

PAPER DETAILS

TITLE: Prosecuting and Punishing South Africans Who Participate in Foreign Armed Conflicts

AUTHORS: Jamil Ddamulira Mujuzi

PAGES: 229-249

ORIGINAL PDF URL: <https://dergipark.org.tr/tr/download/article-file/3551584>

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Prosecuting and Punishing South Africans Who Participate in Foreign Armed Conflicts

Jamil Ddamulira Mujuzi^{*} 

Abstract

Media reports suggested that some South Africans were serving in the Israel Defence Forces in the war between Israel and Hamas in late 2023. The South African government threatened to prosecute them for their participation in the conflict. Section 198(b) of the South African Constitution provides that one of the principles governing national security in South Africa is that “[t]he 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 terms of the Constitution or national legislation.” The Regulation of Foreign Military Assistance Act (1998) provides for the circumstances in which a South African citizen or permanent resident can, with authorisation, take part in an armed conflict in a foreign country. Failure to get authorisation or to comply with the condition(s) of the authorisation is an offence. The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, which is meant to repeal the Regulation of Foreign Military Assistance Act, is not yet in force. In this article, the author illustrates how South African citizens or permanent residents who participate in foreign armed conflicts can be prosecuted and punished.

Keywords

South Africa, Foreign military assistance, Mercenaries, Extra-territorial jurisdiction

^{*}Corresponding Author: Jamil Ddamulira Mujuzi (Prof.), University of the Western Cape Faculty of Law, Cape Town, South Africa.

E-mail: djmujuzi@gmail.com ORCID: 0000-0003-1370-6718

To cite this article: Mujuzi JD, “Prosecuting and Punishing South Africans Who Participate in Foreign Armed Conflicts”, (2024) 74 Annales de la Faculté de Droit d'Istanbul 229. <https://doi.org/10.26650/annaes.2024.74.0010>

I. Introduction

Section 198(b) of the Constitution of South Africa (1996) provides that one of the principles governing national security is that “[t]he 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 terms of the Constitution or national legislation.” In February 1998, Parliament passed the Regulation of Foreign Military Assistance Act.¹ This Act came into force in September of the same year. The Act, which applies to both natural and juristic persons, has two main objectives. The first objective is the prohibition of mercenary activities. This is under section 2 of the Act which provides that “[n]o person may within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity.” Since coming into force, some people have written on the issue of mercenaries² and private security companies which provide security services in foreign countries.³ It is beyond the scope of this article to repeat that discussion. The second objective of the Act is provided for under section 3 of the Act and the focus of this article is the prohibition of foreign military assistance. In 2006, Parliament passed the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act⁴ for the purpose of repealing the Regulation of Foreign Military Assistance Act. However, as at the time of writing, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act had not yet come into force. This means that the Regulation of Foreign Military Assistance Act is still the applicable law. During the making of this Act, legislators were concerned that hundreds of South Africans had enrolled in the armed forces of countries such as the United Kingdom and Israel.⁵ It was also argued that Israel had deployed some of these South Africans in its armed conflicts with Lebanon, Palestine and Syria.⁶ Although there are allegations that some South African citizens or permanent residents have participated in mercenary activities contrary to section 2 of the Regulation of Foreign Military Assistance Act⁷ and some have been convicted accordingly,⁸ there is no reported case

¹ Regulation of Foreign Military Assistance Act, Act 15 of 1998.

² See for example, Shannon Bosch and Marelie Maritz, ‘South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work’ (2011) 14 Potchefstroom Electronic Law Journal 71 - 125

³ See for example, Shannon Joy Bosch, ‘South Africans offering Foreign Military Assistance Abroad: How real is the Risk of Domestic Prosecution?’ [2018] 21 Potchefstroom Electronic Law Journal 1 – 28.

⁴ Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act No. 27 of 2006.

⁵ Debates of the National Assembly (Hansard), Third Session, Third Parliament (29 August 2006) 6144.

⁶ Ibid, 6124 and 6144.

⁷ See for example, *Thatcher v Minister of Justice and Constitutional Development and Others* 2005 (4) BCLR 388 (C) (the applicant was allegedly the mastermind behind a foiled coup d’état in Equatorial Guinea).

⁸ See for example, *Rouget v S* [2006] JOL 15962 (T), para 2 “The appellant recruited persons for mercenary military assistance to the government of the Ivory Coast against dissidents in October 2002. He also provided logistical support and equipment to the group so recruited. The persons recruited were offered a three-month contract and, according to their expertise, were contracted as pilots or infantry soldiers.” He pleaded guilty, was convicted and sentenced a 5-year prison term which was suspended and also ordered to pay a fine. He paid the fine.

in which a person has been convicted of an offence under section 3 of the Act.⁹ However, this situation is likely to change in the next few months or years in the light of the existence of credible media reports that some South Africans were deployed by the Israel Defence Forces in its war against the Palestinian resistance groups.

The latest armed conflict between Israel and the Palestinian resistance groups, which started in October 2023 as part of the larger armed conflict between Israel and Palestine, widely known as the Israel-Hamas war, attracted global political and media attention mainly because of the atrocities committed by both parties. Reputable international human rights organisations¹⁰ and some countries have argued that the atrocities committed by Israel in Gaza amount to war crimes and crimes against humanity.¹¹ In *South Africa v Israel*,¹² in which South Africa alleged that Israel had violated the Convention against Genocide, the International Court of Justice indicated provisional measures against Israel on the ground that “the facts and circumstances mentioned ...are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible.”¹³ In other words, it was plausible that Israel had committed genocide against Palestinians. After the Hamas attack on 7 October 2023, Israel declared a state of war.¹⁴ In preparation for that war, it, amongst other things, mobilised its reservists from Israel and abroad to take part in the war.¹⁵ In early November 2023, South African media reported that some South African citizens had joined the Israel Defence Forces in the fight against Hamas. In response, the South African government threatened to prosecute those citizens who were serving in the Israel Defence Forces without the necessary authorisation.¹⁶ The purpose of this article is to demonstrate how those South Africans, and others who may participate in conflicts of a similar or different nature, could be

9 Although the prosecuting authorities had started investigating some South Africans for participating in an alleged coup in Equatorial Guinea, it is not clear why they were never prosecuted. See *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2005 (1) SACR 111 (CC) para 85.

10 See for example, Amnesty International Law, “Israel/OPT: ‘Nowhere safe in Gaza’: Unlawful Israeli strikes illustrate callous disregard for Palestinian lives” 20 November 2023. Available at <https://www.amnesty.org/en/latest/news/2023/11/israel-opt-nowhere-safe-in-gaza-unlawful-israeli-strikes-illustrate-callous-disregard-for-palestinian-lives/> (accessed 20 November 2023).

11 See for example, “Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties.” 17 November 2023. Available at <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine> (accessed 20 November 2023).

12 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (26 January 2024).

13 *Ibid*, para 54.

14 Hadas Gold, Shirin Faqiri, Helen Regan, Jessie Yeung and Caitlin Hu, “Israel formally declares war against Hamas as it battles to push militants off its soil.” 8 October 2023. Available at <https://edition.cnn.com/2023/10/08/middleeast/israel-gaza-attack-hostages-response-intl-hnk/index.html> (accessed 20 November 2023).

15 Helen Coster and Alexander Cornwell, “Israel’s reservists drop everything and rush home.” 12 October 2023. Available at <https://www.reuters.com/world/middle-east/israels-reservists-drop-everything-rush-home-following-hamas-bloodshed-2023-10-12/> (accessed 20 November 2023).

16 See Kgothatso Madisa, “South Africans fighting in Hamas-Israel war will be prosecuted, SA says.” Available at <https://www.businesslive.co.za/bd/national/2023-11-09-south-africans-fighting-in-hamas-israel-war-will-be-prosecuted-sa-says/> (accessed 10 November 2023).

prosecuted and punished under the Regulation of Foreign Military Assistance Act. The author further deals with the relevant provisions of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act in the hope that this Act will come into force in the near future. The author also suggests ways in which South Africans who are enlisted in foreign armies could be prosecuted for offences committed outside South Africa under other pieces of legislation such as the Implementation of the Rome Statute of the International Criminal Court Act¹⁷ and the Prevention and Combating of Torture of Persons Act.¹⁸ The discussion will start with the offences under section 3 of the Regulation of Foreign Military Assistance Act and sections 3 and 4 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.

II. Offences under the Acts

Section 3 of the Regulation of Foreign Military Assistance Act provides that:

“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 4; (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 5.”

Section 3 should be read with sections 1, 4 and 5. Section 4 provides for the circumstances in which the Committee may authorise a person to render a foreign military service under section 3(a).¹⁹ Section 5 provides for the circumstances in which the Committee may approve an agreement for rendering a foreign military service under section 3(b).²⁰ Section 1 defines the concepts used in section 3. Before discussing section 3 in detail, it is important to understand what ‘foreign military

17 Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002.

18 Prevention and Combating of Torture of Persons Act, No. 13 of 2013.

19 Section 4 provides that “(1) Any person who wishes to obtain the authorisation referred to in section 3(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, in consultation with the Committee, may refuse an application for authorisation referred to in subsection (2), or may grant the application subject to such conditions as they may determine, and may at any time withdraw or amend an authorisation so granted.
(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).”

20 Section 5 provides that “(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 3(b) 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, in consultation with the Committee, may refuse an application for approval referred to in subsection (2), or grant the application subject to such conditions as they may determine, and may at any time withdraw or amend an approval so granted.
(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).”

assistance' entails. Section 1 defines or describes "foreign military assistance" to mean:

"military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of— (a) 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 para-medical services; or (v) procurement of equipment; (b) security services for the protection of individuals involved in armed conflict or their property; (c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state; (d) any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict."

The following observations should be made about the definition of foreign military assistance above. The Act is applicable when the service is rendered whether or not there is an armed conflict. However, most of the "services" relate to armed conflicts. Thus, only section 1(iii)(b) is silent on the issue of armed conflicts. This could be attributable to the fact that the main objective of the Act, as can be inferred from its drafting history, is to prohibit mercenaries.²¹ Section 1(i) includes an open list of examples of armed conflicts.²² In other words, it does not define an "armed conflict." This is the case, although during the second reading of the Bill, the Minister of Defence argued, *inter alia*, that "[t]he Bill defines the many forms of armed conflict to which the continent is exposed."²³ The examples it outlines show that the armed conflict could be of international, internationalised or non-international nature.²⁴ Therefore, before a person is convicted of an offence under the Act, the prosecution must prove that at the time the service was rendered, there was an armed conflict. The Act does not describe the circumstances which have to be in place before it can be inferred that the conflict in question amounted to an armed conflict. To address this loophole, South African courts may have to refer to the Geneva Conventions of 1949 and the relevant protocols which were domesticated by the Implementation of the Geneva Conventions Act for the distinction between the different armed conflicts and the applicable rules.²⁵ Courts may also have to refer to the jurisprudence of international criminal tribunals, such as the International Criminal Court, for detailed criteria to establish whether at the time the service was rendered, there was an armed conflict.

21 While introducing the Bill for its second reading in the National Assembly, the Minister of Defence argued that "This Bill is significant, since mercenary activity has long been a scourge on the African continent. There have been many attempts by the UN and the OAU to deal with the problem of mercenaries. The Regulation of Foreign Military Assistance Bill effectively precludes any South African citizen, resident or company from participating as a combatant in armed conflict for private gain, nationally or internationally, except as provided for in terms of the Constitution or national legislation." See Debates of the National Assembly (Hansard), Second Session, Second Parliament (26 February 1998) 495.

22 Section 1(i) defines an armed conflict to include "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."

23 Debates of the National Assembly (Hansard) (26 February 1998) (n 21) 495.

24 See generally, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15-1762)(04 February 2021) paras 2683 – 2687.

25 Implementation of the Geneva Conventions Act 8 of 2012

For example, the International Criminal Court has developed the criteria that are used to determine whether a conflict amounts to an armed conflict.²⁶ South African courts may find this jurisprudence useful. It is now important to take a closer look at section 3.

Section 3 creates two offences. The first offence, under section 3(a) relates to a person who “offers” to render foreign military assistance as defined under section 1(iii) of the Act. Section 3(a) is applicable when it is the accused who initiated the punishable conduct. He/she makes an offer to a foreign state or non-state actor to render military assistance. Whether or not that offer is accepted is immaterial. The offer could be verbal, written or in any form. The offer could be a bid to render such services. However, section 3(b) is applicable where a person renders foreign military assistance. This could be triggered under two situations. One, where the offer under section 3(a) was accepted and the person went ahead to render the military assistance. In other words, he/she initiated the process and the foreign state or non-state actor accepted the offer hence giving him the opportunity to commit an offence (of rendering a service). Two, where the foreign state or non-state actor made an offer to the accused and he/she accepted it and rendered the military assistance. In this case, the foreign state or non-state actor is the initiator of the process and the accused “grabbed” the opportunity. In both cases under sections 3(a) and (b), there is no requirement that the accused should have rendered military assistance for private gain. His or her motivation for rendering the assistance is immaterial.

It is important to highlight the changes that were introduced by the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.²⁷ As the name suggests, the Act prohibits mercenary activities.²⁸ However, it is beyond the scope of this article to deal with the issue of mercenaries. The discussion is limited to cases where South African citizens, permanent residents or residents offer or render military services to foreign states. Unlike the Regulation of Foreign Military Assistance Act which creates two specific offences under section 3 for persons who are not mercenaries, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act creates two categories of offences (each with different specific offences) for persons who are not mercenaries. The relevant provisions will be reproduced below before I discuss them. The first category is found in section 3 of the Act and the second category is in section 4. Section 3(1)

26 See for example, *The Prosecutor v. Dominic Ongwen* (n 24) paras 2683 – 2687. For a detailed discussion of the law of war, see for example, Rain Liivoja and Tim McCormack, *Routledge Handbook of the Law of Armed Conflict* (Taylor and Francis, 2016); Gary D. Solis, *The Law of Armed Conflict International Humanitarian Law in War* (Cambridge University Press, 2016); Geoffrey S. Corn, Victor Hansen, Richard Jackson, *The Law of Armed Conflict: An Operational Approach* (Aspen Publishing, 2018); Jan Wouters, Philip De Man and Nele Verlinden, *Armed Conflicts and the Law* (Intersentia, 2016); William H. Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2016).

27 Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, Act No. 27 of 2006.

28 Section 2.

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

The second category is provided for under section 4. It is to the effect that:

“(1) No South African citizen or permanent resident may enlist with any armed force, other than the Defence Force, including an armed force of any foreign state, unless he or she has been authorised in terms of section 7.

(2) Subject to section 7 (5) and (6), an authorisation granted in terms of section 7 may be revoked if the person to whom the authorisation has been granted takes part in an armed conflict as a member of an armed force other than the Defence Force and such authorisation contravenes any one of the criteria listed in section 9.”

A combined reading of sections 3 and 4 shows the following. First, the offence(s) under section 3 can be committed by any person – natural or juristic (which includes South African citizens, permanent residents, and anyone in South Africa legally or illegally) whereas the offence under section 4 can only be committed by South African citizens or permanent residents. This is because under section 1 of the Act, a person is defined to mean “a person who is a citizen of, or is permanently resident in, the Republic, a juristic person registered or incorporated in the Republic, or any foreign citizen who contravenes this Act within the borders of the Republic.” Second and related to the above, a South African citizen or permanent resident can commit any of the offences under sections 3 and 4 while in South Africa or elsewhere. However, for “any foreign citizen” (who is not a permanent resident) to commit an offence under section 3, he/she must be “within the borders of the Republic.”²⁹ This implies that he/she does not commit an offence if, for example, they are on a South African-registered ship or aircraft which is not in South Africa at the time of the commission of the offence. Likewise, he/she does not commit an offence if they are in a territory

²⁹ In *S v Basson* 2005 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC), the South African Constitutional Court interpreted the words ‘within the borders of South Africa’ strictly to mean within South Africa.

controlled or administered by South Africa.³⁰ Three, the list of the prohibited activities under section 3 is not exhaustive. This is evident from section 3(1)(c). In other words, it is “catch all” provision. What is required is that the prosecution has to prove that the act in question “has the result of furthering the military interests of a party to an armed conflict or in a regulated country.” Four, for section 3 to be applicable, there has to be an armed conflict or a regulated state. Section 1 defines an armed conflict to include “any”:

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

The above definition under section 1 has to be read with section 6(1) of the Act which provides that: “[t]he Committee must inform the National Executive, whenever it is of the opinion that— (a) an armed conflict exists or is imminent in any country; and (b) such a country should be proclaimed to be a regulated country.” Section 6(2) empowers the President to proclaim a country to be a regulated state. Section 6(3) obligates the President to notify Parliament of such proclamation. Section 6(4) states that this “Act applies in a regulated country.” Section 1 describes a “regulated country” by referring to section 6. A combined reading of sections 1 and 6 shows that section 3 is applicable where there is an armed conflict (it already started) or where the armed conflict is imminent. The definition under section 1 shows that an armed conflict could be of international, internationalised or non-international nature. The Act does not provide the criteria for determining when an armed conflict is “imminent.” The Committee will have to rely on different sources such as official government statements or on statements from international humanitarian agencies or from regional or international inter-governmental bodies to determine whether the armed conflict is imminent. Once the Committee has concluded that an armed conflict exists or is imminent, it is obliged to inform the National Executive of its opinion. However, that is not enough for the President to proclaim the country a regulated state. This can only happen after the Committee has recommended that such a country should be proclaimed as a regulated state. Without that recommendation, the President does not have the power to make the proclamation. Section 6(2) of the Act provides that “[a]fter the Committee has informed the National Executive in the manner contemplated in subsection (1), the President, as Head of the National Executive, may, by proclamation in the Gazette, proclaim a country as a regulated country.” The use of the word “may” implies that the President is not bound by

³⁰ For example, South Africa used to have mandate over Namibia. See “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).” Available at <https://www.icj-cij.org/case/53> (accessed 20 November 2023).

the recommendation of the Committee to proclaim any country a regulated state. However, if the President decides to make a proclamation, section 6(3) obligates him/her to notify Parliament accordingly.

A closer examination of sections 1 and 6 shows that the definition of an armed conflict under section 1 is necessary to help the Committee determine whether or not the conflict in question amounts to an armed conflict for the purposes of section 6. Therefore, for the purposes of the Act, a person can only commit an offence under section 3 if the proclamation has been made under section 3 to the effect that the conflict in question amounts to an armed conflict. The implication for this is that the declaration is a prerequisite for the offence under section 3 to be committed. Thus, the mere fact that another state or other states have declared that a conflict between them or within a state is an armed conflict, does not necessarily mean that a person who does any of the activities under section 3 commits an offence. Differently put, other states' or parties' recognition of a conflict as an armed conflict does not on its own trigger the application of section 3. Likewise, the mere fact that other states or parties have not yet recognised a conflict as an armed conflict does not bar the President from making a proclamation under section 6. Once that proclamation is made, section 3 is triggered irrespective of the views of the parties to the conflict on whether or not the conflict is an armed conflict. The Act does not define a "party" to an armed conflict. It is not far-fetched to argue that an armed conflict can have many "participants" and a precise definition or description of a party to an armed conflict would have to be provided in every proclamation under section 6. This would enable a person to know whether or not they are required to apply for authorisation before they can render any of the services under section 3 to a specific country or group.

The Regulation of Foreign Military Assistance Act does not prohibit South Africans or permanent residents from enlisting with any armed force (including the armed force of a foreign state) unless when the joining such armed forces can be categorised as one of the prohibited activities under section 3 (offer to render or rendering military assistance). However, section 4 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act prohibits South Africans and permanent residents, without authorisation, from enlisting in "any armed force" other than the South African Defence Force "including an armed force of any foreign state." The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act does not define the term "enlist." This term is also not used in the Defence Act.³¹ The drafting history of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act shows that the purpose of the legislators was to prohibit South Africans

31 The Defence Act, Act 42 of 2002.

and permanent residents from “joining” any armed forces.³² This includes armed groups, rebels and state armed forces. This implies that the word “enlist” under the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act has the same meaning as the word “enrol” in section 1(xii) of the Defence Act. This section defines the term “enrol” to mean “to accept and record the attestation of any person as a member of the Regular Force or the Reserve Force.” However, the authorisation to enlist with any armed force can be withdrawn if such a person takes part in an armed conflict contrary to any of the conditions under section 9 of the Act. These conditions will be discussed below. For such authorisation to be revoked, the person must have taken part in the armed conflict as “a member of an armed force.” Section 1(xiv)(b) defines a member to mean “any officer and any other rank.” Section 1(xviii) defines “other rank” to mean “any member thereof other than an officer.” During the second reading of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict, some legislators were of the view that as a general rule, South Africans and permanent residents should be prohibited from enlisting with foreign armed forces.³³ If they are authorised to join foreign armed forces, they should not take part in armed conflicts. Some legislators argued that this prohibition was unconstitutional because, inter alia, it prevented South Africans from exercising their right to work.³⁴ However, this argument was dismissed by the majority who argued that the purpose of the legislation was to regulate and not to prohibit South Africans from taking up employment in the military industry.³⁵ This means that South Africans can enlist in foreign armed forces for the purpose of earning a living provided that they do not take part in armed conflicts. They could enlist as medical personnel, for example. Implied in section 4(2) of the Act is that a member of the South African Defence Force can also be authorised to serve in a foreign armed force. This is evident from the part of section 4(2) which states that “has been granted takes part in an armed conflict as a member of an armed force other than the Defence Force...” The drafting history of this provision shows that this was meant to deal with reservists. That is, former military officers who were no longer in active military service.³⁶

III. Obtaining the Authorisation to Offer or Render Foreign Military Assistance

As mentioned above, section 3(a) of Regulation of Foreign Military Assistance Act has to be read with section 4. A combined reading of the two sections shows

³² Debates of the National Assembly (Hansard) (29 August 2006) (n 5) 6143 and 6157.

³³ Ibid, 6144.

³⁴ Ibid, 6133, 4143 and 6144.

³⁵ Ibid, 6155 – 6156.

³⁶ Ibid, 6127 – 6128 and 6155 – 6157.

that before a person can offer to render foreign military assistance, he/she must obtain authorisation from the Committee. In other words, it is the Committee that decides whether or not such authorisation should be granted. Likewise, a combined reading of sections 3(b) and 5 of the Act shows that the Committee's authorisation is a prerequisite before a person can render any foreign military assistance. For the Committee to decide whether or not to grant the authorisation under sections 4 and 5, it has to consider the factors under section 7. Section 7 provides that:

“(1) An authorisation or approval in terms of sections 4 and 5 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 4 or 5 has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision.

(3) The Minister shall furnish the reasons referred to in subsection (2) within a reasonable time.”

A few observations should be made about section 7. Although the word “may” is used under section 7(1), in this context it should be understood to mean “shall.” This is because it is impossible for authorisation to be granted if it would result in one of the acts mentioned in section 7(a) – (f). This could also be inferred from the drafting history of the Act when, during the second reading of the Bill, the Minister of Defence argued, *inter alia*, that the Bill was “not intended to prevent anyone from rendering legitimate lawful military assistance where such legitimate activities include technical and training support rendered to democratically elected governments by private companies or individuals.”³⁷ The intention of the Bill was “merely to regulate” such activities.³⁸ By referring to “democratically elected government”, the Minister intended to indicate, amongst other things, that the authorisation will not be granted in case the purpose of military assistance was to undermine democratic values. The list of factors mentioned under section 7(1) is not exhaustive. This is inferred from the open-ended nature of section 7(1)(g) in terms of the Committee being empowered to reject an application if it finds it “unacceptable for any reason.” Under section 7(2), the Minister is not obligated to provide written reasons for refusing to grant

³⁷ Debates of the National Assembly (Hansard)(26 February 1998)(n 21) 495.

³⁸ *Ibid*, 495.

the authorisation. However, once the person aggrieved by the Minister's decision requests for the reasons in writing, the Minister is obliged to give the reasons "within a reasonable time." What is reasonable will depend on the circumstances of each case. The Minister's decision is reviewable as an administrative action under the Promotion of Administrative Justice Act.³⁹

Section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides the criteria (factors) that the Committee has to consider in determining whether to grant authorisation under sections 3 and 4 of the Act. Section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act reproduces almost all the criteria (factors) under section 7(1) of the Regulation of Foreign Military Assistance Act. There are two differences between the two provisions. First, section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act adds one criterion which is not included in section 7(1) of the Regulation of Foreign Military Assistance Act. It is to the effect that authorisation will not be granted if it "in any manner initiates, causes or furthers an armed conflict, or a coup d'état, uprising or rebellion against a government." The second difference is that whereas section 7(1) of the Regulation of Foreign Military Assistance Act is open-ended, the list of factors under section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act is closed. Put differently, the Committee can only decline to grant the authorisation on the basis of any of the eight factors under section 9. During the making of the Act, some people argued that section 4 of the Act should be amended so that a person who wanted to enlist with foreign armed forces should just register with the Committee after enlisting with such armed forces. However, this argument was rejected by the majority of the legislators. One of the reasons they gave was that the government had to monitor and, where necessary, control, the activities in which the South Africans in foreign armed forces were involved.⁴⁰

Unlike the Regulation of Foreign Military Assistance Act, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides clear steps that a person whose application for authorisation has been rejected can follow to challenge the decision. Section 7 provides that:

"(5) Any person who feels aggrieved by a decision taken in terms of this section, may apply for written reasons in the manner contemplated in section 5 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

(6) Nothing in this Act must be construed as preventing a person from instituting proceedings in a competent court for judicial review."

³⁹ Promotion of Administrative Justice Act, Act 3 of 2000.

⁴⁰ Debates of the National Assembly (Hansard) (29 August 2006) (n 5) 6121, 6143 and 6157.

This creates a two-stage procedure. The first stage is to apply for the reason(s) for rejecting his/her application for authorisation. If the person is not satisfied with the reasons, he/she has a right to institute review proceedings in a competent court. This inevitably delays the process. It would be good practice for the Committee to immediately provide written reasons whenever it declines an application for authorisation. This would enable the applicant to save money and time by approaching a court to review the Committee's decision. In other words, it would save him/her the time and money that they would have spent applying for the reasons the Committee relied on to reject his/her application. A person who contravenes the above two Acts commits an offence; the next part of the article deals with the relevant penalties.

IV. Penalties for Contravening the Act(s)

Penalties for contravening section 3 of the Regulation of Foreign Military Assistance Act are provided for under section 8. It states that:

“(1) Any person who contravenes any provision of section 2 or 3, or fails to comply with a condition with regard to any authorisation or approval granted in terms of section 4 or 5, shall be guilty of an offence and liable on conviction to a fine or to imprisonment or to both such fine and imprisonment.

(2) The court convicting any person of an offence under this Act may declare any armament, weapon, vehicle, uniform, equipment or other property or object in respect of which the offence was committed or which was used for, in or in connection with the commission of the offence, to be forfeited to the State.”

During the debates on the second reading of the Bill, the Minister of Defence referred to Clause 8 of the Bill (which would later become section 8 of the Act) and argued that “[t]he penalties for transgression are extremely severe, and include fines, imprisonment and forfeiture of property. In this respect, adding more legal bite to the Bill, no limit has been placed on the maximum penalty that may be imposed by the courts.”⁴¹ Although section 8 is silent on the minimum or maximum amount of fine or term of imprisonment which a court may impose, it does not mean that “no limit has been placed on the maximum penalty that may be imposed by the courts.” It has been argued that where a penalty clause is silent on the amount of fine or term of imprisonment that a court may impose on an offender, “the courts are, in this case, only limited to their general jurisdiction when imposing a sentence.”⁴² This means, for example, that the High Court can impose any sentence including life imprisonment. This is because its penal jurisdiction is unlimited.⁴³ However, the maximum sentence that can be imposed by a regional court or the magistrate court is

41 Debates of the National Assembly (Hansard) (26 February 1998)(n 21) 495 – 496.

42 Stephan Terblanche, *A Guide to Sentencing in South Africa* (LexisNexis, 2007) 35.

43 Ibid, 14.

fifteen years or three years respectively.⁴⁴ In terms of section 9 of the Act, which is discussed below, “any court” in South Africa has jurisdiction over any offence of the Act irrespective of whether it is committed in South Africa or abroad. This means that the general jurisdiction of the court will determine the maximum sentence to which a person will be sentenced. Those prosecuted before the magistrate’s court could be sentenced to a more “lenient” sentence compared to those prosecuted before the High Court should each of these courts decide to impose the maximum penalty. Section 10 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides for the penalties for the offences under the Act. It is worded the same way as section 8 of the Regulation of Foreign Military Assistance Act. This means that the discussion above on section 8 of the Regulation of Foreign Military Assistance Act is applicable with equal force to section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.

V. Extra-territorial Jurisdiction Over Offences in the Act(s)

The general rule is that South African courts do not have jurisdiction over offences committed abroad.⁴⁵ However, as the discussion below illustrates, there are exceptions to this rule. Section 9 of the Regulation of Foreign Military Assistance Act provides for one of the exceptions to this general rule. It states that:

“Any court of law in the Republic may try a person for an offence referred to in section 8 notwithstanding the fact that the act or omission to which the charge relates, was committed outside the Republic, except in the instance where a foreign citizen commits any offence in terms of section 8 wholly outside the borders of the Republic.”

During the second debate on the Regulation of Foreign Military Assistance Bill, the Minister of Defence referred to Clause 9 of the Bill (which would later become section 9 of the Act) and argued that the Bill “empowers South African courts to adjudicate upon any such acts that are committed outside the country. All activities that fall within the definition of foreign military assistance will be regulated through the issuing of permits.”⁴⁶ There are two alternative ways to interpret the first part of section 9: one, that it is applicable to South African citizens only; or, two, that it is applicable to South African citizens and permanent residents. It has to be remembered that section 1(vi) defines a person to mean a “natural person who is a citizen of or is permanently resident in the Republic, a juristic person registered or incorporated in the Republic, and any foreign citizen who contravenes any provision of this Act within the borders of the Republic.” Section 1(vi) puts citizens and permanent

⁴⁴ Ibid, 14.

⁴⁵ See generally, *Okah v S and Others* [2016] 4 All SA 775 (SCA); 2017 (1) SACR 1 (SCA).

⁴⁶ Debates of the National Assembly (Hansard)(26 February 1998)(n 21) 496.

residents in the same category. For them to be convicted of an offence under the Act, there is no requirement that they should have contravened the Act “within the borders” of South Africa. A combined reading of sections 9 and 1(vi) the Act suggests that if a South African citizen or permanent resident, while abroad, offers to render foreign military assistance to any state or non-state actor, he/she commits an offence under section 3(a) of the Act and South African courts have jurisdiction over him/him. The same argument applies to cases where a South African citizen or permanent resident renders such military assistance. Whether or not such conduct is prohibited in the country in which the citizen or permanent resident was based at the time of making the offer (under section 3(a)) or rendering the service (under section 3(b)) is immaterial. The effect of the Act is to regulate the conduct of South African citizens and permanent residents who are based abroad. This is what the Supreme Court of Appeal referred to as the “nationality” principle in cases of extra-territorial jurisdiction.⁴⁷ The alternative reading of section 9 is that it does not apply to permanent residents in South Africa who commit the offence(s) under the Act outside South Africa. In other words, section 9 is only applicable to South African citizens or nationals. This is evident from the last part of section 9 which states that the section is inapplicable “in the instance where a foreign citizen commits any offence in terms of section 8 wholly outside the borders of the Republic.” This argument is supported by the fact that South African law draws a clear distinction between citizens and non-citizens. Permanent residents are categorised as non-citizens.⁴⁸ The Constitution (1996) also provides for specific rights of citizens which are not enjoyed by foreign-nationals, including permanent residents.⁴⁹ It could thus be argued that had the legislators wanted the first part of section 9 to apply to permanent residents, they would have stated so expressly. This could have been, for example, by phrasing it as follows: “Any court of law in the Republic may try a citizen or a permanent resident for an offence referred to in section 8 notwithstanding the fact that the act or omission to which the charge relates, was committed outside the Republic...” In the author’s view, section 9 should be interpreted in the light of the drafting history of the Act. This history shows, inter alia, that the Act was meant to regulate the activities of both South African citizens and permanent residents whether or not they are in South

47 In *Kouwenhoven v DPP (Western Cape) and Others* [2021] 4 All SA 619 (SCA); 2022 (1) SACR 115 (SCA) para 60, the Supreme Court of Appeal observed that “No fewer than five different principles are recognised in different jurisdictions... In summary, they are the territorial, nationality, passive personality, protective and universality principles. Under the territorial theory nations claim jurisdiction over crimes committed within their borders. Under nationality they claim jurisdiction based on the nationality of the perpetrator. Under passive personality they base liability on the nationality of the victims of the crime. The protective principle covers treason and any other crime particularly damaging to specific national interests. Universal jurisdiction deals with crimes like piracy, crimes against humanity, war crimes, torture and slavery. Considerable difficulties arise in adhering to a strict territorial principle and the result is that most, if not all, states sanction departures from it. We have not been referred to any rule of international law that outlaws extradition on the basis of such extended grounds of jurisdiction.”

48 See generally, the South African Citizenship Act, No. 88 of 1995.

49 These include political rights (sections 19 and 47); the right to enter, to remain in and to reside anywhere in South Africa (section 21(3)); the right to a passport (section 21(4)); and the right to choose their trade, occupation and profession (section 22).

Africa. Excluding permanent residents from the application of the first part of section 9 would defeat the purpose of the Act. There are two possible defences or mitigating factors in the event of prosecution or conviction for a permanent resident. One, he/she could argue that at the time of offering to participate in the armed conflict or accepting the offer to participate in the armed conflict, he/she was not permanently residing in South Africa. In other words, he/she was a permanent resident “on paper.” The second is that the armed conflict in question was in a country of his nationality/citizenship. A dual citizen could also argue in mitigation that at the time of making or accepting the offer, he/she was domiciled in the country in which the armed conflict took place. However, this is not a defence. The drafting history of both Acts shows that the legislators knew that some South African citizens held dual citizenship (especially in the United Kingdom and Israel) but they never created an exception for them.

Section 11 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act also provides for extra-territorial jurisdiction. It is more detailed than section 9 of the Regulation of Foreign Military Assistance Act. It is to the effect that:

“(1) Any act constituting an offence under this Act and that is committed outside the Republic by— (a) a citizen of the Republic; (b) a person ordinarily resident in the Republic; (c) a company incorporated or registered as such under any law, in the Republic; or (d) any body of persons, corporate or unincorporated, in the Republic, must be regarded as having been committed in the Republic and the person who committed it may be tried in a court in the Republic which has jurisdiction in respect of that offence.

(2) (a) Any act that constitutes an offence under section 2 of this Act and that is committed outside the Republic by a person, other than a person contemplated in subsection (1), against the Republic, its citizens or residents must be regarded as having been committed in the Republic if that person is found in the Republic. (b) A person contemplated in paragraph (a) may be tried for such an offence by a South African court if there is no application for the extradition of the person or if such an application has been refused.

(3) Any offence contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, regarded as having been committed at— (a) the place where the accused is ordinarily resident; (b) the accused’s principal place of business; or (c) the place where the accused was arrested.

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

It is evident that there are differences between extra-territorial provisions in the Regulation of Foreign Military Act and the Prohibition of Mercenary Activities and

Regulation of Certain Activities in Country of Armed Conflict Act. The scope of the Prohibition of Mercenary Activities and Regulation on this issue has been discussed above and will not be repeated here. The author will make some observations about section 11 of the Regulation of Foreign Military Act and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act. First, section 11(1) deals with the nationality principle. As mentioned above, this means that South African courts have jurisdiction over South African nationals or permanent residents who commit any of the offences under the Act while outside South Africa. Second, section 11(2) embodies the “passive personality” and “protective” principles. Since section 11(2) deals with the issue of extra-territorial jurisdiction over mercenary activities, its discussion falls outside the scope of this article. However, it is important to mention that a person who is alleged to have committed a mercenary activity can be extradited for prosecution. Third, unlike section 9 of the Regulation of Foreign Military Assistance Act which is silent on the grounds on which a court can assume jurisdiction over the accused who committed an offence abroad, section 11(3) of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides for three grounds one of which must be in place before a court can assume jurisdiction over the offence. Thus, unless one of the three grounds exists, a court does not have jurisdiction over the offence. However, this is not a requirement under the Regulation of Foreign Military Assistance Act. It implies, for example, that an accused can be prosecuted in Limpopo province even if he is ordinarily resident in Cape Town, his/her principal place of business is Cape Town and he/she was arrested in Cape Town.⁵⁰ Fourth, although sections 11(1) – (3) of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act specifically deal with offences under the Act, section 11(4) refers to “conspiracy or incitement to commit an offence.” In other words, it does not specify that the conspiracy or incitement has to relate to the offence in the Act. It is argued that this could have been an oversight on the part of the legislators. The incitement and conspiracy relate to the offences under the Act. Any other interpretation would lead to an absurdity. Related to the question of extra-territorial jurisdiction for the offences under the Act, is the issue of South African citizens or permanent residents who commit offences under international law while abroad. This issue is not provided for under the two pieces of legislation discussed above. This also raises the issue of holding South African citizens, permanent residents and temporary residents accountable for the offences they have committed in armed conflicts abroad. In other words, apart from being prosecuted for violating either the Regulation of Foreign Military Assistance Act or the Prohibition of Mercenary Activities and Regulation of Certain Activities

⁵⁰ However, under section 111 of the Criminal Procedure Act, the National Director of Public Prosecutions may direct the transfer of a case from one jurisdiction to another. For the circumstances in which section 111 is applicable, see for example, *S v Ndzeke* [1996] 1 All SA 391 (A).

in Country of Armed Conflict Act (should it come into force), they could also be prosecuted for offences under international law committed in the course of violating these two pieces of legislation. It is to this issue that we turn.

The Regulation of Foreign Military Assistance Act and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provide that South African courts have extra-territorial jurisdiction in a case where a person has committed an offence under one of the Acts. However, it could be that the offence in question is also an offence under another piece of legislation. For example, common to both pieces of legislation is that a person shall not be granted authorisation if his/her participation in the conflict would be contrary to South Africa's obligations in terms of international law or would result into the infringement of human rights and fundamental freedoms in the country where the armed conflict is taking place. Some of the human rights violations could amount to genocide, war crimes or crimes against humanity. Section 4 of the Implementation of the Rome Statute of the International Criminal Court Act⁵¹ provides that South African courts have extra-territorial jurisdiction over South African citizens and residents who commit genocide, war crimes and crimes against humanity. This means that if South African citizens or permanent residents participate in an armed conflict in which these offences are committed, they could be prosecuted in South Africa. However, it may be difficult for the South African prosecutors to collect evidence from such countries implicating individual soldiers in the commission of these crimes. This is so because the foreign armies in which they served may be reluctant to provide such evidence. In such a case, South African prosecutors may have to invoke Article 25 of the Rome Statute of the International Criminal Court (as domesticated by Implementation of the Rome Statute of the International Criminal Court Act) and prosecute them as co-perpetrators or joint-perpetrators in the commission of these offences. They could also be prosecuted for aiding, abetting or assisting in the commission of these crimes. International criminal tribunals have developed rich jurisprudence on the circumstances in which persons can be prosecuted for any of these offences.⁵² South African courts could find these principles useful. If there is evidence that South African citizens or residents who serve in foreign armed forces have committed torture, which does not amount to a war crime or a crime against humanity, they could also be prosecuted under the Prevention and Combating of the Torture of Persons Act.⁵³ Section 6 of this Act provides that South African courts have jurisdiction over the offence of torture irrespective of the country in which it

51 Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002.

52 See generally, Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3rd edition 2014) 198 – 220.

53 Act 13 of 2013. For a discussion of the circumstances in which torture committed abroad can be prosecuted in South Africa, see Jamil Ddamulira Mujuzi, "Prosecuting and Punishing Torture in South Africa as a Discrete Crime and as a Crime Against Humanity" (2015) 23(2) African Journal of International and Comparative Law 339–355.

is committed. In both cases (under the Implementation of the Rome Statute of the International Criminal Court Act and the Prevention and Combating of Torture of Persons Act) if there are witnesses who are based abroad and for whatever reason cannot travel to South Africa to testify against the accused, South African law provides for circumstances in which such witnesses can give evidence from abroad.⁵⁴ Alternatively, South African prosecutors can ask courts to issue letters of request and obtain the evidence from abroad.⁵⁵

VI. Conclusion

In this article, the author has discussed the circumstances in which South African citizens and permanent residents can participate in foreign armed conflicts. It has been illustrated that in doing so, they have to apply for authorisation. Before that authorisation is granted, the Committee has many grounds to consider. The authorisation can be withdrawn if the person to whom it was granted does not observe the conditions imposed by the Committee. It has also been shown that South Africans and permanent residents who take part in foreign armed conflicts without the necessary authorisation or who do not comply with the conditions attached to the authorisation may be prosecuted for different offences. The penalties that courts are empowered to impose have also been explained. The author has also dealt with the issue of extra-territorial application of South African legislation to its citizens or permanent residents who take part in foreign armed conflicts. It has been illustrated that there are two ways in which they could be prosecuted. Firstly, under the Regulation of Foreign Military Assistance Act (1998) or under the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (should it come into force in the future). Secondly, for offences under international law under the Implementation of the Rome Statute of the International Criminal Court Act or under the Prevention and Combating of the Torture of Persons Act.

Peer-review: Externally peer-reviewed.

Conflict of Interest: The author has no conflict of interest to declare.

Financial Disclosure: The author declared that this study has received no financial support.

54 Section 158(2) of the Criminal Procedure Act provides that "Section 158(2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media (b) A court may make a similar order on the application of an accused or a witness."

55 Under the International Co-operation in Criminal Matters Act, Act 75 of 1996.

Bibliography

- Amnesty International Law, 'Israel/OPT: 'Nowhere safe in Gaza': Unlawful Israeli strikes illustrate callous disregard for Palestinian lives' 20 November 2023. Available at <https://www.amnesty.org/en/latest/news/2023/11/israel-opt-nowhere-safe-in-gaza-unlawful-israeli-strikes-illustrate-callous-disregard-for-palestinian-lives/> (accessed 20 November 2023).
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (26 January 2024).
- Boothby, WH, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2016).
- Bosch S and Maritz M, 'South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work' (2011) 14 Potchefstroom Electronic Law Journal 71 - 125
- Bosch SJ, "South Africans offering Foreign Military Assistance Abroad: How real is the Risk of Domestic Prosecution?" [2018] 21 Potchefstroom Electronic Law Journal 1 - 28
- Corn, GS, Hansen V, and Jackson R, *The Law of Armed Conflict: An Operational Approach* (Aspen Publishing, 2018)
- Coster H and Cornwell A, 'Israel's reservists drop everything and rush home' 12 October 2023. Available at <https://www.reuters.com/world/middle-east/israels-reservists-drop-everything-rush-home-following-hamas-bloodshed-2023-10-12/> (accessed 20 November 2023).
- Criminal Procedure Act, Act 51 of 1977.
- Debates of the National Assembly (Hansard), Second Session, Second Parliament (26 February 1998).
- Debates of the National Assembly (Hansard), Third Session, Third Parliament (29 August 2006)
- Gold H et al "Israel formally declares war against Hamas as it battles to push militants off its soil" 8 October 2023. Available at <https://edition.cnn.com/2023/10/08/middleeast/israel-gaza-attack-hostages-response-intl-hnk/index.html> (accessed 20 November 2023).
- Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002.
- International Co-operation in Criminal Matters Act, Act 75 of 1996.
- Jacobs and Others v S 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC);
- Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC); 2005 (1) SACR 111 (CC)
- Kouwenhoven v DPP (Western Cape) and Others* [2021] 4 All SA 619 (SCA); 2022 (1) SACR 115 (SCA)
- Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Available at <https://www.icj-cij.org/case/53> (accessed 20 November 2023).
- Liivoja R and McCormack T, *Routledge Handbook of the Law of Armed Conflict* (Taylor and Francis, 2016).
- Madisa K, 'South Africans fighting in Hamas-Israel war will be prosecuted, SA says.' Available at <https://www.businesslive.co.za/bd/national/2023-11-09-south-africans-fighting-in-hamas-israel-war-will-be-prosecuted-sa-says/> (accessed 10 November 2023).
- Mujuzi, JD 'Prosecuting and Punishing Torture in South Africa as a Discrete Crime and as a Crime Against Humanity' (2015) 23(2) African Journal of International and Comparative Law 339–355

- Okah v S and Others [2016] 4 All SA 775 (SCA); 2017 (1) SACR 1 (SCA).
Prevention and Combating of Torture of Persons Act, No. 13 of 2013.
Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act No. 27 of 2006.
Promotion of Administrative Justice Act, Act 3 of 2000.
Regulation of Foreign Military Assistance Act, Act 15 of 1998
Rouget v S [2006] JOL 15962 (T)
S v Basson 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC)
S v Ndzoku [1996] 1 All SA 391 (A)
Solis GD, *The Law of Armed Conflict International Humanitarian Law in War* (Cambridge University Press, 2016);
Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties' 17 November 2023. Available at <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine> (accessed 20 November 2023).
Terblanche, SS *A Guide to Sentencing in South Africa* (LexisNexis, 2007)
Thatcher v Minister of Justice and Constitutional Development and Others 2005 (4) BCLR 388 (C)
The Defence Act, Act 42 of 2002.
The Prosecutor v. Dominic Ongwen (ICC-02/04-01/15-1762)(04 February 2021)
The Prosecutor v. Germain Katanga (ICC-01/04-01/07-3436)(07 March 2014).
Thebus and Another v S 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).
Werle G and Jeßberger F, *Principles of International Criminal Law* (3rd edition Oxford University Press, 2014).
Wouters J, De Man P, and Verlinden N, *Armed Conflicts and the Law* (Intersentia, 2016);

