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The Historical Background as Factor Favoring the Occurrence of Mercenaries and the Contemporary Role of Mercenarism in the Context of International Law

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Abstract:

The article analyses the phenomenon of mercenarism, it focuses on the historical background and the origin of mercenaries from ancient times, throughout medieval period to modern times in the context of usage of mercenaries, the forms of military conflicts as well as factors favoring their occurrence as warriors. The article describes the most significant international legal acts concerning mercenaries and examine the elements of the present legal definition of mercenary found in Additional Protocol I to Geneva Convention presenting weaknesses of the regulation and proves that in fact mercenary is able to avoid responsibility for his illegal actions.

Key words: mercenary, military service, Geneva Convention, armed conflicts

1. Introduction

War, violence and military conflicts have always been part of human life. The complete elimination of war is impossible, despite all the efforts of the international community and anti-war movements, there are constantly places in the world where military conflicts last. The only one things that change are the forms of abovementioned conflicts, weapons and people involved in the process.

As long the wars accompany the human beings, such long armed forces of many nations used foreign volunteers, who were motivated to fight by material reasons, rather than for a cause or out of legal or moral obligation to his country, and for a long time mercenary was defined as a soldier who fights for money¹.

2. History of mercenaries

Over the years of history mercenary work has been considered as the second oldest profession in the world.² The history of the phenomenon of mercenary dates back to ancient times, specifically to ancient Egypt when during the VII century BC pharaohs used mercenaries in their battles. Pharaoh Psametyk I employed Greek soldiers in order to weaken the influence of traditional Egyptian warriors, known from Greek as *machimoi*. Such Policy of the pharaoh caused dissatisfaction among native Egyptians. The proof of the presence of mercenaries in ancient Egypt is the inscription dated back VI century BC, carved on the left leg of the giant monument of Pharaoh Ramses II in Abu Simbelu by Greek soldiers.

The Bible also mentions about kings David and Saul, who have been using mercenary soldiers during their wars and created professional army of them³.

Greek contracted foreigners were in ancient times respected and known as highly trained professionals. Athens were considered not as the home of art and culture but as the home of mercenaries. Greeks proud of

¹ T. Dugdale-Pointon, *Mercenaries*, http://www.historyofwar.org/articles/concepts_mercenaries.html (20.05.2013)

² R. Uessler, *Wojna jako usługa (Krieg als Dienstleistung: private Militärfirmen zerstören die Demokratie)*, Wydawnictwo Sic!, Warszawa 2008, p. 7.

³ J. Rzepka, *Najemnicy w świecie śródziemnomorskim*, [in:] *Starożytne cywilizacje*, B. Zagórski (ed.), nr 111, Polskie Media Amer.Com S.A., Poznań - Warszawa 2005, pp. 3-4.

their soldiers *poleis* adopted many resolution in honor of their soldiers who served for barbarian kings⁴. Medieval mercenaries, also known as condotierres, have also been used in warfare numerous times, the use of condotierres was not unusual up to and throughout the medieval period, by French kings at both Crecy (1346) and Poitiers (1356).

The most sophisticated and professional form of the system of mercenary reached in medieval Italy, and was an effect of an unique combination of specific military and social factors on the Italian peninsula in XIV century. In the middle ages Italy was divided into many independent cities, states and princedoms, which have been constantly fighting for supremacy over the Italy. The *condotierri* dominated the Italian military scene, yet only small number of their leaders have been remembered till present times.

During abovementioned period we may observe a great development of city states that were supported by their agricultural hinterland, known as *contados*. Italian cities constantly have been participating in military conflicts which were initiated in order to defend themselves from other similar states and often to punish subordinate *contados*. Italian cities were rich. It is estimated that in middle ages, the kingdom of Naples was as wealthy as the kingdoms of England. Many factors created the necessity of employing condotierres, the most important of them was the protection the wealth of the cities. The frequency of occurrence of the mercenaries was also tempting for local individuals, who used them to increase their influence and gain the position of the only one ruler of the state - *signori*. The medieval Italy, as the wealthiest and also the most disunited country in Europe, created the perfect environmental for condottiere and the constant state of war between many states allowed the system to flourish⁵.

Mercenaries also played crucial role in medieval Anglo-Saxon England, although in these regions the mercenary military service was not treated with respect, as the widespread ideals of lordship and loyalty to

⁴ *Ibidem*, p. 17.

⁵ D. Murphy, *Condotierres 1300-1500, Infamous medieval mercenaries*, Osprey Publishing, Oxford 2007, p. 4-6.

one ruler militated against its respectability⁶. During the XVII and XVIII century in Europe, national armies were extremely bled. In XVII century Thirty Years' War took many lives and it was inevitable to employ external military support. According to the great British historian specializing in military history of the early modern era, Geoffrey Parker, "Between 1618 and 1640 some 40,000 Scotsmen – perhaps 15% of the total adult males in the kingdom – crossed to Europe to fight in the Thirty Years' War."⁷ Great numbers of national armies were recruited outside its country. About a third of the regiments of the French army were recruited from outside France. What is worth to mention, the largest single group were the twelve Swiss regiments and the famous Swiss Guard, which at present is serving as ceremonial guards in Vatican, and began its history precisely in 1506 when the first Swiss soldier arrived on request of the Pope Julius II⁸.

3. Modern mercenaries

Above examples show that the phenomenon of mercenaries often appeared in the history of modern countries. And what is the situation and popularity of mercenaries nowadays? Herfried Münkler, the excellent German political scientist and researcher of the phenomenon of war tries to answer this question in his book *Die neuen Kriege* (2002), in which he analyses the main trends of evolution of military conflicts, their history and evolution beginning from the nationalization of war to the privatization of war, He emphasizes that modern wars even more than in the old days use mercenaries. The Author justifies his thesis by observing the ten-

⁶ R. Abels, *Household Men, Mercenaries and Vikings in Anglo-Saxon England*, [in:] *Mercenaries and Paid Man. The mercenary identity in the middle-ages*, Proceedings of a Conference held at University of Wales, Swansea, 7th – 9th July 2005, Brill, Leiden – Boston 2008, p.161.

⁷ G. Parker, *Europe in crisis, 1598–1648*, Wiley-Blackwell, p.17.

⁸ The official web page of the Swiss Guard: <http://www.swissguard.va/index.php?id=258&L=3> (20/05/2013)

gency constituted by the fact that the governments of western countries in order to minimize losses among their own soldiers use mercenaries as in their opinion, death of those, who are not bound by civic duty but only by financial contract has less political meaning, for example only in 2002 according to U.S. sources, there were 15.000 of mercenaries in Iraq.

The Author also notes that developed countries more pays their attention on economic aspects of war, such as the location of natural resources, which does not mean that ideological and religious factors has no influence on conflicts but for developed countries that have stabilized ethnic situation, they are much less significant⁹.

Further factors influencing the prevalence of the usage of mercenaries are the nature of modern conflicts and the phenomenon of the privatization of war, which is possible thank to low prices of weapons and their commonness, the new nature of war violence – there are no open battles, the opponents destroy each other slowly, they are saving their military strength, acts of war and military act penetrate each other, violence is gaining autonomy and the meaning of modern mercenaries is growing¹⁰.

4. Legal definition of mercenaries in international law

Together with the development of civilization and the huge number of war victims, what especially took place after the alarmingly experience of the Second World War but also earlier in XIX century, the nations desire to take legal measures in order to regulate acceptable behaviors during the military conflict, what created the laws of war. After the Second World War (1939–45) the vast majority of civilized countries decided to establish the firm and stable standards of international law for the humanitarian treatment of war. The most significant of legal acts regulating laws of war is *Geneva Convention*, which implementation was inspired by the

⁹ H. Münkler, *Wojny naszych czasów (Die neuen Kriege)*, WAM, Kraków 2004, p. 3.

¹⁰ *Ibidem*, p. 10.

actions of United Nations. The problem of mercenaries was first raised during the meeting of United Nations in 1961. The participants of the organization called for the withdrawal of mercenaries from Congo after very violent internal fights¹¹. The fights took place during the Katangese secessions. The famous leader of Katangese airforce was Jan Zumbach, Polish veteran of 303 Squadron, who having vast experience from elite military unit recruited pilots and mechanics¹².

In 1968 in the face of extremely serious situation in Africa, the United Nations General Assembly has adopted a severe position and decided that employing mercenaries against national liberation movements is a criminal act¹³. The term *Geneva Convention* denotes the agreements from 1949, which updates the previous three treaties implemented on 1864, 1906 and 1929 and also added a new treaty.

To the above mention acts were added three additional protocols. The *Protocol Additional to Geneva Convention implemented in 1977* describes the most widely accepted international definition of a mercenary, although not endorsed by some countries, for example the United States of America. The *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977 states:

”Art 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

¹¹ Security Council Resolutions 161A of 21 February 1961, and 169 of 24 November 1961, and General Assembly Resolution 1599 (XV) of 15 April 1961, calling for the withdrawal of mercenaries from the Congo, See: J. Preux, “Article 47”, [in:] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swiniarski, and B. Zimmermann (ed.), ICRC, Geneva 1987, p. 572.

¹² R. Uessler. *Wojna...*, p. 8.

¹³ Resolution 2465 (XXIII) of 20 December 1968, confirmed in particular by Resolutions 2548 (XXIV) of 11 December 1969, 2708 (XXV) of 14 December 1970, 3103 (XXVIII) of 12 December 1973, 33/24 of 8 December 1978. See A.A. Yusuf, *Mercenaries in the Law of Armed Conflict*, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflicts* Giuffrè, Naples 1979, pp. 119-121

2. A mercenary is any person who:

- (a) is especially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces”¹⁴

All the above criteria must be met, according to the Geneva Convention, for a combatant to be described as a mercenary. The analyses of sub-paragraph (a) “is especially recruited locally or abroad in order to fight in an armed conflict” leads to conclusion that this condition excludes individuals, whose service is long-lasting or a permanent (French Foreign Legion) or is based on an agreement concluded by their national authorities (the Swiss Guard), only volunteers specially recruited to participate in military conflict can be considered as a mercenary.

The contents of sub-paragraph (b) introduces a requirement of taking a “direct part in the hostilities”, which caused interpretative doubts. In order to explain the formulation of direct participation, the International Committee of the Red Cross published in 2009 *Interpretive Guidance on the notion of direct participation in hostilities under IHL*, where was described constitutive elements of qualifying an act as direct participation in hostilities, „specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations

¹⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977.

or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another)¹⁵.” As a result, foreign advisers, technicians and similar employers are excluded.

The sub-paragraph (c) is crucial, it makes the difference between volunteers and patriot fighting for noble ideal and mercenary who kills for highest bidder, additionally in contrast to other soldiers, his remuneration is excessively higher. Present article also is criticized as not all of the mercenaries are motivated by financial reasons, some of them are fanatics and fundamentalist, moreover extremely hard to prove is the condition since mercenaries’ remuneration are paid either in their own countries or into bank accounts in other countries. The sub-paragraph (d) can be easily omitted by confirming citizenship of a mercenary by the party of the conflict, the sub-paragraph (e) is considered as meaningless. In fact states which uses mercenaries have to incorporate soldiers as members their military forces.

Nevertheless, implementing of present provision was inevitable as a vast majority of states enlisted foreigners into their forces and without making these into corps. The last sub-paragraph (f) excludes persons sent by a state which is not a party to the conflict on official duty as a member of its armed forces, as a mercenary is a volunteer it is illegal to classify troops sent by other countries as mercenaries even if they fulfill other requirements of the protocol¹⁶.

¹⁵ Melzer N., *Interpretive Guidance on the notion of direct participation in hostilities under IHL*, ICRC, Geneva 2009, p. 20.

¹⁶ Preux J., “Article 47” [in:] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swiniarski, and B. Zimmermann (ed.), ICRC, Geneva 1987, pp. 578-581.

According to the Third Geneva Conventions¹⁷, a captured soldier must be treated as a lawful combatant and, therefore, as a protected person with prisoner-of-war status until facing a competent tribunal, the tribunal may decide that he is a mercenary, the consequence is that he has a status of an unlawful combatant which means that still he must be “treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial” according to art. 5 of The Fourth Geneva Convention¹⁸, after the trial when he is found to be mercenary the consequence are severe. The mercenary is treated as a common criminal and may be sentenced even for execution.

Mercenary is deprived the status of prisoner of war, as a result of that he has no right to be repatriated after the end of war as well. The example of above was the famous trial that took place in Africa, after the 13 men were hired to fight in the civil war that broke out when Angola was lighting for independence from Portugal in late seventies. Mercenary, John Derek Barker as a leader of mercenaries in Angola led the judges to send him to face the firing squad. „Ernesto Teixeira da Silva, one of five judges presiding over the case, said: »Africa feels mercenaries are a danger to the people, the children and to the security of the state. They spread fear, shame and hatred in Angola.«¹⁹.

The definition of mercenaries provided in art. 47 of the additional protocol, although was an effect of consensus adopted by plenary meeting, is still criticized for being timorous, incomplete and doubtful orientation. Nevertheless it defines the phenomenon add what is even more important, penalize his action. The second important act which defines mercenary is *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* adopted in 1989 by the General Assembly of United Nations, who mostly repeats the previous definition²⁰.

¹⁷ *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949.

¹⁸ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949.

¹⁹ http://news.bbc.co.uk/onthisday/hi/dates/stories/june/28/newsid_2520000/2520575.stm (20.05.2013)

²⁰ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, A/RES/44/34, 4 December 1989, General Assembly UN.

5. Conclusion

As war is an integral part of human life, mercenaries have been evolving together with society because military conflict since forever creates opportunity to get richer and in the opinion of the Author nowadays vast majority of conflicts are motivated by financial reasons. The private military companies of unexplained status – heirs of classical mercenaries are being created all around the world. Although laws introducing severe responsibility for mercenaries has been adopted, the demand for different professional military service is still growing and in the atmosphere of free market economy they specialize and start to offer wide selection of services from V.I.P protection to provided airlift, security, logistics, and transportation services, as well as humanitarian support, even inventing their own weapons and play substantial role in military conflict as the *Blackwater* in Iraq. Moreover modern jurisprudence has difficulties with qualifying employers of private military services as mercenary and assigning responsibility, as the components of the legal definition may be easily omitted. The most famous of the companies is *U.S. Blackwater* (at present *Academi*), which was described by Jeremy Scahill - national security correspondent for *The Nation* magazine - as the world's most powerful mercenary army²¹, and many similar organization do not complain about the lack of employment and are not afraid of the crisis. But in the end, why have they to be afraid, if history proves that especially in times of crisis military services of any kind are able to earn the most.

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