American University of Central Asia

International and Business Law Department

Senior Thesis

"Implementation of the Norms prohibiting Grave Breaches of the Geneva Conventions 1949 into Kyrgyz Criminal Law"

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CONTENT

Abstract

The Geneva Conventions of 1949 were adopted over 60 years ago. Nowadays, they are universally ratified by 195 states. 20 years ago have passed since Kyrgyz Republic has joined to the Geneva Conventions. The Geneva Conventions distinguish two types of breaches of the Conventions. The most serious violations are qualified as grave breaches. Such grave breaches are criminally punished. Meanwhile, all Four Conventions oblige state parties to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of those grave breaches.

For today, Kyrgyz Penal Law does not contain norms prohibiting such grave breaches. There is only "Crimes against Peace and Humanity" Section, which consists of several crimes (Genocide (A. 373), Mercenary (375), and Attack on persons or agencies who possess international protection (A. 376)) in Criminal Code of the Kyrgyz Republic. The thesis paper is devoted to the issue of the implementation norms prohibiting grave breaches into Kyrgyz criminal law, i.e. Criminal Code of Kyrgyz Republic.

Introduction

My thesis paper examines serious violations of Geneva Conventions, i.e. grave breaches. In my thesis paper, I define the stage of implementation of grave breaches regime in Kyrgyz criminal law. Thesis of my research work argues that norms prohibiting grave breaches have to be fully implemented into Kyrgyz Criminal Law. The Constitution of Kyrgyz Republic states that all ratified international treaties are applicable part of our domestic legislation.[1] Implementation of grave breaches regime is a primary obligation of our state, since Kyrgyz Republic is a state party of Geneva Conventions.

Initially this topic was interesting for me since the time I volunteered in the development Project of Anthology in International Law by International Law Department of AUCA. I was responsible for editing material of "International Humanitarian Law" and "International Human Rights" chapters. Then I took International Humanitarian Law course, where I studied the Geneva Conventions and the grave breaches. In this way, my interest was growing.

The research work consists of three chapters. First chapter describes the nature of the grave breaches regime and historical background. Second Chapter identifies the system of the grave breaches regime in Kyrgyz Republic. Meanwhile, third chapter analyzes national implementation stage of the grave breaches regime. Then, I provided my summary recommendations for Kyrgyz Republic to comply with obligations imposed on our state by 1949 Geneva Conventions in the scope of grave breaches.

[1] Konstituciya Kyrgyzskoi Respubliki, 27 June, 2010 [The Constitution of the Kyrgyz Republic], art. 12.

CHAPTER I: The Genesis of the Grave Breaches Regime

§ 1. The history of Grave Breaches before Geneva Conventions of 1949

The laws of conducting wars have been established since the earliest times. Criminal sanctions for violations of such laws of war date to codifications long ago. The idea of the grave breaches regime was that some offences were grave to justify codifications as the war crimes. The grave breaches regime emerged in 1949 as a consequence of great sufferings during Second World War.

There were initial predecessors to the grave breaches regime before it originally appeared in the Geneva Conventions of 1949. In this way, the Lieber Code of 1863 known as "Instructions for the Government of Armies of the United States in the Field" contained rules on how soldiers should conduct themselves during the war time (American Civil War).[2] The Code included references to criminal punishment, which influenced on the following treaties.

The main principles laid down in the Lieber Code were the principles of military necessity, justice, honor and humanity. According to provisions of the Code, taking of hostages was allowed, only as a pledge for the fulfillment of agreement by governments during the war (Article 54). Besides the killing of enemy combatants, it was accepted to kill persons whose destruction is incidentally unavoidable (Article 15). Although the Code provided weak protection of civilian population in wartime, it contained basic elements of the grave breaches. Thus, it was totally forbidden to make suffering for the sake of suffering or for revenge, wounding except in fight, use of torture to extort confession, use of poison (Article 16).

The penal sanctions were provided for violations of the Lieber Code's rules. It contained references to the death penalty or severe punishment for the gravity of the offence. Thereby, the Lieber Code emphasizes the punishment for violations of the laws of war and any unlawful acts

[2] Yvez Sandoz, "The History of the Grave Breaches Regime." *Journal of International Criminal Justice 7,* (Oxford University Press, 2009): 661.

committed against the enemies.[3]Lieber Code did not consider the risk that commanders might cover up prohibited acts committed by their soldiers. In 1870 Franco-Prussian War served as evidence that laws of war were constantly violated and did not work. In 1872, Gustave Moynier, president of the International Committee of the Red Cross (hereinafter ICRC) suggested to establish international criminal court. But such a proposal did not lead to further developments at that time.[4]

In 1874, The Brussels Conference took place. The purpose of this conference was to adopt "International Declaration concerning the Laws and Customs of War" on the model of the Lieber Code.[5] Unfortunately this declaration was not adopted, as states were not ready to admit its binding force. But during the conference, there was a proposal to standardize national legislation of each state to ensure punishment for the persons who violate the laws of war. Such idea was a bit closer to the term of the grave breaches, but was not exercised in declaration.[6]

Further in 1880, The Oxford Manual on the Laws of War on Land was adopted. It acknowledged that internal penal sanctions were necessary. In 1899 and 1907 The Hague Conferences were held, where two international treaties were negotiated and further adopted. Both conferences were mainly about the laws of war and war crimes. Article 3 of the Hague Convention 1907 provides that belligerent Party should be responsible for all acts committed by persons forming part of its forces.[7] It means that a state takes responsibility to stop and repress violations committed by members of its military forces.

In 1906, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field was adopted. It replaced the Geneva Convention of 1864. There are Articles 27 and 28 that stipulate the repression of violations. states has the responsibility to prevent misuse the emblem or name of the Red Cross or Geneva Cross in time of peace and war, and to

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[3] *Id*. at 662.
[4] *Id*. at 663.
[5] Project of an International Declaration concerning the Laws and Customs of War, 27 Aug. 1874. This text (along with those following) were found in D. Schindler and J. Toman, T*he Laws of Armed Conflict: A collection of Conventions, Resolutions and other Documents* (Martinus Nijhoff, 2004), 21-28.
[6] *Id.* at 21.
[7] Convention Respecting the Laws and Customs of War on Land, 18 Oct. 1907, in Schindler and Toman, 62.

repress in wartime those violations of the Convention considered to be most grave such as individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals.[8]

Then, the development of new international norms has been set since the First World War. The events of the war brought great human losses for many states. Not only soldiers, but also authorities were violating the laws of war. The lack of internal punishments led to raise the issue strengthening of the penal sanctions.

The First World War turned into a total war. Bombing, attacks on civilians, aggression, rape, executions, and other cruel crimes left almost no sanctuary of person safe from assault. The idea to punish war criminals appeared by the first months of the war. On 2 December, 1914 France organized commission in order to investigate crimes committed by the enemies in violation of the law of nations.[9]

The violence against civilian population during First World War increased the determination of the general population in order to punish for such crimes. There were long discussions for punishment of atrocities. Professor Louis Renault, a French delegate to the Hague Conferences of 1899 and 1907, argued that 'surrender of offenders through a peace treaty might fail', doubting 'that any government even if conquered, could consent to such a clause'.[10] Others held the opinion that war had never been part of the peace settlement.[11]

By the end of the war, in 1919, the Paris Peace Conference took place. The Allied victors of the First World War, as a result of the war created the League of Nations. It was an intergovernmental organization of permanent peace, not the punishment of individuals for past

[8] Sandoz, *supra* note 2, at 665.
[9] *Id.* at 665.
[10] J. F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (West Port and London: Greenwood Press, 1982), 15-16.
[11] *Id.* at 4.

violations.[12] Then, there was a Commission of experts, known as the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties during at the conference.[13] It dealt with the issue for the prosecution of the war crimes during the First World War. The Commission needed to set up the breaches of the laws and customs of war committed by the German Empire and their Allies on land, on sea and in the air.[14] Identifying the relevant offences was not the theoretical discussion. On the contrary, the main objective of the Commission was to list all the crimes committed by the forces of Germans and then to create a catalogue of violations to the laws and customs of war.[15]

On 29 March 1919, the Commission submitted its final report. It was not a great concern for the Commission, whether the offences were international or not. The commission recommended setting up a special body for more exhaustive study of preparing a complete list of charges.[16] The commission had established extensive list of violations of the laws and customs of war that was the basis for criminal punishment.[17] There were already some crimes laid in the future grave breaches, such as: murders, torture, wanton devastation and destruction of property etc.

However, the numerous crimes committed by the Allies were not taken into consideration. At the same time, the Commission concluded that the war was carried on by the governments of Germany and Austria-Hungary together with Bulgaria and Turkey.[18] Moreover, the Commission stated that all persons belonging to enemy countries, who have been guilty of offences against the laws and customs of war are liable for criminal prosecution.[19] This means that the Commission made selective focus on only one side of the offending, not considering the second.

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[12] *Id.* at 37.
[13] Report of Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to Determine War Guilt, *American Journal of International Law 14* (1920), 95.
[14] *Id.* at 115.
[15] Sandoz, *supra* note 2, at 667.
[16] *Id.* at 667.
[17] *Id.* at 667.
[18] Report, *supra* note 13, 116
[19] *Id.* at 117.

Regarding the issue of jurisdiction, the Commission proposed to try war criminals in national courts, with the exception of four categories which should be tried before an ad hoc tribunal.[20]

Meanwhile, the US delegation had a dissenting opinion on the basis of the Commission's two reports. The US representatives contested the idea of the passive responsibility. They also diverged with the point of the punishment of heads of enemy states. The US delegation claimed that the laws and principle of humanity differ with the individual, which, if for no other reason, should exclude them from consideration in a court of justice.[21]

Furthermore, the US representatives disagreed with the concept of the crime against humanity in the Commission's report. The US delegation stated that the notion was not sufficiently established to ensure penal sanctions. Thereafter, the US President Woodrow Wilson three relevant articles of the treaty which further were adopted and became Articles 228, 229 and 230 of the Versailles Treaty (the peace treaty at the end of the First World War). [22]

For the first time an international peace treaty set up the principle in international law that war crimes punishment was a clear conclusion of peace and that the termination of war did not bring a general amnesty.[23] The idea of an international criminal court and code continued to influence the search for means to curb international violence.[24]

The next 20 years the humanity was living in the stability. Further, on 1 September 1939, Germany invaded Poland. This is how the Second World War began. The large-scale atrocities were committed during the Second World War, which lasted to 1945. Massive violations raised the question of international repression of war crimes.[25] Many ideas were expressed. The first proposal was conducting summary executions, similar to that which arose in the times after the First World

[20] Sandoz, *supra* note 2, at 670.
[21] Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission of Responsibility, *American Journal of International Law 14* (1920), 134.
[22] Sandoz, *supra* note 2, at 670.
[23] Willis, *supra* note 10, at 85-86
[24] *Id.* at 113.
[25] Sandoz, *supra* note 2, at 671.

War.[26] Some politicians proposed to punish the war criminals by killing them, others were for initiating prosecutions.

Finally, the idea of judicial procedure prevailed. The Allies decided to establish an international penal tribunal. Thereby Nuremberg Tribunal emerged. It was achieved by the London International Assembly, an institution under the auspices of the League of Nations.[27]

Then, in 1943, the United Nations War Crimes Commission was created in order to avoid previous mistakes of the Allies during the First World War. The Commission established three Committees. Each Committee had its tasks. The third one was placed in charge of dealing with the war crimes.[28] The list of war crimes specified by the Commission of Responsibility (in 1919) was not the result of thorough investigation. However this list of war crimes was used as the basis for their work.[29]

Generally, the Commission considered the issues whether aggression was a war crime and if war crime could be committed against Allies's citizens, or ones' own citizens.[30] Moreover the issue of crimes against humanity was again raised. This time the US delegates changed their minds considering crime against humanity for penal sanction.[31] There was an option either to extend the definition of war crimes or to introduce crime against humanity. Consequently, the choice stopped on the latter option. Thus, Article 6 of the Statute of the Nuremberg Tribunal included crimes against peace, crimes against humanity and war crimes.[32] Henceforth, Nuremberg Tribunal had an authority to try offenders for committing such crimes.

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[26] *Id.* at 671.
[27] History of the United Nations War Crimes Commission and the Development of the Law of War (compiled by the UN War Crimes Commission, 1948), 99
[28] Sandoz, *supra* note 2, at 672.
[29] *Id.* at 672.
[30] *Id.* at 672.
[31] *Id.* at 673.
[32] Statute of the Nuremberg Tribunal, art. 6, 8 Aug. 1945,

War crimes listed in Article 6 are more concise than the war crimes established by the Commission of Responsibility in 1919. But still there is no big difference. In this way the development of war crimes led to development of the grave breaches.

§ 2. Future developments of Grave Breaches

In 1949, after the adoption of the United Nations Charter, states decided to revise the laws of war. Interest in the laws of war was raised from doubt that the purpose of UN Charter's in preventing wars could be warranted in the absence of central military force.[33] Thereby, ICRC made a draft of new body of International Humanitarian Law (hereinafter IHL) on the basis of experience of the Second World War. Then the Swiss Government submitted draft to a diplomatic conference, where four conventions were adopted.[34] Hereby four Geneva Conventions emerged in 1949.

Not all violations of Geneva Conventions are treated equally. The Geneva Conventions identify two types of the convention's breaches. The most serious crimes are qualified as the grave breaches. Such grave breaches are exhaustively listed in each of the conventions. The others are not precisely identified. The grave breaches should be criminally punished. However, state parties are obliged to provide the non-grave breaches to be stopped. Albeit, repression is one of the ways to stop the non-grave breaches. Hence, it is vital to differentiate violations of the Geneva Conventions which ensure criminal punishment from those that a state is required to end by other mechanisms.[35]

A special Committee responsible for consideration of penal sanctions reported during the Diplomatic Conference in 1949 that taking into account unwillingness of the states to include all the breaches of the Conventions in penal legislation, the Committee limited the obligation to enact the grave breaches, so that no legislator would object to include the grave breaches in the penal code. In such terms, the state parties were free to take measures for the repression of non-grave breaches.[36]

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[33] Sandoz, *supra* note 2, at 673.
[34] *Id.* at 673.
[35] *Id.* at 674.
[36] Final Record of the Diplomatic Conference of Geneva of 1949, *Section B, Fourth report drawn up by the Special Committee of the Joint Committee* (Report on penal sanctions in case of violations of the Conventions), 12 July 1949.

The term war crime was suggested to be used but refused with the reason that it should be reserved for the violations of the Hague Conventions. [37] So that grave breaches maintain a separate approach. But at the same time the idea of grave breaches is inherent to war crimes system. Notions of complicity, self-defence, attempts, duress were not included into Conventions for the reason that judges would apply such issues in national laws.[38]

The term universal jurisdiction was applied for all parties of Geneva Conventions. According to the commentary to the Geneva Conventions, the obligation to enact penal legislation implies a duty to fix the nature and duration of the punishment for each offence, on the basis of the principle of making the punishment fit the crime.[39] Such kind of the obligation meant that this legislation involved universal jurisdiction for the grave breaches. But in practice, most of the states failed to fulfill obligation to enact legislation necessary to provide penal sanctions.

The introduction of the Article 3 common to all four Geneva Conventions of 1949 on non-international armed conflicts became a new feature of the Geneva Conventions. This innovation was congruent to the adoption of the Universal Declaration of Human Rights in 1948.[40] The adoption of the 3 article was a great step forward. However, the rules contained in the article had a general nature. So that the obligation to punish grave breaches of the Conventions and application of universal jurisdiction do not concern violations committed in internal armed conflicts.[41] The common Articles 50, 51, 130, 147 which states that grave breaches have to be committed against persons or property protected by the Convention are those defined by the 1949 Geneva Conventions as applicable to international armed conflicts.

Eventually, the states felt that the rules of the IHL should more complete and more adapted to modern conflicts. As a result, on 8 June 1977, Additional Protocol I and II were adopted. Additional

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[37] *Id.*
[38] Sandoz, *supra* note 2, at 675.
[39] J. de Preux, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. III, ed. by J.S. Pictet (Geneva: ICRC, 1960), 622.
[40] Sandoz, *supra* note 2, at 675.
[41] *Id.* at 675.

Protocol I compliments the 1949 Geneva Conventions. The Protocol adds new grave breaches to the pre-existing offences. Namely Articles 11 and 85 of the Protocol specify numerous grave breaches. Most of listed grave breaches are violations of Hague Law provisions which had not been included in 1949 Geneva Conventions. Moreover violations of provisions of the 1899 and 1907 Regulations respecting the laws and customs of war on land were confirmed as war crimes, many of which were included in the Article 6 of the Nuremberg Statute.[42]

According to the Article 85 (5), the grave breaches of Geneva Conventions and Additional Protocol I are classified as war crimes. Though earlier it was refused to use "war crimes" term for grave breaches because it would make confusion between IHL and criminal law. However, it is essential for international criminal law to have full list of violations named as war crimes. It is still necessary to keep in mind that some violations of international customary law which are not included in these treaties are considered as war crimes.

Diplomatic Conference, held in 1974-1977 could not overcome the recognition of the war crimes in non-international armed conflicts.[43] States were not ready to exercise universal jurisdiction for the punishment of war crimes committed in non-international armed conflicts.

What concerns the crimes against humanity, it was accepted as international crime. The difference between crimes against humanity and war crimes is that crimes against humanity have to be widespread and systematic attack against civilian population. Crimes against humanity are covered crimes committed by a state against its nationals. For some reasons such type of crimes were not included in Additional Protocols.

Already in 1995, serious violations of IHL were considered as war crimes committed either in international or non-international armed conflicts.[44] This innovation can be related to the establishment of the ad hoc international tribunals. Pursuant to the Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia, the tribunal had the power to prosecute

[42] Sandoz, *supra* note 2, at 676.
[43] *Id.* at 676.
[44] International Law Commission of the United Nations, art. 20(f),U.N. Doc. A/51/10 (1996).

persons violating the laws and customs of war. Moreover, the Article 4 of the Statute of the International Criminal for Rwanda gives the jurisdiction for violations of Additional Protocol II and common Article 3 of the 1949 Geneva Conventions.

Further, in 1998 The Rome Statute of the International Criminal Court was adopted during a diplomatic conference. It entered into force on 1 July 2002.[45] The Statute includes broad definition of war crimes.

Under Article 8(2) war crimes include grave breaches of the 1949 Geneva Conventions and name those offences which are considered crimes against persons or property protected under those Geneva Conventions.[46] Article 8 (2) (b) defines as war crimes other acts which are serious violations of the law and customs of law applicable during international armed conflict. Lastly, Article 8 (2) (c), (d), (e) enumerates those acts which are in case of not-international armed conflict, serious violations of Article 3, common to the four 1949 Geneva Conventions, any of the following acts committed against persons who do not take any part in the hostilities.[47] Hence, grave breaches are segregated from other categories of war crimes in the Rome Statute.

The negotiators of the Rome Statute criminalized acts which had not been defined as war crimes in 1949 Geneva Conventions and Additional Protocol I.[48] The Rome Statute includes significant differences in contrast with the provisions of Additional Protocol I. Some war crimes according to Additional Protocol I are not considered as war crimes according to the Rome Statute. For example, Additional Protocol I defines the willful and unjustifiable delay in the repatriation of prisoners of war and civilians as Grave Breach, whereas Rome Statute does not consider this offence as a part of international customary law.

Some provisions specified in the Rome Statute develop the crimes of Geneva Conventions which had not been modified by Additional Protocol I. So, Article 8 (2) (b) (xii) of the Rome Statute

[45] United Nations Treaty Database entry regarding the Rome Statute of the International Criminal Court. March 10, 2010.
[46] Rome Statute of the International Court of Justice art. 8(2), July 17, 1998, 37 I.L.M. 999, 2187 U.N.T.S 90.
[47] ICC Rome Statute, *supra* note 46, at art. 8(2)(c), (d) and (e).
[48] Sandoz, *supra* note 2, at 679.

identifies destroying or seizing the enemy's property as a war crime. Article 147 of the fourth Geneva Convention considers it as a grave breach. But it is limited to extensive destructions and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In so doing, the Rome Statute determines the destruction or seizure of enemy property as a war crime unless such destruction or seizure is imperatively demanded by the necessities of war.

The Rome Statute contains even those crimes which are not mentioned in the Geneva Conventions and Additional Protocol I. For example, Article 8 (2) (b) (xxiv) defines it as a war crime to declare abolished. Suspended or inadmissible in a court of law the rights and actions of the nationals of a hostile party. Such provision is taken from Article 23 (h) of the Hague Regulations in 1907.[49]

While Geneva Conventions generally mentions a term "inhumane treatment" in common Articles 50, 51, 130, 147, the Article 8 (2) (b) (xxi), (xxii) of the Rome Statute clarifies the meaning of inhumane treatment as outrages upon personal dignity in particular humiliating and degrading treatment, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization. [50]

In Article 8 (2) (b) (xxiii), The Rome Statute even criminalizes as a war crime the fact of using civilian population as human shields, with or without their consent.[51] While provision of Article 8 (2) (b) (xxvi) of the Statute considers as a war crime conscripting or enlisting children under the age of 15 years into national armed forces or using them to participate in hostilities, this offence was accepted as violation in Article 77 of Additional Protocol I, but was not charged as a Grave Breach.[52] In this sense, the Rome Statute complemented the list of grave breaches and clarified them in more detailed way. Finally, the inclusion of definition of the grave breaches is

[49] *Id.* at 680.
[50] ICC Rome Statute, *supra* note 46, at art. 8(2)(b), (xxi) and (xxii).
[51] ICC Rome Statute, *supra* note 46, at art. 8(2)(b), (xxiii).
[52] ICC Rome Statute, *supra* note 46, at art. 8(2)(b), (xxvi).

relevant because when the Rome Statute was negotiated, it was an agreement that definitions of the crimes in the Rome Statute were to reflect existing customary international law.[53]

§ 3. The definition of Grave Breaches under International Humanitarian Law

Today, grave breaches are serious violations of IHL which are defined in Four Geneva Conventions of 1949 and then the First Additional Protocol of 1977. The grave breaches are part of customary international law as Geneva Conventions are universally ratified and enjoy official state practice reflecting definition of the grave breaches.[54] As mentioned before, the Geneva Conventions were one of the most important results of the World War II concerning the protection of war victims and represented a progress towards the codification of the law of the armed conflicts. Grave breaches were further developed in 1977 by the extension of the list of offences in Additional Protocol I. Since 1949, the time when the Geneva Conventions were adopted, until 1977, the adoption of the Two Additional Protocols, the list of the serious violations increased significantly. Persons who commit the grave breaches bear individual criminal responsibility and principal of universal jurisdiction applies.

Initially the idea of including definition of "grave breaches" in the Geneva Conventions came from the experts called in by the ICRC in 1948. It seemed to be necessary to establish what these grave breaches were, in order to be able to warrant universal treatment in their repression. Violations of detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor disciplinary nature. So, there could be no question of providing for universal measures of repression in that case.[55]

According to the provisions of the Geneva Conventions and the First Additional Protocol, all states Parties are obliged to seek those persons who are suspected for committing grave breaches

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[53] Jean-Marie Henckaerts, "The Grave Breaches Regime as Customary International Law" *Journal of International Criminal Justice 7,* (Oxford University Press, 2009): 691.
[54] *Id.* at 690.
[55] Final Record of the Diplomatic Conference of Geneva of 1949, *Commentary to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Vol. I (Federal Political Department, Bern), art.50.

despite their nationality and citizenship either bring them for the trial to the local courts or to another state party. There is no direct provision stating that jurisdiction has to be asserted regardless the place of the crime. However, there is interpretation that for such violations of Conventions universal jurisdiction is provided. The Geneva Conventions require the state parties to try those persons who have committed the grave breaches to extradite them. In this way, the mandatory universal jurisdiction is provided. Furthermore states have the authority to institute legal proceedings against persons outside of their territory. Despite the nationality of alleged people or the place of the crime, the domestic criminal legislation of the states must enable them to try them in cases if extradition is not appropriate.

Each of the four Geneva Conventions, and the First Additional Protocol, has a separate definition of the grave breaches. These definitions are not entirely uniform as every convention reflects on a different subject.[56]

Under article 50 of the 1949 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (hereinafter First Geneva Convention) grave breaches are defined as wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. [57]

Article 51 of the 1949 Geneva Convention for the Amelioration for the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter Second Geneva Convention) repeats the same list of crimes.[58]

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[56] "International criminal law training materials for the Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law Services and Open Society Justice Initiative* (February 2009), 72.
[57] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 50, 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 287.
[58] Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

Article 130 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter Third Geneva Convention) adds to the list of the following serious violations: compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in it.[59]

Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter Fourth Geneva Convention) extends the list of grave breaches adding unlawful deportation or transfer and confinement of a protected person, the taking of hostages. [60]

Going further, First Additional Protocol of the 1977 relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) extends the list of serious violations in Articles 11 and 85. Primarily aim of Article 11 was to clarify and develop the protection of persons protected by the Conventions and the Protocol against medical procedures not indicated by their state of health, and particularly against unlawful medical experiments.[61] Removal of tissue or organs for transplantation is added to Article 11.

The Article 85 was modest: on the one hand, it made the provisions of the Conventions relating to the repression of breaches, supplemented by this Section, applicable to breaches of the Protocol; on the other hand, it designated any acts defined as grave breaches in the Conventions as grave breaches of the Protocol, if they were committed against the new categories of persons or objects protected under the Protocol. These two aims are the object of paragraphs 1 and 2 of the article adopted by the Conference.[62] So, article 85 extends serious violations to the following international crimes: making the civilian population or individual civilians the object of attack, launching an indiscriminate attack affecting the civilian population or civilian objects in the

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[59] Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
[60] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[61] Final Record of the Diplomatic Conference of Geneva of 1949, *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Vol. I (Federal Political Department, Bern), art.11.
[62] *Id.*

knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects, making non-defended localities and demilitarized zones the object of attack, making a person the object of an attack in the knowledge that he is hors de combat, the perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs.[63]

In addition to these violations, a serious violation should be considered in case of: the transfer by the occupying power of parts of its own civilian population into the territory it occupies, unjustifiable delay in the repatriation of prisoners of war or civilians, practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity depriving a person protected by the Conventions or by Additional Protocol I of the rights of fair and regular trial.[64]

Each state which has signed and ratified the Geneva Conventions is required to implement norms prohibiting grave breaches within its national criminal law. Such obligation to enact legislation necessary to provide effective penal sanctions in relation to grave breaches lies at the essence of any meaningful prosecution of the grave breaches of the Geneva Conventions. It is essential to know what is required for the state and to understand the different models of implementation. "Despite its importance, this specific obligation has led a somewhat shadowy existence, often neglected in state practice and academic research. It is against this background that the present contribution aims to bring into focus the scope and precise content of this somewhat ambiguously formulated obligation."[65]

As grave breaches the most serious war crimes, they should not be left unpunished, the 1949 Geneva Conventions contain an unusually worded obligation to either prosecute such a suspected war criminal or to hand him over to another country to be tried there. Fifty years on, less than one in

[63] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, arts. 11, 85, 8 June 1977, 1125 UNTS 3.
[64] Additional Protocol I, *supra* note 63, at art. 85.
[65] Knut Dörmann and Robin Geiβ, *The Implementation of Grave Breaches into Domestic Legal Orders*, (Oxford University Press, 2009), Abstract.

six of the parties to the Conventions have established universal jurisdiction over grave breaches which is necessary to prosecute a suspect if he was to be found in their country. An assessment and classification of the Conventions, national laws, prosecutions and practical obstacles.[66]

CHAPTER II: The Grave Breaches under International Humanitarian Law

§ 1. The Grave Breaches and National Criminal Law

The four Geneva Conventions of 1949 and their Additional Protocols of 1977 are the basic foundation of the IHL treaties. These conventions are now universally accepted and impose certain obligations on each state. Regarding the "grave breaches" all the state parties of the Geneva Conventions are obliged to adopt legislative actions or to amend permanent laws in order to prohibit and repress those crimes in armed conflict. In these circumstances, the state must eliminate such acts regardless such factors as nationality and the place where the crimes had occurred either outside or inside of the State's territory.

While some aspects of grave breaches passed into customary international law, development of procedural rules applicable to grave breaches seemed to be possible only through adoption of provisions of Geneva Conventions.[67] There are three procedural rules included in those provisions: the obligation to enact effective penal sanctions, the obligation to search and try or extradite and the obligation to establish universal jurisdiction over the grave breaches.

Hence, a great responsibility relies upon a state. It has to seek for people who committed the grave breaches and prosecute them. The state has to bring suspected people/criminals to the trial or extradite them to another state in order to prosecute them. Moreover, the state is responsible for providing judicial assistance in such conditions. It should oblige military commanders to prevent and take measures against those who commit the grave breaches. Then, states have to cooperate in the

[66] M.W. Mouton, *Diplomatic Conference of Geneva*, (16 July 1949).
[67] Jean-Marie Henckaerts, supra note 53, at 693.

term of proceedings related to the grave breaches.[68] Enactment of legal framework of the grave breaches for effective punishment is one of IHL's national implementation.

Usually there is no special procedure for the prosecution of criminals under international law in domestic law of the states. The prosecution procedure under the court's jurisdiction is generally either military or civilian (sometimes both).[69]

According to the Manual of the ICRC, a state as a legislator has some possible ways of translating serious violations of IHL into domestic criminal legislation.

The first option is to apply the existing military or ordinary national criminal law. The main idea of this option is that domestic criminal law provides sufficient punishment for serious violations of IHL and that it is already unnecessary to introduce new types of crimes. Since international law prevails over national law, the national legislation of a state should be in compliance with the international law. [70]

The next option is directed on providing for a general reference to the international law (IHL, customary law) on the serious violations of IHL at the national level.

Further, the third option includes provisions of specific crimes in domestic law of the state which appropriate to those listed in international treaties. This can be accomplished by transferring the same crimes from the international treaties into domestic law. In this way, the penalties for the crimes shall be applied, either individually or by category, or by separately redefining or rewriting in national law.

The fourth option is a combined approach with combined criminalization by generic provisions. The generic provision concerns those facts which are not specifically criminalized and

[68] International Committee of the Red Cross (ICRC), *The domestic implementation of IHL: A Manual*, 2nd ed. (Geneva, 2011), 39.
[69] *Id.* at 30.
[70] *Id.* at 31.

subjected to punishment. The conjunction of general and specific criminalization can be extended by application of the other provisions of common criminal law.[71]

The usage of crimes and general principles in legislation under the requirements of international criminal law, simplifies the work of legal practitioners in those states where such a legislative method can be applied. Nevertheless, the adoption of a special law which is separate from the criminal code does not always correspond into the structure of the criminal legislative system. It also contradicts the practice of some countries to concentrate provisions of criminal law as much possible into one body of law.

The option of including crimes into the legislation involves the problem of where punishment for the crimes should be placed in the domestic law – either in criminal law or military criminal law. Some states have placed the provisions in both bodies of law for the reason that persons responsible for violations of IHL can be either military persons or civilians. Other states have extended one of those bodies of law in such way that it covers military persons and civilians too. Legislative system of every state is different, especially the correlation between criminal law and military criminal law.

In common law countries, serious violations of IHL are sanctioned by national legislation where the treaty obligations are executed under the domestic legal system. Such type of legislation usually determines the material scope of the crimes as well as the jurisdiction to which they are subject.

The application of a statutory limitation on legal action to the crime can relate to the aspects of some legal proceedings. The statutory limitation can apply to the prosecution. Thus, if some time has passed since the violation has occurred, then no verdict could be reached. However, the limitation can apply only to the application of the sentence itself. The fact that some time has passed would mean the criminal sentence could not be applied. Preclusion of serious violations of IHL is essential, so that the point of the statutory limitations for such violations should be raised. "This is all

[71] *Id.* at 32.

the more important in view of the gravity of certain violations, characterized as war crimes, that run counter to the interests of the international community as a whole."[72]

§ 2. Relationship between Universal and National Jurisdiction in the Kyrgyz Republic

Every state exercises its own jurisdiction within its territory. Jurisdiction usually consists of legislative, adjudicative and enforcement elements. In other words, they are: the power to make law, the power to interpret or apply law and the power to enforce the law. Generally the power of enforcement jurisdiction is bounded to national territory.

However, in some circumstances, extraterritorial jurisdiction takes place. It means that State is entitled to legislate for certain events occurring outside its own territory. Extraterritorial jurisdiction has some fundamental principles brought from criminal law, such as: nationality principle, passive personality principle and protective principle. Those principles mean that a state has jurisdiction over acts which are committed by persons who are nationals of the forum state, committed against nationals of the forum state, or affects the safety and security of the state. All of these principles require some certain link between the state exercising jurisdiction and the committed act. Though, universality does not require such link while being another ground for asserting extraterritorial jurisdiction.[73]

Basically, universal jurisdiction means exercising the power and authority over crimes regardless of the place or the nationalities of the alleged persons or victims. The customary IHL provides the states right to assert universal jurisdiction for war crimes committed in both international and non-international armed conflicts. Universality applies to a series of crimes, usually to the international crimes.[74] States should prohibit them as a matter of international public policy.

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[72] Advisory service on International Humanitarian Law, *National Enforcement of International Humanitarian Law*, (January 2004), 8.
[73] ICRC, *supra* note 67, at 38.
[74] *Id.* at 38.

The provisions of other treaties require the state parties to provide for universal jurisdiction over some crimes, also during the armed conflicts. The grave breaches of the Geneva Conventions and the First Additional Protocol are among those international crimes.

Universal jurisdiction can be exercised of either the enactment of national law or the investigation and trial of alleged persons in crimes. Legislative universal jurisdiction is commonly applied in practice of states and is necessary basis for investigation and trial. Nevertheless, it is possible for a state to base its jurisdiction on international law with no reference to national law, thereby asserting adjudicative universal jurisdiction.

In state practice, there are a number of methods for providing universal jurisdiction under each state's own national legislation. Since the Constitution is on the top of the hierarchy of the national law, its provisions have the main importance in determining the status of the treaty and the customary law in the domestic legislation. The relevant provisions of international law are not self-executing. However, such elements of jurisdiction applicable to war crimes better to be provided by domestic legislative system.

States with civil-law system provide for universal jurisdiction in their criminal codes. The jurisdictional and material scopes of the crime can be determined it the same section of the code. The provisions on universal jurisdiction refer to substantive crimes and are included in the general section of the code. Moreover universal jurisdiction can also be specified in criminal procedural code or in a law on the organization of the courts. Some states have provided their local courts universal jurisdiction for certain crimes by the separate law.

In common-law countries universal jurisdiction is provided primarily in legislation where both the jurisdictional and material scope of the crime are defined.

Regardless of the method applied, it is more important to define whether universal jurisdiction requires a certain link to the forum state. Mainly it requires the accused person to be present in that territory before proceedings begin. To ensure universal jurisdiction in national

legislation, all war crimes committed during the international or non-international armed conflict, should be subject to it. It is vital to clarify that jurisdiction applies to all persons either directly or indirectly responsible for committing the crimes, regardless of their nationality, the place of the crime (within the state's territory or outside). The criteria for exercising criminal proceedings or justifying refusal, has to be precise. If the jurisdiction of states is simultaneous, the jurisdiction of one state should be subject to considering penalties already imposed abroad, previous exercise of jurisdiction by another state or international tribunal. Double criminal liability is inconsistent with the main provisions of IHL, according to which the prosecuted crime should also be crime in the place where it occurred.[75]

CHAPTER III: Implementation of the Grave Breaches into Kyrgyz Criminal Legislation

§ 1. Implementation of International Humanitarian Law in the Kyrgyz Republic

States primarily have the duty to implement IHL. They are obliged to take legal and practical measures both in peacetime and in situations of armed conflict. The term national implementation covers all measures that must be taken to ensure that the rules of IHL are fully respected. It is not sufficient to apply these rules once fighting has begun, certain measures must be taken during peacetime. These actions are necessary to ensure that both civilians and military personnel are familiar with the rules of IHL, the structures, administrative arrangements and personnel required for compliance with the law are in place and violations of IHL are prevented, and punished when they occur. [76] Such measures are essential to guarantee that the law is truly respected.

Under IHL a range of measures must be taken by the state. IHL instruments should be translated into the national language. The basic IHL knowledge must be spread as widely as possible both within the armed forces and the general population. The state as a legislator has to prohibit all serious violations of IHL instruments and to adopt criminal legislation that punishes war crimes. It is necessary to ensure that persons, property and places that are specifically protected by the law are

[75] *Id.* at 39.
[76] *Id.* at 19.

properly identified and marked. All protected persons should enjoy judicial and other fundamental guarantees during the armed conflicts. Also, the state must appoint and train persons in IHL and to ensure the presence of legal advisers within the armed forces. There is obligation under IHL to provide for the establishment or regulation of The National Red Cross and Red Crescent Societies, other voluntary aid societies and civil defense organizations. When selecting military sites and in developing and adopting weapons and military tactics. IHL should be taken into account.[77]

The ratification of the Geneva Conventions provides an adoption of state measures necessary for the prevention and repression of illegitimate use or misuse of the Red Crescent and Red Cross emblem. In this regard, the Law of the Kyrgyz Republic (KR) "On the Use and Protection of the Red Crescent and Red Cross Emblem" determined the procedure and the rules of use of, as well as the provision of the legal protection to, the Red Crescent and Red Cross emblem and the designations "Red Crescent" and "Red Cross" in peacetime and in times of either international or internal armed conflict. The same time, not all the concerned ministries and state bodies of the KR have carried out a required amount of work in order to implement the Plan of Action on the Implementation of the IHL, established by the Resolution of the Government of the Kyrgyz Republic No. 51 of 28 January 1999 "On the Creation of the Interdepartmental Commission on the Implementation of the International Humanitarian Law."

To increase the further implementation of the suggestions on the implementation of the norms of the IHL in the legislation of the KR and to organize educational programs in this field, the Government of the KR resolves: [78]

1. The Ministry of Justice of the KR should set up a permanent Interdepartmental Commission on the Implementation of the IHL from among the competent employees of the Ministry of Justice of the KR, Ministry of Foreign Affairs of the KR, Ministry of Health of the KR, Ministry of Internal

[77] *Id.* at 23.

[78] Reglament raboty postoyanno deistvuyuschei Mezhvedomstvennoi komissii pri Ministerstve yustitsii Kyrgyzskoi Respubliki, 2010 [Regulation of permanent Interdepartmental Commission under the Ministry of Justice of the Kyrgyz Republic on the implementation of international humanitarian law] (KYR), No. 1.

Affairs of the KR, Ministry of Environment and Emergency Situations of the KR, Ministry of Defence of the KR, Ministry of Education and Culture of the KR, Social Fund of the KR, National Security Service of the KR, the representatives of the National Society of the Red Crescent, and the representatives of the International Committee of the Red Cross.[79]

2. To approve regulations on the Permanent Interdepartmental Commission on the Implementation of the IHL, and Plan of Action on the Implementation of the IHL.

3. The ministries and state bodies of the KR represented in the above mentioned Commission should submit quarterly informative reports to the Ministry of Justice of the KR regarding the process of implementation of the Plan of Action on the Implementation of the IHL for their generalization and further submission to the Government of the KR.

4. The Resolution of the Government of the Kyrgyz Republic No. 51 of 28 January 1999 "On the Creation of the Interdepartmental Commission on the Implementation of the International Humanitarian Law" is repealed.[80]

§ 2. Implementation Peculiarities of the Grave Breaches Norms into Kyrgyz Criminal Law

Originally, individual responsibility for grave breaches was applicable in times of international armed conflicts. This is demonstrated by the fact that those grave breaches are not mentioned in the II Additional Protocol of 1977 relating to the Protection of Victims of Non-International Armed Conflicts. In fact there are many conflicts of non-international character, which violates the main provisions of the IHL, rather crimes qualified as grave breaches.

Consequently, the Rome Statute of the International Criminal Court was adopted in July 17, 1998. This document includes grave breaches in the list of war crimes pursuant to the Geneva Conventions of 1949. Such crimes relate to the ICC jurisdiction while international and non-international armed conflicts.

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[79] *Id.*
[80] *Id.*

Kyrgyz Republic, in its turn as it was mentioned before, has only signed the Rome Statute and has ratified the Geneva Conventions of 1949. Articles 49, 50, 129 and 146 of Four Geneva Conventions have the same provision obliging state parties to undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention which are defined in those Conventions.[81] Hence, the efficiency of the International Humanitarian Law depends on the actual functioning of the mechanisms of its implementation at the national level.

Kyrgyz Republic, as a state party to the conventions is obliged to prosecute those who commit the grave breaches. For this purpose, it is required to bring the national legislation in compliance with the rules of the IHL, to be precise – Kyrgyz criminal law.

The Criminal Code of the Kyrgyz Republic includes some provisions of the responsibility for violation of the IHL principles. It is so called section XII: "Crimes against peace and human security" which contains only four crimes, which are: Genocide (A. 373), Mercenary (375), and Attack on persons or agencies who possess international protection (A. 376).[82] Numerous grave breaches provided in the Geneva Conventions and Additional Protocol I which are qualified as the war crimes are not still listed in the Kyrgyz Criminal Code. However, the limitation period is not applicable to the crimes against peace and human security. It means that when committing such crimes in cases, specified by the laws of KR, the limitation period does not apply.[83]

There are no special provisions of the grave breaches established by the Geneva Conventions in the Kyrgyz Criminal Code. Such norms have to be included in the section of "Crimes against

[81] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 57, art. 49. Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 58, art. 50. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 59, art. 129. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 60, art. 146.

[82] Ugolovnyi Kodeks Krygyzskoi Respubliki, 2010 [Criminal Code of the Kyrgyz Republic], (KYR), No. 69, Section XII.

[83] *Id.* art. 67(6).

peace and human security" which are totally prohibited by the international treaties of which Kyrgyz Republic is a state party.

The principle of the Universal Jurisdiction which bears inevitability of the punishment. partially embodied in the Criminal Code of the KR. The Article 6 states that extraterritorial jurisdiction applies for Kyrgyz citizens, foreign citizens and stateless persons who committed the crimes outside of Kyrgyz Republic is allowed in cases if it damages the interest of KR and if it is provided by the international treaty. Meanwhile, according to the grave breaches' provisions of the Geneva Conventions (Article 49, 50, 120, 146 and Art. 85, p. 1 of I Additional Protocol) universal jurisdiction of the domestic courts has primary importance for preventing such crimes.[84]

§ 3. The Role and Functions of Interdepartmental Commission on the Implementation of International Humanitarian Law norms in the Kyrgyz Republic

The Interdepartmental Commission on the implementation of IHL norms in the KR was established by the decision of the Kyrgyz Government on January 28, 1999 № 51, with a purpose to exercise proposals on the implementation of IHL in the national legislation.

In 2003, the Government of the KR approved "The regulation of Interdepartmental Commission on the Implementation of IHL norms in the Kyrgyz Republic." Essentially, the Committee was created to address the issues related to the implementation of international legal obligations of the KR in the field of IHL. It works under the Ministry of Justice of the KR.[85]

Further in 2010, "The rules of procedure of a permanent Interdepartmental Commission on the Implementation of IHL norms in the Kyrgyz Republic" was adopted. It determines the organization of work, meetings and decision making process of the Interdepartmental Commission.

The Commission is responsible for the promotion of bringing the Kyrgyz legislation, in accordance with the provisions of the conventions and the treaties relating to IHL, ratified by the KR.

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[84] E.A. Lukasheva, Human Rights: A Manual for Universities, (Norma-Infra, 2002), §4.

[85] Polozhenie o Mezhvedomstvennoi komissii po implementacii norm mezhdunarodnogo gumanitarnogo prava, 2003 [Regulation of the Interdepartmental Commission on the Implementation of International Humanitarian Law] (KYR), arts. 9 and 18, No. 361.

One of its objectives is to review and assess the Kyrgyz legislation in terms of its compliance with IHL norms. It is required to prepare proposals for the implementation of IHL in the KR. All the advisory opinions on draft of international treaties, acts of Kyrgyz legislation in the field of IHL are usually reviewed by the Commission. It is also required to coordinate government activities directed on the implementation of IHL. Furthermore, it has duties to promote IHL and collect information on the development of IHL together with cooperation, exchange of information with the ICRC and other international organizations working in the field of IHL. In addition, the Committee is liable for monitoring the implementation of its decision.[86]

The Commission has the right to submit to the Kyrgyz Government proposals for key areas of the international legal obligations of the KR under IHL. It can entrust to the government the draft proposals on the application of IHL within their jurisdiction. It is authorized to hear the officials of ministries and of other central government bodies during the meetings on the issues of IHL's implementation. Moreover, the Interdepartmental Commission is entitled to engage in the established order of its employees interested bodies. It can set up some working groups, special expert committee for examination and preparation of draft laws and other legal acts in the scope of IHL. Also, it may obtain materials from the governmental agencies on matters within its competence. All decisions of the Commission should be communicated to the concerned authorities in the form of extracts from the records of its meetings.[87]

The Commission carries out its activities in accordance with the annual Action Plan for the implementation of IHL, which is developed on the basis of analysis of the Kyrgyz legislation. The latest action plan for the implementation of IHL in 2013 was adopted by the Commission on December 24, 2012. By the second quarter of 2013, it is planned to develop and conduct public discussion of a bill to amend the criminal code by the establishment of responsibility for war crimes under analysis of the Four Geneva Conventions of 1949 and the First Additional Protocol of 1977.

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[86] *Id*. art. 8.
[87] *Id*. art. 7.

Besides, by the end of the fourth quarter of 2013, harmonization and introduction to the Kyrgyz government the draft law amending the criminal law in the part of the establishment the responsibility for war crimes must also take place. The Red Crescent and the ICRC are the partners in these two upcoming actions. The Ministry of Defence is responsible for this issue. The representative of Ministry of Defence noted that the draft law to amend the criminal law in the part of the establishment the responsibility for war crimes is under development, during the last session.[88]

Conclusion and Recommendations

As Kyrgyz Criminal Law has no provisions providing punishment for the grave breaches of the Geneva Conventions, it can hardly promote the active implementation of the IHL by the courts of the KR. It is necessary implement norms of the grave breaches fully by amending the Criminal Code of the KR. However, the Interdepartmental Commission on the implementation of IHL norms in the KR prepares for the fourth quarter of the 2013 the draft law amending the criminal legislation in the part of the establishment the responsibility for war crimes.

Currently, the criminal legislation of many civilized countries is in line with the legal obligation arising from the obligations of state parties to respect and to demand compliance with the Geneva Conventions and Additional Protocol I. All four of the Geneva Conventions have the relevant articles with the same content, which states that "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches ..." This is a vital requirement, since the effectiveness of IHL to a great extent depends on the actual functioning of the mechanisms of its implementation at the national level. [89]

One of the bright examples of implementations of the norms on the grave breaches is Belgium. It has adopted the Law of 16 June 1993 on the repression of the grave breaches under the

[88] Plan meropriyatiy po implementacii norm mezhdunarodnogo prava na 2013 god, 24 December, 2012 [Action plan for the Implementation of the Norms on International Humanitarian Law in 2013] (KYR).
[89] E.A. Lukasheva, *supra* note 84, at §4.

Geneva Conventions and their Additional Protocol I. Belgium was one of the first states which directly extended the Grave Breaches of the IHL, by qualifying them as war crimes applicable even to non-international armed conflicts. The law establishes in terms of the inevitability of punishment for these crimes, the principle of universal jurisdiction, under which all courts are not geographically limited and have nothing to do with the nationality of the perpetrators. Hereby, Belgian courts have jurisdiction to prosecute foreigners for the grave breaches in cases of non-international armed conflict in any country. [90]

One more peculiarity of this law is that victims of war crimes are given the right to submit complaints to investigating agencies, demanding criminal proceeding, in case if the prosecutor's office itself is inactive. Thus, the victim becomes a civil plaintiff in the criminal process.

It is necessary to extend the list of crimes of the Criminal Code of the KR in the section XII: "Crimes against peace and human security" by adding the Article providing for criminal responsibility for the use of prohibited means and methods of warfare. At least the general terms of some grave breaches should be included, such as: abuse of prisoners of war or civilians, deportation of civilians, looting of national property in occupied territory, the application of an armed conflict of means and methods prohibited by international treaty of the KR. The list of criminal components should provide accurate understanding of "prohibited methods and means of warfare." Therefore they should be fully applied in order to repress criminal acts.

Furthermore, although most of the grave breaches are defined as the war crimes, there is no specific section in the Criminal Code of the KR on the war crimes. The grave breaches should be should be subject to special rules prosecution and suppression applied to war crimes.

Some articles from the Criminal Code of the KR formally coincide with some of the grave breaches. But in fact the articles do not match according to their qualifications to the international legal status of specific war crimes.

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[90] *Id.*

The Criminal Code of the KR should have criminal acts specific to armed conflict, such as: torture or inhuman treatment, the use of weapons, means and methods of warfare that cause superfluous injury, making the civilian population or individual civilians the object of attack, intentional infliction of long-term and severe damage to the environment and etc.

Below, I have conducted the comparative analysis of the norms prohibiting grave breaches among Criminal codes of the KR, Russian Federation and Republic of Kazakhstan in order to clarify which provisions prohibit grave breaches in the penal system KR, Russian Federation and Republic of Kazakhstan.

Comparative analysis among the Grave Breaches specified in the Criminal Codes of Russian Federation, Republic of Kazakhstan and Kyrgyz Republic

Grave Breaches specified in the Criminal Code of the Kyrgyz Republic (KR)	**Grave Breaches specified in the Criminal Code of the Russian Federation (RF)**	**Grave Breaches specified in the Criminal Code of the Republic Kazakhstan (RK)**
None	Article 353. Planning, preparation, initiation or waging a war of aggression	Article 156. Planning, preparation, initiation or waging a war of aggression
None	Article 354. Public appeals for a war of aggression	Article 157. Advocacy and public appeals for a war of aggression
None	Article 355. Development, production, stockpiling, acquisition or sale of weapon of mass destruction	Article 158. Production or spread of weapon of mass destruction
None	Article 356. The use of	Article 159. The use of

	prohibited means and methods of warfare	prohibited means and methods of warfare
Article 373. Genocide	Article 357. Genocide	Article 160. Genocide
Article 374. Ecocide	Article 358. Ecocide	Article 161. Ecocide
Article 375. Mercenary	Article 359. Mercenary	Article 162. Mercenary
Article 376. Attack on persons or institutions that enjoy international protection	Article 360. Attack on persons or institutions that enjoy international protection	Article 163. Attack on persons or institutions that enjoy international protection
None	None	Article 164. Inciting social, national, ethnic, racial or religious hostility

According to this table, Criminal Codes of RF and RK have broader list of articles criminalizing grave breaches than the Criminal Code of KR. Hence, Kyrgyz Republic can add provisions on the basis of practice of Criminal Codes of RF and RK punishing, planning, preparation, initiation or waging a war of aggression, inciting social, national, ethnic, racial or religious hostility, the use of prohibited means and methods of warfare, production or spread of weapon of mass destruction, advocacy and public appeals for a war of aggression, planning, preparation, initiation or waging a war of aggression.

Under Geneva Conventions of 1949, the Universal jurisdiction of national courts has paramount importance in the repression of the grave breaches. The basis of the universal jurisdiction of national courts is to known international criminal justice principle "aut dedere aut judicare" (either extradite or prosecute). In accordance with this principle, the state should seek out and prosecute all persons suspected of having committed or ordered the commission of certain grave breaches, send them over to their own justice, regardless of their nationality and place of the offense. However, the

state can give them over for trial to another state, provided that the country has enough evidence to charge these individuals in criminal procedure.

Therefore, this principle of universal jurisdiction, widely recognized by most of the states and used by the national courts in practice, which in fact, provides the inevitability of punishment also should be fully set in the Criminal Legislation.

After conducting the research about the level of implementation of the grave breaches in the national legislation of the KR, it turned out that not all measures have been done in order to make the provisions of the Geneva Conventions in compliance with the domestic law. When the issue of the systematization of the grave breaches takes place, the Kyrgyz Penal System should provide the broad list of them.

Unfortunately, the reality is different. Numerous grave breaches provided in the Geneva Conventions and Additional Protocol I are not still listed in the Kyrgyz Criminal Code. That is why Kyrgyz Criminal Legislation should be amended in terms of adding serious violations of the Geneva Conventions into Kyrgyz Criminal Code. In this way, Kyrgyz Republic will be able to conduct prosecution and trial over the persons accused in committing the grave breaches, regardless of their nationality and the place of the crime.

The interaction between international and national justice systems should lead to the criminal liability, and the certainty of punishment of persons who have committed or to have ordered to commit crimes against IHL. The most serious of such crimes are defined as grave breaches (war crimes). All substantive and procedural rules should be in compliance with the Geneva Conventions. Such joint efforts of the two criminal justice systems should create a reliable basis for the protection of victims of armed conflict and human rights in the modern world.[91]

[91] *Id.*

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