# МІЖНАРОДНЕ ПРАВО. ПОРІВНЯЛЬНЕ ПРАВОЗНАВСТВО

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## THE CRIMINALIZATION OF WAR CRIMES IN NATIONAL LEGISLATION: A COMPARATIVE ANALYSIS

*The purpose of this article is to study the issue of defining norms prohibiting war crimes in national legislation, as well as a comparative analysis of the legislative practice of states in this area.*

*On the basis of the research carried out by the author, the rules of criminalization of international norms prohibiting war crimes in the national legislation of states, compliance of national legislation with international norms, as well as various aspects of national legislation of different states in this area were examined and serious violations of international humanitarian law defined in national legislation were fully defined, as well as, based on the Geneva Conventions, the non-realization of future obligations was examined.*

*For the first time in the national academic literature, the author demonstrated the importance of criminalizing the norms of national legislation regarding war crimes, conducted a comparative analysis of the national legislation of the states and made relevant proposals.*

*The author notes that since the scope of application of international humanitarian law is a very complex and multifaceted category, although many states have ratified the Geneva Conventions, the norms established in national legislation regarding war crimes are not compatible with the mentioned Conventions.*

*The author notes that states that do not criminalize war crimes in their national legislation are, as a rule, repressive states that do not ratify international treaties on human rights, that is, do not recognize any universal values. He notes that states that provide for criminalization in their national legislation first of all fulfill their obligations in the field of prosecution of war crimes and punishment of the guilty. At the same time, the concept of criminalization makes it possible to distinguish war crimes from other crimes punishable under national law and emphasizes the fact that this is a type of behavior that is prohibited at the international level.*

***Key words:*** *international law, humanitarian law, Geneva Conventions, national legislation, criminalization, international armed conflict, war crimes.*

**Introduction.** International conventions that may create obligations for states fall into two broad categories:

1) Existing international conventions in the field of international criminal law;

2) Existing international conventions in the field of human rights.

Conventions accepted in the field of international criminal law are norms that obligate participating states to prosecute or extradite those who commit acts prohibited by the conventions [1, p. 73]. In order to fulfill these obligations, first of all, it is important to criminalize norms related to war crimes in national legislation. The concept of criminalization leads national courts to prosecute war crimes and supports to end the climate of impunity. Nevertheless, the criminalization of war crimes in the national legislation of many states has not been completed. Basically, it is not considered politically important for these states. That is, it stems from the reluctance of most states to accept the principle of individual criminal responsibility of heads of state or government for war crimes.

**The goals of the article.** Based on a comparative analysis, the level of criminalization of war crimes in the national legislation of the states is studied. At the same time, issues related to whether serious violations of international humanitarian law are fully reflected in the national legislation and compliance of national legislation with international conventions are analyzed.

**Novelty.** For the first time, the author tried to analyze the criminalization of war crimes in the national legislation for local literature, as well as the existing gaps in the national legislation of countries in this field, based on the existing international experience formed in the field of international humanitarian law development.

**Mine matters.** As a rule, the criminalization of serious violations of international humanitarian law in national legislation and a comparative analysis are given as follows:

1) pay attention to the development of national legislation on war crimes based on international criminal law;

2) comparative analysis of national legislation on war crimes;

3) the reasons for the weak establishment of norms related to war crimes in the national legislation.

Although the prohibition of serious violations of international humanitarian law is clearly stated in the Geneva Conventions, it does not define a specific punishment. At the same time, it does not create jurisdiction to try criminals. For this, the states should take the necessary legislative measures and establish the norms related to war crimes in their national legislation.

According to J. Hankins, a lawyer of the International Committee of the Red Cross, although the states are obliged to fulfill the obligations arising from the Geneva Conventions, international agreements and international customs (criminalization of war crimes and norms in national legislation), the states that are parties to the Rome Statute of the International Criminal Court have this in their domestic legislation. They are not obliged to criminalize the norms, that is, the Statute requires that these crimes be prosecuted, punished or issued rather than being established in national legislation [2, p. 5].

The International Criminal Court has the power to prosecute crimes that national courts cannot prosecute and to fulfill the principle of complementarity. Participating states should only be interested in fulfilling the obligations arising from the Statute, and should follow the principle of either punish or give. Here, the Statute gives the main priority to national courts in the prosecution of war crimes. Therefore, States parties should review the provisions of the Statute in their domestic legislation to ensure that, for example, the definition of substantive crimes, the appropriateness of the applicable punishments to the nature of the crime committed, and the remedies against criminal liability are reflected as closely as possible. That is, it should not exceed the possibilities provided by the Statute [2, p. 5]. Because criminalization takes place in a social context and is shaped by broader social dynamics, it is understood as a social practice closely related to political, social, and normative processes. Here, criminalization is not just a theoretical reflection of international norms in national legislation, but its real application mechanisms and importance should be taken into account.

States have confirmed the impossibility of evading individual criminal responsibility for international crimes committed by official officials by abusing their official powers by criminalizing war crimes in national legislation.

Thus, the criminalization and approval of norms related to war crimes in national legislation helped to define the limits of the behavior and responsibility of officials, as well as to strengthen norms related to individual criminal responsibility.

The process of criminalizing war crimes in national legislation began after the Second World War. The prosecution of prominent representatives of Nazism, war propagandists and executors necessitated and accelerated this criminalization.

This process became more widespread mainly after the adoption of the Geneva Conventions. According to General Article 1 of the Geneva Conventions, the participating states undertake to "ensure respect for this Convention". The same provision is repeated in Additional Protocol I. Additional Protocol I further provides that in the event of a serious breach of the Protocol, States Parties undertake to act jointly or individually in cooperation with the UN and in accordance with the UN Charter. In order to fulfill international obligations, states must investigate serious violations specified in the Geneva Conventions and Additional Protocols and are obliged to bring the perpetrators to justice.

Research shows that although many states have ratified the Geneva Conventions, the norms established in national legislation regarding war crimes are not compatible with the Geneva Conventions. It can be said that many behaviors that constitute war crimes are not reflected in the national legislation of states. There are several reasons for this:

**First,** states that do not criminalize war crimes in their national legislation are generally repressive states that do not ratify international human rights treaties, that is, do not accept some kind of universal values. It would not be correct to attribute this exactly to repressive states. For example, a democratic country like the United States is not a party to the Rome Statute, but that does not mean that the United States

is a repressive country. It's just that the United States and other countries like it believe that the countries themselves should try the people who committed war crimes. In particular, these states do not want to accept the prosecution of officials at the international level. For this reason, the United States, China and other countries are not interested in criminalizing war crimes in their national legislation. For example, more than half of African states have been criticized by many states for ratifying the Rome Statute of the International Criminal Court. States argue that ratifying States do not believe in or trust their national judicial system to prosecute international crimes and provide justice.

**Second,** when war crimes are criminalized in the national legislation of states, the principles of international criminal law are often not referred to. Although the general provisions of national legislation apply to international crimes, due to the lack of references, there are certain obstacles in the implementation of criminal prosecution.

**Thirdly,** in order to demonstrate their commitment to international norms, states criminalize them in national legislation, but are indifferent to their application, or do not fully implement criminalization in this area. In short, although the norms related to war crimes have been criminalized, the mechanism for their application has not been developed. At the same time, many states also create an image of enshrining norms related to war crimes in their national legislation. National legislation reflects serious violations of international humanitarian law somewhat superficially. Russia, USA, China and many CIS countries can be included here.

Modern legislation does not have a uniform approach to the definition of war crimes in many countries. In addition, war crimes are not defined by a single name in the criminal legislation of the countries. For example, in the criminal codes of Russia, Kazakhstan, Azerbaijan and Armenia "Crimes against peace and human security", in German legislation "Crimes against international law", in Croatian legislation "crimes against values protected by international law", and in the criminal code of Belarus and Moldova, war crimes are "crimes against the security of humanity and war crimes" [3, p. 27]. For example, more serious violations of international humanitarian law have been identified in the criminal code of Georgia. However, the criminal law does not have a separate "war crimes" section. The acts constituting war crimes are listed in a very unsystematic and confusing manner. Both in the Geneva Conventions and in the Rome Statute of the International Criminal Court, serious violations of international humanitarian law are divided into international and non-international armed conflicts, each of which is broadly classified [4, p. 77].

Serious violations of the Geneva Conventions, that is, serious violations against persons or property protected under the provisions of the relevant Geneva Convention, are listed under the title "Crimes against peace and humanity and international humanitarian law". The first paragraph of Article 411 refers to serious violations of international humanitarian law during international and non-international armed conflicts, and the second paragraph of the same article refers to persons who did not participate in military operations or did not have any means of protection during international or domestic armed conflicts, as well as to the wounded, sick, Deliberate violation of the provisions of international humanitarian law against medical workers and citizens, clergymen, sanitary units and vehicles, prisoners of war, civilians in occupied territories or in the area of military operations, civilian population, refugees, other persons under protection during military operations violations are criminalized. Mercenary was later listed as a war crime in the code. Paragraph 2 of Article 410 of the Criminal Code deals with the involvement of minors as mercenaries in armed conflicts. The involvement of minors in armed forces is a separate provision in the Geneva Conventions. We believe that this does not coincide with the requirements of the Convention and there is an inconsistency here. The Geneva Conventions and the Statute of the International Criminal Court prohibit the recruitment of minors into the armed forces of a party with military superiority. That is, there is no question of mercenary, but the Code presents this behavior in the form of mercenary.

Mercenaries are persons who are not citizens of a state participating in an armed conflict or military operations and who act for the purpose of obtaining material profit, who do not permanently reside in the territory of that state, as well as persons who do not permanently reside in the territory of that state. They were not sent to perform official duties. The convention does not mention any profit in terms of mercenaries.

There is no provision in the Code regarding the destruction of cultural property as a war crime. In order to protect cultural resources, the criminal law of Georgia should ensure the criminalization of the following norms, and the code should be adapted to the 1954 Convention on the Protection of Cultural Resources. The Convention and its second protocol

require states to criminalize a number of serious violations related to the protection of cultural property in their national legislation [5]:

– do not attack religious, educational, scientific, charitable, medical facilities, places where the sick and wounded are placed, without military necessity, which are not military targets, and are clearly visible and distinguishable;

– intentionally making cultural property, including cultural property under enhanced protection, an object of attack without military necessity, or using cultural property under enhanced protection or the areas immediately adjacent to it to support military operations;

– intentionally destroying or misappropriating cultural wealth in a large amount, or committing acts of theft, robbery, illegal embezzlement or vandalism in relation to cultural wealth;

– illegal removal of cultural wealth from the occupied territory, or transfer or termination of ownership rights to cultural wealth in that territory; carrying out any archaeological excavations in the occupied territory, except when it is required to directly protect, record or maintain the cultural wealth; modifying or changing the type of use of cultural property with the aim of hiding or destroying its cultural, historical or scientific character.

For another comparison, if we pay attention to the criminal legislation of Italy apart from European countries, we will see that the crimes related to sexual violence stipulated in the Geneva Conventions and the Additional Protocols of 1977 are not included in non-international armed conflicts. Law No. 6 of 2002 amended Italian war crimes law to apply to all armed conflicts illegal deportations and other acts contrary to international conventions, including biological experiments and unjustified medical treatment [6, p. 24].

Regarding the compatibility of the Italian Criminal Code with the Rome Statute, a number of inconsistencies can be observed as following:

**First,** some war crimes listed in Article 8 of the Statute and forced sterilization, crimes related to sexual violence, and some crimes committed during non-international armed conflicts are not criminalized as war crimes in the code.

**Second,** the punishments for war crimes do not comply with the statutes of the Yugoslavian, Rwandan tribunals and the Rome Statute of the International Criminal Court. For example, according to Article 185 bis of the Italian Criminal Code, a soldier who, for reasons not related to war, commits torture or other inhuman treatment, illegal transfer or other acts prohibited by international conventions, including biological experiments or medical treatment not justified by law, if the act does not constitute a more serious crime and harms other persons protected by international conventions, it is punishable by deprivation of military liberty from two to five years. Furthermore, Italian Law No. 589 of October 13, 1994 removed the death penalty from the criminal code and replaced it with life imprisonment, a step closer to the Rome Statute [7, p. 299].

The Criminal Code of the Federal Republic of Germany can be cited as an exemplary form of development of national legislation on war crimes based on international criminal law. Crimes against international law are specified in a special section of the German criminal code. Here, the first chapter deals with genocide and crimes against humanity, and the second chapter deals with war crimes [8, p. 186].

The chapter on war crimes in Italian legislation clearly reflects the requirements of the Geneva Conventions and the Rome Statute of the International Criminal Court and criminalizes serious violations of international humanitarian law as war crimes in its criminal law [9, pp. 61–62].

Research works prove that although some states have accepted the concept of "war crimes", there are serious deficiencies in the criminal law regarding the constituent elements of war crimes, which causes concern of the international community:

– a more restrictive definition of war crimes is adopted by certain states. According to their national legislation, these states criminalize not serious violations of international humanitarian law, but the clauses of Article 8 of the Rome Statute that do not pose a greater threat than serious violations. For example, they criminalize acts that involve the recruitment of children into armed forces or their active use in groups and hostilities, but not conduct that involves the destruction of civilian areas and the killing of civilians that are not necessarily military in nature.

– the act constituting war crimes is defined as another crime in the national legislation of some states. For example, the deliberate starvation of civilians during a non-international armed conflict is considered a war crime under the Geneva Conventions and Article 14 of the Additional Protocol. States that do not criminalize this as a war crime in their national legislation note that they rely on the Rome Statute and not the Geneva Conventions and Additional Protocols.

– the national legislation of many states distinguishes between international and non-

international armed conflicts. State parties to the Rome Statute do not reflect acts defined as war crimes during an international armed conflict in Article 8 as war crimes during a non-international armed conflict. However, states in their national legislation should not differentiate between acts considered war crimes during international armed conflicts and acts committed during non-international armed conflicts. Even if the state has not ratified the Geneva Conventions and Additional Protocols I, II, it should be recognized as a war crime under national law. All conduct that amounts to war crimes under customary international law must be defined as a crime under national law. In addition, by defining all behaviors that can be considered war crimes in international armed conflicts as war crimes in non-international armed conflicts, states eliminate existing international gaps. For example, Bosnia and Herzegovina has criminalized certain conduct during international and non-international armed conflict as war crimes in its national legislation (Criminal Code Article 179). At the same time, the acts mentioned in paragraphs 3 and 4 of Article 4 of the Canadian Criminal Code, as well as in the criminal legislation of the Netherlands, DR Congo, Spain and Finland, are specified as war crimes.

– Unreasonable delay in the repatriation or release of prisoners of war and civilians after the cessation of hostilities should be criminalized as war crimes in the national legislation of the states. This is a serious violation of Article 85 (4) (b) of Protocol I, which should be criminalized in the national legislation of the states and must refer to the mentioned Article of Protocol I. Countries such as Australia, Belgium, Estonia, the Netherlands, Georgia, Germany and Spain have criminalized this act as a war crime in their national legislation.

– Attacking demilitarized zones, defined as a serious violation in Article 85, paragraph 3 (d) of Protocol I, should be criminalized as a war crime in the criminal law of states. However, this is not found in the criminal legislation of some states.

**Conclusions.** Finally, we would like to note that the criminalization of war crimes in national legislation has several advantages for states:

1. First of all, the states have fulfilled their obligations in the field of war crimes prosecution and punishment of the perpetrators;

2. The concept of criminalization allows to distinguish war crimes from other crimes that should be punished by national legislation and draws attention to the fact that it is a type of behavior prohibited at the international level;

3. The application of the concept of criminalization helps to eliminate the environment of impunity;

4. The criminalization of norms related to war crimes in national legislation creates more opportunities for national courts to prosecute these crimes.

Thus, the criminalization of war crimes in national legislation is important not only in terms of why and when states apply international law, but also in terms of showing how the idea of individual criminal responsibility for these war crimes what has reached its current crucial status. It is also the main mechanism for spreading international norms in local institutions and gaining legitimacy at the international level.

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**Аллахвердієв А.В. КРИМІНАЛІЗАЦІЯ ВОЄННИХ ЗЛОЧИНІВ У НАЦІОНАЛЬНОМУ ЗАКОНОДАВСТВІ: ПОРІВНЯЛЬНИЙ АНАЛІЗ**

*Метою даної статті є дослідження питання визначення норм, що забороняють військові злочини, у національному законодавстві, а також порівняльний аналіз законодавчого досвіду країн у цій сфері.*

*На основі проведеного автором дослідження визначено правила криміналізації міжнародних норм, що забороняють військові злочини, у національному законодавстві держав, відповідність національного законодавства міжнародним нормам, а також різні аспекти національного законодавства різних держав. У цій сфері було проаналізовано чи повною мірою виявлені серйозні порушення міжнародного гуманітарного права в національному законодавстві, а також, виходячи з Женевських конвенцій, проаналізовано невиконання майбутніх зобов'язань.*

*Автором у вітчизняній науковій літературі вперше показано важливість криміналізації норм національного законодавства щодо військових злочинів, проведено порівняльний аналіз національних законодавств держав та внесено відповідні пропозиції.*

*Автор зазначає, що оскільки сфера застосування міжнародного гуманітарного права є дуже складною та багатогранною категорією, хоча багато країн ратифікували Женевські конвенції, норми, встановлені в національному законодавстві щодо військових злочинів, не сумісні із зазначеними Конвенціями.*

*Автор зазначає, що держави, які не криміналізують військові злочини у своєму національному законодавстві, є, як правило, репресивними державами, які не ратифікують міжнародні договори з прав людини, тобто не визнають якихось універсальних цінностей. Він зазначає, що держави, які передбачають у своєму національному законодавстві криміналізацію, перш за все виконують свої зобов'язання у сфері переслідування військових злочинів та покарання винних. Водночас концепція криміналізації дає змогу відрізнити військові злочини від інших злочинів, які караються за національним законодавством, і підкреслює той факт, що це вид поведінки, заборонений на міжнародному рівні.*

***Ключові слова:*** *міжнародне право, гуманітарне право, Женевські конвенції, національне законодавство, криміналізація, міжнародний збройний конфлікт, військові злочини.*