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COMPARATIVE LEGAL CHARACTERISTICS OF THE CRIMINAL LEGISLATION OF FOREIGN COUNTRIES ON LIABILITY FOR MERCENARY ACTIVITIES

Abstract*: the article examines the peculiarities of the regulation of liability for mercenary activities in the criminal law of some foreign countries. The author examines the signs of the corpus delicti in the comparative aspect, analyzes the positive and negative elements of the legislative technique.*

Keywords*: criminal liability, war crime, mercenary activity, foreign law, recruitment, training, financing, military service, military operations, armed conflict.*

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СРАВНИТЕЛЬНО-ПРАВОВАЯ ХАРАКТЕРИСТИКА УГОЛОВНОГО ЗАКОНОДАТЕЛЬСТВА ЗАРУБЕЖНЫХ СТРАН ОБ ОТВЕТСТВЕННОСТИ ЗА НАЕМНИЧЕСТВО

Аннотация*: в статье исследуются особенности регламентации ответственности за наемничество в уголовном праве некоторых зарубежных стран. Автор исследует признаки состава преступления в компаративистском аспекте, анализирует позитивные и негативные элементы законодательной техники.*

***Ключевые слова**: уголовная ответственность, военное преступление, наемничество, зарубежное право, вербовка, обучение, финансирование, военная служба, военные действия, вооруженный конфликт.*

Consider the regulation of mercenary activity in a number of foreign countries with different legal systems. Under article 12 of the Swedish Criminal Code, inducing people to leave the country illegally in order to enlist in the military service of a foreign State is considered illegal recruitment, which is punishable if carried out without a permit. Criminal liability is increased if the recruitment is carried out while Sweden is at war [1, p. 45].

Swedish Criminal Law significantly reduces the criminal liability for military recruitment, limiting its criminal nature only to its commission within its own country. Thus, similar recruitment, but committed abroad, is not considered a crime. Criminal liability for illegal recruitment for military service is limited under the German Criminal Code, according to Section 109h, the concept of a mercenary applies only to German citizens. The rule on mercenary activity has universal jurisdiction, so the Russian legislator did the right thing by establishing the possibility of recognizing any person as the subject of this crime, and not just a citizen of the Russian Federation [2, p. 68].

Thus, article 25 of the Constitution of the Federal Republic of Germany explicitly states that «generally recognized norms of international law are an integral part of federal law», as well as «they take precedence over laws and give rise to rights and obligations directly for persons residing in the territory of the Federation». In order to comply with international law, section 5 of the German Criminal Code, «Criminal acts against the defence of the country», included Section 109J, «Recruitment for foreign military service», as follows:

1. Anyone who recruits a German citizen for military service in the interests of a foreign state in a military or similar institution, or delivers him to the recruiters of this institution, or for military service in a similar institution, is punished.

2. The attempt is punishable. [1, p. 56]

The plot of this rule actually coincides with the provisions of the Rome Statute of the International Criminal Court on the recruitment of mercenaries, except only that

the criminal law of the Federal Republic of Germany extends cases of recruitment not only to persons under the age of 15. It should be noted that German criminal law considers mercenary activity to be an encroachment primarily on the military security of the state itself, and not on international relations.

This provision is not entirely consistent with the provision of the International Convention for the Suppression of the Recruitment, Use, Financing and Training of Mercenaries of 1989 [3]. First, the criminal law of the Federal Republic of Germany does not contain the provision that this composition is a manifestation of mercenary activity. Secondly, the concept of «mercenary» applies only to citizens of the Federal Republic of Germany, thus significantly narrowing the requirement of international law. Third, this Criminal Code does not stipulate responsibility for the use, financing and training of mercenaries, which are also socially dangerous acts. Fourth, the Criminal Code of the Federal Republic of Germany does not criminalize the participation of a mercenary in an armed conflict or military operations. Finally, there is no indication in the rule under study that a person who orders the commission of acts provided for in international law should also be held criminally liable.

It is also significant that criminal liability under German law is not imposed for recruitment to participate in armed conflict or military operations (as prescribed by international law), but for the commission of recruitment for military service in general, in the interests of a foreign state. International law does not contain sanctions for the commission of these acts.

France is characterized by a much clearer regulation of the application of international law as a source of domestic legislation. Thus, Article 55 of the French Constitution states: «Treaties or agreements duly ratified and approved shall have a force exceeding that of domestic laws from the moment of publication, subject to the application of each agreement or treaty by the other party." But, despite this requirement of the French Constitution, a number of issues related to the regulation of mercenary activity in the criminal law of France exist [4].

Book IV, On Crimes and Misdemeanors against the Nation, the State, and Public Order, contains chapter II, On other Attacks on the Institutions of the Republic or on

the Inviolability of the National Territory. This chapter contains section 3 «On the seizure of command, recruitment of armed forces and incitement to illegal self-armament». Here are two articles that are directly related to mercenary activities. Article 412–7 states: «It is punishable... paragraph 2. Recruitment of the armed forces without an order or without the permission of the legitimate authorities." This rule directly refers to the recruitment of persons for the creation of the armed forces. At the same time, the legislator does not take into account citizenship and place of permanent residence as mandatory features of the specified composition. It follows from this that the subjects of the crime provided for by the norm in question can be not only French citizens or stateless persons permanently residing in its territory, but also foreign citizens and stateless persons who do not permanently reside in its territory. It follows from this that the second category of persons is mercenaries, and the norm itself regulates one of the components of mercenary activity.

Article 412–8 of Section 3 provides that " incitement to self-armament against the state authorities or against a part of the population is punishable...". At first glance, this norm does not contain anything new compared to the previous one. However, the difference between these rules is that the objective side, namely recruitment and incitement, has different legal meanings. The person who carries out the recruitment is an accomplice-organizer (since it also contributes with advice and instructions, provides tools and means), while incitement is another type of complicity in a crime (moreover, in Article 412–8, the person only incites to self-armament, that is, does not provide tools and means).

Another norm that can be considered as mercenary activity is Article 413–1 of Section 1 «On Encroachments on the security of the Armed Forces and on security zones for defense purposes» of Chapter III «On other encroachments on national defense». The article states:" Instigation of the military belonging to the French armed forces to join the service of a foreign state, carried out with the aim of harming national defense, is punishable...". Also, this article refers to the subjects – only the military belonging to the French armed forces. Therefore, in order to recognize this crime as a

mercenary, it is necessary that these individuals are formed exclusively to participate in an armed conflict in which France is not a direct participant.

Criminal liability for mercenary activity in France is the sum of the three articles discussed above. If you directly compare the French legislation and international standards, you can come to the conclusion that they do not coincide. Such inconsistencies include: the absence of an indication of the commission of mercenary activity by recruiting mercenaries, since «recruitment» and» recruitment " have different meanings, different content; the absence of criminal liability for the training, financing, use of mercenaries and the participation of a mercenary in an armed conflict or hostilities;

Despite the fact that the French Constitution speaks of the priority of international law over national law, it is impossible to resolve the issues under consideration in accordance with the norms of international law, since the norms of international law do not contain sanctions for committing illegal acts [5, p. 70].

A number of States where the headquarters of an international organization are located, such as the Netherlands, have found it unnecessary to comply with the recommendations of international legislation on the publication and application of domestic rules on mercenaries. The legislators of these countries believe that independent norms of law regulating the criminal aspects of mercenary activity are not necessary at all, since there are international legal acts that have entered into legal force that address this issue. In such a case, the international law on mercenary activities should be applied directly, without any reference to them in the national criminal law [1, c. 67; 6, p. 152].

In the Criminal Code of the Republic of Bulgaria, crimes whose object of encroachment is international relations, as well as in the Criminal Code of the Russian Federation, are in the final chapter of the Special Part – Chapter XIV «Crimes against peace and humanity», and in the Criminal Law of the Republic of Latvia, on the contrary. The special part begins with chapter IX «Crimes against humanity, peace, war crimes, genocide». However, the criminal laws of these countries do not contain independent criminal law norms that qualify such an act as mercenary activity [1, p. 67].

Thus, there are currently no special provisions in the criminal legislation of the United States and European countries that provide for criminal liability for mercenary activities under international criminal law. Mercenary activity may entail criminal liability under the legislation of these States if there are signs of it in the composition of crimes on foreign military service, crimes that infringe on the interests of the state's defense capability.

An exception is the criminal legislation of Poland, which contains elements of mercenary activity, including those based on international legal concepts of the crime in question. Criminal liability is established for the assumption by a Polish citizen, without the consent of the competent authority, of military duties in a foreign army or a foreign military organization (Section 1 of Article 141) or in mercenary military service prohibited by international law (Section 2 of Article 141). Recruitment of a mercenary is the act of a person who is not a member of the armed forces [1, p. 69].

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