E.K. Nogoibaeva
International and Business Law Department
American University of Central Asia
Head and Assistant Professor

N.K. Myrsalieva
International and Business Law Department
American University of Central Asia
LL.M., Indiana University School of Law – Indianapolis
Assistant Professor

Obligation of the Kyrgyz Republic under the Geneva Conventions of 1949 and Their Additional Protocol I of 1977 Concerning Grave Breaches of International Humanitarian Law

Establishing the full regime of repression of the grave breaches of the Geneva Conventions of 1949 and their Additional Protocol I of 1977

With the collapse of the Soviet Union, fifteen new sovereign states have emerged, one of which is the Kyrgyz Republic. Among all of the issues that were to be solved by these newly created independent states was the issue of their succession to treaties, to which the USSR was party.

There are two main conventions in international law that govern the issue of state succession: Vienna convention on succession of states in respect of treaties of 1978 (8) and Vienna convention on succession of states in respect of state property, archives, and debts of 1983 (9). Since Geneva Conventions of 1949 and their Additional Protocols are treaties of humanitarian nature, they are given special treatment under the doctrine of state succession. Human rights treaties and treaties of humanitarian nature are subject to automatic state succession due to their vital importance. Some authors believe that the evidence of the special character of the rights granted under human rights treaties may be found in article 60 [5] of the Vienna Convention on the Law of Treaties of 1969, which provides that provisions relating to the protection of the human person contained in treaties of a humanitarian character may not be terminated or suspended in response to a breach by another party (26, p.5). A slightly different provision exists in the Geneva Conventions of 1949, but with the same idea, according to which although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations (3, art. 2 common to all Geneva Conventions of 1949).

The issue of automatic state succession to human rights treaties has been thoroughly addressed in the separate opinion of Judge Christopher Gregory Weeramentry in the case of

Bosnia and Herzegovina v. Yugoslavia. In his separate opinion, Judge Weeramentry elaborates on the theoretical bases for "clean state" principle, which is the general rule of international law regarding the state succession to treaties. According to this doctrine, "newly independent States should not have to accept as a *fait accompli* the contract of predecessor States, for it is self-evident that the new State must be free to make its own decisions on such matters" (18). In addition to historical factors that strongly support this theory, there are also underlying principles of international law that justify it such as "the principle of individual State autonomy, the principle of self-determination, the principle of *res inter alios acta (*"case between two parties" from Latin), and the principle that there can be no limitation on a State's rights, except with its consent" (18).

However, in his separate opinion Judge Weeramentry stated that "sufficiently cogent reasons should exist to demonstrate that the new State's sovereignty is not being thereby impaired by a deviation from the clean state principle." He further examined the issue "whether there is any impairment of State sovereignty implicit in the application of the principle of automatic succession to any given treaty." As a result of analyses, the conclusion to which Judge Weeramentry came was that the Genocide Convention (18) is subject to the principle of automatic state succession based on the following reasons: 1) it is not centered on individual State interests; 2) it transcends concepts of State sovereignty; 3) the rights it recognizes impose no burden on the State; 4) the obligations imposed by the Convention exist independently of conventional obligations; 5) it embodies rules of customary international law; 6) it is a contribution to global stability; 7) the rights conferred by the Convention are non-derogable and others. Geneva Conventions of 1949 and their Additional Protocols are of humanitarian nature, therefore, it can be argued that they enjoy the same status as the Genocide Convention, i.e. attract the principle of automatic state succession without being officially succeeded to, if they satisfy all the above-mentioned requirements.

International community has an obvious interest in the continuity of obligations contained in human rights treaties. It is therefore not surprising that continuity of obligation under human rights treaties has been insisted upon by both political organs of international organizations and by treaty monitoring bodies (26, p.6). The International Committee of the Red Cross (ICRC) is the main international organization in the field of international humanitarian law, whose main mission is to prevent and alleviate human suffering wherever it may be found (12, Preamble), thus to promote values and provisions contained in Geneva Conventions of 1949 and their additional protocols. The ICRC has taken the view that a successor state is automatically bound by the international humanitarian instruments that were binding on the predecessor state, unless the successor state has made a specific declaration to the contrary (26, p.6).

Nevertheless, "States are encouraged to confirm to appropriate depositaries that they continue to be bound by obligations under relevant international human rights treaties" (37). Despite the official view that the ICRC has taken on the issue of automatic state succession to the treaties of humanitarian nature, in practice, however, the ICRC has encouraged successor States to formally confirm their adherence to international humanitarian law instruments (26, p.6). In September 1993, heads of the state-parties of CIS (Commonwealth of Independent States is an international regional organization, which was created on 8

December, 1991, consists mainly of former USSR states, except for the three Baltic states) in their declaration on international obligations in respect of human rights and freedoms stated that they will consider and take all necessary actions to notify about their succession to human rights treaties.

According to article 17 [1] of the Vienna Convention on succession of states in respect of treaties of 1978 "a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates." A notification of succession has to be in writing (8). Even though the above mentioned convention has never entered into force (26, p.4) and has hardly had any impact on state practice, the noteworthy exception being that practice widely follows the rule according to which a successor State can establish its status as party of a multilateral treaty to which its predecessor State already belonged through a declaration of succession, therefore the provisions of it can be applied on the basis of international customary law (43).

The Kyrgyz Republic, after receiving independence and declaring itself a sovereign entity, expressed its consent to be bound to Geneva Conventions of 1949 and their additional protocols by sending a letter of notification of succession (38). However, internal legislation did not recognize such form of accession to the treaty as a constituent part of the legislation (13), thus the Kyrgyz Republic could not implement technically provisions of the Geneva Conventions of 1949 and their additional protocols according to its constitution. Although, under international law, the state party to the treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty (10, art. 27). States are obliged to perform their duties in good faith, once they have ratified the treaty or accepted their obligations under the treaty by other means (10, art. 26).

On 21 July 1999, the Kyrgyz Republic adopted a Law (16) on ratification of Geneva Conventions of 1949 and Additional protocols of 1977, thus admitting or reaffirming its obligations under these treaties and making them constituent part of its legislation (13). One of the underlying principles of international law is *pacta sund servanda* (10, art.26), which means that "every treaty in force is binding upon the parties to it and must be performed by them in good faith" (10, art.26).

According to the Geneva Conventions of 1949 (3-7, *art. 49 of the I Geneva Convention of 1949, art.50 of the II Geneva Convention of 1949, art. 129 of the III Geneva Convention of 1949, art. 146 of the IV Geneva Convention of 1949, art.85 of Additional Protocol I of 1977)*, the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined by the Conventions and their Additional Protocol I. This is an imperative obligation for Contracting States to promulgate suitable measures in the case their own penal legislation being inadequate. It is desirable that States, which have ratified or acceded to the Convention, take steps without delay to give effect to the obligation incurred by them under relevant articles of the Geneva Conventions of 1949 (31, art. 49).

Additional Protocol I of 1977 complements the Geneva Conventions of 1949 and adds more crimes to the list of grave breaches. The system of repression in the Conventions is not to be replaced, but reinforced and developed by the article 85 of the Additional Protocol I of 1977, so that it will in the future apply to the repression of breaches of both the Protocol

and the Convention (32, art. 85). Additional Protocol I introduces or recognizes these grave breaches as war crimes (7, art. 85 [5]). War crimes, along with crimes against humanity, crime of genocide constitute crimes under international law. Crimes under international law are especially dangerous for the humankind violations of principles and norms of international law, which constitute the basis for the peace and security in the world, protection of individuals and vital interests of international community as the whole (36). Moreover, prohibition of war crimes is part of *jus cogens* (9). Cherif Bassiouni has explained, "*Jus cogens* refers to the legal status that certain international crimes reach.....Sufficient legal basis exists to reach the conclusion that all of these crimes (including war crimes) are parts of the *jus cogens*" (39). As such, the prohibition is a peremptory norm of general international law, which, cannot be modified or revoked by treaty (10, art.53). Thus, the Kyrgyz Republic has not only conventional duty to prosecute the perpetrators of war crimes, but also duty under customary international law.

Crimes against persons

In the past torture was believed to be a legitimate way to obtain testimonies and confessions from suspects for use in trials (44). Torture remains a popular method of repression in totalitarian regimes, and is frequently used by democratic governments as well (44). However, the possibility of using torture and other inhumane treatment is especially high in times of armed conflict.

According to the Geneva Conventions of 1949, grave breaches constitute acts committed against persons such as willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health. Definitions of grave breaches were included in the Geneva Conventions to ensure universality of treatment in their repression (31, commentary to art.50). The list of 'grave breaches' is not exhaustive, although a large number of these offences would certainly appear to be covered (31, commentary to art.50). Kyrgyz Criminal Code penalizes murder which is willful deprivation of someone's life; the same act but committed with special cruelty, joined with rape or forced sexual satisfaction taken in other forms is considered as aggravating circumstances (14, art. 97).

Additional Protocol I of 1977 clarifies this definition and gives broader view to grave breaches. Under article 85 of the Additional Protocol I, acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by article 44, i.e. prisoners of war, article 45, i.e. persons who have taken part in hostilities, and article 73, i.e. refugees and stateless persons, of this Protocol, or against wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

Additional Protocol I, further in detail defines grave breaches in article 11, which states that the physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 (7) shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and

which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty. Paragraph 2 of this article, lists precise acts that are prohibited even with the consent of persons described above. These acts include: (a) physical mutilations; (b) medical or scientific experiments; (c) removal of tissue or organs for transportation, except where these acts are justified in conformity with the conditions provided in paragraph 1. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntary and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient (7, art. 11 para 3). Under the Kyrgyz Criminal Code, forcing the person to give up with his organs or his/her relative's organs for the reasons of transplantation, committed with coercion or threat to use coercion is considered to be criminal offence (14, art. 114).

Almost the same definition of torture is given in article 1 [1] of the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984 (1). The difference between these definitions is that Geneva Conventions and Additional Protocol I do not define purposes or reasons of such acts. International Criminal Tribunal for the Former Yugoslavia (ICTY) jurisprudence has put forward the proposition that under customary international law there is no requirement that the conduct be solely perpetrated for one of the prohibited purposes (33, p. 119).

The distinguishing characteristic between torture and other lesser forms of ill treatment is the severity of the pain or suffering of the victim (33, p. 119). A precise threshold would be impractical to delineate, and thus the task of assessment is left to the discretion of the judge (33, p. 119). However, it has been argued that "degrading, cruel and inhuman treatment" becomes impossible to separate from torture, given the lack of an accepted overriding definition of torture, and in the context where State complicity in violence takes many forms (42). The UN Convention of 1984 against Torture requires that the offence was perpetrated at the instigation, consent, or acquiescence of a public official. Under international humanitarian law, the presence, involvement or acquiescence of a State official or any other authority – wielding person is not required for the offence to be characterized as torture. This conclusion was correctly drawn by the *Kunarac* judgement, which examined in detail all the relevant provisions of humanitarian law (33, p. 120). Under the Kyrgyz criminal legislation it is possible to bring to justice those who have committed crimes against persons, prescribed by the Geneva Conventions and their Additional Protocol I, as most of these crimes are provided for by the Criminal Code (14, articles 97, 104, 105, 108, 110-114, 121, 123). Only recently the new article appeared in the Criminal Code of the Kyrgyz Republic, defining torture and making it a separate criminal offence (14, art. 305-1). The only problem with these articles is that the Criminal Code regards these offences as ordinary ones, not as crimes under international law, which ought to be treated differently, e.g. be subject to universal jurisdiction, be subject to non applicability to statutory limitations, therefore there should be made some amendments to the Criminal Code regarding these crimes. Amendments should stipulate that such acts, committed during the armed conflict of international or non-international character, shall be considered as war crimes.

Crimes against property

"A person's home is not merely a roof over his head, but it is also a means for the physical and social location of a person, his private life and his social relationships."
-President of the Supreme Court of Israel (20, para 14)

One of the grave breaches, prescribed by the Geneva Conventions and their Additional Protocol I is the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (3, art. 50). In deciding what exactly constitutes grave breach it is necessary to define key terms of this provision such as "property," "extensive," and "military necessity." According to the commentary to Geneva Conventions (31, commentary to art. 50) this definition covers, in particular, cases of destruction of buildings or material belonging to enemy medical units, in violation, for example, of Article 33, paragraph 3 [6]. It also covers cases where medical materials or transport are seized without the prescribed conditions being respected. It should, incidentally, be noted that the plea of military necessity may not exceed the limits fixed by the definition of military necessity contained in Articles 33 to 36 [7]. Article 40 cannot be invoked in justification of unfettered resort to destruction or appropriations, which are prohibited elsewhere in the Convention. Under Article 33 of the Geneva Convention I the buildings, material and stores of fixed medical establishments of the armed forces shall not be intentionally destroyed. Some authors argue that the term "property" should be interpreted broadly to encompass public goods such as common land, forests, the atmosphere, water resources, and the open seas. If property is construed broadly, the conventions may constitute powerful protection for the environment from wartime environmental damages (27, p. 203).

To understand better what constitutes extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, Israeli house demolitions in occupied Palestinian areas can be illustrated as an example of such actions (24, p. 885). Since 1967, house demolitions have been utilized as a punitive measure against residents of the West Bank and Gaza. The phrase "house demolitions" refers to the physical destruction of a house or portion of a house by government actors. The Israeli Defense Forces have conducted house demolitions since the time the West Bank and Gaza were occupied (24, p. 885). Such practice has been heavily criticized by scholars and was called as grave breach of international humanitarian law (24, p. 925). An Attorney General of Israel, Meir Shamgar argued that demolitions pursuant to DER 119 are necessary military operations, since the houses from which the attacks take place are, in effect, military bases, and military action is thus required (24, p. 925). His argument is strengthened by the fact that Israel has the prerogative to determine what constitutes military necessity, since it is "for the Occupying Power to judge the importance of such military requirements" (34, p.302). However, the punitive measures cannot satisfy the military necessity requirement under international humanitarian law for property destruction (28, p. 503). The demolition of houses has undoubtedly been carried out extensively; that punitive house demolitions are unlawful under international law has also been clearly established. Destruction that is carried out wantonly refers to destruction that is "extensive, unnecessary and willful" (28, p. 502). Additional Protocol I of 1977, in article 85 recognizes such acts as war crimes. The "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" has

been also defined as a war crime in Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg and in the Statute of the International Tribunal for the Former Yugoslavia. The elements of the war crime of extensive property destruction in the Rome Statute have been set out as follows:

The perpetrator destroyed or appropriated certain property;

The destruction or appropriation was not justified by military necessity;

The destruction or appropriation was extensive and carried out wantonly;

Such property was protected under one or more of the Geneva Conventions of 1949;

The perpetrator was aware of the factual circumstances that established that protected status;

The conduct took place in the context of and was associated with an international armed conflict;

The perpetrator was aware of factual circumstances that established the existence of an armed conflict (40).

If all these requirements are satisfied, than these actions would be recognized as extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, thus constituting war crime. In the case of Israeli house demolitions, it has been strongly argued that these requirements are satisfied and that Israel should stop such activities (28, p. 504).

The Criminal Code of the Kyrgyz Republic does not contain any of the war crimes listed in the Geneva Conventions of 1949 and their Additional Protocol of 1977, including extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. However, it is still possible to bring to justice persons committing such crimes under the article 174, which states that intentional destruction or damage of someone's property, inflicting substantial damage shall be punished with triple aiyp (it is the Kyrgyz word which means 'fine') or fine in the amount of from 100 to 200 of minimum monthly wages, or shall be subject to arrest for the term of up to three months. The same reservation ought to be made as to crimes against person, i.e. amendments to the Criminal Code should stipulate that such acts, committed during the armed conflict shall be considered as war crimes.

Unlawful means and methods of warfare

The main purpose of international humanitarian law is to minimize the number of victims resulting from various armed conflicts, to alleviate the suffering of those who are not taking part in hostilities, that is "to humanize the armed conflict." It does not seek to "outlaw" war, but instead it aims to restrain the parties to an armed conflict from wanton cruelty and ruthlessness, and to provide essential protection to those most directly affected by the conflict (45). For these purposes, there are certain rules, prescribed by international humanitarian law, that regulate the conduct of belligerent parties to avoid unnecessary sufferings.

In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited (7, art. 35). This principle reaffirms the law in force. Whether the armed conflict concerned is considered by the protagonists to be lawful or unlawful, general or local, a war of liberation or a war of conquest, a war of aggression or of self-defense, limited or "total" war, using conventional weapons or not, the Parties to the conflict

are not free to use any methods or any means of warfare whatsoever (32, commentary to art. 35). This principle was reaffirmed in resolutions, adopted by the ICRC, the UN General Assembly where it is stated that "(a) the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) it is prohibited to launch attacks against the civilian populations as such; (c) that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible" (41).

Contrary to what some might think or wish, in law there are no exceptions to this fundamental rule. If one were to renounce the rule, by which Parties to the conflict do not have an unlimited right, one would enter the realm of arbitrary behavior, i.e. an area where law does not exist, whether this was intended or not. It is quite another matter to determine the actual scope of the principle, and the specific rules and practices implied by it, which may differ with the times, depending on the prevalent customs and treaties. These variations do not affect the principle itself but its application (32, commentary to art. 35).

A number of different theories, of which some are still in existence, seek to contest the validity of the rule as such, i.e. the rule contained in the paragraph under consideration. The best known of these, though it is now out of date, was expressed by the maxim "Kriegsraison geht vor Kriegsmanier" ("the necessities of war take precedence over the rules of war"), or "Not kennt kein Gebot" ("necessity knows no law"). These maxims imply that the commander on the battlefield can decide in every case whether the rules will be respected or ignored, depending on the demands of the military situation at the time. It is quite obvious that if combatants were to have the authority to violate the laws of armed conflict every time they consider this violation to be necessary for the success of an operation, the law would cease to exist. Law is a restraint which cannot be confused with more usages to be applied when convenient. "Kriegsraison" was condemned at Nuremberg, and this condemnation has been confirmed by legal writings. One can and should consider this theory discredited. It is totally incompatible with the wording of Article 35, paragraph 1, and with the very existence of the Protocol (32, commentary to art. 35).

Additional Protocol I in article 85 [2], recognizes some unlawful means and methods of warfare as war crimes, namely launching of an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian object; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; making non-defended localities and demilitarized zones the object of attack, making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangements and others.

Launching of an indiscriminate attack: the absolute prohibition against indiscriminate attack is most obviously related to the principle of distinction (21, p. 58). Principle of distinction is one of the most essential principles of international humanitarian law. Central to this principle is the concept of "the military objective," or the legitimate target. If a viable body of law purporting to regulate combat is to exist, a distinction must be drawn between persons or objects which may be attacked and those which may not be attacked (29, 547). Article 52 of the Additional Protocol I to the Geneva Conventions of 1949 defines military objects, which are objectives, limited to those objects, which by their nature, location, purpose

or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The definition of military objectives had been the object of study for a long time, and the solution adopted by the Diplomatic Conference is broadly based on earlier drafts. It should be noted that the definition is limited to objects but is clear that members of the armed forces are military objectives (32, commentary to art. 52). Where objects are concerned, the definition has two elements: (a) their nature, location, purpose or use must make an effective contribution to military action, and (b) their total or partial destruction, capture or neutralization must offer a definite military advantage in the circumstances ruling at the time. It remains a requirement that both elements of the definition must be met before a target can be properly considered an appropriate military objective (29, p. 544). Under article 51 [4] of the Additional Protocol I of 1977 to the Geneva Conventions of 1949, indiscriminate attacks are: (a) those which are not directed as a specific military objective; (b) those which employ a method or means of combatant with cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol, and consequently, in each such case, are of a nature to strike military objectives and civilian objects without distinction. As the emphasis indicates, this provision does not mean that the mere presence of civilians or civilian objects makes any planned attack "indiscriminate." Instead, it reinforces the principle of distinction by capturing the definition of indiscriminate targeting decisions, which by their nature cannot distinguish between military objectives and the civilian population (21, p. 58).

Launching of an attack against works or installations containing dangerous forces: despite the fact that the justified military objectives can be subject of attack; there are still situations, when even then certain object cannot be subject of attack. Such objects are works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations. They cannot be object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population (7, art. 56 [1]). The works and installations concerned enjoy special protection and may not be attacked when such attacks may cause severe losses among the civilian population because of the release of the dangerous forces. If such an attack cannot cause severe losses it is legitimate, provided that the works or installations that are attacked has clearly become a military objective in the sense of article 52 (32, commentary to art. 56 [1]). The Criminal Code of the Kyrgyz Republic does not contain any provision regarding this issue; consequently one of the amendments to be made to the Criminal Code is to include the prohibition of an attack against works or installations containing dangerous forces.

Making non-defended localities and demilitarized zones the object of attack: it is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities (7, art. 59 [1]). It should be noted that even in case a locality contains military objectives and hostile acts are perpetrated from such objectives that does not in any way justify the total destruction of the building in that locality (32, commentary to art. 59 [1]). The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact, which is open for

occupation by an adverse Party (7, art. 59 [2]). This rule must be obeyed even in the absence of a declaration or an agreement (32, commentary to art. 59 [2]). Such a locality shall fulfill the following conditions:

- all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
- no hostile use shall be made of fixed military installations or establishments;
- no acts of hostility shall be committed by the authorities or by the population; and
- no activities in support of military operations shall be undertaken (7, art. 59 [2]).

The Criminal Code does not contain specific provisions penalizing such actions; however, it will be possible to bring to justice those who committed this war crime for other crimes such as destruction of property, murder, etc. However, it is strongly recommended to include the provision prohibiting making non-defended localities and demilitarized zones the object of attack in the Criminal Code.

Launching of an attack against historical objects or places: making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53 and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives constitutes war crimes under the article 85 (d) of the Additional Protocol I of 1977. Article 53 deals with the protections of cultural objects and places of worship. According to this article, it is prohibited to commit any acts of hostility directed at these objects, to use such objects in support of the military effort and make such objects the object of reprisals. The protection laid down in this article is accorded "without prejudice" to the provisions of other relevant international instruments (32, commentary to art. 53). Despite these rules laid down in the Additional Protocol and Hague Conventions (2), some authors argue that the contemporary law on the protection of cultural property in the event of armed conflict is inadequately enforced, due to the absence of mechanism to sanction a nation for its failure to safeguard cultural property (23, p. 211). The Criminal Code of the Kyrgyz Republic contains provisions, which penalize intentional destruction or demolition of historical and cultural heritage, environmental objects, which are protected by the state (14, art. 175). Amendment should be made to this article, stipulating that the same acts committed during the armed conflict of international or non-international character shall be considered a war crime.

Providing for the prevention of the perfidious use of the red cross and red crescent emblems

"Finally, a badge, uniform or armlet might be usefully adopted, so that the bearers of such distinctive and universally adopted insignia would be given due recognition"
- Henry Dunant (35, p. 127)

Historical background of adopting an emblem of red cross and red crescent goes back to 1863 and 1864. At that time the advances in the construction of weapons led to the sharp rise in the number of men killed or wounded on the battlefield and in increase in the gravity

of wounds (25, p. 7). Therefore adoption of one universally recognized distinctive sign was of a great importance and need to protect the wounded and sick and medical personnel. This became one of the principal objectives of the very first meeting of the International Committee for Aid to Wounded Soldiers – the future International Committee of Red Cross on 17 February 1863 (25, p.7).

These were the very first steps undertaken by the international community to alleviate sufferings of wounded and sick by providing special protection. Today this provision on the protection and use of the emblem of red cross and red crescent is present in all four Geneva Conventions of 1949 (3: articles 36, 39-42, 53-54; 4: articles 39, 41-45; 6: articles 18, 20-22, 56) and their Additional Protocols of 1977 (7, articles 8, 18, 23, 38, 85). The essential purpose of the emblem is the protection. It is meant to show combatants that National Society volunteers, medical personnel, ICRC delegates etc; medical units such as hospitals, first aid stations etc; and means of transport are protected by the Geneva Conventions and their Additional Protocols. The indicative use of the emblem is designed to show, mainly in peacetime, that a person or object is linked to the International Red Cross and Red Crescent Movement – whether to a National Red Cross or Red Crescent Society, the International Federation of Red Cross and Red Crescent Societies or the ICRC. In the case of the first use of the emblem as a protective sign, the emblem has to be big in size, that it is visible from the distance, whereas, in the second case, the emblem must be smaller in size. The emblem serves as a reminder that those above mentioned institutions work in accordance with the Movement's Fundamental Principles. It is therefore also a symbol of humanity, impartiality, neutrality, independence, voluntary service, unity and universality (12, preamble).

Under the relevant provisions of the Geneva Conventions and their Additional Protocol misuse of the emblem is strictly prohibited (3, art. 53). Under the article 85 [3] (f) the perfidious use of the distinctive emblem of the red cross, red crescent, or other protective sign recognized by the Conventions or the Protocols (Red lion and sun) is considered as a grave breach, thus constituting a war crime. Perfidy are the acts inviting the confidence of the adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence (7, art. 37). Thus, use of the red cross or red crescent emblem in times of armed conflict to protect armed combatants or military equipment, e.g. ambulances or helicopters marked with the emblem and transporting armed combatants; ammunition dumps masked with red cross flags is considered a war crime.

The Kyrgyz Republic has an obligation under Geneva Conventions and Additional Protocol I to enact any legislation necessary to provide effective penal sanctions against persons committing, or ordering to commit any of the grave breaches of the Geneva Conventions and Additional Protocol. It also undertakes to take measures necessary for the prevention and repression, at all times, of the abuses referred to in Geneva Conventions (3, art. 54).

On 29 September 2000, the Kyrgyz Republic adopted the Law on the protection and use of the emblem of red cross and red crescent, fulfilling its obligations under international law. However, provisions contained in this Law do not provide for sufficient and adequate protection of the emblem. According to article 9 of this Law, the person who intentionally unlawfully uses the emblem of Red Cross or Red Crescent, the designations "Red Crescent" or "Red Cross," distinctive sign or any other sign, mark or signal, which are imitations of them or which could be mistakenly interpreted as such, and also a person, who actually placed

the picture of the indicated emblems or words on signs, posters, announcements, advertising leaflets or commercial documents, or used them for product marking or packaging, or sold, proposed for sale and launched in the market marked product shall be subject to liability in accordance with the code of the Kyrgyz Republic on administrative liabilities. This Law contains hypothesis, disposition, however it makes the reference for sanction to Administrative Code of the Kyrgyz Republic.

However, the Administrative Code of the Kyrgyz Republic does not contain any provision or sanction for unlawful misuse of the emblem of red cross and red crescent. The only relevant provision that exists is the article 341, which provides for liability for unlawful use of trademark. In accordance with this article, unlawful use of somebody else's trademark, insignia of service, name of the place of product origin, or company name shall be liable for administrative fine, for citizens, from five to twenty and for public servants from twenty to one hundred minimum monthly wages with the confiscation of the products. The question here is whether red cross and red crescent emblem can be considered a trade mark, thus to bring those who misuse these emblems to administrative liability.

According to the Law of the Kyrgyz Republic "On trade names" of 1999 (15), the trade name is fixed full or abbreviated name of a legal entity, which is registered with the State Agency on Intellectual Property under the Government of the Kyrgyz Republic – Kyrgyzpatent to achieve legal protection (15, articles 2-3). The same provision exists in relation to trade marks and service marks in the Law of the Kyrgyz Republic "On trademarks, service marks and appellations of places of origin of goods" of 2003 (17, art. 1). Since the emblem of red cross and red crescent is not registered with Kyrgyzpatent, it is not a trade name nor trade mark or service mark, consequently it cannot seek directly the protection under the Article 341 of the Code on Administrative Liabilities. Moreover, in February 2004 the Ministry of Health of the Kyrgyz Republic applied to Kyrgyzpatent with the request to register a new emblem for paid medical services. However, it would be still possible to bring to justice those who misuse the emblem of Red Cross and Red Crescent in violation of the Law "On the protection and use of the emblem of red cross and red crescent," by using analogy of law. But, despite this fact, it is still strongly recommended to make necessary amendments to the Administrative Code of the Kyrgyz Republic on the protection of the respective emblem.

In accordance with Article 10 of the Law "On the protection and use of the emblem of red cross and red crescent," the person who committed a war crime by perfidiously using the emblem of red cross or red crescent or any distinctive insignia in times of armed conflict shall be liable in accordance with the legislation of the Kyrgyz Republic. Again this provision makes the reference for sanction to other laws of the Kyrgyz Republic. In this case, the only law that can be made referenced to is the Criminal Code of the Kyrgyz Republic, since the liability in this case is criminal. In contrast to administrative law, where the analogy of law is permitted, in criminal law analogy is prohibited. Therefore, the sanction or the provision providing for criminal liability for the perfidious use of the emblem of red cross and red crescent in times of armed conflict has to be directly included in the criminal legislation. The Criminal Code of the Kyrgyz Republic does not contain such provision, despite the fact the Law "On the protection and use of the emblem of red cross and red crescent" was adopted four years ago. Therefore, to properly comply with its obligations, the Kyrgyz Republic shall include the above mentioned provision in the Criminal Code, stating that such acts constitute war crimes.

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М. Т. Тюлегенов,
старший преподаватель направления
«Международная и сравнительная политика»,
Американский университет в Центральной Азии

Лоббизм в постсоветском Кыргызстане

Введение

Почему в Кыргызстане не возникает институтов, связанных с лоббированием – вот вопрос, который может возникнуть при общем взгляде на почти двадцатилетнюю историю построения различных политических институтов в стране. Политические институт связаны с вопросом власти, которая в своем практическом проявлении является выражением чьих-то интересов. Понимание политики как пространства борьбы за власть можно определить и как борьбу различных интересов. Множество словарей определяют лоббирование как давление на органы государственной власти с целью продвижения своих интересов. Государство как часть политической системы не является чем-то нейтральным, выражающим (в понимании Ж. Ж. Руссо) интересы «общей воли», а постоянно испытывает на себе давление чьих-то интересов.

Слово «лобби» было использовано впервые в 1808 году (9, с. 200), так что это понятие в современном смысле существует как минимум двести лет. В то время как «лобби» означает прямое и целенаправленное продвижение чьих-то интересов в органах государственной власти, «лоббирование» означает действие по продвижению