

**RUSSIAN CRIMINAL LEGISLATION
ON CRIMES AGAINST PEACE
AND THE SECURITY OF MANKIND:
A CRITICAL EVALUATION***



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Abstract

The article is devoted to the issues of implementation of international humanitarian law provisions into Russian criminal law. The article provides an outline of key problems presented in the provisions of the General and Special Parts of the Criminal Code of the Russian

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Federation, as well as of their possible solutions. The author also analyzes the fundamental issues concerning sources of criminal law and their conformity with international obligations.

Keywords

International humanitarian law, international criminal law, Russian criminal law, Criminal Code of the Russian Federation, criminalization, implementation, international obligations, sources of criminal law

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I. INTRODUCTION

The birth and development of international humanitarian law would have been impossible without its driving forces – individuals, non-governmental organizations and states. Russia can be proud of its achievements in this sphere. The Conferences of 1868, 1874 and 1899 took place upon Russian initiative, and the name of F. Martens is associated with the ‘Martens clause’, which is one of keystones for international humanitarian law. The Russian Empire was among the first states in the world to include in its criminal legislation the elements of what would later be recognized as serious violations of international humanitarian law. In the 1940s, the Soviet Union actively participated in the work of the Nuremberg and Tokyo Tribunals. However, then there was a time of decline. Whether the reason for it was a ‘cold war’ or it was caused by other social and

political processes is an open issue, however, by the end of the 1980s the loss of scientific interest in the issues of international humanitarian law became obvious in Russia. Its vivid practical reflection was found in the provisions of the Criminal Code of the Russian Federation of 1996.

It raises an issue of the *failure of the Russian Federation to fulfill its international obligations on criminalization of serious violations of international humanitarian law*.

To make this position clear, it should be stated that implementation presupposes about efficient formulae being included into national law, as well as being in conformity with international law. One cannot say that about the current provisions of the Criminal Code of the Russian Federation. They are probably inapplicable due to their unconstitutional character, generalized formulae, deviations from the textology of international law, etc.

The argument about international obligations of Russia being fulfilled due to possible application of its 'regular' criminal law (on crimes against life and health (Chapter 16 of the Criminal Code of the Russian Federation) and against the property (Chapter 21 of the Criminal Code of the Russia Federation), is hardly an appropriate one. Firstly, the punishments in 'regular' criminal law do not rise to the level of gravity of serious violations of international humanitarian law. Secondly, the elements of crimes in 'regular' criminal law are probably full of gaps, when it comes to criminalization of serious violations of international humanitarian law. For example, Russian criminal law fails to criminalize certain types of crimes against humanity (if these acts are viewed as constituent elements of serious violations of the international humanitarian law) such as putting a person into conditions calculated to cause death, sexual slavery, acts causing forced pregnancy, and apartheid.

The current situation may involve the jurisdiction of the International Criminal Court (the ICC) over those crimes that are committed in the territory of the Russian Federation, since Russia is obviously unable genuinely to carry out investigation or prosecution (art 17, para 1 "a" of the Rome Statute). Applicability of the Article 17 of the Rome Statute to the situations, when the states are unable to fulfill their obligations concerning implementation of international humanitarian law provisions into national law is not disputed in scholar writings, since it is provided for by the paragraph 3 of Article 17 of the Rome Statute, which states that

inability also takes place in the situations when ‘the state is otherwise unable to carry out its proceedings’.¹

II. GENERAL PROVISIONS OF CRIMINAL LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Within the context of the General Part of Russian criminal law, several complicated issues, regarding implementation of international humanitarian law, arise. Those issues are usually related to acceptability of the provisions as such or to their correct ‘inscription’ into existing institutions.

1. *Universal jurisdiction.* Criminal law of the Russian Federation (part 3 of Art 12 of the Criminal Code of the Russian Federation) provides certain conditions for the criminal liability of citizens of foreign countries or stateless persons, who are not permanently residents of the Russian Federation, in case they committed a crime outside the territory of the Russian Federation. Therefore, the mentioned individuals can be punished (if they have not been already convicted for the same crime in a foreign state) only if a crime was either directed against the interests of the Russian Federation (the so-called ‘real principle’ uniting principle of passive personality and protective principle) or there are grounds for criminal responsibility according to the international treaty of the Russian Federation (the ‘universal principle’).

The current Criminal Code of the Russian Federation provides only for the treaty-based universal jurisdiction, referring in its part 3 of

¹ G Werle, *Principles of International Criminal Law* (2nd edn, Asser Press 2009) 160–161, 164; H Satzger, *International and European Criminal Law* (Sinzheim 2012) 279; Trikoz E.N. Rimskiy statut Mezhdunarodnogo ugolovnogo suda v Rossiysroy Federatsii: ramohnaya model implementatsii // Trikoz E.N. Mezhdunarodniy ugolovniy sud: problem,diskussii, poisk resheniy. Pod red. G.I. Bogusha, E.N. Trikoz. M.: Evropeyskaya komissia, 2008. S. 146 (EN Trikoz, ‘The Rome Statute of the International Criminal Court in the Russian Federation: Framework Implementation Model’ in GI Bogush and EN Trikoz (eds), *International Criminal Court: Problems, Discussions, Search for Solutions* (European Commission 2008) 146; Bogush G.I. Obshiy princip ugolovnogo prava v Rimskom statute Mezhdunarodnogo ugolovnogo suda // Mezhdunarodnoye pravosudiye: sovremenniye problemi. Pod red. G.I. Bogusha, E.N. Trikoz. M.: Institut prava i publichnoy politiki, 2009. S. 91 (GI Bogush, ‘General Principles of Criminal Law in the Rome Statute of the International Criminal Court’ in Bogush and EN Trikoz (eds), *International Criminal Justice: Modern Problems* (Institute of Law and Public Politics 2009)) 91.

Article 12 to 'the situations provided for by the international treaty of the Russian Federation'. Accordingly, criminal law probably gives a negative answer to the possibility of application of universal jurisdiction based upon international customary law, which deserves criticism.

In addition, there is an unresolved issue on the implementation of the universal jurisdiction *in absentia* that means the absence of a suspect (an accused) in the territory of the Russian Federation.² Part 3 of Article 12 of the Criminal Code of the Russian Federation refers to implementation of universal jurisdiction towards the persons, who 'were not convicted in a foreign state and who are brought to criminal responsibility in the territory of the Russian Federation'. The meaning of the clause is not quite clear since it may be interpreted in two ways. By bringing a person to responsibility one may understand solely the case of real presence of a suspected (or accused) person at trial, or it may also include trial in absentia against a person, who is not in Russia to an extent which is permitted by Russian criminal procedural law (part 5 of Art 247 of the Criminal Procedure Code of the Russian Federation). Both options for the interpretation may be equally well substantiated, so it is necessary to clarify legislative provisions.

2. *Command responsibility.* According to part 2 of the Article 86 of the Additional Protocol I to the Geneva Conventions of 1949 'the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew or had information, which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach, and if they did not take all feasible measures within their power to prevent or repress the breach.'

Currently the provisions of international humanitarian law on command responsibility do not correspond enough the context of the Criminal Code of the Russian Federation. As for the *sui generis* offence, the elements of this crime are unknown to criminal law.

² Shaw clearly states that this is a matter of national legislation, and various states use various approaches (MN Shaw, *International Law* (6th edn CUP 2008) 672); Brownlie is being more careful, stating that regarding application of universal jurisdiction to a person, who is in the custody of a state, as a norm of international customary law is not quite correct (I Brownlie, *Principles of Public International Law* (7thedn OUP, 2008) 306).

Article 42 of the Criminal Code of the Russian Federation on execution of the order or command as a justification ground is also not applicable here since it means to regulate responsibility in cases of unlawful orders or commands, but not of failure to act. It is quite difficult to establish command responsibility through the institution of complicity. Based upon the definitions of a perpetrator, organizer, instigator or an accessory according to Article 33 of the Criminal Code of the Russian Federation the commander (or other superior officer), who fails to act, does not correspond to any of these categories.

According to Russian criminal law, Article 86(2) of the Additional Protocol 1 to the Geneva Conventions requires construing a specific criminal offence, when a failure of a superior officer to take all necessary measures within his/her power to prevent or to intercept the commission of any crimes provided for by the law at the time of an armed conflict is recognized as such an act. Additionally, the situation of an armed conflict shall be a significant element within that type of crime. At the same time the failure to act in a situation when a person could and should have known about commitment of a crime (negligence) or did know about it (intent) is somehow untypical for criminal law. Including negligence as a subjective element, referring to the ambience in which the crime was committed, is not an approved technique ever since the current Criminal Code of the Russian Federation was adopted. There are also difficulties, arising from the interpretation of the concept 'all necessary measures within his/her power' and the necessity to establish a link between a superior and a subordinate (shall that link be only a legal one, or *de facto* could be enough). One should also remember that Article 28 of the Rome Statute provides for the different interpretations of limitations of civilian and military superiors responsibility. Another possible solution could involve application of the provisions on complicity to this situation, for example, regarding commanders and other superiors as actual perpetrators of crimes.

3. *Immunities and criminal responsibility.* The issue of immunities still remains a *terra incognita*³ in substantive criminal

³ Kibalnik A.G. *Immuniteti v ugolovnom prave*. Stavropol, 1999. (AG Kibalnik, *Immunities in Criminal Law* (Stavropol 1999)).

law of Russia. The provisions on criminal procedural immunities and lifting of these immunities are included in detail in the national legislation (Arts 447–451 of the Criminal Procedure Code of the Russian Federation). However, the provisions on the responsibility of the supreme official of the state (the President of the Russian Federation) are hardly elaborate. Taking into consideration Article 93 of the Constitution of the Russian Federation, which allows to bring the President of the Russian Federation to criminal responsibility for the treason and other grievous crime, one should draw a conclusion that the President does not have material legal immunity for the breaches of international humanitarian law (neither do all lower ranking officials).

4. *Statute of limitation.* In this respect the Criminal Code of the Russian Federation is in conformity with international law since part 5 of Article 78 and part 4 of Article 83 of the Criminal Code of the Russian Federation provide that the statute of limitation is not applied to the persons, who had committed crimes against the peace and security of the humanity under Articles 353, 356, 357 and 358 of the Criminal Code of the Russian Federation. It should be noted that application of this rule is not dependent on the degree of their participation and a stage of a crime's completion. Hypothetically, one may raise an issue on widening the scope of the criminally punishable deeds in Chapter 34 of the Criminal Code of the Russian Federation to which the limitation periods do not apply.

5. *Circumstances excluding criminality of an act (or justification grounds).* The Criminal Code of the Russian Federation includes 6 articles on circumstances excluding criminality of an act (Arts 37–42). Additionally, the theory of criminal law provides for several more such circumstances, such as execution of a law and victim's consent. At the same time when it comes to international humanitarian law, one may discuss, whether the existing legislative formulae are acceptable or whether there is need to clarify the list of circumstances excluding criminality of an act.

The provisions of Chapter 8 of the Criminal Code of the Russian Federation are aimed at application within the context of regular criminal acts, and it is obvious that they do not provide for the complete conformity with the provisions of international humanitarian law. For example, within the context of part 1 “c” of Article 31 of the Rome Statute

one may speak of certain lack of clarity in the Article 37 of the Code. It is equally true that part 1 “d” of Article 31 of the Rome Statute provides for the stricter conditions of legitimacy of the harm in the situation of extreme necessity and coercion in comparison with the Articles 39 and 40 of the Criminal Code of the Russian Federation. Article 42 of the Criminal Code of the Russian Federation, which is supposed to be applied mostly in the context of the situations regulated by international humanitarian law, involves several ambiguities. Firstly, there are no criteria for ‘obvious unlawfulness’ in part 2 of Article 42 of the Criminal Code of the Russian Federation. Does the law refer to a standard for an average person or a specific accused? The term of ‘obvious unlawfulness’ also poses more questions than answers.⁴ Secondly, based upon the model of paragraph 2 of Article 33 of the Rome Statute there is need for clear provision recognizing orders or commands on committing genocide or crimes against humanity (on a condition that the elements of latter crime are included into the Criminal Code of the Russian Federation) as being obviously unlawful.⁵ Thirdly, there is still an unresolved issue on qualifying an act of a person, who has given an obviously unlawful order or command to commit a premeditated crime (Art 42, para 2 of the Criminal Code of the Russian Federation). From the standpoint of the types of complicitors he should be regarded as an organizer of a crime *de lege ferenda*.

III. SPECIAL PROVISIONS OF CRIMINAL LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

As for elements of specific crimes, the situation in the Russian law is especially critical when it comes to non-criminalized crimes against humanity and an unacceptable formulation of the provisions on the responsibility for military crimes.

As for crimes against humanity, there is an obvious gap in the Russian legislation.

⁴ JA Williamson, ‘Some Considerations on Command Responsibility and Criminal Liability’ [2008] 90 *International Review of the Red Cross* 316–317.

⁵ GI Bogush (n 1) 92.

Within Article 356 of the Criminal Code of the Russian Federation the Russian legislator has managed to do something that no one had done neither before nor afterwards: to put all the criminal violations of the Geneva Conventions, Additional Protocols, other international treaties and customary international law in one crime. It is not an achievement – it is a legislative mistake. The list of critical defects of Article 356 of the Criminal Code of the Russian Federation is endless. There is a mixture of the Hague and Geneva law, failure to include customary international law, gaps or overkills in criminalizing acts, failure to differentiate between international and non-international armed conflicts, etc.

Accordingly, there is obvious need to develop a new system of provisions on international crimes, including serious violations of international humanitarian law.

For example, in spite of the differentiation between the Hague and Geneva law, the Criminal Code of the Russian Federation may provide for the unified responsibility for the use of prohibited means and methods of warfare in the armed conflict, and for the serious violations of international humanitarian law at the time of the armed conflict. Due to a historical tradition, there could be reestablished crime of unlawful use of protected distinctive emblems or titles. As it was said before, the failure of the leading official to act at the time of an armed conflict could be regarded as a crime *sui generis*.

Russian criminal law could possibly differentiate criminal responsibility depending on type of act and its consequences. It could become one of the national specificities of Russian criminal law in respect of regulation of the serious breaches of international criminal law. For example, within the context of the use of prohibited means and methods of warfare in an armed conflict, the attacks upon protected persons and objects seem to pose greater public danger than just use of prohibited means and methods of warfare. Similarly, the theft, destruction or harm to property of other individuals poses less threat than the other serious breaches of international humanitarian law. The premeditated causing of grave bodily harm, other grievous consequences, purposefully causing death of another person, treacherous goals and unlawful use of protected distinctive emblems or titles could be regarded as aggravating circumstances.

IV. CONCLUSION

All of the above-said leads to a conclusion that Russian criminal law has a long way to go through in order Russia's international obligations can be fulfilled. However, the benefits of this process are obvious since the international community expects us to do that. It is not of less importance that the steps in this direction should actualize the Russian scientific thought, while its development has fallen behind the global level.

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