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BRIEF CONSIDERATIONS REGARDING THE NECESSITY OF CRIMINALIZING MERCENARY ACTIVITY

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Abstract:
Starting from the danger posed by mercenary activities, this article provides a concise overview of how the phenomenon is addressed at the international level, both through international treaties and the domestic regulations of certain European Union member states. Additionally, the situation in Romania is described, highlighting the passivity of the national legislator and briefly presenting the two legislative proposals that have been initiated in our country. The article concludes by asserting that it is imperative to criminalize mercenary acts in a comprehensive manner, covering all relevant forms of the mercenary phenomenon and taking into account all categories of active subjects who may commit such offenses.
Keywords: *mercenary, criminal offence, mercenarism, armed conflict, Criminal Code*

I. Introduction

Mercenarism is an activity, a phenomenon, that has accompanied armed conflicts throughout history [1], carried out by individuals driven exclusively by material interest, without any state affiliation or ideology for which they participate in the conflict, aptly referred to as ‘merchants of chaos’ [2].

At present, mercenarism represents a major risk to state security. This assertion is supported by the fact that the types of armed conflicts have diversified significantly, involving both state and non-state actors, with the participation of private entities and paramilitary groups. Mercenaries have become extremely dangerous individuals, being equated by some authors with terrorists, given their close interaction with representatives of various terrorist organizations and their frequent status as members of such organizations. [3] The threat being evident, a firm legislative response is required, one that must occur on two levels: at the level of international law, and at the level of each individual state. On the one hand, a common international vision is needed; on the other

hand, states must adopt provisions within their own legislation that criminalize acts of mercenarism.

In Romania, there is no legal provision that criminalizes mercenarism, which constitutes a major legal vulnerability, making a prompt intervention by the legislator extremely necessary. The absence of any regulation may lead to the emergence and development of structures that could eventually act against the interests of the state. It would be far more difficult to respond and repress such actions once they have occurred than to prevent them through rigorous legal regulation.

II. International standards

The need to regulate mercenary activity, an activity which, in most cases, runs counter to the fundamental principles of international law regarding non-intervention in the internal affairs of states, territorial integrity, and independence, [4] has naturally led the international community to adopt legal instruments aimed at establishing clear limits concerning the status of mercenaries. Among the most significant are Additional Protocol I (1977) to the Geneva Conventions of 1949 and the International Convention against the recruitment, use, financing and training of mercenaries of 4 December 1989.

Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts represents the only document with general, *erga omnes* applicability concerning mercenaries and is the first international instrument to define the term “mercenary.” According to Article 47, paragraph 2 of the Protocol, a mercenary is defined as any person who: (a) is specially 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 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 rank and function in the armed forces of that party; (d) is not a national of a party to the conflict or 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. In order for a person to qualify

as a mercenary, all the conditions provided for in Article 47 of the Protocol must be met cumulatively.

The Convention has several functions, the most important of which is the deterrence of mercenarism by depriving mercenaries of rights, including those equal to members of regular armed forces, as well as by engaging the responsibility of the states to which they belong [5]. Thus, first and foremost, mercenaries are not entitled, according to Article 47, paragraph 1 of the Protocol, to the status of combatant or prisoner of war, which means that they do not benefit from the provisions of the Convention.

Subsequently, through the United Nations Convention against the recruitment, use, financing and training of mercenaries [6], adopted by General Assembly Resolution 44/34, the provisions of Protocol I to the Geneva Conventions regarding the prohibition of including mercenaries in the categories of combatants and prisoners of war were extended.

The Convention adopts the definition of a mercenary from Article 47 of the Protocol and significantly expands it. According to Article 1, a mercenary is considered to be any person who:

(a) is specially recruited, either locally or abroad, in order to fight in an armed conflict;

(b) is motivated to take part in the hostilities primarily by the desire for personal gain and is, in fact, promised material compensation by or on behalf of a party to the conflict, substantially greater than that promised or paid to combatants of similar rank and function in the armed forces of that party;

(c) is neither a national of a party to the conflict nor a resident of territory controlled by such a party;

(d) is not a member of the armed forces of a party to the conflict; and

(e) 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.

Additionally, a mercenary is any person who, in any other situation:

(a) is specially recruited, locally or abroad, for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a government or undermining the constitutional order of a state; or

(ii) undermining the territorial integrity of a state;

(b) is motivated to take part in such an act primarily by the desire for significant private gain and is induced by the promise or payment of material compensation;

(c) is neither a citizen nor a resident of the state against which such an act is directed;

(d) has not been sent by a state on official duty; and

(e) is not a member of the armed forces of the state on whose territory the act is carried out.

The Convention establishes liability both for the mercenary and for the state of origin and, additionally, provides for liability for complicity in acts of mercenarism. State parties are prohibited from recruiting, using, financing, or training mercenaries, and are also obligated to prohibit such activities. Furthermore, the Convention condemns any person who recruits, uses, finances, or trains mercenaries. The document imposes upon state parties the obligation to adopt national legislation establishing penalties for violations of the norms set out in the Convention.

Despite its importance and the fact that it offers a clear international framework for defining and sanctioning mercenaries, the United Nations Convention against the recruitment, use, financing and training of mercenaries enjoys limited applicability, as it has been signed and ratified by a relatively small number of states.

III. Criminalization of mercenary acts in the domestic legislation of certain european states

Although not all states, at least those that have signed and ratified the Convention against the recruitment, use, financing and training of mercenaries should have adopted domestic rules to sanction mercenarism, this has not occurred in practice. Many states invoke as reasons for refusing to ratify the Convention concerns related to its vague applicability or incompatibilities with domestic legislation concerning private military companies.

Nevertheless, beyond these aspects, there are a significant number of states that, recognizing the danger and prioritizing national security above political or economic interests, have chosen to criminalize acts of mercenarism and impose criminal sanctions.

In *France*, mercenary activity is explicitly criminalized. Law no. 2003-340 of 14 April 2003 on the repression of mercenary activity [7] introduced in the French Criminal Code [8], under Title III of Book IV, Chapter VI, the section titled On participation in a mercenary activity. This chapter contains five articles, 436-1 to 436-5, which establish the legal definition of a mercenary, criminalize the organization and leadership of mercenary activities, as well as participation as a mercenary in specific operations, and prescribe penalties applicable to both natural and legal persons involved.

Italy adopted Law 210/1995 [9], through which it ratified and implemented domestically the UN Convention against the recruitment, use, financing and training of mercenaries. The law introduces in Article 3. And 4 specific criminal offenses related to mercenarism and sanctions not only those who act as mercenaries, but also those who facilitate mercenarism through recruitment, organization, financing, or training activities. Furthermore, the Italian Criminal Code [10] provides in Article 288 for the offense of unauthorized recruitment or enlistment of an Italian citizen in the service of a foreign state, and in Article 244 criminalizes acts by a person who, without the approval of the Italian Government, recruits or engages in other hostile acts against a foreign state in a manner that exposes the Italian state to the danger of war. [11]

Germany has not ratified the UN Convention against the recruitment, use, financing and training of mercenaries and does not directly criminalize offenses related to mercenary activity, although German legal doctrine considers that such activity primarily threatens the state's military security [12]. Nonetheless, the German Criminal Code [13] indirectly addresses the concept, sanctioning under Article 109h any person who, on behalf of a foreign power, recruits a German citizen for military service in a military or paramilitary organization, or refers them to the recruitment services or military structures of such an organization. In essence, the law penalizes both the recruitment of German citizens and the facilitation thereof.

Poland has expressly included in its Criminal Code offenses relating to mercenary activity. Thus, Article 141 of the Polish Criminal Code [14] criminalizes the act of a Polish

citizen who undertakes military obligations in a foreign army or military organization without the consent of the competent authority, as well as the act of undertaking service in a military formation prohibited by international law. Article 142 provides, in paragraph (1), for the offense of recruiting Polish citizens or foreign residents of the Republic of Poland for military service in a foreign army or military organization, and in paragraph (2), for the offense of recruiting such persons for service in a military formation prohibited by international law or paying, organizing, training, or using such a service. [15]

In *Portugal*, the Criminal Code [16] stipulates in Article 238 the offence of recruiting mercenaries, which consists in the act of a person who recruits or attempts to recruit mercenaries for the military service of a foreign state or for any armed organization, national or foreign, that seeks, through violent means, to overthrow the legitimate government of another state or to undermine the independence, territorial integrity, or normal functioning of that state's institutions. The definition of a mercenary is taken from international law, with paragraph (2) of Article 238 specifying that a mercenary is defined as such by international law. Although the Portuguese Criminal Code sanctions the act of recruiting mercenaries, it does not include any offence related to the actual conduct of mercenary activities.

It should be noted that the offence has not been continuously provided for in the Criminal Code. For a brief period, Article 238 was repealed, and the offence was transferred, identically in content, to Article 18 of Law no. 31/2004 on Violations of International Humanitarian Law [17], a legal act representing the instrument by which Portugal aligned itself with the Statute of the International Criminal Court and international humanitarian law, amending its criminal legislation. After a relatively short period, the offence was reintroduced into the Criminal Code, again under Article 238, through Law no. 59/2007 [18].

IV. The situation in Romanian legislation

Romania ratified Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts through Decree no. 224/1990 [19]. According to Article 11, paragraph (2) of the Romanian Constitution, this makes the treaty part of domestic law.

On the other hand, although Romania signed the United Nations Convention against the recruitment, use, financing and training of mercenaries on 17 December 1990, it has not ratified the document to this day. The reasons for this lack of ratification remain unclear; however, this passivity adds to the broader legislative inaction at the national level regarding mercenary activity. As a result, Romanian legislation has never expressly provided for a criminal offense related to mercenary activity.

At the level of legislative initiative, in 2007 a draft law was proposed regarding the prohibition of mercenaries [20], which aimed to ban activities specific to mercenaries, as well as their recruitment, use, financing, and training by Romanian public authorities and institutions or by natural and legal persons located on Romanian territory (Article 1). The proposed legislation offered a definition of the mercenary and sought to criminalize the following acts as offenses: engaging in mercenary activity; initiating, organizing, or establishing paramilitary structures on Romanian territory that are not subject to state authority and control, as well as providing any form of support to such structures; recruiting and training mercenaries; hiring and using mercenaries; providing goods or raising and collecting funds for the purpose of supporting or financing illegal paramilitary structures or mercenary activities; managing assets belonging to paramilitary structures; and supporting mercenary activity.

As stated in the explanatory memorandum [21] of the draft legislation, the bill was deemed necessary to complement laws on national security and the fight against terrorism. It therefore proposed harsh penalties for such offenses, of up to 20 years imprisonment, similar to those established for terrorist acts. In the case of legal entities that recruit, use, finance, or train mercenaries, the proposed sanctions included monetary fines and judicial dissolution.

The legislative proposal was ultimately unsuccessful, being rejected by vote in both chambers of Parliament.

Recently, following the discovery that Romanian military personnel on parental leave had fought as mercenaries in the Republic of Congo, a new legislative proposal was introduced in 2025. As stated in the Explanatory Memorandum [22], its aim is to strengthen the national legal framework concerning the activities of active personnel in

the defense, public order, and national security structures by prohibiting their participation in mercenary activities.

The draft law [23] seeks to amend several legal acts - Law no. 51/1991 on Romania's National Security, Law no. 80/1995 on the Statute of military personnel, Law no. 384/2006 on the Statute of professional soldiers and non-commissioned officers, Law no. 360/2002 on the Statute of the police officer, and Law no. 145/2009 on the Statute of penitentiary police officers. The proposal provides a definition of mercenary activities and prohibits members of these professional categories from participating in mercenary activities, as well as in private security and protection services. The proposal also includes the introduction of a new article in the Criminal Code, Article 437¹ - Participation in prohibited activities, with the following legal content: "(1) Participation, in any form, by active military personnel, active professional soldiers and non-commissioned officers, public servants with special status from public order and national security structures, and penitentiary police officers in mercenary activities or in personal security and protection activities, or in activities carried out for private security and protection companies, without authorization from the Romanian authorities, shall be punished by imprisonment from 5 to 10 years and the prohibition of certain rights. (2) If the act provided for in paragraph (1) is committed during a state of war, the penalty shall be life imprisonment or imprisonment from 15 to 25 years and the prohibition of certain rights. (3) Attempt shall also be punishable." At the time of writing this article, the draft law is undergoing the legislative procedure, having been referred to the standing committees of the Chamber of Deputies for report. The legislative proposal is a welcome initiative, given the absence of any domestic legal provision prohibiting such activities. However, beyond the obvious positive aspects, we consider the initiative to be incomplete, as it only regulates the situation of active military personnel. The threat to national security posed by participation in mercenary activities is just as serious when private individuals are involved, individuals who do not belong to any of the structures covered by the legislative proposal. Indeed, the draft addresses the issue from the perspective of the military and their active personnel, but it does not provide a general and comprehensive solution to the problem of mercenarism. Moreover, considering that one of the arguments made by the initiators in the Explanatory Memorandum is that involvement in mercenary or private security

activities without public oversight may result in the transfer of military know-how to foreign entities or non-state actors - an issue representing a major vulnerability for national security - it would be appropriate to extend the provisions to include retired personnel, at least for a limited period after their transfer to the reserve (a proposal also made by the Economic and Social Council in its advisory opinion on the draft law).

V. Conclusions

As outlined in the previous chapters, states have recognized the danger posed by mercenary activity and have taken measures against this phenomenon by adopting firm legal provisions to sanction individuals who engage in mercenary or related activities.

Contrary to this trend, Romania has remained in a state of continuous passivity, as its domestic legislation contains no provision prohibiting and criminally sanctioning mercenary activity, this legislative void creating the premises for the commission of acts related to mercenary activity without the possibility of holding the perpetrators criminally liable Through this, Romania becomes part of a category of states that may be described as passive-states which, by accepting acts of aggression committed by their own citizens on the territory of another state without taking reasonable measures for protection and for sanctioning the perpetrators, disregard their own obligations to respect the territorial integrity and political independence of other member states of the international community. [24]

Romania has failed to implement the few legislative initiatives aimed at addressing the phenomenon. As previously mentioned, the only legislative proposal that went through the full legislative process and reached a vote in Parliament, the one from 2007, was rejected by lawmakers. The second proposal, introduced in 2025 and currently undergoing the legislative procedure, while commendable as a step in the right direction, remains incomplete, as it limits the category of active subjects of the offense solely to active members of military structures.

In order to constitute comprehensive regulation, the scope of active subjects should be extended to include reservists, as well as civilians who have had no connection with military institutions, with the possibility of differentiating penalties accordingly. Moreover, those who recruit personnel for mercenary activities, train mercenaries, or

finance, manage, or lead such operations must also be held criminally liable. In addition to individuals, legal entities involved in such activities must likewise be held accountable.

To achieve its intended purpose, the legal provision must cover all relevant forms of mercenarism; only in this way can effective protection against the phenomenon be ensured.

The subject remains open, timely, and of major interest, with numerous implications, which requires further development in the future, with the ultimate goal of adopting coherent criminal provisions that effectively sanction mercenary acts.

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