

**FRAMEWORK FOR CRIMINAL PROSECUTION  
OF INTERNATIONAL CRIMES  
ACCORDING TO THE LEGISLATION OF  
RUSSIAN FEDERATION AND  
REPUBLIC OF BELARUS**

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## A. INTRODUCTION

The comparative analysis of Criminal Codes of member States of the Commonwealth of Independent States (further in text – the CIS) illustrates the following. The majority of Codes formalised the elements of “crimes under the international criminal law”, and placed special emphasis on such object of criminal encroachment as international peace and security<sup>1</sup>. The Model Criminal Code of 17th February 1996, which contains a special section on crimes against the peace and security of mankind, received sufficiently wide practical use in the CIS States.

The majority of the CIS states are straddling the fence on the issue of International Criminal Court. Of 12 CIS states, 8 countries have already signed the Rome Statute (Russia, Georgia, Kyrgyzstan, Moldova, Ukraine, Armenia, Tajikistan, Uzbekistan), yet only 2 of them ratified (Tajikistan and Georgia). Ukraine is planning to do this in the near future.

On the order of the President of the Russian Federation, the Minister of Foreign Affairs on behalf of the Russian Federation signed the Rome Statute on the 13th September 2000 in New York. In pursuance of the order of the President of the Russian Federation of 10th January, 2003, under the aegis of the Ministry of Justice and owing to the cooperative efforts of the Interdepartmental Working Group, the following draft Law has been prepared: “On introduction of amendments into the legislation of the Russian Federation aimed at ensuring cooperation of the Russian Federation with the International Criminal Court, and bringing the legislation of the Russian Federation in conformity with the Rome Statute of the International Criminal Court”. At the end of 2005, the draft was submitted to the Administration of the President of the Russian Federation together with the report of Ministry of Justice.

The objective impediments to ratification of the Rome Statute in Russia encompass properties of constitutional law, criminal law and criminal procedure law. The constitutional impediments relate to: a) persons whose immunity is recognised by the Constitution of Russia (Rome Statute, Article 27); b) surrender by Russia of its citizens under the jurisdiction of the ICC at the ICC’s request (Rome Statute, Article 89); c) issues of amnesty and pardon; d) jury trial. According to the statements made by the Russian human rights defenders, other impediments to ratification of the Rome Statute constitutes military actions on territory of Chechen Republic (“anti-terrorist operation”), and “and fears of ruling Russian elites to end up among those being under ICC prosecution or trial.

The Chapter presents a comparative analysis of domestic criminal codes of the Russian Federation (further in text – RF) and Republic of Belarus (further in text – RB), the two CIS states having formally instituted a Union State<sup>2</sup>.

In these countries, the Criminal Codes (further in text – CC) are considered to be the only source for criminal law, and where the application of Criminal Law by analogy is forbidden (Articles 1 and 3, CC RF). At the same time, it is determined that Criminal Code is founded on domestic Constitution and generally recognised principles of International Law. One of the CC objectives is to secure the peace and security of mankind (Article 2, CC RF).

<sup>1</sup> CC of the Russian Federation, May, 24th, 1996, CC of the Republic of Belarus, June, 24th 1999 r., CC of the Republic of Uzbekistan, September, 22nd, 1994, CC of the Republic of Kazakhstan, July, 16th, 1996, CC of Turkmenistan, June, 12th, 1997, CC of the Kirghiz Republic, October, 1st, 1997, CC of Republic Tajikistan, May, 21st, 1998, CC of Georgia, July, 22nd, 1999, The CC of Republic of Armenia from May, 23rd, 2003, CC of the Azerbaijan Republic, December, 30th, 1999, CC of Ukraine 2000, CC of Republic of Moldova, April, 18th 2002.

\* Refer to: draft Federal Law “On introduction of amendments into the legislation of the Russian Federation aimed at ensuring cooperation of the Russian Federation with the International Criminal Court, and bringing the legislation of the Russian Federation in conformity with the Rome Statute of the International Criminal Court”. It is placed on the web-site of Institute of Law and Public Policy: <http://www.ilpp.ru/7067376541>

<sup>2</sup> The Agreement on forming the union between the Russian Federation and the Republic of Belarus, 1997.

Despite the constitutional provision for priority of ratified international treaties (Part 4, Article 15 Constitution RF), their criminal law standards cannot directly (straightforwardly) operate in its own territory (Article 5, Federal Law “On the international treaties of the Russian Federation” dated 15 July 1995). In fact, standards of criminal law included in international treaties will operate only after inclusion of their provisions in the text of CC (by means of descriptive statutes or descriptions in one statute by reference to another), which is unambiguously stated in Article 8, “Grounds of Criminal Liability” CC RF.

This, in fact, confines jurisdiction of the Russian Courts relative to jurisdiction of other states’ courts, which can bring an individual directly to justice (this includes a citizen of the Russian Federation) on the grounds of international law, while the Russian Court is deprived of such opportunity.

In Russia and Belarus, in regard to crimes against peace and security of mankind, there is currently no relevant experience in judiciary practice. The number of people responsible for these crimes who are being brought to justice is negligible.

However, the importance of inclusion in the Criminal Code for provision of responsibility for crimes against the peace and security of mankind was highlighted as far back as the Soviet era. Soviet criminal law included an active international standard related to non-application of limitation periods of criminal prosecution to persons who committed crime against peace and humanity as well as war crimes during the Second World War (Decree of the Presidium of the Supreme Council of the USSR dated 4th March 1965). The RF Law “On rehabilitation of the repressed people”, adopted in 1991, defined acts of genocide as a crime irrespective of whether the acts were committed peace time or in war time within domestic or foreign policy activities.

The important part of the CC RF 1996 appeared to be special Section XII and Chapter 34 of the same heading “Crimes against the peace and security of mankind”, consisting of eight articles 353 – 360. These criminal acts can be broken down into three groups: 1) crimes against international peace (Articles 353 and 354); 2) crimes against the fundamentals of international humanitarian law (Articles 355 – 359); 3) crimes against stability of international relations (Article 360).

Section VI “Crimes against peace, security of mankind and war crimes” forms a special part of the CC RB. Unlike the CC RF, the section consists of two chapters: Chapter 17 “Crimes against peace and security of mankind” (Articles 122-131) and Chapter 18 “War crimes and other violations of laws and customs of war” (Articles 132-138). The Belarus legislator has made a significant step forward in comparison with the Model CC for the CIS States and a number of other Criminal Codes of the former Soviet republics, including the CC RF. The classification of international crimes under the Charter of the Nuremberg tribunal 1945 and the Rome Statute 1998 was employed. In addition, two separate articles containing so-called complex elements of international crimes were drafted. One of them is Article 128 “Crimes against security of mankind”, which lists serious infringements of the standards of international humanitarian law reflected in Article 7 of the Rome Statute. Another one is Article 136 “Criminal violations of the rules of international humanitarian law during armed conflicts” in which 16 sub-articles listed almost all known elements of such crimes.

## B. CRIMES UNDER INTERNATIONAL LAW AND EXTENSION OF NATIONAL CRIMINAL JURISDICTION OVER THESE CRIMES

### I. Crime of genocide

#### I.1. Elements of crimes and its statutory recognition

The CIS states, which ratified or accepted the UN Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948, by way of implementation of their obligations, introduced the criminal responsibility for *crime of genocide*.

**Article 357** "Genocide" of the CC RF states:

*"Actions directed at destruction, in whole or in part, of national, ethnic, racial or religious group as such: by killing members of the group, causing grave harm to their health, violent hindrance to child-bearing, forcible transfer of children, violent resettlement or making conditions of life intended to achieve physical destruction of members of this group, – shall be punishable...»*

The main **object** of this crime is the security of mankind which can be exposed to encroachment in peace times or in times of armed conflict. **The additional object** is the life and health of people belonging to various demographic communities.

**The objective part** of the crime consists of six kinds of acts and appears to conform with provisions of the Convention on the Prevention and Punishment of the Crime of Genocide 1948; Article 4 of the Charter of ICTY, 1993; Article 6 of the Rome Statute and Article 17 of the Draft Code of Crimes Against the Peace and Security of Mankind 1996, developed by the UN International Law Commission.

The only difference from Article 357 of the CC RF is the replacement of terms "premeditated" with "deliberate" and "serious bodily harm" with "grave harm to health". Here, the killing and causing grave harm to health are identified as one of the forms of genocide which appear to be independent criminal crimes (Article 105 and 111 CC RF).

One of the forms of genocide refers to the forcible transfer of relevant groups of the population. However, the Rome Statute refers to deportation or forcible transfer of population to crimes against humanity (Article 7 (1) (d)). This is explained by historical experience of Russia as an integral part of the Soviet Union where, from 1917 to the mid-1950s, many sections of the population were exposed to deportation in connection with their national or social affiliation (Germans, Lithuanians, Estonians, Crimean Tatars, Chechens, Ingush, etc.). Until today, the consequences of these forcible deportations of entire ethnic groups to severe regions of the Soviet Empire affect the situation in Russia. It is worth remembering the conflict between Ingush and North Ossetians in the early 1990s which brought bloody armed conflicts.

**Subject of crime** – general. **The subjective part** of genocide constitutes the expressed premeditation and a specific ambition in the form of desire of a guilty person to achieve *destruction*, in whole or in part, of national, ethnic, racial or religious group as such (so-called "genocidal intent"). By this indicia of a crime one may distinguish genocide from general criminal crime, with a motive of national, racial, religious hatred or enmity, such as killing or causing grave harm to health (part 2 (l) Article 105, part 2 (e) Article 111 CC RF) where there is no set aim of achieving destruction, in whole or in part, of the demographic group to which the victim belongs.

<sup>3</sup>

Dates of ratification or accession to the Convention 1948: the Azerbaijan Republic – August, 16th, 1996; The Republic of Belarus – August, 11th, 1954; Georgia – October, 11th, 1993; Republic of Kazakhstan – August, 26th 1998r.; Republic Kyrgyzstan – September, 5th, 1997; Republic of Moldova – January, 26th, 1993; Ukraine – November, 15th, 1954, etc. source: <http://www.unh-chr.ch/html/menu3/b/treaty>.

Chapter 17 of the CC RB "Crimes against security of mankind" consolidates ten elements of crime: genocide (Article 127), deportation (Article 128), illegal detention (Article 128), enthrallment (Article 128), mass or systematic extrajudicial executions (Article 128), kidnapping followed by the disappearance of persons (Article 128) torture or acts of cruelty committed in connection with racial, national, ethnic affiliation, political convictions and religion of civilians (Article 128), manufacture, accumulation or distribution of prohibited weapons for conducting war (Article 129), incitement of racial, national or religious enmity or discord (Article 130), ecocide (Article 131).

**Article 127** "Genocide" of the CC RB states:

*"...Acts aimed at systematic destruction, in whole or in part, of any racial, national, ethnic, religious group or a group distinguished by application of any other criterion, as well as killing members of group, Inflicting grievous bodily harm or Deliberately inflicting conditions of life calculated to bring about physical destruction in whole or in part, of this group, forcible transfer of children from one ethnic group to another, or measures directed at hindrance to child-bearing inside of such groups (genocide), – shall be punished...»*

Distinctive peculiarities of elements of genocide under the CC RB appear to be used in its definition, unlike a conventional definition of genocide, of two additional indicia:

1) alongside national, ethnic, racial and religious group, genocide may be directed against "a group distinguished by application of any other criterion", e.g., on the basis of a way of life (nomads), a social origin (intellectuals), the places of residence (islanders), etc;

2) a specific purpose of genocide is pointed out by a "systematic" destruction, in whole or in part, of any of these social groups.

## I.2. Penal consequences

According to classification of crimes defined in the law (Article 15 CC RF and Article 12 CC RB), the crime of genocide by considering nature and degree of its social danger relates to a category of **particularly grave crimes**. Those are premeditated acts for which the sentence **above ten years** or tougher form of imprisonment shall be provided.

So, for example, the sanction of Article 357 of the CC RF is relatively undetermined/strict penalty (mixed nature): "... are punished by imprisonment for a term of twelve to twenty years, life imprisonment or a death penalty".

Referring the crime of genocide to the category of particularly grave crimes under the CC RF and CC RB is reflected in the following **legal consequences** for a person committing this crime:

- unconditional punishment for preparation of this crime (Part 2, Article 30 CC RF),
- service of imprisonment in corrective colonies with strict or enforced regime (Article 58 CC RF),
- opportunity for imposing the death penalty as an exclusive measure for especially grave crimes encroaching on human life. (Article 59 CC RF),
- inapplicability of rules on conditional sentence in particularly grave crimes (Part 1 Article 73 CC RF),
- inapplicability of rules on relief from criminal responsibility even when voluntary acknowledgement of guilt, active repentance, reconciliation with a victim and so forth take place (Articles 75, 76 CC RF),
- inapplicability of limitation periods for bringing the criminal responsible to justice (Part 5 Article. 78 C RF and Article 85 CC RB),
- restrictions in applying for release on parole from endurance of the punishment. In Russia, one may apply for release on parole only after the convicted and sentenced prisoner had truly served punishment at least two thirds of the sentence of imprisonment, and when life imprisonment is concerned – at least twenty five years of imprisonment (Part 3 and 5, Article 79, CC RF). In Belarus, release on parole from endurance of the punishment for particularly grave crimes is permissible only after three quarters of the term of imprisonment has duly been served (Part 3, Article 90, CC RB).

## II. Crimes against humanity

### 1. Elements of crime and its statutory recognition.

The CC of the CIS states in most cases does not provide the responsibility for the full list of elements of *crimes against humanity*, determined in Article 7 of the Rome Statute. Only the CC of the Azerbaijan Republic appears to be an exception. In part, the criminal responsibility for crimes against humanity is provided by the CC of the Republic of Belarus and the CC of Georgia.

Other CC of the CIS states only provides some of the elements of crimes under Article 7 of the Rome Statute (for example forcible resettlement under the CC RF or deportation under the CC of Kazakhstan). This suggests the need for additional measures of implementation along harmonisation with Article 7 of the Rome Statute including the missing link between crimes against humanity and armed conflicts.

For all crimes against humanity recognised by international law, the CC RF *only* provides the criminality and punishment for *genocide*.

In the near future, the Russian legislator is expected, when preparing ratification of the Rome Statute, to define a responsibility for committing all crimes against humanity, the struggle against which is going ahead on the international level and elements of which are determined in Article 7 “Crimes against humanity” of the Statute.

So, the crime defined in Article 7 (1) (d) of the Statute as deportation or forcible transfer of population is already included in Articles 357 of the CC RF as kinds of genocide.

All other elements of crimes against humanity, although known to the CC RF, are, however, provided by the CC as general crimes, rather than crimes under international law. This is clearly illustrated by the following examples of adjacent elements from the Special Part of the CC RF: “crimes against humanity” by way of \* Murder (Article 105, CC RF); \* illegal imprisonment, as well as those linked to kidnapping (Articles 126 and 127, CC RF); \* trafficking in person and use of slave labour (Articles 127<sup>1</sup> and 127<sup>2</sup>, CC RF); \* rape (Article 131, CC RF); \* sexual violence in other forms (Article 132 and others, CC RF); \* recruitment into prostitution (Article 240, CC RF); \* illegal detention, taking into custody or holding in custody (Article 301, CC RF); \* torture (Part 2, Article 302, CC RF); \* forcible resettlement, inflicting conditions of life calculated to bring about physical destruction a part, of the population, deprivations of fundamental laws contrary to international law on the basis of affiliation to demographic group or other collectivity (Article 357, CC RF); \* others causing grave harm to physical or mental health (e.g., Article 111, 116, 117, CC RF) the brutal acts prohibited under the international treaty of the RF.

In the scientific publications amending Section XII of the CC RF by adding a new article is also proposed providing responsibility for such a crime against humanity as the crime of apartheid, i.e., “institutionalised discrimination under racial, ethnic or religious motives which invoke violation of fundamental rights and freedom of a person and results in causing serious harm to a part of the population” (Article 7(1) (j), Rome Statute).

In the future, during the formulation of disposition of this standard on apartheid in the CC RF, the way forward should be the one proposed in Article 7(2) (h) of the Rome Statute: without literally repeating all particular kinds of crimes against humanity, committed under the context of apartheid policy with a certain criminal purpose, but make only appropriate reference to the general standard of the CC of the RF regarding crimes against humanity.

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**Article 128** CC RB “Crimes against security of mankind” defined six elements of encroachments on people, as a result of which the population, in whole or in part, cease or potentially cease to exist.

Such acts as deportation, illegal imprisonment, enthrallment, mass or systematic practice of extrajudicial executions, kidnapping followed by disappearance of persons, torture or acts of cruelty, are directed against civilians as such. In scientific publications, the need is noted for recognition, in relation to these crimes, the presence of an additional characteristic – mass scale of committing the acts being a part of these elements of crimes.

Essential indicia of crimes under Article 128 CC RB are committing these acts “in connection with racial, national, ethnic affiliation, political convictions and religion of civilians”. Otherwise, the given acts are subject to qualification under Articles of the CC which provides criminal responsibility for crimes against a human being, against justice and others.

Unlike genocide, crime against security of mankind does not pursue a specific purpose of systematic destruction in whole or any group of human beings. However, at the same time, the elements of crimes provided in Article 128 do not cover all kinds of crimes against humanity under Article 7 of the Rome Statute. For example, there is no defined responsibility for prosecutions by sexual indicia or by other reasons prohibited by international law (Article 7(1) (h), the Statute). Although these acts are partially covered by elements of such general criminal offences under CC RB as murder, causing of injury, illegal imprisonment, crime against sexual self-determination and others.

## **2. Penal consequences**

In view of lack of proper regulations in the CC of the RF, the punishment for those or other kinds of crimes against humanity is provided in sanctions for committing similar general criminal offences (murder, rape, etc.). In connection with those crimes, the general rules of sentencing by appropriate standards of General Part of the CC RF shall be applied until the moment of implementation of Article 7 of the Rome Statute in Section XII of the CC RF.

With reference to the sanction for the forcible resettlement of a part of the population (one of the elements of crimes against humanity), it should be reminded that this act is covered by the standard concerning the responsibility for genocide and therefore, shall be punishable under Article 357 CC RF “by imprisonment for a term of twelve to twenty years, life imprisonment or a death penalty”.

Listed in Article 128 CC RB “crimes against security of mankind” shall be punishable by imprisonment of between seven and twenty five years, life imprisonment or a death penalty.

## **III. War crimes**

### **1. Elements of crime and its statutory recognition.**

Concerning *war crimes*, it should be especially emphasized that the CIS states, which ratified or accepted the Geneva Conventions for the Protection of Victims of War 1949, bear direct responsibility for their implementation<sup>4</sup>.

Today only CC of Azerbaijan, CC of Belarus, CC of Georgia and CC of Tajikistan appear to be compatible with Article 8 “War crimes” of the Rome Statute. The structure of war crimes in CC RB is even a little bit wider than the list contained in Article 8 of the Rome Statute.

The remaining CIS states that, despite providing for war crimes in their CC, in case decision in favour of ratification of the Rome Statute is made, will be bound to accomplish supplementary measures on implementation.

On the 24th September 1993, all CIS states signed an *agreement on prime measures for protection of victims of armed conflicts*, aimed at protection of victims of armed conflicts and, first of

all, civilians in specific regions of the former USSR. The parties committed themselves to bringing their national legislation into conformity with standards and principles of international humanitarian law. A principle of taking immediate measures for protection of persons illegally imprisoned in connection with an armed conflict was also provided, irrespective of whether they were interned or detained. With the aim of suppressing any acts that breach international humanitarian law, each Party of the Agreement undertakes to apply effective measures of legal prosecution and punishment of persons who organised, committed and ordered an act, which is qualified as a war crime or crime against humanity under international law or national legislation.

The CC RF and CC RB under the term "war crimes" provide for crimes against international law, committed in circumstances of armed conflicts of both international and non-international nature. The CC RF is yet expected to provide war crimes in a separate Chapter of the Criminal Code. Currently, there is a serious lack of legal regulation and incomplete implementation of standards of the ratified Geneva Conventions for the protection of war victims 1949 and Additional Protocols 1977.

Within the CC RF, there should be partition of responsibility for two main categories of crimes: war crimes the in narrow sense and other violations of the laws and customs of war, of which the subjects are both military personnel and civilians. Justice in respect of these crimes shall be executed by both military courts and courts of general jurisdiction.

<sup>4</sup> Dates of ratification or accession: The Republic of Belarus –August, 3rd, 1954; the Azerbaijan Republic – June, 1st, 1993; Georgia – September, 14th, 1993; Republic of Moldova –May, 24th, 1993; Republic of Kazakhstan – May, 5th, 1992; Republic of Kyrgyzstan – September, 18th, 1992; Ukraine – August, 3rd, 1954; The Republic of Uzbekistan – October, 8th, 1993, etc. Source: <http://www.icrc.org>.

Currently, **Article 356** CC RF provides a rather limited list of war crime elements. In addition, some articles **of Chapter 33** "Military Crimes" of the CC RF contain a number of crimes similar in nature to the serious violations of international humanitarian law. However, their subjects may only be military men of Armed Forces of the RF or reservists in time of scheduled military gathering.

**Article 356** "Application of prohibited means and methods of conducting war" of the CC RF states:

*"1. Cruel treatment of army prisoners or civilians, deportation of civilians, plunder of national property in occupied territories, use in armed conflicts of means and methods prohibited by an international treaty of the Russian Federation, – shall be punishable..."*

*2. Use of weapons of mass destruction, prohibited by an international treaty of the Russian Federation – shall be punishable..."*

The **object** of this crime is the system of conducting war which uses certain means and methods regulated by international law. **The additional object** is the protection of army prisoners and civilians, as well as integrity of national property of subjugated people. The **subject of crime** can be a person of 16 years of age being a participant of armed conflict (officials of military management, commanders of military formations, military men, etc.).

The standard under consideration provides two independent elements of crime:

Part 1, Article 356 – violations of standards of international humanitarian law,

Part 2, Article 356 – use of weapons of mass destruction.

In order to qualify for act according to Part 1, Article 356 one needs to provide completion of at least one single act, because the **objective part** in this standard is formulated *alternatively*: cruel treatment of army prisoners or civilians; or deportation of civilians; or plunder of national property in occupied territory; or use in armed conflicts of means and methods prohibited by an international treaty of the Russian Federation.

The distinguished peculiarity of these crimes is *conditions of their commitments* in circumstances of war or an armed conflict.

In Russia, the current definition of "armed conflict" is provided by the RF Government Decree dated December 9th 1994 and by the Order of Minister of Defence of the RF 1994, also, in part, by the Law of the RF "on the provision of military and civil personnel for participation in activity for maintenance or restoration of international peace and security by the Russian Federation" ("Code for Peacemakers") dated May 26th 1995.

Elements of war crime such as *cruel treatment* of army prisoners or civilians suggest physical or mental violence of an aggressive nature, first of all, directed against the right of life, health, humane treatment, personal and sexual freedom, honour, dignity, property, etc. Hence, commitment of a physical crime against an army prisoner or civilian (for example, murder, rape, etc.) is covered by disposition of Part 1, Article 356 of the CC RF. However, additional qualification under Part 2, Article 105 of the CC RF is also available in case of qualified murder of the persons protected by international law (e.g., the helpless state of a victim or encroachment on a pregnant woman).

Regarding Article 356 of the CC RF referring to "use in armed conflict of *means and methods prohibited by an international treaty of the Russian Federation*" and taking into account the rules related to competition of general and specific standards, the qualification should be carried out under "a residual principle", whereby use of these means or methods does not form some other acts listed in the same disposition of Part 1, Article 356 of the CC RF.

As a whole, it should be noted that the list of war crimes is incomplete and limited in comparison with elements of "serious violations of international humanitarian law". In Article 356 of the CC RF, acts such as torture and inhumane treatment are not included; use of weapons, means and methods of conducting the war, causing excessive damages or having non-selective action; transformation of civilians or individual civilians into a target of attack; an attack on installations and constructions containing dangerous forces; publishing an order "leave no one alive" and others are included.

In disposition of Article 356 of the CC RF, there is no provision for reflection of such important qualifying indices which transforms general crime against human rights into war crime, as a systematic and large-scale attack on civilians (Article 8, Rome Statutes). From the vast catalogue of war crimes under the Rome Statute, only three kinds are reflected in the CC RF: cruel treatment, deportation and robbery. Although general reference to Russia's commitments as well as to the international treaties ratified by Russia, in principle, implies expansion of Article 356 of the CC RF on all other means and methods of conducting war prohibited by international law.

*Use of weapons of mass destruction* (Part 2, Article 356 CC RF) is regarded as a kind of use of prohibited means and methods in an armed conflict. *The use of WMD* implies the acts of use of destructive properties of given weapons for disabling, personnel attrition of the opposing side, infection of locality and various objects as well as disorganisation of army back-up service.

The "Concept of national security of the Russian Federation" 2000 provides an opportunity for Russia to use the nuclear weapons first in the interests of "prevention of aggression of any scale" against Russia and its allies.

Therefore, the acts of using WMD under Part 2, Article 356 CC RF as compelled measures of adequate response to aggression (under the right of self-defence) or use of such WMD that is not prohibited by an international treaty of the Russian Federation, cannot be qualified.

The Interdepartmental Working Group of the Ministry of Justice of the RF has prepared **a draft Law** on implementation of substantive provisions of the Rome Statute . Under this project, in the Special Part of the CC RF, there should be a new Chapter "War crimes" consisting of four articles: Article 358<sup>1</sup> "Encroachments on persons under protection of international humanitarian law", Article 358 "Use of prohibited means and methods of conducting war", Article 359 "Use of mercenaries" and Article 360 "Failure to act or issuance of a criminal order in time of armed conflict".

\* \* \*

The CC RB, unlike the CC RF, provides for the responsibility for war crimes sufficiently in detail, and describes the elements in more detail.

**Chapter 18, CC RB (Article 132–138)** “War crimes and other violations of laws and customs of war” contain two categories of international crime.

1) As such, “*war crimes*” appear to be acts committed in the course of armed conflicts of any nature and which in its own content are considered serious violations of the Geneva Convention for the protection of war victims 1949 and Additional Protocols 1977.

Here, 19 elements of these crimes have been provided: in Articles 135 and 136 – by 9 elements and in Article 138 – 1 element.

□ Text is placed on the web-site of Institute of Law and Public Policy: (August 2007). <http://www.ilpp.ru/7067376541>.

2) The “*other violations of laws and customs of war*” appear to be the acts representing other violations of international humanitarian law, provided by the Geneva Convention 1949, Additional Protocols 1977, and by other international treaties in this area.

Here, 14 elements of these crimes have been provided: in Articles 132, 133 and 134 – by 1 element, in Part 2, Article 135 – 2 elements, in sub-articles 1–5 , 9 and 16, Article 136 – 7 elements, in Part 1 and 2, Article 137 – 2 elements. However, the list of crimes is not closed by virtue of the blanket nature of sub-article 16 of Article 136 CC RB.

**Part 1, Article 135** of the CC RB covers the following crimes:

- compelling persons who have surrendered or have no opportunity to be protected, wounded, ill, tortured, employees of medical, sanitary and clergy units, army prisoners in an occupied territory or war zone, civilians or other persons under international protection, to serve in armed forces of the hostile power or to be deported;
- denial of rights of the above-stated groups of persons for independent and neutral court;
- restriction of rights of these groups of persons for protection under criminal trial.

**Part 2 Article 135** of the CC RB covers the following crimes:

- causing grave physical injuries;
- torture;
- carrying out medical, biological and other experiments on these persons, even if this takes place with their consent;
- use of these persons in military operations as human shields;
- capture of these persons as hostages;
- enforcement of civilians into hard labour.

**Part 3, Article 135** of the CC RB covers the following crimes:

- intended killing of persons listed in Part 1 of this article.

**Article 136** of the CC RB provides for punishment of the following crimes:

- use of methods and measures of conducting war which cause excessive wounds or have similar consequences to them;
- deliberately inflicted extensive, long-term and substantial damage to the environment;
- attacks on persons, buildings, establishments, transport convoys and vehicles designated by protective emblems of the Red Cross or the Red Crescent;
- using starvation of civilians as a method of warfare;
- recruitment of children under the age of fifteen years for service in armed forces or for participation in military action;
- voluntary and unjustifiable extensive destruction of property or its appropriation with non-justifiable military necessity;
- attacks on undefended populated area and demilitarised zones;
- attacks on protected cultural values, their destruction or withdrawal on a large scale or conducting acts of vandalism against such values with no military necessity;

- use of cultural values under strengthened protection or the places of carrying liturgical actions directly related to them with no military necessity, as well as attacks on such values or places directly related to them;
- violation of an armistice agreement or suspension of hostilities and infringement of other agreements signed with the aim of removal, exchange or transit the wounded men and fallen remained on the field of death;
- attacks on civilians or individual civilians;
- voluntary attacks on civilians or civil objects in case of which it becomes obvious, that this will cause excessive losses among civilians and excessive damages of civil objects;
- attacks on establishments or institutions containing dangerous substances or subjects if it is obvious that these attacks will cause excessive losses among civilians and excessive damages of civil objects;
- attacks on persons resulting in non- participation in military actions;
- transfer of parts of its own civilian population into the territory it occupies;
- unreasonable delays in returning army prisoners and civilians;
- use of other means and methods of conducting war prohibited by international treaties of the Republic of Belarus.

The important indices of war crimes and other violations of laws and customs of war under the CC RB is their commitment during *an armed conflict* which characterises concurrently time, place, and circumstances of committing the crime.

**Subject of crime** is defined on a case-by-case basis. Some articles directly or indirectly provide for characteristics of a *special subject* of one or another international crime (Article 133, Part 1 and 2, Article 137). So, there is a provision for a special subject of such crimes as failure to act or issuance of criminal order at a time of an armed conflict (Article 137), namely: a chief or an official. However, the responsibility for failure to take measures for the crimes being prepared or suppression of crimes being committed by a subordinate is limited to the authority of the chief or the official (e.g., issuance of order to suppress socially dangerous acts, imposition of disciplinary penalty, initiation of criminal case, etc.).

On **the subjective part**, war crimes are characterised by presence of a direct or indirect premeditation while the calculation of the actual and substantiated value of damage, in principle, is not a characteristic of them. A fault by imprudence is practically excluded. However, the CC RB provides for crimes with the double form of fault when there is a careless attitude to the indices which qualify the act.

Use of weapons of mass destruction prohibited by an international treaty of the Republic of Belarus is referred to the category "*other violations of laws and customs of war*" (Article 134 CC). We believe that this is not an absolutely true qualification of given international crimes as this raises a question of an opportunity for bringing criminal responsibility under cases of use of weapons of mass destruction in time of peace. Besides, the CC RB contains, in addition to special article 134, the provisions for responsibility of use such as methods of conducting war which can be considered to be causing excessive damages or having non- selective actions, or causing extensive long-term and serious damage to the environment or having non-selective nature and affecting civilians or civil objects (sub-articles 1, 2 and 11, Article 136 CC).

A positive section of the CC RB appears to be the responsibility for a number of serious and other violations of international humanitarian law committed against persons having international protection in time of military action.

It is important to note, that disposition of Part 1, Article 135 decodes the concept of *victims of war crimes*. Here, the provisional list of such persons is provided: 1) persons laid down their arms or having no means of protection; 2) wounded men; 3) sick person; 4) wrecked; 5) medical, sanitary and clerical personnel; 6) army prisoners; 7) civilians in occupied territory or in area of hostilities; 8) other persons having international protection in time of military actions (e.g., journalists engaged in dangerous professional business trips in the areas of armed conflicts (Article 79, AP1), personnel of civil defence organizations (Article 62, AP1), personnel participating in operations on rendering

assistance (Article 71, AP1), the personnel of humanitarian organisations, such as ICRC, etc.).

Thus, the criminal responsibility provides 11 alternative acts directed against these persons: in Part 1, Article 135 – compelled to service in the armed forces of the hostile power, forcible resettlement, denial of rights for independent and neutral court, restriction of the right for protection under criminal trial; in Part 2, Article 135 – causing grave physical injuries, torture, carrying out medical, biological and other experiments even with consent, use for protection of armed forces or objects against military acts, capture and being held as hostages, hijacking into forcible hard labour; in Part 3 Article 135 – murder.

Article 136 CC RB provides 16 alternative elements of criminal violations of standards of international humanitarian law at a time of armed conflicts. However, in our opinion, many of them have analogies in other adjacent standards of Chapter 18 CC RB.

In practice, when acts are taken for qualification, a *complex collision* between Article 135 and sub-article 10 of Article 136 may arise, as well as between sub-article 10 of Article 136 (attacks on civilians or individual civilians) and sub-article 11 of Article 136, (attacks of a non-selective nature with excessive losses among civilians).

Here, it is proposed to lay down a partition *by directivity of criminal intent*. If guilt is understood, that means and methods of conducting military actions for destruction or disabling both individual civilians, and civilians were used, then the act is qualified under sub-article 10 of Article 136. The act is qualified under sub-article 11 of Article 136 if similar actions were directed against combatants or military objects, but guilt is understood, if the actions cause excessive losses among civilians.

Transfer a part of own civilians into the occupied territory (sub-article 10 of Article 136) should be clearly distinguished from enforcement of civilians of occupied territory to resettlement (Part 1, Article 135) and from its deportation (Article 128). Thus, acts under transfer of civilians of other occupied states irrespective of the purposes of such transfer will not entail responsibility under sub-article 14 of Article 136 CC.

## 2. Penal consequences

For committing criminal act under Part 1, article 356 CC RF, a guilty person is threatened with a term of imprisonment up to twenty years. Since the sanction does not provide the minimal penal term then part 2, Article 56 CC RF “Imprisonment for a certain term” is applied, according to which imprisonment is provided for a term of between two months and twenty years.

For an committing criminal act under Part 2, Article 356 CC RF, the sanction provides for imprisonment of between ten and twenty years.

For crimes under Article 135 CC RB, the following is provided:

- under Part 1, Articles: restriction of freedom (institutionalisation in special establishments without isolation from a society provided the convicted person is under supervision) of between three and five years, or imprisonment of between three and seven years;
- under Part 2, Articles: imprisonment of between five and fifteen years;
- under Part 3, Articles: imprisonment of between eight and twenty five years, or life imprisonment, or the death penalty.

For crimes under Article 136 CC RB, imprisonment of between five and twenty years is provided.

## IV. Crime of aggression

### 1. Elements of crime and its statutory recognition

*Aggression*, by its gravity, an exclusive international crime, which implies planning, preparation, initiating and conducting aggressive war, is criminalised in the criminal legislation of the majority of CIS states: CC of the Russian Federation – Article 353; CC of the Republic of Belarus – Article 122; CC of the Azerbaijan Republic – Article 101; CC of Georgia – Article 404; CC of Moldova – Article 139; CC of Kazakhstan – Article 156; CC of Republic of Tajikistan – Article 395; CC of Ukraine – Article 437.

However, responsibility for aggression or aggressive war stands on rather narrow interpretation, containing incomplete elements of those acts that can be qualified as aggression (*the Definition of aggression in Resolution of General Assembly of the United Nations 3314 dated December 14th 1974*).

The CC RF devoted two Articles 353 and 354 to this international crime.

**Article 353** “Planning, preparation, initiating or conducting aggressive war” of the CC RF states:  
“1. *Planning, preparation or initiating aggressive war – shall be punishable...*  
2. *Conducting aggressive war – shall be punishable...*”.

**The object of crime** appears to be international peace and security of mankind and the direct object – security of particular states.

**The objective part** of crime under Article 353 of the CC RF entirely in conformity with international legal definition of acts associated with aggression. This element of crime is characterised by the presence of *alternative indices*: planning, preparation or initiation of aggressive war. All of them imply an active form of acts (action) and are long-lasting in nature.

“*War*” implies an armed struggle between the states or public groups (civil war) for achievement of certain purposes by violent means. In the RF, the state of war is provided by the Federal Act and is characterised by such indices as war situation, mobilisation, civil defence and territorial defence (see the Federal Act dated April 24th, 1996 “On defence”).

Legal definition of the concept of “*aggressive war*” is based on Article 1 of the Resolutions of General Assembly of the United Nations 3314 dated December 14th 1974, according to which refers to the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any manner inconsistent with the UN Charter of the United Nations (e.g., making available the territory by a state to another state for use in aggressive purposes against a third state). Meanwhile, the Russian lawyers understand that a given international legal definition of aggression was formulated with reference to the aggression made by states, rather than by physical persons, and it is the Security Council of the United Nations, rather than national courts of justice that is guided by this definition.

Preparation for aggressive war becomes apparent in its “*planning*” – development of particular tactical or strategic plans for initiating or conducting aggressive war, i.e., as a matter of fact, the initial stage of preparation of aggressive war; as well as its actual “*preparation*” – the preparatory actions directed to the implementation of appropriate plans (activation of intelligence services against the enemy, escalating production of war equipment, increase in the armed contingent, the affirmation of army combat readiness, etc.).

Under the term “*initiating*” of aggressive war used in comments to the CC RF, the same acts are basically implied which are provided in Article 3 of Resolutions of the United Nations GA 3314, namely: a) intrusion or attack by armed forces of the state on the territory of another state or any military occupation, or any annexation by use of force of the territory of another state or any part of it; b) bombardment by armed forces of the state of the territory of another state or use of any weapons

against other state; c) blockade of ports or coast line of the state by armed forces of another state; d) attack by armed forces of the state on land, sea or air forces or sea and air fleets of another state; e) use of armed forces of one state, which is being in the territory of another state under the agreement with the accepting state in breach of the conditions provided in the agreement, or any continuation of their stay in such territory after cancellation of the agreement; f) act of the state allowing its territory provided for the disposal of other state, be used by this other state for commitments of act of aggression against the third state; g) smuggling the armed gangs, groups, and regular forces of mercenaries by the state or on behalf of the state into other state who commit acts of utilisation of armed forces against other states, having so serious character that it appears to be equivalent to the acts listed above or its significant participation in the acts.

Many scientists believe that “*conducting aggressive war*” (Part 2, Article 353 CC) represents the qualified elements of crime. This also comprises the actions aimed at continuation of aggressive war after the fact of its initiating (fully-fledged large-scale offensive operations, regular air raids, missiles and bombing attacks, etc.). This crime is notable for continuous implementation of criminal acts but legally it is considered to be *ended* if after the recognition by the Security Council of the United Nations of the intrusion as the act of aggression, a guilty person did not take measures to terminate hostilities and withdraw troops or recall smuggled armed formations or mercenaries to the territory of other state.

**The subject** of this crime is the person holding the state post and by virtue of its powers capable of planning aggressive war, making a decision and implementing preparation or initiating the war.

In addition, these can be other officials, first and foremost, from the military departments (representatives of military authority and heads of a military-industrial complex). Nevertheless, the subordinate persons will be responsible for committing other international crimes, for example, the use of weapons of mass destruction, genocide, war crimes or use of mercenaries.

In addition to that, the subject may be represented by foreign citizens, e.g., in case of commitment of aggression against Russia and the Russian territory (Article 11 CC RF).

\* \* \*

Chapter 17 CC RB "Crime against the peace and security of mankind" contains ten articles (Articles 122 – 131). Here, we are only interested in the group of *crimes against peace*. The following five elements relate to them (Article 122 – 126): two of them are linked to planning, preparation, initiating or conducting aggressive war (Article 122) or its propaganda (Article 123), and the remaining elements are crimes of terrorism orientation pursuing, among others, the objective of provocation of war.

In Belarus, punishment of preparation and conducting aggressive war is provided by Article 122 CC, which, on the whole, conforms to the provisions of Article 353 CC RF. No particular specifics were found compared with the Russian standards.

## 2. Penal consequences

Planning, preparation or initiating of aggressive war in Russia shall be punishable by imprisonment of between seven and fifteen years. For the qualified form of this element of crime (conducting aggressive war) one can be threaten by imprisonment of between ten and twenty years.

The CC RB, for the same crimes provides for imprisonment of between five and fifteen years and for the qualified element – of between seven and twenty years of imprisonment, or life imprisonment, or death penalty.

## V. Other crimes under international law, provided by national law

### 1. Public appeals for initiating aggressive war

#### 1.1. Elements of crimes and their statutory recognition

In the USSR, criminal responsibility for propaganda of war has for the first time been provided for by the Law on Protection of the Peace, 1951. In August 1953, the Soviet delegation submitted to the special committee of the United Nations the project of definition covering all major kinds and forms of aggression, including ideological element in order to study the concept of aggression. Propaganda of war and weapons of mass destruction, propaganda of fascist and Nazi ideology, racial and national exclusiveness, hatred to and disregard of other people was provided under *ideological aggression*.

Punishment of public appeals for initiating aggressive war is provided by Article 354 of the CC RF and Article 123 of the CC RB.

**The objective part** can be articulated orally or aurally (presence of a third party or with a view of their acquaintance, in the form of audio or video records) or in writing (in mass media, in slogans, leaflets, posters, etc.) appeals for initiating aggressive war. Public appeals are not a single concrete appeal for aggressive war against a certain state, perhaps they may not contain it at all, they have *the objective* of forming public opinion on needs, acceptance or appropriateness of initiating war and, nevertheless, are criminally punishable irrespective of appearance of results of this propagation (start of war or military conflicts).

A crime is committed not only in cases when the appeal originates directly from a guilty person and was publicly stated, but also when a guilty person supports appeals of other persons, for example, making public any respective posters or slogans.

And in the CC RF, *the qualified elements* of this crime (Part 2 Article 354) are provided for, namely: commitments of these acts by using mass media (printed periodic editions, radio, television, video programs, cinema-chronicle programmes, electronic mass media – internet systems and so forth) or a special subject (person holding a state post of the RF or a state post of the subject of the RF).

#### 1.2. Penal consequences

This crime shall be punished in both countries by penalty or imprisonment of up to three years.

For the qualified element in Russia, the penalty or imprisonment is up to five years in conjunction with debarring to hold certain posts or to be occupied with certain activity for up to three years.

In Belarus, the qualified element threatens to provide imprisonment of between two and five years which can be in conjunction with debarring to hold certain posts or to be occupied with certain activity.

With regard to a limitation period it should be noted, that here, the general provisions referred to a limitation period shall be applied.

## V.2. Development, manufacture, accumulation, purchase or sale of weapons of mass destruction

### V.2.1. Elements of crimes and their statutory recognition

The **Subject** of crime under **Article 355 of the CC RF** is only those kinds of weapons of mass destruction, manufacture, purchase or sale which are prohibited by the international treaty of the RF. It is a question of such weapons which act non-selectively by exploding or by means of radioactive materials, killing chemical and bacteriological weapons and any other weapon which will be developed in future, possessing the properties of a nuclear bomb or any other aforementioned weapons.

Conventional standards classify the weapons of mass destruction (killing) as follows: chemical, biological, toxin weapon (its manufacture is completely prohibited) and nuclear weapons (its manufacture is limited). The category of especially dangerous conventional indiscriminate weapon or causing excessive damage, and also other types of weapon of mass destruction (beam, infrasonic, genetic, psychotropic, etc.).

Disposition of Article 355 CC RF has been changed by the Federal Act in 2001: two new concepts were entered – "development" and "accumulation", and the list of types of weapon of mass destruction was supplemented by making reference to "... other types of weapon of mass destruction", in addition to chemical, biological and toxin weapon. Thus, the list is not complete, although the emergence of new types of weapons only provides the criminal responsibility when the international treaty of the Russian Federation is in place.

The **objective part** of crime alternatively forms five ways of illegal turnover of weapons of mass destruction: development; manufacture; accumulation; purchase; and sale. "*Development*" means a theoretical substantiation and implementation of research work resulting in the production of appropriate types of weapon. "*Manufacture*" represents the acts directed at mass-scale industrial production of weapons of mass destruction. "*Accumulation*" means formation of appropriate accumulation of weapons of mass destruction. "*Purchase*" of weapons of mass destruction presumes any ways and means of possessing it: purchase, theft, donation, exchange, appropriation, etc. "*Sale*" assumes alienation of subjects of crime into possession of other persons: sale, exchange and donation.

Purchase or sale of weapons of mass destruction, as an international war crime, differs from the elements of crime provided for by Article 189 CC "Illegal export of technologies, scientific and technical information and services, raw material, materials and equipment used during manufacture of weapon of mass destruction, arms and military equipment". This crime does not pursue the purpose for use in armed conflicts. If that is the purpose, then the *preparation* for production of weapons of mass destruction takes place.

Also, the crimes should be clearly separated under Article 355 and Article 220 "the illegal treatment of nuclear materials and radioactive substances". This mercenary act, as well as any other plunder of someone else's property aimed at selling, as well as abroad, do not concern international crimes.

In addition to this, *military preparations* for use of chemical and other weapon of mass destruction do not form elements of crime under Article 355 CC RF; they should be qualified as preparation for aggressive war (Article 353), use of prohibited means and methods of conducting war (Article 356) and others.

\* \* \*

In the CC RB, criminal responsibility for a similar crime is more extensive. Alongside manufacture, purchase and turn over of weapons of mass destruction the other prohibited means of conducting war are covered. So, the punishment is provided for storage, transportation or transfer of

such weapon or such means, its delivery to manufacture, as well as for the very fact of use of such weapons or such means or implementation of research works in connection with this weapon.

### V.2.2. Penal consequences

This crime shall be punishable by imprisonment of between five and ten years.

With regard to a limitation period it should be noted that the general provisions referred to a limitation period shall be applied.

## V.3. Ecocide

### V.3.1. Elements of crimes and their statutory recognition

The elements of crime of ecocide in both countries are provided equally (**Article 358** CC RF and **Article 131** CC RB). This is “*mass destruction of vegetation or wildlife, poisoning of the atmosphere or water resources, as well as commitment of other acts, capable of causing ecological catastrophe*”.

In accordance with Article 4 of Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977, the standard concerning the criminal responsibility for ecocide has been set out. The disposition consists of alternative forms of aggressive impact on environment which can be committed in parallel, complementing each other and aggravating total harm.

The **subject** of crime is represented by the environment in general, as well as by lithosphere, hydrosphere, atmosphere, biota (the physical environment), and space.

The **objective part** of ecocide presumes physical destruction of vegetative communities and population of animals, regularly or temporarily occupying one or another territory, therefore, the threat of annihilation of vegetative or animal variety even in one ecosystem is increased. The act of ecocide is also considered to be an introduction of such active agents in air or water spheres which deprive atmospheric air and natural water environments of life-supporting properties as inhabitants of vegetative and animal organisms.

This is probably a unique illustration that may be used as a Russian precedent – successfully detected crime in connection with a destruction of several million baby salmon by bleaching powder which was leaked into the water-intake well of a fish-breeding factory «Ozerki», Kamchatka, in February 2001 causing damage totalling 12 billion roubles.

The elements of crime provided for in Article 358 CC RF are considered to be *complete* in the course of commitment of any of the acts listed in disposition if they are capable of causing a consequence in the form of *eco-catastrophe*. Legally significant attributes of such a threat are, on the one hand, a real opportunity for significant and steady misbalance of the natural performance of the ecosystems and-or a biological diversification in ecosystems; and on another hand, – subjective comprehension by a guilty person of such a prospect (direct or indirect criminal intent).

### V.3.2. Penal consequences

This crime shall be punishable under the CC RF by imprisonment of between twelve and twenty years, and under the CC RB – of between ten and fifteen years.

The limitation period in both countries shall be excluded (Article 78(5) CC RF, Article 85 CC RB).

## V.4. Use of mercenaries

### V.4.1. Elements of crimes and their statutory recognition

Use of mercenaries is one of the means and methods of warfare encroaching on life of uncertain number of inhabitants of country, participating in military acts or armed conflicts, prohibited by the world community.

This act is recognized as a dangerous international delict and criminally liable act in a number of international documents, including Resolution 2465 of the United Nations General Assembly 1968. In article 47 of Additional Protocol I dated August 12th 1977, for the first time a wide definition of mercenary was given. A known precedent of the international struggle against the use of mercenaries was the legal trial of 13 mercenaries in Angola, which took place in Luanda in 1976 and was concluded with a guilty verdict.

International Convention against the Recruitment, Use, Financing and Training of Mercenaries dated December 4th 1989 is in place. The Russian Federation has not yet ratified the Convention. However, the problem of using mercenaries for military use is especially real for Russia in view of events in the North-Caucasian region and, in particular, in the Chechen Republic.

**Article 359** of the CC RF contains *three elements for the use of mercenaries*. Part 1 provides the formal elements of a number of alternative acts in the form of recruitment, training, financing, other material supply or use of mercenaries in armed combat or in military action. Part 2 provides a qualified type of the same crime: a) using a guilty person in an official capacity and b) committing a criminal act in respect of a minor under 18 years of age at the time of recruitment and others acts in connection with the use of mercenaries. Part 3 provides the second independent element for the use of mercenaries in the form of participation of the mercenary in armed combat or military act.

*“Recruitment of the mercenary”* presumes achievement of an agreement in writing or in oral form between the recruiter and at least one under recruitment which conforms with the attributes of the mercenary. It is considered to be *completed* irrespective of execution of obligation of the deal in the form of participation of a recruited person in armed conflict or transfer of money or other form of compensation to the recruited person.

*“Training of the mercenary”* presumes transfer (information) to a mercenary in various forms (e.g., by providing workshops and trainings) knowledge, skills and the practical tips directed at achievement of results in armed acts (e.g., effective use of weapons, ammunition and military equipment, tactics of conducting combat, etc.).

*“Financing the mercenary”* is perceived as maintenance of at least one mercenary by money (in cash and cashless), which is intended for payment of rewards for participation in military operations or for provision of logistics (purchase of arms, tools, foodstuffs and equipment, etc.). Funds or other logistics of mercenaries as criminal acts are considered to be *completed* at the moment of actual use of material items (money resources and so forth) according to assumed prescription and not at the moment of its receipt by the mercenary.

*“Use of a mercenary in armed conflict or military acts”* means direct involvement of at least one mercenary in combat operations both in the area of operations and beyond its borders in executing an order (assignment) of the employer. The meaning of *“military acts”* can cover the situation which by intensity or nature of violence does not reach a level of armed conflict.

In case the mercenary is a person who cannot be, under criminal responsibility by virtue of being under the age for criminal responsibility (16 years) or subject to other grounds, provided by the CC RF, then by virtue of Part 2, Article 33 of the CC RF a guilty person, employing such a person should, in addition, be regarded as the perpetrator, as provided by Part 3, Article 359 of the CC RF. Thus a guilty person should know the age of the person before committing them to the acts laid down in part 1, Article 359 of the CC RF, i.e., to be unequivocally aware of the minor age of the mercenary.

“Participation of a mercenary in armed conflict or a military act” is expressed in direct involvement of at least one mercenary in armed conflict on the side of any participant of this conflict when weapons, ammunition, explosives, explosive devices are used. Commitment of a mercenary to other crimes (e.g., murder, robbery, illegal turn over of weapons and so forth) during an armed conflict or military acts requires additional qualification under other articles of the CC.

In fact, Article 359 of the CC RF does not make a distinction between the use of mercenaries and involvement of mercenaries in military acts and in armed conflict which is one of the important criteria of international and legal definition of the mercenary (Article 1 and 3 of Conventions 1989).

In the note to Article 359 of the CC RF the following definition of "mercenary" is given:

*This is “a person acting with the purpose of obtaining material reward and is not a citizen of the state involved in armed conflict or a military act, does not have regular residency in the territory and in addition is not a person directed to perform official duties”.*

Russian legislation does not contain provisions, according to which a mercenary should be specially recruited to combat in an armed conflict and does not state that the mercenary is not a staff of armed forces of a party in the conflict, while the attribute is provided by sub-article «e» of Article 47 of AP I, 1977.

So, mercenaries in territories of a number of subjects of the Russian Federation (first and foremost, the Chechen Republic) directly testify that their purpose is to detach a number of territories from under the jurisdiction of Russia with the aim of establishing independence. The acts of mercenaries directed at undermining the constitutional system and territorial integrity of the state should be qualified as crime against interests of security of the constitutional system under Article 279 of the CC RF as well as use of mercenaries under Article 359 of the CC RF.

On a **subjective part**, this crime can only be committed with direct intent. For committing the acts linked to mercenaries (recruitment, training, financing, other logistics, use), the requisite appears to be an alternative purpose – involvement of a mercenary in armed conflict or military act. For elements of direct involvement of a mercenary in armed conflict or military act, an obligatory indices lies in the form of obtaining material reward. The motive for this crime is mercenary, but at the same time, does not exclude availability of some other motives of behaviour (e.g., religious or ethnic intolerance, political predilections, and adventurism).

#### **V.4.2. Penal consequences**

Part 1 of Article 359 of the CC RF provides imprisonment of between four and eight years; Part 2 – of between seven and fifteen years with an opportunity of additional imposition of monetary fines, and Part 3 – for the term of between three and seven years.

The CC RB provides imprisonment of between seven and fifteen years (Article 132) or from three to seven years (Article 133). Under Article 133, confiscation of property can also be imposed.

#### **V.5. Attacks on persons or organisations that have international protection**

##### **V.5.1. Elements of crimes and their statutory recognition**

Formerly in Russia, Article 67 “Act of terrorism against the representative of foreign state” of the CC of the RSFSR 1960 was in place.

The prohibition of this crime is laid down in the convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, 1973 (entered into force

in the USSR on February 20th 1977) and in the Convention on the Safety of United Nations and Associated Personnel, 1994.

The CC RF also included new **Article 360** “Attacks on persons or offices which have international protection”. The victim and the subject are mandatory elements.

The **victim** is a person, using international protection, i.e., a representative of a foreign state or an employee of international organisation. However, the article contains no direct suggestion for two grades of persons, using international protection: 1) members of family accompanying the representative of a foreign state; 2) members of family living with the employee of international organisation.

**Subject of crime** is premises, dwelling or means of transportation having official status.

The **objective part** of crime appears to be an attack on persons, premises and transport that have international protection, i.e., violent physical or mental (threat) effect on the personality of victim. In the elements set out in article 360 of the CC RF, the responsibility relates only to the very fact of attack (a violent encroachment).

After amendments made by the Federal Act dated December 8th 2003 to article 360 of the CC RF, provisions were made for the main and qualified elements of crimes. The use of violations in the form of murder, grave harm to health or harm to health of average gravity in the qualified form or torture in the qualified form requires additional qualification under the article providing responsibility for general criminal offence against the life and health of a person (Article 105, Article 111, Part 2 Article 112, Part 2 Article 117 CC RF).

“An attack on official and living premises, transportation means and the items, using international protection” implies unauthorised breach of their immunity, encroachment on diplomatic territory or consular office or representation of international organisation, occupancy of transportation means, unlawful entry into it, etc.

From the point of view of **subjective part**, in addition to criminal intent for the qualified kind of crime (Part 2, Article 360), the provision of a special criminal purpose – “provocation of war or complication of international relations” is also required. The provocation of war assumes that a guilty person, committing an attack on the person or organisation under international protection was seeking the start of an armed conflict between the states (groups of states) as subjects of international law.

\* \* \*

In the CC RB there are two independent standards with regard to similar acts – **Article 124** and **125**. In article 124, the responsibility is provided for committing to one or several acts, such as: violent acts in respect of representative of a foreign state or international organization (Part 1), kidnapping of a particular person (Part 1), deprivation of its freedom (Part 1) and murder of such a person (part 2).

A violent act is physical violence (causing physical pain, injecting of dope into the body, etc) and mental (threat of the use of physical violence). Disposition of Article 124 of the CC RB provides for such indices, for the purpose (alternative) of provocation of international complications or wars.

In article 125 providing responsibility for committing attacks on organisations under international protection, the Belarus legislator selected the qualified elements of such an act and unlike in the CC RF, provided for increased responsibility for committing the same acts which include imprudence the death of person, or causing grave body injury, or associated with a deliberate destruction of property or important documents.

## V.5.2. Penal consequences

Part 1, Article 360 of the CC RF provides imprisonment of up to five years, and Part 2 – of between three and seven years.

Article 124 of the CC RB provides imprisonment of between five and fifteen years and in case of murder of the protected persons – of between ten and twenty five years, or life imprisonment, or death penalty.

In Article 125 of the CC, punishment begins with the restriction of freedom (sanction without imprisonment) up to imprisonment of between three and twelve years if a protected person was wounded or killed by imprudence.

The limitation period in both Russia and Belarus is oriented towards general criminal law.

## V.6. International terrorism

### V.6.1. Elements of crimes and their statutory recognition

In **article 126** of the CC RB there is a definition of international terrorism. However, today there is no universal international treaty defining such crime and regulating the struggle against it.

On the **objective part**, this crime is characterised through the following acts: 1) committing explosion, arson or other acts (e.g., emergencies or wrecks on transport, to hydro, heating, and power supply systems, radioactive, chemical, bacterial or other contamination of locality, etc.), directed at destruction of people or causing body injuries, destruction of or damages to buildings, road facilities and communication infrastructure, communication facilities or other property; 2) commitment to the same acts; 3) murder of state figure or public figure of foreign state; 4) causing bodily injuries to such persons; 5) causing damages to their property.

Thus two more requisites of international terrorism are provided: **first**, a mandatory indices of the objective part of crime for first two of the above forms – the crime scene, namely: territory of the foreign state; **secondly**, a mandatory indices of the subjective part – the purpose in the form of provocation of international complications, wars or destabilisation of a domestic situation of the foreign state.

## V.7. Illegal use of the emblems protected by international treaties during military action

### V.7.1. Elements of crime and their statutory recognition

**Article 138** CC RB states:

“Deliberate, in breach of international treaties, use of emblems of Red Cross and Red Crescent or signs for protection of cultural values or other signs protected by international law, use of a flag or other state designation of enemy, the neutral state or international organisation during the course of military acts...”.

A similar standard in the CC RF 1996 is absent. Although, in the CC of the RSFSR 1960, the Section on War Crimes included an article providing for illegal use of signs of Red Cross and Red Crescent.

The current CC RF can qualify such abuse of the above emblems as illegal methods and means of conducting military acts. However, by the character of the social danger they are insufficiently grave for recognition as international war crimes punishable by imprisonment of up to twenty years.

Therefore, it would be more accurate to formulate the element of illegal use of emblems

protected by international law separately and to pursue as crimes of international nature, rather than international war crimes.

### **V.7.2. Penal consequences**

In the CC RB, the sanction provides for restriction of freedom or imprisonment of up to three years. The limitation period is defined by general provisions of the Belarus CC.

## **V.8. Special responsibility of military chiefs**

### **V.8.1. Elements of crime and their statutory recognition**

The CC RF does not recognise similar elements of crime. Although, in General Part of the CC it specifies that military chief only bears criminal responsibility for the unlawful orders and assignments issued (Article 42 (1) of the CC).

*The CC RB in Part 1 Article 137 provides the special responsibility of a military chief or the person equal to him for failure to prevent war crimes (e.g., use of weapons of mass destruction, breach of laws and customs of war, infringement of standards of international humanitarian law). This appears to be a question of deliberate failure made by a military leader or the official to pursue the actions under their competence and directed at prevention of subordinates from committing crimes under Articles 134, 135 and 136 CC, in time of armed conflict.*

**Part 2, Article 137** of the CC defines such element of crime, as “criminal order during armed conflict”:

“The order issued in time of armed conflict by a military chief or official to the subordinate to leave no one alive, or another clearly criminal order or assignment directed at committing crimes, provided for in Articles 134, 135 or 136 of the present Code... ».

The instructions quoted here relate only to deliberate omissions or clear criminal orders committed or issued in time of armed conflict. The general provisions of the CC give criminally legal responsibility to military chiefs and other authorised persons for issuance of orders.

### **V.8.2. Penal consequences**

Article 137 CC RB provides imprisonment of between five and fifteen years (part 1) or of between five and twenty years (part 2).

The limitation period shall be excluded (Article 85 CC RB).

## **B. FRAMEWORK FOR APPLICATION OF NATIONAL CRIMINAL LEGISLATION**

### ***I. Main principles of national criminal law***

#### ***I.1. General characteristics of the main principles of national criminal law***

*Operation of standards under the national CC RF and CC RB across applicable territories and within a circle of people is equally based on certain principles which will be considered in detail with reference to the CC RF.*

*Operation of criminal law is based on five principles: territorial, citizenship, patronising (special mode), universal and real*

**Territorial principle.** According to the territorial principle based on inviolability of sovereignty of the Russian Federation, every person who commits a crime in the territory of the Russian Federation is criminally responsible under the national Criminal Code (Part 1 Article 11 CC RF).

*The “territory of the Russian Federation” is understood to be within the limits of frontiers of land (a continental part of the state and islands), waters (territorial and inland waters, as well as parts of the boundary rivers and lakes), depths of the earth, air space above land and sea.*

According to **Part 2, Article 11 of the CC RF**, the national criminal legislation operates in cases of committing crime on the continental shelf of the Russian Federation which includes the adjoining territorial sea down to a certain depth from the surface and depth from the sea floor and within the exclusive economic zone of the Russian Federation which consists of a distance of 200 nautical miles starting from the same source lines as the territorial waters (territorial seas).

Responsibility for committing crime on board an air, sea, or river vessel, registered with a port and being outside the limits of Russia in neutral air or water space comes under the CC RF.

In case of committing crime on board a vessel in territorial and inland waters or air space of other country, the responsibility comes under the legislation of the latter.

According to territorial principle of criminal law operation, the people who have committed the crime in the territory of the Russian Federation including foreign nationals (citizens) and stateless persons come under the criminal responsibility of the CC RF.

From this general rule in **Part 4, Article 11 of the CC RF**, the exception is provided in respect of persons having diplomatic immunity. Diplomatic channels shall solve the issue of criminal responsibility in case of persons committing a crime in the territory of the Russian Federation. However, persons who abuse the right of diplomatic immunity are persona non grata and shall leave the territory of the Russian Federation.

*Part 1, Article 98 of the Constitutions of the RF states that Members of the Council of the Federation and Deputies of the State Duma possess a right to inviolability during all terms of their authority. Hence, they cannot be held the criminally responsible without cancelling their right to inviolability. Judges (Part 1, Article 122 of the Constitutions of the RF) also enjoy the right to inviolability.*

**Principle of citizenship.** In **Part 1, Article 12 CC RF** it states that Russian citizens and stateless persons living in Russia permanently who have committed crimes abroad shall be held criminally responsible under the CC RF. However, there are two conditions: 1) if the act committed is recognised as a crime in the state in which it was committed and 2) if these persons were not condemned in the foreign state.

If a crime is committed by a person who has dual citizenship (one of which is Russian Federation) in any third state, one should assume an international principle of "effective citizenship", according to which the law of that state in which the citizen and his family permanently reside, work, have real estate, have all civil and political rights, shall be applied.

If a foreign national commits a crime in the territory of Russia then their extradition can be rejected following a priority of the territorial principle above the principle of citizenship.

**Principle of protection (special mode).** Military units of the Russian Federation can be located outside of the state borders. For example, Russian military formations on the border between Georgia and Abkhazia carry out peace-making functions. The Russian military bases exist in Georgia and Armenia and units of Federal Frontier Service are in Tajikistan. The military men of the Russian Federation who are abroad and commit a crime, bear criminal responsibility under the CC RF if international agreements of Russia do not provide any other order of solution for this issue (**Part 2, Article 12 CC RF**).

**Real principle (principle of state protection).** In **Part 3 Article 12 CC RF**, it stipulates that foreign nationals (citizens) and persons without citizenship, not permanently residing in Russia, who have committed crimes abroad, bear criminal responsibility under the CC RF for crimes directed against the interests of the Russian Federation if they were not convicted in the foreign state and are being brought to justice in the territory of the Russian Federation. This principle covers state interests (principle of state protection) and personal interests of citizens of Russia (passive personal principle).

**Principle of universality.** This principle has an absolute priority before other principles of law operating in space. The Russian Federation participates in fighting international crimes (crimes against the peace and security of mankind) and crimes of an international nature. In **Part 3 Article 12 CC RF**, it outlines that foreign citizens and persons without citizenship, or not permanently residing in the Russian Federation who have committed a crime outside the borders of Russia bear criminal responsibility under the CC RF in the cases *stipulated by the international treaties* of the country if they were not convicted in the foreign state (*ne bis in idem*) and are being brought to justice in the territory of the Russian Federation.

The principle of universality shall be applied if a criminal was not convicted by a foreign state in which the crime was committed, only because a person escaped criminal prosecution, or a foreign state, for any reasons, does not show its desire to carry on the criminal prosecution or action at the place it was committed is not considered to be punishable.

## **I.2. Main principles of national criminal law with regard to international crimes**

Special provisions concerning crimes under international law which would deviate from the aforementioned standards of national criminal law do not exist in Russia or in Belarus.

According to **Part 3 Article 6 CC RB**, crimes against the peace and security of mankind and war crimes shall be prosecutable irrespective of whether or not this is provided by the international treaty ratified by Belarus.

## **II. Prosecution in the line of duty or at someone's discretion**

Article 21 (2) CPC RF dated December 30th 2001, as well as the Belarus criminal procedure, concerning criminal prosecution, assumes that the principle of legality, on which criminal prosecution authorities are obliged to accept measures, provided in the CPC, for cases investigations,

determinations of a guilty person and bringing them to justice as soon as they receive data related to the criminal case committed.

Exceptions from this principle are only possible in the cases stipulated by international treaties which have priority before general provisions of the CPC.

## **D. GENERAL PREREQUISITES OF PUNISHMENT AND RELEASE FROM PUNISHMENT**

### **I. General prerequisites of punishment and release from punishment**

Positive and negative general prerequisites of punishment for international crimes committed both in Russia and in Belarus are based on standards of the General Part of the CC; basically, they conform to this. Therefore, below, the analysis, mainly, of standards of the CC RF is given. The Belarus CC is mentioned only when it deviates from Russian law.

#### **I.1. Intentional forms of crime for international crimes**

If it is not clearly defined otherwise, then only intentionally performed acts or failure to act can be recognised as a crime.

**Article 25 of the CC RF** “Crime committed intentionally” provides for discrimination of two kinds of criminal intent – direct and indirect. Crime is recognised as committed under *the express intent* if the person was aware of the social danger of their actions (failure to act), expected an opportunity or inevitability of the socially dangerous consequences occurring and desired them to happen (**Part 2, Article 25 CC RF**). Crime is recognised as committed under *indirect intents* if the person was aware of the social danger of their action (failure to act), expected an opportunity of the socially dangerous consequences to occur, did not wish, but consciously admitted these consequences or were nonchalant about them (**part 3, article 25 CC RF**).

#### **I.2. Imprudent form of guilt when committing a crime**

A rather important point of the CC RF is the instruction that the act committed only by imprudence, is recognised as a crime only when it is provided by the appropriate article of the Special Part of the CC (**part 2, article 24**). It should be noted that no article devoted to responsibility for crimes against the peace and security of mankind (Article 353 – 360) provides for imprudent form of guilt.

The CC RF provides two possible kinds of imprudent guilt – criminal flippancy and carelessness (**article 26 CC RF**). Flippancy assumes that the person expects an opportunity of the socially dangerous consequences of act or failure to act to occur, however, without sufficient grounds for that, self-confidently hopes to prevent the consequences (**part 2, article 26 CC**). When *carelessness*, the person does not expect an opportunity for happening of socially dangerous consequences of acts or failure to act, although with a necessary attention and prudence should have and could have expected these consequences (**part 3 article 26 CC**).

#### **I.3. Provisions for actual and legal mistakes**

A mistake represents a wrong judgement of a person committing a crime with regard to behaviour, actual circumstances of criminal conduct, consequences, situation of wrongfulness, etc.

Special importance is given to legal mistakes, i.e. wrong judgment of a person with regard to legal essence or legal consequences of committing a crime.

In the CC RF there is no standard definition of a mistake, although during discussions in connection with its draft proposals for inclusion of such a standard were expressed. In part, provisions for mistakes in the penal prohibition have been entered in **article 28 of the CC RF** as innocent wrongdoing.

Thus, in the CC RF, as well as in the CC RB, there are no similar articles to 16 and 17 of the CC FRG or article 122-3 of the CC France, related to criminal responsibility in case of erroneous judgment by a guilty person of its acts or in case of mistake by judicial authorities.

In Russian legal literature, it is noted almost by everyone that provision of article in the CC regulating conditions for condonation or mitigation of responsibility, in the occurrence of a mistake, appears to be a positive moment in all cases. The option of a *factual mistake*, i.e. a wrong judgement by a person related to the actual facts, being objective elements of crime, is also under discussion: a) mistake in *object* of elements of crime, and b) mistake in *objective part* of elements of crime.

In the first instance, the acts should be qualified depending on orientation of criminal intent. However, if the object, at damage of which the criminal intent was directed, had not been suffered, then criminal conduct is usually qualified as *criminal attempt* (**part 3, article 30 CC RF**) and considered with that crime which was actually committed.

In most cases of erroneous judgement of act, the entire criminal conduct is qualified as criminal attempt for deliberately committing crime. This, in particular, takes place when a criminal wrongly assumes circumstances which would soften a verdict or when the criminal conduct, due to use of broken facilities, does not lead to desired result.

#### **I.4. Punishment of criminal attempt to commit crime and opportunity for promptly abandoned intent**

Crime is recognised as *committed* if the act committed by a person contains all attributes of elements of crime laid down in the current Criminal Code (**part, 1 article 20 CC RF**).

*Non-committed crimes*, which are both *mere preparation* and *attempted crime* under **part 3, article 29 CC RF** shall be punished under the same article of the CC RF, as committed crimes.

There are two kinds of non-committed crimes: 1) interrupted due to circumstances independent of the person and 2) voluntary uncompleted (abandoned). Mere preparation and attempted crimes are crimes interrupted due to circumstances independent of a person.

However, preparatory acts shall be punishable only in case of preparation to grave or particularly grave crime (**Part 2 Article 30 CC RF**). Imprisonment for a term of at least five years shall be given.

The term of punishment or amount of penalty for mere preparation cannot exceed *half*, and the term of punishment or amount of penalty for attempted crime cannot exceed *three quarters* of the maximum *term or amount of the highest type* of punishment provided for the crime committed (**part 2, and 3 article 66 CC RF**).

By *mere preparation* it is recognised search, manufacturing or adaptation by a person of means or instruments of crime, recruiting accomplices for the crime, criminal conspiracy to commit crime or other deliberate arrangement for committing crime, provided, that in doing so the crime was not committed due to circumstances independent from the person (**part 1, Article 30 CC RF**). By **attempted crime** it is recognised as deliberate acts (failure to act) by a person directly aimed at

committing crime, provided, in doing so the crime was not committed due to circumstances independent from the person (**part 3, article 30 CC RF**).

They should be distinguished from *voluntary* uncompleted *crime*, in which socially dangerous consequences did not appear by virtue of *voluntary refusal* to complete a crime. In this process, motives of uncommitted crime can be the extremely various, the only valid matter being voluntary refusal. *Voluntary refusal of a crime by a person of mere preparation or cancellation of acts (failure to act), directly aimed at committing a crime if a person was aware of an opportunity of committing a crime. A person is not held criminally responsible if they voluntary and eventually refuse to commit the crime (part 1 and 2, article 31 CC RF).*

Voluntary refusal of crime should be distinguished *from active repentance*. The first occurs *before* socially dangerous consequences appear; however, repentance occurs *after* their appearance. Under voluntary refusal, there is no element of crime. Under active repentance – the elements of crime are present. Voluntary refusal gives grounds for holding a person but not bringing them to the justice. The active repentance represents grounds for clearing criminal responsibility.

### **I.5. Types of accomplices and responsibilities of accomplices**

Accomplices of crime alongside an executor under Article 33 (1) of the CC RF shall be recognised as an organiser, instigator and accomplice.

In Articles 33 (2) up to (5) of the CC RF, kinds of accomplice are outlined as follows:

(2) The executor is recognised as a person who has directly committed a crime or directly participated in its commitment together with other persons (co-executors), as well as a person who has committed a crime by means of use of other persons, immune to criminal responsibility by virtue of age, mental incompetence or other circumstances provided for by the current code.

(3) The organiser is recognised as a person who organised the crime committed or supervised it and equally a person who created an organised group or a criminal society (criminal organisation) or supervised them.

(4) The instigator is recognised as a person who impelled other person to commit a crime by persuasion, tampering, threat or in any other way.

(5) The aider and abettor is recognised as a person who promoted the crime by providing advice, instructions, information, means or instruments for committing the crime or by removing obstacles, as well as a person who promised in advance to hide the criminal, means or instruments of committing crime, traces of crime or subjects obtained by virtue of crime and equally a person who promised in advance to acquire or sell such objects.

The responsibility of accomplices is provided for by nature and degree of their actual participation (Article 34 (1) CC RF). The measure of punishment is provided for by the appropriate article, under which an executor shall be punishable (Article 34 (3) CC RF).

In case of failure by the executor to commit the crime completely due to circumstances independent from the person, other accomplices bear criminal responsibility for mere preparation or attempted crime (Article 34 (5) CC RF).

Also a person who failed to compel other persons to committing crime due to circumstances independent of it bears criminal responsibility for mere preparation (Article 34 (5) CC RF).

### **I.6. Existence of punishment for failure to act**

By crime carried out in both countries are recognised as the delicts of active act (i.e. failure to comply with proscription), and delicts of a failure to act (i.e. failure to comply with instructions).

Unequivocally formulated in the Russian CC international and legal elements of crimes relate exclusively to delicts of active act. It should be pointed out that Russian law under "war crimes" unequivocally understands the use of such means and methods which are prohibited by international treaties.

Under Belarus law, "war crime", however, is also recognised as a deliberate failure to take measures on the part of a military chief or official during an armed conflict, being their duty, with the purpose of prevention of committing war crimes by its subordinates.

### **I.7. Special responsibility of chiefs**

The special responsibility of chiefs for the international legal elements of crimes described here in the Russian CC is not provided. Thus, general provisions of the CC, e.g., definition of article 42 (1) of the CC RF is provided under which the criminal responsibility for consequences of obligatory order or assignment is born by a person, issuing unlawful order or assignment.

As it was already shown, the Belarus CC contains special elements of crime "Issuance of criminal order during an armed conflict". At the same time, the responsibility of a military chief or person equal to them in connection with admitting the occurrence of war crimes by its subordinates shall be provided. These provisions, however, concern only deliberate criminal orders or a failure to act during armed conflict.

### **I.8. Meaning of acting under order**

Punishment of actions under the order in connection with international and legal crimes in Russia and Belarus is provided by the general provisions of the given CC, i.e. article 42 of the CC RF and article 40 of the CC RB. A guilty person acting in execution of obligatory orders is considered to bear no criminal responsibility for the consequences of their actions. The criminal responsibility for this act is born exclusively by the person who issued such unlawful order or assignment.

Appropriate Article 42 (1) of the CC RF states:

*"Causing damage to the interests protected by criminal law is not a crime committed by a person acting in execution of obviously unlawful order or assignment. The criminal responsibility for causing such harm is borne by a person who issued the unlawful order or assignment"*

However, this principle does not operate in the event when a guilty person knows about the illegality of the order or assignment (article 42 (2) of the CC RF: "obviously unlawful"). In such cases, the person who committed the crimes deliberately shall be answerable on the grounds of generally accepted principles. A provision corresponding to article 33 (2) of the Statute of the ICC stating that obvious unlawful order or obvious unlawful assignment for non release from criminal responsibility does not exist in the Russian or Belarus CC.

### **I.9. Meaning of actions under circumstances of justifiable defence**

Criminal responsibility for crimes under international law committed in circumstances of justifiable defence is provided by general provisions of the CC. Under article 37 (1) of the CC RF, a person acts in circumstances of justifiable defence if they protect the rights of defending persons or other persons or interests of society and the state protected by law against socially dangerous encroachment.

All persons equally, irrespective of their profession or other status, use the law for justifiable defence. It does not matter whether there was an opportunity to avoid encroachment or to take advantage of getting help from other persons or state authorities (article 37 (3) CC RF).

Deliberate acts, obviously mismatching the character and degree of danger of an encroachment to society, exceed the limits of justifiable defence. Excess of justifiable defence, however, is only possible in case of encroachments which are not associated with violence or threat of life-threatening violence (article 37 (2) CC RF).

### **10. Force Majeure circumstances**

As to the problems of a state of emergency, here again, in respect of crimes under international general law, provisions of the CC shall be applied. Under article 39 (1) of the CC RF, the person acts "in situation of extreme emergency" and is released from the criminal responsibility if the action is directed at elimination of danger directly threatening a person or the rights of the person or other persons, interests of society or state protected by law, provided this danger could not be eliminated by other means, and by doing this, the excess of emergency limits was not admitted.

By excess of limits of extreme emergency it is recognised as (deliberate) causing damage which is obviously mismatching in nature and degree of the threatened danger and circumstances in which danger was under elimination, when the damage to the specified interests was equal or more significant, than the prevented damage (Article 39 (2) CC RF).

### **11. Age from which punishment is admissible**

Under the general provisions of the Russian CC which are applicable to crimes under international law, a person who has reached 16 years of age can be held criminally responsible (article 20 (1) CC RF).

For some elements of crimes, clearly specified in article 20 (2) of the CC RF, e.g. (murder, abduction, rape, capture of hostage, terrorism, etc.) the age of a person being held criminally responsible is reduced to 14 years age.

Similar provisions are included in article 27 of the CC RB.

### **12. Rules on sentencing and special purposes for punishment for crimes under international law**

General provisions in the Russian CC for rules on sentencing and purposes of punishment shall be also applied for crimes under international law.

When sentencing, the nature and degree of danger of the crime on society, personality of a guilty person and the mitigating or aggravating circumstances are specifically clearly formulated in the CC (article 60 CC RF).

Under purposes of punishment the restoration of social justice, correction of the person who committed the crime and prevention of commitment of new crimes (article 43 (2) CC RF) are laid down.

### **13. Punishment of legal persons**

In Russia and in Belarus, only physical persons can be brought to justice (article 19 of the CC RF, article 21 of the CC RB).

Current criminal codes of these countries do not provide for punishment of legal persons.

### **14. Meaning of immunity under international law and constitutional law**

In Russia and Belarus, in respect to prosecution of crimes under international law there are no special provisions provided for immunity under international law or constitutional law. In this respect, general provisions of the CC or CPC are provided. If it involved crimes committed inside the country

by foreign diplomats and other immune foreigners, then the reference is given to the standards of international law (article 11 (4) of the CC RF, article 5 (4) of the CC RB).

Article 11(4) of the CC RF states:

*“The issue of criminal responsibility of diplomatic representatives of foreign states and other citizens who are immune, when a crime is committed by these persons in the territory of the Russian Federation shall be solved according to standards of international law”*

In Russia and Belarus, exclusive rules of international law operate accordingly inside the country, if they are standardised with international law.

### **15. Provisions for a limitation period in relation to crimes under international law**

A limitation period in Russia under articles 78 and 83 of the CC RF is not applied to the following elements of crimes under international law: planning, preparation, initiating or conducting aggressive war (article 353 CC RF); use of prohibited means and methods of conducting war (article 356); genocide (Article 357) and ecocide (article 358).

The question of application of limitation periods to persons who committed the crime for which the death penalty or life imprisonment appears to be covered, e.g., crimes defined by the Rome Statute against humanity (murder, etc.) are considered by the court individually in each case.

In the Belarus CC (article 83 on 85), the number of crimes under international law, excluding limitation period, is higher than in the Russian CC. Under article 85 of the CC RB in case of the following crimes the limitation periods are excluded in respect of prosecution and punishments: preparation or conducting aggressive war (article 85); international terrorism (article 126); genocide (article 127); crimes against security of mankind (article 128); manufacturing, purchase or distribution of prohibited means of conducting war (article 129); ecocide (article 131); use of weapons of mass destruction (article 134); criminal breach of standards of humanitarian international law during armed conflicts (article 136); failure to act or issuance of criminal order during an armed conflict (article 137).

### **16. Meaning of amnesties and pardons for prosecution of crimes under international law**

General provisions of articles 84 and 85 of the CC RF provided for amnesty and pardons also operate in relation to crimes under international law. Under article 84 (1) of the CC RF, amnesty can be declared by the State Duma of the Federal Assembly of the Russian Federation in respect of individually a uncertain group of people. The pardon in respect of an individual person is carried out by the President of the Russian Federation (article 85 (1) CC RF). Russian law does not provide restrictions in areas of possible application of amnesty or pardon (e.g., definition of certain elements of crimes for which the possibility of amnesty or pardon would be excluded).

### **17. Meaning of prohibition of retroactivity for prosecution of crimes under international law**

Under article 9 (1) of the CC RF, the act can be recognised as a crime when the CC provided punishment for such crime at the time the crime was committed. In this respect, the time the act occurred makes sense, rather than success coming into sight.

In addition to that, article 10 (1) sub-article 2 of the CC RF stipulates:

*“The criminal law defining the criminality of act, strengthening punishment or otherwise worsening position of a person, has no retroactivity”.*

Retroactivity, softening position of a guilty person, however, is provided by the law (article 10 (1) CC RF) and also becomes effective if a guilty person has already served their sentence.

In respect of crimes under international law in this context, there are no peculiarities.

### **18. Meaning of principle “ne bis in idem” (exclusion from double jeopardy) in respect of crimes under international law**

Principle “*ne bis in idem*” (article 6 (2) CC RF) also operates in respect to crimes under international law. However, the principle is only applied in the event the criminal (citizen, foreigner or stateless person) committed the crime abroad and the person has already been convicted in the state in which the act was committed. The principle is not applied if the crime was committed inside the country and the criminal has already been convicted abroad.

## **II. Other preconditions of punishment and release from punishment, especially in regard to crimes under international law**

Russian CC and Belarus CC do not recognise other preconditions of punishment and opportunities of release from punishment, operating specifically in respect of crimes under international law.

### **E. Procedural deviations from “standard procedures” in cases of crimes under international law**

General provisions of CPC are applied to the process considering crimes under international law both in Russia, and in Belarus. There are no deviations from “standard procedures”.

### **E - F. National practice of criminal prosecution for committing international crimes**

According to statistics, no more than 1 – 2 crimes committed annually against the peace and security of mankind were registered in the Russian Federation. This fact, against the view in respect of the Statute of the ICC, proves inexpediency of participation of the ICC in the process of bringing guilty persons committing such crimes to criminal prosecution. The solution for the task is within the power of the national courts of justice. There is one example of an unsuccessful attempt of imputation of an element of public appeals to initiating of aggressive war (**Part 2, Article 354 CC RF**). In fact, in 2002 the head of the Moscow branch of “Transnational radical party” N. Hramov submitted an application to the State Office of the Public Prosecutor of the RF in which he requested a criminal case be raised against the deputy D. Ragozin for “public appeals to initiating aggressive war against the neighbouring state (Georgia), committed by use of mass media”. The leader of the Russian radicals stated that the application of Chairman of the Committee on international affairs of the State Duma of the RF, Dmitry Ragozin was distributed on May 13th 2002 under the heading: “Rogozin states: the organiser of the act of terrorism in Kaspiysk is hiding in gorge Pankissk of Georgia”. Furthermore, N. Hramov quoted Ragozin’s words as follows: “The Russian administration should have no moral restrictions with regard to conducting army operation in gorge Pankissk after May 9th, in the same way as the USA administration did not have them after the September, 11th”. In this statement from a “person holding the state post” the applicant found elements of crime, contained in part 2, article 354 of the CC RF.

Concerning the crime of genocide the Russian expert knows a unique (and unsuccessful) attempt of imputation of **article 357 CC RF**. In fact, on April 10th, 2001 the Stavropol district court in Pyatigorsk completed hearings of a case between two inhabitants of the Chechen Republic, R. Gajchaev and R. Halidov. Bandits plundered and forced out inhabitants of one Chechen village. In so doing, their victims appeared only to be Russian. Natives of Chechen village Shelkovskaya led by Gajchaev and Halidov were choosing victims from among the Russian inhabitants of the neighbouring village Chervlennoy: Chechens were not touched Gajchaev and Halidov, being afraid of, inter alia, the blood feud. Being in a state of alcoholic or narcotic intoxication, they addressed owners of houses, rushed inside the houses, disposed with the occupants, giving no mercy to old men or children, and took away all valuable property.

The most monstrous crime was disposal of the Russian family Zemljakovs: bandits raped the wife and 10 year old son in view of the husband and beat the wife with an axe. Then they strangled the man. The last to be killed was the boy whom they tortured gravely before death. In total, in two years the bandits from the village of Chervlennoy committed ten murders, two rapes and four robberies. Employees of the local branch of "Shariat security" did not touch the gang and paid no attention until after an "endorsement": criminals raped and killed elderly Chechen woman. When federal troops entered the Chechen Republic, Gajchaev and Halidov were detained.

The court found them guilty of murders and other crimes, however they were excluded from prosecution article 357 CC RF on the grounds of no proof of the purpose of destruction, in whole or in part, of the Russian population of the Chechen Republic, paying no attention to blunt statement of Gajchaev that he "simply killed Russians".

As the Russian precedent related to crime of ecocide (**article 358 CC RF**) one can use an almost unique illustration – successfully detected crime in connection with the destruction of several million baby salmon using bleaching powder, which were loaded into the water-intake well in a fish-breeding factory «Ozerki», Kamchatka, in February 2001, it caused damage totalling 12 billion rubles.

In connection with crime of use of mercenaries (**article 359 CC RF**) one can use the following illustration from the Russian judiciary practice. The mercenary Abdel Aziz deserted from the Iraq army was sentenced to 12.5 years imprisonment. Since 1998, this mercenary declared himself a spiritual leader of the Chechen bandits, conducted their training in training centres and personally blessed fatwa (religious blessing) for intrusion of Chechen mercenaries into Dagestan.

Criminal cases are periodically raised in connection with the facts of attacks on persons under international protection (**article 360 CC RF**). E.g., on March 22nd 2001 the Moscow city court sentenced A. Suslikov who fired at the US embassy in Moscow. As a result, he was convicted under articles 166, 205, 222 and 360 of the CC RF of committing the following acts.

On March, 29th, 1999 two persons in camouflage and masks tried to shoot at the building of embassy from RPG-18 "Fly", however, when the grenade gun failed, they let out two submachine gun bursts towards the embassy and disappeared from the scene of the crime. The court delivered a guilt verdict and pointed out that a guilty person undertook this act with the purpose of "intimidating the population, rendering affect on the authorities' decision-making" and "complicating international relations".

In Belarus, the judiciary practice is somewhat poorer. It can be said that in this country, that new provisions of the Criminal Code have recently been put in place and the country is not involved in international or internal armed conflicts.