

THE ANALYSIS OF THE COMPARATIVE LAW ELEMENTS ON THE ACTIVITY OF MERCENARIES IN THE EXPERIENCE OF THE COMMONWEALTH OF INDEPENDENT STATES (CIS)

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Abstract

Proficiency elements of criminal activity of mercenaries are inextricably linked to the comparative study regarding various criminal legislation, especially those which have common elements with national criminal law.

Given the historical context of criminal law common development of countries of the Commonwealth of Independent States (CIS), in this article we deal with a comparative analysis aimed at legislation which concerns the offense of mercenary activity. Such an objective is natural, since comparative criminal law is an area of science of criminal law, which is intended to study rules and legal institutions belonging to different national systems in order to know the meaning and content, and the differences between these rules and institutions.

Keywords: *law, war, peace, mercenary, criminal punishment, deprivation of liberty*

JEL Classification: [K 14]

1. Introduction

The offense of mercenary activity is described in art. 141 of the Criminal Code of the Republic of Moldova, in Chapter I entitled “Crimes against peace and security of mankind”, war crimes. The current wording of the criminalization is the effect of the commitments assumed by the Republic of Moldova, which tried to implement the incriminating standards provided by the International Convention on the Fight Against the Recruitment, Use, Financing and Training of Mercenaries, signed in New York on 4-th December 1989.

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From the very title of the above-mentioned Chapter it is apparent that the offenses it incorporates, depending on the particular legal object, can be classified into three categories:

- Crimes against peace: planning, preparing, launching or leading the war – art. 139 PC of the RM; propaganda of the war – art. 140 PC of the RM; use, development, production, otherwise obtaining, processing, possession, storage or preservation, direct or indirect transfer, storage, transport of weapons of mass destruction – art. 140¹ PC of the RM; attack on the person benefiting from international protection – art. 142 PC of the RM;
- Crimes against human security: genocide – art. 135 PC of the RM; crime against humanity – art. 135¹ PC of the RM; ecocide – art. 136 PC of the RM; cloning – art. 144 PC of the RM;
- War crimes: war crimes against persons – art. 137 PC of the RM; war crimes against property and other rights – art. 137¹ PC of the RM; use of forbidden means of war – art. 137² PC of the RM; use of prohibited methods of warfare – art. 137³ PC of the RM, unlawful use of distinctive signs of international humanitarian law – art. 137⁴ PC of the RM; giving or executing a manifestly illegal order; non-exercise or inappropriate exercise of due control – art. 138 PC of the RM; activity of mercenaries – art. 141 PC of the RM.

Present classification is absolutely necessary for knowing the criminal facts mentioned above, especially when it comes to elucidating their special legal object. We can easily notice that the crime of mercenary activity is a deed that attacks the social relations that are conditioned by the observance of the norms of international humanitarian law to lead the war.

This clearly results from the provisions of the International Convention on the Fight against the Recruitment, Use, Financing and Training of Mercenaries, which regulates these rules as to the prohibition of practicing such activities.

2. The purpose of the scientific article

The purpose of this scientific exposure is to highlight the importance of performing comparative documentation to identify the strengths of harmonization of its own legislation.

3. Basic content

Art. 141 PC of the Republic of Moldova provides criminal liability for two deeds involving mercenary activities:

1. Actual activity of mercenaries, which, in accordance with paragraph (1) article 141 consists of the participation of the mercenary in an armed conflict, military action or other violent actions aimed at overthrowing or undermining constitutional order or violation of the territorial integrity of the state. Such an act is punishable by imprisonment from 3 to 7 years.

2. Activity of supporting and using mercenaries, which, in accordance with art. 141 parag. (2) consists of hiring, training, financing or other mercenaries insurance and their use in armed conflict, in military actions or other violent actions aimed at toppling or undermining the constitutional order or violate the territorial integrity of the state. The act is punishable by imprisonment from 5 to 10 years (Cojocaru & Soroceanu, 2018, p. 10).

In the criminal law of the Russian Federation, criminalization is stated in art. 359 PC of the RM titled as marginal criminal liability on mercenary activity. Essentially offense is committed by two typical embodiments, the particular form taken and which consist of separate offenses:

1. *Recruiting, training, financing or material support of a mercenary, as well as its use in armed conflicts at military or violent actions. It is punished by imprisonment for a period of 4 to 8 years [art. 359 par. (1) FR Criminal Code];*

2. *Participation of a mercenary in an armed conflict or violent military action. It is punished by imprisonment for a period of 3 to 7 years [art. 359 par. (3) Criminal Code]*¹.

In art. 359 par. (2) Russian Federation Criminal Code is provided a compounded version of the facts described in par. (1) provides that: the same act committed by a person who uses his office or in relation to a minor. Aggravated form is punished with imprisonment for 7-15 years with a fine of up to 500 000 RUB.

Belorussian criminal law of the Republic provides for criminal liability for mercenary activities in several articles placed in different chapters of the Special Part of the Penal Code:

1. *recruitment, training, financing or material support of a mercenary and use in armed conflicts or violent military action – art. 132 of Chapter XVIII of war crimes and other illegal actions on carrying war. Such an offense is punishable by imprisonment from 7 to 15 years.*

2. *participation of a person on the territory of a foreign state in armed conflicts, military action that is not part of the armed forces of belligerents and acts to receive remuneration materials without the State of nationality or in which he has his permanent residence (Mercenary) art. 133 of Chapter XVIII of war crimes and other illegal actions on carrying war. The act is punishable by imprisonment from 3 to 7 years.*

3. *enrollment of citizens of Belarus or stateless person permanently residing in the Republic of Belarus in formation armed on the territory of a*

¹ Penal Code of the Russian Federation, adopted by the State Duma on 24.05.1996, with the last modifications and completions of 27.12.2009, art. 359. http://www.consultant.ru/document/cons_doc_LAW_10699/a9e28227f557dc1e6659c1d88613790bb3dddb5b/ (viewed on 14.12.2018).

foreign state which is party to an armed conflict, and the participation itself to an armed conflict, military actions or other violent actions without state authority in the absence of signs crime under art. 133. Incrimination is deployed at Art. 361.3 paragraph (1) of Chapter 32, entitled: Crime against the State. The act is punished by such a deed of 2 to 5 years.

4. recruitment, preparation, training or use of citizens of Belarus or stateless persons who have permanent residence in the Republic of Belarus to participate in the territory of a foreign state in armed formations of one of the warring parties in armed conflicts, military actions or other violent actions as well as the financing or granting of other material support in the absence of the signs of the offense referred to in art. 132. This act is provided in Art. 361.3 paragraph (2) of Chapter 32, Crime against the State. The punishment that can be applied for such an act is imprisonment for a period of 5 to 10 years².

The offense of illegal activity of mercenaries is also enforced in art. 375 PC of the Kyrgyz Republic. This can be presented in the form of three normative modalities, described with different content. Thus, according to art. 375 par. (1) shall be punished with imprisonment from 8 to 15 years and with the confiscation of property the illicit actions of recruitment, training, training aimed at acquiring skills and abilities for committing a terrorist or extremist offense as well as financing or other material support offered to a mercenary or its use in armed conflicts or other military actions. In par. 2 of the same article shall be punished by imprisonment from 8 to 15 years and the confiscation of the assets of a mercenary's participation in an armed conflict or military or violent actions.

The aforementioned facts are characteristic of the following aggravating forms, provided in art. 375 par. (3) PC of the Kyrgyz Republic:

- 1) by a group of people by prior agreement;*
- 2) by an organized criminal group;*
- 3) using its official function;*
- 4) using a minor. In the presence of aggravating forms, the facts are punishable by imprisonment for a period of 15 to 20 years or by life imprisonment and confiscation of property³.*

A similar pattern of criminalization of mercenary activity that established the criminal laws of the Member above, concerns and criminal laws of other countries in the former Soviet space, such as the Penal Code. of

² Penal Code of the Republic of Belarus, adopted by the House of Representatives on 09.07.1999, with the latest amendments and additions of 17.02.2018, art. 132, 133 and art. 361.3. <http://xn----ctbcgfvicvibf9bq8k.xn--90ais/> (viewed on 24.12.2018).

³ Penal Code of the Republic of Kyrgyzstan, in force with the last modifications and additions of 04.08.2018, art. 375. http://continent-online.com/Document/?doc_id=30222833#pos=4207;-71 (viewed on 24.12.2018).

the Republic of Tajikistan (Article 401)⁴; PC of the Republic of Turkmenistan (Article 169)⁵; PC of the Republic of Kazakhstan (Article 170)⁶; PC of the Republic of Armenia (Article 395)⁷; PC of Georgia (Article 410)⁸.

In the criminal legislation of Ukraine, the activity of mercenaries is punished by art. 447 of the PC, Section 20, Crime against peace, human security, laws and international order. The incriminating rule is structured in five paragraphs.

The first four are similar to the criminal norms of some of the criminal laws of the states analyzed above, such as: Moldova, Russian Federation, Belarus. Particularly, in art. 447 par. (5) Penal Code of Ukraine provides for a special way of releasing criminal liability, which can be applied when the person voluntarily ceases to participate in an armed conflict, to military or violent acts and reported his participation in an armed conflict or otherwise contributed to stopping or detecting offenses related to mercenary activity before criminal prosecution began. In order to benefit from this rule, it is also necessary for the person's actions not to identify another criminal offense provided by PC of Ukraine⁹.

In Chapter XVII of the Penal Code of the Republic of Azerbaijan, with the generic name of War Crimes, at Art. 114 criminal liability for mercenaries' activity is stipulated. This embraces three normative modalities that involve mercenary activities:

- *recruitment, training, financing or material support of a mercenary, and the use of military action in armed conflicts or violence (art. 114 par. (1) of the Penal Code.);*

- *action under par. (1) committed by a person using his official position or against a minor (art. 114 par. (2) Penal Code.);*

⁴ Penal Code of the Republic of Tajikistan of 21.05.1998, with the last amendments and additions of 03.07.2014, art. 401. <https://www.wipo.int/edocs/lexdocs/laws/ru/tj/tj023ru.pdf> (viewed on 25.12.2018).

⁵ Penal Code of the Republic of Turkmenistan, dated 12.06.1997, with the latest amendments and additions of 09.11.2013, art. 169. <https://www.wipo.int/edocs/lexdocs/laws/ru/tm/tm015ru.pdf> (viewed on 12.01.2019).

⁶ Penal Code of the Republic of Kazakhstan, 21.05.1998, with the last modifications and additions of 03.07.2014, art. 170. <https://zakon.uchet.kz/rus/docs/K1400000226> (viewed on 12.01.2019).

⁷ Penal Code of the Armenian Republic, dated 29.04.2003, art. 395. <https://www.wipo.int/edocs/lexdocs/laws/ru/am/am012ru.pdf> (viewed on 12.01.2019).

⁸ Penal Code of Georgian 22.07.1999, art. 410. <https://matsne.gov.ge/ka/document/download/16426/143/ru/pdf> (viewed on 12.01.2019).

⁹ Penal Code of Ukraine with the latest amendments of 18 October 2018. <https://meget.kiev.ua/kodeks/ugolovniy-kodeks/razdel-1-20/> (viewed on 15.01.2019).

- *participation of a mercenary in an armed conflict or military action violence (art. 114 par. (3) of the Penal Code.)*¹⁰;

In the Penal Code of the Republic of Uzbekistan, the headquarters are devoted to art. 154¹. According to art. 154 par. (1) is subject to criminal liability, *a person who participate as a member of a foreign State in an armed conflict or military action and who is not a citizen or soldier of a conflict country or who does not permanently reside in the controlled territory of the conflicting party or is not officially designated any state in carrying out official duties as part of the armed forces in order to obtain material remuneration or other personal benefits.* This is punished by imprisonment from 5 to 10 years. In art. 154 par. (2) PC of Uzbekistan is responsible for the criminal responsibility for the activity of mercenaries committed in the form *recruiting, training, financing or material support of a mercenary, as well as its use in armed conflicts at military or violent actions.* A punishment of 7 to 12 years may be applied for committing the deed.

We can observe that unlike other criminal laws, at art. 154 PC of Uzbekistan, the legislative technique, the definition of mercenary is described even in the content of the incriminating rule. In the above-described legislation, the notion of mercenary is laid down in a descriptive criminal rule, formulated either in the rules of the general part or in the special part of PC.

These notions are, as a rule, a faithful reproduction of the notion of mercenary as laid down in the International Convention on the Fight against the Recruitment, Use, Financing and Training of Mercenaries. For example, match art. 130 PC of the Republic of Moldova: by mercenary is meant the person specially recruited in the country or abroad to fight in an armed conflict that takes part in the military operations in order to obtain a personal advantage or a promised remuneration by a party to conflict or on its behalf, who is neither a national of the conflict party nor a resident of the territory controlled by a party to the conflict, is not a member of the armed forces of a party to the conflict and has not been sent by a state other than party to the conflict, on official mission as a member of the armed forces of that State.

A similar pattern of criminalization of the notion of mercenary to that established in the criminal law of the Republic of Moldova is also enshrined in the criminal law of other states in the ex-Soviet space, such as: PC of the Republic of Azerbaijan (Article 114); PC of the Kyrgyz Republic (Article 375); PC of the Republic of Armenia (Article 395); PC of Georgia (Article 410); PC of the Russian Federation (Article 359); PC of Ukraine (Article 447);

¹⁰ Penal Code of the Republic of Azerbaijan of 30-th December 1999, as last amended by 01.06.2018, art. 114. http://continent-online.com/Document/?doc_id=30420353#pos=1366;-56 (viewed on 15.01.2019).

PC of the Republic of Turkmenistan (Article 169); PC of the Donetsk People's Republic (Article 421).

According to art. 154 of the PC of Uzbekistan is subject to criminal liability, the person who is a citizen of the Republic of Uzbekistan, falls within the military service, security agencies, police, military justice or other similar bodies of foreign states. The latter is punished with a fine of up to 300 minimum wages or unconditional community work up to 3 years. According to par. (2) of the same article the person is punished who recruits a citizen of the Republic of Uzbekistan to military service to serve in security agencies, police, military justice or other similar bodies in foreign states.

This person is punished by restricting freedom (house arrest or prohibition to leave the country) from 3 to 5 years or by imprisonment from 3 to 5 years¹¹.

Tense situation which occurred last time in Ukraine, had as consequence the separation of Donbas from region Donetsk province, which until 2014 were a whole. Therefore, Donetsk People's Republic became independent in the fact but not in reality, it is the product of a policy promoted by the separatist Russian Federation, adopted its own Penal Code, which in art. 421 provides for criminal liability for the activity of mercenaries¹².

Despite the stated incrimination separatist authorities of Donetsk region were most often accused of using mercenaries in warfare with armed forces of Ukraine.

Conclusion

The first finding that appears is that the criminal legislation of the CIS implements a legislative technique specific and simultaneously common incrimination of crime activities of mercenaries dictated that these laws have evolved in the same historical space, with quality of the former Soviet Union republics.

However, between incriminations above were also highlighted some differences of essentially determined on the one hand specific national political system of governance and their experience taken in the face of such phenomena and, on the other hand, concern of legislators to provide differentiated criteria for the individualization of criminal punishment for mercenary activity.

¹¹ Penal Code of the Republic of Uzbekistan, dated 12.06.1997, with the last amendments and additions of 01.12.2015, art. 154, 1541. <http://lex.uz/docs/111457> (viewed on 21.01.2019).

¹² Penal Code of the Donetsk People's Republic, adopted by resolution of the President of the Council of Ministers of August 17, 2014, art. 421. <https://dnrsovet.su/zakonodatelnaya-deyatelnost/dokumenty-verhovnogo-soveta-dnr/ugolovnyj-kodeks-donetskoj-narodnoj-respubliki/> (viewed on 22.01.2019).

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