

**DEFENCE PORTFOLIO
COMMITTEE
6 June 2006**

**SOUTH AFRICAN POLICE
SERVICE RESPONSE TO
SUBMISSIONS ON
MERCENARY BILL**

COMMENTS

- ♦ Submissions stimulated debate and added value to it.
- ♦ We categorized issues and it is trusted that our comments will assist committee.
- ♦ Some issues are really policy issues, and our comment will be limited to the legal dimension.

**EXCLUSION OF LIBERATION
STRUGGLES, etc FROM
"ASSISTANCE OR SERVICE"**

- In international law, liberation struggles fall within the context of "international conflict" therefore Protocol I of the Protocols to the Geneva Conventions is applicable to such struggles.
- Exclusion in counter-terrorism context different: the exclusion in terrorism legislation does not relate to "convention offences" which cover almost all forms of terrorism thus exclusion only apply to the general offence of terrorism.
- At initial briefing already recommended that International Law Advisers should be involved in order to consider whether it must be retained. It is eventually a policy decision.

**DEFINITION OF "ARMED
CONFLICT"**

- Consider ----
- Review of definition of armed conflict.
- Developing jurisdictional grounds for when declaring an area of armed conflict.
- Consider whether "Armed conflict" within context of Bill, should only be those proclaimed by President.
- No formal way of determining when armed conflict starts or ceases in international law.
- Note NZ legislation -no definition of armed conflict or declaring act applicable to specific countries criteria in NZ Act-participation in hostilities in an armed conflict.

ARMED CONFLICT: TYPES

- Internal armed conflict.
 - International armed conflict.
 - Internationalised armed conflict.
- Classical examples of armed conflict-
- General War
 - Limited conflict
 - Regional conflict
 - Civil war
 - Insurgency
 - Terrorism
 - Riots, disturbances, isolated incidents of violence NOT considered armed conflict

DEFINITION OF "MERCENARY ACTIVITY"

- Consider the inclusion of such definition in the Bill. Use New Zealand Mercenary Activities (Prohibition) Act, 2004.
- Person recruited, in order to take part in hostilities in an armed conflict, or concerted act of violence.
- purpose, or one of whose purposes, in taking part in hostilities in the armed conflict, or concerted act of violence, is making significant private gain.
- promised or paid by, party to the armed conflict material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in armed forces of that party

DEFINITION: "MERCENARY ACTIVITY" CONTINUED

- Person not mercenary if-
- A citizen of a party to the armed conflict or ordinarily resident in territory controlled by a party to the armed conflict.
- a member of the armed forces of a party to the armed conflict
- sent by a State that is not a party to the armed conflict on official duty as a member of its armed forces .
- taking part in— (a) a peace support mission for any of the purposes of the United Nations

DEF. "MERCENARY ACTIVITY" CONTINUED...

- Person not a mercenary if-
- Performing the detection, clearance, deactivation, or destruction of mines or unexploded ordnance, other than in a combat role
- the delivery of humanitarian aid.
- domestic policing duties or other lawful activities of a similar kind involving the protection of individuals or property.
- Offence of mercenary activity only if directly participating in act of hostility in an armed conflict.

provision...
is made in respect of "humanitarian
assistance" and "assistance or service".

- In view of the definition of "assistance or services" which differs from and replaces the existing definition of foreign military assistance, and the previous exemption of humanitarian assistance, transitional arrangements would be necessary.

exempt particular...
organisations, and certain NGO's which act in support
of peace, operations and their personnel permanently;
AND

- Discretion to exempt organisations which are not generally exempted in respect of particular events, as section.

HUMANITARIAN ASSISTANCE ALTERNATIVE

- ♦ Reporting obligation- only applicable to RSA based humanitarian organisations.

ENLISTMENT IN FOREIGN ARMED FORCES

- ♦ Propose retaining for application for permission for enlistment.
- ♦ Once permission is granted, should not lapse once person is deployed in conflict by employer.
- ♦ Make provision for revoking permission in specified circumstances such as international obligations, furthering of terrorism by such participation or if deployment is contrary to UN Resolutions.

NGO's INVOLVED IN ADVISORY CAPACITY

- ♦ Definition of mercenary activity, if reviewed should address the problem raised in this regard.

EXCLUSION OF ASSISTANCE OR SERVICE UNDER BANNER OF UN, AU, SADC TO THEM OR PERSONS EMPLOYED BY THEM IN PEACEKEEPING

- ♦ See NZ legislation.
- ♦ It could be stated that the above will not be "mercenary activity" or "assistance or services" with reference to definitions thereof in Bill.

PRIVATE MILITARY/SECURITY COMPANIES OPTIONS

- RSA nationals and permanent residents must apply to contract to perform military/security functions other than being combatant in areas of armed conflict, which by definition is mercenary activity.
- Propose Registration required to perform security services outside RSA by means of amendments to PSIRA legislation.
- Reporting to PSIRA of deployments abroad, in respect of functions, duties, etc. by such registered companies.

PENALTIES FOR CLAUSE 2(a) to (d), 3(a) to (d)

- This is not omitted as stated in some inputs, but is addressed in the Schedule, by amending legislation pertaining to prescribed sentences.

EXTRATERRITORIAL JURISDICTION OVER NON-NATIONALS

- (c) a person who was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;
- Some submissions recommended the deletion of (c) above. Jurisdiction clause, however, exactly the same as New Zealand legislation. However, scope of NZ Legislation not as broad in respect of mercenary activity.
- By addressing the scope of the Bill through the definition of "armed conflict" and mercenary activity", the jurisdiction can remain as it is. Consider that Act only apply in respect of "assistance or services" by RSA citizen/permanent resident, but in respect of "mercenary activity" to any person. Thus only "universal jurisdiction" in respect of "mercenary activity".

NON REFERENCE TO INTERNATIONAL INSTRUMENTS

- In some inputs the absence of a reference in the Preamble of the Bill to the AU and UN Instruments relating to mercenary activities has been questioned.
- RSA not a Party to UN or AU Conventions against Mercenarism.
- AU Convention will possibly be reviewed in the near future. If RSA is to become a Party to these instruments shortly it could be included, otherwise reference could be made to the Resolutions of the AU, UN and eo NAM

OFFENCES

- Mercenary activities.
- Recruitment, training.
- Financing.
- Military assistance without permission
- Non notification of performing security services
- Training of prospective mercenaries or mercenaries

EFFECT OF PMC's

- The uncertain status of PMCs also factors to the disadvantage of the PMCs employees. The law of war is not just about regulating behaviour during armed conflict, but also about determining status and ensuring that combatants have their rights respected. While they are still mandated to adhere to the customs and rules of war, upon capture, this uncertain status means that PMC employees are at risk of not receiving the IHL guaranteed protection and may even be tried as criminals
- Members of security services attracted by short term prospects at high risk

ACTIVITIES WHICH PERSONS SHOULD BE PROSCRIBED TO PERFORM, ARE:

1. direct participation in hostilities;
2. use, recruitment, financing and training of mercenaries;
3. activities that could lead to a lethal outcome;
4. assistance to governments that are not internationally recognized, non-state armed actors, or irregular forces;

ACTIVITIES WHICH SHOULD BE PROSCRIBED

5. acts that might lead to human rights violations or internal repression;
6. looting, plunder, and other illicit economic activities such as mineral extraction; &
7. unauthorised procurement and brokering of arms.

**ACTIVITIES OF PMC'S/PSC'S
THAT REQUIRE REGULATION**

- ♦ 1. military advice and training;
 - ♦ 2. arms procurement;
 - ♦ 3. logistical support;
 - ♦ 4. security services;
 - ♦ 5. intelligence gathering; and
 - ♦ 6. crime prevention services.
- ♦ 'The rise and rise of Private Military Companies': By Hyder Gulam