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THE PRIVATE MILITARY COMPANY COMPLEX IN CENTRAL AND SOUTHERN AFRICA: THE PROBLEMATIC APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

The presence of Private Military Companies (“PMCs”) in contemporary warfare represents a remarkable transition from warfare practices prior to the Cold War.¹ Instead of traditional overt and direct opposition between countries or superpowers, PMCs act as “private providers”² of physical protection or armed force for their clients.³ A PMC is a private corporation that specializes in security or armed force.⁴ Like any corporation that resides in a particular nation, a PMC must abide by the laws of a particular sovereign.⁵ However, given that PMCs often contract with countries that face both internal and external conflicts (potentially involving other nations), the threat of international conflict remains a pressing concern. Since human rights violations are always a concern during international warfare, International Humanitarian Laws (“IHLs”) aim to control state armies and ensure basic protections of human rights in armed conflict.⁶ There is some debate, however, as to whether or not IHLs apply to PMCs in the same fashion they can at times apply to sovereigns.⁷ IHLs do not explicitly refer to PMCs,⁸ and most

1. Hin-Yan Liu, *Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company*, 15 J. CONFLICT & SECURITY L. 141, 142 (2010). For the purposes of this note, Private Security Companies that participate in armed conflict and Private Military Companies will be discussed and referred to collectively as “PMCs” throughout.

2. *Id.* at 141.

3. In this context, “client” refers to the government, organization, or entity that a PMC officially makes a contractual relationship with. For a more in depth discussion on this relationship, see generally *id.*

4. *Id.* As further support for the analogy to private corporations, PMCs also focus on profit margins, revenue, and other financial concepts. The annual market revenue of all PMCs has been estimated to be approximately one hundred billion United States dollars as of 2010. *Id.* at 142; see also P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 78 n.10 (2008).

5. See Liu, *supra* note 1, at 142 (explaining that PMCs do not operate in a “legal vacuum,” but rather are subject to a “plethora of legally applicable norms.”) (emphasis added). Liu argues that certain laws (specifically, international laws governing human rights) bind PMCs, but those laws are insufficient and state legislation is necessary to create a fully functional PMC regulatory framework. *Id.* at 167–68.

6. *Id.* at 167.

7. See generally *id.* Specifically, the author notes that a common accusation in the argument of IHL applicability to PMCs is that PMCs operate in a “legal black hole.” *Id.* at 167. As we will see

attempts to retroactively fit PMCs into IHL interpretations have been problematic.⁹ International legislation is also partially responsible for the difficulties in applying IHLs to PMCs due to the combination of a lack of time, effort, and political motivation for some sovereigns to address the issues.¹⁰ As a result, PMC activities potentially fall into a troublesome gray area with respect to human rights protections in armed conflict.

Despite the lack of a major conflict on the scale of the United States' Middle East conflicts, Africa has been a point of considerable interest and curiosity with respect to PMC involvement.¹¹ Africa has been considered a potential stage for increasing PMC involvement for a few reasons. First, the conflicts both in and between the various countries of Africa would provide a business opportunity for PMCs.¹² Second, many of the leading PMCs originated from Africa and already possess regional geographic familiarity.¹³ Third, some African countries have already encouraged the use of PMCs by allowing the legislature to regulate their activities.¹⁴ These factors contribute to the notion that Africa is particularly susceptible to, if not in some places inviting, PMC activity.

further in this Note, countries can attempt to control PMCs in a variety of ways, including the creation of internal regulatory provisions and enforcement mechanisms. For the purposes of this Note, it is important to keep in mind that PMCs are a relatively recent construct and post-date most IHLs. *Id.* at 153.

8. Louise Doswald-Beck, *Private Military Companies Under International Humanitarian Law*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 116, 116 (Simon Chesterman and Chia Lehnhardt eds., 2007).

9. The various existing literature that struggles to address the application of PMCs to IHLs supports this notion. *See generally* SINGER, *supra* note 4.

10. Doswald-Beck, *supra* note 8, at 134–35.

11. Shaun Randol, *Africa: The Next Boon for Private Military Firms?*, INT'L AFFAIRS FORUM, <http://www.ia-forum.org/Content/ViewInternalDocument.cfm?ContentID=6566> (last visited Sept. 17, 2012).

12. *Id.* It is notable that many countries in Africa have difficulties in sustaining sufficiently trained army or police personnel due to armed conflicts. By hiring a PMC, the country in question can benefit from already-trained military forces with up-to-date technology. In terms of the future, a country may wish to continue to employ the PMC for additional contractual obligations. In rare examples, a country may opt to directly integrate a PMC into their own military force. *See* Liu, *supra* note 1, at 155 (citing E-C GILLARD, *Private Military/Security Companies: The Status of their Staff and their Obligations Under Humanitarian Law and the Responsibility of States in Relation to Their Operations*, in *PRIVATE MILITARY SECURITY COMPANIES: ETHICS, POLICIES, AND CIVILIAN-MILITARY RELATIONS* 532 n.70 (D-P Baker & M. Caparini eds., 2008)).

13. Randol, *supra* note 11. Specifically, Randol notes the Executive Outcomes organization of South Africa. Although presently defunct, this PMC was one of the leading PMC firms in the late 20th century. *Id.* For more on the dissolution of Executive Outcomes, see *Executive Outcomes*, ECONOMY-POINT.ORG, <http://www.economypoint.org/e/executive-outcomes.html> (last updated July 13, 2011).

14. *See, e.g.*, Regulation of Foreign Military Assistance Act 15 of 1998 (S. Afr.); *see also* Liu, *supra* note 1, at 149–53 (discussing South African attempts at regulation, and the Foreign Military Assistance Act specifically).

HOW CONTEMPORARY INTERNATIONAL HUMANITARIAN LAWS HAVE ATTEMPTED TO TACKLE THE EXISTENCE OF PMCs AND “MERCENARISM”

There are two major issues fueling this Note’s underlying analysis. The first is whether conflicts that usually concern internal affairs of African countries can constitute an “international” matter for IHL jurisdiction.¹⁵ Second, if the first issue is answered in the affirmative, it must be known if and to what extent there is a pressing danger of human rights violations by PMCs in particular. With respect to the first issue, the “international” concern could surface through a domino effect of a nation’s allies involving themselves in a conflict or war theater.¹⁶ Alternatively, there will be a need for an international presence to quell the flames of war when internal conflicts spill over the borders of one country and into another.¹⁷ Addressing the second point requires a more lengthy analysis; whether PMCs are more likely to commit human rights violations in armed conflicts than sovereigns requires an analysis on why IHLs are not easily applicable to PMCs.¹⁸

Critics of PMCs disparagingly label PMCs’ philosophies and activities as mercenary conduct (often labeled as “mercenarism” with the implication that the conduct itself is negative or reprehensible).¹⁹ Mercenaries are often portrayed as guns-for-hire in both literature and the media, typically motivated by financial gain rather than by a personal stake in the conflict.²⁰ Arguably, the activities of a PMC are a form of mercenarism²¹ in the sense that a PMC operates in armed conflicts

15. For example, an “internal” matter could stem from lack of resources. The scenario may become an “external” matter when the need for resources creates hostility with neighboring countries, as seen in conflicts at the border of the Democratic Republic of the Congo. *See infra* note 77 (differentiating the Democratic Republic of the Congo from the Republic of the Congo); Koinange, *infra* note 78 and accompanying text (exemplifying how an internal conflict can become international).

16. History shows that this phenomenon can occur. For example, World War I escalated into a global conflict when an isolated act of assassination triggered a series of existing alliances among European countries. Given the myriad of African nations, the concern of a domino effect of alliances that have connections with nations across the world could potentially shift an isolated event to an international concern.

17. *See supra* text accompanying note 15; Koinange, *infra* note 78 and accompanying text.

18. Specifically, the problem of applying IHLs to PMC activities starts with the fact that PMCs only began operating on a significant scale after the drafting of particular IHL pieces that will be discussed. *See* Liu, *supra* note 1, at 153 (explaining that PMCs are a relatively recent phenomenon, post-dating most IHLs).

19. Liu, *supra* note 1, at 143. Liu notes that “[t]he term ‘mercenarism’ connotes ethically and morally dubious activities” but does not analyze the association further. *Id.*

20. *See* Randol, *supra* note 11.

21. Liu states, “The nature of PMC activity is potentially within the sphere of mercenarism.” Liu, *supra* note 1, at 143.

pursuant to contractual obligations and could be outside of the contracting country's absolute influence. Moreover, some of the historically infamous regimes in Africa attained their political and military might through reliance on mercenary activity.²² Given the negative connotations of mercenary conduct, PMCs may be reluctant to firmly define their activities as acts of mercenarism.

Although mercenarism prior to the Cold War was often regulated or historically insignificant,²³ IHLs have addressed mercenarism in part through the Geneva Convention (however, as will be seen, the depth of its treatment of mercenarism is a matter of debate).²⁴ In international conflicts, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I") states that mercenaries "shall not have the right to *be a combatant* or a prisoner of war."²⁵ Protocol I also provides a list of characteristics that govern who is a mercenary under the Geneva Convention (which is non-exhaustive).²⁶ However, the mercenary definitions possess some troubling limitations when attempting to analyze PMCs. First, the definition applies to any "person" but does not mention how it applies to a group, organization, entity, or corporation.²⁷ Second, a mercenary must *not* be a national of a party in the conflict or a resident of territory held by any party in the conflict.²⁸ Third, the mercenary must not

22. *Id.* In addition to decolonization efforts in the 1950s and 1960s, some have also noted a "strong link . . . between mercenarism and the apartheid regime in South Africa." *Id.* (citing SINGER, *supra* note 4, at 37). The relationship between South Africa and groups engaged in mercenarism, however, changed drastically towards the end of the 20th century and the beginning of the 21st century. See Simon Chesterman, *Leashing the Dogs of War*, 5 CARNEGIE REPORTER 1 (2008), available at <http://carnegie.org/publications/carnegie-reporter/single/view/article/item/73/> (discussing late twentieth-century South African legislation designed to "prohibit private military companies from operating").

23. Liu, *supra* note 1, at 141–42. It is possible mercenarism was less necessary during the Cold War to aid a nation's political or military structure, given the lack of full-scale global military conflicts.

24. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

25. *Id.* art. 47 (emphasis added). The secondary issue of the prisoner of war status for mercenary participants will be discussed further in note 32 but will not be a primary focus for this article.

26. *Id.* art. 47, ¶ 2(a)–(f).

27. *Id.* art. 47, ¶ 2. The definition explicitly states, "A mercenary is any *person* . . ." *Id.* (emphasis added). In one sense, it is distressing to suggest that the Geneva Conventions intended to remove mercenary groups from the definition. However, when looking at the history of regulation or insignificance of mercenaries prior to the Cold War, holding mercenaries accountable for potential human rights violations on an individual basis might not have been feasible at the time. With that said, the definition does not seem to account for a *corporation*-like entity acting as a mercenary and committing human rights violations.

28. *Id.* art. 47, ¶ 2(d). Like the issue with the "person" specification, this also causes confusion

be a member of a party's armed forces in the conflict.²⁹ The abovementioned criterion provides an easy escape route for PMCs; PMCs can avoid the Geneva Convention's classifications entirely.³⁰ Not being a "person" or being a "national" for Protocol I purposes are some of the tactics that could allow PMCs to avoid mercenary classifications. It is possible that the Geneva Convention did not take into account the potential privatization of security and warfare in its concept of mercenarism.³¹ The possible failure to account for the privatization of the military potentially allows PMCs to evade the Geneva Convention's accountability provisions for committing violations of human rights or being held as a prisoner of war in the same context.³² Even an inquiry into the *non*-international (internal) focused Protocol II does not provide any assistance in rectifying this issue.³³ In short, the potentially incomplete

when applied to corporations. Arguably (or definitively by law depending on the country), a corporation can be considered a resident of a country without being a "person." See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 667–68 (1819) (explaining that a corporation is an "artificial person" subject to suit in court and able to enter into contracts with binding obligations). This is especially problematic when considering that PMCs, despite having global markets, are generally based in a specific country. Additionally, because a significant number of PMCs are housed in African countries, Protocol I's applicability to PMCs may be problematic if the PMC in question is a citizen of a country. Even if a conflict is international, a PMC could potentially evade the Geneva Convention entirely by asserting residency in a held territory or claiming the same nationality as a country involved in the conflict.

29. *Id.* art. 47, ¶ 2(e). As will be discussed later in this Note, this becomes a major issue in some African countries when a PMC is closely aligned to a country and resembles its military but still remains a mere contractor.

30. See *id.*; see also *supra* text accompanying notes 27–29 (discussing specific ways in which a PMC may evade Protocol I's definition of a mercenary).

31. See generally Kevin A. O'Brien, *Private Military Companies: Options for Regulation*, RAND EUR. CAMBRIDGE (2002).

32. In paradoxical fashion, falling under Protocol I's mercenary definition would effectively exclude a mercenary individual from being considered as a combatant or a prisoner of war under Article 47(1). Article 47(1) implies that non-mercenaries have the *right* to assert POW or combatant status. Some have stated that the exclusion contradicts "the established principal of humanitarian law, that all belligerents should be treated equally." Liu, *supra* note 1, at 144 (internal quotation marks and citations omitted). However, whether or not a PMC would have standing to assert POW or Article 47(1) combatant status, even if a PMC did fall under the mercenary classification, is another area on which the Geneva Convention is silent. However, this inquiry will not be a primary focus of this Note.

33. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Protocol II is relevant in the sense that it applies to all armed conflicts not covered by Protocol I, which

take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this [Protocol II].

Id. art. 1, ¶ 1. However, Protocol II does not discuss the issue of mercenaries in any detail. Implicitly, the responsibility of defining mercenary conduct may fall to the country in question.

definition of mercenarism can leave the question of accountability for human rights violations open for PMCs when it *should* be a simple inquiry.

This does not, however, mean that the authors of international regulations have *never* attempted to address mercenarism as it relates to PMCs. In the late 20th century, the United Nations attempted to target mercenary individuals through the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (“Convention Against Mercenaries”).³⁴ The motivation for passing this legislation was the prevention of mercenarism aimed at “violat[ing] principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples.”³⁵ The definition of “mercenary” in this convention is similar to that in Protocol I.³⁶ This convention, however, provides alternative definitions for a mercenary individual, such as being “motivated to take part therein essentially by the desire for significant private gain.”³⁷ Moreover, this convention takes into account the possible existence of mercenary groups and businesses by holding accomplices³⁸ or financiers³⁹ potentially accountable for human rights violations.

However, there are some major issues that effectively defang the Convention Against Mercenaries. Only 32 countries have agreed to be parties to the Convention Against Mercenaries through ratification or accession.⁴⁰ Further confounding things, only a small fraction of all

34. International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, G.A. Res. 44/33, U.N. Doc. A/RES/44/34 (Dec. 4, 1989), *available at* <http://www.icrc.org/ihl.nsf/FULL/530?OpenDocument> [hereinafter Convention Against Mercenaries].

35. *Id.* pmb1. In addition, the Convention Against Mercenaries also lists some other concerns that motivated its creation, including “new unlawful international activities” concerning drug trafficking and mercenarism conducted “in perpetration of violent actions which undermine the constitutional order of States.” *Id.*

36. *Id.* art. 1, ¶ 1(a)–(e).

37. *Id.* art. 1, ¶ 2(b). *See generally id.* art. 2(a)–(e) (providing additional characteristics of mercenaries).

38. *Id.* art. 4, ¶ (b).

39. *Id.* art. 2. Even though the convention does not explicitly state PMCs, there is language here holding those who finance mercenary groups as criminally accountable as opposed to the Geneva Convention, which did not hold financiers accountable. This implicitly supports the notion that the convention was also designed for application to groups that integrated mercenarism-esque activities as a business model like PMCs and other firms concerning private security. The language of including a group who “recruits, uses, finances or trains mercenaries” does not allow a PMC a lot of leeway under the convention, assuming that an individual member can fit the mercenary criteria of Article 1, Paragraphs 1–2. *Id.*

40. International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 75, *available at* <http://treaties.un.org/Pages/ViewDetails>

countries that are parties to the treaty are African countries.⁴¹ As a result, despite its presence as an express attempt to control mercenarism, the Convention Against Mercenaries lacks authoritative power in most African countries, let alone with other countries internationally. Most countries internationally, however, have agreed to both Protocol I and Protocol II of the Geneva Convention.⁴² Even though the above-referenced countries show some agreement with the Geneva Convention's definition of mercenarism,⁴³ this Note will analyze how these states choose to criminalize mercenarism.

How PMCs figure into the IHL framework is still an open question. When considering that the international convention designed to discourage mercenarism has little authoritative power internationally, the Geneva Convention remains the default authority. But as discussed previously, the Geneva Convention was not drafted with the idea that highly rigid, corporation-like groups engaging in mercenary activities would be increasingly commonplace in armed conflicts.⁴⁴ With international legislation not adequately prepared to account for PMCs, the next step is to determine whether African countries themselves address mercenarism.

.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&lang=en (Signature, Ratification/Accession, Reservation/Declaration List).

41. *Id.* Specifically, only Liberia, Libya, Mauritania, Senegal, Togo, and a few other smaller African countries have signed onto the treaty or acceded to the treaty. None of the countries that will be discussed in this article have signed or acceded to the treaty. *Id.* Libya in particular has faced criticism in the past by relying on mercenaries to fight in Saharan conflicts. Joseph Ngugi, *Dogs of War Back As States Cut Spending*, THE NATION (KENYA) (Sept. 19, 2011), available at <http://www.nation.co.ke/oped/Opinion/Dogs-of-war-back-as-states-cut-spending/-/440808/1239090/-/13y291w/-/index.html>.

42. *See* Int'l Comm. Of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I): Signature, Ratification/Accession, Reservation Declaration List, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited Sept. 16, 2012); Int'l Comm. Of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): Signature, Ratification/Accession, Reservation Declaration List, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (last visited Sept. 16, 2012).

43. Some African countries have incorporated IHLs into their constitutions to some degree. *See, e.g.*, CONST. OF ANGOLA, 2003 amend., arts. 11–12.

44. Again, it must be noted that the proliferation of PMCs post-dated the drafting of the Geneva Convention Protocols. It is possible that the framers of the Geneva Convention did not anticipate that armed conflict and security would become a highly privatized, finance-driven business venture as opposed to containing warring superpowers in the vein of World War II and the Cold War. Given the wider use of PMCs in present day, it is very possible that international regulation will take more explicit steps on dealing with mercenary activities that could potentially jeopardize human rights. Unfortunately, the weak support of the Convention Against Mercenaries may serve as an illustrative example of a reluctance to allow mercenarism regulation fall into the hands of international legislation.

A LOOK AT CENTRAL AND SOUTHERN AFRICA

The media and some scholars believe that Africa will be the next target for widespread PMC proliferation.⁴⁵ As previously discussed, this notion seems quite credible when considering the prevalence of African conflicts combined with the significant number of PMCs housed in Africa.⁴⁶ Despite the gap International Law leaves for PMCs through its potentially incomplete language and drafting, some African countries have attempted to regulate and even criminalize impermissible mercenarism through legislation. Notable examples of African countries that have taken a stance on mercenarism include South Africa, the Democratic Republic of the Congo, Uganda, and Angola. Legislation in these countries will be analyzed over other African countries for a number of reasons. These include the presence of PMCs in certain countries more than others,⁴⁷ the history routine of conflict in the region,⁴⁸ some of the countries having affirmative legislation concerning PMCs,⁴⁹ and some countries making its stance known concerning international legislation's difficulty in addressing PMCs.⁵⁰ This Note will compare and contrast the different approaches of these Central and Southern African countries in regards to regulation of PMC activity. At the end of the analysis, this Note will synthesize the ramifications that each country's legislation may have on the international community.

SOUTH AFRICA—A HOSTILE HOME FOR THE PMC

South Africa is unique in the sense that many PMCs have operated in South Africa, have originated from the country, are domiciled in the

45. Randol, *supra* note 11; Doug Brooks, *Private Military Service Providers: Africa's Welcome Pariahs*, in *GUERRES D'AFRIQUE*, Nouveau Mondes No. 10, 69–86 (Laurent Bachelot Geneva ed., 2002) (unofficial English version available at <http://www.hoosier84.com/02-00africaswelcomepariahs.pdf>); Zenzile Khoisan, *Africa 'Opening the Door to Private Armies'*, *CAPE ARGUS* (SOUTH AFRICA), Aug. 6, 2004.

46. See Randol, *supra* note 11; Liu, *supra* note 1, at 155; *supra* text accompanying notes 11–13.

47. The Democratic Republic of the Congo, for example, has seen massive amounts of PMC operations in the late 20th and 21st centuries. See Sebastian Deschamps, *Towards the Use of the Private Military Companies in the United Nations Peacekeeping Operations*, at 25 (Jan. 15, 2005) (unpublished thesis, United Nations Institute Peace Operations Training Institute), available at <http://cdn.peaceopstraining.org/theses/deschamps.pdf>.

48. *Id.* Deschamps notes that the Democratic Republic of the Congo in particular had a troubled history concerning disputes over natural resources and has often seen the use of PMCs in such conflicts.

49. As the analysis progresses, keep in mind that the Constitutions of Uganda, the Democratic Republic of the Congo, and Angola differ in respects to this subject matter.

50. See, e.g., Angola's Proposal, *infra* note 126.

country either presently or at some earlier time, or a combination of all three.⁵¹ Most importantly, South Africa is also one example of an African country that has taken explicit steps in regulating PMC activity and mercenarism in general.⁵² Interestingly, South Africa contributes to the PMC proliferation, yet it still manages to strictly regulate how its society interacts with such companies.⁵³ South Africa's primary goal seems to limit the capability of its *citizens* to engage in mercenary-activities.⁵⁴

South Africa first enacted the Regulation of Foreign Military Assistance Act ("RFMAA") as an attempt to regulate mercenarism.⁵⁵ The RFMAA imposes strict standards concerning mercenarism by criminalizing the conduct of *any* South African citizen that attempts to partake in mercenary activities.⁵⁶ Unlike the Geneva Convention, this Act also accounts for the presence of PMCs or Private Security Companies through the inclusion of "security forces" in the Act.⁵⁷ Criminal penalties include imprisonment, a hefty fine, or both.⁵⁸ The Act does, however,

51. South Africa has a rather interesting history on this point. The South African 32nd Recon Battalion was a highly active military force during the apartheid. When being disbanded in the early 1989, the 32nd Recon Battalion merely rearranged itself into becoming a PMC/Security Company housed in South Africa. Chesterman, *supra* note 22. Executive Outcomes is another example of an older, significant PMC that originated from South Africa. See Randol, *supra* note 11; *supra* text accompanying note 13.

52. Chesterman, *supra* note 22.

53. *Id.* Chesterman states, "South Africa is a rare case of a country that is a significant supplier of private military companies adopting strong legislation attempting to prohibit private military companies from operating." *Id.*

54. *Id.* "[I]t adopted legislation intended to prohibit South African citizens [from] working for such companies." *Id.*

55. Regulation of Foreign Military Assistance Act 15 of 1998. The newest piece of regulation on this subject is the Prohibition of Mercenary Activities Act 27 of 2006 (S. Afr.). The two statutes do not differ substantially. The Prohibition of Mercenary Activities Act's preamble sets a harsh tone against mercenary activities by stating that

[t]he Constitution of the Republic of South Africa . . . provides . . . that the resolve to live in peace and harmony precludes *any* South African citizen from participating in armed conflict, nationally or *internationally*, except as provided for in the Constitution or national legislation *Id.* (emphasis added). It would seem that the drafters of this legislation were concerned about the potential international impact of mercenary-esque activities.

56. Regulation of Foreign Military Assistance Act 15 of 1998 §§ 2–3. The relevant language is that "no person" may participate in mercenary activities or offer to render such services. *Id.*

57. *Id.* § 1(2)(b). For an explanation of the distinction between PMCs and Private Security Companies, see *supra* text accompanying note 1.

58. Regulation of Foreign Military Assistance Act 15 of 1998 § 10(1). For more on this matter, see Bjorn Moller, Private Military Companies and Peace Operations in Africa (Feb. 8, 2002) (unpublished seminar paper, Copenhagen Peace Research Institute). The exact criminal punishments include imprisonment up to ten years and/or fines up to one million Rand (South African currency). *Id.* at 10.

permit some forms of mercenarism.⁵⁹ The Act outlines the process for obtaining authorization and even lists criteria used in granting or refusing authorizations.⁶⁰ The most important provision concerns refusal or denial of authorization depending on whether the authorization of a PMC would be “in conflict with [South Africa’s] obligations in terms of international law.”⁶¹ This language would have definitely barred authorizations of mercenary activity if South Africa had agreed to be bound by the Convention Against Mercenaries. But because the Geneva Convention possesses considerable gaps on this subject, the RFMAA alone is the main driving force for South Africa to reject or allow authorizations of PMCs.⁶²

Arguably, South Africa’s regulation merely attempts to ensure that a PMC will never act contrary to South Africa’s own interests.⁶³ Given how interests of a country can fluctuate under various circumstances, it would seem as if there is always a possibility for permissible PMC activity in

59. Regulation of Foreign Military Assistance Act 15 of 1998 § 4. This section allows for “any person” to be able to register with the South African government and apply for authorization to conduct “foreign military assistance” by the government. *Id.* § 4(1). It specifies that “the Committee” (or more appropriately, a committee) will be in charge of reviewing authorizations for conducting mercenary activity. *Id.* § 4(2) (emphasis added). The authorization, however, has its limitations. For instance, an authorization granted cannot be transferred to any other party. *Id.* § 4(4).

60. *Id.* § 7(1)–(3). This section highlights potential grounds for the Committee refusing authorization rather than allowing authorization.

61. *Id.* § 7(1)(a). Other important criteria to note include potential infringement upon human rights “in the territory in which foreign military assistance is to be rendered.” *Id.* § 7(1)(b) (emphasis added); encouraging terrorism, *id.* § 7(1)(d); escalating regional conflicts, *id.* § 7(1)(e); and prejudicing South Africa’s “national or international interests.” *Id.* § 7(1)(f).

62. However, it would seem that a PMC’s interests must align with that of the South African government for the authorization to occur in the first place. The RFMAA provides a sort of escape route for the South African government in the Exemptions in § 11. It states that the South African government “may exempt any person from the provisions of sections 4 and 5 in respect of a particular event or situation, and subject to such conditions as he or she may determine.” *Id.* § 11. In short, South Africa may be able to circumvent the authorization process by exempting individuals and corporations from the process, assuming that an event or situation calls for it. The fact that the RFMAA does not go deeper into what type of event or situation justifies exemption status leaves the issue of potential abuse an open question. The Prohibition of Mercenary Activities Act also contains the same language as the RFMAA. The Prohibition of Mercenary Activities Act provides similar criteria for “authorisation or exemption.” Prohibition of Mercenary Activities Act 27 of 2006 § 9.

63. The Regulation of Foreign Military Assistance Act specifies criteria that would officially authorize PMC or mercenarism activity. See Regulation of Foreign Military Assistance Act 15 of 1998; Prohibition of Mercenary Activities Act 27 of 2006; *supra* text accompanying note 62–63. However, the challenge, especially when viewed in conjunction with the Geneva Convention, is whether or not a PMC would technically be a government instrumentality after obtaining authorization. Direct integration would take the integrated PMC directly out of immediate Geneva Convention jurisdiction in terms of mercenary activities as the PMC would then be an armed force of a country rather than a mercenary group. See Protocol I, *supra* note 25, art. 47, ¶ 2(e); *supra* text accompanying note 30.

South Africa.⁶⁴ This is not to say that South Africa tends to *favor* PMC and mercenary activity.⁶⁵ The RFMAA's hostile language implies a rule of *exclusion* concerning mercenary activity.⁶⁶ Moreover, the preservation of human rights is a goal that the RFMAA explicitly states more than once.⁶⁷ The interest of preserving human rights also comes up in South African case law discussing potential situations of mercenary conduct. In *Kaunda v. South Africa*,⁶⁸ for example, some general interests include whether South Africa at least "enjoys" diplomatic relations with the other country in question,⁶⁹ protections of human rights as stated in South Africa's constitution,⁷⁰ and whether the mercenary activity is aimed at provoking a "regime-change."⁷¹ Unfortunately, given the lack of publication of PMC authorizations in South Africa, ascertaining under what conditions South Africa could find that a PMC's activities both would *not* impede human rights and would *conform* with South Africa's interests is unknown.⁷²

64. See Regulation of Foreign Military Assistance Act 15 of 1998; Prohibition of Mercenary Activities Act 27 of 2006; Protocol I, *supra* note 24; *supra* text accompanying notes 63–64.

65. In other words, it cannot be said that South Africa has an affirmative preference for using PMCs over the country's own military and police. This approach differs from the Democratic Republic of the Congo and Uganda.

66. Regulation of Foreign Military Assistance Act 15 of 1998 pmbi; *id.* § 11.

67. *Id.* pmbi.; *id.* § 7(1)(b).

68. 2004 (4) BCLR 235 (CC) (S. Afr.). This case came before the Constitutional Court of South Africa when 69 South African citizens were being held in Zimbabwe, some accused of being mercenaries in order to overthrow the President of the Equatorial Guinea. *Id.* at 237, ¶ 1. The detainees argued that they would be denied a fair trial if they were extradited from Zimbabwe to Equatorial Guinea. The Constitutional Court rejected most of the detainee's arguments. *Id.* at 251, ¶ 31. RFMAA did not perfectly apply here because the detainees would have had to satisfy extradition criteria in Zimbabwean law for there to be South African jurisdiction. *Id.* at 275, ¶ 86.

69. "[T]here is a vast difference between defending a mine owner against unlawful assaults on its property, and planning a coup against the head of a state with which South Africa *enjoys* diplomatic relations." *Id.* at 277, ¶ 90 (emphasis added).

70. "The founding values of our Constitution include human dignity, equality, and the advancement of human rights and freedoms." *Id.* at 266, ¶ 65. "The advancement of human rights and freedoms is central to the Constitution itself." *Id.* at 31, ¶ 231.

71. "Mercenary activities aimed at producing regime-change through military coups violate this principle in a most profound way." *Id.* at 135, ¶ 272. The principle that this quote is referring to is a quote from Section 198(b) of the South Africa Constitution which also appears in the preamble of the Regulation of Foreign Military Assistance Act: "The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation." Regulation of Foreign Military Assistance Act 15 of 1998 pmbi.

72. See Chesterman, *supra* note 22 (emphasis added). Since Erinys International is an example of a PMC that functions in South Africa, the implication is that Erinys fully satisfied the RFMAA and the Prohibition of Mercenary Activities Act. *Office Locations: Africa Regional Office*, ERINYS, <http://www.erinys.net/#/locations-south-africa/4532932121> (last visited Sept. 26, 2012) (evidencing that Erinys is based out of South Africa). But again, due to the lack of publication on authorizations for PMCs or Private Security Companies, this question remains open.

DEMOCRATIC REPUBLIC OF THE CONGO—SILENT RELIANCE ON PMCS
THAT SOUTH AFRICA MANAGED TO AVOID?

One overarching concern with PMC activity in African countries directly relates to the strength (or lack thereof) of countries' militaries.⁷³ Contracting with a PMC may appear to be an easy solution to supplement a country's lack of military strength.⁷⁴ While it is true that some countries may require more immediate military and more security presence than others,⁷⁵ South Africa seems to be capable of providing its own military and security might.⁷⁶ The Democratic Republic of the Congo⁷⁷ ("the Congo") is in a vastly different position than South Africa, due to constant natural resource disputes that weaken the Congo's military might⁷⁸ and the United Nations' inability to conduct effective peacekeeping operations in the region.⁷⁹ Despite these circumstances, the Congo does not take an explicit stance either for or against mercenary activities in the region.⁸⁰

73. Brooks, *supra* note 45. Brooks primarily argues that the declining military state of African countries provides a sort of window for PMC reliance. When considering the frequency of conflict in most African countries in combination with lack of resources and manpower to effectively combat enemy forces, Brooks' argument may be a realistic concern. *See infra* note 79.

74. Brooks, *supra* note 46, at 1.

75. The issue of constant conflict concerning natural resources is a subject that will be discussed concerning the Congo area.

76. The South African National Defense Force still seems to be very active. Recent developments mostly include revamping of the South African Air Force and efforts taken against contraband. *The South African National Defence Force (SANDF) Recovers Contraband Goods*, DEP'T OF DEF. OF THE REPUBLIC OF S. AFR. (Oct. 13, 2011), http://www.dod.mil.za/news/news%202011/Oct%2011/border_success.htm. However, there have been no recent developments of full military conflicts between South Africa and other countries.

77. The Democratic Republic of the Congo and the Republic of the Congo are two different and neighboring countries. The discussion throughout will mostly refer to the Democratic Republic of the Congo as simply "the Congo" for the sake of brevity. When discussing the Republic of the Congo specifically, it will be referred to by its full title.

78. Jeff Koinange, *Blood Diamonds: Miners Risk Lives for Chance at Riches*, CNN (Dec. 12, 2006), http://articles.cnn.com/2006-12-12/world/diamonds.koinange_1_conflict-diamonds-blood-diamonds-mbuji-mayi?_s=PM:WORLD. The term "Blood Diamonds" has often been used to describe African conflicts concerning the control over diamonds. *Id.* Koinange notes that blood diamonds have fueled much of Africa's "dirtiest" wars, ranging from Sierra Leone, Liberia, Angola, and the Congo. *Id.* Most troubling is the fact that people from all ages mine diamonds in an effort to escape their impoverished lives. *Id.* In such situations, the potential for violations of human rights against all parties involved is very prevalent.

79. Deschamps, *supra* note 47, at 25.

80. As the analysis progresses, keep in mind that this potentially could be due to an implicit reliance on PMCs throughout the region.

The Congo has a rather troubled history.⁸¹ Armed conflicts over diamonds have occurred in the Congo and its neighboring countries for several decades.⁸² Due to these diamond conflicts, PMCs like Executive Outcomes⁸³ operated heavily throughout the Congo.⁸⁴ However, the Congo saw the use of mercenaries even before the proliferation of PMCs.⁸⁵ The United Nations (“UN”) attempted to stabilize some areas in the Congo despite it being a mercenary hot-spot.⁸⁶ UN peacekeeping operations in the Congo have, however, faced extraordinary opposition and only achieved minimal success.⁸⁷ The most troubling aspect about the UN’s failed peacekeeping operations combined with the region’s instability is that the lack of effective international assistance may further incentivize PMCs to fill the gap.⁸⁸

Like South Africa, a country could potentially remedy the lack of international action by enacting their own legislation concerning PMCs and mercenary activities. Legislation on this subject is rather sparse, however, despite the Congo’s prior ties to PMCs.⁸⁹ Historically, the Congo

81. Zaire changed into the Democratic Republic of the Congo on May 17, 1997. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-fact-book/geos/cg.html> (last visited Oct. 20, 2012).

82. See Koinange, *supra* note 78.

83. See Randol, *supra* note 13; Chesterman, *supra* note 22; *supra* text accompanying note 51.

84. Deschamps, *supra* note 47, at 25. Most notably, PMCs and Private Security Companies continue to fight over natural resources even today. *Id.*

85. *Id.* The author notes that historically the Congo was somewhat accustomed to the “frozen embrace of mercenaries.” *Id.* Such infamous examples include Bob Denard and Mike Hoare, leaders of former German and French soldiers that committed war crimes. *Id.* The author describes them as “romantics” that were “in search of adventure and anti-communist/capitalist ideology.” *Id.*

86. *Id.*

87. *Id.* Some reasons include insufficiently trained troops, lack of international support, and poor logistical information. There have been calls for increased UN presence in the area, but typically such calls for assistance go unanswered. *Id.* The UN has attempted to impose arms embargoes to help rectify the lack of their presence in the region. Meike de Goede, *Private and Public Security in Post-War Democratic Republic of Congo*, in *THE PRIVATE SECURITY SECTOR IN AFRICA COUNTRY SERIES NO. 146*, 35, 35 (Sabelo Gumede ed., 2008). However, Goede’s concern that PMCs often step into the realm of illegality, in combination with Deschamps’ concern of PMCs conducting “private peacekeeping” operations, is especially troubling.

88. “The absence of effective international action may drive the private sector to lead a private ‘peacekeeping’ operation, backed by mining firm [sic] in order to protect their investments or to develop new ones.” Deschamps, *supra* note 47, at 25.

89. Dr. Joanna Spear, *Market Forces: The Political Economy of Private Military Companies*, FAFO REP. 531, 1, 22 (2006). Dr. Spear notes that the Congo has been known to be involved in hiring PMCs since the late 1990s, during the time period of the “Congo Wars.” Moreover, a cited source states that the Congo was “[e]ffectively renting military expertise from Zimbabwe in a manner not dissimilar to a private company.” David Shearer, *Private Military Force and Challenges for the Future*, 8 CAMBRIDGE REV. INT’L AFFAIRS, at 87 (1999).

has at best made an implicit stance towards mercenarism.⁹⁰ The Constitution of the Congo fails to explicitly explore this issue in any depth.⁹¹ When considering the lack of legislation on the subject, it is very possible that the Congo indirectly supports the use of PMCs. Noting the violence surrounding “blood diamonds,”⁹² PMCs may be a sufficient domestic deterrent for a country that lacks the military power or political stability to supply its own deterrent. This exemplifies a phenomenon that Doug Brooks posited:⁹³ a country with political instability may be forced to rely on a PMC as a source for hostility deterrence and safety.⁹⁴

UGANDA—LEAVING POSSIBILITIES OF REGULATION OPEN THROUGH LEGISLATION

Like the Congo, Uganda also resides in a region that has been marred by a history of “insecurity, high crime rates and corruption.”⁹⁵ This has led to a society that is aware of the need for private security, military companies, and militaries to ensure some semblance of its stability (and even to protect against potential human rights violations by *other* countries) when the government cannot.⁹⁶ Ongoing threats to Uganda’s domestic safety, mostly stemming from border disputes, have also reinforced some form of reliance on PMCs.⁹⁷ Unlike the Congo, Uganda

90. Spear, *supra* note 89, at 63. The Congo, Angola, Zaire, and other African countries were signatories of the “Organisation of African Unity ‘Convention for the Elimination of Mercenaries’ of 1972.” *Id.* However, it is also noted that those three countries have encouraged mercenary activity despite their signing of the Convention. Moreover, the Convention itself is not currently in effect. *Id.*

91. See CONST. DEM. REP. CONGO, 2005. The Constitution explores basic concepts of the “Congolese,” collective and individual rights, duties, and some basic structure of the government. Article 63 provides some insight when concerning the military; the article states, “All Congolese have the sacred right and duty to defend the country” and “compulsory military service *may* be established under the conditions prescribed by law.” *Id.* art. 64 (emphasis added). Moreover, “All national, provincial, local and customary authorities have the duty to safeguard the unity of the Republic” The contours of this “duty” are for the most part unknown in the context of potential PMC utilization. *Id.*

92. See Koinange, *supra* note 78.

93. Brooks, *supra* note 46.

94. See Randol, *supra* note 11.

95. Solomon Wilson Kirunda, *Private and Public Security in Uganda*, in THE PRIVATE SECURITY SECTOR IN AFRICA COUNTRY SERIES NO. 146, 1, 3 (Sabelo Gumedze ed., 2008).

96. *Id.* “This has created a security-conscious citizenry. Private security providers have emerged to meet their needs. . . . Ugandans have lived in a security-conscious setting for fear of the security situation relapsing into what they experienced during the regimes of Obote and Amin.” *Id.* These two regimes were known for “gross human rights violations that were perpetrated through government agencies.” *Id.*

97. *Id.* at 4. One of the main security threats as of 2008 concerned the Nile basin. *Id.* Several neighboring and bordering countries were vying for control and occupation of the basin. *Id.* Such countries include the Congo, Rwanda, Kenya, Tanzania, Egypt, Sudan, Eritrea, Ethiopia, and Uganda.

has attempted to regulate the PMC activity in the past. One notable example is the Police Act of 1994.⁹⁸ Even though the Police Act also attempts to deal with other problems pertaining to the Ugandan army and police force,⁹⁹ this Note will analyze the Police Act as it affects PMCs.

The Police Act of 1994 is one explicit example of legislation by Uganda that regulates PMC activity. It provides some basic criteria for the “control of private security organizations.”¹⁰⁰ The Act gives the Ugandan Minister the power to make regulations¹⁰¹ on multiple subjects, including: control over PMC operations,¹⁰² requiring *all* PMCs to register with the government,¹⁰³ setting forth the types of uniforms and equipment a PMC would use,¹⁰⁴ and determining what fees or forms would be given pursuant to the Police Act’s purposes.¹⁰⁵ Moreover, the Police Act defines a PMC-esque group as one that performs private investigations or watches, guards, or patrols *without* actually being a part of the official Ugandan police or armed forces.¹⁰⁶ This could create some legal ambiguity when considering there is not much that differentiates a PMC from the Ugandan official forces in terms of function under the Police Act, assuming that the PMC is officially recognized.¹⁰⁷ In contrast to South Africa, it appears that the Ugandan government wants to maintain a greater presence and

As a side effect, many small militias have “dump[ed]” small arms “uncontrollably” in Uganda. *Id.* Thus, due to such disputes on Ugandan borders and in countries surrounding Uganda, Uganda has been believed to possess “large stockpiles of small arms and light weapons.” *Id.* (internal citations omitted).

98. Police Act Stat. 13/1994 (Uganda).

99. The Police Act contains several provisions governing firearm and equipment usage by the Ugandan army and police force. See JACQUELINE MACALESHER & ANGUS URQUHART, UGANDA AND INTERNATIONAL SMALL ARMS TRANSFERS: IMPLEMENTING UN PROGRAMME OF ACTION COMMITMENTS, SAFERWORLD 8 (July 2008), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=90985>.

100. Police Act § 72.

101. *Id.* § 72(1).

102. *Id.* § 72(1)(a).

103. *Id.* § 72(1)(b)–(c).

104. *Id.* § 72(1)(d).

105. *Id.* § 72(e).

106. *Id.* § 72(2). Specifically, the Act states that a “private security organisation” is one that “undertakes private investigations as to facts or as to the character of a person, or one which performs services of watching, guarding, or patrolling for the purpose of *providing protection against crime*, but does not include the force, the prisons services or the armed forces of Uganda.” *Id.* (emphasis added).

107. Conceptually, PMCs could easily be utilized for the purpose of “protect[ing] against crime” simply by acting as a security or military force designed to protect their employers. *Id.* Even when addressing the argument that there may be a key difference between Private *Military* Companies and Private *Security* Companies, as both terms tend to overlap in the grand scheme of things; PMCs often include security work when ensuring the protection of key government areas and PSCs can exercise military work when engaging in armed conflict with other militias or when supplying itself with weaponry and equipment.

involvement in the actual activities and operations of PMCs.¹⁰⁸ This route could prove dangerous; it almost encourages the assimilation of PMCs into the official government forces to the point that PMCs may circumvent international conventions concerning mercenarism.¹⁰⁹

This is not to say that a country could not be held judicially accountable for the acts of its PMCs under IHL, however, even if the process of doing so is immensely difficult in practice.¹¹⁰ Despite Uganda's regulatory scheme, this approach may also create some issues in terms of handling mercenarism, even if it does not completely nullify the overall threat of IHL violations.¹¹¹ In comparison to the regulations conducted by South Africa and the lack of regulation by the Congo, Uganda is an extreme case; a country could potentially control a PMC by directly assimilating the PMC into its own government.¹¹²

108. *See, e.g., id.* § 72(1)(d) (providing for the regulation of “uniforms and other equipment” used by private security organizations). In contrast, South Africa's legislation never contained any provisions reserving the right to dictate uniforms and equipment of its hired PMCs. *See* Regulation of Foreign Military Assistance Act 15 of 1998.

109. The key concern is when a private military company would cease to be “private” under the Police Act. The concern is not so much the registration of a PMC, since South Africa overcame similar procedural hurdles. The main concern is the broad language the Police Act uses to reserve the ability to control the operations, activities, and equipment of a PMC. With this kind of control, there may be little conceptual difference between a police force and a PMC outside of status and specification. Potentially, the government could absorb a PMC into its own official forces with this kind of control. One concern includes whether or not a controlled PMC would be exclusive to the Ugandan government or whether it would still be free to contract with other countries (perhaps even subject to Uganda's specifications). Unfortunately, there is not much judicial exploration on this issue. Moreover, the Police Act still is not designed to govern PMCs that operate *outside* of Uganda. *See* Kirunda, *supra* note 95, at 26.

110. There has been a recent scenario in which international humanitarian law still dictates that an “occupying power” must display certain conduct. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 ICJ 168 (Dec. 19). In 1998, there was some issue as to whether or not the Congo consented to the presence of Ugandan troops within its territory. *Id.* at 168. Ultimately, the court found that Uganda was “responsible for actions of private actors.” Doswald-Beck, *supra* note 8, at 133. The court further found that the Hague Regulations of 1907 also applied as Uganda has a responsibility to prevent violations of international humanitarian law. *Id.* This case was important when considering that a country could potentially still be held responsible for the acts of its endorsed PMCs (or at least PMCs that operate in its country regardless of the presence of regulations or lack thereof). But this venue is difficult because the litigation process, including evidence collection and witness gathering, would be costly and difficult across two different countries. *Id.* Moreover, it is easier to try such violators as individuals in their own countries as opposed to as a PMC. *Id.* at 134–35. Other factors such as impunity can also make a judicial resolution difficult in practice (especially if a PMC was given immunity of jurisdiction by the courts of the country where the crime took place). *Id.*

111. *See* Doswald-Beck, *supra* note 111, at 133–35.

112. *See* Kirunda, *supra* note 95, at 26; *supra* text accompanying note 110.

ANGOLA—HOSTILITY TO “NEW MERCENARISM” WITH A HISTORY OF
PMC ACTIVITY

Angola represents a strange case in the overall analysis. From a statistical standpoint, the number of PMCs that operated in Angola was quite high, especially in recent decades.¹¹³ Like in the Congo and Uganda, domestic strife over natural resources and political instability have potentially created a need for PMCs.¹¹⁴ The state of legislation concerning regulation of private military and security companies is vague.¹¹⁵ Angola has at least taken a stance against mercenarism,¹¹⁶ however, despite its gaps in legislation.¹¹⁷

The first potential source of Angola’s stance concerning mercenarism is within its 2010 Constitution.¹¹⁸ The Constitution ensures protection of “basic human rights”¹¹⁹ and “freedoms of individuals and members of organised social groups.”¹²⁰ Unlike the other countries discussed, Angola’s Constitution specifically grants the government *alone* the power to ensure the country’s national security and compliance with international law.¹²¹

113. See JULIE BERG, UNIV. OF CAPETOWN INST. OF CRIMINOLOGY, *ANGOLAN POLICING OVERVIEW IN: OVERVIEW OF PLURAL POLICING OVERSIGHT IN SELECT SOUTHERN AFRICAN DEVELOPMENT (SADC) COUNTRIES* (Dec. 2005), available at http://www.aprn.org.za/File_uploads/File/SADCPolicingoversight2005.pdf. Julie Berg traces the increase of PMC activity in Angola to its civil war in the mid 1990s. *Id.* at 5. Some reports note that Angola’s private security industry has “flourished.” *Id.*; see also Herbert Howe, *Global Order and Security Privatization*, 140 STRATEGIC FORUM 1 (1998) (detailing the struggle of nation-states to maintain their monopoly on power and the consequent rise of PMCs). Estimates of private security firms operating in Angola are around 80, compared with the five that operated in Angola in 1993. BERG, *supra*, at 5.

114. BERG, *supra* note 113, at 5. Berg notes that one of the primary causes of instability in Angola is the diamond industry. *Id.* Specifically, “[t]he diamond industry has reportedly been the cause of many human rights violations by Angolan police and private security alike as attempts have been made by the government to re-claim and control the industry.” *Id.* (internal citations omitted).

115. In response to the increasing proliferation of mercenarism as a business venture, the Angolan government has at least shown cognizance of the phenomenon. There has at least been some discussion in terms of controlling the activities of PMCs. *Id.* at 5–6 (internal citations omitted). The discussion also included possible differentiation between “illegal” and “legal” mercenary and PMC activity respectively. While this may imply that Angola attempted to incorporate regulation like South Africa and Uganda, Julie Berg states, “It is not clear to what extent legislation exists in Angola which regulates private military and security companies but the government *seems* committed to the application of [a] combination of international, regional and national legislation that specifically targets mercenarism.” *Id.* at 5–6 (emphasis added) (internal citations and quotation marks omitted).

116. The stance taken by Angola with regard to mercenarism, at least as it exists today, goes beyond the Congo’s “implicit” stance. See *infra* notes 128–44.

117. BERG, *supra* note 113, at 5–6.

118. CONST. ANGOLA, 2010.

119. *Id.* art 2, ¶ 2.

120. *Id.* art. 2, ¶ 2.

121. *Id.* art 202. “The state, with the involvement of citizens, shall be responsible for guaranteeing national security, observing the Constitution, the law and *any international instruments to which*

The Constitution does contain a vague caveat to this language, as Angola still reserves the right to use “legitimate force”¹²² to achieve those ends. This portion of the Constitution gives some insight into the term force as being in accordance with the Constitution and international law.¹²³ The Constitution seems to imply that Angola prioritizes international law.¹²⁴ Based on these facts alone and given the attitude of international law toward PMC activity, it is still unclear whether or not Angola affirms or rejects PMC activity through legislation.¹²⁵ However, Angola has recently explicitly stated its opinion on mercenary activity.

Angola’s concerns with “new mercenarism”¹²⁶ were addressed by the Geneva International Model of the United Nations (“GIMUN”). According to GIMUN, Angola’s proposition against mercenarism is evidently two-fold: (1) it wants the UN to create a new definition for “mercenary”;¹²⁷ and (2) it proposes an alternate scheme to control Private Militaries and Private Security Companies.¹²⁸ Angola voices concern with the concept of “new mercenarism,”¹²⁹ or mercenarism as a business venture. The proposal also includes the potential dangers to human rights that new mercenarism poses.¹³⁰ Angola believes that the current definition of mercenarism should extend to participation in *both* international and

Angola is a party.” *Id.* art. 202, ¶ 1 (emphasis added). Even though it is possible that a route of regulation that blurs the lines between PMC and state, such as Uganda’s, could potentially implicate Article 202, Angola’s perspective on mercenarism will be discussed further.

122. *Id.* art 203. “The Republic of Angola shall act using all appropriate *legitimate* means to preserve national security and shall reserve the right to resort to *legitimate force* to restore peace and public order, in compliance with the Constitution, the law and international law.” *Id.* (emphasis added).

123. *Id.* When combined with the precarious position that PMCs have in the realm of international law, however, “legitimate force” may not automatically exclude PMC usage. No definitive answer to this question likely exists, as there is not much material exploring what “legitimate force” actually means. *Id.*

124. *Id.* art. 202.

125. *Id.*; see also *supra* text accompanying note 122.

126. Geneva Int’l Model United Nations, Sec. Council, Angola’s Proposal to the Commission on Human Rights (2005).

127. *Id.*

128. *Id.* at 2.

129. *Id.* at 1. “The ‘new mercenarism’ prevalent in Angola included the interrelation of traditional mercenary activities with big business, involved in extraction of valuable natural resources, particularly diamonds.” Angola urged international bodies to look “beyond ‘traditional’ mercenarism.” *Id.*

130. *Id.* The proposal indicates that new mercenarism threatens “the right to life, physical integrity or freedom of individuals . . . peace, political stability, the legal order and the *rational* exploitation of natural resources in the regions where they operate.” *Id.* (emphasis added). “Rational” exploitation sets a different precedent from the “blood diamond”-type of exploitation of natural resources through implication. See Koinange, *supra* note 78.

internal conflicts.¹³¹ In other words, Angola believes that the concept of new mercenarism must be “borne in mind” as a “complex crime” capable of meriting prosecution for all culpable parties *anywhere*.¹³² Angola wants mercenary status to be more than just a legal question;¹³³ it wants mercenary status to be an exceedingly complex concept that must be analyzed in terms of actors, acts, and potential threats to “security and international peace.”¹³⁴

Second, GIMUN notes that Angola proposed an alternate scheme for controlling PMC activity. Angola’s main concern was that PMCs and the governments who hire them often hide their true intentions under the façade of “peacekeeping.”¹³⁵ In an attempt to overcome this phenomenon, Angola supports a combination of international, regional, and national legislation that specifically targets PMCs and other Military/Security Services to “avoid the involvement of [PMCs/Security Services] into mercenary activities on the continent.”¹³⁶ In other words, Angola supports a “framework that [works] uniformly across the board.”¹³⁷ In support of

131. Angola’s Proposal to the Commission on Human Rights, *supra* note 126, at 2. Also, recall that the Geneva Convention Protocol I concerned solely international conflicts and how Protocol II concerned non-international conflicts. See Protocol I, *supra* note 24; Protocol II, *supra* note 33; *supra* text accompanying note 33. Angola is essentially calling for a legislative reform that would not distinguish mercenarism in regards to international conflict from mercenarism concerning non-international conflict.

132. *Id.* “It must also be borne in mind that mercenary activity is a complex crime in which criminal responsibility falls upon those who recruited, employed, trained and financed the mercenary or mercenaries, and upon those who planned and ordered his criminal activity.” *Id.* As an aside, Angola admitted that mercenary activity has surfaced in its own internal conflicts. “We must admit that during the 27 years of Civil War mercenary activities emerged in internal conflict situation [sic].” *Id.*

133. *Id.*

134. *Id.* GIMUN notes four recommendations when taking “new mercenarism” into account:

- (1) The concept of a mercenary should cover the participation of mercenaries in both international and internal armed conflicts.
- (2) To link mercenarism to crimes committed by mercenaries, which had become prevalent.
- (3) Mercenary activity should be considered not only in relation to the self-determination of peoples but also as encompassing a broad range of actions, including the destabilization of constitutional governments, various kinds of illicit trafficking, terrorism and violations of fundamental rights.
- (4) It is necessary to make a distinction between those acts which are already prohibited acts and acts which required criminalization.

Id.

135. *Id.* at 2. “The main issue concerning the PMCs is that their activities, often hidden under the shroud of peacekeeping operations and providing help to national governments in maintaining stability during the crisis situations, are nothing more but mercenarisms.” *Id.*

136. *Id.*; see also BERG, *supra* note 113, at 7–8.

137. Angola’s Proposal to the Commission on Human Rights, *supra* note 126, at 1. The complete issue states, “Although different regions of the world had and still have their own specific problems in regard to the security industry, the same private companies operate across the world. It might be

the previously mentioned strategy, countries at the regional and national level could focus on “regionally targeted strategies.”¹³⁸ This approach focuses more on “controlling and monitoring” PMCs within the region.¹³⁹ According to GIMUN, Angola supports¹⁴⁰ legislative language that takes PMCs outside of the “grey areas of international law”¹⁴¹ and compensates for the lack of PMC-related legislation in most countries.¹⁴²

It is unknown whether or not international bodies like the UN took these suggestions for mercenarism reform under serious consideration. As of early 2010, however, several unnamed African countries were tasked with discussing this very issue.¹⁴³ Whether or not the UN eventually takes Angola’s proposal to heart in terms of implementing and encouraging international, regional, and national legislation still remains to be seen.

useful, therefore, when regulating the private security industry, to have a framework that worked uniformly across the board.” *Id.*

138. *Id.* “At the same time, regional mechanisms and national legislation could go beyond those standards to produce more regionally targeted strategies.” *Id.*

139. *Id.*

140. *Id.* The recommendations on this issue are summarized as:

(1) An important way to regulate private military companies is to set thresholds for permissible activity, systems of registration and oversight mechanisms.

(2) Application of combination of international, regional and national legislation that specifically targets mercenarism.

(3) Any structures of international supervision of such companies would have to be instituted under the Economic and Social Council. They could provide oversight on legislation and serve as a basis for collating information, and scrutinizing and recording contracts between companies and host and receiving States on the basis of international human rights and humanitarian law standards.

(4) Establishing national regulatory mechanisms to ensure transparency in the industry.

Id.

141. *Id.* “Government of Angola believes that mercenary activities of PMCs exist in the ‘grey areas’ of international law.” *Id.*

142. *Id.*

At [sic] present moment only a few countries have included [PMCs/Security services] in their national legislation and as a consequence [PMCs/Security Services] exist internationally without effective regulation. . . . [Angola] believes that international regulation would supply the legal framework for these services and provide them with both legitimacy and well-defined laws to abide by.

Id.

143. U.N. Office of the High Comm’r on Human Rights, *UN and Africa to discuss Mercenaries and Private Military and Security Companies* (Feb. 25, 2010), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9844&LangID=E>.

FINAL SYNTHESIS—POSSIBLE APPROACHES TO THE ISSUE OF
MERCENARISM

When exploring the different methods of the discussed countries, there are four potential options for ensuring that a PMC *cannot* violate international humanitarian laws without penalty: (1) Completely ban PMC usage; (2) Regulate PMC usage with discretion left to each country; (3) Opt for a comprehensive and uniform legislative approach (international, regional, and national legislation targeting PMC activity); (4) Alter the Geneva Convention alone to explicitly include PMC activity under mercenarism. The first option—completely banning PMC usage—has some issues when considering that countries like the Congo, Uganda, and many others have governmental and regional instability that makes self-protection quite difficult. Under that argument, there would still be an issue as to whether or not a suitable replacement for a PMC could be supplied for such countries, as even UN forces have struggled to maintain peace in those regions.¹⁴⁴ The second option—regulating PMC usage with discretion left to each country—better resembles the system that is already in place; some countries regulate with varying amounts of strength while some do not regulate PMC activity at all. This may have the side effect, however, of placing PMCs into an undefined grey area between being a “private company” and a “government instrumentality.”¹⁴⁵ The comprehensive approach is ideally the best solution.¹⁴⁶ The biggest advantage is that this mode of reform would address PMCs in a uniform methodology that other countries can easily adopt.¹⁴⁷ Unfortunately, this approach would take an unprecedented amount of work to quickly create and effectively enforce.¹⁴⁸ Moreover, at the regional and national level, such legislation might be contrary to the interests of *many* African

144. Deschamps, *supra* note 47, at 25. As previously noted, UN Peacekeeping Forces, while formidable, often encounter much difficulty in maintaining the peace in high conflict areas in Africa. *Id.* Realistically, a PMC could exert a greater presence in such areas due to financial support and reimbursement in exchange for their services. The UN would not be able to take advantage of such an arrangement and their resources would ultimately be finite.

145. This issue applies to both South Africa and Uganda in some respects.

146. *Id.* “Effective regulation of PMCs and PSCs requires an interlocking framework of national, regional, and international control mechanisms.” Kirunda, *supra* note 95, at 17.

147. See Angola’s Proposal to the Commission on Human Rights, *supra* note 126, at 2. The proposal discusses the benefits of an adoptable and “uniform” legislative effort. *Id.* It could very well apply to PMC activities across the world and would also better ensure that international humanitarian laws applicable to the world would not be easily violated by PMC activity.

148. See Doswald-Beck, *supra* note 8, at 134–35.

countries, if not many countries across the globe.¹⁴⁹ The final option, while being the most cost-efficient option, may not do much in terms of protecting IHLs, especially if such countries either disregard the Geneva Convention or find some possible legal loophole to be exploited for decades.¹⁵⁰

CONCLUSION

Despite the difficulty present in implementing such a change, the comprehensive approach suggested by Angola may potentially be the best option to combat “new mercenarism.” It focuses on PMCs internationally, addresses regional and national issues, and could potentially fill in the legal gaps left by the Geneva Convention. Even though a wide-scale proliferation of PMCs has not yet occurred in Africa, this analysis must emphasize three points: (1) Many of the world’s leading PMCs are housed in Africa; (2) Many African countries are high conflict areas today; and (3) PMCs still have a great international presence in war and conflicts worldwide, and one PMC can have a great international ripple effect.¹⁵¹ When considering the history of human rights violations committed by mercenary groups, it would be prudent to learn where and how a country can effectively regulate PMC activity. This would ensure that mercenary history marred with human rights violations does not become the international community’s grim future due merely to a few legislative gaps.

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149. When using Africa as an example, countries that regulate PMC activity or enjoy PMC activity would be quite impaired by a uniform piece of legislation that limits the usability of potential PMC clients.

150. For a specific example, recall the issue surrounding the “person” language in Protocol I of the Geneva Convention. Even to this day, the scope of “person” has not been explicitly articulated in the convention. *See* Protocol I, *supra* note 24.

151. *See supra* text accompanying note 16. Again, recall that one of the greatest wars that mankind has ever known started with a domino effect of alliances (World War I). The very same issue could occur because a PMC decided to act outside of its authority. Thus, the international nature of this analysis still remains a pressing factor; the actions of one poorly governed PMC and any potential violation of human rights can potentially have long-lasting effects on a myriad of countries around the world.

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