

## EXPLANATIONS OF THE "WAR CRIMES" FROM AN INTERNATIONAL LEGAL POINT OF VIEW

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### Abstract

*From the provisions of existing international law it can be concluded that all crimes defined in international criminal law as military are united by the following legal features: 1. These crimes encroach on the procedure for conducting armed conflicts of an international and non-international nature established in the fundamental principles of international law and international humanitarian law. The regulated procedure for conducting military operations in armed conflicts is an integral part of the interests of ensuring peace and security of all mankind. 2. The list of war crimes is established in the documents of international criminal law. In this regard, A criminal breach of universally recognized principles of international law and international humanitarian law committed during an international or non-international armed conflict is a "war crime" which gives rise to a substantial relationship in international criminal law.*

*All of the above makes it possible to define a war crime under international law as an act which consists in violating the rules for conducting armed conflicts of an international and non-international nature established by fundamental principles of international law and international humanitarian law and the crime of which is defined in an act of international criminal law.*

**Keywords:** *war crimes, Geneva conventions, grave breaches, armed conflicts, international humanitarian law, laws and customs of war, The Hague Convention, Rome Statute.*

The vast majority of authors argue that it is international humanitarian law that criminalizes war crimes. Thus, the responsibility for war crimes, according to this opinion, is established by international humanitarian law. For example, Wolfrum Rüdiger, a prominent figure in German legal doctrine, believes, "war crimes" are violations of the law of war or international humanitarian law, for the commission of which specific individuals are criminally responsible, is very widespread [10, 1307]. The responsibility of states and individuals for violation of the norms on the use of means and methods of warfare, on the protection of the wounded, sick, prisoners of war and civilians is established in international humanitarian law.

In no case do we dispute that the definition of unacceptable means and methods of conducting armed struggle (military conflict), the interests of protecting human rights in an armed conflict are established precisely by international humanitarian law.

At the same time, one cannot but agree with the assertion that the unambiguous recognition that criminal liability for violations of these norms is also established in international humanitarian law mixes the objects and tasks of two emerging branches of international law - international humanitarian and international criminal law.

Indeed, the recognition that international humanitarian law establishes precisely the crime of violations of its own provisions will inevitably lead us to the conclusion that "humanitarian" law, designed to protect the rights and interests of parties and victims of armed conflicts, is itself functionally designed for legal prosecution of violators, and not just for any prosecution, namely, prosecution of a criminal.

However, in the sources of international humanitarian law (in its generally accepted sense), when establishing general principles and particular provisions for the protection of warring parties and civilians, the wording "a person found guilty of a criminal offense related to armed conflict" or "serious violations of these documents (Geneva Conventions and Additional Protocols) are considered war crimes" (for example, part 5 of Article 85 of Additional Protocol I) [9, 167]. Moreover, in Art. 8 of the Rome Statute, a war crime is defined as a "serious" or "other" violation of the Geneva Conventions, a violation of the laws and customs applicable in international and non-international armed conflicts. Moreover, such "violations" must be established within the framework of international law.

Is it possible to say that under international law this document refers specifically to international humanitarian law? It seems that it is possible - after all, it is it that sets the general principles and particular rules for protecting the interests of persons involved in an armed conflict and civilians. But criminal and criminally prosecuted are violations of these rules formulated in the same documents.

Consequently, the same international legal act can act as a source of both international humanitarian and international criminal law. In the second case, it will be such if it establishes precisely the crime of a violation of the law or the custom of warfare. We give an example. If an international document prohibits an indiscriminate attack on a civilian object as such, then in this case we are talking about the humanitarian rule of conducting an armed conflict. If it's a violation of this rule, then we're talking about a war crime. But the concept of "war crime" can hardly be considered a categorical concept of international humanitarian law. The following considerations can be made in favor of this argument:

First, the "rule", "law", and "custom" of conducting an armed conflict are mandatory provisions on how warring parties should behave in an armed conflict. Thus, international humanitarian law establishes certain protected interests, the violation of which is prohibited;

Secondly, attacks on such interests can be very different (accordingly, the type of responsibility of the offender may be different); criminal (by definition) encroachment entails criminal liability;

Thirdly, the basis of the criminal liability of the subject may be the presence of all objective and subjective signs of *corpus delicti* (as defined in international criminal law) in a specific violation of the provisions of international humanitarian law. Consequently, the provisions of international humanitarian law are a kind of starting point for declaring an assault criminal. But such an encroachment, qualified as a crime, gives rise to a criminal relationship, which in turn is no longer the subject of international humanitarian, but international and (or) national criminal law.

Thus, a violation of international humanitarian law, regarded as criminal, is a legal fact for international and national criminal law, by virtue of which there arises a criminal nature of the relationship, the implementation of which resolves specifically criminal law, and not humanitarian legal conflict.

According to the I Principle of international law, recognized by the Charter of the Nuremberg Tribunal: "every person who has committed any act recognized as a crime under international law bears responsibility for it and is liable to punishment[3, 203].

In order to determine the concept of "war crime" in international criminal law, it is necessary to dwell on the question of understanding international criminal law itself.

The presence of criminal law in international law does not currently raise any serious objections. This is evidenced by a large number of various international legal documents adopted from the middle of the 20th century.

According to the most common point of view, their adoption, as a rule, was determined by the task of interstate cooperation in maintaining world order, in combating international crime, in preventing war crimes committed in the course of international and domestic armed conflicts, as well as in punishing those responsible.

Recently, interest in the problem of the existence of international criminal law has grown significantly, but the approach to defining such a law as a branch of public international law has remained the same.

Larissa van den Herick and Karsten Stan, professors at the University of Leiden in the Netherlands, point out that in international law theory international criminal law is accepted as an area of international law. In this case, there are a few basic doctrines that define the essence of this field [7, 61].

Antonio Casesse, one of the most prominent figures in international law define international criminal law as a branch of public international law, the principles and norms of which govern the cooperation of states and international organizations in the fight against crime [2, 41-45].

There is another, the most common concept (Yoram Dinstein, M. Cherif Bassiouni), according to which international criminal law is a complex industry that includes substantive and procedural rules, which in turn can apply to both international public and private international, as well as national criminal law.

A legal fact giving rise to an international criminal legal relationship is the commission by a person of an act whose criminality is defined in an international legal source. It is the criminal act of international criminal law that is the "starting point" in the understanding of international criminal law as an independent industry.

"An international crime is an act of behavior that is universally recognized as criminal, but in respect of which ... for a number of reasons ... the exclusive jurisdiction of the state is impossible to exercise control in ordinary circumstances"[4, 173].

Thus, international criminal law, establishing the criminality of acts that are not subject to the jurisdiction of only one state, is characterized by the fact that it ensures the international law and order as a whole with the help of specific criminal law methods and means. At the same time, international criminal law is designed to combat crime in the field of international maritime law, international air law, diplomatic law, international economic and financial law and etc.

In other words, modern international criminal law regulates the area of homogeneous relations and interests, while a specific regime of legal regulation that is characteristic of this particular industry is gradually being formed. The circle of such relations and interests certainly includes the interests of protecting humanity from war crimes.

Moreover, of course, international criminal law is an integral part of the system of international law as a whole. There is no contradiction: after all, the system of international law as a whole is precisely a combination of various branches of international law. The task of international criminal law is to protect the international law and order from criminal offenses. Of course, the category "international rule of law" itself is extremely extensive due to the mutual integration of various categories of rule of law provided by international law.

International criminal law defines the crime of the most diverse acts. We share the point of view according to which the objective legal criterion for determining the crime of an act under international criminal law is that a variety of acts in one way or another encroach on the interests of maintaining the global law and order, while each crime does harm (or creates a threat of harm) which or part of the global rule of law. It is this quality of any crime under international criminal law that determines its legal nature.

It should be borne in mind that the interests of ensuring the global law and order as a whole and its constituent parts ultimately relate to the interests of all people, regardless of their place of residence, demographic and other characteristics.

As it turns out, neither in international criminal law, which provides the international law and order, nor in international humanitarian law, aimed at the legal regulation of armed conflicts, it is not possible to find the main elements of war crimes. In our opinion, a violation of the rules governed by these areas of international law will lead to war crimes.

Therefore, we consider it appropriate to study specifically what actions can be attributed to war crimes. In foreign literature usually distinguish several types of war crimes as violations of international humanitarian law

According to the most common opinion, the rules on grave breaches apply only to international conflicts and only to acts committed against so-called protected persons or during military operations. Protected persons are wounded or sick combatants fighting on land and at sea, prisoners of war and civilians caught in the power of a state of which they are not citizens.

Most breaches of the Geneva Conventions and their Additional Protocols are not "grave". But even among those violations that are not on the lists of "grave," many are considered war crimes. However, in this case, the state has no obligation to extradite or prosecute the perpetrators.

Other breaches, also not classified as "grave", are not war crimes, but only unlawful acts, for which, under international law, only the state that allowed them is responsible. For example, if the head of a prisoner of war camp does not keep records of disciplinary punishments (which constitutes a violation of Article 96 of III Geneva Convention), he most likely does not commit a war crime [8, 85].

However, it should be noted that the delimitation of various violations, their classification or non-attribution to the number of serious ones are not absolute. But even if some cruelties committed during the war do not fall under the prohibitions of the Geneva Conventions or Additional Protocol I, they can nevertheless constitute a war crime in the framework of customary law: such a crime is defined as "violation of the laws and customs of war" (namely this formulation was featured at the Nuremberg trials) [6, 167-177].

In relation to interstate conflicts, states have agreed that such crimes include certain violations of the Hague Convention of 1907 and its Regulations on the laws and customs of the land war, such as the use of toxic substances, senseless destruction of cities, not caused by military necessity, attacks on non-defended locality, religious and cultural institutions, the looting of public and personal property.

The Rome Statute among war crimes in international conflicts mentions not only serious violations of the Geneva Conventions, but also 26 serious violations of the laws and customs of war, most of which have been classified as crimes since the Second World War [13].

As for armed conflicts of a non-international nature (civil wars), many authors believe that such conflicts relate exclusively to the internal jurisdiction of states, and accordingly the list of war crimes is much shorter here [12, 116].

Additional Protocol II, the provisions of which mainly govern the actions of the parties in the course of a non-international conflict, does not contain rules defining responsibility, and the definition of war crimes established in customary international law here is far from being as clear as in the case of international conflicts.

The Charter of the International Tribunal for the Prosecution of Persons Responsible for Grave Breaches of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (established by the UN Security Council in 1993) contains a list of "grave breaches of general article 3 of the Geneva Conventions" (single article relating to civil wars), as well as other norms aimed at protecting the victims of armed conflicts, and basic norms regarding methods of warfare. A grave breaches is defined in it as a violation that has grave consequences for the victims and violates the norms that protect important values [1].

This should also apply to actions against life and health (murder, ill-treatment, torture, mutilation, corporal punishment, rape, forced prostitution, obscene claims), summary executions, hostage-taking, collective punishment and robbery. Such a list, although shorter than the list of serious violations given in the Geneva Conventions and Additional Protocol I, and other war crimes in international conflicts, nevertheless covers the most terrifying acts committed in recent conflicts, Such crimes are often committed, especially in conflicts such as Syria, Iraq, Congo, Somalia and Sudan.

The Charter of the International Tribunal for the Court of Persons Responsible for Genocide and Other grave breaches of International Humanitarian Law Committed in the Territory of Rwanda, Responsible for Genocide and Other Similar Violations Committed in the Territory of Neighboring States from January 1 to December 31, 1994 includes the quality of war crimes serious violations of the general art. 3 Geneva Conventions and Serious Violations of Additional Protocol II. The Statute of the International Criminal Court defines four grave breaches of the general art. 3 Geneva Conventions (encroachment on life and physical integrity, encroachment on human dignity, hostage-taking and summary executions) and 12 grave breaches of the laws and customs of war (attacks against the civilian, robbery, rape, mutilation, etc.) [13].

War crimes committed during international and internal armed conflicts fall within the scope of the Geneva Conventions: "Although there are some differences between them, war crimes committed in an internal armed conflict remain war crimes" [5, 224-228]. An internal armed conflict is defined as a conflict between insurgent groups fighting against the government if they exercise control over the territory and population and can conduct military operations.

War crimes are subject to international law. After World War II, only two international tribunals were established - in the former Yugoslavia and in Rwanda, which were able to initiate trials against war criminals. The Rome Statute determines that crimes committed before the establishment of the International Criminal Court are not subject to its jurisdiction [11, 340]. At the same time, the Geneva Conventions suggest that war crimes committed in a country that has signed the Convention should be prosecuted in accordance with international criminal law.

For the above reasons, we believe that the definition of a war crime comes down not only to a criminal violation of international humanitarian law, but also to a violation

in the course of armed conflicts of an international and non-international nature of fundamental principles of international law (*jus cogens* principles). Moreover, the criminality of such violations is also defined in international criminal law.

This concept does not contradict the concepts and ideas that have already been formulated in the doctrine of international law. The analysis of international legal norms allows to distinguish the following types of war crimes: grave breaches of the 1949 Geneva Conventions in international armed conflicts; violation of other norms and rules for conducting international armed conflicts; grave breaches of the 1949 Geneva Conventions in non-international armed conflicts; violation of other norms and rules for conducting non-international armed conflicts.

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