

South Africans offering Foreign Military Assistance Abroad: How real is the Risk of Domestic Prosecution?

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Abstract

This article discusses the efficacy of the existing *Regulation of Foreign Military Assistance Act* 15 of 1998, and the proposed *Prohibition of Mercenary Activities and Regulation of Certain Activities in the Country of Armed Conflict Act* 27 of 2006, in regulating the private security industry and prosecuting those in contravention of the legislation. It discusses the motivations behind recent attempts to deny the citizenship of South African nationals who had taken up employment abroad in the private security industry. The article gives some guidance regarding the likelihood of prosecution for the new school of South African fighters taking up arms for foreign causes like ISIS, the IDF, and Nigeria.

Keywords

Foreign military assistance; private security; domestic prosecution; ISIS.

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1 Introduction

This article is a sequel to one published in 2011 *PER* entitled "South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work". In that article my co-author Marelie Maritz and I criticised the "aggressive overreaching legislation"¹ and the broad powers vested in the National Conventional Arms Control Committee (NCACC) to grant or withhold authorisation to those working in the private military and security (PMS) industry. We concluded that the South African legislation seemed to be at odds with both the domestic legislation of other states and the existing international law obligations. We predicted that South African private security contractors (PSCs) would either continue to operate clandestinely or "denounce their citizenship in order to avoid prosecution".² We cautioned that the *Regulation of Foreign Military Assistance Act* 15 of 1998 (FMA) and its proposed successor, the *Prohibition of Mercenary Activities and Regulation of Certain Activities in the Country of Armed Conflict Act* 27 of 2006 (PMA), would face legal challenges on constitutional, administrative and international law grounds.³ Five years on it is now opportune to take stock of what has come of the post-apartheid government's choice to view South African PSCs and South African Private Military and Security Companies (PMSCs) that offer foreign military assistance abroad as mercenaries. I have also been prompted to revisit the conclusions that we drew in "South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work" as a result of several incidents that have made news headlines over the last six years.

In 2014 Runners for Palestine opened a case against a South African national, Dean Goodson, for serving in the Israeli Defence Force (IDF) in contravention of the FMA. In March 2015 reports emerged that familiar names in the PMS industry – like Eben Barlow together with former members of "Executive Outcomes" – had re-surfaced in northern Nigeria, where together with another ex-South African PMSC (now based in Lagos), Pilgrims Africa Ltd they were assisting the Nigerian government to combat Boko Haram.⁴ In April 2015 a 15-year-old Cape Town girl who attempted to

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¹ Bosch and Maritz 2011 *PELJ* 108.

² Bosch and Maritz 2011 *PELJ* 108.

³ Bosch and Maritz 2011 *PELJ* 108.

⁴ Fabricius 2015 <http://www.iol.co.za/news/africa/sadf-mercenaries-turning-tide-in->

board a flight, intent on joining Islamic State, was taken off the flight.⁵ Several other South Africans have also reportedly already left to join ISIS. All of these incidents, while varied, have one aspect in common: all of these individuals operate without any NCACC authorisation.

I will pick up where our last article left off and address these burning questions: Has the FMA been more successful in regulating the private security industry and prosecuting those in contravention of the legislation since 2011? Has the proposed PMA entered into force, and has it proven to be a more successful prosecutorial tool than the FMA? What has come of the attempts to deny the citizenship of South African nationals who had taken up employment abroad in the private security industry? And, lastly, what are we to make of the new school of South African fighters taking up arms for foreign causes like ISIS, the IDF, and Nigeria? Are they likely to face prosecution under the existing legislative regime?

2 The prosecutorial success of the FMA and its impact on the private security industry

Given South Africa's international reputation for being one of the most prolific exporters of PSCs, one would expect the NCACC to have been flooded with applications from South African citizens requesting authorisation to render foreign military assistance after the FMA entered into law. Instead, less than a handful of individual PSCs and South African-based PMSCs have ever applied for the required NCACC authorisation.⁶ Given this lack of adherence to the pre-authorisation requirements set out in the FMA, one would expect the NPA to have acted swiftly to prosecute

nigeria-1843796; York 2015 <http://www.theglobeandmail.com/news/world/nigeria-hires-mercenaries-to-fight-boko-haram/article23442385/>. A contractor to the Nigerian army confirms that they are being hired at US\$400 per day: "It is the same group of people who fought in Sierra Leone, and in Angola ... he puts their ages at between 50 and 65. They aren't as fast as they used to be but they are well trained and efficient in handling weapons. If you have that knowledge you don't lose it. The things that Boko Haram have done over the past four, five years are so appalling. For once these guys are fighting the right enemy. They are on the right side. It is an opportunity for redemption ... adding that Nigeria is considering hiring more." (Wallis and Manson 2015 <https://www.ft.com/content/4cda876e-d2e8-11e4-a792-00144feab7de>).

⁵ Hartleb 2015 <http://www.news24.com/SouthAfrica/News/Cape-Town-teen-girl-pulled-off-flight-was-trying-to-join-ISIS>.

⁶ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 61; Gumedze 2012 <https://www.issafrica.org/iss-today/the-need-for-an-international-code-of-conduct-for-private-security-actors-in-africa>.

the estimated 1.7 million-plus South African PSCs deployed abroad.⁷ In reality, there have been very few instances of prosecution for contravention of the FMA – despite the fact that the *FMA* prohibits a wide range of activities, including the provision of equipment and "advice and training to other militaries".⁸ The NPA has not successfully prosecuted any South African nationals or organisations for offering these additional services,⁹ and appears to have restricted its prosecutions to only the high-profile instances of alleged mercenary activities.¹⁰

As we detailed in "South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work", almost without exception these cases have culminated in plea bargains and have resulted in the imposition of suspended jail terms and fines (ranging from R10 000 to R200 000).¹¹ Given this abysmal prosecutorial track record, it comes as no surprise that Simon Mann and Nick du Toit could so easily recruit a small army of men for their doomed Wonga coup on South African soil,¹² even after the FMA had entered into force. And when you consider that their recruits stood to earn between \$1,500 (for foot soldiers) and \$5,000 (for team leaders) per month,¹³ the threat of these insignificant fines was probably of little real deterrent effect.

In February 2013 the NPA brought charges under the FMA against 20 Congolese nationals¹⁴ for allegedly plotting to overthrow Joseph Kabila, the president of the Democratic Republic of Congo, and his government.¹⁵

⁷ Gaston 2008 *Harv Int'l LJ* 241; Hodge 2006 http://www.slate.com/articles/news_and_politics/foreigners/2006/08/army_for_hire.html; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 61.

⁸ This might include: "backpacks, spare parts for vehicles, tents" (Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 59); Avant *Market for Force* 162.

⁹ Avant *Market for Force* 162.

¹⁰ Messner "Working Towards Effective Legislative and Regulatory Solutions" 152; Jacobs 2008 *Strateg Rev S Afr* 11; Taljaard "Implementing South Africa's Regulation of Foreign Military Assistance Act" 175-176.

¹¹ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 54.

¹² Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 54. In fact, in later years when Simon Mann recruited for his great "Wonga coup" failure, he initially claimed it was for a revived EO. Eben Barlow dismissed this misrepresentation, stating that the "Wonga coup took place several years after EO closed its doors" (Barlow "E-mail Response"- on file with author).

¹³ Roberts *The Wonga Coup* 130.

¹⁴ One of the accused (Etienne Kabila) claimed to be the "biological son of the slain Laurent Kabila, and that Joseph was an adopted child from a Rwandan family" (Potgieter and Patel 2013 <http://www.dailymaverick.co.za/article/2013-02-11-congo-rebels-a-kabila-family-affair/#.WD0rlpN97fY>; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 55).

¹⁵ Anon 2013 <http://www.bbc.com/news/world-africa-21432981>; Taljaard "Implementing South Africa's Regulation of Foreign Military Assistance Act" 179;

Judge Billy Mothle presided over the case in the Pretoria High Court, and the initial list of 20 accused persons soon dropped to 5, owing to a lack of evidence.¹⁶ Counsel for the defence requested that Mothle J declare the FMA unconstitutional, describing its provisions as "unclear" and "ambiguous".¹⁷ In the end, all 5 men were acquitted when it came out during cross examination that the prosecution's case was heavily reliant on evidence which had been collected unlawfully in a trap set up by the Police's Anti-Terrorism unit – a division of the Hawks.¹⁸ The defendants were, at the conclusion of the trial, contemplating filing a civil suit against the State for their wrongful arrest and detention.¹⁹ In handing down his judgment, Judge Mothle²⁰ expressed concerns about the overly expansive scope of the FMA, stating that it "was broad enough to also cover the legitimate activities of private military companies". This is the first indication from the judiciary that the plot to paint everyone employed in the PMS industry as mercenaries – through the application of the FMA – was going to face stiff challenges before the courts.

While the FMA had failed to deliver the prosecutorial results that had been anticipated, this is not to say that the introduction of the FMA has not impacted negatively on the careers of South African PSCs. For some foreign PMSCs and militaries who had previously hired South Africans, the threat of reputational damage by association from the possible prosecution of South African contractors under the FMA made the once sought-after South African PSCs a liability. One UK-based PMSC, Erinys, retrenched 100 South African security contractors, citing their need to avoid

Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 55; Fabricius 2015 <http://www.iol.co.za/the-star/strange-chapter-in-sa-congo-saga-ends-1823026>.

¹⁶ SAPA 2014 <http://www.iol.co.za/news/crime-courts/drc-coup-plot-trial-continues-1733776>.

¹⁷ SAPA 2014 <http://www.iol.co.za/news/crime-courts/drc-coup-plot-trial-continues-1733776>. In response, the state argued that the objective of the FMA was to ensure that "SA was not seen as a haven for mercenaries" (Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 55; Makhubu 2015 <http://www.iol.co.za/news/crime-courts/five-drc-rebels-freed-1821749>).

¹⁸ SAPA 2014 <http://www.iol.co.za/news/crime-courts/drc-coup-plot-trial-continues-1733776>; Makhubu 2015 <http://www.iol.co.za/news/crime-courts/five-drc-rebels-freed-1821749>

¹⁹ Makhubu 2015 <http://www.iol.co.za/news/crime-courts/five-drc-rebels-freed-1821749>.

²⁰ SAPA 2014 <http://www.iol.co.za/news/crime-courts/drc-coup-plot-trial-continues-1733776>; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 55.

reputational damage "if the South African government chose to investigate and prosecute these individuals".²¹

In short, despite the legislative zeal, individual South African PSCs have largely ignored the requirements of the FMA and have persisted in offering their services abroad. While some foreign companies (like Erinys) stopped hiring South Africa contractors the majority, however, seem to have continued doing "business as usual".

3 Will the PMA have a better track record?

At the time of writing "South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work", the *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006*,²² which was drafted in 2006 and had attained the necessary presidential assent in November 2007, had already lingered for four years awaiting the necessary proclamation to make it law. Nine years on, the PMA has yet to receive the necessary presidential proclamation and regulations required to make it binding law.²³

Whether the PMA will be a more successful prosecutorial instrument than the FMA, when and if it ever enters into force, will be interesting to discover. In our earlier article we focused our discussion on the administrative-law hurdles which the PMA would likely face given the unfettered discretionary powers given to the NCACC.²⁴ Given that the NCACC has had very few applications for authorisation to consider, it is perhaps more relevant to look more closely at the new provisions contained in the PMA, to assess whether it is ever likely to overcome the difficulties which continue to paralyse the FMA.

As we had previously suggested, the provisions in the PMA were no less draconian than those of the FMA. However, there are two notable ways in which the PMA sought to enhance the chances of the NPA's successfully prosecuting those participating in the PMS industry without the required

²¹ Jacobs 2008 *Strateg Rev S Afr* 11; Hodge 2006 http://www.slate.com/articles/news_and_politics/foreigners/2006/08/army_for_hire.html; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 60.

²² Security and Constitutional Affairs Select Committee 2006 <https://pmg.org.za/committee-meeting/7298/>.

²³ Jeff Radebe confirmed that "the PMA is not yet in operation pending the finalisation of Regulations to this Act" (Radebe 2013 <http://www.politicsweb.co.za/archive/2006-prohibition-of-mercenary-activities-act-not-y>; Gumedze *Elimination of Mercenarism* 40).

²⁴ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 57.

authorisation. The first pertains to the definition of the term "mercenary". It is evident from the records of the parliamentary working group's discussion minutes²⁵ that they wanted to expand the application of the term "mercenary" to include:

... other forms of involvement in the security sector that might only destabilise states, irrespective of whether the situation rose to the level of an armed conflict and even without an armed conflict being declared.²⁶

The definition also included within the Act's ambit "advice, logistical support, training, security services or personnel recruitment".²⁷ This expanded understanding of the scope of mercenary activities does not reflect the international community's understanding of the term "mercenary" – as set out in the UN *Mercenary Convention*.²⁸

Consequently, after some careful word-craft, a South African could face prosecution as a "mercenary" under the PMA for providing supportive or financial assistance in a conflict, where private gain was shown.²⁹ Hypothetically this means that the NPA would be able to bring a charge for "mercenary" activities under the PMA against South Africans who not only join the IDF or ISIS, but who financially support those fighting for IDF or ISIS – if their "private gain" can be demonstrated. Exactly how the NPA intends to show that those taking up arms and financially supporting ISIS or IDF are doing so for private gain remains to be seen, since in these two instances the motive for offering support is often cited as being ideological. The PMA could also be used to prosecute those PSCs who hold South African citizenship and who have reportedly been assisting the Nigerian government with advice and training in their pursuit of Boko Haram. More alarming is the possibility that any South African company selling anything from backpacks to tents to a foreign military, or any armed group, could find themselves in the dock as a result of the new parameters of the PMA.

The PMA also augmented the prior jurisdictional scope of application of the FMA. Smarting from the difficulties faced in prosecuting those involved in the infamous "Wonga coup", those drafting the PMA increased the jurisdictional scope of the NPA's prosecutorial authority through the

²⁵ Security and Constitutional Affairs Select Committee 2006 <https://pmg.org.za/committee-meeting/7298/>; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 53.

²⁶ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 56.

²⁷ Franklin 2008 *Transnat'l L & Contemp Probs* 251.

²⁸ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 56.

²⁹ Franklin 2008 *Transnat'l L & Contemp Probs* 251. This approach echoes the broad anti-terrorism legislation passed in the US and elsewhere.

inclusion of section 11³⁰ – making it possible for the NPA to prosecute any criminal activity by a South African committed outside of South Africa.³¹ Under the new scope of the proposed PMA, their mere involvement in the security sector and the potential that this might destabilise states is all that is required; it is no longer a pre-requisite that an armed conflict is declared.³² This will mean that if or when the PMA enters into force, South Africans deployed abroad in the PMS industry without NCACC authorisation,³³ even where they are employed by a PMSC that has no links to South Africa, and even at the invitation of the territorial state, will have to renounce their South African citizenship to avoid potential prosecution under section 11. The same is true for those 800 plus South Africans who currently serve in the British armed forces, all those who like Dean Goodson serve in the IDF,³⁴ and those South African nationals who have reportedly joined ISIS without the required NCACC authorisation.

Whether the PMA will ever see the light of day remains to be seen, and one has to wonder why, after 9 years, it is still no closer to replacing the FMA. Whatever the official or underlying reason is, it is clear that the government's objective to restrict South African citizens from fighting for foreign causes is still very much on the agenda, and the proposed amendment to the *South African Citizenship Act 88 of 1995* is testament to this.

4 Denying citizenship when all else fails

In "South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work" we noted with concern the true motive behind the amendment proposed in 2010 to section 6 of the

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- ³⁰ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 57.
S 11 of the PMA: "Any act constituting an offence under this Act and that is committed outside the Republic by—
a citizen of the Republic;
a person ordinarily resident in the Republic;
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."
- ³¹ Franklin 2008 *Transnat'l L & Contemp Probs* 253; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 65.
- ³² Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 56.
- ³³ A person seeking such authorisation must submit an application to the NCACC, which considers the application and may either refuse it, grant the application subject to such conditions as it may determine, or at any time withdraw or amend an authorisation already granted (s 7(2) of the PMA).
- ³⁴ Franklin 2008 *Transnat'l L & Contemp Probs* 253.

South African Citizenship Act 88 of 1995.³⁵ In its initial form, the amendment would have permitted the government to revoke the South African citizenship of any South African found to be serving in a foreign military.³⁶ The real motive behind this proposal was allegedly to deter South African citizens from serving in the Israeli Defence Force,³⁷ since the FMA was not proving an effective mechanism to deter or enforce its authorisation regime through the NCACC. At the time, the Director General of the Department of Home Affairs³⁸ was certain that the proposed amendment was intended only to prevent naturalised South African citizens from retaining their South African citizenship if they were simultaneously serving in a foreign military.³⁹ Naturally, this sparked concerns about the potential for the proposed amendment to be used to deny citizenship to any South African citizen serving in a foreign military, and not just those who had obtained citizenship by naturalisation. As Kader Asmal⁴⁰ astutely pointed out:

We know how our government has not been able to implement the present anti-mercenary legislation because it has overreached itself. We wonder about the justification for the proposed amendments.

To avoid the serious constitutional issues⁴¹ which this raised, section 6(3) was re-worked to avoid this implication, and it now reads:

Section 6(3): Any person who obtained South African citizenship by naturalisation in terms of this Act shall cease to be a South African citizen if he or she engages, under the flag of another country, in a war that the Republic does not support.

In the end this potential backdoor means at attempting to enforce the objectives of the FMA was also found wanting. In short, South African

³⁵ *South Africa Citizenship Amendment Act 17 of 2010*. The *South Africa Citizenship Amendment Act* will add subsection (c) to the already existing s 6 of the *South Africa Citizenship Act 88 of 1995*.

³⁶ defenceWeb 2010 http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=9204:SouthAfrica-to-strip-soldiers-abroad-of-citizenship&catid=54:Governance&Itemid=118; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 58.

³⁷ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 58.

³⁸ Mkuslei Alpeni.

³⁹ This Bill would, however, not have any effect on South African PSCs who are not serving in a foreign military. Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 58.

⁴⁰ defenceWeb 2010 http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=9204:SouthAfrica-to-strip-soldiers-abroad-of-citizenship&catid=54:Governance&Itemid=118; Kader Asmal was a Professor of Constitutional Law.

⁴¹ Manby *Citizenship Law in Africa* 78; LSSA 2010 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100817pchomelssa_0.pdf; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 58.

nationals serving in the armed forces of foreign states will not lose their South African citizenship – unless they acquired that citizenship by naturalisation.

5 South African PSCs active abroad: has Executive Outcomes risen from the ashes?

It is widely acknowledged that the South African PMS industry, which proliferated in post-apartheid South Africa, benefitted from the bush-war expertise of the personnel who had previously served under the SANDF's special operations units. When those units were disbanded under the new democratic dispensation, the market was flooded with highly trained and readily employable personnel. South African PMSCs such as Executive Outcomes found these conditions conducive to setting up shop and were able to respond quickly and decisively to calls for their services on the continent.

Perhaps it was their success that made the new democratically elected ANC government wary of them – as a threat at domestic level, but also due to the way their activities in the region might undermine the ANC government's regional foreign policy and cause it political embarrassment.⁴² It was believed that the real intent behind the drafting of the FMA was to "de-legitimise the industry".⁴³

Despite reports that the aim of the FMA was to close down PMSCs like Executive Outcomes (EO), Barlow⁴⁴ (the founder of EO) claims that his company was in fact approached by the government and asked to comment on the draft FMA – which Barlow says they did. He remarks that many of their suggestions were in fact incorporated into the FMA. At the time EO was struggling to disassociate themselves from other PMSCs masquerading as EO. While there is no government confirmation of this little-known fact, Barlow maintains that EO was one of the first South African companies to be given a licence by the South African government to operate across Africa.

Nevertheless, because of their public notoriety EO were forced to cease operating⁴⁵ under that name after the introduction of the FMA. Other PMSCs

⁴² Franklin 2008 *Transnat'l L & Contemp Probs* 252.

⁴³ *Avant Market for Force* 162, 167.

⁴⁴ Barlow "E-mail Response" – on file with author.

⁴⁵ Several Executive Outcomes' operatives moved across to Lifeguard and continued to work in Sierra Leone (O'Brien 2000 *RUSI Journal* 59; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 59).

which had kept a lower public profile⁴⁶ quietly moved offshore, "charter shopping"⁴⁷ for states where the domestic legislation was less draconian and where the vagaries of the NCACC were not likely to impact on them. Some resorted to operating more clandestinely – but still within the borders of South Africa.⁴⁸ Those providing legal advice or lobbying government on their behalf have reported the lengths to which these PMSCs go to hide their identities and guard the details of their involvement in the industry.⁴⁹ Ironically, the hardline stance taken in the FMA, rather than affording the government the opportunity to regulate the industry, has resulted in the industry's going underground or off-shore and effectively circumventing any government regulation.⁵⁰

As for the individual South African PSCs, they may have been forced into early retirement from the SANDF when the armed forces were re-organised – but for many of them early retirement was not financially viable. With the FMA setting a hostile tone for the domestic PMSC industry, many PSCs resorted to seeking employment with foreign PMSCs⁵¹ and foreign militaries. Many PSCs relocated, like ex-EO operative Cobus Claassens, who heads up the Nigerian branch of the UK-based Pilgrims Group: a PMSC providing "security for multinationals and the British High Commission".⁵²

These "retired" South African PSCs were then, and still are, highly sought-after, despite their advanced years. Speaking to the Royal Danish Defense College, Barlow⁵³ quipped that:

⁴⁶ Including the PMSCs: Saracens, Security Control Systems and Lifeguard (Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 60).

⁴⁷ Perrin *Modern Warfare* 228; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 60.

⁴⁸ Including, for example: Frederick, Nicholas and Duncan (FND); Avant *Market for Force* 161, 166; Holmqvist *Private Security Companies* 42.

⁴⁹ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 60.

⁵⁰ Taljaard "Implementing South Africa's Regulation of Foreign Military Assistance Act" 167, 169.

⁵¹ Brooks 2000 *International Peacekeeping* 136; Taljaard "Implementing South Africa's Regulation of Foreign Military Assistance Act" 167, 169.

⁵² Wallis and Manson 2015 <https://www.ft.com/content/4cda876e-d2e8-11e4-a792-00144feab7de>; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 60.

⁵³ Formerly head of EO, now chairman of Specialised Tasks, Training, Equipment and Protection (STTEP). "Mercenaries from South Africa have proved quietly decisive in helping the Nigerian military turn around its campaign against Boko Haram, writes Colin Freeman in Abuja" (Freeman 2015 <http://www.telegraph.co.uk/news/world-news/africaandindianocean/nigeria/11596210/South-African-mercenaries-secret-war-on-Boko-Haram.html>).

Yes, many of us are no longer 20-year-olds. But with our age has come a knowledge of conflicts and wars in Africa that our younger generation employees have yet to learn, and a steady hand when things get rough.

Barlow openly discusses his mandate to teach the Nigerian Armed forces the tactics of "unconventional mobile warfare" in their war against Boko Haram.⁵⁴ The Nigerian government insists that Barlow and his fellow South Africans are providing only technical advice and are not offering combat-related services. Barlow counters that:

... his men had been involved in direct combat, intelligence gathering, troop transportation and evacuation of casualties.⁵⁵

Furthermore, March 2015 media reports of a South African death in Nigeria, reportedly as a result of friendly fire, suggest that Barlow's version has some traction.⁵⁶ Officially Nosiviwe Mapisa-Nqakula, South Africa's Minister of Defence, has threatened to prosecute any South African found to have been involved in conflict in Nigeria.⁵⁷ To date, however, no charges have been laid against any South Africans deployed in Nigeria. Interestingly, Nigeria's ambassador to South Africa confirmed, in the third session of the South Africa-Nigeria Defence Committee sitting in Cape Town on 27 September 2017, that Nigeria was thankful for the support it had received from South Africa in the form of military hardware⁵⁸. This announcement comes on the back of speculation in the Nigerian Media during 2016 that South Africa was "joining the fight against Boko Haram".⁵⁹ While the veracity of these claims is questioned,⁶⁰ this does suggest that there will be very little political will to prosecute PSCs who may be assisting in the fight against Boko Haram, since the SANDF is resource strapped and unable to assist.

⁵⁴ Barlow date unknown <http://eebenbarlowsmilitaryandsecurityblog.blogspot.co.za/>.

⁵⁵ Barlow writes on his blog that his air power unit was "given kill blocks to the front and flanks of the strike force and could conduct missions in those areas" (Barlow date unknown <http://eebenbarlowsmilitaryandsecurityblog.blogspot.co.za/>).

⁵⁶ Smith 2015 <https://www.theguardian.com/world/2015/apr/14/south-africas-ageing-white-mercenaries-who-helped-turn-tide-on-boko-haram>; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 61.

⁵⁷ SAPA 2015 <http://www.iol.co.za/news/africa/arrest-sa-mercenaries-says-defence-boss-1810571>. "Fellow PSCs say that public opinion in SA, and the western world is on their side" (Wallis and Manson 2015 <https://www.ft.com/content/4cda876e-d2e8-11e4-a792-00144feab7de>).

⁵⁸ Hyman 2017 <http://www.timeslive.co.za/news/africa/2017-09-28-sa-fought-boko-haram>.

⁵⁹ Allison 2016 <https://www.dailymaverick.co.za/article/2016-03-08-nigeria-is-south-africa-really-joining-the-fight-against-boko-haram/#.WdzljtMjHUo>.

⁶⁰ Defence ministry spokesman, Sipiwe Dlamini, claims "there is no such decision to send any military elements by the RSA to assist with the fight against Boko Haram" (Allison 2016 <https://www.dailymaverick.co.za/article/2016-03-08-nigeria-is-south-africa-really-joining-the-fight-against-boko-haram/#.WdzljtMjHUo>).

6 South Africans taking up arms for foreign causes like ISIS and the IDF: is the risk of prosecution under the FMA real?

It is not uncommon to hear of South Africans of Jewish descent electing to serve in the Israeli Defence Force. In 2009 the Palestinian Solidarity Alliance, together with the Media Review Network, handed over to the NPA a list (the "Gaza Docket") of 73 South African citizens who were allegedly serving in the IDF during Operation Cast Lead⁶¹ in Gaza. Among the names listed is Dean Goodson, who has openly admitted to and promoted his involvement with the IDF. Tayob,⁶² a lawyer involved in compiling the Gaza Docket, argues that "in terms of the *Foreign Military Assistance Act*, (they) must be prosecuted". The official line from the Department of Defence, however, remains that:

... the NCACC has not granted permission to any South African to participate in the current Gaza conflict.

However, they concede that they are "aware that some may be serving in the IDF without clearance".⁶³ Despite calls for the prosecution of South Africans serving in the Israeli military, there appears to be a reluctance to charge or prosecute those acting in violation of the FMA. The NPA declined to prosecute the 73 individuals named in the Gaza Docket – but that decision has been taken on review.⁶⁴

The involvement of South African citizens in the IDF has also attracted the attention of the Chief Prosecutor at the International Criminal Court (ICC). In November 2009 Al-Jazeera reported that Luis Moreno-Ocampo was conducting an investigation into war crimes committed during Operation

⁶¹ Operation Cast Lead took place from December 2008 to January 2009.

⁶² Cottle 2015 <http://www.vocfm.co.za/will-the-anc-govt-ever-prosecute-s-africans-serving-in-the-idf/>; Asmal 2014 <http://mg.co.za/article/2014-08-07-gaza-conflict-for-some-war-is-where-the-heart-is>.

⁶³ Cottle 2015 <http://www.vocfm.co.za/will-the-anc-govt-ever-prosecute-s-africans-serving-in-the-idf/>; Asmal 2014 <http://mg.co.za/article/2014-08-07-gaza-conflict-for-some-war-is-where-the-heart-is>.

⁶⁴ Asmal 2014 <http://mg.co.za/article/2014-08-07-gaza-conflict-for-some-war-is-where-the-heart-is>.

Cast Lead by a South African IDF officer, Lt Col David Benjamin.⁶⁵ At the time, South Africa was still a signatory to the *Rome Statute*.⁶⁶

The IDF is not the only agency recruiting South Africans. Some sources claim that as many as 140 South Africans have been recruited by Islamic State in Syria (ISIS).⁶⁷ Several infamous Islamist fighters have also been apprehended with South African passports – including al-Qaeda militant Fazul Abdullah Mohammed, the "White Widow" Samantha Lewthwaite, and Abu Hurayra al-Afriki. Iraq's ambassador to South Africa, Dr Hushaim al-Alawi, has confirmed that at least 3 South African ISIS recruits have been killed in action, although their deaths were subsequently covered up as car accidents.⁶⁸ If these reports are to be believed, then South Africans are fast becoming the most prolific recruiting ground for ISIS – for African fighters outside of North Africa.⁶⁹

Dube,⁷⁰ spokesperson for the Department of State Security, said that the Department was unaware of any specific cases of South Africans fighting for the Islamic State – but said that his Department had received:

... a number of reports of people claiming to be doing all kinds of work outside the borders of our country.

He emphasised that under the FMA any kind of mercenary activity is illegal, and that the FMA explicitly prohibits South African citizens from taking up arms overseas.⁷¹ The additional legal angle in the cases involving South Africans taking up arms for ISIS is that these individuals can also face prosecution under the *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33 of 2004, which prohibits "South African citizens from committing terrorist acts domestically and in foreign

⁶⁵ Cottle 2015 <http://www.vocfm.co.za/will-the-anc-govt-ever-prosecute-s-africans-serving-in-the-idf/>.

⁶⁶ Cottle 2015 <http://www.vocfm.co.za/will-the-anc-govt-ever-prosecute-s-africans-serving-in-the-idf/>; Anon 2016 <https://www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-document-shows>.

⁶⁷ Allison 2015 <http://www.dailymaverick.co.za/article/2015-02-22-exclusive-is-this-the-first-south-african-fighting-for-the-isis/#.wbmtlpn94du>. An Al Jazeera investigation in 2015 claims that at least 23 South Africans have joined Islamic State of Iraq and the Levant group (ISIL) (Corke 2015 <http://ewn.co.za/2015/04/07/Online-activity-alerted-authorities-on-isis-bound-teen>).

⁶⁸ Anon 2015 <http://www.news24.com/SouthAfrica/News/South-Africans-return-home-from-ISIS-held-territory-20150911>.

⁶⁹ ISS 2015 <https://www.issafrica.org/iss-today/are-south-africans-soft-targets-for-isis-recruitment>

⁷⁰ ISS 2015 https://www.issafrica.org/iss-today/are-south-africans-soft-targets-for-isis-recruitment_

⁷¹ ISS 2015 https://www.issafrica.org/iss-today/are-south-africans-soft-targets-for-isis-recruitment_

countries" – including "providing or offering to provide a skill, expertise, or training".⁷² In August 2016 the Johannesburg magistrate's court heard testimony from Renaldo Smith, who testified that he and the Thulsie twins were part of a group planning to leave South Africa to join ISIS.⁷³ They were arrested and charged with three counts of contravening the *Protection of Constitutional Democracy against Terrorist and Related Activities Act*, before the case was moved to the High Court. They have been placed on the US terror watch list and are due to appear before the High Court again on the 20 October 2017.⁷⁴

Given the possibility that those with links to ISIS might have plans to target South African sites and not only fight abroad, they are more likely to face arrest and prosecution under the *Protection of Constitutional Democracy against Terrorist and Related Activities Act*, as appears to be the case with the Thulsie twins. The case of the Thulsie twins will be watched closely to assess whether those with ISIS and Boko Haram affiliations may find that they are targeted for prosecution despite the inefficiencies of the FMA. South Africans fighting for the IDF or involved in the PMS industry abroad (without the NCACC's authorisation) are unlikely attract the same degree of prosecutorial attention under the existing legislative regime, as set out in the FMA. If the NPA's track record is anything to go by, however, they will at worst face insignificant fines and will doubtless be offered a plea bargain.

7 Conclusion

The international community, including many prolific users and suppliers of personnel to the PMS industry,⁷⁵ has focused its attention on regulating the

⁷² ISS 2015 https://www.issafrica.org/iss-today/are-south-africans-soft-targets-for-isis-recruitment_

⁷³ Pretorius 2016 <http://www.news24.com/SouthAfrica/News/police-were-exercising-their-right-by-arresting-thulsie-twins-prosecutor-20160804>.

⁷⁴ Anon 2017 <https://www.iol.co.za/news/politics/justice-safety/sas-thulsie-twins-placed-on-us-terror-list-11281219>.

⁷⁵ The United Kingdom regulates the industry according to FCO 2001-2002 HC 557 and the FCO 2009 *Consultation on Promoting High Standards of Conduct by PMSCs Internationally*. The United States passed the *Arms Export Control Act*, 1976; *Uniform Code of Military Justice* US Code Title 10 Subtitle A Part II Chapter 47; *Military Extraterritorial Jurisdiction Act*, 2007; *Public Law 106-523*, US State Department Committee on Armed Services 2010 https://fas.org/irp/congress/2010_rpt/sasc-psc.pdf (Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 62).

industry⁷⁶ through projects like the Montreux Document,⁷⁷ the International Code of Conduct for Private Security Service Providers (ICOC),⁷⁸ the draft PMSC Convention,⁷⁹ and the most recent movement towards ISO accreditation (ISO 18788 and ISO 28007) for this industry,⁸⁰ through a third-party certification audit.⁸¹

South Africa is one of only two states⁸² which have opted, instead, to regulate the participation of their nationals in the private security industry through the extra-territorial application of domestic legislation.⁸³ South Africa is also the only national state that has drafted legislation aimed at regulating this industry, which perceives foreign military assistance with mercenary suspicion.⁸⁴ Notably, the drafters of the PMSC Draft Convention, who initially had an anti-mercenary mandate,⁸⁵ officially dispelled the misconception that PMSCs are necessarily mercenaries. The prosecutorial track record of the FMA and the fact that the PMA has failed to enter into force after nine years, coupled with the blatant disregard that PSCs have shown the NCACC, suggests that this approach has not rendered the desired results and "is neither practicable nor necessary".⁸⁶ The historic lack of applications for authorisation to offer foreign military assistance has been linked to concerns around the broad and ambiguous discretionary powers given to the NCACC, and an inability to assess the potential success of one's application. Even those involved in the review of applications have

⁷⁶ Gomez del Prado 2008 http://www.law.wisc.edu/gls/documents/gomez_del_prado_paper.doc; Walker and Whyte 2005 *ICLQ* 651, 660-661, 687; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 62.

⁷⁷ ICRC 2009 https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

⁷⁸ ICOCA 2010 <http://www.icoc-psp.org>. To date, over 500 private military security companies have signed the ICoC (Crook 2013 *AJIL* 213).

⁷⁹ *OHCHR Draft Convention on Private Military and Security Companies (PMSCs)* A/HRC/15/25 (2010); Gabor 2013 <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14105&LangID=E>; Gumede 2009 <http://www.issafrica.org/publications/papers/addressing-the-use-of-private-security-and-military-companies-at-the-international-level>; OHCHR 2013 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13154&LangID=E>.

⁸⁰ ISO 2015 http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=63380.

⁸¹ DeWinter-Schmitt 2014 <http://psm.du.edu/commentary/index.html>; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 64.

⁸² The other being India.

⁸³ *Avant Market for Force* 162, 163; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 62.

⁸⁴ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 65.

⁸⁵ Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 63.

⁸⁶ *HRC Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination* A/HRC/15/25 (2010) para 7.

admitted that there was a degree of uncertainty surrounding how they were to interpret the provisions of the FMA.⁸⁷ With the concern that an application could be unfairly denied (in terms of section 9) or withdrawn at a later stage (in terms of sections 4(3) and 5(3)), those in the industry have elected to continue conducting business as usual without NCACC authorisation. They have taken this risk in the knowledge that the potential for prosecution will be minimal, and they will have a good basis to challenge any prosecution on administrative or constitutional law grounds.⁸⁸

PMSCs and PSCs will probably be a permanent feature in all "humanitarian, peacekeeping, and peace-enforcement operations".⁸⁹ This is a reality that the South African government has conceded since 2012 in their *South African Defence Review*.⁹⁰

PSCs with links to South Africa will continue to feature in defence transformation, peacekeeping and peace building in conflict and post-conflict⁹¹ for the foreseeable future.⁹²

In the 2012 *South African Defence Review*, the government acknowledged that South African Private security contractors continue to provide essential services and that they have a force-multiplying effect, but that the issue "remains the effective regulation of South African private security companies"⁹³ since "it became apparent that this legislation (the FMA) lacked adequate substance".⁹⁴ In the 2015 *South African Defence Review* the government made the point that mercenarism is not to be confused with "the legal activities of private security companies".⁹⁵ Since 2014 the official position in the annual *South African Defence Review* has repeatedly, and at times word-for-word, indicated a new willingness to loosen the

⁸⁷ Avant *Market for Force* 162; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 59.

⁸⁸ Two South African PMSCs – Meteoric Tactical Solutions and Erinys – both providing protection services in Iraq, were deployed without NCACC authorisation. However, no legal action was taken against either company or their South African employees (Schreier and Caparini 2005 https://www.dcaf.ch/sites/default/files/publications/documents/op06_privatising-security.pdf 107-108).

⁸⁹ Singer 2006 *BJWA* 108.

⁹⁰ DOD 2012 http://www.gov.za/sites/www.gov.za/files/defence%20review_daft.pdf ch 3 para 48.

⁹¹ DOD 2012 http://www.gov.za/sites/www.gov.za/files/defence%20review_daft.pdf ch 3 para 48.

⁹² Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 65.

⁹³ DOD 2012 http://www.gov.za/sites/www.gov.za/files/defence%20review_daft.pdf ch 3 para 48; Bosch, Maritz and Kimble "Mercenaries or Legitimate Actors" 65.

⁹⁴ DOD 2012 http://www.gov.za/sites/www.gov.za/files/defence%20review_daft.pdf ch 3 para 49.

⁹⁵ DOD 2015 <http://www.dod.mil.za/documents/defencereview/Defence%20Review%202015.pdf>.

government's prior hardcore regulatory stranglehold on the PMSC industry. Could we be seeing a new era for the regulation of the PMS industry in South Africa, and could this explain why the PMA appears to have been shelved?

While this might be the light at the end of the tunnel for the ex-EO operatives who continue to share their expertise across the continent, those joining the ranks of ISIS would be wise to heed the caution of the Department of State Security. Those signing up to the IDF appear to occupy a middle ground, and their fate rests in the success or otherwise of appeals by groups like the Palestinian Solidarity Alliance to force the NPA to apply the FMA in these cases.

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LIST OF ABBREVIATIONS

ANC	African National Congress
AJIL	American Journal of International Law
BJWA	Brown Journal of World Affairs
DOD	Department of Defence
DRC	Democratic Republic of Congo
EO	Executive Outcomes
FMA	Regulation of Foreign Military Assistance Act
Harv Int'l LJ	Harvard International Law Journal
HRC	Human Rights Council
ICC	International Criminal Court
ICLQ	International and Comparative Law Quarterly
ICoC	International Code of Conduct
ICOCA	International Code of Conduct Association
ICRC	International Committee for the Red Cross
IDF	Israeli Defence Force
ISIL	Islamic State of Iraq and the Levant
ISIS	Islamic State in Syria
ISO	International Organisation for Standardisation
ISS	Institute for Security Studies
LSSA	Law Society of South Africa
NCACC	National Conventional Arms Control Committee
NPA	National Prosecuting Authority
OHCHR	Office of the High Commissioner for Human Rights
PELJ	Potchefstroom Electronic Law Journal

PMA	Prohibition of Mercenary Activities and Regulation of Certain Activities in the Country of Armed Conflict Act
PMS	Private Military and Security Industry
PMSC	Private Military and Security Companies
PSC	Private Security Contractors
RUSI Journal	Royal United Service Institute Journal
SA	South Africa
SANDF	South African National Defence Force
SAPA	<i>South African Press Association</i>
Strateg Rev S Afr	Strategic Review of South Africa
STTEP	Specialised Tasks, Training, Equipment and Protection
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems
UK	United Kingdom
UN	United Nations
US	United States of America