

Working Group on the use of Mercenaries

**To inform the Working Group's annual thematic report to be presented to the
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**Submission by:
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Introduction

1. This submission has been prepared by the Southern Africa Litigation Centre (SALC) and focuses on the alleged violations of international law by private military and security companies (PMSCs) in the conflict in Northern Mozambique (Cabo Delgado). On this basis, this submission illustrates challenges and gaps in the governing South African legal framework to regulate the use of PMSCs as well as ways to hold members of PMSCs accountable.

Alleged violations of international law in Northern Mozambique (Cabo Delgado)

2. Since 2017, an armed group known as Al-Shabaab has emerged in northern Mozambique and waged an insurgency against the government. In order to deal with the escalating conflict, the government sought assistance in the form of hiring foreign PMSCs. It has been reported that the government of Mozambique contracted at first the services of Russian PMSC, the Wagner Group.¹ It has further been reported that Mozambique then hired the Dyck Advisory Group (DAG), a South African PMSC.² It appears that DAG operated in Mozambique from April 2020 until April 2021.³ In addition, Paramount, another South African PMSC, has also supported the Mozambican forces.⁴

¹ Tim Lister & Sebastian Shukla, *Russian mercenaries fight shadowy battle in gas-rich Mozambique*, CNN, 29 Nov. 2019, available at: <https://edition.cnn.com/2019/11/29/africa/russian-mercenaries-mozambique-intl/index.html>; Joseph Cotterill, *Mozambique looks to private sector in war against Islamists*, FINANCIAL TIMES, 15 March 2021, available at: <https://www.ft.com/content/2f35c5b0-7084-4bfd-b702-44769a6ac835>.

² Institute for Security Studies, *Will foreign intervention end terrorism in Cabo Delgado?*, at 4, available at: <https://issafrica.s3.amazonaws.com/site/uploads/policy-brief-165.pdf> (hereinafter: ISS report); see also <https://www.dyckadvisorygroup.com/contact-us.php>;

³ Peter Fabricius, *SA military company in insurgent combat zone, the Dyck Advisory Group, will not extend contract with Mozambique*, Daily Maverick, 31 March 2021, available at: <https://www.dailymaverick.co.za/article/2021-03-31-hero-to-zero-south-african-military-company-in-insurgent-combat-zone-will-not-extend-contract-with-mozambique/>; see also ISS report, at 4

⁴ ISS report, at 4.

3. It has been reported that DAG allegedly directly engaged in hostilities predominantly through their use of armed aircraft and allegedly committed potential violations of international law, which may amount to international crimes.⁵ According to a report by Amnesty International, DAG helicopters opened fire on civilians and civilian infrastructure.⁶ If such allegations turn out to be true, such conduct by DAG members could be characterised as war crimes and other grave human rights violations.

4. On 13 May 2021, a representative of the National Conventional Arms Control Committee (NCACC) spoke on the issue of DAG operating in Mozambique at the Joint Standing Committee on Defence in the South African Parliament.⁷ The NCACC is the state entity responsible for authorisation and approval of any form of foreign military assistance going from South Africa to any other country. The representative of the NCACC stated with respect to DAG and the allegations of international law violations that:

*'The NCACC confirms that DAG has not applied under the RFMA [Foreign Military Assistance Act] to operate in Mozambique. (...) Once information is established to be true [with respect to the alleged violations of international law], DAG is in violation of the RFMA [Foreign Military Assistance Act] and is liable for prosecution.'*⁸

⁵ Amnesty International, "What I Saw is Death": War Crimes in Mozambique's Forgotten Cape (2021) (hereinafter: Amnesty International report) at 10, 17 available at: <https://www.amnesty.org/en/documents/afr41/3545/2021/en/>; John Campbell, *The Military-First approach in Mozambique is Bound to Fail*, COUNCIL ON FOREIGN RELATIONS, 23 Nov. 2020, available at: <https://www.cfr.org/blog/military-first-approach-northern-mozambique-bound-fail>; Alex Vines, *What next for the insurgency in Cabo Delgado?*, CHATHAM HOUSE, 7 Apr. 2021, available at: <https://www.chathamhouse.org/2021/04/what-next-insurgency-cabo-delgado>; Joseph Hanlon, *Mozambique: Mercenaries to the Fore as Dyck Contract Extended*, ALL AFRICA, 27 July 2020, available at: <https://allafrica.com/stories/202007270611.html>; Joseph Cotterill, *Mozambique looks to private sector in war against Islamists*, FINANCIAL TIMES, 15 March 2021, available at: <https://www.ft.com/content/2f35c5b0-7084-4bfd-b702-44769a6ac835>.

⁶ See Amnesty International report, at 10, 17

⁷ South African Parliament, Joint Standing Committee on Defence meeting, 13 May 2021. Link to the exact moment of the recorded meeting: https://youtu.be/oo39cCllyc_Q?t=9112.

⁸ South African Parliament, Joint Standing Committee on Defence meeting, 13 May 2021. Link to the exact moment of the recorded meeting: https://youtu.be/oo39cCllyc_Q?t=9139.



The representative further confirmed that the NCACC is currently in the process of verifying such reports.⁹

5. On 26 August 2021, the same NCACC representative elaborated again on the issue of alleged violations by DAG in Mozambique.¹⁰ The representative stated that none of the South African agencies that the NCACC is in touch with could confirm the allegations and the actual operation of DAG in Mozambique.¹¹
6. However, on 29 March 2021, the Associated Press published an online article that quoted the director of DAG, Lionel Dyck, on the, at the time, ongoing operation in Palma.¹² In addition to the confirmation of operating in Mozambique by the director of DAG, various newspaper articles and NGO reports documented the engagement of DAG in Cabo Delgado.¹³ Therefore, it is inexplicable on which basis the NCACC made the assessment that there was no engagement of DAG in Mozambique.
7. With respect to accountability for such alleged crimes committed by DAG, SALC is not aware of any ongoing investigation or prosecution into the alleged crimes, neither in Mozambique nor in South Africa.

⁹ South African Parliament, Joint Standing Committee on Defence meeting, 13 May 2021. Link to the exact moment of the recorded meeting: https://youtu.be/oo39cClyc_Q?t=9107.

¹⁰ South African Parliament, Joint Standing Committee on Defence meeting, 13 May 2021. Link to the exact moment of the recorded meeting: <https://youtu.be/vMbYzPIIz-l?t=3139>.

¹¹ South African Parliament, Joint Standing Committee on Defence meeting, 13 May 2021. Link to the exact moment of the recorded meeting: <https://youtu.be/vMbYzPIIz-l?t=3139>.

¹² Andrew Meldrum, *Rebels leave beheaded bodies in streets of Mozambique town*, Associated Press, 29 March 2021, available at: <https://apnews.com/article/mozambique-palma-rebels-beheaded-bodies-e0b0a68eec8f322ebbcdf13384f890fd>.

¹³ See Ibid., Peter Fabricius, *SA military company in insurgent combat zone, the Dyck Advisory Group, will not extend contract with Mozambique*, Daily Maverick, 31 March 2021, available at: <https://www.dailymaverick.co.za/article/2021-03-31-hero-to-zero-south-african-military-company-in-insurgent-combat-zone-will-not-extend-contract-with-mozambique/>.

Regulation of PMSCs in South Africa

8. While South Africa has ratified and is a state party to the Additional Protocol I (AP I) of the Geneva Conventions, it is not a state party to the *OAU Convention against the Recruitment, Use, Financing and Training of Mercenaries* or the *Convention for the Elimination of Mercenarism in Africa*.¹⁴ On this basis, South Africa is bound by Article 47 of the AP I, which states that mercenaries are denied the right to be combatant or a prisoner of war and defines who qualifies as a mercenary.¹⁵ South Africa further supports the Montreux Document, a non-binding intergovernmental document that provided a compilation of legal obligations and good practices to promote respect for international humanitarian law and international human rights law by PMSCs in an armed conflict.¹⁶
9. South Africa regulated mercenary activity through the Regulation of Foreign Military Assistance Act 15 of 1998 (RFMA), which prohibits the recruitment, use, training or financing of mercenary activities.¹⁷ The act defines mercenary activity as the 'direct participation as a combatant in armed conflict for private gain.'¹⁸ While the RFMA sets up a prohibition of mercenary activity under section 2, the act allows for 'foreign military assistance' in terms of sections 4 and 5 of the RFMA.¹⁹ 'Foreign military assistance' is defined as:

¹⁴ International Committee of the Red Cross (ICRC), *State Parties Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) dated 8 June 1977, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatyS_elected=470; ICRC, *State Parties to OAU Convention for the Elimination of Mercenarism in Africa*, Libreville dated 3rd July 1977, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatyS_elected=485.

¹⁵ Article 47 of the AP I.

¹⁶ See Federal Department of Foreign Affairs, *Participating states of the Montreux Document*, available at: <https://www.eda.admin.ch/eda/en/dfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>; ICRC, *The Montreux document on pertinent international legal obligations and good practices for states related to operations of private military security companies during armed conflict* (2009), available at: <https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies>.

¹⁷ Section 2 of the Regulation of Foreign Military Assistance Act 15 of 1998 (RFMA), available at: https://www.gov.za/sites/default/files/gcis_document/201409/a15-98.pdf.

¹⁸ Section 1(iv) of the RFMA.

¹⁹ See sections 2-5 of the RFMA.

‘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.’²⁰*

10. Comparing the definition of ‘mercenary activity’ and ‘foreign military assistance’ illustrates that a clear distinction between the two activities cannot adequately be conducted. Considering the practice of PMSCs and their active engagement in conflict situations, it appears that PMSCs benefit from the lack of clarity and have adapted to this changing landscape by finding avenues to circumvent legal restrictions.

11. The applicable law in terms of the RFMA further sets out that authorisation or approval for foreign military assistance can only be granted by the NCACC.²¹ The criteria for such authorisation or approvals are regulated in section 7 of the RFMA. In this context, authorisation or approval may not be granted if, among others, such conduct would:

²⁰ Section 1(iii) of the RFMA.

²¹ Sections 4 and 5 of the RFMA.



- 11.1. be in conflict with the Republic's obligations in terms of international law;²²
- 11.2. result in an infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;²³ or
- 11.3. be unacceptable for any other reason.²⁴

12. The RFMA does not further specify such criteria and does not clarify the discretion and risk assessment that has to be conducted by the NCACC in that regard. However, such legal certainty is crucial to create a transparent system and prevent violations of international law that may amount to international crimes from happening in the first place.

13. As illustrated in the example of Cabo Delgado, a major challenge in terms of accountability is the disclosure of information. In this context, it is crucial to know which South African PMSCs are operating in which country. The RFMA further does not provide any provision that regulates a duty to disclose information on granted or refused authorisations and approvals in terms of the act. Disclosure by NCACC of information about authorisations and approvals, would enable victims of human rights violations to identify their potential opponents or respondents with respect to possible legal steps. As seen in the example of DAG in Cabo Delgado, information and proof about the presence of a PMSC in a country is essential for any legal remedy or prosecution of international crimes.

14. South Africa also has more recent legislation on the regulation of PMSCs in the form of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 (PMA).²⁵ However, the PMA is not operative yet as the President has not published a proclamation in the *Gazette* specifying a date when it

²² Section 7(1)(a) of the RFMA.

²³ Section 7(1)(b) of the RFMA.

²⁴ Section 7(1)(g) of the RFMA.

²⁵ Republic of South Africa, No. 27 of 2006: *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006*, 509 GOVERNMENT GAZETTE 30477 (16 Nov. 2007), available at: https://www.gov.za/sites/default/files/gcis_document/201409/a27-06.pdf.

comes into operation.²⁶ While the PMA does provide a slightly more detailed definition of mercenary activities, a changed wording regarding the criteria that have to be considered regarding an authorisation and a provision that regulates extra-territorial jurisdiction for any act that constitutes an offence under the PMA, it still fails to close major gaps that have been presented in terms of the RFMA.

Prosecution: Accountability through Universal Jurisdiction or extraterritorial jurisdiction

15. Another critical challenge for victims and prosecutions of mercenaries, mercenary-related actors, and PMSCs is jurisdiction. In the example of alleged human rights violations in Mozambique by DAG, a key question regarding accountability from a victim's perspective is one of jurisdiction. The example of DAG and their alleged conduct shows that in order to take legal steps against a PMSC, their operation in a country needs to be confirmed first.

16. Even though the representative of the NCACC stated in the South African Parliament in May 2021 that DAG did not have the necessary approval of the NCACC under the RFMA and that an operation despite the lack of such approval would result in conduct that could be prosecuted, no investigations or prosecutions have been initiated in South Africa. The same applies to Mozambique. No investigations or prosecutions have been initiated into the alleged conduct by DAG. Mozambique's criminal code addresses in article 163 the crime of mercenary activities. Article 163 states, however, that 'individuals commit the crime of mercenarism if they try to overthrow a legitimately constituted foreign government by armed violence and do so with an armed force composed entirely or in

²⁶ See section 16 of the PMA.

part of foreigners.²⁷ On this basis, an investigation or prosecution is highly unlikely to be initiated in Mozambique

17. While there have been some prosecutions in South Africa for mercenary action under the RFMA, the example of DAG and their engagement in Cabo Delgado shows that regulatory framework is not being enforced to the extent that such conduct might be prosecuted and impunity for potential international crimes could be prevented.²⁸
18. While the PMA provides with section 11 a provision that confirms extra-territorial jurisdiction for any violation of the prohibition of mercenary activity, such a provision remains ineffective until the act becomes operative. However, the seriousness of the alleged conduct in question might justify legal proceedings based on the principle of universal jurisdiction. While universal jurisdiction might provide a right to initiate prosecutions in a country that has no link to the alleged conduct or committed crime, this submission focuses on the application of the principle of universal jurisdiction as a basis for prosecutions of South African PMSCs related to their conduct abroad.
19. SALC's strategic litigation in the *Torture Docket* case resulted in a judgment by the South African Constitutional Court that confirmed the applicability of the principle of universal jurisdiction under certain conditions at the stage of investigations and prosecutions when it comes to the most serious international crimes.²⁹ With respect to international crimes, section 4(3) of the International Criminal Court (ICC) Act describes under which

²⁷ Zarko Perovic, *What laws constrain this Russian Private Military Company?*, Lawfare Blog, 23 March 2021, available at: <https://www.lawfareblog.com/what-laws-constrain-russian-private-military-company>.

²⁸ For prosecutions under the RFMA see S Bosch & M Maritz, *South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work*, PER / PELJ 2011 (14) 7, 98; R Taljaard, *Implementing South Africa's Regulation of Foreign Military Assistance Act*, in PRIVATE ACTORS AND SECURITY GOVERNANCE, 177 (A Bryden & M Caparini eds., 2006); P Jacobs, *South Africa's new counter-mercenary law*, Strategic Review for Southern Africa (2008) 11; SJ Bosch, *Southern Africans offering Foreign Military Assistance Abroad: How real is the Risk of Domestic Prosecution?*, PER/PELJ 2018 (21), at 3-6.

²⁹ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*, 2015 (1) SA 315 (CC).

circumstances the principle of universal jurisdiction could be applied.³⁰ Therefore, South African courts may apply the principle of universal jurisdiction if an international crime was committed outside South Africa and if at least one of the following factors is present:

- 19.1. That person is a South African citizen; or
- 19.2. That person is not a South African citizen but is ordinarily resident in the Republic; or
- 19.3. That person, after the commission of the crime, is present in the territory of the Republic; or
- 19.4. That person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.³¹

20. On this basis, alleged conduct by DAG in Mozambique that can be characterized as an international crime such as a war crime could be prosecuted in South Africa if one of the criteria above is satisfied.

Conclusion and Recommendations

21. This submission highlights that due to lack of information and gaps in the legal framework, PMSCs are able to benefit from these circumstances. In some cases, this results in situations such as the one in Cabo Delgado where PMSCs allegedly violate human rights and potentially commit international crimes. On this basis, SALC recommends that:

- 21.1. The National Prosecuting Authority enforces the principle of universal jurisdiction with respect to PMSC conduct outside South Africa to hold those accountable who have committed international crimes.
- 21.2. The South African government should review the applicable law in terms of disclosure of information and require the NCACC to issue quarterly reports to the cabinet and a committee of the parliament.

³⁰ Section 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (hereinafter: ICC Implementation Act).

³¹ See section 4(3) of the ICC Implementation Act.

- 21.3. The South African government should review regulations in order to clarify the distinction between mercenary activity and foreign military assistance.
- 21.4. A transparent risk assessment and application of the criteria under the governing legal framework by the responsible state entities such as the NCACC is crucial to prevent atrocities that may amount to international crimes.