NORMATIVE BASIS OF THE PROSECUTION OF INTERNATIONAL CRIMES UNDER THE LEGISLATION OF THE REPUBLIC KYRGYZ REPUBLIC

(as of December 2007)

Author:

MUSABEKOVA Ch.A.,
PhD in Law,
Associate Professor

BISHKEK, 2007

A. Introduction

1. General Information

The Kyrgyz Republic is a state in the middle part of Central Asia, mostly within the territory of Tenir-Too. The capital is Bishkek. The population is 5,139 million (as of 2006). Ethnic Kyrgyzs are 68,4 per cent of the Kyrgyz Republic's population, ethnic Uzbeks – 14,3 per cent of the population, and Russians – 9,4 per cent of the population. The official language is Kyrgyz, which belongs to the Turkic linguistic group. Russian language is widely used by all ethnic groups in public life and interpersonal communication and possesses of an official language status. (Article 5(2) of a new edition of the Kyrgyz Constitution, of 23 October 2007). Islam and Orthodoxy are the major religions.

The territory of contemporary Kyrgyzstan, as the whole territory of Central Asia, is one of the earliest centers of human civilization. Archeological studies proved that a primitive man lived since the Stone Age. As an ethnos, Kyrgyzs were known in Central Asia since the 1st millennium b. c. First states-like formations in the territory of the modern Kyrgyzstan arouse in II century b.c, when the country's southern agricultural regions were integrated into Parkan state. Between IV-III centuries b.c. ancient Kyrgyzs joined the powerful tribal unions of nomads which seriously disturbed China. The erection of the Great Wall of Chine had been stated that time. Between II-I centuries b.c., a part of Kyrgyz tribes exempted itself from the power of Huns and went to the Yenisey River ("Yeni-say" means "the Mother river" in Kyrgyz) and the lake Baykal ("Bay Kel" means in Kyrgyz "the Rich Lake"). Here they established their first state and the Kyrgyz Khaganate. From the middle of the IX century to the beginning of X century, the State of Great Kyrgyzs took up the territory of the Southern Siberia, Mongolia, the Lake Baykal, the Uppers of Irtysh, a part of Kashgar, Issyk-Kul and Talas. Starting from XIII century, Kyrgyzs had to wage wars for their independence against various conquerors. In the second half of XV century, the integration of Kyrgyz tribes led to the establishment of the first independent khanate, which integrated a principal part of Kyrgyz nation that had been formed by that time. In 1863 Northern Kyrgyzstan was annex to the Russian Empire, in 1876 Southern Kyrgyzstan was also incorporated in it. After the October Revolution of 1917, Kyrgyzs as well as all peoples that were under the former tsar's Russia was joined the Soviet Republic. In 1918 Kyrgyzstan became a part of the Turkestan Autonomous Soviet Socialistic Republic (ASSR). According to the national territorial demarcation of the Central Asian republics of 14 October 1924, Kara-Kirgiz ("Kirgiz" since 25 May 1925) Autonomous region (oblast') that had been included into the Russian Soviet Federative Socialistic Republic (RSFSR), was reorganized and renamed as the Kirgiz ASSR on 1 February 1926 and as the Kirgiz SSR on 5 December 1936. Kyrgyz nation received its national independence and sovereignty by peaceful means after the break-up of the USSR. In October 1990, at the session of the Supreme Soviet of the Republic, a decision on renaming the Kirgiz SSR into the Kyrgyz Republic was taken. On 15 декабря 1990 the Supreme Soviet accepted the Declaration on sovereignty of the republic, on 31 August 1991 the Declaration on independence of Kyrgyzstan was passed as well.

The Constitutions upon the Soviet Constitutions' models were passed in 1929, 1937 and 1978. On 5 May 1993, for the first time, the Constitution of the Kyrgyz Republic as an independent sovereign State was passed. Since then it was significantly amended seven times: in October 1994, in February 1996, in October 1998, in February 2003, in November 2006, in December 2006, in October 2007. So, Kyrgyzstan is a unique state whose experience with regards to the frequency of its Constitution's revisions deserves to take its place in the Guinness Book of Records.

According to a new edition of the Kyrgyz Republic's Constitutions (hereinafter the KR Constitution) of 23 October 2007, the Kyrgyz Republic acknowledges itself as a democratic, legal, secular and social State (article 1). Kyrgyzstan is a unitary state with the mixed

(presidential and parliamentarian) form of government. According to article 12(1) of the Constitution of 2007, the Constitution's provisions have a superior legal power within the territory of Kyrgyzstan. All other normative legal acts must be in accordance with its text; international treaties and State's other obligations must not be contrary to the Constitution, either.

2. International law and legislation of the Kyrgyz Republic

The requirement to comply with international law rules is contained in many articles of the KR Constitution. Its principal provision is an article 12(3) of the Constitution of 2007:

"International treaties and agreements, which shall have taken effect in accordance with a procedure prescribed by law, to which the Kyrgyz Republic is a party and generally accepted principles and norms of international law, shall be a constituent part of the legislation of the Kyrgyz Republic"

The same provision is included into the Preamble of the KR Law "On International Treaties of the Kyrgyz Republic" №89 of 21 July 1999:

"International treaties are the legal ground of the international relations of the Kyrgyz Republic.

International treaties of the Kyrgyz Republic are a constituent and direct part of the legislation of the Kyrgyz Republic, according to the Constitution.

The Kyrgyz Republic advocates the strict observation of norms of international law and confirms its adherence to the fundamental principle of international law – the principle of conscientious fulfilment of international obligation".

and in the article of the Law №34 "On normative legal acts" of 1 July 1996:

"1. In case of incompatibility of a law or other legal act of the Kyrgyz Republic with an international agreement passed in accordance with the procedure prescribed by law, to which the Kyrgyz Republic is a party, or general recognized norms of international law, the rules set out by these agreements and norms shall be applied"

Thus, the following types of international legal sources are a part of legal system of the Kyrgys Republic:

1) generally recognized principles and norms of international law;

2) international treaties and agreements, to which the Kyrgyz Republic is a party and which have entered into force in accordance with the proper procedure;

Generally recognized principles and norms of international law. The KR Constitution recognizes the generally recognized principles of international law in the KR legislation. In international law, there are no legal acts, which would contain the exhausted list of the generally recognized principles. They are included in the UN Charter, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations of 24 October 1970, Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975 and other acts. It is necessary to note that there is not an absolute unanimity concerning which principles are generally recognized. Therefore one should suppose that the KR Constitution covers only those generally recognized principles, which the Kyrgyz Republic recognizes as such.

A generally recognized rule of international law (customary rule) is created as a result of repeating practice of States and become a binding rule for those States that has recognized its binding power. The Universal Declaration on Human Rights of 1948, which was passed by the General Assembly's resolution and whose provisions became customary rules of international law as a result of the use of them by States, is an example of such customary rules. We believe that, in this case, one could say that the KR Constitution has contained in the KR legal system the generally recognized rules of international law, which our State recognizes.

International treaties. In accordance with article 5 of the Law "On international treaties", consent of the Kyrgyz Republic upon the obligation of an international treaty can be expressed by means of:

- signing of a treaty;
- the exchange of notes or letters constituting a treaty;
- the ratification of a treaty;
- the approval of a treaty;
- the accession to a treaty;
- the use of any other means.

In the issue of the determination of the international rules' position in the hierarchy of the KR sources of law, a question, which concerns the correlation between international treaties and the KR Constitution, plays a significant role. The analysis of the text of the KR Constitution, the Law "On international treaties" and other laws shows that the Constitution has a superior legal power within the territory of the Kyrgyz Republic. The international treaties, which are recognized as incompatible with the Constitution, are not subjected to be entered into force and further applied.

There are articles in some law branches, which set out the priority application of international law in the cases of collision between its norms and the KR domestic legislation. Most KR laws formulate this provision in the following way:

«If an international treaty of the Kyrgyz Republic provides for other rules than the present law provides, the international treaty's rules shall be applied".

The priority use of international treaties does not revoke one or another rule of domestic legislation. This means that the provision of the domestic legislation does not act conformably to an international treaty between the KR and a foreign state. However, the domestic legislation's provisions have the legal effect with regards to other states.

Hence the constitutional provision of concern becomes apparent in the recognition of the direct application of rules of international law in the area of internal activity and home jurisdiction, in the instructions to use these rules directly by the courts, other State bodies, State official and citizens. This conclusion is explained by the interpretation of article 3(12) of the KR Constitution in the context of other constitutional norms and other numerous legislative acts of the KR, which provide for their combined use, together with international treaties.

3. The Rome Statute and the KR Legislation

The position of the KR in respect to the ICC Rome Statute can be called "expectant".

The KR took part in the Diplomatic Conference of Plenipotentiaries on the creation of the ICC that was held in Rome between 15 June - 17 July 1998. On the 4th of December 1998 the President of the KR signed a Decree, which had empowered the Chairman of the Constitutional Court, md. Bayekova Cholpon, to sign the ICC Rome Statute. On 12 December 1998 the Chairman signed the Rome Statute on behalf of the Kyrgyz Republic.

On 18 June 2003, by passing the Decree N 361 «On realisation of actions on the implementation of norms of international humanitarian law in the KR», the Plan of Actions, which provided the research of the issue concerning the expediency of the ratification of the Rome Statute, was approved by the government. However, the Kyrgyz Republic has not

ratified the document yet although a certain activity in respect to the ratification of the Rome Statute is going on.

In fact, more active work was carried out by the non-governmental sector under the support of the European Union's programme «The Information and Ratification Campaign concerning ICC in Russia, Turkey and Central Asian States». In the legal doctrine, the suggestions about the final acceptance of the ICC jurisdiction were being promoted. These ideas implied even the passing of a separate law, which would regulate the issues of the determination and punishment of crimes against peace and security. In addition, that was stipulated with the legal duty to fulfill properly the State's international obligations. However, certain difficulties in the process of the ratification of the Rome Statute still exist; they are not only of legal character, they also have political grounds which impact to this prolonged process.

Inside the State, there are oppositionists who suppose that a number of the Rome Statute's provisions contradict to the KR Constitution; according to them, the Constitution shall be amended before the Rome Statute is ratified. In particular, it deals with the following provisions:

1) article 27 of the Rome Statute, according to which the Rome Statute's provisions equally concern all persons irrespective of their public position. This article's provisions mismatch article 49(1); article 56(1); article 83(2) of the KR Constitution of 23 October 2007 that guarantees immunity to the KR President, deputies of the Parliament and judges;

2) article 89(1) of the Rome Statute which insists on handing persons over to the ICC, and article 107(3), which deals with handing a person over to a 3rd State for court prosecution or execution of the sentence. This is incompatible with article 20(5) of the KR Constitution of 23 October 2007, according to which a citizen of the KR cannot be extradited to another State, even upon the reasons, which are linked with criminal prosecution;

The Constitution of the KR does not provide the handing over citizens of the KR (as a separate category of extradition) to any international bodies of criminal prosecution.

3) article 42(4) and article 66(2) of the Rome Statute which state that the burden of proofs lays upon the prosecutor who is elected by the Assembly's members, does not conform to article 77 of the KR Constitution, according to which the support of indictment is entrusted on the KR Offices of Public Prosecutor.

While considering the Statute with respect to its conformity to the KR Constitution, one should take into consideration the following aspects, in our opinion.

First, as regards the immunity of high-ranked State officials.

Above all, in accordance with article 27(1) of the Rome Statute, its provisions are equally applied to all persons irrespective of their public positions. In particular, the state position of the Head of the State, a member of the Parliament, an elected representative or a State official does not exempt a person from criminal accountability according to the Statute and is not a mitigating circumstance as such.

Article 27(2) of the Statute states that immunities and special norms, which can be linked with a person's official position, must not prevent the Court from exercising its jurisdiction.

According to article 12(3) of the KR Constitution, generally recognized principles and norms of international law are a constituent part of the KR legal system.

One of these principles is the principle of the conscientious fulfillment of international obligations that was known since an earlier stage of the development of States as the *«pacta sunt servanda»* legal custom. At present, it takes its place in numerous international agreements.

As a generally recognized norm of behavior, it is included into the UN Charter, whose Preamble underpins the determination of UN members "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

The determination of criminal liability for the prosecution of most crimes which are enshrined in the Rome Statute is an international obligation of the KR, according to other international legal documents which have entered into force for our State, namely the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (entry into force on 21 October 1950)[1]; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949 (entry into force on 21 October 1950)[2]; Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (entry into force of 6 June 1957)[3]; International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 (entry into force 18 July 1976) [4]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (entry into force 26 June 1987) [5]**.**

In fact, the Statute reflects most *corpus delicti* of the crimes listed in the treaties mentioned above and other treaties to which the KR is a party.

The Statute's provisions, which criminalise the crime of genocide, war crimes and crime of aggression, are considered today as a rule of customary international law, what was repeatedly confirmed by various international bodies.

Consequently, the criminalization of the acts in accordance with article 12 of the KR Constitution, does not depend on the observation of the Rome Statute by the KR and its entry into force for the State.

Secondly, the Statute does not exclude the establishment of the provisions and do not cancel the rules of the KR Constitution relating to the immunity of the KR President, deputies of the Parliament and judges; but it just arises from the fact that the immunity of these persons is connected with the national security and cannot be an obstacle for the ICC jurisdiction with respect to those who committed the crimes enshrined in the Statute.

That is entirely in line with the KR international obligations.

The Convention on the Prevention and Punishment of the Crime of Genocide provides directly that perpetrators of the crime is to be subjected to prosecution irrespective of whether they take the key State positions under the Constitution, are public officials or natural individuals (article 4). Consequently, the provisions of the Constitution relating to immunities of the indicated categories should be interpreted in a permanent connection with article 12 of the KR Constitution.

Thirdly, immunities of a certain category of public officials are not their privilege; they are connected with their functions for the State's interests. Therefore, according to the KR Constitution and international legal obligations it is not a guarantee of their safety. The President's immunity, the immunities of deputies of the Parliament and judges only determines the specific procedure of their prosecution.

Fourthly, the persons who benefits from the immunity can bear a criminal liability under the national legislation with the involvement of domestic court mechanisms what conforms to the State's international legal obligations. According to the principle of complementarity (article 17 of the Rome Statute), the ICC does not accept for the consideration the cases if a person has been convicted or acquitted other court (including the national courts) what ahs been carried out in accordance with the proper procedure (article 20).

Consequently article 27 of the Statute does not contradict to article 49(1), article 56(1), article 83(2) of the KR Constitution.

Besides, as for the extradition of the persons to the ICC.

---

[1] For the KR, it entered into force in 1992 on the ground of the succession

[2] Ratified via the KR Law N 86 of 21 July 1999.

[3] Accession via the Decrees of the Jokorgu Kenesh (Parliament) of 8 June 1995, N 121-1 and of 10 June 1995 П N 94-1.

[4] The KR accessed via the KR Law of 26 July 1996 N50.

[5] The KR accessed via the KR Law of 26 July 1996 №46.

According to article 20(5) of the KR Constitution, a citizen of the KR cannot be hanged over to other States.

Article 89(1) of the Statute foresees that the ICC may forward an arrest warrant and extradition request together with all supporting documents to any State on the territory of which a person of concern stays, or to address to this State with the request to cooperate in respect of the arrest and handing an over an alleged criminal. The States parties to the Statute must comply with such requests in accordance to their national legislation.

The analysis of the provisions of the KR Constitution, the Statute and other normative legal acts as well as the research of special literature and international legal practice allows concluding the following.

The «rendition» and «extradition» terms are often perceived as synonyms, in their common sense; however in international legal treaties and legal doctrine they are interpreted differently what makes them non-identical by legal nature.

Consequently, international treaties and the doctrine start from the fact that delivering a person to another sovereign State drastically differs from handing a person over to the Court that has been established in accordance with international law, with the participation in the treaty and with the consent of the interested States.

If the former is determined by the "handing over" or "extradition" terms, according to the international law terminology, the latter is explained by the notion "rendition".

The Statute also adheres to this international practice, according to its article 102: "rendition" means delivering a person to the Court by a State, whereas "extradition" implies delivering a person by one State to another one, according to the provisions of international treaties, conventions and national legislations.

According to article 20(5) of the KR Constitution, handing over / extradition of the KR citizens to another State is forbidden. Consequently this provision related only to its national jurisdiction, but not to international law. Its goal is a guarantee of the unprejudiced criminal proceeding, justice and lawful sentence for the KR citizens.

The ICC cannot be compared to a foreign State's court since it has been established, as it has already been pointed out, with the participation and upon the consent of the interested States on the ground of international law.

The purpose which explains the prohibition to hand over one State's citizens to another one is achieved in the ICC by means of the use of the corresponding Statute's provisions which have been elaborated (or approved) by the States parties. These provisions are based on international human rights treaties which are bound the KR.

Consequently the KR Constitution provisions relating to the prohibition of handing over the KR citizens (even in case of the broad interpretation of the "handing over" term) cannot be considered independently of the KR international obligations.

Hence, it is necessary to take into consideration the principle of complementarity which is set forth in article 17 of the Rome Statute, which implies that if the national jurisdiction is applied with respect to the persons who have committed the international crimes, the ICC does not exercise its own jurisdiction with respect to those individuals. Consequently the issue concerning their rendition to the ICC does not come up.

Further, regarding the authority of the Offices of Public Prosecutors.

Article 77 of the KR Constitution states that the Offices of Public Prosecutors are united in a system on which the support of accusation in the court is imposed.

First, according to article 77, the fulfillment of their functions in the court on behalf of the State deals with the internal (not international) jurisdiction. Secondly, according to article 42(4) of the Statute, the Prosecutor who must exercise the criminal prosecution in the court and prove a defendant's guilt is elected by the States parties to the Statute; consequently their will is not restricted in this regard.

Since, according to article 12 of the KR Constitution, the international treaties, which have entered into force for the KR upon the proper procedure, become a constituent part of the State's legal system, the corresponding provisions of the Statute regarding the support of

the accusation in the ICC, can be implemented into the KR laws without amending the Constitution.

That allows supposing that article 42(4) and 66(2) of the Statute do not contradict to the provisions of article 77 of the KR Constitution.

According to some human right organizations, one more obstacle to the ratification of the Rome Statute is the US military base "Ganci" in the territory of the KR ("counterterrorist operation") and the anxiety of the American government in respect to its military personnel at this base that can be subjected to the jurisdiction of the ICC.

In fact, the Prime minister of the KR, Mr. N. Tanaev, approved the draft agreement between the KR government and the US on handing over persons to the ICC. According to this treaty, the States came to the mutual agreement not to hand over the citizens of both States to the ICC ("Agreement on article 98" of the Rome Statute). However, the agreement has not been ratified yet by the parliament.

3. Criminal proceeding legislation

The criminal proceeding in the KR is regulated by the KR Constitution (a new edition of 23 October 2007) and the Criminal Proceeding Code (CPC) of the KR of 30 June 1999 №626, which has replaced the former CPC of 1960[7].

The KR Constitution provides for a number of important issues of the criminal proceeding law, namely in article 14(2) «Human Rights and Freedoms» principles of the criminal proceeding is set forth: right to freedom and personal inviolability, right to inviolability of correspondence, phone conversations, telegraph, post and other messages, right to inviolability of dwelling and private life, to respect of honour and dignity, right to compensation for damage caused by unlawful acts of state bodies and public officials, *etc*.

The Constitution (article 15(5,7)) also set forth the detailed expression of the rules following the principle of presumption of innocence and moral norms in accordance to which: а) no one is obliged to witness against (him)herself, his / her spouse and close relatives list of whom is determined by the law; б) the proofs received unlawfully do not use in legal proceedings.

The Constitution enshrines other norms, which matter for the legal procedure. Article 15(6) guarantees the right to hearing one's case in the court with the participation of jury panel, in certain criminal cases[8]. Chapter 7 "Judicial power in the KR" contains the provisions concerning the exceptional right of the court to exercise justice (article 82(1)); public character of court hearings, competitiveness and equality of the parties (article 88).

The present Criminal Proceeding Code was accepted during the legal court reforms and embraces such novelties as the involvement of the defender since the moment of the first interrogation or factual detention of the suspected (or accused); competitiveness and equality of the parties; appeal of court decisions which have not entered into force, in order of appellation; ban to use proofs received unlawfully; right not to testify against oneself, one's spouse and close relatives[9].

The Criminal Proceeding Code consists of two parts (General and Specific), which are divided into sections, chapters, articles, paragraphs. The General Part of the Criminal Proceeding Code contains the norms, which are essential for the whole criminal legal proceeding, its separate parts and its subject. The Specific Part grants the regulation of a

[6] Entered into force by the Law №63 "On entry into force the Criminal Proceeding Code of the KR" of 30 June 1999

[7] Bulletins of the Supreme Soviet of the Kirgiz SSR, 196 , №40, art.146.

[8] For the purposes of the realisation of the constitutional norm on the involvement of jury penal in the courts of the KR, a new chapter 37-1 was included into the CPC: "Criminal proceedings with the involvement of jury panels", (Law of 25 June 2007 N 91). Besides, by the Decree of the President of 20 April 206, a working group on working out the draft law on jury panels in the KR courts was established. Later the working group produced the draft to the Administration of the President.

[9] See: A.K. Kulbaev, Criminal Proceeding in the Kyrgyz Republic, textbook. – Bishkek, 2006. pp.20-23.

legal proceeding from the moment of instituting of criminal case to the inspection of lawfulness and legal validity of sentences and other procedural decisions after they enter into legal force. The Specific Part also covers the particularities of separated criminal proceedings (Juvenal criminal proceedings, use of compulsive medical measures).

For the first time, the Criminal Proceeding Code contains provisions concerning petitions and appeals, principal provisions on the co-operation among the courts, prosecutors, investigators and the corresponding organizations, State officials of foreign States (section XIV); chapters on cases of private accusation (chapter 37), on simplifying procedure of court hearings and taking a court decision if an accused consents with the accusation (chapter 36-1), on criminal proceeding with the participation of jury panel (chapter 37-1).

As a result of long discussions, the unanimous triumph of international standards expressed in the establishment of the court control with respect to detentions, according to article 15 (para.1, 2) of the new education of the KR Constitution of 9 ноября 2006[10]. The time of detention is shortened from 72 hours to 48 hours, and the authority to detain was passed to courts. The right to freedom and personal inviolability, prohibition of arbitrary and unlawful detentions, which are contained in article 9 of the ICCPR, the party to which the Kyrgyz Republic is since 12 January 1994, were also pronounced. The previous Criminal Proceeding Code conferred the right of control on the prosecutor what contradicted to the ICCPR provisions[11]. In accordance with the Law "On a new edition of the KR Constitution of 9 November 2006, the authority of Offices of Public Prosecutors on giving sanctions to detain, were kept till the corresponding amendments of the acting laws which should have been passed during six months since the day of entry into force the above mentioned law. Even if the amendments of the legislations had not been made during the indicated period, these authorities nevertheless would have been passed to the courts.

However the Parliament properly and in time amended the legislation,[12] including the Criminal Proceeding Code. According to those amendments, the detention is permitted in a few cases and only upon the court decision (article 110 of the KR Criminal Proceeding Code). According to article 94 and 95 of the Criminal Proceeding Code[13], for detaining of a

---

[10] The provision has been included into the acting edition of the KR Constitution of 23 October 2007 (para 1, 2 art 15).

[11] For the detailed explanation of the author's position concerning this issue *see*: "The Specific Features of the Development of the court reform in the Kyrgyz Republic and issues of concern" (collection of articles) /Edited by K. Osmonov, K. Kerezbekov: «Uchkun», 2005. pp.36-39.

[12] Law on the amendment and modification of the KR Criminal Code; Criminal Proceeding Code; Code on the administrative accountability; Criminal Executive Code; Law "On Supreme Court and local courts", On Office of Public Prosecutor", "On procedure and conditions of detention of persons detained upon the suspension and accusation of the commission of crimes ", "On general principles of amnesty and pardon", "On entry into force the Criminal Proceeding Code of the Kyrgyz Republic" and "On entry into force the Criminal Code of the Kyrgyz Republic" of 25 June 2007 N 91.

[13] **Article 94 of the Criminal Proceeding Code**:

«(1) A person suspected in the commission of a crime may be detained:

1) if he has been apprehended on a crime scene or immediately after the commission of a crime;

2) if witnesses including victims directly point at the person as at the perpetrator of the crime;

3) if obvious signs of a crime will be found on the suspected, his clothes, with him or in his dwelling.

(2) A person may be detained at the presence of other data which give the ground to suspect him in the commission of the crime, and in the cases when he has no permanent place of living, his personality has npt been identified or when he endeavored to run away from a crime scene».

Article 95 of the Criminal Proceeding Code:

«(1) A report on detention of a person suspected in the commission of a crime must be drawn up within three hours from the actual delivering of the suspected. The grounds and motives of the detention, place and time of the detention (with pointing out hours and minutes), results of personal search shall be recorded in the report. The report must be explained to the suspected as well the rights, which are foreseen in the article 40 of the present Code. The report on detention is signed by a person who has drawn it up, and by the detainee. An investigator must report to a prosecutor about the detention within twelve hours from the moment of drawing up the report on detention.

person suspected in the commission of a crime, the petition on detention and other necessary documents must be presented before a judge during 48 hours from the moment of detention. A detainee is also present at the court hearings.

The detention as a measure of repression is used upon the court decision in respect to the accused in the commission of crimes, for which the criminal legislation provides the punishment in the form of deprivation of liberty for the period exceeding three years if another, lighter measure of repression cannot be applied.

In exceptional cases this measure can be chosen for the person who has allegedly committed a crime for which the criminal legislation provides the punishment in form of the deprivation of liberty for the period not exceeding three years if the following aggravating circumstances take place:

1) the accused does not have a permanent place of living in the territory of the KR;

2) his/her personality has not been identified;

3) he hided himself from the investigation bodies or court.

The petition on the use of detention as a measure of repression is subjected to be considered by a judge of the district (town) court or the court of military garrison with the participation of the suspected (accused), prosecutor and defender, at the place of detention the suspected (accused) during two hours from the moment of delivering the documents to the court.

The decision of the judge on the choice of a measure of repression or rejection may be appealed at a higher court during 5 days. The maximum time limits of detention and the process of their prolonging are contained in the article 11 of the Criminal Proceeding Code[14].

In criminal proceedings, the corresponding provisions of the law which determine the legal system, competence of the courts, authority and principles of activity of prosecutors' offices, tasks and authority of bodied of the Ministry of Home Affairs, rights and duties of advocates are applied[15]. The norms of these / others laws of criminal proceeding must be in line with the Criminal Proceeding Code's provisions, according to article 3(1) of the CPC.

The laws and other normative acts which abolish or depreciate human rights and freedoms, or violate the independence of the courts and competitivety of the process, contradict to generally recognized principles and norms of international law, international treaty of the independent State, must not be accepted in the Kyrgyz Republic (article 1(4) of the Criminal Proceeding Code).

The Constitutional Court' decisions and the Supreme Court's interpretations of the court decisions significantly influence the criminal proceeding activity. However, the Supreme Court's interpretations are not the sources of law. They do not formulate the new

---

(2) The detainee must be interrogated in conform to the rules which are foreseen in article 191 of the present Code ».

[14] **Article 111 of the Criminal Proceeding Code** (extract):

«(1) At the investigation of a crime a measure of repression in the form of the arrest may be chosen upon the court decision for the period not exceeding to two months.

(2) In case of impossibility to end the investigation for the term not exceeding two months and at the absence of the grounds for the change or cancellation of the measure of repression, the term may be prolonged by a judge of the district (town) court or military court of the garrison:

1) term not exceeding six months – upon the investigator's petition conformed by a controlling prosecutor;

2) term not exceeding nine months – upon the investigator's petition conformed by deputies of the General Prosecutor of the Kyrgyz Republic;

3) term not exceeding one year – upon the investigator's petition conformed by the General Prosecutor of the Kyrgyz Republic.

(3) Further prolongation of the term is not admitted. The detaining accused shall be subjected to immediate release. With respect to the realized another measure of repression shall be chosen ».

[15] For instance, Law "On Supreme Court and local courts" on 18 July 2003 №153, "On Office of Public Prosecutor"on 18 December 1993 № 1341-XII; "On Bodies of Home Affairs" on 11 January 1994 №1360-XII; "On advocate activity" on 21 October 1999 N 114; "On procedure and conditions of the detention of imprison persons, accused and suspected on 31 October 2002 №150, etc.

rules, which would fill the gaps in the legislation but make recommendations in respect to the application of the acting legislation. Agency acts also have the analogous legal sense: orders and decrees of the General Prosecutor of the Kyrgyz Republic, and heads of other ministers and agencies.

The generally recognized principles and norms of international law and international treaties ratified by the KR is a constituent part of the criminal proceeding law (article 1(2) CPC).

4. Criminal Legislation

According to article 1 of the Criminal Code of the KR, the State's criminal legislation consists only of the Criminal Code. The acting Criminal Code of 1 October 1997 №68 was passed by the Legislative Assembly of Jocorgu Kenesh (Parliament) on 18 September 1997. Afterwards it was amended and modified[16]. It was entered into force on 1 January 1998 by the Law "On entry into force the Criminal Code of the KR" of 1 October 1997 №69 and consequently the previous Criminal Code of 29 December 1960 lost its legal effect[17].

The list of various punishments, which listed in the Criminal Code, is applied towards the perpetrators of crimes. Punishments, which are not provided by law, are not admitted. The punishments are enumerated by way of the transfer from a light punishment to a more severe one and thus establish a strict system. This list gives the flavour on various types of punishments. The court cannot thus select a punishment from the list at its discretion but must chose the type of punishment provided by the appropriate article. However in exceptional situations the court may set lighter punishment, which is not included into the article, but the court must be guided by the list of punishments. They are divided into principal, complementary and those, which can be considered as both principal and complementary.

The Criminal Code numbers the **following categories if crimes as principal** (art. 42):

1) bringing to public labours;
2) fine;
3) triple ayip;
4) deprivation of the right to take certain positions or to be engaged in certain activity;
5) public excuse and compensation of damage;
6) correctional labours;
7) restriction of liberty;
8) detention in a disciplinary military unit;
9) deprivation of liberty;
10) life imprisonment.

It is noteworthy that the most important event of 2006 and the unanimous triumph of international standards became the exception from the previous Constitution's provision that guaranteed the right to life ("no one can be arbitrarily deprived from his life") the word "arbitrarily" what means the abolishment of death penalty. For the performance of this

[16] In the editions of the KR laws: N 124 of 21 September 1998, N 141 of 9 December 1999, N 77 of 23 July 2001, N 92 of 19 November 2001, N 36 of 12 March 2002, N 109 of 22 June 2002, N 115 of 8 June 2002, N 141 of 16 October 2002, N 36 of 17 February 2003, N 98 of 11 June 2003, N 99 of 11 June 2003, N 100of 11 June 2003, N 192 of 5 August 2003, N 193 of 9 August 2003, N 199 of 24 August 2003, N 221 of 14 November 2003, N 223 of 15 November 2003, N 13 of 15 February 2004, N 17 of 7 March 2004, N 46 of 23 March 2004, N 99 of 26 July 2004, N 101 of 27 July 2004, N 191 of 15 December 2004, N 122 of 5 August 2005, N 1 of 5 January 2006, N 35 of 6 February 2006, N 56 of 13 February 2006, N 57 of 13 February 2006, N 156 of 8 August 2006, N 158 of 8 August 2006, N 159 of 8 August 2006, N 182 of 22 November 2006, N 183 of 22 November 2006, N 211 of 28 December 2006, N 216 of 28 December 2006, N 230 of 29 December 2006, N 16 of 12 February 2007, N 91 of 25 June 2007, N 129 of 31 June 2007, N 131 of 6 August 2007, N 150 of 10 August 2007, N 152 of 15 August 2007).

[17] Bulletins of the Supreme Soviet of the Kyrgyz SSR, 1960, №30, p.145.

norm, death penalty as a measure of punishment has been excluded and replaced by life imprisonment[18].

Complementary punishments:

1) deprivation from a special, military, honorary rank or class;

2) confiscation of property.

Fine, public excuse with compensation of damage and deprivation from right to take a certain position or to be engaged in certain activity can be applied both as principal penalties and as complementary ones.

5. Elements of international crimes in the acting criminal legislation of the KR.

Taking into account a particularly grave character of international crimes and by announcing its adherence to the generally recognized principles and norms of international law, the Kyrgyz Republic has expressed its willingness to fight actively against international criminality. Thereupon, the Criminal Code of the State, which is based on the Constitution, considers the prevention of crimes against peace and security of humanity and protection from criminal encroachments as the objects of protection. (article 2(1) of the Criminal Proceeding Code).

The KR Criminal Code makes use of the general principles and norms which are included into international treaties and other acts ratified by the KR Parliament, as a source of a number of provisions concerning the criminal liability. However, one should bear in mind that the international treaties which contain the criminal legal norms is a constituent part of the KR legal system but they cannot be applied directly since,

first, many international treaty are only expressed the intention of States to struggle against certain crimes but do not reveal the nature of the crimes;

secondly, even determining a crime, the international treaty articles do not set a sanction for the commission of the crimes;

thirdly, even if treaties provide a sanction, it cannot be used due to the absence of the terms of punishments in the texts.

Consequently, international treaties' criminal norms may be applied in practice only after being implemented in the KR Criminal Code[19]. Nevertheless their significance for the KR criminal legislation is highly important as the generally recognized international legal norms concerning the criminality of aggression was, use of mass destruction weapon in such a war, encroachment on human rights and freedoms (genocide) and the others were implemented into the Criminal Code. For instance, the KR Criminal Code of 1997 contains for the first time an autonomous chapter on crimes against peace and security of mankind (Chapter 34), which are related to the category of international crimes.

Crimes against peace and security of mankind are a special category of international crimes whose gravity was initially recognized in international treaties.

Crimes against peace and security as the gravest international crimes are internationally unlawful acts which encroach upon the fundaments of States' existence, upon nations and peoples, undermining the most important generally recognized principles of international law and threatening to international peace and universal security[20].

Only four crimes against peace and security are included into the KR Criminal Code, chapter 34:

---

[18] Law N 91 of 25 June 2007 "On the insertion of amendment and modification into the Criminal Code of the Kyrgyz Republic, the Criminal Proceeding Code of the Kyrgyz Republic, Code of the Kyrgyz Republic on administrative accountability, the Criminal Executive Code of the Kyrgyz Republic, into the Law "On Supreme Court and local courts", "On Office of Public Prosecutor", "On procedure and conditions of the detention of imprison persons, accused and suspected", "On the general principles of amnesty and pardon", "On entry into force of the Criminal Proceeding Code" and "On entry into force of the Criminal Code".

[19] See: Курманов А.К. Преступления против мира и безопасности человечества (по уголовному законодательству Кыргызской Республики). Бишкек, ИД «Наука и образование», 2002. С.84-85.

[20] See: Международное право. Словарь-справочник. М.: Инфра, М.1997.

"Genocide" (article 373);
"Ecocide" (article 374);
"Mercenarism" (article 375);
"Attacks against international protected persons or buildings" (article 376).

The list of the crimes against peace and security is a half in comparison with the criminal codes of the Russian Federation, Kazakhstan and other countries. However the specialists suggested filling this gap in the national criminal law[21].

Thus, for the purposes of the present report it makes sense to comment the international crimes which are included into the KR Criminal Code, above all from the point of view of national criminal legislation and criminal policy and with the considerations of the corresponding sources of international law.

B. International crimes and their place in national criminal legislation

I. Genocide[22]

1. *Corpus Delicti* and sources of law

The international criminal liability for the crime of genocide was established in 1948 by the Genocide Convention. It is noteworthy that almost all UN members including the KR are the parties to the Convention. Following its international obligations, the KR implemented and criminalized the *crime of genocide*.

The definition of the crime is worded in article 373 of the KR Criminal Code:

'Genocide' is the acts aimed at destroying, in whole or in part, a national, ethnical, racial or religious group by means of killing members of the group, causing serious bodily or mental harm to their health, forcible prevention of births within the group, forcibly transferring children, enforced displacement or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part […]"

This article as it was mentioned above is compatible with the Rome Statute; in case of the ratification of the Statute no additional implementation measures will be required.

Article 2 of the Convention gives the definition of the crime as well:

"For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
a). Killing members of the group;
b). Causing bodily or mental harm to members of the group;
c). Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d). Imposing measures intended to prevent births within the group;
e). Forcibly transferring children of the group to another group.

The object of crime is the relations which grant safe non-discriminative life conditions for the national, ethnic, racial or religious groups of population.

The victims of the crime are not natural individuals as such but the whole groups with respect to which the intention to destroy exists.

The *actus reus* of the crime of genocide is the commission one of the following acts:

- Killing members of a national, ethnic, racial or religious group;
- Causing bodily or mental harm to them;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

[21] See: Курманов А.К. Указ.соч. С.88.

[22] See: Джоробекова А.М., Джоробеков З.М., Кенешбек уулу А. Уголовное право Кыргызской Республики (Особенная часть). Учебное пособие под общей ред. Кигишьян В.А. – Б., 2007.

- Deliberately inflicting the conditions of life calculated to bring about its physical destruction in whole or in part.

The KR Criminal Code practically quotes the provision of art. 2 of the Convention but contains some particularities.

In particular, the wording "causing bodily or mental harm to [members of the group]" was replaced by another wording in the text of the article - "causing serious bodily or mental harm to their health"[23]. Probably the author used here the wording, which is closer and more habitual to the KR criminal legal system.

According to the Convention's sense, all act – both forcible and nonviolent – should be regarded as "measures intended to prevent births within the group" At the same time article 373 of the KR Criminal Code means only "forcible prevention of births". It slightly narrows the scope of acts, which fall into the crime of concern.

Discussing the "forcibly transferring children", the Kyrgyz criminal law – as well as the Kazakh legislation – does not clarify that the matter concerns the transferring children "of the group to another group". That clarification is important as the children being transferred to another group stop associating themselves with their group of origin.

One of the forms of genocide is the forcible displacement of group of population. This extending interpretation of *actus reus* of the crime has a historical precondition. Between 1917 – 1950, at the Soviet period, many repressed nations were deported to the Central Asia from the Caucasus (Karachais, Balkars, Chechens, Ingushes), from the Crimea (Crimean Tatars), from the Volga region (Germans), from the Soviet Far East (Koreans)[24].

The mens rea of the crime is characterised by the direct intention; a special object in the form of intention of a perpetrator to destroy in part or in total a national, ethnic, racial or religious group as such. If this intention is absent, the acts cannot be qualified as the crime of genocide. The aim to destroy a human group in whole or in part differs genocide from certain forms of the use of prohibited means and methods of warfare and from some common criminal offences (murder, willful causing grave harm to health, *etc*). However one should bear in mind that there is another characteristic, which distinguishes genocide from the use of certain means and methods of warfare – this crime can be committed in peacetime and is not necessary linked with an armed conflict. If genocide is committed during an armed conflict, the perpetrators' acts must be qualified in aggregation of crimes since genocide is a prohibited means of warfare according to article 374 of the KR Criminal Code.

In accordance with article 17 and 18(1) of the KR Criminal Code, a sane natural individual reached age of 16 years, can be subjected to criminal accountability for the crime of genocide.

2. Provided legal consequences

The crime of genocide is regarded by the KR Criminal Code as a particular grave crime[25] and after the abolishment of death penalty are punished with the deprivation of liberty for the period from twelve to twenty years or with life imprisonment[26].

---

[23] **Article 104**: «(1) Deliberate infliction of grave harm to health, which is dangerous to a person's life and entailed the loss of sight, speech, hearing or of an organ or the loss of an organ's functions, mental illness and another harm to health related to a substantial stable loss of general working capability by at least one third or which entailed the interruption of pregnancy or which has expressed in irreversible disfiguration of a face[...]»

[24] See: Стрелецкий В. Территориально-этнические притязания в Средней Азии.// Этнополис: Этнополитический вестник России. – 1993. - № 2. – С.93.

[25] According to **Article 13** of the KR Criminal Code:

"[p]particularly grave crimes are deliberate acts for the commission of which this Code establishes a punishment in the form of deprivation of liberty for more than ten years or life imprisonment".

[26] **Article 50**: "(1) Life imprisonment is the isolation a convicted from the society by means of transferring him to a correctional settlement of particular regime which is set out fro the commission of particularly grave

Regarding the qualification of particularly grave crimes, measures of accountability, execution of the punishment and cancellation of conviction:

(1) criminal liability for the preparation of a crime (article 27(2));[27]

(2) criminal liability for the attempt to commit a crime (article 28);[28]

(3) increasing criminal liability for the commission of a crime by a criminal organization (article 31(4));[29]

(4) possibility to assign as a punishment the deprivation of liberty for the period to 20 years; on aggregation of crimes, the maximal time of the deprivation of liberty cannot exceed 25 years, on aggregation of sentences it cannot exceed 30 years (article 49(2,3);[30]

(5) possibility to deprive a person from a special, military, honorary status or rank, including diplomatic one, qualification class (article 51);[31]

(6) impossibility to assign a punishment which exceeds three quarters of the maximum period of deprivation of liberty or the volume of the gravest type of punishment of the Particular Part of the KR Criminal Code, in the presence of the reporting guilty or active contribution to the revelation of a crime, and in the absence of aggravating circumstances at the commission of a particular grave crime (article 53(4));[32]

(7) non-applicability of statutory limitations to the perpetrators of crimes against peace and security of mankind in the case specifically stressed by the Criminal Code (article 73(3, 4));[33]

(8) impossibility to apply the conditional conviction to the persons committed particularly grave crimes (article 64 (7)) [34];

(9) possibility to apply pre-term release on the expire of, at least, three quarters of the assigned period at the commission of a particularly grave crime; at least, four fifth parts of

---

crimes against life, honour and dignity of a person or for acts aimed at the destruction, in part or in whole, of national, ethnic or religious groups.

(2) Life imprisonment may not be assigned to:

- women;
- persons who have committed crimes at the age of up to eighteen years;
- men who have reached the age of sixty years old at the moment of the commission of crime.

[27] **Article 27(2)**: "Criminal liability may be assigned only for the preparation to a grave or particularly grave crime".

[28] **Article 28**: "An attempt to a crime is an action or omission which has been committed with the direct intention, directed to the commission of a crime if the crime has not been carried to the conclusion upon the circumstances which did not depend on a perpetrator's will".

[29] **Article 31(5):** A criminal association is a stable organization of two or more persons who have preliminarily co-operated for the systematic commission of grave or particularly grave crimes".

[30] **Article 49(2,3):** "The deprivation of liberty shall be assigned for a term between six months and twelve years. In case of the assignment of punishments on aggregate of crimes, at the complete or partial addition of the terms of the deprivation of liberty, the maximum term of deprivation of liberty may not exceed twenty five years, on aggregate on sentences it may not exceed thirty years".

(3) Life imprisonment can be replaced by the deprivation of liberty as an act of pardon

[31] **Article 51**: "For the commission of a grave or a particularly grave crime a person may be deprived from a special, military, honorary rank or class rank".

[32]**Article 54(4)**: "In case of reporting guilty or active contribution to the investigation of a crime and at the absence of aggravating circumstances, the term or volume of a punishment [...] may not exceed [...] for the commission of a particularly grave crime – three-fourths of a maximum terms or volume of the most severe type of punishment which is provided for in a respective Article of this Code's Specific Part".

[33]**Article 73:** "(3) The applicability of statutory limitation to a person who has been sentenced to life imprisonment is determined by the court. If the court finds unacceptable to apply statutory limitation, life imprisonment shall be replaced by the deprivation of liberty.

(4) Statutory limitation may not be applied to the persons who have committed crimes against peace and security in the cases which are particularly foreseen by the KR Criminal Code ".

[34]**Article 64(7):** "The conditional release may not be applied to the persons who have been convicted fro the commission of particularly grave crimes, to persons who have no permanent place for living and to foreign nationals who temporarily live in the Kyrgyz Republic".

the period at the commission of a crime as a repeated commission of a particular gravity; at least, five sixth parts of the period in the case of replacement of life imprisonment with deprivation of liberty as an act of pardon (art 69(3)(3,4,5)[35];

(10) possibility to apply pre-term release on the expire of, at least, thirty years of the period of deprivation of liberty if a court recognizes no necessity to serve life imprisonment (art 69(5)[36];

(11) impossibility to suspend the punishment to pregnant women and women who have minor children, if they are convicted to the deprivation of liberty for the period exceeding five years for the particularly grave crimes (art 72(1));[37]

(12) possibility to release from criminal liability or punishment on the ground of amnesty (art 74);[38]

(13) cancellation of conviction on the expire of ten year after serving the punishment (art 76(3)[39] or, in case of the commission of a crime by perpetrators under 18 years old, it can be done after seven years of serving the punishment (art 89(4)).[40]

(14) possibility to address to the KR President with the petition on pardon after the sentence enters into force[41].

II. Crimes against humanity

1. *Corpus delicti* and sources of law

---

[35] **Article 69(3)**: "The conditional release may only be applied after a convicted person has actually served by a convicted:

3) at least two-thirds of a punishment assigned for a particularly grave crime, at least three fourths of a punishment assigned to a person with regard to which the conditional release was used before if the conditional release has been cancelled upon the circumstances which are foreseen by para 7 of the present article;

4) at least four-fifths of a punishment assigned for a particularly danger repeated commission of a crime;

5) at least five-sixths of a punishment by which life imprisonment has been replaced as an act of punishment".

[36] **Article 69(5)**: "The conditional release may be applied to a person who serves his sentence in the form of life imprisonment if the court finds that there is no need for him to serve this sentence any more and if he actually he has served out at least thirty years of deprivation of liberty".

[37] **Article 72 (1)**: (1) "With regard to convicted pregnant women and women who have children at the age up to fourteen years, except for those who have been convicted for the deprivation of liberty for the commission of particularly grave crimes, the court may postpone the serving of their sentence to the time of reaching by their children the age of fourteen year".

[38] **Article 74:** "(1) The Jokorgu Kenesh (Parliament) of the Kyrgyz Republic passes the amnesty act in respect of individually indefinite range of persons.

(2) Persons who have been convicted crimes may be released from the criminal liability by an act of amnesty. Persons who have been convicted crimes may be released from the punishment or the assigned punishment may be reduced or replaced by less severe punishment or those persons may be released from the serving of additional crimes. [...]"

[39] **Article 76(3)**: " The conviction shall have cancelled [...]

6) with regard to persons who have been convicted for particularly grave crimes, after ten years following the serving of a sentence have served out".

[40] **Article 89(4):** " With regard to persons who have committed crimes before attaining the age of eighteen years, the terms of cancellation of conviction, provided for in Article 76 of the present Code, shall be shortened and equal to, respectively: [...]

4) seven years following the serving of deprivation of liberty for [the commission of] a particularly grave crime ".

[41] **Article 75:** "(1) With respect to an individually determined person pardon is granted by the President of the Kyrgyz Republic.

(2) A person who has been convicted for a crime, may be released from the further serving the sentence or the punishment which has been assigned to him may be reduced or replaced by less severe penalty.

(3) A person who has been assigned to life imprisonment has the right to apply the petition on pardon after the sentence enters into force".

The criminal legislation of the KR does not know the notion "crimes against humanity" in the sense of contemporary international criminal law and in particular in the sense of article 7(1) of the ICC Rome Statute. Starting from the definition which is given by the Rome Statute, the crimes against humanity is characterized by the following main features: (1) the attacks against any civilians; (2) widespread or (3) systematic character of the attacks in the context of which they are committed; (4) deliberative character of such attacks. The criminal Code does not operate by the similar qualification criteria but one can suppose that the analogous features can be found in the KR Criminal Code - for instance, aggregation of crimes (article 15)[42], or repeated commission of criminal offences[43].

Among all crimes recognized by international law as crimes against humanity, the KR Criminal Code criminalized only the *crime of genocide*[44].

The other crimes although being known to the Criminal Code, are considered as common criminal offences but not as international crimes. In particular, they are the following crimes from the Specific Part of the Criminal Code:

(1) the full conformity with the article 7 of the Rome Statute's crimes can be found only in the following crimes:

– *Killing* (article 97);

– *Enslavement* (article 124 – "Human traffic");

– *Imprisonment* or *other severe deprivation of physical liberty in violation of fundamental rules of international law* (article 125 – "Unlawful deprivation of liberty ", art 126 – "Unlawful placement in a psychiatric clinic");

– *Torture* (article 305-1);

– *Rape* (article 129);

– *Sexual slavery* (article 123 – "Kidnapping", article 125 – "Unlawful deprivation of liberty", article 124 – "Human traffic" if the given crimes are committed with the aim of the exploitation of victim[45]);

– *Enforced prostitution* (article 131 – "Compulsion to the acts of sexual character"[46], article 271 – "Establishing or running brothels for engaging in prostitution and pimping");

(2) the partial conformity with the article 7 of the Rome Statute's crimes can be found in the following crimes:

– *Extermination* (article 373 – "Genocide");

– *Enforced pregnancy*[47]*, enforced sterilization or any other forms of sexual violence of comparable gravity* (article 116 – "Unlawful abortion", article 130 – "Forced actions of sexual character", article 260 – «Involvement into prostitution», article 261 – «Establishing or running brothels for engaging in prostitution and pimping»);

---

[42] **Article 15(1):** "An aggregate of crimes is the commission of two or more acts for neither of which the perpetrator has been convicted. The crimes for the commission of which the perpetrator has been released from the criminal liability on the grounds set by law".

[43] **Article 16:** "(1) A repeated commission of crimes is the commission of a deliberate crime by a person who has already had the conviction for an earlier committed deliberate crime. [...]

Note. A person's conviction for the commission of a crime in a foreign State shall be taken into consideration in the Kyrgyz Republic, at the recognition of the fact of repeatedly commission of crimes".

[44] See above the "Genocide" section.

[45] **Comment 2 to Article 124**: "Exploitation means the involvement of a person in criminal activity, enforcement to prostitution or other sorts of sexual activity, to forced labour or services, adoption for commercial use, use in armed conflict ".

[46] **Article 131:** "Compulsion of a person to sexual acts, beggary, lesbianism or the commission of other acts of sexual character by means of blackmail, threats of destruction, damage or seizure of property or use of finance or another dependence of a victim criminalizes the involvement in prostitution ".

[47] Like the Criminal Code of the Republic of Kazakhstan, the KR Criminal Code qualifies the "enforced pregnancy" as such, i.e. neither as a separate crime nor as a circumstance which would aggravate the liability for the crime of rape. However, probably, such crimes may in practice be qualified under Article 130 as "other actions of a sexual nature [carried out] with violence or a threat of its application against the (male of female) victim or against other persons, or by way of using a helpless condition of the (male or female) victim".

– *Enforced disappearances* (article 123 - "Kidnapping", article 125 -"Unlawful deprivation of liberty");[48]

– *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health* (article 104 – "Willful causing of grave harm to health", article 105 – "Willful causing of less grave harm to health", article 111 – "Torments");[49]

– *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds* (article 299 - "Incitement of national, racial, religious or interregional hatred").[50]

(3) The crime of **apartheid** is not considered by the Criminal Code. The legal doctrine suggests new articles to be included in it; they would provide the criminal liability both for the crime of *apartheid* and for other crimes of the Rome Statute.

During the preparation to the ratification of the Rome Statute, the Parliament of the KR should set the liability for the commission of all crimes against humanity whose elements are enshrined in article 7 of the Rome Statute.

2. Provided legal consequences

The punishment for one or another category of crimes against humanity can be found in the sanctions of the articles for the commission of similar common criminal offences (murder, rape, *etc*.), taking into account the indicated above gaps in the KR Criminal Code. The general rules of assigning punishments on the corresponding norms of the General Part of the Code will be applied.

From the point of the KR criminal law, the common criminal offences considered in the given section of the Report are related to the categories of the grave[51] and particularly grave[52] crimes.

A person who has been held guilty for the commission of the crimes against peace and security of mankind, the KR court must assign the punishment at the limits set by the corresponding articles of the Specific Part of the Criminal Code bearing in mind the provisions of the General Part of the KR Criminal Code.

In general, at the assignment of the punishment the crime's character and the degree of public gravity, personality of the convinced, including his behavior before and after the commission of the crime, mitigating or aggravating circumstances (art. 54 and 55 correspondingly), sanction and influence of the assigned punishment on the convinced, on his correction, on his family or his dependants should be taken into account.

III. War crimes

[48] Articles 123 and 125 embrace the objective element of the crime of enforced disappearance (arrest, detention or kidnapping a person by a State or a political organisation or with their permission, support or consent).

[49] It seems that the elements of crimes provided for in Articles 104, 105 и 111 do generally correspond to the standards of Article 7(1) of the Rome Statute, but their titles differ for objective reasons.

[50] **Article 299**: "(1). Deliberate acts aimed at the incitement of national, racial, religious or inter-regional hatred, humiliation of the national dignity, propaganda of exceptionality, superiority of one nation and inferiority of citizens on the ground of their attitude towards religion, national, or racial affiliation, if these acts are committed publicly or with the use of mass media [...];

2 The same acts, committed

1) with the use of violence or with the threat of the use of it;

2) by a person who benefit from his official position;

3) by an organized group [...]".

[51] **Article 12:** "Grave crimes are deliberate acts for the commission of which the maximum punishment provided for in this Code is at least five years but it does not exceed ten years of deprivation of liberty".

[52] **Article 13:** "Particularly grave crimes are deliberate acts for the commission of which the maximum punishment provided for in this Code exceeds ten years or life imprisonment".

1. *Corpus Delicti* and sources of law

Regarding *war crimes*, one should stress particularly that the countries parties to the Geneva Conventions on the protection of victims of war of 1949 and two Additional Protocols of 1977 must amend their national legislation in conformity to them. They are the ground of international humanitarian law (IHL)[53].

The KR ratified and joint the following international IHL treaties:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (ratified by the Law of 21 July 1999 N 86);
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949;
- Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949[54];
- Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949[55];
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977[56];
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977[57];
- Convention on the Rights of the Child of 1989[58];
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000[59];
- Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954[60];
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 1972[61];
- Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction of 13 January 1993[62].

In spite of recognition of its obligations under IHL, the Criminal Code of the KR does not contain any provisions, which would criminalize war crimes. Moreover, neither Criminal Code nor Criminal Proceeding Code contains the definition "war crimes" at all.

However it does not mean that the measures, which are, aimed at the implementation of the IHL norms is not being undertaken in the Republic.

---

[53] International humanitarian law is the branch of international law, which regulates the issues of the restriction of means and methods of warfare and protection of victims of armed conflicts. // Цит. по кн.: Курманов А.К. Указ. Соч. С. 96.

[54] Has been ratified by the KR Law N 86 of 21 July 1999.

[55] Has been ratified by the KR Law N 86 of 21 July 1999.

[56] Has been ratified by the KR Law N 86 of 21 July 1999.

[57] Has been ratified by the KR Law N 86 of 21 July 1999.

[58] The Parliament's decree N 1402-XII "On the accession to the Convention on Rights of a Child" of 12 January 1994.

[59] Law "On the accession to the Optional Protocol on the involvement of children in armed conflict and to the Optional Protocol on the sale of children, child prostitution and child pornography of 25 May 2000" N 118 of 12 July 2002.

[60] The Parliament Legislative Assembly's decree N 121-1 "On the accession to the Convention for the Protection of Cultural Property in the Event of Armed Conflict" of 8 June 1995.

[61] Law N 144. "On the accession to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction signed on 10 April 1972 in Moscow, London and Washington cities" of 17 August 2004

[62] Law N 89 "On the ratification of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction"of 29 April 2003.

The efforts of implementing IHL were undertaken at the governmental level. By the KR government decree of 28 January 1999 N 51 the Inter-agency commission on IHL implementation was established. Namely, the commission must have reached the following aims:

- contribution to the correspondence of the KR domestic legislation to the provisions of the international IHL treaties whose party the KR is;
- research and assessment of the KR legislation in the part of its compatibility to IHL norms;
- preparation of suggestions on the implementation of IHL norms into the KR legislation;
- considering and preparation of consultative opinions on the draft of international treaties, acts of the KR legislation in respect to IHL;
- coordination of the state bodies' activity in respect to the IHL implementation into the KR legislation, *etc*.

Besides, the plan of action on the IHL implementation was accepted. Among the actions there were planned those which were aimed at the amendment of the KR legislation according to the IHL international treaties.

As a result of the measures a draft law "On the amendment and modification of the KR Criminal Code and Criminal Proceeding Code" was elaborated and approved. The draft law presupposed inserting the whole Chapter 35 "War crimes" in the Criminal Code. However the corresponding amendments were not accepted.

The following crimes should have been implemented into the KR Criminal Code:

- Mercenarism (article 377)[63];
- Attacks against the persons who, having laid down his arms or

having no longer means of defence; against wounded, sick persons, medical and religious personnel, prisoners of war, civilian population, other persons who are under the protection of IHL (article 378);

- Destruction or appropriation of property and attacks against cultural objects (art 379);
- Unlawful displacement of population (article 380);
- Unlawful enlisting children under the age of eighteen years into armed forces or armed group (article 381);
- Attacks violating IHL (article 382);
- Attacks against personnel or entities involved in a humanitarian assistance or peacekeeping mission (article 383);
- Treacherous use of the emblems of the Red Cross and Red Crescent (article 384);
- Unlawful of the emblems of the Red Cross and Red Crescent (article 385);
- Negligence or giving an unlawful order during an armed conflict (article 386);
- Other violations of laws and customs of war (article 387).

Later the measures on stimulating the consideration of this draft law by the Parliament were undertaken. The Law «On amending and modifying the KR Criminal Code and Criminal Proceeding Code» had been approved by that moment by the KR Government on 24 August 2001 (Decree № 474). The approval the draft law was planned for 2003-2005. However at the present time no corresponding amendments were made by the KR Parliament.

The legal doctrine also suggested the ideas concerning the implementing of all crimes in one article that should have been titled «Serious violation of IHL» and should have been worded like following:

«Cruel treatment with prisoners of war or with civilian population, deportation of civilian population, compulsion of a prisoner of war or civilian to serve in adversary armed forces, intentional deprivation of a prisoner of war or civilian from the right to fair trial, making civilian population or individuals the object of attacks, attacks on installations or structures which

[63] This crime is included into the KR Criminal Code (art 375). The draft law suggests implementing it into the "War crimes" category.

contain dangerous forces, plunder of national property on the occupied territories, as well as making clearly identified historical monuments, pieces of art or places of worship which are cultural heritage of nations and which are granted by a special protection, an object of attacks, treacherous use of the emblems of the Red Cross, Red Crescent and other protective emblems, and commission of other acts prohibited by IHL».

Judging from the above mentioned, one should note that the KR Criminal Code has serious gaps in the legal regulation concerning war crimes. The KR legislation must be essentially modified.

The only provision, which partially coincides with one of the crimes of the Rome Statute in the category of war crimes, is art. 227 of the KR Criminal Code, «Taking hostages» (article 8 (c(iii)) of the Rome Statute «Taking hostages»).

The crime is aimed at the public security and private freedom and inviolability of a person.

The *actus reus* of the crime is taking and retention of a person as a hostage committed to compel the State, international organization, organization or individual to undertake or to refrain from undertaking any act for the sake of the hostage's release.

The claims can have any character: departure from the country, a large amount of money, weapon or drugs, release certain persons from prisons, meeting with journalists, *etc*.

In contrast to kidnapping (article 123 of the Criminal Code), persons who take hostages produce their demands openly. Moreover, frequently they do it intentionally.

For the purpose of the prevention of potential consequences of the crime, the KR Criminal Code provides the freedom from the criminal liability if a perpetrator releases the hostages and if no other crime was committed.

Article 227(2) of the KR Criminal Code indicates the characteristics of the crime that was committed:

1) by a group of individuals in the preliminary agreement;

2) by an criminal organisation;

3) with the use of physical violation, dangerous for life and health, or with the threat of killing;

4) with the use of weapon or other objects used as a weapon;

5) in respect to two or more persons;

6) in respect to a person under 18 year if a perpetrator knew that beforehand;

7) in respect to a pregnant woman if a perpetrator knew that beforehand;

8) for self-interests or being specially hired for the commission of that crime;

The commission of the same crime by a criminal group, or with causing negligently the death of the victim or grave harm to his health or other grave consequences, are the particularly aggregative circumstances.

The *mens rea* of the crime is characterized by the direct intention. The aim is to achieve of or refrain from certain acts.

The *perpetrator* of the crime is a sane person reached age of 14 years.

2. Provided legal consequences

Most military crimes in the draft law can be regarded as grave and particularly grave crimes.

The draft article 385, "Unlawful of the emblems of the Red Cross and Red Crescent", is an exception; it imposes the sanction in the form of fine or six month detention or deprivation of liberty for the period till three years.

As for the liability for taking hostages, article 227 of the Code provides the punishment as the deprivation of liberty from five to ten years; from eight to fifteen years taking into account all qualification sings; from twelve to twenty years at the presence of particularly aggregative characteristics.

IV. The Crime of Aggression

1. *Corpus Delicti* and sources of law

Being a peace-loving State, which has declared its adherence to the principles and norms of international law, the KR also recognized the inadmissibility of any propaganda and summons to aggressive war. In particular, the KR Constitution contains the provision that the KR does not have any goals of the expansion, aggression and territorial claims which are to be achieved by the use of military force; it rejects the militarization of the State's life and submission of the State and its activity to the military aims (art.9). Hence the object of this crime is also the international peace and security of the KR.

However the Criminal Code of the KR does not criminalize the criminal liability for the crime of **aggression.**

Being a crime of exceptional gravity which supposes the planning, preparation, unleashing and conduct of war, *aggression* has been criminalized in most CIS countries[64]: in Russian Federation (art 353 of the Criminal Code); Republic of Belarus (art 122 of the Criminal Code); Republic of Azerbaijan (art 101 of the Criminal Code); Republic of Georgia (art 404 of the Criminal Code); Republic of Kazakhstan (art 156 of the Criminal Code); Republic of Moldova (art 139 of the Criminal Code); Republic of Tajikistan (art 395 of the Criminal Code); Republic of Ukraine (art 437 of the Criminal Code).

Up to the present time, the definition of aggression is absent in international criminal law. While elaborating the Rome Statute, the parties could not come to the conclusion concerning the unified definition of the term. According to the Rome Statute, aggression is "a waiting crime"; that is to say, the crime in the Statute will be only subjected to the general jurisdiction based on the UN Resolution on the definition of aggression № 3314 of 14 December 1974 until the States parties define the notion.

Apart from the enumerated crimes against peace and security of mankind, the legal doctrine[65] suggests the following crimes be included into the Chapter 34 of the Criminal Code:

- the planning, preparation, unleashing and conduct of war;
- propaganda and public summons to unleashing war.

2. Provided legal circumstances

Correspondingly, if the Chapter 34 "Crimes against Peace and Security of Mankind" is included into the KR Criminal Code, all crimes of this draft chapter will be considered as grave and particularly grave crimes, since the sanction for their commission is the deprivation from liberty exceeding five years to twenty years or life imprisonment[66]. Therefore the punishment for the crime of aggression will correspond to the gravity of the crime.

V. Reflection of other crimes in the national legislation

V.1. "Ecocide (article 374 of the Criminal Code).

V.211. Corpus Delicti and Sources of Law

[64] From the draft of the Report "Основы уголовного преследования международных преступлений по законодательству Российской Федерации и Республики Белорусь", подготовленного группой авторов в составе З. Ламмих, Р. Графундер, Е.Трикоз. М., 2007.

[65] See: Курманов А.К. Указ соч. С.152.

[66] See above

The criminal accountability for the crime of ecocide can be found in art. 374 of the KR Criminal Code:

«Mass destruction of flora and fauna, contamination of atmosphere or water resources, as well as the commission of acts which are capable of causing ecological catastrophe, - [...]».

The crime is directed against the social relations, which provide ecologic security of mankind.

The aim of ecocide is the flora and fauna, water resources, land, cosmic space and other components of the ecosystem.

The *actus reus* of the crime is characterized by the following acts committed in any form: а) Mass destruction of flora and fauna; б) contamination of atmosphere or water resources; в) the commission of acts which are capable of causing ecological catastrophe.

The mass destruction of flora and fauna is the destruction of the ecosystem of a region, which inevitably causes the total disappearance of flora and / or mass fall of fauna within such a territory.

The contamination of atmosphere or water resources can be in the form of saturation of air and water sources with the critical mass of contaminating combinations, which causes the serious harm to health or death of living organisms and of human being above all.

The commission of other acts capable of causing ecological catastrophe can be committed in the form of the pollution of water sources or air in the volumes exceeding the volumes set by the sanitary norms.

The ecologic catastrophe is causing such damage to the ecosystem, which is inevitably linked with irreversible global consequences in the environment and the existence of human beings in any other region of the earth or the whole planet.

The given crime is considered as particularly grave crimes.

Means rea of the crime is characterized by the indirect or direct intention.

The *perpetrator* of the crime is any sane person reached age of 16 years.

V.1.2. Provided legal consequences

The crime is related to the category of particularly grave crimes.

Article 374 assigns the punishment in the form of the deprivation of liberty for the period from twelve to twenty years.

V.2. "Mercenarism" (art 375).

V.2.1. *Corpus delicti* and sources of law

The criminal liability for the crime is set in article 375 of the Criminal Code of the KR.

International law does not consider directly mercenarism as a crime so far.

The crime is aimed at the social relations that grant the observation of the principles of the legal regulations of armed conflict for their maximum possible humanization.

The *actus reus* of the crime is characterized by the commission of the following acts: recruiting; training; financing and other material stimulation of a mercenary; use of a mercenary in an armed conflict.

According to the remark given to art 375, mercenary is a person acting for the purposes of financial rewards, who is not a citizen of the State party to the conflict, who does not live permanently within its territory and who is not a person acting on behalf of the State, in the official capacity.

Recruiting of mercenaries is seeking and invitation of the persons for military trainings for the further use of them in armed conflict.

Training is a process aimed at teaching them the newest means and methods of warfare against adversary.

Mercenarism is characterized by the elements of financing of other material rewards, which is given to a mercenary for his consent to participate in an armed conflict and for the direct participation in it.

The use of mercenary in armed conflict means dependant execution of orders (instructions) of the guilty.

Article 375(2) of the Criminal Code provides the liability for the participation of the mercenary in armed conflict.

Article 375(2) of the Criminal Code provides the liability for the same acts committed by a person with the use of one's official position or in respect to a person under 18 years old.

Means rea is characterized by the direct intention.

The perpetrator of the crime is a sane individual reached 16 years of age; article 375(3) demands a special subject.

V.2.2. Provided Legal Consequences

The crimes under article 375(1) may be considered as the crimes of less gravity[67] or grave crimes[68] since they are penalized by the deprivation of liberty from four to eight years. In its turn, the mercenary's participation qualified upon article 375(2) is punished by the deprivation of liberty from three to seven years. In case of assignment of the punishment in the form of the deprivation of liberty up to five years, the crimes will be referred to the first category (crimes of less gravity), whereas the latter case will be related to the second category (grave crimes).

The crimes given in article 375(3) are the crimes of particular gravity; the sanction for its commission is the deprivation of liberty for the period from seven to fifteen years with or without the confiscation of property.

V.3. "Attacks on internationally protected persons or buildings" (article 376).

V.3.1. *Corpus delicti* and sources of law

The criminal liability for the crime is set in article 376 of the Criminal Code of the KR.

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 to which the KR is a party, is a source of the law.

The crime is aimed at the social relations that grant the international protection to persons and buildings.

The victim can be any person who, according to the intentional law, benefits from a special protection from any attacks. According to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, the following persons are related to this category:

a) A Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

б) Any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special

[67] See above
[68] See above

protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

According to the Convention on the Safety of United Nations and Associated Personnel of 1994, the members of UN peacekeeping operations and employees of international organizations at providing humanitarian assistance should be reckoned in the mentioned persons as well.

The commission of the crime is possible only provided that the mentioned persons are being in the territory of a foreign States.

Actus reus of the crime is the attack on a representative of a foreign State or an employee of the international organization under international protection, their dwelling houses and offices, means of transportation, if all these acts are committed to provoke a war or to complicate international relations.

The crime's *corpus delicti* is formal, according to the legislative construction.

The crime is considered as a grave criminal offence.

Means rea of the crime is a direct intention since the perpetrator is aware the consequences of his act and wants them to begin.

The compulsory sign of the crime is the aim that is to say the provocation of a war or complicating international relations. The provocation of a war is the acts directed to the discreditation of the country of the internationally protected person, or the State whose representative of such a person, or other State to involve them in the armed conflict.

The crime's perpetrator is a sane person reached 16 years of age.

V.3.2. Provided legal circumstances

The sanction for the commission of the crime is the deprivation of liberty for the period from three to eight years.

C. The principles of realization of criminal legal norms

I. The jurisdiction principles of the criminal legislation

1. General review of the principles of jurisdiction of the criminal legislation

The KR criminal law acts in the determined space, in the determined time, in respect to a certain range of persons[69].

The principle of territoriality means the jurisdiction within the certain territory. According to article 5 of the KR Criminal Code[70] all persons committed crimes within the territory of the State are subjected to criminal liability on the ground of the KR Criminal Code.

---

[69] For more details see: Уголовное право Кыргызской Республики. Общая часть. Учебник./Под общей ред. Кигишьян В.А. Б.,2002. С.58-63.

[70] **Article 5**: «Application of criminal law to persons who have committed crimes on the territory of the Kyrgyz Republic»):

«1. All persons who have committed a crime on the territory of the Kyrgyz Republic shall be held liable in accordance with this Code.

2. A crime shall be considered committed on the territory of the Kyrgyz Republic, if it was completed or suppressed on the territory of the Kyrgyz Republic.

3. The issue of criminal liability of diplomatic representatives of foreign States and of other persons who enjoy immunities, and who have committed a crime on the territory of the Republic of Kazakhstan, shall be dealt with in accordance with provisions of international law».

Article 5(2) states that the criminal responsibility for the crime will be according to the KR Criminal Code if the crime was committed or suppress in the KR. Consequently a perpetrator holds his responsibility for the crime upon the place of the commission.

The crime is recognized as committed in the KR if the criminal actions were started and finished in its territory including the arrival of criminal consequences, and in case when the criminal actions have been accomplished outside the KR but the criminal result took place in its territory.

The territory of the KR is the land, interiors, water, air space above all objects within the territory of the Republic which is determined by the international treaties and KR laws. According to the norms of international law, the territory of the KR is ships and airplanes with the distinctive emblems of the KR outside the State.

The essence of the territorial principle of criminal law is that all perpetrators of the crimes in the territory of the KR are subjected to be prosecuted in accordance with the KR law regardless of whether they are citizens of the KR, foreign citizens or apatrides. The exception is the citizens of foreign States who benefit from the right of extraterritoriality and by virtue of that, possess diplomatic immunity. They are exempt from the jurisdiction of the KR.

According to article 5(3) of the KR Criminal Code, the issue of the criminal liability of foreign agents and other citizens of foreign States who are under the jurisdiction of the KR, in case of commission of a crime in the KR shall be solved via diplomatic negotiations.

The Heads of States, members of governments, members of embassies (ambassadors, envoys, chargés d'affaires), members of the diplomatic staff, councilor, commercial representatives, military attachés, first, second and third secretaries, assistance of attachés and members of their families if they are not citizens of the KR benefit from the diplomatic immunity. On the ground of the mutual agreement, members of parliamentary and governmental delegations of foreign States, officials of international delegations, consulates, technical personnel of embassies and consulates, military personnel of foreign States also posses diplomatic immunity from the criminal liability in the KR.

Rationae personae in respect to the persons committed crimes outside the KR is regulated by art 6 of the KR Criminal Code[71]. Article 6(1) formulates the *principle of citizenship (active personality principle)*: all citizens of the KR and stateless persons who permanently live in the territory of the KR, after committing a crime outside the country, are subjected to the prosecution upon the KR criminal code if they were not prosecuted before by a foreign State.

Consequently the persons who committed crimes outside the KR territory shall be prosecuted under the KR criminal law regardless of whether the criminal legislation of the State where the crimes were committed, criminalize them or not.

Article 6(2) formulates the principle of non-extradition of the KR citizens who have committed a crime within the territory of another State. In its turn, article 6(3) of the KR Criminal Code states that foreign citizens and stateless persons who committed crimes outside the KR and who currently are in its territory may be extradited to a foreign State for the prosecution of carrying the punishment according to international agreements.

---

[71] **Article 6** «Application of criminal law to persons who have committed crimes outside the Republic of Kazakhstan»:

«1. Citizens of the Kyrgyz Republic and stateless persons who permanently live in the Kyrgyz Republic who have committed crimes outside the Kyrgyz Republic shall be held criminally liable in accordance with this Code, if these persons have not been convicted in another State.

2. Citizens of the Kyrgyz Republic and stateless persons who permanently live in the Kyrgyz Republic who have committed crimes outside the Kyrgyz Republic shall not be subjected to be extradited to this State.

3. Foreign nationals and stateless persons who have committed crimes outside the Kyrgyz Republic and who currently stay within the territory of the State may be extradited to a foreign State for holding criminally liable or for serving their sentence in accordance with international treaties».

In all cases of the commission of crimes abroad by foreign citizens and stateless persons who were detained in the KR territory, the matter concerns only the extradition of the criminals by the interested State.

The State can demand the extradition when:

- the crime was committed in its territory;
- the criminal is a citizen of this State;
- the crime was aimed against this state and caused damage to it.

Rationae temporis is included in article 7(1) of the KR Criminal Code:

«The criminalization and prosecution of an act is determined by the law which was in force during the commission of this act».

For the interpretation of this principle it is necessary to open the content of the following principles: а) entry into force of the criminal law; б) end of power of the criminal law; в) retroactivity of the criminal law.

The procedure of the criminal law's entry into force is determined by the Law "On the procedure of the publication of the KR laws" of 14 February 1997 (№19)[72]. A criminal law is entered into force in 10 days after its publication. The official publication is the first publication of the law's full text in the newspaper "Erkin-Too", "Nasha Gazeta" or in the code of laws, bulletins of the Parliament. Any laws must be officially published during seven days after it has been signed by the President.

If the exact date of the law's entry into force is indicated in the text of the law the latter enters into force from this date. For instance, according to article 1 of the KR Law "On entry into force of the KR Criminal Code" signed by the President on 4 October 1997, the Criminal Law entered into force on from 1 January 1998.

The Criminal Code ceases its operation as a result of:

а) abrogation of it by other law which has been entered into force;

б) replacement of it by other law which has been entered into force;;

в) expire of the period that it was designed for.

Retroactivity of the criminal code is the expansion of its power to those criminal offences, which had been committed before it was passed.

According to article 7(2) of the KR Criminal Code, the law which cancels the punishment or mitigates it, possess retroactive effect; that is to say it is expanded to those criminals who had committed the crimes before the Criminal Code had entered into force including those who serve their sentences or who have served their sentences but still have their convictions.

According to art 7(3) of the Criminal Code, the law which sets the penalization of the crime, enforcing the punishment or otherwise deteriorating the state of persons does not have retroactivity effect.

2. Review of the principles of jurisdiction which are applied to international crimes

The principles of jurisdiction given in article 5, 6, 7 of the Criminal Code, are applied to equal conditions to all crimes including the crimes against peace and security.

3. Belonging the principles of jurisdiction to substantive criminal law or criminal proceeding law

[72] See: Слово Кыргызстана, 1997, 18-19 февраля.

The principles of jurisdiction are contained in substantive criminal law (article 5, 6 and 7 of the Criminal Code of the KR. In its turn, Criminal Proceeding Code contains *rationae temporis, rationae materiae* and *rationae personae* (in respect to foreign citizens and stateless persons as well) and the principle concerning the application of criminal proceeding law of a foreign state (article 3) [73].

II. The Responsibility to prosecute or prosecution at discretion

In accordance with article 26(4) of the Criminal Proceeding Code, cases on the crimes against peace and security of mankind are the crimes of public accusation. Consequently the prosecution on these cases is carried out compulsorily, regardless of whether the victims submitted the petition or not[74].

D. General preconditions of punishment or release from the punishment

Section III of the KR Criminal Code is dedicated to the issues of criminal liability. The definition and categories of punishment are regulated by the Chapter 9 of the Criminal Code (article 41–52). The general conditions of punishment and release from the punishment are regulated by the Section IV (article 65–73). The particularities of juvenal justice are enshrined in the Section V of the Criminal Code (article 77–89).

I. General Preconditions of Punishability or Release from it[75]

1. Intentional guilt

---

[73] **Article 3 of the Criminal Proceeding Code** «Limits of impact of the criminal proceeding law»:

«1. The criminal procedure shall be carried out in accordance with the law which acts at the time of investigation and court hearings.

2. The criminal procedure shall be carried out on the territory of the Republic of Kazakhstan in accordance with this Code, irrespective of where a crime has been committed.

3. Legal proceedings upon the crimes, which have been committed, by foreign citizens and stateless persons, shall be carried out on the territory of the KR in accordance to the norms of the present Code, if international treaties on mutual legal assistance do not provide other.

4. At the fulfillment of instructions or decisions of courts or investigatory bodies of a foreign State concerning certain investigatory actions, upon the request of these bodies, the criminal proceeding law of this State may be applied if an international treaty of two States provides for this.

5. With regards to the persons who enjoy diplomatic immunity, investigatory actions provided for this code may be carried out only upon their request or consent. The consent to carry out these acts must be asked from the Ministry of the Kyrgyz Republic.

6. The criminal proceeding Code, which imposes new obligations, cancels or belittle directly or indirectly the rights of participants of the criminal proceeding has no retroactivity.

7 The admissibility of proofs is determined by the law which was empowered at the moment of the obtaining them ».

[74] **Article 26 of the Criminal Proceeding Code** «Cases of private, private-public and public prosecution and indictment»:

«(1) Depending on the character and gravity of a crime, the indictment at the court shall be carried out in private, private-public and public order.

(2) Cases related to crimes, foreseen by the articles 110, para 2 article 112, para 1 article 126, articles 127, 128, 134, 135, para 1 and 2 article 136, para 1 article 137, para 1 article 139, article 140, 141, 146, 150, 151, 178, 194, para 1 article 324., shall be considered as cases of private prosecution.

The criminal prosecution of these cases shall be carried out only upon the petition of a victim and cancelled by the reconciliation of the parties. The reconciliation may take place before the sentence enters into force.

(3) Cases related to crimes of little gravity, foreseen by the articles 10, 11, para 1 article 129 and para 1 article 130 of the KR Criminal Code, shall be considered as cases of private-public prosecution.

(4) Cases related to other crimes shall be considered as cases of public prosecution».

[75] See: Уголовное право Кыргызской Республики. Общая часть. Учебник./Под общей ред. Кигишьян В.А. Б.,2002. С.138-154; Курманов К.Ш. Уголовное право Кыргызской Республики. Общая часть./Отв. Ред. чл.-корр. НАН КР, д.ю.н., проф. Тургунбеков Р.Т. Б., 1998. С.56-69.

Article 23 of the Criminal Code defined that an act committed with direct or indirect intention is a crime committed intentionally.

The direct intention is the commission of the act if a perpetrator was aware of the social danger of his act, foresaw its consequences and wished its coming. It is noteworthy that all crimes against peace and security provided by the KR Criminal Code presuppose the direct intention.

The indirect intention is the commission of a crime when the perpetrator was aware of the social danger of his act, foresaw its consequences and did not wish its coming but deliberately admitted their arrival or was indifferent to their arrival.

2. Guilt on carelessness

First of all, guilt on carelessness is an independent type of guilt; besides, it is less dangerous than the intentional one. Article 24 says about the crimes committed on carelessness. In these cases, a perpetrator either foresees the possibility of the arrival of the socially dangerous consequences but self-confidently reckons on prevention of them without any sufficient grounds, or does not foresees the possibility of the arrival of such consequences albeit he could have foreseen them.

Depending on the fact of the foresight of consequences, the carelessness in criminal law is possible in two types: as criminal recklessness and criminal negligence.

The *criminal recklessness*, the foresight of the consequences by a person is an intellectual element of the guilt on carelessness whereas reckless reliance on the prevention of potential consequences is will-bound element. (article 24(2)).

Upon the *criminal negligence,* a person did not foresee the socially dangerous consequences of his actions (omissions) but had to and could have foreseen them. This element differs from both indirect intention (conscious admission of the arrival of socially dangerous consequences) and recklessness (self-confident counting on the prevention of consequences) (article 24(3)).

3. Regulation of mistakes of facts and mistakes of law

A mistake as such is the direction of the thoughts and acts, which are admitted accidentally at the commission of any offences by a person, as a result of which the aim of the crime cannot be achieved and its criminal consequences are not covered.

In according with this presumption, the theory of criminal law[76] considers two categories of mistakes: mistake of law and mistake of facts.

Mistake of law does not exclude the person's responsibility of the act committed by him if the committed actions (omission) are criminalized by criminal law although the perpetrator did not regard his act as criminal. Besides, mistake of law can have another expression: the person mistakenly guesses that the act committed by him is criminal although it is not a crime (so-called supposed crime).

Mistake of fact emerges only in intentional crimes and concerns the miscomprehension and errors in the committed acts in respect to both the acts as such and the object of the crime, its consequences and links between these two categories.

The KR Criminal Code does not contain the provisions, which are analogues to art 32 of the Rome Statute[77]. Partially, the provisions concerning the mistake of law and of fact were included into the art 25 of the Code[78] as the innocent causing of damage (accident).

[76] See: Уголовное право. Общая часть./ Под общей ред. Кигишьян В.А. С.151-152.

[77] **Article 32 of the Rome Statute** («Mistake of fact and mistake of law»):

Taking into account the person's concrete intention to commit the crime and depending on the criminal, his acts would be qualified as am attempted crime (if the criminal result was not achieved) or as a crime committed with the aggravating circumstances (if there were victims as a result).

4. Punishability of an attempted crime and the possibility to reject the commission in proper time

Many crimes are prepared in advance, are thoroughly planned, are carried through certain prior stages, then the realization of the plan starts and finally, as a culmination of the whole process, the criminal result is achieved. In the criminal law theory it is called the stages of the commission of a crime within of which one can single out the preparation of a crime (1), attempt at a crime (2), complete crime (3). However it is possible to speak about the stages only in respect to international crimes since crimes on carelessness cannot be divided into any stages. Nevertheless taking into account that only intentional crimes are considered in this report, the stages matter for its purposes.

According to article 26 (1) of the KR Criminal Code, a complete crime is an act, which contains all characteristics of the crime, which is included into the Criminal Code.

The *preparation* to the crime and attempt at it are related to incomplete crimes. Article 27 and 28 of the KR Criminal Code contain the conditions of holding criminally liable for the preparation and attempt at the crime.

According to article 27 and 28, the criminal liability for the preparation and attempt at the crime ensues upon the same article that provides the sanction for the complete crime.

The preparation to the crime and attempt at the crime are the sorts of the intentional crime commission of which has not been finished due to the circumstances which do not depend on the perpetrator's will.

According to article 27(1) of the Criminal Code, the preparation to the crime is:

«Preparation to the crime is the following acts committed intentionally: search for or the adaptation of the means or tools, arrangement to commit a crime or other intentional creation of conditions for the commission of a crime if the crime has not been completed due to the circumstances which were not depended on the perpetrator's will».

The criminal liability ensues only in case of the preparation to a grave or a particularly grave crime (article 27(2)).

Article 28 gives the definition to the attempt at the crime:

«Attempt at a crime is an action or omission committed with the direct intention, aimed at the commission of the crime of the crime has not been completed due to the circumstances which were not depended on the perpetrator's will».

The criminal liability for the attempt at a crime ensues in all cases irrespective of the gravity of the act.

The punishment for the preparation and attempt at the crime is assigned upon the article of the Specific Part of the Criminal Code, which provides the sanction for a concrete crime. The disposition of article 26 of the Criminal Code does not set the obligation to mitigate the sanction of the punishment for incomplete crime. In both cases the court determines the penalty by article 56, 59, 60 (assignment of lighter penalty than it is

---

"1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33"

[78] **Article 25 of the KR CPC:** «An act is considered to have been committed innocently, if the perpetrator who has committed the crime, did not recognize and did not foresee the social danger of his action (omission) and must not and could not have recognized upon the actual circumstances».

prescribed by law; if several crimes were committed: upon several sentences). Upon assignment of the punishment, the court takes into consideration the character and the degree of the socially dangerous acts committed by an accused, decree of the commission of the acts, reasons by virtue of which the crime has not been completed (article 57).

There is another type of an incomplete crime, which has not been completed due to the circumstances, which were not depended on the perpetrator's will – a voluntary incomplete crime. Article 29 states that a person is not subjected to the criminal liability if he stops committing the crime voluntarily and finally and if the acts factually committed by him do not contain elements of the crime.[79]

Apart from the voluntary rejection, there is another term in criminal law – "active repentance". To repent means to feel regret, to confess the made mistake or wrongful act[80].

As a rule, active repentance comes up after the commission of the crime; it differs it from the voluntary rejection of the commission of a crime where criminal result has not arrives.

In certain cases, active repentance may be either the mitigating circumstance or the ground for the release from the criminal liability. For instance, according to article 54 of the Criminal Code the following circumstances, which mitigate the penalty, can be:

1) reporting guilty, full hearted repentance, active contribution to the expose of a crime;
2) voluntary compensation of damage or removal of the caused harm.

5. Types of accessories and their responsibility

Article 30 of the Criminal Code divides the accomplices of crimes into perpetrators, organizers, instigators and accessories:

1. The complicity in a crime is the willful joint participation of two or more persons in the commission of an intentional crime.
2. In addition to the perpetrator, accomplices in a crime shall be its organiser, instigator and accessory.
3. A perpetrator is a person who has directly committed a crime or immediately participated in its commission together with other persons, as well as a person who has committed a crime by way of using other persons who are not criminally liable by law.
4. An organiser is a person who has organised the commission of a crime or managed is commission, as well as a person who has established an organised criminal group or a criminal association (criminal organisation) or managed them.
4. An instigator is a person, who induces another person to commit a crime.
5. An accessory is a person who contributes to the commission of a crime by way of providing advice, directions, supplying information, tools or means of the commission of the crime, as well as a person who has promised in advance to conceal the criminal, tools or other means of the commission of the crime, traces of the crimes or items acquired as a result of the crime, as well as a person who has promised in advance to procure or dispose of such items.

---

[79] **Article 29** («Voluntary refusal to commit a crime»):

«1. The voluntary refusal to commit a crime shall be the discontinuation by a person of preparatory actions or the discontinuation of an action (omission) directly aimed at bringing the crime to an end. A person shall not be held criminally liable for a crime, if he or she has voluntarily and irreversibly refused to bring that crime to an end.

2. The act with regards to which the voluntary refusal has been carried out does not entail the criminal liability. A person who has voluntarily refused to bring a crime to an end shall only be held criminally liable, if the action he has in fact committed contains the elements of another crime.

(3) The voluntary refusal of organiser of a crime, instigator and the accessory of a crime shall not be held criminally liable, if these people in time have carried out all the measures which depended on them to prevent the crime and the socially dangerous circumstances have not arrived therefore».

[80] See: Ожегов С.И. Словарь русского языка. М., 1988. С.536.

Depending of the activity of a criminal association, article 31(1) of the Criminal Code determines the following groups of the complicity: simple complicity, complex, complicity, organized group, and criminal association[81].

The lawmaker states that the complicity is possible only at the commission of the intentional crime.

Concerning the responsibility of accomplices one should note that it does not constitute any additional grounds for the criminal liability. Accomplices are responsible to the same degree as individual perpetrators of crimes. Each accomplice bears his personal criminal liability.

The questions of liability of the accessories that have not contributed into *actus reus* of the crime – that is to say if the distribution of the roles took place among the accessories - are solved otherwise. The accomplices' actions cannot be considered in isolation from the perpetrators' actions. Intercommunication and correlation exist among the accomplices (organizers, instigators and accessories) and perpetrators. If a perpetrator stops the criminal activity at the stage of the preparation upon the circumstances, which do not depend on his, will, all other accomplices will be held criminal liability for the complicity in the preparation to the crime. Taking into account that each accomplice has committed a crime, the court is bound to determine the role of every person in the committed crime and the degree of the social danger.

According to article 30(7) of the Criminal Code, the criminal liability of organizers, instigators and accessories should ensue under the Article, which provides for a punishment for the commission of a given crime, with a reference to this article.

6. Punishability of omission

A socially dangerous act (action or omission) is a necessary sign of any *corpus delicti* (para.1 art.8 УК КР).

The KR criminal legislation provides the criminal accountability for omission as well.

In the sense of criminal law, act is a socially dangerous, desired and active behavior of a person prohibited by criminal law.

In its turn, *omission* is a socially dangerous, desired and passive behavior of a person, which is expressed in failure to fulfill those acts, which he must and could have done by virtue of his duties[82].

It is obvious that article 8(2) of the Criminal Code, which provides that an action or an omission, which formally contains elements of act provided for in the Criminal Code´s Specific Part but does not pose any social danger, due to its little significance, that is, does not cause and harm to any person, society or State, should not be considered a crime, does not fit within the context of the present report.

7. Special liability of superiors

A special liability of superiors for the commission of the crimes, which are described in the present report, is not provided.

---

[81] **Article 31:** «[...] (2) A simple accomplice is the commission of a crime by two or more persons each of whom commits the acts which are the crime's element (co-execution). A simple accomplice can be of two kinds:

1) a crime committed by a group of persons without preliminary agreement;

2) a crime committed by a group of persons upon the preliminary agreement.

(3) A complex accomplice is the commission of a crime by two or more persons by means of the distribution of roles (organizator, instigator, perpetrator and accessory).

(4) An organized group is a stable group consisting of two or more persons who have co-organised beforehand for the commission of crimes.

(5) A criminal association is a stable union of two or more persons or groups that have co-organised beforehand for carrying out criminal activity.

[82] See: Уголовное право. Общая часть./ Под общей ред. Кигишьян В.А. С.99-101.

As a military crime, the Criminal Code contains the crime of rejection to execute the order of a superior (article 355); in this regard the person who gave the unlawful order is to be subjected to liability. The non-execution of an order is perceived as the non-execution of a superior's order, which was given, in the proper order if the non-execution has caused significant damage to the military interests. In accordance with the edition of this article, a subordinate has no right to access the order's relevance, as a consequence, a superior who gave an order will be responsible for the potential consequences of the unlawful order.

8. Significance of conduct upon orders

The conduct of a subordinate who acts upon orders from his superior is regulated by Article 39 of the Criminal Code, which provides for the liability for the execution of an unlawful order or an instruction.
A person who has issued an unlawful order or instruction shall be held criminally liable for inflicting such harm.

According to the article, the infliction of harm to interests by a person who acts in pursuance of an order or an instruction, which is mandatory for him, shall not be a crime. The ground for the prosecution for the execution of an order or other instruction is the giving of such an order or an instruction by a related person in the proper order. Such a person who gave an unlawful order shall hold the liability for the infliction of the harm to an individual and to the society. As regarding a subordinate who has fulfilled an unlawful order or instruction he is not subjected to the criminal liability if the order or an instruction were unlawful but the executor did not recognize their unlawfulness at the moment of the execution.

A person who has committed a. Non-compliance with a manifestly unlawful order or instruction shall exclude criminal liability.[83] Article 39(2) of the Criminal Code states that a person who has committed a deliberate crime in pursuance of a manifestly unlawful order or instruction shall be held criminally liable on general grounds. In this case the perpetrator was aware the unlawful character of the order; therefore he hold his own criminal liability as a consequence of the obligation to foresee the criminal consequences of acts committed by them by virtue of their professional duties.

It is noteworthy that the provisions of article 39 cover both military and civil superiors who give the orders and instructions, which are mandatory for their subordinates, since the text of the Criminal law does not provide for the opposite.

Article 39(3) of the Criminal Code provides that a person shall not be subjected to criminal liability for the non-execution or other violation of an order or an instruction or job duties have been imposed on him illegitimately. His liability comes up only if the acts factually committed by him contain the elements of another crime.

Article 39 gives rise to several significant conclusions:

- overall, subordinates are legally compelled to comply with lawful orders and instructions issued by their superiors. With respect to the military personnel, disobedience or another non-compliance with a lawful order or instruction issued by a superior entails criminal liability under Article 355 of the Criminal Code;

[83] Cf. Article 33 of the Rome Statute of the International Criminal Court («Superior orders and prescription of law»):

«1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful».

- the infliction of harm at the execution of a lawful order or instruction is not a crime and does not entail criminal liability either for the subordinate or the superior;
- if a superior issues a manifestly unlawful order or instruction to his subordinate, the subordinate must refuse to comply with such an order or instruction and must not be held criminally liable for non-compliance.

9. Significance of conduct in the state of necessary defence

The criminal liability for the commission of international crimes in the state of necessary defence is determined by the general provisions of the Criminal Code.

In accordance with article 36 of the Criminal Code, it is not a crime to inflict harm on an attacker in the state of necessary defence, that is, in the context of defending one's person, residence, property, land and other rights of the person who defends himself or herself or of other people, of interests of society and State which are protected by law from a socially dangerous attempt, by way of inflicting harm on the attacker, if there was no excess of necessary defence.

It is specifically pointed out in part 2 of article 36 that all persons, irrespective of their professional or other special training and official capacity, have an equal right to necessary defence. This right belongs to a person irrespective of the possibility to avoid a socially dangerous attempt or to address other persons or State bodies for help.

Criminal liability is entailed, if harm is deliberately inflicted as a result of an excess of limits of necessary defence. Part 3 of article 36 defines an excess of limits of necessary defence as a manifest discrepancy of defence actually applied to the character and degree of a criminal attempt's social danger, in consequence of which the attacker suffers an obviously excessive harm, which is not compatible with the circumstances.

However, the second paragraph of part 3 of article 36 contains a reservation that it is no excess of limits of necessary defence to inflict harm on a person who attempts on another person's life, or when repelling other kinds of attacks related to the use or attempted use of weapons. The infliction of harm on carelessness to the attacker does not entail the criminal liability in this situation.

10. Significance of existence of a state of emergency

The General Part of Kazakhstan's criminal legislation contains a provision (16 paragraphs), what lists the aggravating circumstances of a crime. One of these characteristics is specifically devoted to the commission of a crime by way of using the circumstances of *a state of emergency*, *a natural or another social disaster*, or in the circumstances of *mass disorders* (article 55(1)).

In this context, social disasters imply natural resisters of any kind – flood, fire, earthquake, catastrophe, epidemics, *etc*.

State of emergency is a type of a regime which is applied for a limited period of time in the State or its separated region under specific circumstances in cases of direct threat to the constitutional system, mass disorders attended by the violence and threats to human lives.

As a rule, state of emergency restricts human rights and, in particular, the freedom of movement.

Mass disorders are accompanied with violence, pogroms, destruction of property, use of weapon and offering the armed resistance to representatives of official power (article 233(1)).

Since these circumstances are deliberately used by a person for personal enrichment, profits and other criminal interests, they are regarded as aggravating.

A simple coincidence of a crime and the time of disaster, state of emergency or mass disorders, does not create the aggravating circumstances.

At the assignment of the punishment, the court can recognize as aggravating only those circumstances, which are listed in the art 55 of the Criminal Code.

In accordance with article 55(4), an aggravating circumstance indicated by the article as an element of a crime, cannot be taken into account at the assignment of penalty. Since this circumstance is not listed specifically among the elements of crimes against the peace and security of mankind, it may be concluded that it should be taken into account by the court as a circumstance, which aggravates the criminal liability and punishment for the commission of any of these crimes.

Another aspect of the issue concerns the significance of state of emergency; in this regards the general provisions of the KR Criminal Code are applied but as the circumstances, which exclude the criminality of an act. According article 37(1), the infliction of harm to protected interests in the state of utmost necessity, that is, for the removal of the danger which threats to an individual or other persons, interests of the society and the State, is not a crime if the danger could not be removed by other means and if the inflicted harm is less significant than prevented one and if the limits of utmost necessity have not been exceeded. In the opposite case, the exceeding of the limits of utmost necessity shall be recognized a crime[84].

11. Age of criminal liability

In accordance with article 18(1), criminal liability may ensue with respect to persons who have attained the age of sixteen years by the time of the commission of a crime. According to the general provisions of the KR Criminal Code, this norm is applied to international crimes, too.

However, for the commission of the following crimes including some crimes, which are considered in the present Report, criminal liability ensues at the age of fourteen years (paragraph 2 article 18):

1) murder (article 97),
2) deliberate infliction of grave harm to health (article 104),
3) deliberate infliction of medium-gravity harm to health with aggravating circumstances (article 105),
4) kidnapping (article 123),
5) human traffic (article 124),
6) rape (article 129),
7) violent acts of sexual character (article 130),
8) theft (article 164),
9) abaction (article 165),
10) robbery (article 167),
11) burglary (article 168),
12) taking possession of property in particular large volumes (article 169),
13) extortion (article 170),
14) unlawfully taking possession of a car or of another means of transportation (article 172),

[84] **Article 37 (para 2)**: «The exceeding of limits of the utmost necessity is the infliction of harm which clearly does not correspond to the character and degree of the danger and circumstances under which the danger could have been removed, if the harm which has been inflicted to the indicated interests was equal or more significant than the prevented one. The infliction of harm on carelessness in this situation does not entail criminal liability».

15) deliberately destroying or causing damage to property by means of arson or other socially dangerous means, or with the infliction of grave circumstances (article 174(2)),

16) terrorism (article 226),

17) taking a hostage (article 227),

18) hooliganism with the aggravating circumstances (paragraph 2, 3 article 234),

19) vandalism (article 235),

20) taking possession or extorting weapons, munitions, explosive substances (article 245),

21) unlawful production, acquisition, stocking, transportation or conveyance with the purpose of the sale or sale of narcotic or psychotropic substances. (article 247),

22) taking possession or extorting narcotic or psychotropic substances (article 248),

23) setting means of transportation or communication out of order (article 283).

12. Rules of assigning punishments and special purposes of punishment for international crimes

The rules of assigning punishment and special purposes of punishment, provided in the General Part of the Criminal Code, are applied in respect to international crimes as well. The rules of assigning punishment are included into Section III of the Criminal Code (article 41–52).

The aim of punishment is the restoration of social justice, reeducation of the convicted, and the prevention of other crimes both by the convicted and other persons.

The punishment does not persuade the goal to inflict physical suffering or humiliation of human dignity.

At the assignment of a punishment, the character and degree of a given crime's social danger, the perpetrator's personality, including his behavior before and after the commission of the crime, circumstances which mitigate or aggravate the criminal liability and punishment, as well as the influence of the assigned punishment upon the convicted person's correction and the living conditions of his family or his dependants (article 53(1)).

A just punishment, which is necessary and sufficient for the rectification of a convicted and for the prevention of new crime, shall be assigned (article 53(2)).

The punishment in the form of the deprivation of liberty can be only assigned provided that the goals of the punishment cannot be achieved by other, less severe penalty foreseen by the corresponding article of the General Part of the Criminal Code (article 53 (2)). A stricter punishment than one provided for by the respective articles of the Criminal Code´s Specific Part for the commission of a given crime may be assigned for a multiplicity of crimes or result from a multiplicity of sentences, in accordance with articles 59 and 60. Grounds for assigning a lighter punishment than one provided by the respective articles of the Criminal Code's Specific Part for the commission of a given crime are set out in article 56.

13. Criminal liability of juridical persons

In accordance with article 17 of the Criminal Code, only individuals may be held criminally liable[85]. The Republic of the Kyrgyz Republic's criminal legislation does not provide for the criminal liability of juridical persons.

14. Significance of international and constitutional immunities[86]

In respect to the prosecution of international crime, there are no any specific provisions concerning the international or constitutional immunities. In these cases, the Criminal or Criminal Proceeding Code's general provisions are applied. If a matter concerns the crimes, which have been committed by diplomats or other foreign citizens who benefit from the immunity, a law enforcement body makes the reference to international law norm (article. 5(3)):

«In case of the commission of a crime within the KR territory by diplomatic representatives of foreign States and other citizens who are not subjected to the KR jurisdiction, the issue of criminal liability shall be solved, according to the acting laws and international treaties, by diplomatic means on the ground of international law norms».

As regards the high-ranked public officials, in accordance to the KR Constitution, the deputies of the Parliament,[87] judges,[88] and the President and ex-Presidents[89] as well benefit from the functional immunities, which are applicable for the period of their being in positions. Consequently they may be held to liability neither during the period of their staying in power nor on the expiry on it.

15. Provisions on statutory limitations with regard to international crimes

Starting from the high social gravity of the crimes against peace and security of mankind (article 373 – genocide; article 374 – ecocide; article 375 – mercenary; article 376 – attacks on the internationally protected persons or buildings), in accordance with art 67(6)[90], no statutory limitations should apply to these crimes. However, it is noteworthy that

---

[85] **Article 17 of the Criminal Code**: «The criminal liability may only ensue with respect to a sane natural person who has attained the age stipulated in this Code».

[86] For more details, see Section A (3) «The Rome Statute and the law of the Kyrgyz Republic» of the present Report.

[87] **Article 56(1)** of the KR Constitution of 23 October 2007: «A member of the Jogorku Kenesh shall enjoy the right of inviolability. He or she may not be persecuted for statements made in relation to his or her activity as a member of, or for the voting results in, the Jogorku Kenesh. A member of the Jogorku Kenesh may not be detained or arrested, subjected to search or personal inspection, except in cases where he or she has been apprehended on a crime scene. A member of the Jogorku Kenesh may only be held criminally liable or subjected to judicially imposable administrative penalties with the consent of the Jogorku Kenesh, except where he or she has committed a particularly grave crime».

[88] **Article 83(2)** of the KR Constitution: «A judge shall enjoy the right of inviolability and may not be detained or arrested, subjected to search or personal inspection, except in cases where he or she has been apprehended on a crime scene.

The inviolability of a judge shall also extend to his or her residence, office, means of transportation and communication, correspondence, property and documents».

[89] **Article 49** of the KR Constitution: «1. The President shall enjoy the right of inviolability. The honour and dignity of the President shall be protected by law».

Article 53 of the KR Constitution: «All former Presidents, except those who have been demoted from office in accordance with Article 51 of this Constitution, shall bear the title of ex-President of the Kyrgyz Republic».

[90] **Article 67 of the KR Criminal Code** «Statutory limitations of criminal liability»:

«1. A person shall be released from criminal liability, if the following terms have elapsed since the day of the commission of a crime:

1) one year – after the commission of a crime of little gravity;

2) three years – after the commission of a crime of lesser gravity;

3) seven years – after the commission of a grave crime;

the KR lawmaker made a reservation – "in the cases with is specifically foreseen by the law".

The issue of the application of statutory limitation to the persons who have committed crimes for the commission of which life imprisonment is set as the punishment, for instance crimes against humanity (killing, *etc*), the court should take the decision separately in each individual case. If the court does not find the opportunity to apply statutory limitation, life imprisonment cannot be assigned, only a certain period of the deprivation of liberty (article 67(3)).

16. Significance of amnesty and pardon for the prosecution of international crimes

Amnesty is an act of the Parliament, which realizes a certain category of criminals are from criminal liability and punishment, or mitigates the penalty or cancel the conviction (article 74).[91]. As a rule, amnesties are dated to certain events or anniversaries.

Amnesties cover those persons who had committed crimes before the amnesty was passed; but it does not act in respect to crimes committed afterwards.

Pardon is an act of the President in regard with the convicted by the court, which releases individuals (one or several) from the criminal liability or mitigates their punishment or cancels the conviction (article 92). A person who has been convicted to life imprisonment has the right to ask for being pardon after the sentence enters into force (article 75(4)).

The range of crimes and the persons who have committed them and who can be subjected to amnesties and pardons is not limited. Whereas amnesty acts are initiated by the KR supreme legislative power acts of pardon are passed by the President upon the petition of a person who has committed a crime, or his relatives, social organizations or State bodies. Acts of pardons in respect of the convicted foreign citizens are passed upon the request of a foreign State in accordance with the citizenship of the convicted. The refusal to satisfy the claim does not exclude the right to apply the petition on pardon in six months.

---

4) ten years – after the commission of a particularly grave crime, except in cases provided for by the fifth part of the present Article.

2. The statutory limitations shall be calculated from the day of the commission of a crime and until the moment of the sentence's entry into legal force.

3. If a person commits a new crime [before the statutory limitations have elapsed], the statutory limitations shall be calculated independently with respect to each crime.

4. The course of the statutory limitations shall be suspended, if a person who has committed a crime evades investigation or judicial prosecution. In this case, the course of the statutory limitations shall recommence from the moment the person is apprehended or reports guilty.

5. The issue of applying the statutory limitations to a person who has committed a crime, for the commission of which a life sentence may be imposed, shall be decided upon by the court. If the court does not consider it possible to apply the statutory limitations, the life sentence shall not be imposed, but a deprivation of liberty shall be.

6. In cases, which are specifically provided for by the legislation of the Kyrgyz Republic, no statutory limitations shall apply to persons who have committed crimes against the peace and security of mankind».

[91] **Article 74 of the KR Criminal Code** «Amnesty»:

"1. The Jogorku Kenesh of the Kyrgyz Republic shall issue an act of amnesty with respect to an individually indefinite range of persons.

2. Persons who have committed crimes may be released from criminal liability on the ground of an act of amnesty. Persons who have been convicted for crimes may be released from punishment, or the punishment that was assigned to them may be diminished or replaced by a lighter type of punishment, or such persons may be released from an additional type of punishment".

[92] **Article 75 of the KR Criminal Code** «Pardon»:

"1. Pardon shall be exercised by the President of the Kyrgyz Republic with respect to an individually definite person.

2. [On the ground of] a pardon, a person who has been convicted for a crime may be released from serving further punishment, or the punishment that was assigned to him may be diminished or replaced by a lighter type of punishment.

3. A person who has been assigned a life sentence may request a pardon after the entry into legal force of the sentence".

17. Significance of non-retroactivity of criminal law with respect to international crimes

The issue of non-retroactivity of criminal law is determined by the constitutional norm (article 15(13) of the Constitution):

«A law which establishes or worsens the liability of a person may not be retroactive. No one is accountable for the acts, which were not criminal offences at the moment of the commission. If the criminal liability was cancelled or mitigated after an offence has been committed provisions of the new crime shall be applied».

The application of the criminal law *rationae temporis* is regulated by articles 7 of the Criminal Code. As a general rule, the criminality and punishability of an act (common as well as international crime) should be determined by the law, which applied at the time of the commission of that act. The time of the commission of a crime is the time of carrying out a socially dangerous action (omission), irrespective of when its consequences arrive.

Apart from that, article 7 states:

«(2) A law which diminishes the punishability of an act or softens the punishability of an act shall have retroactivity, that is, shall act in respect to the persons who have committed before the law entered into force, and in respect to those who serve their sentence or who has served their sentence but have the convictions.

(3) *A law, which establishes the criminality or punishability of an act, severs the liability or punishment or otherwise worsens the situation of the person who has committed this act, must not be retroactive ».*

There are no any specific provisions in respect to international crimes.

18. Significance of the «ne bis in idem» principle with respect to international crimes

The «ne bis in idem» principle is set out in article 15(11) of the Criminal Code of the Republic of Kazakhstan:

«No one shall be held criminally liable twice for the same crime»

It is also set out in article 3(3):

«No one shall be held criminally liable repeatedly for the same crime». The present provision equally covers both common criminal offences and international crimes.

II. Other conditions of punishability and releasing from punishment, which are specifically relevant to international crimes

Kyrgyz Republic´s criminal legislation does not contain any provisions on punishability and releasing from punishment, which could be specifically relevant to international crimes.

E. Procedural deviations from «normal procedure» at the investigation and judicial prosecution of international crimes

The Criminal Procedure Code of the Kyrgyz Republic regulates, on equal grounds, the procedural aspects of investigation and judicial prosecution of common and international crimes. The criminal procedural legislation does not provide for any deviations, with respect to the latter, from the "normal procedure".

F. Existing practice of prosecution

In respect to the crimes against peace and security of mankind that are foreseen by the KR Criminal Code (article 373 – genocide; article 374 – ecocide; article 375 – mercenarism; article 376 – attacks on internationally protected persons and buildings), there is no judicial practice of prosecution of these crimes (including the crime of torture, article 239), no criminal proceeding has been instituted.

With regard to other crimes, which have been considered in the present report, one can note the following facts. In the investigation and court practice, there were situations of investigating the following crimes and transferring them to the court (such common crimes as murder, infliction of harm to health, *etc*, are excluded):

- kidnapping (article 123);
- human traffic (article 124);
- taking hostages (article 227);
- organization of unlawful armed group and membership in it (article 229);
- brigandage (article 230);
- establishment of a criminal association (organization) (article 231);
- mass disorders (article 233);
- encroachment of national, racial or religious hatred (article 299).

G. Conclusions and recommendations

On the basis of the aforesaid, the following conclusions can be drawn and the following recommendations can be made:

1. The elements of international crimes have already been integrated in the initial version of the Criminal Code, which was adopted on 1 October 1997, i.e. before the adoption of the Rome Statute of the International Criminal Court on 17 July 1998, and the formulations (dispositions and sanctions) of the respective Articles have not subsequently been revised. A probable reason for that is the absence of an according judicial practice;
2. The list of the crimes against peace and security, which is included into the KR Criminal Code, is half less in comparison with the criminal codes of Kazakhstan or Russian Federation. The gap should be filled.
3. The elements of the crime of genocide are generally analogous to the definition of the 1948 Convention; however, there are some discrepancies in the formulation;
4. The absence of the notion of crimes against humanity from the criminal law should not prevent the criminal prosecution of acts listed in Article 7 of the Rome Statute as common crimes (except the crime of apartheid). However, the existence of statutory limitations with respect to common crimes, which have been committed on the territory of the Kyrgyz Republic or abroad, may create legal and practical difficulties for law enforcement agencies;
5. The range of international humanitarian law treaties, in which the Kyrgyz Republic participates, allows for embracing a majority of war crimes listed in Article 8 of the Rome Statute of the International Criminal Court. However, despite the attempts to arrange the legislation in accordance with international legislation, serious problems still exist in the legal regulation of war crimes in the KR Criminal Code since Article 159 of the Criminal Code (1) refers to international treaties of the Kyrgyz Republic and (2) does not comprise customary international law, the law enforcement agencies may be faced with difficulties when having to qualify war crimes;
6. Today the Kyrgyzstan is keeping an “expectant” position with regard to the Rome Statue. As for December 2007, Kyrgyzstan has not ratified the Rome Statute although it participated in the Diplomatic Conference of Plenipotentiaries and signed the Statute on 12 December 1998.
7. One should say that, in the process of the preparation to the ratification of the Rome Statute, certain difficulties of both legal and political character take place. The analysis of the KR Constitution’s norms does not contradict to the constitutional norms of the KR, it does not need to be modified. It will be sufficient to inset certain amendments and modifications in other legal acts (Criminal Code, Criminal Proceeding Code, *etc*).
8. The agreements between the Kyrgyz Republic and the United States on their mutual obligations not to deliver each other’s nationals to the International Criminal Court ("Article 98 Agreement") does not allow to make optimistic conclusions concerning the ratification of the Rome Statute by the Kyrgyz Republic. The official treaty between the States has not been concluded, but the agreement nevertheless reflects the State’s position.

9. The establishment of the criminal liability for the commission of most crimes which are foreseen by the Rome Statute is an international obligation of the Kyrgyz Republic in accordance to other international treaties by provisions of which the State is bound, and, on account on article 12(3) of the Constitution, the use in the law enforcement practice of the multilateral treaties – above all, treaties on the protection of human rights and freedoms, on international humanitarian law and international criminal law – is admitted from both theoretically and practically.

10. The punishability of the crime against peace and security of mankind is primordially enshrined in international treaties. The States parties to the treaties bear the obligation to observe their provisions following the "pacta sunt servanda" principle. In particular states are bound to take all necessary measures on the prevention and prosecution of the crimes on the national legislation level and to implement into their domestic legal system the provisions on criminal liability for the commission of international crimes. The norms on the criminal liability for these crimes were implemented in the Specific Part of the Criminal Code by this way. Thereupon we think that the existing international obligations will allow to arrange the KR national legislation in conformity with the contemporary trends of international criminal law irrespective of the fact of the ratification of the Rome Statute by the Kyrgyz Republic.