

## Infringement of the Inviolability of the Home in Russian and German Criminal Codes

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The article focuses on the analysis of the norms of the Russian and German Criminal codes, providing for criminal liability for infringements of one of the main human rights – inviolability of the home (Article 139, Russian Criminal Code; Sections 123, 124, German Criminal Code).

**Keywords:** Russian Federation, Germany, Criminal Code, criminal liability, infringement of the inviolability of the home.

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### Infringement of the inviolability of the home in Russian and German Criminal codes

Legislation of many countries sets down criminal liability for the encroachment on one of the main rights of a man – the right to the inviolability of the home. The legal basis of this right is provided in various international legal documents and in the national constitutions. For example, Article 12 of the Universal Declaration of Human rights stipulates that “*no one shall be subjected to arbitrary interference with his... home ...*”.

This main right can be enjoyed by any person, while the protection embraces only those premises, where a person’s private life is conducted, and the right to the premises arises from either ownership, tenancy, use or other legal relations.

Article 23 of the Russian Constitution provides that “*home is inviolable. Nobody can enter the dwelling against the will of people, living in it, with the exception of cases set down by law or by a court order*”.

It is noteworthy, that “*the scope of premises, protected by Art. 25 of the Russian Constitution, is quite broad. Apart from houses and apartments, this scope includes caravans, temporary cabins, hotel rooms, yachts etc., if they are used as living quarters by people who have the right not to admit others into the place of their private lives. In certain cases this condition can be also applied to professional premises*”<sup>1</sup>.

In Germany inviolability of the home is set forth in Article 13 of the Basic Law of the land (1949):

*“(1) Home is inviolable.*

*Searches may be ordered only by a judge or, in exigent circumstances, by other organs as specified by law, and may be carried out only in the form prescribed by law.*

*In other cases intrusion into a dwelling and other abridgements may only be excused by purposes of averting general danger or danger to particular persons, and, as provided by law, for averting the threat to general safety and order, specifically, for urgent relief of housing shortage while combating epidemics and protecting endangered juveniles”.*

Both Russian and German Criminal Codes set down the norms, which describe the elements of criminal offences relating to interference with the inviolability of the home. Chapter 19 of the Russian Criminal Code contains Article 139 “Violation of the inviolability of the home”, while Chapter 7 “Crimes against public order” in the Special part of the German Criminal Code sets down two criminal offences, violating this main right of man and citizen: breach of the peace of the home (§ 123) and serious breach of the peace of the home (§ 124).

To proceed, we should consider these norms in detail.

Public danger of the crime, specified in Art. 139 of the Russian Criminal Code, is determined by unlawful intrusion into private life of a citizen, abridgement of his will and, thus, by infringement of personal rights and freedoms. It stems from the fact that Art. 139 of the Russian Criminal Code protects only those premises where a person’s private life is conducted, and the right to the premises arises from either ownership, rental, use or other legal relations.

**The immediate object** of the crime is social relations, providing for the inviolability of the home of man and citizen. Anyone can be a holder of the right to the inviolability of the home (a Russian citizen or a person not enjoying Russian citizenship). The legal framework for this is Art. 12 of the Universal Declaration of Human rights, which sets down that “*no one shall be subjected to arbitrary interference with his...home ...*” Therefore, when the term “citizen” is used in describing the elements of the offence in the Russian CC, it should be interpreted broadly. Another fact of importance is the person’s lawful residing in the dwelling (e.g. as an owner, tenant etc.).

**The objective aspect** of Art. 139 of the Russian CC can be described as unlawful entering the dwelling, committed against the will of a person residing in it. Thus, inviolability of the home is construed as any unlawful intrusion into other’s dwelling (e.g. staying in the dwelling without the owner’s knowledge, unlawful use of the dwelling in the owner’s absence, etc.).

Moreover, the Russian CC of 1996 discarded the particularization, characteristic of the Criminal Code of the Soviet Russia (1960). Article 136 of the Soviet Code specified unlawful search, unlawful eviction or other unlawful actions.

The Federal law of March 20, 2001 added a note to Art. 139 of the Russian CC. It specifies how the term “home”, used in the CC norms, should be interpreted. This term embraces

- 1) individual houses with all its residential and non-residential premises;
- 2) residential dwellings regardless of its form of ownership, which are part of housing resources and suitable for permanent or temporary habitation;
- 3) other dwellings or premises, which are not part of housing resources but designated for temporary habitation<sup>2</sup>.

Thus, in the Russian CC “home” is construed as, first and foremost, a house, an apartment, a room, in which people live and which is designated for permanent or

temporary habitation. The position of the Russian judiciary regarding the qualification of the perpetrator's actions as violation of the inviolability of the home has a sound legal basis. It considers irrelevant the period of time during which the victim has been using the premises as dwelling. Court opinions of some other countries also qualify unlawful intrusion into premises, provided to the victim for temporary use (for example, a hotel room) as infringement of the inviolability of the home, if it happens against his will. These perspectives are, certainly, well-founded<sup>3</sup>.

In the Russian legislation the notion "unlawfulness", when applied to intrusion, is defined, as follows. The Russian Constitution sets down, that intrusion into one's home is allowed only in the cases provided for by the federal law or by a court order. All other cases of intrusion into one's home against the resident's will are deemed to be unlawful.

Intrusion is considered unlawful, if there is no legal basis for an unauthorized person to be in his home. Russian courts do not qualify as violation of the inviolability of the home any actions, related to intrusion in exigent circumstances (for example, to prevent flooding, fire, etc.). These cases are considered as exigency, though formally they may infringe a person's right to the inviolability of the home.

The notion of "intrusion" has rather a broad interpretation in the Russian judicial decisions. It includes a secret or open intrusion into the dwelling, committed with overcoming obstacles or without such, if the perpetrator intrudes into the borders of the dwelling without consent of the people residing in it. *"Intrusion into the dwelling is criminal not only in case of open disregard for obtaining consent, but also if it is carried out deceitfully, for example, by providing a forged search warrant, etc."*<sup>4</sup> Along the same lines, not only intrusion into the dwelling, but also installing special technical devices for audio and video surveillance therein without the knowledge of the residents, should be deemed as unlawful intrusion.

The subjective aspect of the crime, defined by Art. 139 of the Russian CC, is characterized by the direct intent. The perpetrator of the crime is aware that he is violating the inviolability of the home and intends to commit this action. The motives and aims of the violation may be various. However, for the purpose of distinguishing between the violation of the inviolability of the home and arbitrary behaviour (Art. 330 of the Russian CC) determination of the motive is of a special significance. Courts have to consider cases, when a person, that *de facto* has lost his right to reside in the dwelling, intrudes into it against the will of its residents. A former spouse who has long been living in a different place can serve as an example. Such an action is often viewed by courts as violation of the inviolability of the home.

The perpetrator of the crime is a legally sane person that has reached the age of 16.

The crime is deemed completed, starting with the moment of intrusion into the dwelling. Then a question arises: can we regard as intrusion the following action: the perpetrator rings the doorbell, the host opens the door, and the perpetrator puts his foot into the doorway, thus preventing the closing of the door? In a view of judicial decisions of a number of countries, we should answer this question in affirmative<sup>5</sup>.

Article 139, part 2 of the Russian CC describes an aggravated version of this crime. The aggravating feature is using violence or threatening to use it while intruding into the dwelling. The violence, used by a person while illegally intruding into the dwelling, can be manifested in inflicting minor bodily harm, battery, etc. Threatening to use violence is manifested in the moral pressure on the victim, indicating that the perpetrator intends to use physical violence. If in the process of illegal intrusion into the dwelling grievous or medium gravity harm or death is caused,

the perpetrator's actions are defined cumulatively by Art. 139 and Art. 111 of the Russian CC, or Art. 105. It is also maintained that, if during the illegal intrusion torture is used, the perpetrator is responsible cumulatively for offences described in Art. 139 and 117 of the Russian CC.

A particular aggravated version of this crime is described in Art. 139, part 3. Its salient feature is perpetrator's use of his official capacity to intrude into the dwelling. It is justly argued that "*such persons violate the inviolability of the home when they intrude into other's dwelling without the relevant competence (e.g. if the warden of a dormitory conducts a search, an inspection, a seizure), and when these actions are performed by competent persons without legal grounds, or even with legal grounds but without a warrant (e.g. an investigator conducting a dwelling inspection without a prosecutor's or a court's order)*".<sup>6</sup>

When a person abuses his power, and his actions possess the relevant elements of the crimes, he may be prosecuted cumulatively for the offences described in Art. 139 and Art. 286 of the Russian CC (if the perpetrator holds a government office) or for crimes described in Art. 139 and Art. 203 (if the perpetrator is a senior manager of a business or other entity).

Currently, in Russia there are rather few court cases relating to violation of the inviolability of the home (Art. 139 of the Russian CC). In contrast, in Germany prosecutions for violating Art. 123 of the German CC are mounted more often.<sup>7</sup>

Section 123 of the German Criminal Code sets down criminal responsibility for violation of the inviolability of the home. In comparison with Art. 139 of the Russian CC, this section offers a broader definition of the crime. It can be explained by the fact that Section 123 of the German CC "Violation of the inviolability of the home"<sup>8</sup> construes "home" not only as a dwelling, but also as business premises<sup>9</sup> or enclosed premises, or closed premises, designated for public services or transportation. Here lies the main distinctive feature pertaining to the violation of the inviolability of the home according to the German CC and its fundamental difference from the criminal offence described in Art. 139 of the Russian CC.

## **Special features of legally protected interest (*Rechtsgut*) in Section 123 of the German Criminal Code**

In German criminal law writing there is no uniformity regarding the content of the legally protected interest (*Rechtsgut*), which is infringed by this criminal action. Such diversity of opinion is rooted in the classification of this legally protected interest as an individual, not public interest, despite the location of Section 123 in the chapter describing criminal offences against public order (Special part of the German CC). This is the point of view held by the majority of German legal scholars and supported by a long history of judicial decisions.<sup>10</sup> Their views can be summarized, as follows: a legally protected interest in this case is the right to peace (privacy) in the home (*Hausrecht*)<sup>11</sup>, which is substantially different from the civil law concept of ownership. This interest can be described as "a special individual legal interest"<sup>12</sup>. It means, among other things, that a person has a discretionary right to decide who can be present and who cannot be present in a certain area. Another line of reasoning maintains that this norm protects a limited private space of a particular person.<sup>13</sup> Traditionally, this legal interest (*Hausrecht*) "is embodied in a personified limited sphere of freedom of a certain person".<sup>14</sup> Therefore, in the view of

some German legal scholars, this criminal offence is a special delict against personal freedom and infringes on a special individual personified legal interest.

The opponents of the perspective discussed above are the minority. They argue that a legal interest protected by this norm cannot be defined as a special individual legal interest.<sup>15</sup> In their opinion, Section 123 embraces not only dwellings but also business premises, and the classification of these as a personal area appears questionable. However, in my view, the first definition of the legally protected interest is more valid, since any of the premises, specified in Section 123, should be, to some extent, protected from unauthorized access, not desirable by a legally authorized person. The access procedure to the premises, specified in the norm, can obviously vary. However, this norm provides different protection to a dwelling and to business premises. When applied to a dwelling, it protects a private, family life of a man, the access to which can be granted only by this person. Business premises (for example, a commercial facility) also need protection against unauthorized access – in particular, businesses need to protect commercial secrets, production-related features, as well as their production or working areas.

To sum up, both Russian CC and German CC norms on the violation of the inviolability of the home protect rights and interests of a person and provide for inviolability of his dwelling.<sup>16</sup> A more consistent approach (in comparison with Special part of the German CC) is manifested in the Russian CC, as this norm is contained in Part VII “Crimes against a person”.

Section 123 of the German CC contains a long descriptive disposition: “*Whoever unlawfully intrudes into the dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation, or whoever remains therein without authorization and does not leave when requested to do so by the authorized person...*”

German legislators, as mentioned above, offer quite a broad definition of the inviolability of the home. The protection, according to this norm, is guaranteed not only to a dwelling as such, but also to business premises or enclosed premises, or closed premises, designated for public services or transportation. Here lies one of the main differences of the norm, according to the German CC, from the criminal offence described in Art. 139 of the Russian CC. Let’s take a closer look at these terms.

“Dwelling” is construed as a generic notion. It comprises all residential premises of a person or a group of people, a family, as a rule, or those used for the same purposes.<sup>17</sup> This notion embraces hotel rooms, boats, trailers and camping tents, i.e. “dwellings”, designated for temporary residence. However, “dwelling” does not include the means of transport.<sup>18</sup> This can be justly accounted for by the difference of purpose – the means of transport are not designated for residence. Russian legal scholars hold the same view.

The opinion of German courts, arguing that the term ‘dwelling’ does not embrace the premises used only for temporary night lodging, appears to be quite valid.<sup>19</sup>

In some cases German courts also view auxiliary premises (e.g. backrooms, halls, stairwells, sanitary premises, etc.) as “dwellings”.<sup>20</sup> Furthermore, if they are not a part of a person’s private area, still, in certain cases they may be classified as enclosed premises. The term ‘enclosed premises’ also comprises newly erected houses and tenantless residential buildings. Specific features of the German norm on the inviolability of the home, in my opinion, fully support such a perspective.

To conclude, in the framework of the violation of the inviolability of the home in the Russian and German Criminal codes the notion of ‘dwelling’ is interpreted similarly. However, this is the only common ground shared by these codes, since German legislators have a broader view regarding the violation of the inviolability of the home: this crime implies not only intrusion into a dwelling, but also into business premises or other enclosed property of another, or into closed premises designated for public service or transportation. Let us proceed with analysis of these notions.

The notion “business premises” covers detached premises, used temporarily or permanently mostly for business, research, artistic or other similar activities.<sup>21</sup> Some German legislators argue that the term can also embrace movable structures, for example, trailers, travelling circus, etc.<sup>22</sup> In my view, such an interpretation is perfectly justified.

The following court cases illustrate the viewpoint described above.

The Supreme court of the land (*Oberlandesgericht*) held in Cologne on July 4, 1982 stated, that the premises, relating to foreign missions and consulates on the German territory, and if they are not dwellings, are classified as business premises (*Geschäftsräume*), according to Section 123 of the German CC.

According to the criminal case files, at 9 a.m. on August 3, 1981 the enclosed territory of the Iranian Embassy in B. was broken into by members of Muslim student society. This action was a part of the protests against persecution of religious and political dissenters, in which the Khomeini government was, in their opinion, involved. Some protesters took control over and disabled the security system of the consulate. Placards, condemning Khomeini’s actions, were brought into the Embassy. The staff of the embassy demanded that the protesters leave the consulate and the area immediately. The commanding police officer also demanded to leave the enclosed territory. The protesters did not comply with the police orders and were forcibly removed from the area. All the protesters, detained during the removal, were prosecuted. They were found guilty of the violation of the inviolability of the home and sentenced, according to Section 123 of the German CC, to a fine of 30 daily wages, 10 DM each. The appellate instance upheld this decision.

The defendants were absolutely rightly convicted according to the German CC, as Section 3 of the CC provides that the German criminal law is applicable to all actions committed on the German territory. Foreign embassies are a part of the German territory.<sup>23</sup>

Another case illustrating the broad interpretation of the terms “business premises” and “enclosed premises” took place in Oldenburg on January 21, 1985. The court of Oldenburg convicted C. of the violation of the inviolability of the home. He intruded into the gallery – an accessory building of a mall (a trade fair facility), which was not used as a trading space.<sup>24</sup>

The term “enclosed premises” is construed to include any premises, owned by somebody and which are somehow protected against unauthorized access (e.g. by a fence or a wall). The extent to which the premises should be protected against an unauthorized access is arguable. In my opinion, to assess it correctly, it should be assumed that putting up a prohibiting notice (e.g. “No access”) is insufficient for applying the norm to the perpetrator’s actions. It is obvious that such notices cannot guarantee a complete protection against unauthorized access.

German courts also maintain that even a vacant building, regardless of its intended use, in some cases may be protected according to Section 123 of the German CC.<sup>25</sup> It is possible, if the legally authorized person retains the right to prevent unauthorized access. However, the Criminal Law Senate of the Supreme Court of

the land in Stuttgart held that a condemned building with broken doors and windows is not included in the term “enclosed premises”. This reasoning was behind the sentence (October 29, 1982) imposed on K, who was acquitted after intruding into a collapsed detached building with broken doors and windows, meant for demolition.<sup>26</sup> The Court ruled that the building, formerly used as a dwelling or business premises, but currently vacant and designated for demolition, is not covered by the protection of Section 123 of the German CC.

One more concept, peculiar to the German norm on the inviolability of the home and absent from Art. 139 of the Russian CC, is the notion of “enclosed premises, designated for public services or transportation”. It embraces such premises that are naturally or constructively protected from public access. Some German legal writers argue that enclosed premises can be located in a building.<sup>27</sup> This perspective appears quite valid. The term ‘premises designated for public services’ covers, for example, schools, government offices, courts – i.e., those, in which the activities, based on public law, are conducted. The premises designated for public transportation include, first and foremost, those used by public transport and are expressly assigned for this purpose. They cover both business premises and means of public transport. German courts justly regard as such the stations, waiting areas, trams, buses, etc.

A further analysis of Section 123 of the German CC reveals that the disposition of the norm contains two different courses of action (in German criminal law terminology – the first and the second alternatives):

- 1) intrusion into the premises mentioned above; or
- 2) remaining therein without authorization and not leaving when requested to do so by the authorized person.

The first alternative of Section 123 of the German CC. Intrusion takes place when the perpetrator steps inside the premises mentioned above against the will of the authorized person. Here the German norm is similar to Art. 139 of the Russian CC. German legal scholars hold that for an intrusion into a flat to happen, stepping inside is sufficient. Intrusion implies not only bringing inside the perpetrator’s body, but also its part (e.g., putting the perpetrator’s foot in the doorway to prevent closing of the door).

On the whole, German criminal legislators and courts provide a much broader interpretation of the “intrusion” feature, as compared to the Russian criminal law. According to the German perspective, intrusion does not necessarily mean a physical intrusion. The “intrusion” feature may be discovered even within the psychological impact on the victim (e.g. a loud voice, disturbing noise, ringing the doorbell or phone calls at night). A debatable issue relating to the intrusion feature is its presence in the case of throwing objects into the premises, for example, when someone throws trash into a neighbour’s window. Russian legal scholars might find such an interpretation of the intrusion feature rather controversial.

German criminal law writers and courts reasonably maintain that the intrusion feature appears only if the intrusion is carried out against the victim’s will. The will must be expressed clearly and unambiguously (orally or implied by actions). However, it is arguable whether intrusion takes place if the perpetrator intrudes into the premises regardless, not against, the consent of a legally authorized person. The controversy is rooted in the fact that the procedure for the access to different types of premises, namely, a dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation (which

in German criminal law writing are termed objects of crime, “*Tatobjekt*”), varies. In my opinion, we can decisively state that intrusion, both against and regardless of an authorised person’s will, amounts to the crime in question. An example of this is the situation, when the authorized person does not have an opportunity to express his will. Article 139 of the Russian CC, to reiterate, refers only to intrusion in the home against the person’s will. Consequently, Russian legislators give an unequivocal answer to the question stated above.

A court case can further clarify this issue. On March 6, 2003, 11.25 p.m., an employee of the “V-d” hotel discovered an unauthorized man in a restaurant’s backroom. He was detained and brought to Passau police station. There he was identified as X., formerly employed by the hotel. Later on, in his room, the police found X’s belongings: a rucksack, a jacket and a bunch of keys to some premises of the “V-d” hotel. The investigation established that X., who was unemployed, had broken into the “V-d” hotel premises and then decided to commit a theft from the restaurant’s backroom. A complaint for criminal prosecution of X. was filed by the restaurant’s manager.<sup>28</sup>

German legal scholars also debate the following issue: if the perpetrator enters the dwelling with the consent of the authorised person (for example, as a guest), and in the dwelling he assumes the intent to commit a theft, do his actions amount to the intrusion into a dwelling?<sup>29</sup> I suppose, they do not. If, however, later on the owner finds out the perpetrator’s intent and demands that the perpetrator should leave the dwelling, the perpetrator’s actions amount to the violation of the inviolability of the home. This situation is described in the first paragraph of the Second alternative, Section 123 of the German CC: “*whoever remains in the said premises without authorization and does not leave when requested to do so by the authorized person...*”

It is noteworthy that the “illegality” feature does not define a concrete crime, but indicates illegality of the conduct in its entirety.

**The second alternative of Section 123 of the German CC.** The feature of “*remaining in the said premises without authorization and not leaving when requested to do so by the authorized person*”, appears when the perpetrator will not leave the said premises. Therefore, it is omission. The notion of “commission by omission” is described in Section 13 of the German CC: “*Whoever fails to avert a result, which is an element of a penal norm, shall only be punishable under this law, if he is legally responsible for the fact that the result does not occur, and if the omission is equivalent to the realization of the statutory elements of the crime through action.*”<sup>30</sup> It should be pointed out that the experience of German legislators relating to this issue was used in the Russian CC, when constructing the norms on recklessness.

The alternative in question is a distinguishing feature of the violation of the inviolability of the home, according to the German CC, as compared to the Russian CC, Art. 139. I am favouring the introduction of the relevant changes to Art. 139 of the Russian CC. The following German court cases may serve to clarify my point of view.

Considering the abovementioned feature of the crime the German courts assume that the request of the authorized person to leave must be clearly and unequivocally expressed in the oral form, at least once or implied in his actions.<sup>31</sup>

The request must come from the person possessing the legal interest, protected by the norm – the right to the inviolability of the home (*Hausrechtsinhaber*), or from a person not possessing the right, but delegated certain rights for exercising the right. In the norm under review this person is defined as “authorised person” (*Berechtigter*). In the framework of the first and the second alternatives of Section 123 of the German CC, this notion covers a person possessing the right to the inviolability



of the home (*Hausrechtsinhaber*), or his lawful representative, i.e. a person who has either by law or by means of a transaction, been delegated the power to exercise this right. In the framework of the second alternative, the scope of authorized persons, i.e. those, who can express the request to leave the premises, is broader. It embraces not only a person possessing the right to the inviolability of the home (*Hausrechtsinhaber*) and his lawful representative, but also persons charged with guarding the inviolability of the home (the so-called "*Hausrechtsschutzpersonen*"), for example, in the absence of the owners.<sup>32</sup> According to German legal writing, it is debatable, though, that all members of the right holder's (*Hausrechtsinhaber*) family always possess this right. In this respect German legal scholars are positive about the following: in the framework of the second alternative, family members have the right to demand leaving the premises only if they were delegated this right by the holder (*Hausrechtsinhaber*). It is problematic to establish the fact of delegating the right, and in each case the party must argue their case in court.

In this respect, a court case can further clarify the matter. The Second Criminal Law Senate of Cologne in its Sentence of December 14, 1966, ruled that the right to the inviolability of the home "*may be protected by a minor<sup>33</sup> family member, even if he/she does not possess clear powers to do so*". The details of the case are as follows: in February, 9, 1965, the perpetrator, who was advertising for newspapers and offering to buy annual subscriptions, entered the residential premises, where a girl of 15, Gabriela S., was sick in bed. The girl's mother, who was renting the apartment, was absent. The defendant's conduct disturbed the girl, causing discomfort. The girl repeatedly requested the defendant to leave the apartment, but he did not comply with the request. The court found him guilty of the violation of the inviolability of the home (Section 123, paragraph 1, Alternative 2).<sup>34</sup>

The subjective aspect of the crime (*subjektiver Tatbestand*) implies the presence of intent, even if it is indirect. The perpetrator of the crime must know, that he is intruding into the premises, which is the object of the crime (*Tatobjekt*), or remains there despite the request of the authorized person to leave. Here lies a certain similarity between the subjective aspects of the crimes described in Section 123 of the German CC and Article 139 of the Russian CC.

There was an interesting court case based on the following circumstances: a person entered a hotel room, which he mistakenly believed to be his, and proceeded to take a bath. The authorized users of the room found him in the bathroom. The man was, certainly, not prosecuted according to the norm in question, since he was sincerely mistaken regarding illegality of his conduct. A mistake occurred.<sup>35</sup>

Paragraph 2 of Section 123 contains a procedural instruction, that the crime in question must be prosecuted, as mentioned above, only if the victim files a complaint. Such a norm construction is characteristic of the Special part of the German CC.

Section 124 is the second norm in the Special part of the German CC providing for the criminal liability for the violation of the inviolability of the home. It describes a serious violation of the inviolability of the home. This norm sets down a separate criminal offence, not an aggravated version of Section 123, as it might appear to a Russian lawyer, who could be misled by the name of the norm.

Section 124 provides that: "*When a crowd of people publicly gathers with intent to join forces to commit acts of violence against persons or things and unlawfully intrudes into the dwelling, business premises, or other enclosed property of another, or into closed premises designated for public service, then anyone who takes part in these acts shall be punished with imprisonment for not more than two years or a fine.*"

The disposition of this norm contains the features of two criminal offences and is a specific blend of these crimes: violation of the inviolability of the home (§ 123) and violation of public order, accompanied by violent actions of a group of people (§ 125).

The legal interest protected by this norm along with the right to the inviolability of the home, is public order. Therefore, the location of the crime in Chapter 7 of the Special part of the German CC appears justified.

The disposition of the serious violation of the inviolability of the home contains the same alternative courses of actions as in § 123, with the only difference that they must be committed by a crowd of people jointly. The notion of “crowd of people” is judgmental. German courts establish the content of the notion with the regard to the circumstances of each case. As a rule, a group of 15–20 people<sup>36</sup> is the standard, however, in some circumstances, their number may be lower.<sup>37</sup> In estimating this feature, German legal writing cites the Decision of the 4<sup>th</sup> criminal law Senate of August 29, 1985, which rules what must be considered a crowd of people.

The decision was made in the case about the violation of public order, accompanied by violent actions of a crowd of people. It is not necessarily an innumerable crowd of people, but such a group of people, whose number cannot be determined at once. The same view is maintained in the German legal writing.<sup>38</sup>

Thus, for example, the Sentence of the Federal court of May 31, 1994, points out that, for a group of people to be deemed a “crowd of people”, it must be so large that, if one or two people join or leave it, it will be unnoticeable. Another essential feature of a “crowd” is its ability to be perceived as a single entity: they must be located in space in such a manner, that other people will think so.<sup>39</sup>

German courts hold that the “public” manner of such a gathering appears, when already gathered people can be joined by any crowd of people.

Another mandatory feature of the crime is the purpose – a crowd of people gathers for a reason – with the intent to commit violent actions against people or property.<sup>40</sup>

This norm is also peculiar to the German CC and absent from the Russian CC.

## Summary

In this article we have conducted a comparative legal analysis of the norms of the criminal code of the Russian Federation and the criminal code of Germany, which establish criminal liability for violation of such a fundamental right of a man and a citizen as the inviolability of home.

The analysis reveals both general similar approaches and differences in solving relevant problems. Such general approaches should include the fact that the legislators of all countries strive, using various branches of the law, to protect the man’s housing rights as an important part of his private life from unlawful attacks on inviolability of home: no one has the right to enter private home against the will of its inhabitants, with the exception of cases established by law or on the basis of a judicial decision.

The main difference is that the German legislators, as we have repeatedly noted above, rather broadly interpret the violation of home privacy. Under this provision of criminal law not only the housing itself shall be protected, but also production premises and premises protected from the access of strangers, as well as the closed spaces for public services or transport. This is one of the main differences characterising the composition of the act of violation of the inviolability of home as stipulated

in the Criminal Code of the Federal Republic of Germany from the Art. 139 of the Criminal Code of the Russian Federation.

The analysis of the both countries' norms leads to the conclusion that the general approach of the legislators both in Germany and Russia when criminalizing socially dangerous behaviour related to the violation of the inviolability of home, has resulted in the enactment in the relevant structures of such a criminogenic characteristic as the nature of the act itself, expressed in violation of absolute legal prohibitions.

To conclude the present research paper, it should be pointed out that there is a similarity of perspectives in the Russian and German legislation, providing for the protection of the fundamental right of a man and citizen – inviolability of the home. However, in spite of this similarity, the criminal codes of these two countries contain considerably different norms, setting down criminal liability for the infringement of this right. The analysis of the specific features of these norms was provided in the article.

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- <sup>3</sup> For a detailed analysis, see A. V. *Serebrennikova.* Criminal liability for the violation of the inviolability of the home: comparative study of the Russian and German CC, Moscow, 2003.
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- <sup>6</sup> Commentary to the Russian Criminal Code. Ed. by V. M. Lebedev. The 4<sup>th</sup> edition, Moscow, 2008, p. 317.
- <sup>7</sup> According to the crime statistics, in 2011 6 363 865 criminal offences were registered in Germany, including 48 778 violations of the inviolability of the home (§123) and 360 serious violations of the inviolability of the home (§124).
- <sup>8</sup> The translation of the notion “*Hausfriedensbruch*” as violation of the inviolability of the home is the closest possible equivalent of the Russian term. The literal translation should read as “violation of the inviolability of a premise (home)” in the broadest sense of the word. This meaning will be used in the further analysis of Section 123 of the German CC.  
Professor A. E. Zhalinsky justly believes that the term “*Hausfriedensbruch*” should be translated as “breach of the peace of the home”. // *Zhalinsky, A. E.* ‘Modern German Criminal Law’, Moscow, 2004.
- <sup>9</sup> The translation of the term “*Geschäftsräume*” as “business premises” is rather arbitrary. A more exact variant would read as “premises used for certain professional activities”, business premises, offices. The previously used term “commercial premises” gave a much narrower interpretation of the term. See German Criminal Code (in the Russian translation), Moscow, 2000.
- <sup>10</sup> See OLG Köln NJW 1982, 2740; OLG Hamm NJW 1982, 2740. These court decisions are quoted further.
- <sup>11</sup> According to Prof. A. E., this term should be translated as “domestic right”. “*It: 1) must be other’s for the encroaching person, vest its holder with powers, which determines legal capability to protect against other people the space this right covers; 2) may have various legal grounds; 3) extends to various objects*” //: *Zhalinsky, A. E.* ‘Modern German Criminal Law’, Moscow, 2004, p. 523.
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- <sup>15</sup> See *Schall, H.* Die Schutzfunktionen der Strafbestimmung gegen Hausfriedensbruch. Osnabrück, 1974. S. 90 ff.
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- <sup>23</sup> RGSt. 69, 55.
- <sup>24</sup> See NJW 1985, 1352.
- <sup>25</sup> OLG Hamm, NStZ 1982, 381.
- <sup>26</sup> OLG Stuttgart, NStZ 1983, 123. Regarding the court decision relating to this issue see also OLG Köln, NStZ 1982, 333; LG Münster, NStZ 1982, 202; LG Mönchengladbach, NStZ, 1982, 424.
- <sup>27</sup> See *Rudolphi, E., Horn, H.-J., Samson, E.* Op. cit. § 123. Rdn. 29.
- <sup>28</sup> From unpublished decisions of Passau court (Germany), 2003-2004. (Amtsgericht Passau).
- <sup>29</sup> See *Geppert, K.* Op. cit. S. 380-381.
- <sup>30</sup> German Criminal code, p. 15
- <sup>31</sup> RGSt. 5, 110.
- <sup>32</sup> See *Schönke, A., Schröder, H., Lenckner, T.* Strafgesetzbuch. Kommentar. München, 2001. Rdn. 29.
- <sup>33</sup> In this case the term “minor” is used to translate “*minderjähriger*”.
- <sup>34</sup> See BGHSt 21, 224.
- <sup>35</sup> Regarding the mistake, see §§ 16-17 of the German CC.
- <sup>36</sup> BGHSt 33, 308.
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