



*American University of Central Asia*  
*U.S. Accredited Degrees in the Liberal Arts*

# **LEGAL LIABILITY OF NON-EXECUTION OF MILITARY ILLEGAL ORDERS BY MEMBERS OF ARMED FORCES IN THE KYRGYZ REPUBLIC**

**SENIOR THESIS**

For the Bachelor of International and Business Law degree

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Bishkek

2015

## **THESIS ACKNOWLEDGEMENTS**

I dedicate this work to my family members; all of these would not become real without the support of my family. They supported me during my studying period and I am endlessly thankful for providing me all of opportunities to develop and rise as a person. In addition, I dedicate this work to my future husband, who inspired me during this hard - working process.

Also, I express my gratitude to my Supervisor Elida K. Nogoibaeva who was helping me for last three semesters. It was huge work done with the help of Elida Kanybekovna who advised and directed me through the whole process of the writing of this Thesis work. It was a great experience to work together with such an outstanding Professor and person.

I really appreciate the work of staff of the International and Business Law department and I want to thank: Kamila Mateeva – for being a good head and the strict leader of the IBL department; Begaiym Esenkulova – for teaching me how to analyze, formulate and write works. The writing process of the senior work is truly her merit; Saniya Toktogazieva – helped me in understanding of International Law spheres; Kanykei Kasybekova – the Tax Law course taught me to find solutions even in unclear situations; Lillian Langford – for helping me in development of legal skills and Ravshana Makeeva - for being a good coordinator for these four years.

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## ABSTRACT

The Kyrgyz Republic has its army and all parts that constitute the system of Defense. Almost the most important part of the army is Members of Armed Forces. They have special legal liability, specific work and conditions which are written in many normative legal acts of the Kyrgyz Republic<sup>1</sup>. Sometimes, legal norms provided by the legislation are not enough to solve some situations. These situations may arise as a result of misunderstanding of the law by Members of Armed Forces and can result in violation of laws.

At the moment of receiving illegal order, Members of Armed Forces hesitate and do not know how to act: in case of execution of illegal order there comes a criminal liability for committing a crime<sup>2</sup>; however, the national legislation of the Kyrgyz Republic does not provide Members of Armed Forces with clear definition and legal liability for the non-execution of illegal orders: “The person is not criminally liable for the non-execution of illegal order, ..., if they have been assigned to the person unlawfully. Liability arises only when the factual executed act contains elements of another crime.”<sup>3</sup> Firstly, this norm does not really describe the solution of the non-execution of the illegal problem. Secondly, Article 39 does not state anything about disciplinary liability, however it is extremely important to consider the fact that the system of the military service is built on the discipline.

The Commonwealth of the Independent States (CIS) countries can become as a model in question of paraphrasing Article 39 in favor of Members of Armed Forces. Almost all Criminal Codes of CIS countries state: “Non-execution of illegal order excludes criminal

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<sup>1</sup> Zakon Kirgizskoi Respubliki o Statuse Voennosluzhashikh Kirgizskoi Respubliki [The Law of the Kyrgyz Republic under the Status of Members of Armed Forces of the Kyrgyz Republic from June 11, 2009], art. 1 (Kirg.).

<sup>2</sup> Ugolovnii Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 39, 3. (Kirg.).

<sup>3</sup> Ibid.

liability.”<sup>4</sup> This implementation of the norm seems more explaining and understandable than the Kyrgyz Republic’s one. In addition, the experience of foreign countries can be used as recommendations for Kyrgyz courts, scholars and legislators.

As a result, the problem of misunderstanding of criminal and disciplinary liabilities of Members of Armed Forces can be solved by taking into account many foreign countries and norms under Humanitarian Law.

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<sup>4</sup> Ugolovnii Kodeks Respubliki Tadjikistan [UK RT] [Criminal Code of the RT from May 21, 1998], art. 45, 3. (Tadjh.).

Ugolovnii Kodeks Respubliki Belarus’ [UK RB] [Criminal Code of the RB from July 9, 1999], art. 40, 3. (Bel.).

Ugolovnii Kodeks Respubliki Kazakhstan [UK RK] [Criminal Code of the RK from July 3, 1999], art. 38, 2. (Kaz.).

Ugolovnii Kodeks Azerbaizhanskoi Respubliki [UK AR] [Criminal Code of the AR from May 26, 2000], art. 40, 3. (Azerb.).

Ugolovnii Kodeks Respubliki Armeniia [UK RA] [Criminal Code of the RA from April 29, 2003], art. 47, 3. (Arm.).

Ugolovnii Kodeks Latviiskoi Respubliki [UK LR] [Criminal Code of the LR from July 8, 1998], art. 34, 2. (Latv.).

Ugolovnii Kodeks Turkmenistana [UK TR] [Criminal Code of the TR from June 12, 1997], art. 42, 4. (Turkm.).

Ugolovnii Kodeks Respubliki Moldova [UK RM] [Criminal Code of the RM from June 12, 1997], art. 40, 2. (Mold.).

Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42, 2. (Russ.).

## INTRODUCTION

From the ancient times countries had armies. At early centuries, armies were assembled in order to expand territories of the state. The Rome Empire was one of the greatest empires from all the time.<sup>5</sup> Empire's conquests were so vast that it has become the most powerful and warlike Empire of that time.<sup>6</sup> It was the one and only Empire which had all the territory on the Mediterranean Sea.<sup>7</sup> The most important thing which helped them to get this greatness was army.<sup>8</sup> Almost all resources were spent on the maintenance of the army.<sup>9</sup> According to the history, we can conclude that armies at that time were created for the expansion of the territories. Nowadays in XXI century, with the experience from two World Wars, it became much important to have an army for the protection. It is known that for the protection of the State there should be a constant force which is ready to secure the State and citizens in any emergency situations. It can be considered that the State can hardly survive without army, because if there is no army, nothing secures the State.

Every country has its liability to protect the State and its citizens. The Kyrgyz Republic also has this liability<sup>10</sup>. As Members of Armed Forces are legitimate citizens of the Kyrgyz Republic, they are also under the protection of the Kyrgyz Republic. Government has to protect people in all possible ways. In order to meet all the obligations to protect the State, Government has created the Ministry of Defense. Under the Defense can be understood the

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<sup>5</sup> "Rimskaja Imperiia. Drevnii Rim", Historie istoricheskii portal, accessed November 15, 2014, <http://www.historie.ru/civilizacii/rimskaya-imperiya/84-rimskaya-imperiya-drevnii-rim.html>.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Connolly, Peter "Greece and Rome," Encyclopedia of Military History, accessed November 15, 2014 <http://ancientcoins.narod.ru/books3/Piter5.htm>

<sup>10</sup> Konstitutsiia Kirgizskoi Respubliki [Konst. KR] [Constitution of the Kyrgyz Republic, from 27th June 2010], art. 50, 5 (Kirg.).

protection and security of the territorial integrity, inviolability, prevention of internal and external conflicts which can lead to the breaking of the Constitutional regime.<sup>11</sup>

The defense system is an element of national security and one of the most important functions of the state, which is understood as a system of political, economic, military, social, legal and other measures to prepare for armed defense and armed defense of the state sovereignty, territorial integrity, society and citizens of the Kyrgyz Republic. The Defense System is organized and implemented in accordance with the Constitution of the Kyrgyz Republic, the Kyrgyz Republic legislation, fundamental principles and norms of international law, but also entered in to the law in accordance with international treaties. For the Defense System, the use of means of warfare are the Armed Forces of the Kyrgyz Republic, other military formations, unified military and economic security, set conscription of citizens of the Kyrgyz Republic and military transport obligation of public bodies, legal entities, irrespective of their legal forms, as well as the owners of the vehicles.<sup>12</sup>

The problem of non-execution of illegal orders is actual and important because the Kyrgyz Republic had two revolutions in last 10 years. From unofficial sources it is said that approximately 100 people died from actions of Members of Armed Forces. Maybe there would not have been so many victims if Members knew that they are obliged not to execute illegal orders and for such actions there is no criminal liability.

The main question of this work is how should the Kyrgyz Republic regulate the failure to execute military orders by Members of Armed Forces, where those orders are illegal? **The Kyrgyz Republic has to provide a clear regulation for the non-execution of the military illegal orders by Members of Armed Forces in a way as to provide a**

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<sup>11</sup> Zakon Kirgizskoi Respubliki ob Oborone i Vooruzhennikh Silkakh Kirgizskoi Respubliki [The Law of the Kyrgyz Republic under Defense and Armed Forces of the Kyrgyz Republic of the Kyrgyz Republic from June 11, 2009], art. 1 (Kirg.).

<sup>12</sup> Ibid.

**protection from the legislative side.** After finding the possible way to solve the situation of the legal liability of non-execution of illegal orders, in this work several **Research Problems** were reviewed:

- (1) Illiquid content of the Article 39 of the Criminal Code of the Kyrgyz Republic, which regulates criminal liability for the non-execution of illegal orders.

Reformation of the Article 39 of the Criminal Code of the Kyrgyz Republic in behalf of the better understanding of legal consequences for the non-execution of illegal orders by Members of Armed Forces;

- (2) Absence of the norm, which regulates disciplinary liability for the non-execution of illegal orders.

Reformation of the Article 39 of the Criminal Code of the Kyrgyz Republic in behalf of the addition of the disapplication of the disciplinary liability of Members of Armed Forces for the non-execution of illegal orders;

- (3) Model of CIS countries: can it work for the Kyrgyz Republic?

Most of CIS countries state the Article for the non-execution of illegal orders clearly and accurately. As a result, executors of orders may clearly understand legal consequences for the non-execution of illegal orders;

- (4) Norms under International Humanitarian Law: can they work for the Kyrgyz Republic?

Norms from International Law cannot be used in the Kyrgyz Republic unless they are legally ratified by the State and included into the national legislation. In courts, cases can be used only as recommendations, which do not have obligatory character.



The practice of International Law norms is greatly influenced by the practice and value of Human Rights principles.<sup>13</sup> As soon as liability for execution/non-execution of orders is imposed on Members of Armed Forces, there can be possibility of violations of Human Rights because of the specific type of activity. For the purpose of solving problems of misunderstanding of definitions, liabilities and violations of norms of the national and International Laws, several approaches were found: correction of the national norm, based on the example of model countries and norms under International Humanitarian Law.

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<sup>13</sup> Hitomi Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Heidelberg: Springer, 2009), accessed April 14, 2014, <http://www.springer.com/gp/book/9783540705260>.

## **CHAPTER 1. LEGAL REGULATION OF THE PROBLEM BY THE KYRGYZ REPUBLIC'S LEGISLATION.**

Almost every country has its own Defense system in case of armed conflict or wars. The main aim of Members of Armed Forces is to protect and secure the State and its citizens. They obliged things which ordinary citizen cannot do. Members of Armed Forces are the part of national Defense system, and they have liability to protect the country in any time. At the time of the performance of the military duty, soldiers have a right to use weapons.

<sup>14</sup>According to the system of army, Soldiers are trained to *kill* because this action is legal and aimed to the protection of the country.<sup>15</sup>

### **1.1. DEFINITIONS.**

In order to create a strong system of protection of the country, Government has created the special unit of power which is responsible for Defense system and Members of Armed Forces. Commanders (at the top of the military hierarchy) rule Members of Armed Forces. Commander has a right to give orders to Members of Armed Forces and they must execute orders. One of the most important principles of the relationship between the Commander and a Members of Armed Forces is the principle of Sole of command.<sup>16</sup> The idea of this principle is that the order given by a Commander should be executed immediately and without any doubts.<sup>17</sup> As Members of Armed Forces have special liability under the Kyrgyz Republic in addition to nationwide laws obeyed by normal citizens, they also obey special rules.<sup>18</sup>

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<sup>14</sup> Ustav Ministerstva Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Ministry of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 11. (Kirg.).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid. 36.

<sup>18</sup> Charter of Armed Forces of the Kyrgyz Republic, Disciplinary Charter of Armed Forces of the Kyrgyz Republic, The Law of the Kyrgyz Republic on the Status of the Members of Armed Forces, The Constitutional Law of the Kyrgyz Republic On Martial Law, The Law on Defense and Armed Forces of the Kyrgyz Republic, The Law on the Strategic Objects of the Kyrgyz Republic, The Law of the Kyrgyz Republic on National Security, The Law of the Kyrgyz Republic on Mobilization Preparation and Mobilization, The Law of the

“The Armed Forces consist of a 1. Central body of military control; 2. Connections; 3. Units; 4. Institutions of the Ministry of Defense of the Kyrgyz Republic; and 5. The Border Service of the Kyrgyz Republic.”<sup>19</sup> The central body of military control by the Ministry of Defense is the main headquarter of the General Headquarters of the Armed Forces.<sup>20</sup> President of the Kyrgyz Republic is directing the Defense System of the state and the armed forces – is the Chief Commander of the Armed Forces of the Kyrgyz Republic, which is within its authority shall issue orders and directives of Chief Commander of the Armed Forces binding for the Armed Forces and other military formations.<sup>21</sup>

Kyrgyz citizens fulfill their constitutional duty and obligation to defend the Kyrgyz Republic by the military and alternative service.<sup>22</sup> Evasion of military service in the absence of a legal basis for exemption from the service is punished under the Criminal Code of the Kyrgyz Republic.<sup>23</sup> Terms of military and alternative service is set by laws and other legal acts of the Kyrgyz Republic.<sup>24</sup> Defense of the Fatherland – an obligation and sacred duty and of citizens.<sup>25</sup> As Members of Armed Forces are the state officials they have special type of

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Kyrgyz Republic on Liability of Members of Armed Forces, The Law of the Kyrgyz Republic on Civilians’ Protection, The Law of the Kyrgyz Republic on the Establishment of Military Ranks, Class Ranks, Special Class Ranks and Special Titles, The Law of the Kyrgyz Republic on Weapons, The Law of the Kyrgyz Republic on Universal Conscription of Citizens of the Kyrgyz Republic, of the Military and Alternative Service, Charter of the Garrison and Guard Services of the Armed Forces of the Kyrgyz Republic, Charter of Internal Service of the Armed Forces of the Kyrgyz Republic, Drill Regulations of the Armed Forces of the Kyrgyz Republic.

<sup>19</sup> Zakon Kirgizskoi Respubliki ob Oborone i Vooruzhennikh Silkakh Kirgizskoi Respubliki [The Law of the Kyrgyz Republic under Defense and Armed Forces of the Kyrgyz Republic of the Kyrgyz Republic from June 11, 2009], art. 6 (Kirg.).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid. art. 7.

<sup>22</sup> Ugolovnii Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 351, 1. (Kirg.).

<sup>23</sup> Ibid.

<sup>24</sup> Zakon Kirgizskoi Respubliki ob Oborone i Vooruzhennikh Silkakh Kirgizskoi Respubliki [The Law of the Kyrgyz Republic under Defense and Armed Forces of the Kyrgyz Republic of the Kyrgyz Republic from June 11, 2009], art. 18 (Kirg.).

<sup>25</sup> Konstitutsiia Kirgizskoi Respubliki [Konst. KR] [Constitution of the Kyrgyz Republic, from 27th June 2010], art. 56, 1 (Kirg.).

liability, they obey and comply special laws and rules, they execute orders given by a Commander (or who is higher than them according to the hierarchy).<sup>26</sup>

Military service is the special type of governmental service. Based on the special nature of military service, there is a priority under other services of The Kyrgyz Republic's citizens. "Members of Armed Forces are: 1. Military officers; 2. Warrant officers; 3. Members of Armed Forces on extended service; 4. Cadets of military schools; 5. Sailors; 6. Sergeants; and 7. Petty officers in active service, as well as military Members of Armed Forces-women".<sup>27</sup> Members of Armed Forces enjoy the rights and freedoms of citizens of the Kyrgyz Republic with the constraints posed by the conditions of military service.<sup>28</sup> They are assigned the constitutional and other general civil and military duties.<sup>29</sup> Each Members of Armed Forces are assigned to the corresponding military rank.<sup>30</sup> Member of Armed Forces who perform duties of military services are governmental representative and under Government's security.<sup>31</sup>

Commander is an official governmental representative who is responsible for subordinates Members of Armed Forces and their actions.<sup>32</sup> Commander has a right to give orders to the Soldiers.<sup>33</sup> Order is Commander's request, addressed to the Members of Armed Forces (must be under him according to the hierarchy) which requires immediate performing

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<sup>26</sup> Zakon Kirgizskoi Respubliki o Statuse Voennosluzhashikh Kirgizskoi Respubliki [The Law of the Kyrgyz Republic under the Status of Members of Armed Forces from August 1, 1992], art. 1 (Kirg.).

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ustav Ministerstva Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Ministry of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 7. (Kirg.).

<sup>32</sup> Ibid. art. 30.

<sup>33</sup> Ibid.

of certain actions and must not violate certain rules.<sup>34</sup> Order can be given in written or oral form.<sup>35</sup>

Sole of command is one of the principles of the Armed Forces of the Kyrgyz Republic; it manages relations between Members of Armed Forces.<sup>36</sup> It consists in giving the Commander fullness of regulatory power in relations to subordinates and assigning to it the personal liability of the state for all aspects of the life and activities of the military unit, and units of each Members of Armed Forces.<sup>37</sup> Sole of command is expressed in the right of the Commander, based on a comprehensive assessment of the situation, make decisions unilaterally, to give appropriate orders in strict accordance with the requirements of laws and military regulations and to enforce them.<sup>38</sup> Discussion of the order is unacceptable, and disobedience or other failure to order a military offense.<sup>39</sup>

It was mentioned before that Members of Armed Forces execute orders given by a Commander or someone who is higher than them according to the status. Members of Armed Forces should execute only legal orders (not violating any norms or rules of the Kyrgyz Republic).<sup>40</sup> Legal orders are those which are aimed to the development of Soldiers' disciplinary and the principle of Sole of command.<sup>41</sup> Order should be stated clearly and understandable to the Soldiers.<sup>42</sup> Members of Armed Forces *must* execute legal orders

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<sup>34</sup> Ustav Ministerstva Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Ministry of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 36. (Kirg.).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid. 30.

<sup>37</sup> Ibid. 30.

<sup>38</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Internal Service of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 31 (Kirg.).

<sup>39</sup> Ustav Ministerstva Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Ministry of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 30. (Kirg.).

<sup>40</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Internal Service of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 37 (Kirg.).

<sup>41</sup> Ibid.

<sup>42</sup> Ibid. 38.

immediately.<sup>43</sup> In case of non-execution of legal order, Members of Armed Forces are responsible under the Disciplinary Charter of Armed Forces of the Kyrgyz Republic.<sup>44</sup> In addition Members of Armed Forces are responsible for *all* orders executed by him and are responsible under Civil, Administrative and Criminal Codes of his Country.<sup>45</sup>

It is prohibited to execute orders which are illegal and violating legislation of the Country.<sup>46</sup> In case of Commander giving illegal order and Members of Armed Forces executes it; both Commander and Members of Armed Forces are responsible for consequences under the Criminal Code of the Kyrgyz Republic<sup>47</sup>. Members of Armed Forces are not criminally liable for the non-execution of the order, or other violation of orders, or duties, if they have been unlawful.<sup>48</sup> Liability arises only if the act committed by him actually contains elements of another crime.<sup>49</sup> In some cases under circumstances mitigating liability can be the commission of a crime under threat or coercion or because of material, service or other dependence, as well as in the case of execution of the illegal order or instruction.<sup>50</sup> According to the mentioned above, we can conclude that Order in the military system plays the very important role in the formation and development of discipline of Members of Armed Forces.

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<sup>43</sup> Zakon Kirgizskoi Respubliki o Statuse Voennosluzhashikh Kirgizskoi Respubliki [The Law of the Kyrgyz Republic under the Status of Members of Armed Forces from August 1, 1992], art. 30 (Kirg.).

<sup>44</sup> Ugolovni Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 355, 1. (Kirg.).

<sup>45</sup> Zakon Kirgizskoi Respubliki o Statuse Voennosluzhashikh Kirgizskoi Respubliki [The Law of the Kyrgyz Republic under the Status of Members of Armed Forces from August 1, 1992], art. 31 (Kirg.).

<sup>46</sup> Ugolovni Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 39, 3. (Kirg.).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid. art. 54, 1, 1).

## 1.2. SIGNIFICANCE AND LEGAL/PRACTICAL NATURE OF THE PROBLEM.

Soldiers are trained to execute orders without any doubt. The system works in a way that at the time of receiving the order, Soldier must execute it. It was mentioned before that the system of army is based on the principle of Sole Command.<sup>51</sup> This system of Sole of Command is not arguable. System works in a way that Order is not arguable.<sup>52</sup> In situations when Commander gives illegal order to the Members of Armed Forces it is obvious violation of the Criminal Code. In cases when Commander makes a soldier to kill innocent person, soldier face two options: to execute or not execute. What Members of Armed Forces must do according to the legislation? From one side it is obvious violation of norms, but from another side Members of Armed Forces cannot have another option: in case of execution of illegal order he will be responsible for illegal actions<sup>53</sup>; in case of non-execution of an order, he will be responsible for non-execution of the order.<sup>54</sup> Besides this Kyrgyz Republic's legislation does not provide soldiers with the norm which regulates the consequence for non-execution of illegal order. Therefore, what Members of Armed Forces should do in such situations?

As we know, we had 2 revolutions in last 10 years which changed a vision of military orders. According to unofficial sources there were many people killed by those, who executed orders given by Commanders. In April 7, 2010 Revolution, a lot of civilians died. From that time there are a lot of conversations about whether these actions were legal or not. From one side it can be argued that Members of Armed Forces had a right to kill people because Protestants were trying to undermine the constitutional order of the Kyrgyz Republic. From another side it can be said that Members of Armed Forces had to use

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<sup>51</sup> Disciplinary Ustav Vooruzhennikh Sil Kirgizskoi Respubliki [the Disciplinary Charter of the Members of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 9. (Kirg.).

<sup>52</sup> Ibid.

<sup>53</sup> Ugolovni Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 39. (Kirg.).

<sup>54</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Internal Service of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 40 (Kirg.).

weapons because it was an order from their Commanders. It can be seen that the problem about 2010 Revolution is very serious and there should be found some possible options to prevent such situations in the future.

As it can be considered, if our Country had a norm which clearly regulates non-execution of illegal orders, there would not have been so many victims at that time. At the time of receiving Order to kill civilians Members of Armed Forces did not know what to do: in case of non-execution of the order there will be liability and in case of execution of illegal order, there *still* will be liability under the legislation of the Kyrgyz Republic.<sup>55</sup>

As Members of Armed Forces face this problem, State does not provide them with proper and understandable regulation/norm/rule which regulates this problem. It is concrete and manifestly gap in the law which The Kyrgyz Republic has in its own legislative system. Execution of the military illegal order is a circumstance which precludes legal liability in the legislative system of many countries, including CIS, such as Kazakhstan, Uzbekistan and Belarus.<sup>56</sup> In France's Criminal Code is written: "Person is not criminally responsible for committing Order by the request of the Commander or legitimate authority, except the cases when order is unlawful."<sup>57</sup>

The Kyrgyz Republic also has such regulation and with the same idea. However, there is another side of this situation: which actions should be done in order to preclude *any* type of legal liability when there is an illegal order given by a Commander? It looks from one side that there is a conflict of laws: it is said that the disciplinary system of Armed Forces is

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<sup>55</sup> Ugolovniy Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 54, 4. (Kirg.).

<sup>56</sup> N. F. Kuznetsova, *Kurs ugolovnogo prava. Obshchaya chast'. Tom 1: Ucheniye o prestuplenii* (Moscow, 2002), 505.

<sup>57</sup> Code pénal français [The Criminal Code of the France from January 1, 1992], art. 122-4, 2.



constructed on the Unity of Command<sup>58</sup>; but Criminal Code of the Kyrgyz Republic states that execution (which is *mandatory* for the orders) of illegal order is punishable.<sup>59</sup>

Our legislative system has developed a lot of laws and rules which regulate the work of Armed Forces of the Kyrgyz Republic. It is an enormous work done in order to create sustainable and workable conditions for the excellent performance, but there is also many things to change and correct. With the help of Amendments into the laws can be made important corrections, which can make an effect on the situation. Members of Armed Forces are an integral part of the national army which has to be protected on the same level as ordinary citizens of the Kyrgyz Republic. We also should remember that soldiers are integral part of the Kyrgyz Republic's society; some situations can be solved only with the help of Members of Armed Forces. As our legislation has created sustainable and convenient system of protection of rights for ordinary citizens (like administrative/civil/criminal regulation), the Kyrgyz Republic should create and in some cases improve norms which are connected to the military sphere of our country. It is a problem which should have a solution; otherwise, Kyrgyz Republic will have nobody to stand for itself.

### **1.3. COMMENTARY TO THE CRIMINAL CODE OF THE KYRGYZ REPUBLIC.**

For the purpose of the better understanding of the legal norm stated in normative legal acts of the Kyrgyz Republic, it is useful to look for explanations in official Commentaries. The Criminal Code of the Kyrgyz Republic is provided with un-official commentary which does not have an obligatory character: "... The book has recommendations for the Criminal Code of the Kyrgyz Republic. This commentary is *recommended* for law enforcement officials for the purpose of use in practice, it is also useful for professors, students, advocates

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<sup>58</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Internal Service of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 30 (Kirg.).

<sup>59</sup> Ugolovnii Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 39, 2. (Kirg.).

and everyone who is interested in legal practice.”<sup>60</sup> Nonetheless, this unofficial Commentary comments Article 39: “Non-execution of illegal order precludes criminal liability.”<sup>61</sup> This commentary would be perfect, if it would have been an official one. Unfortunately, it has only recommendatory character and Judges may not take into consideration this provision.

#### **1.4. DISCIPLINARY LIABILITY FOR THE NON-EXECUTION OF ILLEGAL ORDERS.**

As it was described before, the military system is built on the discipline.<sup>62</sup> Often there come situations of disciplinary offenses: for violation of the military service rules, obligations, non-execution of orders, etc.<sup>63</sup> Another side of the problem of the non-execution of illegal orders is the absence of the disciplinary liability. Article 39 states about criminal liability, but says nothing about the disciplinary one.<sup>64</sup> It is not so significantly as preclusion of criminal liability, but still, non-execution of illegal order is connected to the non-execution of the order and this action causes disciplinary liability for disobedience. At the moment of receiving illegal order, Members of Armed Forces feel confused and not sure whether there will be disciplinary liability or not. In order to prevent execution of illegal orders because of misunderstanding of consequences for actions, it is really important to correct Article 39 of the Criminal Code of the Kyrgyz Republic and include absence of disciplinary responsibility for the non-execution of illegal orders.

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<sup>60</sup> “Periodicheskie izdaniia”, Izdatel’stvo Akademiia, accessed January 29, 2014, <http://www.academy.kg/product.phtml>

<sup>61</sup> The Commentary to the Criminal Code of the Kyrgyz Republic on October 1, 1997 № 68 – Bishkek Toktom.

<sup>62</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Kirgizskoi Respubliki [The Charter of the Internal Service of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 30 (Kirg.).

<sup>63</sup> Disciplinarii Ustav Vooruzhennikh Sil Kirgizskoi Respubliki [the Disciplinary Charter of the Members of Armed Forces of the Kyrgyz Republic from August 7, 1998], art. 9. (Kirg.).

<sup>64</sup> Ugolovni Kodeks Kirgizskoi Respubliki [UK KR] [Criminal Code of the KR from October 1, 1997], art. 39. (Kirg.).

## CHAPTER 2: MODELS OF NATIONAL LEGISLATIVE SYSTEMS OF THE CIS COUNTRIES AND NORMS UNDER INTERNATIONAL HUMANITARIAN LAW.

In some countries' legislation such as The Republic of Kazakhstan, the Republic of Belarus, the Republic of Uzbekistan the Republic of Tajikistan, the Azerbaijan Republic, the Republic of Armenia, the Lithuanian Republic, the Turkmenistan, the Republic of Moldova, the Russian Federation, France, the Netherlands, execution of the order given by a Commander is the obstacle which precludes criminal liability and punishment.<sup>65</sup> As it is defined in the foreign criminal law, "the problem of the liability for execution of illegal order is being the most difficult in the criminal law. In such cases, there come two obligations: observance of military discipline and impossibility to harm interests protected by criminal law legislation."<sup>66</sup> The general tendency of the development of criminal law for at-least two centuries has been the recognition of not only individuals' rights, but also duties to disobey and non-execute legal/illegal orders. Russian criminologist N.S.Tagantsev wrote that "the theory of the blind and irresponsible execution of superior orders rose in the era of slavery and absolute despotism, it was maintained by the existence of the serfdom; but this doctrine must inevitably disappear at the first rudiments of civil liberties."<sup>67</sup>

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<sup>65</sup> Ugolovnii Kodeks Respubliki Tadjikistan [UK RT] [Criminal Code of the RT from May 21, 1998], art. 45. (Tadjh.).

Ugolovnii Kodeks Respubliki Belarus' [UK RB] [Criminal Code of the RB from July 9, 1999], art. 40. (Bel.).

Ugolovnii Kodeks Respubliki Kazakhstan [UK RK] [Criminal Code of the RK from July 3, 1999], art. 38. (Kaz.).

Ugolovnii Kodeks Azerbaizhanskoi Respubliki [UK AR] [Criminal Code of the AR from May 26, 2000], art. 40. (Azerb.).

Ugolovnii Kodeks Respubliki Armeniia [UK RA] [Criminal Code of the RA from April 29, 2003], art. 47. (Arm.).

Ugolovnii Kodeks Latviiskoi Respubliki [UK LR] [Criminal Code of the LR from July 8, 1998], art. 34. (Latv.).

Ugolovnii Kodeks Turkmenistana [UK TR] [Criminal Code of the TR from June 12, 1997], art. 42. (Turkm.).

Ugolovnii Kodeks Respubliki Moldova [UK RM] [Criminal Code of the RM from June 12, 1997], art. 40. (Mold.).

Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42. (Russ.).

<sup>66</sup> Ignatov A., Krasikov Y., *Kurs rossiskogo ugolovnogo prava: V 2 tomakh. Tom 1. Obshaya chast'* (Moskva: NORMA, 2001), 327.

<sup>67</sup> Tagantsev Nikolai, *Lektsii po russkomu ugolovnomu pravu/ Chast' obshchaia* (Sankt-Peterburg, 1988), 546.

Generally, at the end of the XIX century, in European criminal law, theory and legislation of different countries have already formed the approaches to the problem, which almost are not different from today ones. N.S. Tagantsev pointed out as an entirely undisputed position that the execution of an illegal order manifestly is not an excuse, even making no exception for military discipline: "The Code (1872) of the most disciplined army – German one, acknowledged that the legal liability for execution of illegal order is laid on the Commander who gave that illegal order, nonetheless, for the impunity of the executor there should be: (1) order is given in connected to the military service and by the Commander; (2) the order itself does not contain any illegal demand (known to the executive)."<sup>68</sup>

In cases of execution of the order criminal law principles of legal liability were formulated in International Criminal Law with the help of the establishment and operation of the Nuremberg International Military Tribunal in the case of major German war criminals.<sup>69</sup> In this process, the defense side put forward the argument that suspects committed criminal acts on the basis of the Commander's order.<sup>70</sup> In accordance with this fact, they were not able to non-execute orders and therefore, they are condemned unfairly.<sup>71</sup> However, the Nuremberg Tribunal rejected this interpretation and found that the presence of a criminal order does not relieve the Executer from the legal liability, although it may be considered as a reason for commutation of sentence.<sup>72</sup> Later, that norm became as a common principle of International Law according to the Resolution 95(1) of the United Nations General Assembly "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal",

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<sup>68</sup> Tagantsev Nikolai, *Leksii po russkomu ugolovnomu pravu/ Chast' obshaia* (Sankt-Peterburg, 1988), 547.

<sup>69</sup> "Trial of the major war criminals before the International Military Tribunal", Library of Congress, accessed October 14, 2014, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf).

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

adopted December 11, 1946 at the 55th plenary session of the UN General Assembly.<sup>73</sup> Principle IV states: "The fact that Executer executed order which was given by his Commander, does not relieve him from legal liability under international law, in cases when a moral choice was in fact possible for the Executer."<sup>74</sup>

Next, the principle of legal liability for the execution of illegal orders has been consistently reflected in the statutes of the Tokyo Tribunal (International Military Tribunal for the Far East)<sup>75</sup>, the International Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR)<sup>76</sup>, the Rome Statute of the International Criminal Court<sup>77</sup> and a number of other international documents. Nowadays, the special rules of legal liability for the execution of the order exist in the criminal law legislation of most countries of the world. The opposite side of the legal liability for execution of the order is the legal liability for non-execution of the order. Accordingly, command subordinates (Soldiers or Members of Armed Forces) are often faced with a difficult choice, fearing to be punished in any case. In this regard, the Criminal Code of some countries, such as Latvia, Lithuania, Mongolia, Finland, Uzbekistan, Belarus, Kazakhstan and Tajikistan specifically state that a person who has not performed manifestly unlawful order or instruction shall not be criminally responsible under the national legislation.<sup>78</sup> In cases when the order given by a Commander is a manifestly illegal, The Criminal Law of the Russian Federation provides two possible options: (1) execution of such

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<sup>73</sup> "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal", Audiovisual Library of International Law, accessed October 19, 2014, [http://legal.un.org/avl/ha/ga\\_95-I/ga\\_95-I.html](http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html).

<sup>74</sup> Ibid.

<sup>75</sup> "Judgement: International Military Tribunal For The Far East [Chapter 2]", ibiblio The Public's Library and Digital Archive, accessed February 2, 2015, <http://www.ibiblio.org/hyperwar/PTO/IMTFE/>.

<sup>76</sup> "Practice Relating to Rule 155. Defence of Superior Orders", International Committee of the Red Cross, accessed April, 2, 2014, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule155](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule155).

<sup>77</sup> "Rimskii Statut Mezhdunarodnogo Ugolovnogo Suda.", Organizatsiia Obyedenennikh Natsii, accessed November 1, 2014, [https://www.un.org/ru/law/icc/rome\\_statute\(r\).pdf](https://www.un.org/ru/law/icc/rome_statute(r).pdf).

<sup>78</sup> Kozochkin I., *Ugolovnoe pravo zarubezhnikh gosudarstv. Obshaya chast'* (Moskva, 2001), 532.

illegal order (Executer will be criminally responsible for illegal actions); (2) non-execution of illegal order (Criminal liability is excluded according to the Art. 42, 2 of the CC RF)<sup>79</sup>

The Kyrgyz Republic legal norms do not really represent an option of non-execution of illegal order because of illiquid content of the Article 39 of the Criminal Code of the Kyrgyz Republic. As the problem exists, **The Kyrgyz Republic has to provide a clear regulation for the non-execution of illegal order by Members of Armed Forces in a way as to protect Members of Armed Forces.**

#### **SUBCHAPTER 1. CIS COUNTRIES APPROACH.**

The Kyrgyz Republic is the member of the CIS which consists of 10 more countries such as Azerbaijan Republic, Republic of Armenia, Republic of Belarus, Republic of Kazakhstan, Republic of Moldova, Russian Federation, Republic of Tajikistan, Turkmenistan, Republic of Uzbekistan and Ukraine.<sup>80</sup> Besides the fact that these countries are members of the CIS, they also have been one whole country – The Union of Soviet Socialistic Republics.<sup>81</sup> As the result, almost all republics have copied almost the same national legislations – this practice established as the result of the same legislation for almost 70 years. Despite the fact that national legislations are similar, they still have differences. The legal norm concerning non-execution of military illegal order is written similar in the majority of countries except Kyrgyz Republic.

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<sup>79</sup> Ugolovniy Kodeks Rossiiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42, 2. (Russ.).

<sup>80</sup> “Gosudarstva-Uchastniki SNG”, Ispolnitel’nyi Komitet SNG Oficial’nyi sait, accessed November 8, 2014, <http://www.cis.minsk.by/index.php?id=2>.

<sup>81</sup> “Raspad SSSR i sozdaniye Sodruzhestva nezavisimykh gosudarstv (SNG)”, Testent.ru, accessed April, 25, 2014, <http://testent.ru/index/0-87>.

### 2.1.1. CIS COUNTRIES AS MODELS.

The Republic of Tajikistan states that “the non-execution of illegal order or directive precludes criminal liability.”<sup>82</sup> The same provision is included in the national legislations of the Criminal Codes of the Republic of Belarus<sup>83</sup>, the Republic of Kazakhstan<sup>84</sup>, the Azerbaijan Republic<sup>85</sup>, the Republic of Armenia<sup>86</sup>, the Latvian Republic<sup>87</sup>, Turkmenistan<sup>88</sup>, the Republic of Moldova<sup>89</sup> and the Russian Federation<sup>90</sup>.

Based on the Articles mentioned above it can be seen that the legal norm concerning the non-execution of illegal military orders precludes criminal liability. CIS countries legislations clearly state situations and possible consequences – in cases of receiving of illegal orders there will not be criminal liability for the non-execution of the order. Although CIS countries legislations are similar, there is still a need of description of definitions used in the national legislations.

### 2.1.2. THE RUSSIAN FEDERATION’S APPROACH.

Additionally, as a model it can be reviewed definitions from the national legislation of the Russian Federation. The Russian Federation has been a strategic partner of the Kyrgyz Republic: both countries have a long-term experience of friendly relations which mostly

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<sup>82</sup> Ugolovniĭ Kodeks Respubliki Tadjikistan [UK RT] [Criminal Code of the RT from May 21, 1998], art. 45, 3. (Tadj.).

<sup>83</sup> Ugolovniĭ Kodeks Respubliki Belarus’ [UK RB] [Criminal Code of the RB from July 9, 1999], art. 40, 3. (Bel.).

<sup>84</sup> Ugolovniĭ Kodeks Respubliki Kazakhstan [UK RK] [Criminal Code of the RK from July 3, 1999], art. 38, 2. (Kaz.).

<sup>85</sup> Ugolovniĭ Kodeks Azerbaĭzhanskoi Respubliki [UK AR] [Criminal Code of the AR from May 26, 2000], art. 40, 3. (Azerb.).

<sup>86</sup> Ugolovniĭ Kodeks Respubliki Armeniia [UK RA] [Criminal Code of the RA from April 29, 2003], art. 47, 3. (Arm.).

<sup>87</sup> Ugolovniĭ Kodeks Latviiskoi Respubliki [UK LR] [Criminal Code of the LR from July 8, 1998], art. 34, 2. (Latv.).

<sup>88</sup> Ugolovniĭ Kodeks Turkmenistana [UK TR] [Criminal Code of the TR from June 12, 1997], art. 42, 4. (Turkm.).

<sup>89</sup> Ugolovniĭ Kodeks Respubliki Moldova [UK RM] [Criminal Code of the RM from June 12, 1997], art. 40, 2. (Mold.).

<sup>90</sup> Ugolovniĭ Kodeks Rossiiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42, 2. (Russ.).

expresses in the constant migration from one country to another.<sup>91</sup> The chosen country model also has an army which established the system of rules and norms followed by all Members of Armed Forces and other military personnel. The unity of command is one of the main principles which form the system of army of many countries. The principle of the unity of command grants commander in chief with the full authority in terms of the command subordinate including the right to give orders and to demand their execution. Moreover, in the military criminal law of states, the subject of the military discipline and order among the troops, and, consequently, the combat capability of the armed forces, are directly linked to the regulation of the basics and conditions of legal liability command subordinates for any failure to perform orders of superiors.<sup>92</sup> In this connection it is important to analyze the state of the current Russian legislation, scientific and legal views on the obligation of orders.

Order which does not meet conditions is not enforceable.<sup>93</sup> Thus, general military regulations require unconditional performance of given orders by Members of Armed Forces; otherwise Commanders have a right to use a wide variety of coercive measures including individual criminal prosecution for non-execution of the order.<sup>94</sup> At the same time the criminal legislation points out that not all orders should be performed and executed.<sup>95</sup> Moreover, execution of illegal orders includes criminal liability under the national legislation of the Russian Federation.<sup>96</sup> For example, the person who committed an intentional crime due to manifestly illegal order is criminally responsible.<sup>97</sup> **However, non-execution of**

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<sup>91</sup> “Otnosheniia RF I KR”, Rossiia v Kirgizstane, accessed December 17, 2014, <http://www.rusinkg.ru/rf-i-kr/content/5-rf-i-kr/36-otnosheniya-rf-i-kr>.

<sup>92</sup> Shulepov N. A., “Ugolovno-pravovie posledstviia neispolneniia voennoslužhashimi prikaza po zakonodatelstvu sovremennikh gosudarstv. Voенno-ugolovnoe pravo”, *Pravo v Vooruzhennikh Silakh* 9-10 (2003): 13-16

<sup>93</sup> S. Drutskoi, *Prichini nevmeniia v voенno-ugolovnom prave* (Varshava, 1902), 168.

<sup>94</sup> Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code], art. 332 (Russ.).

<sup>95</sup> Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code], art. 42. (Russ.).

<sup>96</sup> Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code], art. 42, 2. (Russ.).

<sup>97</sup> Ibid.



**manifestly illegal order precludes criminal liability.**<sup>98</sup> Let us review such actions from prospective of the elements of a crime:

Action	Object of the crime	Objective side of the crime	Subject of the crime	Subjective side of the crime
Execution of illegal order.	Public order.	Actions of the command subordinate encroaching on the concrete object.	Only military servicemen (or Members of Armed Forces, soldiers, etc.) temporarily or constantly, on the military service or military rank command subordinate to the relevant Commander.	Clear intent. Awareness not only of the factual circumstances of the action but its social dangerous status i.e. ability to cause harm to the public relations secured by laws of the Russian Federation.
Non - execution of the legal order.	Relations of subordination on the basis of the unity of the Command.	The crime can be committed in a form of the disobedience to the Commander in Chief or other willful desire not to perform an order <sup>99</sup> and non-execution of the order due to the negligence. <sup>100 101</sup>	Only military servicemen (or Members of Armed Forces, soldiers, etc.) temporarily or constantly, on the military service or military rank command subordinate to the relevant Commander.	Clear intent.
Non – execution of illegal order.	No.	No.	No.	No.

<sup>98</sup> Ugolovniy Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code], art. 42, 2. (Russ.).

<sup>99</sup> Ugolovniy Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 332, 1. (Russ.).

<sup>100</sup> Ibid. 332, 3.

<sup>101</sup> Disobedience is the refusal to execute the order when the command subordinate clearly states the order will not be executed.; In cases of willful non-execution of the order the command subordinate accepts the order for the execution, but does not factually perform it, i.e. does not do actions prescribed by the order, executes order not in time or does things prohibited by laws. Intent for non-execution of the order can appear at the time of receiving the order or after it.; Non-execution of the order by negligence occurs after the command subordinate receives an order and does not execute it due to the negligence or careless attitude to the military service.

From the perspective of the general principles of the *corpus delicti*, we can make a conclusion that non-execution of illegal order is not a crime, which breaks public order or harms public relations. The key word here is “illegal”. This word itself means bad and illegitimate and causes doubts. According to the Russian Federation’s legislation, the legal order should be executed unconditionally.<sup>102</sup> According to the requirements<sup>103</sup>, illegal order is impossible in theory. However, daily life proves opposite: illegal orders exist. An example of illegal orders can be the situation when the Member of Armed Forces receives an order from his Commander to rob/kill ordinary human without obvious importance for the military service. Such situations should have been regulated and supported by the national legislation. Ergo, which procedures do we have? Before answering the question posed, it is necessary to define concepts mentioned here: Order - is an instructor of the Commander in Chief directed to the command subordinate(s) who requires mandatory performing with the compliance of the rules established by legislation.<sup>104</sup> The order can be given in written and oral forms.<sup>105</sup> Oral orders are given by all Commanders and considered to be not illegal.<sup>106</sup> Illegal order is the one which is contrary to the laws, given not in the interests of the military service, impossible to execute in the nature.<sup>107</sup> Members of Armed Forces are required to refuse to execute the order if it found as illegal;<sup>108</sup> they should be informed about the concrete definition of such conceptions in time of the military trainings and about possible legal liability which can be held in cases of execution of illegal orders.<sup>109</sup> Manifestly illegal order

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<sup>102</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Rossiiskoi Federatsii [The Charter of the Internal Service of the Ministry of Armed Forces of the Russian Federation from December 14, 1993], art. 30-31. (Russ.).

<sup>103</sup> Ibid. 38-41.

<sup>104</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Rossiiskoi Federatsii [The Charter of the Internal Service of the Ministry of Armed Forces of the Russian Federation from December 14, 1993], art. 36, 1. (Russ.).

<sup>105</sup> Ibid. 36, 2.

<sup>106</sup> Ibid. 36, 2.

<sup>107</sup> “Ugolovnoe pravo Rossii. Neispolnenie prikaza”, Bibliotekar.ru, accessed February 25, 2015, <http://bibliotekar.ru/ugolovnoe-pravo-3-2/83.htm>.

<sup>108</sup> Ignatov A. N. and Krasikov Y. A., *Kurs Rossiiskogo ugolovnogo prava*, (Moskva: NORMA, 2001), 327.

<sup>109</sup> General'nyy direktorat po pravam cheloveka i pravovym voprosam. Sovet Yevropy. “*Voprosi prav cheloveka u voennosluzhashikh*,” Strasburg: Sovet Yevropy, 2011. Accessed December 4, 2014, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others\\_issues/Armed\\_Forces/Rec/Publication\\_FA\\_ru.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Armed_Forces/Rec/Publication_FA_ru.pdf).

is the one which by its content is connected to the violation of the law and other legal norms.<sup>110</sup> Since the Criminal Law of the Russian Federation connects criminal liability for execution of illegal order with the commission of an intentional crime, it would be appropriate to use the term “manifestly illegal order”; Commander in Chief – military official who has the full administrative authority with respect to command subordinates, with the right to give orders and require their execution.<sup>111</sup>

Returning to the problem mentioned above and analyzing definitions we can conclude that the establishments of the principle of the unconditional of the order, military regulations are based on the presumption of the legality and compliance with the laws. Before giving an order the Commander is obliged to fully analyze the situation and provide measures for the execution of the order.<sup>112</sup> Commander is responsible for the order and its consequences, for the compliance and violations of the laws.<sup>113</sup> The order should be formulated clearly and without double interpretation.<sup>114</sup> Commanders who gave orders which violates some laws or not connected to the military service as well as orders which are directed to the violation of the Russian Federation’s legislation are legally responsible according to the legislation of the Russian Federation.<sup>115</sup> Under certain circumstances Members of Armed Forces as well as Commanders, are also legally responsible under the disciplinary, administrative, civil or criminal legislation.<sup>116</sup>

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<sup>110</sup> “Kommentarii k stat’ e 42 UK RF”, [www.Labex.ru](http://www.Labex.ru), accessed January, 7, 2015, [http://www.labex.ru/page/kom\\_uk\\_42.html](http://www.labex.ru/page/kom_uk_42.html).

<sup>111</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Rossiiskoi Federatsii [The Charter of the Internal Service of the Ministry of Armed Forces of the Russian Federation from December 14, 1993], art. 3. (Russ.).

<sup>112</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Rossiiskoi Federatsii [The Charter of the Internal Service of the Ministry of Armed Forces of the Russian Federation from December 14, 1993], art. 38. (Russ.).

<sup>113</sup> Ibid. 34.

<sup>114</sup> Ibid.

<sup>115</sup> Federal’nyi Zakon RF o Voinskoi obiazannosti i voennoi sluzhbe [Federal Law of the Russian Federation on the Military obligation and military service from March 28, 1998], Rossiiskaia Gazeta [Ros. Gaz.] Apr. 2, 1998.

<sup>116</sup> Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42 (Russ.).

Article 42 states that “1. A person who commits an intentional crime pursuant to the execution of the manifestly illegal order is criminally responsible; 2. Non-execution of illegal order precludes criminal liability.”<sup>117</sup> Member of Armed Forces is required to execute the order unconditionally and accurately on time, discussion of the order is not allowed.<sup>118 119 120</sup> However, the command subordinate, as well as all citizens of the Russian Federation is obliged not to violate the Criminal legislation of the country and not to commit crimes with or without the order. Thus, at the moment of receiving illegal order there is a difficult situation of two basic duties of the Member of Armed Forces: to execute an order and not to commit a crime. Supposing that Member of Armed Forces has to execute or non-execute illegal order, he/she should act in a way as to give less harm by his/her actions than the harm that would come if he/she had acted differently. Compliance with the principle of the extreme necessity<sup>121</sup> in cases of non-execution of illegal order precludes liability for non-execution of the order.<sup>122</sup> Provisions related to the non-execution of manifestly illegal order are linked only to the criminal legislation of the Russian Federation.<sup>123</sup> Actions (inactions) of the command subordinate who did not execute the order can be recognized as lawful by the Court if it will be proved that the given order was manifestly illegal.<sup>124</sup> Non-execution of manifestly illegal orders precludes criminal liability.<sup>125</sup> Since the Criminal Code of the Russian Federation precludes only criminal and no other legal liability, the harm caused by

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<sup>117</sup> Ibid. 42, 2.

<sup>118</sup> Federal’nyi Zakon RF o Voinskoi obiazannosti i voennoi sluzhbe [Federal Law of the Russian Federation on the Military obligation and military service from March 28, 1998], Rossiiskaia Gazeta [Ros. Gaz.] Apr. 2, 1998.

<sup>119</sup> Federal’nyi Zakon o Statuse Voennosluzhashikh [Federal Law of the Russian Federation on the Status of Members of Armed Forces from May 27, 1998], Rossiiskaia Gazeta [Ros. Gaz.] June 2, 1998.

<sup>120</sup> Ustav Vnutrennei Sluzhbi Vooruzhennikh Sil Rossiiskoi Federatsii [The Charter of the Internal Service of the Ministry of Armed Forces of the Russian Federation from December 14, 1993], (Russ.).

<sup>121</sup> Elimination of direct danger to the individual and the rights of the person or others legally protected interests of society or the state, if this danger could not be eliminated by other means.

<sup>122</sup> Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42 (Russ.).

<sup>123</sup> V. P. Revin, *Ugolovnoye pravo Rossii. Obshchaya chast’. Uchebnik.* (Moskva: ZAO Yustitsinform, 2009), 145.

<sup>124</sup> Ibid.

<sup>125</sup> Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42 (Russ.).

the order should be criminally relevant and to encroach on public relations secured by the Criminal legislation of the Russian Federation.<sup>126</sup>

According to the analysis of the CIS countries and the Russian Federation in particular, it can be concluded that legal norm concerning the non-execution of illegal order should include clear provision of the norm without double interpretation and conditions. The Kyrgyz Republic can use CIS countries national legislations as a model only in case of interpretation of preclusion of criminal liability. None of the CIS countries preclude disciplinary liability for non-execution of illegal order, although orders and discipline are strictly connected to each other.

## **SUBCHAPTER 2. REGULATION OF THE NON-EXECUTION OF ILLEGAL ORDER UNDER INTERNATIONAL HUMANITARIAN LAW.**

The principle of the binding orders and legal liability of the command subordinate (Member of Armed Forces) for the execution of illegal order is written in the International Law. The Statute of the International Military Tribunal for the trial and punishment of the major war criminals of the European countries of Axis power (Germany, Italy and Japan) defined: “The fact that the Defendant acted pursuant to the order given by the Government or the Commander does not relieve him/her from the legal liability, but may be considered as the mitigation of the punishment in case if the Tribunal determines that principles of justice require so.”<sup>127</sup> The same provisions existed in the Charters of International Tribunals for concrete cases.<sup>128</sup> Besides International Conventions and Treaties, cases and experience of

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<sup>126</sup> V. P. Revin, *Ugolovnoye pravo Rossii. Obshchaya chast'. Uchebnik.* (Moskva: ZAO Yustitsinform, 2009), 147.

<sup>127</sup> “Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal”, Yale Law School Lillian Goldman Law Library in memory of Sol Goldman, accessed October 27, 2014, <http://avalon.law.yale.edu/imt/imtconst.asp#art8>.

<sup>128</sup> “Updated statute of the International Criminal Tribunal for the former Yugoslavia”, International Criminal Tribunal for the former Yugoslavia, accessed November 16, 2014, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

foreign countries can be used as reliable sources for the Court decisions of the Kyrgyz Republic.

### 2.2.1. DIFFERENT COUNTRIES' EXPERIENCE.

In order to understand the problem of non-execution of illegal order from the International Law side, firstly, it should be reviewed the whole picture of execution of illegal orders as a whole. Non-liability for the execution of illegal order can be argued in any cases on the basis of the priority to norms of International Law.<sup>129</sup> However in this case the principle of legal liability for execution of illegal order can be limited to actions which are defined by International Law: genocide, military crimes and crimes against humanity.<sup>130</sup>

The Criminal Code of the Italian Republic discharges the command subordinate from liability for execution of illegal orders in cases when law does not allow any control on the legality of the order by the executive.<sup>131</sup> According to the Criminal Code of the Republic of Poland, the prohibited act committed by a Member of Armed Forces due to the received order is not considered as a crime only in cases when the crime was committed unintentionally.<sup>132</sup> The Criminal Code of the Kingdom of Sweden states that the action executed by a command subordinate due to the received order precludes criminal liability only in cases when it was the duty to obey orders.<sup>133</sup> In some countries there is another approach: for Members of Armed Forces legal liability for the execution of illegal order is limited to the exceptional cases. Thus, the Criminal Code of the Bosnia and Herzegovina and Macedonia the Member of armed Forces is criminally responsible for the execution of the order given by a

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<sup>129</sup> “Glava chetvertaia. Otvetstvennost’ za narusheniia prava vooruzhennikh konfliktov”, UNHCR The UN Refugee Agency, accessed June 17, 2014, <http://www.refworld.org.ru/cgi-bin/texis/vtx/rwmain/opensslpdf.pdf?reldoc=y&docid=532079224>.

<sup>130</sup> Ibid.

<sup>131</sup> Italiano Codice penale [The criminal Code of Italian Republic from October 19, 1930], art. 51, 4.

<sup>132</sup> Kodeks karny RP [The Criminal Code of the Republic of Poland from June 6, 1997], art. 318.

<sup>133</sup> Strafflagen Konungariket Sverige [The Criminal Code of the Kingdom of Sweden from January 1, 1965], art. 8, part 24.

Commander directed to the commission of the military or another serious crime or in cases when the command subordinate was aware of the fact that the execution of the order constitutes crime.<sup>134 135</sup>

In the major countries of the world there is no clarification of the degree of the criminal liability for execution of illegal order.<sup>136</sup> Such provisions are written in the national legislations of post-soviet countries.<sup>137</sup> According to the criminal Code of the CIS Model Code countries, the command subordinate who committed the intentional crime is criminally responsible on the general grounds.<sup>138</sup> English law only in rare cases refers to the execution of the order as the defense against prosecution.<sup>139</sup> There are concrete actions which can be recognized as legal and reasonable for the purpose of the implementation of the justice (i.e. performance of the decision of the court, actions directed to the prevention of the rape, etc.) which in other cases can be considered as unlawful. However, it is considered that the

<sup>134</sup> Krivični Zakon Bosne i Hercegovine [The Criminal Code of Bosnia and Herzegovina from 2003], art. 390.

<sup>135</sup> Кривичниот законик на Република Македонија [The Criminal Code of the Republic of Macedonia from March, 2004], art. 352.

<sup>136</sup> Piontkovskii A. A., *Uchenie o prestuplenii po sovetскому ugovnomu pravu* (Moskva: Svetoch, 1961), 479.

<sup>137</sup> Ibid.

<sup>138</sup> Ugolovnii Kodeks Respubliki Tadzhikistan [UK RT] [Criminal Code of the RT from May 21, 1998], art. 45, 3. (Tadzh.).

<sup>138</sup> Ugolovnii Kodeks Respubliki Belarus' [UK RB] [Criminal Code of the RB from July 9, 1999], art. 40, 3. (Bel.).

<sup>138</sup> Ugolovnii Kodeks Respubliki Kazakhstan [UK RK] [Criminal Code of the RK from July 3, 1999], art. 38, 2. (Kaz.).

<sup>138</sup> Ugolovnii Kodeks Azerbaizhanskoi Respubliki [UK AR] [Criminal Code of the AR from May 26, 2000], art. 40, 3. (Azerb.).

<sup>138</sup> Ugolovnii Kodeks Respubliki Armeniia [UK RA] [Criminal Code of the RA from April 29, 2003], art. 47, 3. (Arm.).

<sup>138</sup> Ugolovnii Kodeks Latviiskoi Respubliki [UK LR] [Criminal Code of the LR from July 8, 1998], art. 34, 2. (Latv.).

<sup>138</sup> Ugolovnii Kodeks Turkmenistana [UK TR] [Criminal Code of the TR from June 12, 1997], art. 42, 4. (Turkm.).

<sup>138</sup> Ugolovnii Kodeks Respubliki Moldova [UK RM] [Criminal Code of the RM from June 12, 1997], art. 40, 2. (Mold.).

<sup>138</sup> Ugolovnii Kodeks Rossiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42, 2. (Russ.).

<sup>139</sup> Bohrer, Ziv "England And The Superior Orders Defence—Choosing The Middle Path". *Oxford University Commonwealth Law Journal* 12 (2012): accessed February 28, 2014, doi:10.5235/14729342.12.2.273.

superior order does not preclude legal liability if executed actions were not justified by indicated purposes.<sup>140</sup>

N. S. Krylova wrote:

“...the last common feature of the status of the personnel is the consistent implementation of personal subordination which provides subordination of a subordinate to a superior. The level of hardness of the subordination to orders of authorities is not the same. In its extreme form it is shown in the Armed Forces and militia, where the immediate and undoubted execution of orders of Commanders is necessary for the purpose of the achievement of goals. Members of Armed Forces are subjects to the military law which grants officers broad disciplinary powers in relation to the ordinary soldiers such as the right to arrest, investigation, punishment, transfer the case to the military court. In addition there is a number of military law offences aimed at maintaining of the strict discipline in the army. Any case of the resistance or disobedience is considered as a serious military offense – a rebellion.”<sup>141</sup>

At the present time the special norms of liability for the execution and non-execution of legal/illegal orders exist in the Criminal legislations of many countries such as the United Kingdom and Belgium.

### **2.2.2 The United Kingdom’s approach.**

It is known that Members of Armed Forces are trained to execute orders. First of all, Members of Armed Forces are human beings and they have ability to distinct between good and bad. Based on their activity they are obliged to execute only legal orders and recognize unlawfulness of illegal orders.<sup>142</sup> Psychological findings show that people are less likely to obey to commit a crime if actions contradict their moral and ethical views.<sup>143</sup> However, in many situations soldiers are unable to differentiate in which cases orders should be

<sup>140</sup> Fisenko I. V., *Bor'ba s mezhdunarodnimi prestupleniyami v mezhdunarodnom ugolovnom prave* (Minsk: Tesei, 2009), 256.

<sup>141</sup> "Otvetsvennost' Gosudarstvennogo Sluzhashchego Za Vypolneniye Nezakonnogo Prikaza Rukovoditelya - Gosudarstvennaya Sluzhba - Uchebnyye Materialy Dlya Studentov." StudMe.org. Accessed November 17, 2014.  
[http://mobile.studme.org/10191224/pravo/otvetstvennost\\_gosudarstvennogo\\_sluzhaschego\\_vypolnenie\\_nezakonnogo\\_prikaza\\_rukovoditelya](http://mobile.studme.org/10191224/pravo/otvetstvennost_gosudarstvennogo_sluzhaschego_vypolnenie_nezakonnogo_prikaza_rukovoditelya).

<sup>142</sup> John Parry, “Culpability, Mistake and Official Interpretation of Law” *American Journal of Criminal Law* 25 (1997): 24-25.

<sup>143</sup> Munoz-Rojas D. and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations* (2004)



disobeyed.<sup>144</sup> Especially it is connected to situations of war times when almost all methods of wars are recognized as lawful ones without taking into account moral, ethical and humane views.<sup>145</sup> During such period of time it becomes really hard to specify which orders are legal and which are not. At the time of receiving illegal order, subordinates are more likely to hesitate and look for the proof of the illegality of received order:

“Research findings indicate that if a second authoritative body makes a proclamation that contradicts the commander’s wrongful order, subordinates are less likely to obey on impulse and will instead rationally consider the conflicting normative messages.<sup>146</sup> Supposedly, the law makes such a proclamation when it states that soldiers should only obey legal orders, or alternatively when it states that all blatantly immoral orders must be disobeyed. Yet experience indicates that during emergency situations, low-ranking subordinates often do not critically examine the legality or morality of orders, even if they are instructed by law to do so; such messages are often ineffective because soldiers have a limited ability to determine whether an order is illegal or immoral, and also because such general messages do not tend to surface into a low-ranking subordinate’s mind when she is given an order in the heat of battle. A legal scheme that delineates certain categories of orders that should be disobeyed, on the other hand, is more likely to “catch” the soldier’s attention, and is thus more likely to reduce conditioned obedience.”<sup>147</sup>

### 2.2.3 BELGIUM’S APPROACH.

In the Belgian Law there is a preference given to the principles of “smart bayonets”.<sup>148</sup> According to the Law “On the Disciplinary Charter of Armed Force” “Members of Armed Forces should execute orders which were given by Commanders. However, the order cannot be executed if its execution would cause commission of a crime or offense.”<sup>149</sup> Article 136 of the Criminal Code of Belgium rejects the reference to the superior order as the justification in cases of commission of the crime under International Humanitarian Law.<sup>150</sup> In cases of receiving illegal order, the subordinate must ask for a

<sup>144</sup> Bohrer, Ziv “England And The Superior Orders Defence—Choosing The Middle Path”. *Oxford University Commonwealth Law Journal* 12 (2012): 273-294, accessed February 28, 2014, doi:10.5235/14729342.12.2.273.

<sup>145</sup> Ibid.

<sup>146</sup> S Beu, Danielle, and M.Ronald Buckley. 2015. 'This Is War: How The Politically Astute Achieve Crimes Of Obedience Through The Use Of Moral Disengagement'. *Sciencedirect.Com*. <http://www.sciencedirect.com/science/article/pii/S1048984304000621>.

<sup>147</sup> Bohrer, Ziv “England And The Superior Orders Defence—Choosing The Middle Path”. *Oxford University Commonwealth Law Journal* 12 (2012): 273-294, accessed February 28, 2014, doi:10.5235/14729342.12.2.273.

<sup>148</sup> “Glava chetvertaia. Otvetstvennost’ za narusheniia prava vooruzhennikh konfliktov”, UNHCR The UN Refugee Agency, accessed June 17, 2014, <http://www.refworld.org.ru/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=532079224>.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

confirmation for the execution of illegal order.<sup>151</sup> If Commander confirms manifestly illegal order, the subordinate must not execute it.<sup>152</sup> However, if the subordinate failed in assessing manifestly illegal order, he/she commits act of disobedience.<sup>153</sup> Thus, there comes difficult situation where the subordinate has no right to mistake: if he/she considers illegal order as legal one – he/she commits a crime by executing it; if subordinate considers legal order as illegal one – he/she commits an offense by refusing to obey it.<sup>154</sup> In order to solve such misunderstanding situations there is a need to provide subordinate with the presumptions of “opinion of the Commander outweighs opinion of one, two or X subordinates” or contrary “opinion of subordinate outweighs if one, two or X subordinates support it”.<sup>155</sup>

Based on the analysis made above it can be concluded that problems on the military service sphere have many countries. It is really important to look for solutions and establish practices which can help Members of Armed Forces differentiate situations when orders should be executed and which liability may arise in cases of non-execution of orders.

### **SUBCHAPTER 3. NORMS UNDER INTERNATIONAL HUMANITARIAN LAW.**

For the purpose of the misunderstanding of legality and illegality of military orders, Members of Armed Forces should have trainings on the raising of the awareness of Human Rights including their own ones. At the time of such trainings Members of Armed Forces should be informed that they must oppose manifestly illegal orders such as genocide, war

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<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Council of Europe, Directorate General of Human Rights and Legal Affairs. *Human Rights Of Members Of The Armed Forces Recommendation CM/Rec (2010) 4 Of The Committee Of Ministers And Explanatory Memorandum*. Accessed December 14, 2014,

[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec\\_2010\\_4en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec_2010_4en.pdf).

<sup>155</sup> Ibid.

crimes, and crimes against humanity or tortures.<sup>156</sup> One of the main characteristics of the military service which distinguishes it from other types of services is the disciplinary system. The main aim of the military discipline is to provide operative effectiveness of the military force.<sup>157</sup> Military discipline requires non-violation of rules, military charters and execution of orders given by higher officials.<sup>158</sup> By this, the military discipline is organized to coordinate the behavior and actions of the Members of Armed Forces and establish frames for the mutual relations between them which should enforce the compliance of the discipline.<sup>159</sup>

The military discipline is tightly connected to the hierarchical structure of the Armed Forces – subordination and the principle that Members of Armed Forces should unconditionally obey orders which were given by a Commander or the officer higher by the rank. Disobeying orders or failure to comply with current military regulations or rules is considered to be the violation of the discipline. “Each member state is competent to organize its own system of military discipline and enjoys a certain margin of appreciation in the matter. However, only conduct likely to constitute a threat to military discipline, good order, safety or security may be defined as a disciplinary offence. The severity of any punishment should be proportionate to the offence.”<sup>160</sup> The system of the military discipline accepts the possibility of imposing of restrictions on certain rights and freedoms of Members of Armed Forces which cannot be used against civilian population as a result, such system does not contradict the obligations of States.<sup>161</sup> It is obvious that all States have different systems of

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<sup>156</sup> Council of Europe, Directorate General of Human Rights and Legal Affairs. *Human Rights Of Members Of The Armed Forces Recommendation CM/Rec (2010) 4 Of The Committee Of Ministers And Explanatory Memorandum*. Accessed December 14, 2014, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec\\_2010\\_4en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec_2010_4en.pdf).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Council of Europe, Directorate General of Human Rights and Legal Affairs. *Human Rights Of Members Of The Armed Forces Recommendation CM/Rec (2010) 4 Of The Committee Of Ministers And Explanatory Memorandum*. Accessed December 14, 2014, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec\\_2010\\_4en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec_2010_4en.pdf).

<sup>161</sup> “Case of Engel and others v. The Netherlands” HUDOC European Court of Human Rights, accessed March 17, 2014, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479#{\"itemid\":\[\"001-57479\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479#{\).

the army and military service because these systems become results of the long-established national military traditions. As a rule, States consider its own national military traditions as one of the distinctive features of the national identity because the system of the Armed Forces is the guarantor of the national integrity and security. Each State has a right to establish its own military system and use the margin of appreciation in this matter as it often happens in cases when systems of different countries significantly differ from each other.<sup>162</sup>

The disciplinary offence can be considered the behavior which can constitute a threat to the military discipline, established military order, public order or the security.<sup>163</sup> The military discipline must be based on the legal regulatory framework, particularly in regard to the definition of disciplinary offenses and related penalties.<sup>164</sup> This is a reflection of the principle which states that without law there cannot be the punishment for the crimes and aimed to the prevention of arbitrary disciplinary punishments.<sup>165</sup> Legislative and regulatory base should include procedures of disciplinary hearings in cases of the violation of disciplinary orders; types and terms of punishments and authorized bodies responsible for the punishments.<sup>166</sup> For the effective security for victims of severe treatment in the Armed Forces there is a need to provide the operative information about the behavior which is incompatible with the military discipline and ethics as well as the immediate investigation of such cases for the purpose of the gathering information and punishing responsible people in the very short time.

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<sup>162</sup> Ibid.

<sup>163</sup> Council of Europe, Directorate General of Human Rights and Legal Affairs. *Human Rights Of Members Of The Armed Forces Recommendation CM/Rec (2010) 4 Of The Committee Of Ministers And Explanatory Memorandum*. Accessed December 14, 2014, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec\\_2010\\_4en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec_2010_4en.pdf).

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Council of Europe, Directorate General of Human Rights and Legal Affairs. *Human Rights Of Members Of The Armed Forces Recommendation CM/Rec (2010) 4 Of The Committee Of Ministers And Explanatory Memorandum*. Accessed December 14, 2014, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec\\_2010\\_4en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/cmrec_2010_4en.pdf).

### 3.1. CASES.

#### *Dostler Case*

May 8, 1945 the General Dostler was arrested by Americans and brought to the Military Tribunal of the United States of America in the Province of Caserta on charges for shooting and killing 15 soldiers of American subversive group.<sup>167</sup> For his own defense, Dostler stated that he was executing Hitler's order of October 18, 1942 when it was ordered to immediately kill all captured prisoners.<sup>168</sup> Dostler claimed that he was only the transmission link in the whole process of the sending the order to the Colonel Almers.<sup>169</sup> However, the Court didn't heed this argument and October 12, 1945 sentenced Dostler to the death by shooting.<sup>170</sup> This sentence created the precedent for the series of the Nuremberg trials<sup>171</sup> that "using Superior orders as a defense does not relieve officers from liability of carrying out illegal orders and their liability to be punished in court. Similar principles were found in sections of the Universal Declaration of Human Rights."<sup>172</sup>

#### *Einsatzgruppen Trial*

Some Courts' decisions refer to the criteria formulated in Nuremberg trials: whether executer of the order had the freedom of choice between execution and non-execution of the

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<sup>167</sup> Richard A. Falk, *The Vietnam War and International Law, Volume 3: The Widening Context* (Princeton University Press, 1972), accessed September 24, 2014, [https://books.google.kg/books?id=8vF9BgAAQBAJ&pg=PA451&lpg=PA451&dq=The+Dostler+Case,+22+United+States+Military+Commission+\(1945\).&source=bl&ots=-QkhFEps42&sig=XZNqUJW4JKeTG3QaigxWVA\\_Dyo4&hl=en&sa=X&ei=j\\_1AVbemMqHpywPWvIHwAg&redir\\_esc=y#v=onepage&q=The%20Dostler%20Case%2C%2022%20United%20States%20Military%20Commission%20\(1945\).&f=false](https://books.google.kg/books?id=8vF9BgAAQBAJ&pg=PA451&lpg=PA451&dq=The+Dostler+Case,+22+United+States+Military+Commission+(1945).&source=bl&ots=-QkhFEps42&sig=XZNqUJW4JKeTG3QaigxWVA_Dyo4&hl=en&sa=X&ei=j_1AVbemMqHpywPWvIHwAg&redir_esc=y#v=onepage&q=The%20Dostler%20Case%2C%2022%20United%20States%20Military%20Commission%20(1945).&f=false).

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950. Principle IV", International Committee of the Red Cross, accessed November 14, 2014, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DFA0BDF15E81AE88C12563CD0051C99E>.

<sup>172</sup> "Updated statute of the International Criminal Tribunal for the former Yugoslavia", International Criminal Tribunal for the former Yugoslavia, accessed November 16, 2014, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

order.<sup>173</sup> The United States Military Tribunal, Nuremberg stated that received harm in case of non-execution of the order much less the damage caused by execution of illegal order: If someone states that he/she executed the order under duress, it should be proved that the harm caused by the obedience to the order was not proportionately large compared to the damage which could appear in the result of the non-execution of the illegal order.<sup>174</sup> For example the murder of the person which is innocent, executed by the subordinate according to the received military order will not be considered as the mitigation obstacle if in cases of non-execution of the order the subordinate he/she was threatened to be arrested for few days.”<sup>175</sup><sup>176</sup>

Neither Geneva Conventions of 12 August 1949 nor Additional Protocols of 8 June 1977 have anything about rejection of the reference to the superior order as the justification, because during the development of these documents many countries considered this principle incompatible with norms of obedience to orders from superiors accepted in national legislations.<sup>177</sup> The fact that this principle has not been concluded into those documents does not mean its disappearance. This principle is confirmed implicitly by the UN General Assembly in its resolution 95 (I) and International Law Commission in the formulation of the principles of the Nuremberg law in 1950 and in the Draft Code of Offences against the Peace and Security of Mankind 1954<sup>178</sup>, 1991 g (v. 12) and 1996 is also present in the UN

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<sup>173</sup> The United Nations War Crimes Commission, *Law Reports of Trials Of War Criminals* (London: : His Majesty's Stationery's Office, 1949), accessed September 14, 2014, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-9.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf).

<sup>174</sup> “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950. Principle IV”, International Committee of the Red Cross, accessed November 14, 2014, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DFA0BDF15E81AEA8C12563CD0051C99E>.

<sup>175</sup> “Glava chetvertaia. Otvetstvennost’ za narusheniia prava vooruzhennikh konfliktov”, UNHCR The UN Refugee Agency, accessed June 17, 2014, <http://www.refworld.org.ru/cgi-bin/taxis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=532079224>.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> United Nations, *Draft Code Of Offences Against The Peace And Security Of Mankind 1954*. 2005, accessed December 15, 2014, [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7\\_3\\_1954.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf).

Convention on 10 December 1984 against Torture<sup>179</sup>, in the Statute of the International Criminal Tribunals<sup>180</sup> and the Statute of the ICC<sup>181</sup> in the UN General Assembly Declaration of 18 December 1992 on the Protection of All Persons from Enforced Disappearance<sup>182</sup> and the Declaration of the UN General Assembly on December 9, 1998 on the Right and Liability of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms<sup>183</sup>. Therefore, the duty to disobey manifestly unlawful order rightly described as the usual rule applicable in internal and international armed conflicts.<sup>184 185</sup>

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<sup>179</sup> United Nations General Assembly, *Question Of Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, 2001. Accessed December 14, 2014, <http://www.un.org/documents/ga/docs/56/a56156.pdf>.

<sup>180</sup> “Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).”, University of Minnesota Human Rights Library, accessed November 5, 2014, <http://www1.umn.edu/humanrts/icty/statute.html>.

<sup>181</sup> “Rome Statute of the International Criminal Court”, International Criminal Court, accessed November 5, 2014, [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>182</sup> “47/133. Declaration on the Protection of All Persons from Enforced Disappearance”, United Nations, accessed November 5, 2014, <http://www.un.org/documents/ga/res/47/a47r133.htm>.

<sup>183</sup> “53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms”, Official Documents System of the United Nations, accessed November, 4, 2014, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>.

<sup>184</sup> “Rule 154. Obedience to Superior Orders”, International Committee of the Red Cross, accessed November 19, 2014, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule154](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule154).

<sup>185</sup> “Rule 155. Defence of Superior Orders”, International Committee of the Red Cross, accessed November 19, 2014, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule155](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule155).

## RECOMMENDATIONS

The Kyrgyz Republic is relatively young country which has a lot of things to develop. An enormous work has been done in order to establish the strong and stable basis for the population and people of the Kyrgyz Republic. Even if there is a huge work done there are still things that need to be changed in order to develop the country. With the help of Amendments into the national legislation of the Kyrgyz Republic there can be made serious modifications which can somehow change the situation for the better. Although the Kyrgyz Republic has a big list of normative legal acts which regulate the military sphere, there are still problems that need attention of the Legislator. Problems of interpretation and understanding of the legal norms can lead to the unconscious violation of laws.

Analysis of the current legislation of the CIS countries, Russian Federation (which was used as a model) in particular and the International Law as whole, also scientific views about mandatory character of the order given by a Commander in Chief lets me make suggestions for the improvement of the current legislation of the Kyrgyz Republic regarding the problem with the legal liability of non-execution of military illegal orders by Members of Armed Forces in the Kyrgyz Republic. According to the analysis made above, there can be made several recommendations in order to improve the national legislation of the Kyrgyz Republic – make Amendments into the national legislation of the Kyrgyz Republic:

1. *Correct the Article 39 of the Criminal Code of the Kyrgyz Republic.* The norm does not really represent and describes the situation of the receiving of illegal order: “No person shall be criminally liable for failure to perform any other violation of orders, or duties, if they have been assigned to him/her unlawfully. Liability arises only when actual act committed by he/she contains elements of another crime.” As a result Members of Armed Forces can be misled with no clear



understanding of the law. The Kyrgyz Republic legislator can correct the definition of the norm by using model of CIS countries and the Russian Federation in particular: “Non-execution of illegal orders excludes criminal liability.”<sup>186</sup>

2. *Include into the Article 39 of the Criminal Code of the Kyrgyz Republic preclusion of the disciplinary liability for the non-execution of illegal order.* For now the Criminal Code provides us with no criminal liability, but there is nothing written about disciplinary liability which is also connected to the order itself. As it was already described above, the system of order consists of the discipline and other important institutes. At the time of receiving the illegal order there comes a doubt: in daily life non-execution of the order causes disciplinary punishment; in cases of illegal orders the national legislation states nothing about disciplinary liability for non-execution. By this, the absence of the disciplinary liability for the non-execution of illegal orders complicates the process of disobedience of illegal orders by Members of Armed Forces.
3. *Use foreign countries cases as supporting materials and recommendations in solution of cases concerning Members of Armed Forces in the Kyrgyz Republic.* Even the legislative system of the Kyrgyz Republic differs from Case-Law countries; still, Judges of Kyrgyz Courts can use Case Law countries’ experience as helpful source;
4. *Educate Members of Armed Forces of the Kyrgyz Republic about basic International Humanitarian Law norms.* Soldiers should have basic understanding of legal norms; the military service is closely connected to the International Humanitarian Law sphere. Members of Armed Forces should know their rights not only under the national legislation of the Kyrgyz Republic, but also under

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<sup>186</sup> Ugolovnii Kodeks Rossiiskoi Federatsii [UK RF] [Criminal Code of the RF from June 13, 1996], art. 42, 2. (Russ.).

International Humanitarian one. The process of education can be organized by the Ministry of Defense and local military units on the territory of the Kyrgyz Republic with support of Non-governmental Organizations, etc. With the help of such educational trainings Members of Armed Forces will have an ability to explore more about their rights, obligations and liabilities under national and International legislation systems.

## CONCLUSION

The norm of the International Humanitarian Law which states that every combatant is obliged not to obey manifestly illegal orders has become a part of the Customary International Law.<sup>187</sup> This norm comes from the obligation to comply with norms of the International Humanitarian Law and the norm which states that the execution of the order given by a Commander is not the circumstance which precludes criminal liability in cases if the subordinate or the Member of Armed Forces should have known about criminal character of the given order. As soon as illegal orders of Commanders cannot serve as circumstance precluding liability, some Courts base their decisions on the fact that subordinates were obliged not to execute such orders.<sup>188</sup> Besides the practice concerning the orders of Commanders as a circumstance precluding criminal liability in the military charters, normative legal acts and legislation of States itself there is a practice which includes the obligation not to execute order which is manifestly illegal or causes execution of the crime.<sup>189</sup> The practice and the fact that the subordinate or the Member of Armed Forces executing illegal order cannot rely on the justification of the execution of the order and still considers guilty shows that there is an obligation not to execute illegal orders.<sup>190</sup>

In the military law of the majority of countries there is an obligation to obey all legal orders and non-abetment to such orders is the punishable offence. Besides, this position can be interpreted as the expectation of non-execution of illegal orders by subordinates of

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<sup>187</sup> Henckaerts, Jean-Marie, and Louise Doswald-Beck. "Rule 154. Every Combatant Has a Duty to Disobey a Manifestly Unlawful Order." In *Customary International Humanitarian Law Volume I: Rules*, 563-567. Vol. 1. New-York: Cambridge University Press, 2009.

<sup>188</sup> "Rule 154. Obedience to Superior Orders", International Committee of the Red Cross, accessed November 19, 2014, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule154](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule154).

<sup>189</sup> Ibid.

<sup>190</sup> Henckaerts, Jean-Marie, and Louise Doswald-Beck. "Rule 154. Every Combatant Has a Duty to Disobey a Manifestly Unlawful Order." In *Customary International Humanitarian Law Volume I: Rules*, 563-567. Vol. 1. New-York: Cambridge University Press, 2009.

Members of Armed Forces, the practice of such actions was not found.<sup>191</sup> Non-execution of illegal orders should not have criminal liability on the national legislation level, because subordinates must obey only legal orders:

“A soldier does not have to fear punishment for insubordination when he disobeys orders that he knows are illegal or are manifestly illegal, nor does he have to fear punishment for the commission of war crimes when he follows orders which are not manifestly illegal. The only asymmetry that potentially undermines the supremacy of the law would seem to be that a subordinate may carry out an order that he knows to be illegal, but which is not manifestly illegal, and yet maintain the defense of superior orders. The structure of the manifest illegality defense should have the natural consequence of eliminating situations where this set of circumstances arises. Assigning the superior presumptive knowledge of the law, and thus liability under the law, should create an incentive for the superior to learn the law and a disincentive to deliver illegal orders.”<sup>192</sup>

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<sup>191</sup> Henckaerts, Jean-Marie, and Louise Doswald-Beck. "Rule 154. Every Combatant Has a Duty to Disobey a Manifestly Unlawful Order." In *Customary International Humanitarian Law Volume I: Rules*, 563-567. Vol. 1. New-York: Cambridge University Press, 2009.

<sup>192</sup> B. Insko, James. "Note: Defense Of Superior Orders Before Military Commissions". *Duke Journal Of Comparative & International Law* 389: 5.

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