's national or international interests(;)[.]

((g) be unacceptable for any other reason.)

(2) A person whose application for an authorisation (or)[,] approval [or exemption] in terms of Section 3 (or)[,] 4 [or 10] has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision.

[(3) The Minister is obliged to furnish such reasons within fourteen days of a request in terms of subsection (2).]

EXEMPTIONS

In order to reduce the ongoing administrative burden on the NCACC and the Minister, and to allow them to concentrate on the true objects and subjects of the Bill (the "*big fish*" or "*generally unsavoury characters*" who engage in "*violent entrepreneurial activity*" motivated by "*greed and avarice*", according to Minister Asmal in front of the Portfolio Committee on Defence), it is suggested that meaningful provision be made for the exemption of "*tadpoles*." In other words, provision should be made both in the realm of authorisation and of approval for the exemption of categories of persons who obviously cannot and will not participate in or fuel an armed conflict in a foreign country (especially if the suggested amendments pertaining to the definition of 'foreign military assistance' are rejected). It is therefore proposed that Section 10 be expanded as follows:

"10. [(1) Any natural person or category of national persons who wishes to obtain exemption from the provisions of sections 3 and 4 shall submit to the Committee an application for exemption in the prescribed form and manner.]

[(2) The Committee must consider an application for approval submitted to it in terms of

subsection (1) and must make a recommendation within 30 days of receipt of such application to the Minister that the application be granted or be refused. If, in the opinion of the Chairperson, the application pertains to bona fide services of an urgent nature, the application may be forwarded directly to the Minister with a recommendation to the Minister that the application be granted or be refused, provided that an explanation for such action be provided to the Committee.]

[(3)] The Minister, acting upon the recommendation of the Committee [or Chairperson], [and within seven days of receipt of such recommendation] may exempt any natural person or category of natural persons from the provisions of Sections 3 and 4 (in respect of a particular event or situation, and) subject to such conditions as he or she may determine."

The conditions which the Minister may determine, may include a number of measures to ensure that only *bona fide* persons or categories of persons qualify for exemption, and may include, for example, the requirement that applicants submit to the Minister a comprehensive prospectus, an annual audited statement of accounts, and quarterly reports of all activities. The creation of a small inspectorate within the Defence Ministry would also enhance the ability to ensure that the entire regulatory framework provided by the legislation is effectively implemented.

CONCLUSION

The imminent submission to Parliament of the Foreign Military Assistance Bill occurs against the current review of the Security Officers Amendment Act, while the statutory establishment of the NCACC itself still has to see the light of day. Neither of these issues can be deliberated in isolation, since the domestic private security industry will be affected by the former and the NCACC will regulate both arms transfers and 'foreign military assistance'. Logically, statutory regulation of foreign military assistance through the NCACC should follow the legislation which establishes the NCACC and not the other way around. Of greater concern than the effects on the private security industry, however, is the potential negative impact of the Bill on persons and organisations who wish to play a constructive role in the resolution of conflict and the alleviation of human suffering in Africa.

The formal objectives of the Bill, and those envisaged by Professor Asmal – who will gain extensive discretionary powers to regulate the activities of literally any NGO working into Africa – therefore differ substantially. Due to systems overload and administrative backlogs, it is doubtful whether such an approach will succeed in controlling some of the real 'mischief', such as the illicit trade in arms and the commercial pilots who fly arms, ammunition and other supplies into conflict areas – and whose activities will not be stopped by legislation without also sealing South Africa's notoriously porous borders.

NGOs, academics, and legitimate business people must support the initiative evident in the Bill to control nefarious military assistance activities through appropriate legislation. However, they must also protest against an approach that potentially paints them with the same brush as mercenary outfits. By necessity, NGOs breathe transparency and international accountability far removed from security agencies. In fact, while the independence of the NGO movement has been accepted by the recent NGO Bill, the proposed Foreign Military Assistance Bill flies in the face of this hard-fought space.

Legislation which blurs the distinction between legitimate and peaceful outreach programmes, on the one hand, and mercenary activities on the other, is likely to retard the cause of peace and stability, while enhancing the legitimacy of those profiting from armed conflict. South Africans may yet be justly proud of progressive legislation that successfully counters the private fuelling of armed conflicts, especially if this translates into effective regulation which does not infringe on the basic constitutional rights of peace loving citizens – but they cannot embrace the Foreign Military Assistance Bill in its present form.

ENDNOTES

1. The text of the proposed Bill is appended at the end of this paper.
2. Remarks by Prof. Kader Asmal, MP, Chairperson of the National Conventional Arms Control Committee, at a Parliamentary briefing on the Bill on Foreign Military Assistance, 19 August 1997.

3. Section 36(1) specifies that: "*The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors* ..."
4. The NCACC is a committee consisting of some 21 cabinet ministers, chaired by Professor Kader Asmal, which meets once a month to consider and make recommendations on South African arms transfers to foreign countries. Despite improvements in the speed with which applications are processed, the NCACC process continues to frustrate the defence industry. If a host of applications to provide 'foreign military assistance' are received from the private security industry, aid agencies, NGOs and individuals, the already heavy burden on the NCACC may prove unmanageable.

APPENDIX

REGULATION OF FOREIGN MILITARY ASSISTANCE BILL [B 54-97]
BILL

To regulate the rendering of foreign military assistance by South African juristic persons, citizens and persons resident within the Republic.

PREAMBLE

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. In order to implement aspects of this provision and in the interest of promoting and protecting human rights and fundamental freedoms, universally, it is necessary to regulate the rendering of foreign military assistance by South African juristic persons, citizens and persons resident in the Republic.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context indicates otherwise-

(i) "armed conflict" includes any armed conflict between-

(a) the armed forces of foreign states;

(b) the armed forces of a foreign state and dissident armed forces or other armed groups; or

(c) armed groups;

(ii) "Committee" means the National Conventional Arms Control Committee as constituted by the National Executive by the decision of 18 August 1995;

(iii) "foreign military assistance" means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of-

(a) direct combative participation in armed conflict;

(b) military assistance to a party to the armed conflict by means of-

(i) advice or training;

(ii) personnel, financial, logistical, intelligence or operational support;

(iii) personnel recruitment;

(iv) medical or paramedical services; or

(v) procurement of equipment;

(c) security services for the protection of individuals involved in armed conflict or their property;

(d) any other action that has the result of furthering the military interests of a party to the armed conflict;

(iv) "Minister" means the Minister of Defence;

(v) "person" means a natural person who is a citizen of or is permanently resident in the Republic, or a juristic person registered or incorporated in the Republic;

(vi) "Republic" means the Republic of South Africa;

(vii) "register" means the register of authorisations and approvals maintained in terms of section 5.

Rendering of foreign military assistance prohibited

2. No person may within the Republic or elsewhere-

(a) offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorisation to offer such assistance in terms of section 3;

(b) render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 4.

Authorisation for rendering of foreign military assistance

3. (1) Any person who wishes to obtain the authorisation referred to in section 2(a) shall 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 must make a recommendation to the Minister that such application be granted or refused.

(3) The Minister, acting upon the recommendation of the Committee, may refuse an application for authorisation referred to in subsection (2), or may grant the application subject to such conditions as the Minister may think fit.

(4) Any authorisation granted in terms of this section shall not be transferable.

(5) The prescribed fees must be paid in respect of an application for authorisation granted in terms of subsection (3).

Approval of agreement for rendering of foreign military assistance

4. (1) A person who wishes to obtain the approval of an agreement or arrangement for the rendering of foreign military assistance, by virtue of an authorisation referred to in section 2(a) to render the relevant military assistance, shall submit an application to the Committee in the prescribed form and manner.

(2) The Committee must consider an application for approval submitted to it in terms of subsection (1) and must make a recommendation to the Minister that the application be granted or be refused.

(3) The Minister, acting upon the recommendation of the Committee, may refuse an application for approval referred to in subsection (2), or may grant the application subject to

such conditions as the Minister may determine.

(4) Any approval granted in terms of this section shall not be transferable.

(5) The prescribed fees must be paid in respect of an application for approval granted in terms of subsection (3).

Register of authorisations and approvals

5. (1) The Committee shall maintain a register of authorisations and approvals issued by the Minister in terms of sections 3 and 4.

(2) The Committee must each quarter submit reports to the National Executive and to the Portfolio Committee on Defence of the National Assembly with regard to the register.

Criteria for granting or refusal of authorisations and approvals

6. (I) An authorisation or approval in terms of sections 3 and 4 may not be granted if it would-

(a) be in conflict with the Republic's obligations in terms of international law;

(b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;

(c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;

(d) support or encourage terrorism in any manner;

(e) contribute to the escalation of regional conflicts;

(f) prejudice the Republic's national or international interests;

(g) be unacceptable for any other reason.

(2) A person whose application for an authorisation or approval in terms of section 3 or 4 has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision.

Offences and penalties

7. Any person who contravenes any provision of section 2, or fails to comply with a condition laid down by the Minister with regard to any authorisation or approval granted in terms of section 3 or 4, shall be guilty of an offence and liable on conviction to a fine not exceeding one million rand or to imprisonment for a period not exceeding ten years, or to both such fine or imprisonment.

Extraterritorial application of Act

8. Any court of law in the Republic may try a person for an offence referred to in section 7 notwithstanding the fact that the act or omission to which the charge relates was committed outside the Republic.

Regulations

9. The Minister, acting on the recommendation of the Committee, may make regulations relating to-

(a) any matter which is required or permitted in terms of this Act to be prescribed;

(b) the criteria to be taken into account in the consideration of an application for an authorisation or approval in terms of section 3 or 4;

(c) the maintenance of the register; and

(d) any other matter which may be necessary for the application of this Act.

Exemptions

10. The Minister, acting upon the recommendation of the Committee, may exempt any natural person or category of natural persons from the provisions of sections 3 and 4 in respect of a particular event or situation, and subject to such conditions as he or she may determine.

Short title

11. This Act shall be called the Regulation of Foreign Military Assistance Act, 1997, and shall come into operation on a date fixed by the President by proclamation in the Gazette.