THE MILITARY - POLITICAL LEADERSHIP OF AZERBAIJAN ARE MILITARY CRIMINALS

CRIMINAL LEGAL AND CRIMINAL PROCEDURAL FEATURES OF BRINGING THE REPRESENTATIVES OF THE MILITARY-POLITICAL LEADERSHIP OF THE AZERBAIJAN REPUBLIC TO RESPONSIBILITY FOR COMMITING WAR CRIMES

Chairman of the Investigative Committee of the Republic of Armenia,
Third class State Counselor of Justice Grigoryan G.M.

The specificity of war crimes lies in the fact that such acts are planned, organized, encouraged, instigated, or, which is less likely, do not prevent, tolerate, or are unable to suppress by persons who hold the highest political and military posts in a State. In fact, the commission of war crimes would not be possible without participation of high-ranking officials, since it is they who develop plans and give orders, therefore such persons should bear more responsibility than subordinates who directly committed the act.[1]

The problem of bringing such persons to justice is due to the fact that representatives of the military-political leadership of states do not directly participate in the commission of war crimes, real murders and rapes, do not personally pull the trigger, do not evict anyone, are not present at the places of executions and other crimes, do not personally give orders to commit war crimes, do not sign documents, and crimes are committed far from their offices. Therefore, it would be a paradox to punish only the perpetrators of war crimes, protecting the organizers from criminal liability.[2]

To achieve these goals, as well as to determine the circle of persons subject to responsibility and the correct qualification of a particular act, it is necessary to consider the forms and types of participation in war crimes, which are used by international criminal law and to project the acts of the armed forces of the Azerbaijan Republic (hereinafter the AF of the Az.R) on the corpus of previously passed judgments of various international criminal courts (the so-called case law corpus[3]), since acts committed by this category of persons, as a rule, become the subject of

[1] See: International Law Commission Report, Commentary to Article 7 of the Draft Code of Crimes Against the Peace and Security of Mankind of 5 July 1996. UN Doc A/51/10//Yearbook of the International Law Commission. 1996, Volume II (2).

[2] See: Gaeta P., Official Capacity and Immunities, in: Cassese A., Gaeta P., Jones J. The Rome Statute of the International Criminal Court: A Commentary. Oxford, 2002, p. 983.

[3] Judgments of international courts are undoubtedly the sources of the ICL, perform the most important function of interpreting the conventional and conventional norms of the ICL, serve as an important proof of general practice and the recognition of customary norms, but not judicial precedents. Judgments of international courts are undoubtedly the

investigation by international criminal justice bodies on the basis of definitions developed by international practice. It is obvious that the investigation of war crimes committed by representatives of the military-political leadership of states and the imposition of punishment on them remains a much politicized problem until it becomes a widespread and uniform international legal practice.

Thus, on July 12, 2020, the Armed Forces of Az.R, under the general command of Defense Minister Colonel-General Zakir Hasanov, 1st Deputy Defense Minister – Chief of General Staff Colonel-General Najmeddin Sadykov, violating the ceasefire agreement, by the forces and means of the 3rd army corps, in particular, 812 motorized rifle brigade of the 3rd army corps, 065 rifle brigade (stationed in the village of Soyuzbulakh), 196 infantry battalion (stationed in the village of Akhstafa) and 052 special brigades (stationed in the village of Yashma), under the command of Major-General Kh. Dzhabrailov, Chief of Staff of the army corps Major-General P. Khashimov, commander of the 812 motorized rifle brigade Colonel Shukurov and other high-ranking military officials, when interacting with mortar-missile-artillery weapons of fire destruction, in violation of paragraph (a) (invasion or attack by the armed forces of a State on the territory of another State ...), paragraph (b) (Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State) and paragraph (d) (An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State) of the Article 3 of the Resolution of the United Nations General Assembly of December 14, 1974; and Article 8 bis of the Statute of the International Criminal Court (hereinafter ICC), infringing on the territorial integrity of the Republic of Armenia (hereinafter RA), unleashed an aggressive war and carried out an act of aggression.

During the conduct of an aggressive war of the Armed Forces of Azerbaijan Republic, in order to achieve military superiority, grossly violating the norms 1 (the principle of distinction between civilians and combatants), 7 (the principle of distinction between civilian objects and military objects), 11 (indiscriminate attacks), 54 (attack on objects necessary for the survival of the civilian population) of the customary rules of international humanitarian law (i.e. the practice of States establishes responsibility regardless of whether the State is a party to Additional Protocol I or the ICC Statute); Article 25 of the Hague Regulations, and Articles 48, 51 (2) and 52 (2), Article 51 (4),

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paragraph 3 (b) and paragraph 5 of Article 85 of Additional Protocol I, using prohibited methods of warfare, without distinction between civilians and combatants, targeting systematic, deliberate and targeted attacks against civilians who were deep in home front and were not participating in hostilities in 8 peaceful settlements including, in particular, women and elderly people living in densely populated areas adjacent to the line of contact between the armed forces of the Republic of Armenia and Azerbaijan Republic, the most important civil infrastructures - buildings, roads, houses, other infrastructure, individual civilians, which led to injuries to persons protected by international law, as well as illegal large-scale deliberate destruction of private and state property in the preliminary total amount of AMD 145.844.000. Thus, in a result of mortar-missile-artillery strikes, 55 private residential houses were damaged in the indicated settlements, of which: 24 - in the village of Aygepar, 19 - in the village of Nerkin Karmirakhbyur, 12 - in the village of Chinari; 5 public buildings, of which 1 kindergarten and 2 factories in the village of Aygepar, 1 greenhouse in the village of Chinari, 1 brandy factory in the town of Berd, 1 cemetery in the village of Tavush; 3 civil infrastructures, of which 1 water pipeline in the village of Aygepar, 1 gas pipeline and 1 water pipeline in the village of Nerkin Karmirakhbyur; 7 cars, of which 1 car belonged to the RA Ministry of Emergency Situations, 6 – to civilians[4]. The shelling killed several heads of livestock. The mentioned acts are war crimes.

The analysis of the factual circumstances allows us to conclude that an indiscriminate mortar-missile-artillery fire strike, or rather, systematic, deliberate and targeted attacks on predetermined squares of the civilian population could not be associated with military necessity, could not make a significant contribution into hostilities, and the complete or partial destruction of civilian objects, their neutralization under the circumstances existing at a particular moment did not give any military advantage, and also could not be associated with the enforcement of peace and could not significantly affect the provision of military superiority over the armed forces of the RA.

So, under the command of Major-General H. Dzhabrailov, with the use of multiple rocket launch systems BM-21-Grad, heavy flame-thrower systems TOS 1A - Solntsepek (diameter 220mm, firing range 6000m, number of guides 24), large-caliber artillery, caliber up to 125 mm., D-30 (122mm, howitzer, firing range 15.3 km), T-72 A tanks (as a result of modernization by Turkey and Israel it was renamed into T-72-Aslan, 125mm, sighting range 4000m), mortars of caliber 120, 82 and 60 mm., "2 S12 SANI" (range of strike from 500-7100 meters), "2 B 14 Podnos" (82 mm, range of

[4] See: the synthesized analytical statement “On violations of ceasefire regime by Azerbaijani Armed Forces in 2020” of the Operational Department of the General Staff of the RA Armed Forces.

strike from 58 to 3922 meters), "M-57DPM" (60 mm, range of strike due to the type of mine - 1800-2500 meters), the actions of which were corrected by unmanned aircraft, an indiscriminate mortar-missile-artillery fire strike was carried out on predetermined squares of the civilian population and other infrastructure objects of a civilian nature at a depth of 11 km. 45 shells were fired from tank guns, 48 from D-30 artillery mounts, 316 from 120 mm mortars, 8 from 82mm mortars, 7 from 60 mm mortars, from various types of small arms, including large-caliber 12 449 shots were fired.

It is noteworthy that the Armed Forces of Az.R violating the norms 23, 97 of customary international law and the requirements of Article 28 IV Geneva Convention (concerning protected civilians) and Article 51 (7), 58 (b) of Additional Protocol I (concerning civilians in general), Article 8 (2) (b) (xxiii) of the Rome Statute prohibiting the use of human shields (i.e. deliberately combining military objects and civilians in space in order to prevent an attack on these military objects), mortar-missile-artillery fire weapons deployed in peaceful settlements Ashagi-Oksyuzlu, Yukhari-Oksyuzlu, Alibeyli, Dondar-Kushchu, Aghdam, Kyognakishlak, Musakey. Thus, 6 units of 60 mm mortars, 10 units of 82 mm mortars and 4 units of 120 mm mortars were deployed near the settlements of Aghdam, Alibeyli, Kyognakishlak, Asrikjirdan; up to 2 tank platoons (6 units) of T-72-Aslan tanks: 2 - near the settlement of Aghdam, 1 - Alibeyli, 3 - Kyognakishlak; one BM-21 multiple rocket launch battery (4 units) - near the Ashagi-Oksyuzlu settlement, one D-30 artillery battery (6 units) - near the Yukhari-Oksyuzlu settlement, one battery near Tovuz and one battery - near the Hajilari settlement[5]. The specified acts are war crimes.

Using human shields, (i.e., covering military facilities with the civilian population), mortar-missile-artillery shelling of the front line of defense, positions, posts, trenches, company strongholds and communications of the units of the Armed Forces of the Republic of Armenia (hereinafter the AF of the Republic of Armenia) was carried out. Striking unmanned aerial vehicles (hereinafter UAVs), reconnaissance UAVs "Aerostar", "Hermes", "Orbiter" and others of Israeli, Turkish and Azerbaijani production were also widely used.

The intelligence activity of the Azerbaijani Armed Forces testifies to the fact that systematic, deliberate and purposeful attacks were carried out on predetermined squares of civilian population.

[5] See: the synthesized analytical statement “On violations of ceasefire regime by Azerbaijani Armed Forces in 2020” of the Operational Department of the General Staff of the RA Armed Forces.

So, in 2019, the enemy carried out 544 reconnaissance UAV flights, of which 333 were on the territory of Azerbaijan, 37 along the length of the state border of the Republic of Armenia, 1 with crossing the border.

From 1 January to 11 July, 2020, inclusive, the enemy carried out 325 reconnaissance UAV flights, 1 in violation of the state border (July 8, 2020) up to 5 km deep.

The number of UAV reconnaissance flights of the Azerbaijani Armed Forces in 2020 by months was: in January – 5; in February – 11, of which 4 crossed the contact line; in March – 22, of which 2 crossed the contact line; in April – 21, of which 12 crossed the contact line; in May – 11; in June – 11, of which 1 crossed the contact line; from 1 July to 11 July – 14.

From 12 to 22 July 2020 inclusive, the enemy carried out 67 reconnaissance and attack UAV flights, of which: 44 from Azerbaijan side (34 reconnaissance, including 1 Hermes-900, the rest Orbiter-2, Orbiter-3, Aerostar, and 10 – striking), including 28 with crossing the state border in the direction of Ijevan-Berd.

Having determined in advance the squares of the civilian population and other infrastructural objects of a civilian nature, the Armed Forces of Azerbaijan subjected the following settlements of the Republic of Armenia to an intensive mortar-missile-artillery fire strike of an indiscriminate nature:

- the town of Berd - located at a distance of 11 km from the state border;

- Aygepar village - located at a distance of 700 meters from the state border;

- the village of Nerkin Karmirakhbyur is located at a distance of 1.7 km from the state border;

- the village of Tavush - located at a distance of 3 km from the state border;

- the village of Norashen - located at a distance of 6.9 km from the state border;

- the village of Chinari - located at a distance of 2.5 km from the state border;

- the village of Movses - located at a distance of 2.5 km from the state border;

- Merab village - located at a distance of 3 km from the state border.

On the facts of these crimes, the RA Investigative Committee is currently considering the possibility of initiating a criminal case on the totality of crimes under part 2 (Unleashing or waging an

aggressive war) of the Article 384 of the RA Criminal Code "Aggressive War", part 1 of Article 387 of the RA Criminal Code "Use of prohibited means and methods of warfare", point 1 (Attack on the civilian population or individual civilians), point 2 (An indiscriminate attack that affects the civilian population or civilian objects, if it is obvious that such an attack will lead to excessive losses among civilians or cause excessive damage to civilian objects, if the infliction of such harm is excessive to achieve concrete and direct military superiority) part 3 of the Article 390 of the RA Criminal Code "Serious violations of the norms of international humanitarian law during armed conflicts", Article 391 "Inaction or issuance of a criminal order during an armed conflict", according to point 2 (murder of a person or his relatives, in connection with the performance by this person of his official activity or public duty), point 6 (in the way dangerous for the life of many people), point 13 (motivated by national, racial or religious hatred or religious fanaticism) of the part 2 of Article 104 of the RA Criminal Code “Murder”, point 1 (committed by arson, explosion or any other generally dangerous method), point 4 (committed on the basis of national, racial or religious hatred or religious fanaticism) of the part 2 of Article 185 of the RA Criminal Code "Intentional destruction or damage to property". At present, the Investigative Committee of the Republic of Armenia has initiated 37 criminal cases for each fact of attempted murder or wounding of citizens and military personnel, as well as destruction of property, for the multiple offences under point 2, point 6, point 13 of the part 2 of the Article 104 of the RA Criminal Code "Murder" or as attempted murder and according to point 1, point 4 of the part 2 of the Article 185 of the RA Criminal Code "Intentional destruction or damage to property".

At this stage of investigation, the involvement of the following servicemen of the Armed Forces of Azerbaijan Republic was established in the commission of war crimes: Defense Minister Colonel-General Hasanov Zakir; 1st Deputy Defense Minister – Chief of the General Staff, Colonel-General Sadykov Najmeddin; the commander of the 3rd army corps, Major-General H. Dzhabrailov; Chief of Staff of the 3rd army corps, Major-General P. Khashimov; commander of the 812 motorized rifle brigade, Colonel Shukurov. Operational-search measures are being carried out to identify other servicemen of the Armed Forces of Azerbaijan Republic, involved in war crimes.

Thus, based on the evidences collected during the investigation of 37 criminal cases initiated by the Investigative Committee of the Republic of Armenia on the facts of a number of international crimes committed by the armed forces of Azerbaijan in the period from 12 to 22 July 2020, as well as the volume, nature, system, tactical and technical characteristics and locations of the used mortar-missile-artillery weapons of fire destruction, the degree of thoroughness of the analysis of the

selected ground targets, the involvement of high-ranking military officials responsible for the development and conduct of the military operation, the number of personnel involved, the observance of the established procedure for this, the extent of ignoring the norms of international humanitarian law, the Investigative Committee of the Republic of Armenia has come to the conclusion that this is the result of in advance planned, thorough military, political and propaganda training, planned, organized and sanctioned directly by the highest political and military leaders of Azerbaijan.

International criminal law[6] provides for individual criminal responsibility of a person, both for the direct commission of international crimes and for other complex forms of complicity aimed at realizing a common goal, plan or project, including the indirect participation to facilitate the commission of a crime, where the person does not have to share the intent of the accomplices.

The provisions that the person who planned, instigated, ordered, committed or otherwise facilitated or abetted in planning, preparing or committing a crime is personally responsible for this crime are reflected in practically identical articles of all statutes of international courts. For example, Article 6 of the London Statute, Article 5 Statute of the Tokyo Tribunal, respectively in paragraph 13 of principle VII and Article 2 (3) of the Draft Code of Offences against the Peace and Security of Mankind (1954) and (1996) in Article 7 (1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY); in Article 6 (1) of the Statute of the International Criminal Tribunal for Rwanda (hereinafter ICTR), in Article 6 (1) of the Statute of the Special Court for Sierra Leone, at Article 29 of the Law establishing the Extraordinary Chambers in the Courts of Cambodia for the consideration of crimes committed during the existence of Democratic Kampuchea, in section 14 (3) of the Regulation of the UN Transitional Administration in East Timor No. 2000/15, Article III (e) of the Convention on the Prevention and Punishment of the Crime of Genocide, but the most detailed list of types of complicity in an international crime is listed in Article 25 (3) of the Rome Statute of the International Criminal Court (hereinafter ICC). Thus, "in accordance with this Statute, a person shall be subject to criminal responsibility and punishment for a crime within the jurisdiction of the Court if that person: a) commits such a crime individually, jointly with another person or through another person, regardless of whether the other is subject to person of criminal responsibility; b) orders, instigates or induces the commission of

[6] In the preparation of this material and coverage of court decisions of international criminal justice bodies on specific criminal cases, were widely used the examples published on the website of the Bulletin of International Criminal Justice, available at http://mup-info.com/biblioteka/book

such a crime, if this crime is being committed or if there is an attempt on this crime; (c) in order to facilitate the commission of such an offense, aiding, abetting or in any other way facilitating its commission or attempt on it, including providing the means for its commission; d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.

Such assistance must be provided intentionally and either: (i) in order to support the criminal activity or criminal purpose of the group where such activity or purpose is related to the commission of an offense within the jurisdiction of the Court; or (ii) in the knowledge of the intent of the group to commit an offense; e) in relation to the crime of genocide, directly and publicly instigate others to commit genocide; f) attempts to commit such a crime by taking an action that constitutes a significant step in its commission, but the crime remains unfinished due to circumstances beyond the control of the person concerned. However, a person who refuses to attempt to commit a crime or otherwise prevents the completion of a crime shall not be punished in accordance with this Statute for attempting to commit that crime if that person has completely and voluntarily abandoned the criminal purpose".

Thus, 5 types of participation in a crime are described: direct commission, ordering, planning, instigating, as well as aiding and abetting.

Direct commission of a crime corresponds to the concept of "perpetrator" in Armenian criminal law. In this case, the act can be expressed both in action and in inaction, or in insufficiently effective action. Thus, in the judgments of the ICTY Trial Chamber in the cases of Kordić and Čerkez, Kvoćka, Vasilyević, Kunarac, as well as in the judgments of the ICTR in the Rutaganda, Musema, Semanza cases, the direct commission of a crime requires the direct personal or physical participation of the accused in the actual actions that constitute a crime,[7] and the ICTY decision in the Stakić case notes that the accused must participate, physically or otherwise, directly or indirectly, in the material elements of the crime, which are expressed in positive actions or

[7] See: ICTY. Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February 2001 (IT-95-14 / 2-T), paragraph 376. ICTY. Judgment of the Trial Chamber in the Kvoćka case, 2 November 2001, paragraph 251; Judgment of the Trial Chamber in the Vasilević case, 29 November 2002, paragraph 62; Judgment of the Trial Chamber in the Kunarac et al. case, 22 February 2001, paragraph 390.
See also: ICTR. Judgment of the Trial Chamber in the Rutaganda case, 6 December 1999, paragraph 41; Judgment of the Trial Chamber in the Musema case, 27 January 2000, paragraph 123; Judgment of the Trial Chamber in the Semanza case, 15 May 2003, paragraph 383.

omissions based on the duty to act, individually or in association with others. The accused should not be directly involved in all aspects of the alleged criminal behavior.[8]

Criminal ordering: commanders and other chiefs are criminally responsible for war crimes committed on their orders, which are provided for by the legislation of many states, including Article 47 of the Criminal Code of the Republic of Armenia (2003) (hereinafter referred to as the RA CC). The practice of states establishes this rule as a rule of customary international law [9] (rule 152) applicable regardless of the type of conflict and has found its expression in a significant number of ICTY and ICTR judgments.[10] A criminal ordering is a war crime[11] committed by a commander or other superior, i.e. persons who, due to their official position, have the ability to give orders and expect that such orders will be executed by people under their control. Thus, in the decision of the Trial Chamber in the Blaškić case, the ICTY stated that "there is no need for the order to be given in writing or in any other specific form. It can be explicit or implicit. The fact that the order was given can be proven through circumstantial evidence"[12] for example, an analysis of the behavior of the military units subordinate to the accused. Thus, for example, in the Galić case, considering the evidence of systematic sniper and artillery shelling of the civilian population of

[8] See: ICTY. Judgment of the Trial Chamber in the Stakić case, 31 July 2003, paragraph 439.

[9] See: Henkerts J.-M., Doswald-Beck L. Customary International Humanitarian Law. Rule 152, MKKK, 2006, p. 711, p. 714-715. Three situations can be distinguished in relation to the actions taken by subordinates in accordance with the order to commit war crimes. First, in the event that war crimes have actually been committed, the practice of states clearly indicates that the responsibility of commanders exists, as stated in this rule. Second, if war crimes are not actually committed, but only an attempt is made to commit them, the practice of states tends to assume that commanders are also responsible for this. The Statute of the International Criminal Court (art. 25 (3) (b)) and Regulation No. 2000/15 of the United Nations Transitional Administration in Timor Leste (section 14 (3) provide that the commander is responsible for ordering the commission of a war crime if the crime is committed or if there is an attempt on this crime. The national legislation of some states stipulates that the commander who gives the order to commit the crime is guilty, even if the subordinate only attempts to commit such a crime. Third, in the event that no war crimes have been committed, and no attempt has been made to commit them, several states impose criminal responsibility on the commander just for giving the order to commit a war crime. However, in most cases, practice shows that in such cases the commander is not responsible. However, it is clear that if the norm is to prohibit giving an order, for example, not to leave anyone alive, the commander giving such an order is guilty even if the order is not followed; See 1996 Draft Code of Crimes against the Peace and Human Security, article 2, commentary, p. 8. A superior official who gives an order to commit a crime is in a certain respect more guilty than his subordinate, who only obeys the order and thus commits a crime that he would not have committed on his own initiative ... A superior official substantially facilitates the commission of a crime, using his position as a superior to compel a subordinate to commit a crime. A superior official who orders a subordinate to commit a crime is failing to fulfill two basic obligations that any person in the position of a superior bears. First, the superior official fails to fulfill the obligation to ensure the lawful conduct of his subordinates. Second, the superior officer is in breach of the obligation to act in accordance with the law in the exercise of his or her powers, and thus abuses the power vested in him because of his position.

[10] See, for example: ICTY. Judgments in cases Delalić et al, Blaškić, Kordić anc Čerkez, Krstić.
See also: ICTR. Judgments in Akayezu, Kayishema, Ruzindana cases.

[11] Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention, Article 28 of the Hague Convention for the Protection of Cultural Property, Article 2 of the 1996 Draft Code of Crimes against the Peace and Human Security establish the responsibility of the superior official who gave the order to commit an international crime.

[12] See: ICTY, Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 281.

besieged Sarajevo, the Court found, "in sum, the evidence leads to the conclusion that General Galić, who, although being notified of the crimes committed by his subordinates, over which he had full control, and who consistently and over a long period of time was unable to prevent the commission of crimes and punish those responsible despite this knowledge, promoted a campaign of unlawful violence against civilians through orders passed down the chain of a campaign with the primary goal of spreading terror among the civilian population of Sarajevo[13]. At the same time, the execution of the order of the chief does not relieve the subordinate from criminal responsibility if the subordinate knew that the action he was ordered to perform is illegal, or should have known about it due to the clearly illegal nature of this action.

In our opinion, most war crimes are clearly illegal and such a question will never arise[14]. This principle is called the "principle of responsibility of the subordinate" or "the principle of inadmissibility of reference to the order of a superior chief." State practice establishes the principle of subordinate responsibility as a rule of customary international law. The inadmissibility of reference to an order is established by the Statutes of the Nuremberg and Tokyo Tribunals, Article 8 London Statute, Article 4 (b) of the Law of the Control Council number 10, Article 6 of the Statute of the Military Tribunal for the Far East, Nuremberg Principle IV, Article 7 (4) of the ICTY Statutes, Article 6 (4) ICTR Section 21 Ordinance Establishing a Court with Exclusive Jurisdiction for Serious Criminal Offenses in East Timor, Section 6 (4) Statute of the Special Court for Sierra Leone, Article 33 of the Rome Statute of the ICC. An analysis of this provision in the listed statutes shows that a person is exempted from criminal liability not at all because he has fulfilled a legally binding order for him, but because of the absence of a subjective element of the crime caused either by an error in law, or an error in fact, or both factors together. This interpretation of the issue of responsibility for the execution of an order finds its justification in the practice of states. The

[13] See: ICTY, Judgment of the Trial Chamber in the Galić case, 5 December 2003, paragraph 749.

[14] When establishing the inference element in the executor of a criminal order, it is possible to refer to the criterion of "reasonable person" (English: reasonable person or reasonable man), which, being borrowed from common law, is often used by special international tribunals for Yugoslavia and Rwanda. The determination of guilt will depend on the answer to the following question: whether, beyond a reasonable doubt, a sane person in the circumstances should have come to the conclusion that the order is illegal. Interesting in this regard is the statement of the Central District Military Court of Israel in the Shmuel Malinka case: "The distinguishing feature of an" obviously illegal "order should be striking, like a black flag waving over the given order, like a warning sign saying: "Forbidden!" If only legal experts can determine this, the order is not illegal; a definite and obvious illegality that is visible in the order itself ... an illegality that catches the eye and outrages the heart, if the eyes are not closed, and the heart is not hardened and corrupted." The court further determined that the execution of the order may be a mitigating circumstance in conditions where the order is given in the heat of battle, suddenly and when delay could possibly threaten the life of the soldier and his comrades. This same consideration was adopted by states at the Rome Conference when they formulated Article 33 of the Statute of the International Criminal Court, "to protect the military who are on the battlefield and obey orders that they are unable to evaluate."

military regulations and the national law of most states speak of "clearly illegal orders."[15] This approach is also implemented in the RA Criminal Code. At the same time, there is also a practice that does not require the executor to know about the illegality of the order. Thus, in the Blaškic case, the ICTY Trial Chamber ruled that "it is immaterial whether the order was clearly illegitimate". [16]

However, this practice is not widespread and uniform enough to establish a rule of customary international law.[17]At the same time, in the decisions of the ICTY and ICTR Trial Chambers, respectively in the case of Kordić and Čerkez and in the case of Gakumbtsi, it is sufficient that the "chief-subordinate" relationship actually exists, i.e. that a person has de facto the political or military power to give orders, and a formal relationship of subordination is not required.[18]

Thus, a criminal order differs from such forms of participation in a crime as instigating, aiding and abetting by the presence of a sign of coercion, which a person exercises on the basis of either official or actual authority, or on the basis of the use or threat of physical violence.[19] At the same time, the execution of the order of the superior does not relieve the subordinate from criminal responsibility if the subordinate knew that the action he was ordered to perform is illegal, or should have known about it due to the clearly illegal nature of this action. The fact that the person acted in pursuance of the order may be considered a mitigating circumstance. This principle is called the "principle of responsibility of the subordinate" or "the principle of inadmissibility of reference to the order of a superior". Most of the main war criminals who were convicted by the Nuremberg Tribunal cited the execution of the orders of their superiors as defense arguments. The Tribunal rejected the reference

[15] See: J.-M. Henkerts, L. Doswald-Beck, Customary International Humanitarian Law. Rule 113, MKKK, 2006, pp. 721-726.
[16] See: ICTY, Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 282.
[17] See: J.-M. Henkerts, L. Doswald-Beck, Customary International Humanitarian Law. Rule 113, MKKK, 2006, p. 726.

[18] See: ICTY. Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February 2001, paragraph 388: "No formal chief-subordinate relationship is required to establish an "order"" when it is demonstrated that the accused had the power to order." ICTR. Judgment of the Trial Chamber in the Gakumbtsi Case, 17 June 2004, paragraph 281.
[19] The ICTR Trial Chamber, when considering the case of Sylvester Gakumbtsi regarding the nature of actual power, as well as the line separating "order" from such forms of participation in crime as "instigating" and "aiding and abetting", determined that "the power of an influential person," the Court points out, can derive from his social, economic, political or administrative position, or from his strong moral authority. Such power can be exercised de jure or de facto. When people are faced with an emergency or danger, they can naturally turn to such an influential person, waiting for his decision, help, or measures aimed at overcoming the crisis. When he speaks, everyone listens to him with keen interest; his advice inspires more respect than the opinions of others, and can easily be taken as a motivation for action. Such words and actions are not necessarily criminal, but in appropriate cases may constitute forms of participation in a crime such as "incitement" and "aiding and abetting". Under certain conditions, the power of such a person can be strengthened by both legal and illegal elements of coercion, such as declaring a state of emergency, the actual exercise of administrative functions, or even the use of threat or illegal force. The presence of an element of coercion can indicate how the influencer's words will be received. Thus, simple words of exhortation or support can be perceived as orders within the meaning of Article 6 (1) of the Charter "

to the orders of the superiors and noted: “The provisions of Article 8 of the Charter are consistent with the laws of all nations. The fact that a soldier killed or tortured on orders in violation of international laws of war was never considered a defensive argument against charges of these atrocities. The very fact of the existence of an order can be exposed only as a mitigating circumstance when imposing a punishment".[20]

State practice establishes the principle of subordinate responsibility as a rule of customary international law applicable to crimes, regardless of the type of conflict. It is closely linked to the rule that every combatant has a duty to disobey an unlawful order, and to the imperative duty to comply with international humanitarian law.[21] The same approach is implemented in Part 3 of Article 47 of the RA Criminal Code, that failure to comply with a clearly illegal order or instruction excludes criminal responsibility. The UN International Law Commission clarified that although the person issuing the criminal order bears special responsibility for the crime, “the guilt and inevitable role played by the subordinate in the actual commission of the criminal act cannot be ignored. Otherwise, the legal force and consequences of the prohibition of crimes under international law would be significantly weakened by the absence of any responsibility or punishment of the actual perpetrators of these heinous crimes, any factor deterring potential violators. "[22]

Planning refers to the substantial projecting (formulation or approval of a criminal plan) of the commission of a crime, both in the preliminary phases and in the phases of its execution[23], which can be proven, including through circumstantial evidence[24]. To charge a person with planning, it must be proven that the crime was actually committed.

Instigating is the inducement[25] of another person through deliberate[26] nudge, persuasion or other way of encouraging[27] the commission of a crime, either by explicit or implicit behavior, by either

[20] See: Nuremberg Process, 1961, Vol.VII, p.368.
[21] See: the same source, pp. 721-724, 631-635.
[22] See: 1996 Draft Code of Crimes against the Peace and Human Security, Article 5, commentary, point 3.
[23] See: ICTY. Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 279. Judgment of the Trial Chamber in the Krstić case, 2 August 2001, paragraph 601. ICTR. Judgment of the Trial Chamber in the Akayezu case, 2 September 1998, paragraph 480. Judgment of the Trial Chamber in the Rutaganda case, 6 December 1999, paragraph 37. Judgment of the Trial Chamber in the Musema case, 27 January 2000, paragraph 119; Judgment of the Trial Chamber in the Bagilisham case, 7 June 2001, paragraph 30.
[24] See: ICTY. Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 279.
[25] See: ICTY. Judgment of the Trial Chamber in the Krstić case, 2 August 2001, paragraph 601. Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 279.
[26] See: ICTY. Judgment of the Trial Chamber in the Orić case, 30 July 2006, paragraph 273-279. This means, firstly, that the instigator should be aware of his or her influence on the main offender, aimed at committing a crime, regarding his own behavior. At the same time, the instigator, even if he does not seek and does not wish, must at least be aware that the crime will be committed. Secondly, with regard to the main offender, the instigator must know and agree to the

action or inaction, but in the latter case, he must be endowed with the obligation to prevent the crime.[28] Thus, mere presence at the scene of an atrocity may constitute incitement if the accused is a representative of the authorities and does nothing to prevent or stop the crime[29]. In the Aleksovsky case, the ICTY argued that a person's position of power must be considered an important sign for establishing that mere presence constitutes an act of intentional participation. The presence at the scene of a crime of a person who has undeniable power over the perpetrators of an unlawful act, under some circumstances, can be interpreted as an approval of their behavior (the effect of "approving spectator"[30]). Instigating does not have to be "direct and public" or involve the presence of the instigator at the crime scene. The influence of the instigator can be carried out both directly and through intermediaries, both on a small and on a large group of people.[31] Instigating differs from the form of participation in a crime in the form of an order in that it does not imply any subordinate relationship between the instigator and the direct perpetrator of the crime. At the same time, it is noted that the exercise of influence is hardly possible without a certain ability to exert influence on others[32].

The criteria for aiding[33] and abetting[34] were defined by the ICTY in the Furundzija case, where actus reus (objective side) is an act or omission that consists of practical assistance, support or moral support that has a significant effect on the commission of a crime, and mens rea (subjective side) - knowledge that these actions help to commit a crime[35]. In the decisions of the ICTY and the ICTR,

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deliberate completion of the main offense. Thirdly, the volitional element of intention, in conditions when the instigator is aware of the more than likely commission of a crime, which will follow from his behavior, can be characterized as an acceptance of his commission. Although the instigator is not required to foresee exactly who and under what circumstances will commit the underlying crime, and that this would exclude indirect inducement, the instigator must at least know the basic and essential elements of the crime that will be committed.

[27] See: ICTY. Judgment of the Trial Chamber in the Orić case, 30 July 2006, paragraph 271, also see the paragraph 274.

[28] See: ICTY. Judgment of the Trial Chamber in the Orić case, 30 July 2006, paragraph 273. Also see: ICTR. Judgment of the Trial Chamber in the Rutanga case, 6 December 1999, paragraph 41.

[29] See: ICTY. Judgment of the Appeal Chamber in the Tadić case, 15 July 1999, paragraph 198. See also: Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February 2001, paragraph 387. Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 280.

[30] See: ICTY. Judgment of the Trial Chamber in the Aleksovski case, 24 March 2000, paragraph 65. See also: ICTY. Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 284.

[31] See: ICTR. Judgment of the Appeal Chamber in the Akayezu case, 1 June 2001, paragraphs 474-483. Also: ICTY. Judgment of the Trial Chamber in the Orić case, 30 July 2006, paragraph 273.

[32] See: ICTY. Judgment of the Trial Chamber in the Orić case, 3- July 2006, paragraph 272.

[33] Aiding corresponds with the notion of "physical aiding", which is characteristics of Armenian criminal law.

[34] Abetting corresponds to the concept of "intellectual complicity" adopted in Armenian criminal law, which consists in facilitating the commission of a crime with advice, instructions, and also a promise made in advance to hide the offender. An intellectual accomplice only strengthens the determination to commit a crime, while the instigator by his actions induces such determination. "Aiding" generally refers to some form of physical assistance in committing a crime, but of a "secondary" nature, while "abetting" implies support or other form of moral coaxing.

[35] See: ICTY. Judgment of the Trial Chamber in the Furundzija case, 10 December 1998, paragraph 249.

respectively, in the cases of Kvoćka et al, Akayezu, Ntakirutimana et al[36], it is emphasized that aiding is helping someone through the provision of funds, and abetting is facilitating an illegal act, for the commission of which the abettor feels "sympathy" through actions like "Encouragement" of the main culprit. Meanwhile, the contribution of an aider and abettor to the commission of a crime must be substantial, i.e. must have an actual impact on the commission of the crime[37]. Moreover, for the onset of criminal liability, at least one of these forms of participation in a crime is sufficient. Article 25 (3) (c) of the Rome Statute prescribes that the purpose of aider and abettor should be in facilitating the commission of a crime. An aider and abettor should not share the intent of the main offender, but must be aware of this intent and the main elements of the crime[38]. At the same time, there is no requirement that the aider and abettor know exactly what kind of crime was being prepared and was actually committed. If a person knew that at least one of the many crimes was likely to be committed, and one of them is actually being committed, and he intended to facilitate the commission of such a crime, then that person is guilty as an aider or abettor[39].

A person's guilt can be established on the basis of various circumstances, in particular, such as the person's position as a superior and his presence at the crime scene. Moral or verbal support, or even mere presence at the crime scene, may in some cases be sufficient to conclude that the accused was involved in the crime[40]. The act of assisting a crime, expressed in "aiding and abetting", can occur before, during, or after the crime is committed. It can take the form of providing the means to commit a crime, or promises to take certain actions as soon as the crime is committed. Therefore, "the act contributing to the commission of the crime and the commission itself may be geographically and temporally distanced."[41] Thus, in the Rutaganda case, the ICTR noted that the act of assistance may be geographically and chronologically unrelated to the actual commission of the crime[42], and in the Tadić case, the ICTY noted that the aider and abettor are responsible for all the naturally occurring consequences of the criminal act[43]. The ICTY Appeals Chamber determined

[36] See: ICTY. Judgment of the Trial Chamber in the Kvoćka et al, 2 November 2001, paragraph 254. See also: ICTR. Judgment of the Trial Chamber in the Akayezu case, 2 September 1998, paragraph 484. See also: Judgment of the Trial Chamber in the Ntakirutimana and Ntakirutimana, 21 February 2003, paragraph 384.
[37] See: Report of the Commission of the International Law. 47th Session. 6 May – 26 July 1996. UNO. A/51/10, p. 24.
[38] See: Judgment of the Trial Chamber in the Furundzija case, 10 December 1998, paragraph 245. See also: Judgment of the Trial Chamber in the Aleksovski case, 24 March 2000, paragraph 162. Judgment of the Trial Chamber in the Vasilyević case, 29 November 2002, paragraph 71. See also: Judgment of the Trial Chamber in the Vasilyević case, 29 November 2002, paragraph 71.
[39] See: ICTY. Judgment of the Trial Chamber in the Furundzija case, 10 December 1998, paragraph 246.
[40] See: ICTY. Judgment of the Trial Chamber in the Aleksovski case, 25 June 1999, paragraph 62.
[41] See: ICTY. Judgment of the Trial Chamber in the Tadić case, 7 May 1997, paragraph 687.
[42] See: ICTR. Judgment of the Trial Chamber in the Rutaganda case, 6 December 1997, paragraph 992.
[43] See: ICTY. Judgment of the Trial Chamber in the Tadić case, 7 May 1997, paragraph 692.

that the mere knowledge of an aider and abettor that his actions are helping to commit the underlying crime is sufficient to establish guilt.[44]

In the case of Nasser Orić, the ICTY Trial Chamber determined that instigation, in the sense of the term "instigation", differs from "aiding and abetting" in that the former requires some influence on the main offender through nudge, persuasion or other incentive the commission of a crime and must contain more than just facilitating the commission of the crime by the perpetrator, which may be sufficient to aiding and abetting.[45]

In this case, the inaction of the person including commander can be willful and negligent. In the case of deliberate inaction, the person (commander), knowing that his subordinate is committing or preparing to commit a crime, realizes that if he does not interfere, the natural and foreseeable consequence will be the commission of a crime and being obliged to suppress the actions of the subordinate, such inaction has a significant effect and support crimes, which may be perceived by subordinates as approval of their crimes. Thus, the objective side of aiding and abetting is committed, but in our opinion, in such a situation, the actions of the person (commander) should be qualified as a co-perpetrator of this crime. This approach is implemented in the decisions of the ICTY Trial Chambers in the cases of Kordić and Čerkez, Blaškić, Vasiljević.[46] In a situation where a person (commander), knowing about the crimes committed by subordinates, refuses to punish and encourages subordinates in the form of submission to military awards, promotions and other measures, stimulates further crimes, as in the case of commanders of various levels in the hierarchical structure of the Armed Forces of Az.R, then such an act, in our opinion, can be qualified as a more active instigating.

Thus, in the decision of the ICTY Trial Chamber in the case of General Radislav Krstić, inaction was clearly demonstrated, which constituted a form of aiding and abetting. The court found that the accused did not order the murders. Neither he, nor any of his subordinates personally participated in the murders and was not at the scene of the murders. However, he allowed his commander, General Mladić, to use the personnel and vehicles of his corps to prepare massacres (to transport future victims from places of detention to places of executions; for the illegal expulsion of women and

[44] See: ICTY. Judgment of the Appeal Chamber in the Vasiljević case, 25 February 2004, paragraph 102.
[45] See: ICTY. Judgment of the Trial Chamber in the Orić case, 30 July 2006, paragraph 271; also see: paragraph 274.
[46] See: ICTY. Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February 2001, paragraph 371; ICTY. Judgment of the Trial Chamber in the Vasiljević case, 29 November 2002, paragraph 70; ICTY. Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 284.

children, etc.). In addition, although he gave an order not to harm Muslim refugees, he took no action to ensure that the order was carried out.[47]

The ICTY developed such a form of participation in a crime as the doctrine of "Joint criminal enterprise" (hereinafter - JCE) which played a decisive role in the consideration of cases involving the prosecution of persons occupying a high position in the military-political hierarchy of States, and which was subsequently used by the ICTR[48], the Special Court for Sierra Leone, including in relation to the President of Liberia, Charles Taylor[49], and later laid in the basis of the modern understanding of this doctrine and now, covertly reflected in paragraph "d" of part 3 of the Article 25 of the Rome Statute of the ICC. By its nature, it is close, but not identical to the concepts of "organized criminal group" and "criminal association" used by the Armenian criminal law.

The essence of the common purpose doctrine is that multiple criminals work together to achieve a goal, without stopping to commit crimes. In the ICTY Charter, this concept is embodied in the word "commit". The ICTY Appeals Chamber, which examined the Tadić case[50], suggested that this legal principle should be applied in cases where top political leaders join a criminal group with the aim of committing international crimes, based on the following provision: "The Charter provides jurisdiction over persons who plan, instigate, order, physically commit a crime, or otherwise aid and abet its planning, preparation or execution. This does not exclude such methods of participation in the commission of crimes, when several people have a common criminal purpose, which is realized either jointly or separately by some members of this group"[51].

The ICTY argued that JCE is not a definition of a new crime, it is an explication of the principle of criminal responsibility contained in the word "committed" which is used in the Statute. However, the Court stated that criminal responsibility arising from participation in the JCE is not equivalent to "the guilt by association". The Tribunal referred to the Report of the UN Secretary-General, directly rejecting the guilt of mere membership in the organization, and reaffirmed the principle of individual criminal responsibility stating that "Nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nulla poena sine culpa)".

[47] See: ICTY. Judgment of the Trial Chamber in the Krstić case, 2 August 2001; ICTY. Judgment of the Appeal Chamber in the Krstić case, 19 April 2004.
[48] See: ICTR. Judgment of the Trial Chamber on the Natakirutimana et al, 13 December 2004, paragraphs 467-484.
[49] See: SCSL. Prosecutor against Charles Taylor (Case NSCSL-03-01-PT). Indictment of 7 March 2003.
[50] See: ICTY. Judgment of the Appeal Chamber in the Tadić case, 15 July 1999, paragraph 190. Judgment of the Trial Chamber in the Kvoćka et al, 2 November 2001, paragraph 255.
[51] See: ICTY. Judgment of the Appeal Chamber in the Tadić case, 15 July 1999, paragraph 186.

The ICTY case law distinguishes three forms of JCE:

1) Crimes are committed by an individual who is acting under the common design possess the same criminal intent to commit a certain crime shared by all the members. The objective and subjective elements of this form of JCE are as follows: a) an individual shall participate in realization of one of the aspects of the common intent facilitating the actions of co-perpetrators; b) an individual even if he has not personally committed actions constituting the objective side of the crime, should wish the criminal result; 2) crimes are committed by a group of people holding various positions in the hierarchy system, acting in accordance with an agreed plan and in accordance with common intent. A person is aware of the inhuman nature of the system and intends to participate in the activities of this system. Objective and subjective elements of this form of JCE are: a) a person must be in a certain organized system; b) the person is aware of the nature of this system and has a common intention to participate in the implementation of the crime; c) the person actively participates in the work of the system and in any form participates in the implementation of the crime (the so-called "concentration camp situation"); 3) the general intent of the person is aimed at participating in the criminal activity or criminal purpose of the group with its contribution to the JCE or the commission of a crime by the group, i.e. crimes committed by other persons, although they are outside the common intent of the person, however, for the person they are natural and visible consequence of the implementation of a common goal, where each of the participants is responsible for all visible crimes committed by its other participants.

Subjective elements are as following: a) the intention of the person to participate and contribute to any action of the group, including to achieve the criminal goal of a group, where responsibility for a crime that has not been generally agreed upon is established if the person foresaw that such a crime could have been committed by one or several members of the group and willingly took on this risk (the so-called "extended form of JCE"). Awareness of the possibility of committing a crime and willingly accepting its risk excludes a possible reference to the "excessive act".

Thus, the ICTY has developed the objective elements of a crime (actus reus), common for all three types of the joint criminal enterprise, which should be expressed in the following elements: 1) *the multiplicity of persons* (JCE exists when there are several persons who take part in the realization of a common criminal goal. They do not have to be mandatory organized in a military, political or administrative structure); 2) *the existence of a common plan, project or goal that provides for or entails the commission of a crime.* The plan, project or purpose does not have to be pre-drawn up or

formulated. The agreement or understanding of the people who make up the overall project or purpose need not be specific, they may be not-expressed, and established from actual circumstances. The common plan or purpose may be implemented impromptu and can be established on the basis of the fact that a group of people acts in concert to implement the JCE); 3) *the person's participation in the common intent*, entailing the commission of one of the crimes. (Participation should not entail the commission of a certain crime (for example, murder, extermination, torture, violence, etc.), but may take the form of assistance or contribution to the fulfillment of the common plan or the realization of the common purpose. As for the elements of the subjective side, both the first and the second form of JCE implies the direct intention of its participants to commit a certain type of crime, where each of the participants in JCE is responsible for all actions arising from the criminal plan, and in the third form, the same person may have the intention on commission of some crimes within the common purpose and recklessness in relation to others which were not part of a common goal, but were its foreseeable consequences[52].

For example, as a typical participation in the third form of JCE (extended form) is clearly demonstrated in the conclusion of the ICTY Appeal Chamber in the case of Radislav Krstić. In order to hold the accused responsible for actions that are natural and foreseeable consequences of the joint criminal enterprise, there is no need to establish his actual knowledge that these other actions will be committed. It is enough to show that these actions, which were outside the agreed criminal enterprise, were a natural and visible consequence of the agreed criminal enterprise, and that the accused participated in this enterprise, knowing about the likelihood that these other crimes could be committed. It is also not necessary to establish that Radislav Krstić actually knew about the commission of these other criminal acts. It was enough to show that their commission was visible to him and that these other crimes were actually committed[53]. Thus, the ICTY Appeals Chamber in the case of M. Krajišnik came to the conclusion that political speeches should be considered as actions that are no different from other actions.

The scientific community for the creation and application of the doctrine of the JCE has been divided, inter alia, into directly opposing positions on evaluating the effectiveness of the practical application of the doctrine of the JCE. Some of them see in the doctrine the principle of "victors' trial over the defeated" or "trial by a biased", others dispute the legitimacy of the conception by the

[52] See: ICTY. Judgment of the Appeal Chamber of Tadić case, 15 July 1999.
[53] See: ICTY. Judgment of the Appeal Chamber in the Krstić case, 19 April 2004, paragraph 150.

judges of the ICTY, while others point out the amorphous concept, elements and boundaries of the JCE doctrine, etc.

Thus, N. Dershowitz argues that none of the five types of complicity provided for in Article 7 (1) of the ICTY Statute is "joint criminal enterprise". Rather, the JCE acts like a conglomerate of five types of responsibility, which allows prosecutors and judges to construct some combination of evidences against the accused in order to convict him of some generalized crimes, without evidence that the accused planned, instigated or otherwise aided or abetted to the commission of any particular crime.[54]

Despite the fact that the JCE doctrine is the most complex and controversial theory in international criminal law, in our opinion, such a progressive nature of the doctrine is due to the tendency to commit war crimes by high-level military leaders and political leaders, the difficulty of holding them responsible and is dictated by the interests of justice, being "a silver bullet of justice" and acting as the only effective means of holding top political and military leaders liable at a strategic level.

As soon as the ICTY developed and improved the JCE doctrine, it became obvious that it was much more effective to prove involvement in the commission of a crime on the basis of this form of complicity than on the basis of a separate "superior responsibility doctrine", which, in essence, is a form of the commander's responsibility for his own inaction or omission, in a context where international law imposes a positive obligation to act, rather than for the actions of the perpetrators. In accordance with this doctrine, commanders and other superiors are criminally responsible in cases of crimes committed by their subordinates, if they knew or should have known that their subordinates intend to commit or are committing such crimes, but did not take all necessary and reasonable measures within the limits of their authority to prevent them, or, if such crimes have already been committed, to punish those who committed them. The responsibility of higher commanders for the crimes committed by their subordinates is due to the great power of commanders over subordinates and the ability to prevent violations of international humanitarian law, which are provided for in Article 86 "1" and Article 87 "1" of Additional Protocol I to the Geneva Conventions, in military charters, in the legislation of a number of States, including those

[54] See: Dershowitz N., Doctrine of "Joint Criminal Enterprise" in Judgments of International Criminal Tribunal for the former Yugoslavia// International Criminal Tribunal for the former Yugoslavia: Activities. Results. Effectiveness. M., "Indrik", 2012, p. 23.

that are not parties to Additional Protocol I. Azerbaijan is among them.[55] Moreover, the practice of States establishes this type of responsibility as a rule of customary international law, regardless of the type of conflict[56]. Such a norm is reflected in practically identical articles of all statutes of international courts[57], including in Article 28 "1" of the Rome Statute of the ICC[58], and expressed itself in a variety of judgments, including in the cases of Delalić et al., Aleksovsky, Blaškić, Kunarac, Kordić and Čerkez, Krstić, Kvoćka, Strugar et al. Martić, Hadžhikhasanović et al., Karadžić and Mladić.[59]

To establish the responsibility of higher superiors for the actions of subordinates, the ICTY case law developed the main features of the responsibility of a superior in connection with the criminal acts of his subordinates: 1) the existence of a chief-subordinate relationship between the accused and the person who directly committed the crime; 2) the subjective side can be expressed from intent to criminal negligence and includes an obligatory element of "knowledge", i.e. the chief knew [60]that the subordinates were going to commit, commit or have committed crimes (the so-called "factual knowledge") or the chief did not know, but should have known that subordinates are going to

[55] See: J.-M. Henkerts, L. Doswald-Beck, Customary International Humanitarian Law. Rule 113, MKKK, 2006. P. 716.
[56] See: the same source. P.715.
[57] See, for example: Article 7 (3) ICTY Statute, Article 6 (3) ICTR Statute, Article 6 (3) Statute of the Special Court for Sierra Leone, Section 16 Regulations of the UN Transitional Administration in East Timor (UNTAET) No. 2000/15, Article 29 Law establishing the Extraordinary Chambers in the Courts of Cambodia to deal with crimes committed during the existence of Democratic Kampuchea.
[58] See: Article 28 (1) of the Rome Statute of the International Criminal Court "Liability of commanders and other superiors" formulates this rule as follows: In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[59] See: ICTY Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February, 2001, paragraph 401; Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 294; Judgment of the Trial Chamber in the Delalić et al, 16 November 1998, paragraph 346; Judgment of the Trial Chamber in the Stakić case, 31 July 2003; Judgment of the Trial chamber in Blagojević case, 17 January 2005, paragraph 790. See also: ICTR. Judgment of the Trial Chamber in the Bagilishem case, 7 June 2001, paragraph 38.
[60] ICTY. Kordić and Čerkez/trials/26 February 2001/para.427. The term "knew" is understood as the realization that the relevant crimes were committed or should have been committed.

commit, commit or have committed crimes[61] (so-called "constructive" knowledge), i.e. inaction of the chief; 3) inaction or omission of the commander in a situation where he could prevent a crime or punish those responsible[62], i.e. had the opportunity and obligation to take all necessary measures to prevent or suppress the crimes of his subordinates, including report the crime to a superior chief, the competent authorities, initiate an investigation or punish the perpetrator himself and did not take such measures; 4) the exercise of effective control (possession of power implies effective control if no evidence to the contrary is given[63]), i.e. the ability to prevent the commission of a crime or to punish for it, to take measures to bring criminals to justice[64], the official position of the accused, even if "actual power" is not determined only by his formal position[65], the power to give orders and punish for non-compliance[66], the forces involved (by the commander) in conducting military operations[67], the power to impose disciplinary measures[68], the power to control the nomination of personnel[69], the participation of the accused in negotiations regarding the actions of the troops[70], etc.[71]

At the same time, the ICTY and the ICTR later began to adhere to the practice of applying a less strict subjective criterion "had reason to know", which implies that the commander has a certain minimum of initial information about the possibility of his subordinates committing crimes, and does not provide for responsibility for the inability to obtain such information due to the commander's improper performance of his duties, and the ICC (Article 28 "a") adheres to the practice of applying the more stringent criterion "should have known". We share the position of the

[61] See: ICTY. Judgment of the Trial Chamber in the Delalić et al, paragraph 386; Judgment of the Trial Chamber in the Naletić and Martinović case, 31 March 2003, paragraph 70-71; Judgment of the Trial Chamber in the Blagojević case, 17 January 2005, paragraph 792.

[62] See: ICTY. Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February 2001, paragraph 401; Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 294; Judgment of the Trial Chamber in the Delalić et al, 16 November 1998, paragraph 346; Judgment of the Trial Chamber in the Stakić case, 31 July 2003; Judgment of the Trial Chamber in the Blagojević case, 17 January 2005, paragraph 790. Also: ICTR. Judgment of the Trial Chamber in the Bagilishem case, 7 June 2001, paragraph 38.

[63] See: ICTY. Judgment of the Appeal Chamber in the Delalić et al, 20 February 2001, paragraph 197.

[64] See: ICTY. Judgment of the Appeal Chamber in the Blaškić case, 29 July 2004, paragraph 69. Judgment of the Trial Chamber in the Hadžihasanović et al, 15 March 2006, paragraph 82; ICTY. Judgment of the Trial Chamber in the Delalić et al, 20 February 2001, paragraph 252, 266, 302-303.

[65] See: ICTY. Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February 2001, paragraph 418.

[66] See: ICTY. Judgment of the Trial Chamber in the Kordić and Čerkez case, 26 February 2001, paragraph 421. Judgment of the Trial Chamber in the Strugar case, 31 January 2005, paragraph 394-396, 406, 408.

[67] See: ICTY. Judgment of the Trial Chamber in the Strugar case, 31 January 2005, paragraph 394.

[68] See: ICTY. Judgment of the Trial Chamber in the Delalić et al, 16 November 1998, paragraph 767. Judgment of the Trial Chamber in the Strugar case, 31 January 2005, paragraph 406, 408.

[69] See: ICTY. Judgment of the Trial Chamber in the Delalić et al, 16 November 1998, paragraph 767. Judgment of the Trial Chamber in the Strugar case, 31 January 2005, paragraphs 404, 411, 413.

[70] See: ICTY. Judgment of the Trial Chamber in the Strugar case, 31 January 2005, paragraph 398.

[71] See: ICTR. Judgment of the Trial Chamber in Kayishema and Ruzindana case, 21 May 1999, paragraph 229-231, in reference to paragraph 378 of the Judgment of the Trial Chamber in the Delalić et al, 16 November 1998.

ICC, because otherwise the commanders, in order to evade responsibility, may refer to the impossibility of obtaining information about the illegal behavior of their subordinates.

Criminal negligence can be in the case when the commander did not know, but "should have known" that his subordinates were going to commit, are committing or committed crimes. In this case, the chief was obliged to be aware of such crimes, checking all the necessary information that could indicate to him the possibility of crimes, and control the actions and behavior of subordinates. If he ignores this standard of conduct, he acts with gross negligence and is therefore responsible for it.[72]

We fully share the position of the ICTY, formulated in the Krnojelac and Blaškić cases, that if it is not possible to reveal the identity of the direct perpetrators of crimes by their name, it is enough to identify the unit to which the criminals belonged and show that the accused exercised effective control over this group[73]. At the same time, several chiefs may be held responsible for the same crime committed by the same person, if it is established that the perpetrator of the crime was under the command of several chiefs at the time of its commission[74]. Moreover, as pointed out by the UNO International Law Commission, the principle of responsibility of higher officials "applies not only to the immediate superior of a subordinate, but also to other higher officials in the military command system or in the state hierarchy, if appropriate criteria are met."[75]

Thus, the difference between the doctrine of the commander's responsibility and the doctrine of joint criminal enterprise, as well as cases of execution, order, planning, instigating, aiding and abetting, is that under the doctrine of the commander's responsibility, a person is not a participant in a crime and is only responsible for his own inaction, and under the doctrine of the JCE and other types of complicity, a person in one form or another participates in a crime and bears responsibility for this crime. However, the application of the doctrine of commanders' responsibility, in our opinion, is more resource-intensive and ineffective in comparison with the application of the JCE doctrine. The problem is the difficulty of proving the subjective side, the element of "knowledge" and the relationship "chief - subordinate". Our opinion is confirmed by the small number of convictions using the doctrine of commanders' responsibility in its pure form, where rare examples are

[72] See: Cassese A. International Criminal Law, 2003, p. 172.
[73] See: ICTY. Krnojelac case. Preliminary judgment of the Trial Chamber on indictment form, 24 July 2004, paragraph 217. Judgment of the Trial Chamber in the Hadžihasanović et al, 15 March 2006, paragraph 90.
[74] See: Judgment of the Trial Chamber in the Krnojelac case, 15 March 2002,paragraph 93; Judgment of the Trial Chamber in the Blaškić case, 3 March 2000, paragraph 303.
[75] See: 1996 Draft Code of Crimes against the Peace and Security of Humanity, Article 6, commentary, point 4.

demonstrated, including in the decisions of the ICTY Trial Chamber in the Strugar, Hadžhihasanović et al[76] cases and numerous convictions using the JCE doctrine, which has many of the same provisions as the command responsibility doctrine, but without the requirement to establish a chief-subordinate relationship.

In our opinion, the analysis of the actions of the Armed Forces of Azerbaijan Republic, committed in the period from 12 to 22 July 2020, shows that acts of planning, preparing, instigating, abetting, aiding, issuing criminal orders, providing and executing them, depending on the circumstances, despite the fact that they may qualify with reference to Article 38 of the RA Criminal Code, according to the rules of complicity stipulated by the national legislation, as an organizer, leader, aider and abettor, and in those rare corpus delicti where such a form of participation as an organized criminal group[77] is provided as a qualifying feature (part 3 of Article 41 of the Criminal Code RA) and the criminal association (part 4 of Article 41, Article 223 of the RA Criminal Code (Creation of a criminal association or participation in a criminal association), according to the corresponding aggravating factor, according to the aggregate of crimes, under Article 384 "Aggressive war", part 1 of the Article 387 of the RA Criminal Code "The use of means and methods of war prohibited by an international treaty in hostilities or armed conflicts", Article 390 of the RA Criminal Code "Serious violations of the norms of international humanitarian law during armed conflicts", point 13, part 2 of the Article 104 of the RA Criminal Code " Murder motivated by national, racial or religious hatred or religious fanaticism", and in some cases under Article 391 "Inaction or issuance of a criminal order during an armed conflict" is debatable.

This approach was implemented by the Investigative Committee of the Russian Federation in cases initiated under Article 357 of the Criminal Code of the Russian Federation "Genocide" regarding the events that took place in South Ossetia in 2008 and in the Southeast of Ukraine, since 2014[78]. At the same time, in both cases, the cases initially initiated on the facts of murders, subsequently, with sufficient grounds to believe that an organized group committed the crimes, were re-qualified and combined into one proceeding.

[76] See: ICTY. Judgment of the Trial Chamber in the Strugar case, 31 January 2005; ICTY. Judgment of the Trial Chamber in the Hadžihasanović et al case, 15 March 2006.
[77] A crime is recognized as committed by an organized group if it was committed by a stable group of persons who have united in advance to commit one or more crimes. An organized group is distinguished from a group of persons by prior conspiracy by signs of stability and organization.
[78] See: URL.http://sledcom.ru/cases/item/1168 (date of application 04.02.2017).

It seems that this qualification is controversial. Such forms of participation as an organized criminal group and a criminal association can be imputed, in our opinion, if war crimes are committed by individuals or organizations, and not by states or their official bodies. Moreover, we believe that the prosecution of representatives of the military-political leadership of the opposing state is currently possible only at the international level and on the basis of definitions developed by international criminal justice bodies, and qualification according to the rules of complicity stipulated by national legislation will entail an insurmountable difficulty of proving, when the process of bringing charges will be practically impossible and will turn into the plane of political accusations.

To bring the military-political leadership of the opposing side to responsibility, in our opinion, there are two mechanisms: 1) the defeat of the opposing side and bringing the war criminals to justice by the victor on the territory of the defeated side; 2) the implementation of the provisions of the JCE doctrine into national legislation, bringing national legislation in line with the Rome Statute of the ICC and establishing a procedure for proceedings in cases of war crimes on the basis of the principle of compulsory universal jurisdiction, as well as organizing interaction and cooperation between states, international and national criminal justice bodies. We will not consider military-violent scenarios, but only in order to ensure the mentioned 2nd point, and also, taking into account what seems to be of key importance, we will analyze only legal issues.

Thus, in Section XIII, Chapter 33 of the RA Criminal Code, articles on criminal responsibility for crimes against the peace and human security are highlighted, it contains 15 corpus delicti, of which 6 corpus delicti are classified as war crimes. In general, Chapter 33 of the RA Criminal Code is a kind of codification of war crimes at the level of national criminal legislation. At the same time, Chapter 33 of the RA Criminal Code contains no qualifying feature in the elements of war crimes - the commission of a war crime during an armed conflict of an international or non-international character. Regardless of the type of armed conflict, actions under Article 387 of the RA Criminal Code "Use of prohibited means and methods of warfare", Article 390 of the RA Criminal Code “Serious Violations of International Humanitarian Law during Armed Conflicts”, Article 391 of the RA Criminal Code "Inaction or Issuance of a Criminal Command during an Armed Conflict", Article 395 of the RA Criminal Code "Mercenary", Article 396 of the RA Criminal Code “Assualt on persons or organization under international protection”, Article 397 of the RA Criminal Code “Illegal use of identification signs protected by international treaties”.[79]

[79] RA Criminal Code (2003).

From the analysis of the norms of the criminal legislation of the Republic of Armenia, it follows that neither in the name nor in the content of the above offenses, such a legal term as "war crime" is used.

In addition, the legislator, making a reference to international treaty law and the codified "Hague Law", does not mention customary law. Moreover, Articles 387, 390, 397 of the RA Criminal Code, which are blanket in nature, refer to the “international treaties of the Republic of Armenia” or to the norms defining “international protection”.

However, the RA Criminal Code does not make any general reference to international treaties as a source for determining the corpus delicti. Moreover, even if such a general reference existed, such a reference norm would contradict to part 1 of the Article 1 of the RA Criminal Code, which determines that “the criminal legislation of the Republic of Armenia consists of this Code. New laws which envisage criminal liability are incorporated into the Criminal Code of the Republic of Armenia".[80] In addition, part 1 of the Article 5 of the RA Criminal Code states “It is only the criminal law that decides whether the act is criminal and punishable, as well as other criminal and legal consequences”.[81]

Thus, bringing to criminal responsibility on the basis of another normative legal act, except for the RA Criminal Code, is excluded in the Republic of Armenia.

Parts 1 and 3 of the Article 5 “Hierarchy of legal norms” of the Constitution of the Republic of Armenia (1995), taking into account the changes adopted by referendums of 2005 and December 6, 2015[82], established that the Constitution shall have supreme legal force. In case of conflict between the norms of international treaties ratified by the Republic of Armenia and the laws of the Republic of Armenia, the norms of international treaties shall be applied.

Part 3 of the Article 116 "Ratification, Suspension and Revocation of International Treaties" of the RA Constitution declares that international treaties contradicting the Constitution cannot be ratified. The Constitution does not proclaim international law as an integral part of the Armenian legislation and clearly indicates that the Constitution has supreme legal force.

[80] Part 1 of the Article 1 of the RA Criminal Code (2003).
[81] Part 1 of the Article 5 of the RA Criminal Code (2003).
[82] Constitution of the Republic of Armenian (1995).

Part 2 of the Article 5 of the RA Constitution stipulates that laws must comply with constitutional laws, and secondary regulatory legal acts must comply with constitutional laws and laws.

Strictly speaking, the RA Constitution implies that laws, other legal acts and international treaties adopted in the RA should not contradict its Constitution. Thus, in case of a conflict between a domestic law and an international treaty obligation, the latter does not necessarily override the former. Rather, the treaty regulates a specific situation to which both the treaty and the law can apply. Domestic law remains in force and may operate in other circumstances, when there are no applicable provisions of international treaties.

As for the "generally recognized principles and norms of international law", the RA Constitution contains no provisions that could be interpreted as giving such principles and norms an advantage over domestic laws.

In addition, the RA Criminal Code does not reproduce those provisions of the RA Constitution that establish the superiority of an international treaty over the domestic law. If the provision of the RA Constitution on the overriding force of an international treaty was reproduced in the RA Criminal Code, then due to only partial incorporation of war crimes into domestic law, the criminal justice bodies would face a gap in legislation.

To eliminate this legislative gap, one can refer, for example, to Additional Protocol I (1977) and qualify the crime as a "war crime", but AP I (1977) does not contain the types and amounts of punishment. Thus, the introduction of an amendment to the RA Criminal Code referring to the relevant international treaties in search of elements of a war crime is one of the ways out of the current situation, but after that it will be necessary to turn to the RA Criminal Code again to choose a punishment.[83]

Thus, the list of war crimes in the RA Criminal Code is significantly limited, and the above circumstances testify to the incompleteness and fragmentation of Section XIII "Crimes against Peace and Human Security" of the RA Criminal Code and necessitate the elimination of illogicality, incompleteness and insufficient consistency.

The existing situation can change dramatically if the Republic of Armenia brings the legislation on war crimes in line with modern international requirements.

[83] Tuzmukhamedov B.T., Implementation of the International Humanitarian Law in the Russian Federation. Actual problems and comments // International Journal of the Red Cross. 2003. P. 177-190.

So, if a political decision is made to ratify the Rome Statute of the ICC, then it will be necessary to amend the current legislation of the Republic of Armenia. At the same time, in our opinion, special attention should be paid to the implementation of the norms of customary international law in the field of combating war crimes.

In addition, the introduction of appropriate amendments to the RA Criminal Code and other laws will provide the Republic of Armenia with the ability to carry out criminal prosecution for war crimes itself, minimizing the cases when the situation, according to the principle of complementarity, can be accepted for the ICC. However, national implementation legislation is necessary for those provisions of treaties that are not in themselves executive and therefore require legislation to be applied.

Currently, about 40 states have adopted implementing legislation under the Rome Statute of the ICC, including Australia, Argentina, Belgium, Great Britain, Germany, Georgia, Spain, Canada, Lithuania, Malta, the Netherlands, New Zealand, Portugal, Uruguay, Finland, Switzerland, South Africa and several other countries. Several dozen more states that have ratified the Rome Statute of the ICC are in the process of developing and adopting the necessary acts for implementation.

Each state party to the Rome Statute of the ICC is free to choose the ways of implementing its treaty obligations as long as it acts in good faith and the result of these actions demonstrates the ability to fulfill all obligations under the Rome Statute of the ICC.

In total, when implementing the Rome Statute of the ICC, the participating states have to solve three main blocks of issues: 1) elimination of contradictions between the Rome Statute of the ICC and the constitutional acts of the state; 2) bringing the national criminal legislation in line with the requirements of the Rome Statute of the ICC; 3) creation of a legal basis for interaction with the ICC.

As the existing practice of implementation shows, each of the above tasks can be solved in different ways, based on the legal traditions of a particular country or the simple discretion of the legislator.[84] For example, the Republic of Armenia signed on October 1, 1999, but has not yet ratified the Rome Statute of the ICC for political reasons.

[84] Dodonov V., edited by Bogush G.I., Trikoz E.N., Models of implementation of the Roman Statute of the International Criminal Court in national legislations of foreign states. International Criminal Court: problems, discussions, search for solutions. M.: European Commission, 2008, pp. 76-84.

Despite the fact that at the moment the Rome Statute of the ICC has been ratified by 124 states, nevertheless, there is a tendency for a number of states to refuse to ratify the Rome Statute of the ICC, which consider this international body of justice to be politicized, protecting exclusively the interests of a number of Western powers.

For example, guided by national interests, more than 40 of the 193 UN member states refused to sign the Rome Statute of the ICC, including China, Israel, India, Iran, about 30 other states have signed it, but have not ratified it, including USA, etc[85]. The Gambia, South Africa announced their withdrawal from the ICC in 2016, Burundi, Kenya, the Philippines announced their imminent withdrawal from the ICC, and on November 16, 2016, in accordance with Decree of the President of the Russian Federation No. 361, Russia sent notification to the UN Secretary General of the intention not to be a party to the Rome Statute of the ICC, which was signed on behalf of Russia on 13 September 2000.[86]

In our opinion, the Rome Statute of the ICC will not be ratified by the Republic of Armenia in the near future, however, we are convinced that this is not an obstacle to the consistent implementation[87] of the provisions of the ICC in the absence of a decision to ratify the Rome Statute of the ICC and the inclusion of new elements of war crimes in the RA Criminal Code with a view to bringing national legal norms in line with the requirements of conventional legislation and eliminating gaps in the criminalization of war crimes. However, it is rather difficult to determine a specific way of implementing war crimes in Section XIII of the RA Criminal Code (2003).

It seems that the most acceptable in this case is a mixed approach of general reference combined with detailed criminalization of some of the most serious war crimes. In this case, the general reference refers to crimes that are not reflected in this criminalization. With regard to the way in which customary norms of international humanitarian law, which provide for responsibility for war crimes, are implemented into the national criminal law, general transformation is the only means of incorporating customary rules and, from the point of view of legal technique, since the very moment of emergence of a customary rule is usually extremely difficult to define[88].

[85] URL: http://bbc.com/russian/features-38001948
[86] URL: http://www.mid.ru/ru/press_service/spokesman/official_statement//asset_publisher/t2GCdmD8RNIr/
[87] The term "implementation" means "implementation in accordance with a certain procedure", "providing a practical result and actual implementation by specific means."
[88] Vinokurov A.Yu. International -legal, theoretical and organizational basis for the criminal prosecution of war crimes against civilian population. P.90.

In our opinion, with a mixed approach, it will be more expedient and rational, depending on the design of a particular rule, to apply all methods of implementing the norms of international humanitarian law, including customary norms: incorporation, transformation, general, private or specific reference.

The use of such a "hybrid" method of implementation will undoubtedly entail a revision of the established legal and technical traditions of the Armenian criminal legislation, but at the same time it will allow bringing the elements of war crimes of the RA Criminal Code in line with the global trend of design and harmonization with the provisions of Article 8 of the Rome Statute of the ICC – "War Crimes ", and will also allow to more fully implement international obligations regarding the application of International Humanitarian Law norms.

Taking into account the fact that war crimes are recognized as independent crimes, it seems necessary in the structure of Section XIII of the RA Criminal Code "Crimes against the Peace and Human Security" to be included in a separate chapter and the specified section should be reworded.

At the same time, it would be most expedient to base this section on a three-stage division of the object of the crime and combine international crimes in Section XIII of the RA Criminal Code, taking into account the generic object, and then group them in three separate chapters by specific object, separating them from each other by the direct object of the criminal encroachment. "Crimes against Peace", "Crimes against humanity", "War crimes" and, by a mixed method of implementation, reflect in it the norms of customary international humanitarian law providing for responsibility for war crimes, as well as 50 different corpus delicti of war crimes, taking into account their list given in Article 8 of the Rome Statute of the ICC.

In the proposed edition, the title of the section, three chapters and articles will clearly define the generic, specific and immediate objects of crimes.

In addition, it is necessary to incorporate Article 25 of the Rome Statute of the ICC and, in relation to war crimes, develop the types and forms of complicity to the provisions of the JCE doctrine and other types of complicity, i.e. criminalize such methods of participation in the commission of crimes when several people have a common criminal purpose, which is realized either jointly or by some members of this group, in accordance with the practice of international criminal justice bodies. Moreover, in order to determine the circle of persons subject to responsibility, it is necessary to develop an algorithm according to the vertical principle.

Thus, in order to bring the military-political leadership of the opposing side to justice, it is necessary to establish a military-political hierarchical connection in the state, i.e. to establish a connection between persons who, using their own power, directing and implementing state policy, in order to fulfill their jointly developed strategic criminal plan, transmit their orders down through the military hierarchy of officials at all levels along the chain of military instances to the perpetrators of the crime and are connected with many crimes committed in different regions of the armed conflict (since it is not excluded that individuals commit a single crime, for mercenary and other personal motives). It is also necessary to establish this connection in the reverse order, i.e. to establish the perpetrators of the crime, and if it is not possible to reveal the identity of the direct perpetrators by name, it is enough to determine the unit in which he serves and rise through the chain of military instances through different levels of the military hierarchy to the political leadership of the country (soldier, leader of squad, platoon, company, battalion, regiment, (brigades), divisions (corps), head of directorate of certain types of troops, commander of the branches and types of troops, Deputy – Chief of General Staff, Chief of General Staff, Minister of Defense, etc.).

For the implementation of the JCE doctrine, the starting point is the presence of a strategic criminal plan by the military-political leadership of the country, as evidenced by: systematic statements, imbued with military rhetoric, by persons engaged in political activities and holding government positions; diplomatic demarches against another state or other administrative entity; contrary to existing treaties, the buildup of the armed forces; uncontrolled acquisition of offensive weapons; accumulation of weapons and ammunition; food stockpiling; intensification of intelligence against another state; frequent command and staff exercises to deploy offensive actions; specific actions to use military force against another state or other administrative entity; reconnaissance in force; approval of military action plans, etc. Contributing to the achievement of the common goal of the JCE through war crimes and making a significant contribution to the JCE through active instigating may indicate an unwillingness to prosecute war crimes perpetrators, encouraging such persons in the form of representation to military awards, promotions and other measures aimed at further stimulating the commission of crimes.

As for the problems of the criminal procedure for the investigation of war crimes committed by the military-political leadership of the Azerbaijan Republic, it should be noted that at present one of the least developed problems in the theory of international law is the problem of criminal procedure in

cases of international crimes, including war crimes and is among the least developed.[89] To date, the doctrine of international law does not provide a holistic understanding of the problem of the criminal procedure for the investigation of war crimes committed by the opposing parties to an armed conflict, and legislative and law enforcement practice is in dire need of the development of theoretical provisions on the legal regulation of the grounds and procedure for the production of investigative and other procedural actions during the investigation of war crimes. A fundamental feature of the criminal procedure for investigating such crimes is that the persons who commit war crimes belong to the opposing sides of the conflict, and in order to establish the involvement of specific military personnel (pilots, artillerymen, snipers, etc.), the opposing side, who gave and carried out orders on airstrikes, shelling and the destruction of civilians, other war crimes and proving their guilt, etc., investigation is required (including such specific ones as interrogation of representatives of the opposing side of the armed conflict, analysis of radio communications, etc. .) and procedural actions on the territory and with the participation of the opposing side.

It seems that the national criminal justice authorities, guided only by the provisions of the national CPC, without taking into account international legal norms and mechanisms for investigating such crimes, without conducting investigative and procedural actions on the territory and with the participation of the opposing side, in conditions of an armed conflict or the absence of a truce, will not be able to effectively use the potential of the arsenal of the criminal process and ensure the investigation and the possibility of bringing to criminal responsibility the representatives of the opposing side responsible for war crimes, unless, of course, consider military-violent scenarios, which are purely hypothetical in nature[90].

It is indisputable that national law enforcement agencies should extend the operation of criminal laws in relation to persons who have committed a crime also outside the state[91] and exercise their

[89] Lobanov S.A., Criminal proceedings in cases on war crimes (International – legal aspects). M., 1997, P. 12.

[90] For example, in 1942, at the most difficult time for the USSR, the All-Union Extraordinary Commission was created to investigate the atrocities of the fascist invaders. This happened at a time when the Germans were not far from Moscow and the radical turning point in the war had not yet come. In 1942, no one thought about conducting an international trial of the main Nazi criminals and creating international investigative bodies. However, the Soviet Union and other countries of the anti-Hitler coalition, including the United States, collected evidence of the fascist atrocities. This also required political will. So W.Churchill insisted that German war criminals be hanged without trial, I.V. Stalin demanded that they be tried. F. Roosevelt, who initially held a neutral position, then agreed with the position of I.V. Stalin. After the end of the Second World War, the International Nuremberg Tribunal was formed. The materials that served as the evidence base for the Tribunal were collected for four years - from 1942 to 1945.

[91] Part 3 of Article15 of the RA Criminal Code "Operation of criminal laws against persons who have committed a crime outside the Republic of Armenia." Foreign citizens and stateless persons who do not permanently reside in the Republic of Armenia, who have committed a crime outside the Republic of Armenia, are subject to criminal liability under the Criminal Code of the Republic of Armenia if they have committed: 1) crimes provided for by an international treaty of

criminal jurisdiction against representatives of the opposing side on the basis of the principle of passive citizenship, which implies the extension of the criminal law norms of the state depending on the citizenship of the victim of the crime or the principle of protection, which presupposes the extension of the criminal law norms of the state, depending on whether the interests of the state are violated and whether the security of the state is affected.

At the same time, after the initiation of criminal cases of this category on the principle of extraterritorial[92] criminal jurisdiction, at the stage of investigation and presentation of evidence to representatives of the opposing side, the national law enforcement agencies are faced with the problem of limiting their powers within the framework of the national CPC. At the same time, the very fact of the initiation of a criminal case against representatives of the opposing side does not yet indicate that any of them will be brought to criminal responsibility. This problem goes beyond the capabilities of the national CPC or giving legal force to international treaties within the RA legal system.

The evidence of the ineffectiveness of the investigation of war crimes only on the basis of the national Criminal Procedure Code may be those initiated against unidentified servicemen of the Armed Forces of Azerbaijan Republic and subsequently suspended under point 5 of part 1 of the Article 31 of the RA Criminal Procedure Code ("insurmountable circumstances [force majeure] arise to temporarily block any further proceedings") of more than 2,000 criminal cases, as well as a criminal case initiated by the Investigative Committee of Russia on 08.08.2008 on the principle of extraterritorial criminal jurisdiction (part 3 of the Article 12 of the RF Criminal Code), on the facts of war crimes committed in South Ossetia. The materials of the criminal case in 400 volumes were not transferred to the court of general jurisdiction of Russia, but were sent to the ICC and the ECHR, where the victims turned. After a long review at the ICC, with the approval of the Pre-Trial

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the Republic of Armenia; 2) grave or especially grave crimes directed against the interests of the Republic of Armenia or the rights and freedoms of citizens of the Republic of Armenia.

[92] A State's exercise of criminal jurisdiction over individuals is based on a number of basic principles. The main ones are territorial, personal national (the principle of active citizenship), passive personal (the principle of passive citizenship), the principle of protection (security or real) and universal principles. The territorial principle - depends on the place where the crime was committed and presupposes the full exercise of the state's criminal jurisdiction over all persons who have committed a criminal offense and who are within its territory; personal national (the principle of active citizenship) - depends on the citizenship of the offender and involves the extension of the criminal law norms of the state to its citizens, regardless of their location; passive personal (the principle of passive citizenship) - depends on the citizenship of the victim of the crime; the principle of protection (security or real) - depends on whether the interests of the state are violated and whether the security of the state is affected; universal principle - depends on whether the violation is viewed as a threat to all of humanity.

Chamber, the materials were accepted for investigation by the ICC Prosecutor only on 26 January 2017.

It seems that the materials of the criminal case initiated by the Investigative Committee of Russia on the facts of war crimes committed in the Southeast of Ukraine, the volume of which is more than 5500 volumes, will be sent to the ICC and the ECHR, as it happened with the previous case.

At the same time, by the Investigative Committee of Russia[93], on the basis of the provisions of the Code of Criminal Procedure of the Russian Federation, against a number of high-ranking officials of Ukraine were issued orders to prosecute them, to choose a preventive measure in the form of detention, to be put on the wanted list, including to the international.[94]

Nevertheless, it seems that the prosecution of representatives of the military-political leadership of another state is currently possible only at the international level. Moreover, the lack of the ability to conduct an investigation on the territory of the warring party to such an extent that would allow ensuring the fulfillment of the tasks of the criminal process, gives rise to a lack of objective evidence of the commission of a war crime by a specific person.

In addition, for those uninterested in an objective investigation of the opposing side of the armed conflict, this circumstance creates an opportunity for unsubstantiated and sometimes ridiculous accusations of bias in the investigation based on the unilateral collection of evidence, which is fraught with an increase in the number of unsolved war crimes, the perpetrators of which remained unpunished, but also by providing an unlimited resource for political speculation to justify any irresponsible political and adventurous military action.

The right, and in some cases the obligation of states to suppress war crimes on the basis of the principle of universal jurisdiction, also determines the peculiarity of the criminal procedure for investigating war crimes.

Strictly speaking, cases in relation to war crimes may be located not only in the jurisdiction of the national courts of a state, but also in the jurisdiction of the national courts of other states, and from the moment of establishment also in the ICC.

[93] URL: http:/www.russian.rt.com/article/35732#ixzz3B1znNc00
[94] URL: http://www.sledcom. ru/cases /item/1168/

However, the jurisdiction of the ICC over war crimes under Article 8 of the Rome Statute of the ICC extends when committed as part of a plan or policy or when such crimes are committed on a large scale.

At the same time, regardless of the fact of ratification by the state of the Rome Statute of the ICC, the UN Security Council, on the basis of Article 41 of the Charter VII of the UN Charter and in accordance with Article 13 (b) of the Rome Statute of the ICC, may refer the situation for consideration to the ICC Prosecutor.

For example, despite the fact that Libya neither ratified the Rome Statute of the ICC (which is an international treaty) nor participated in it, by virtue of which the ICC did not have jurisdiction over the leaders of Libya[95], on June 27, 2011 the Pre-Trial Chamber of the ICC satisfied the motion of the ICC Prosecutor and decided to issue warrants for the arrest of M. Gaddafi, i.e. in relation to the incumbent head of state, who is under immunity from criminal prosecution, his son Seyful-Islam Gaddafi and the head of Libyan military intelligence A. Al-Senussi.

This decision of the ICC was preceded by the UN Security Council Resolution No. 1970 of February 26, 2011, according to point 4 of which, the issue of the situation in the Libyan Arab Jamahiriya from February 15, 2011 was referred to the ICC Prosecutor, and paragraph 5 obliged the Libyan authorities cooperate fully with the Court and the Prosecutor and provide them with all necessary assistance in the implementation of the said resolution. Although the Resolution recognized that states that are not parties to the Rome Statute of the ICC are not bound by it, it nevertheless urged all states and relevant regional and other international organizations to cooperate fully with the Court and the Prosecutor.

As for the principle of applicability of universal jurisdiction, this principle is vividly illustrated by the case of A. Eichmann, the head of the Nazi German Gestapo Department for Jewish Affairs and Emigration, who was personally guilty of organizing the extermination of millions of Jews. It was in this case that the Israeli Supreme Court ruled that the prosecution of those responsible for war crimes, crimes against humanity and genocide is universal. And the state exercising universal jurisdiction acts as an "agent of the world community" and acts with the aim of maintaining peace and general security.

[95] As, in accordance with the general rule, treaty does not create obligations or rights for a third state without its consent, and Libya did not give such consent.

The use of universal jurisdiction in relation to war crimes is evidenced by the judicial practice of various countries of the world. So in 1994, R. Sarić, a Bosnian Serb, who was in Denmark with the aim of obtaining political asylum, was sentenced by a Danish court to eight years in prison for the murder and torture of prisoners in a Bosnian camp. Moreover, the court qualified his actions as serious violations of Articles 129 and 130 of the III Geneva Convention (1949), Articles 146 and 147 of the IV Geneva Convention (1949) in conjunction with Article 8 (5) of the Criminal Code of Denmark.

In 1997, the Supreme Court of Bavaria (FRG) found Bosnian Djajic guilty of fourteen counts of murder, based on point 1 of paragraph 6 of the Criminal Code of the Federal Republic of Germany ("Murder") and Article 3, 146, 147 IV Geneva Convention (1949). In 1997, the Supreme Court of the Netherlands convicted the Bosnian Serb D. Knežević for war crimes committed against Muslims in Bosnia and Herzegovina. In 1997, the Military Tribunal of Lausanne (Switzerland) sentenced Rwandan citizen F. Nyonteze to life imprisonment, who was found guilty of war crimes committed in Rwanda in 1994. The Military Court of Cassation of Switzerland confirmed the sentence.

In 2004, the District Court of Rotterdam (Netherlands) convicted a citizen of the Democratic Republic of the Congo for the torture he committed against citizens of the Democratic Republic of the Congo on the territory of this country.

In 2005, the District Court of The Hague convicted two former Afghan generals of the Afghan secret police for war crimes and torture committed in the 1980s in Afghanistan against Afghan citizens. In 2005, a court in Great Britain sentenced Afghan field commander F. Zardad to 20 years in prison for committing acts of torture and taking hostages of Afghans in Afghanistan in the mid-90s. In 2005, a judge in Great Britain ordered the detention of former Israeli General D. Almog in connection with his participation in serious violations of the Geneva Conventions (1949) in the Gaza Strip.

The admissibility of the application of universal jurisdiction is also confirmed by the case-law of the European Court of Human Rights (ECHR), which was reflected in a number of its decisions. Thus, the Decree of the ECHR (2007) in the case "Jorgić v. Germany" recognized as legitimate the conviction by a German court to life imprisonment of a citizen of Bosnia and Herzegovina of Serbian origin Jorgić for committing acts of genocide in 1992 in the Doboj region on the territory of Bosnia. The ECHR judgment of 2009 in the case "Ould Dah v. France" recognized as lawful the conviction in 2005 by a French court to 10 years in prison and a fine of 15,000 euros decide to a

Mauritanian citizen - an intelligence officer of the Mauritanian army for committing in Mauritania in the period 1990-1991 acts of torture against military personnel accused of preparing a coup d'etat[96].

The case of A. Pinochet, the arrest of the head of the Republic of Chad in Senegal, the issuance of a warrant for the arrest of the Minister of Foreign Affairs of the Republic of the Congo by a Belgian judge, a unanimous decision from May 29, 1998 the French National Assembly regarding the draft law according to which France recognizes that in 1915 the Armenian genocide took place[97].

Thus, the jurisprudence of different countries of the world and the practice of international cooperation in the field of criminal prosecution of perpetrators of war crimes testifies to the use of the principles of extraterritorial and universal jurisdiction, which radically changes the very nature of investigation, criminal prosecution, judicial proceedings and its international legal basis. At the same time, of course, universal jurisdiction presupposes the use by states of internal mechanisms to prosecute criminals in accordance with their domestic criminal and criminal procedure laws.

The ICC is called upon to play a special role in overcoming the practice of impunity for persons guilty of committing war crimes, as a "court of the last level"[98]. The ICC potentially has jurisdiction over war crimes cases.

It seems that for the Republic of Armenia, which is interested in investigating war crimes committed by the armed forces of Azerbaijan, one of the best options would be the ratification of the Rome Statute of the ICC and active participation in the activities of the ICC. The ratification of the Rome Statute of the ICC will entail the need to amend the current legislation by introducing the corresponding prescriptions into national legislation. However, the decision to ratify is extremely difficult, requires political will and is unlikely to be resolved in the near future.

The foregoing predetermines the content of the proposed by us possible criminal procedure for the investigation of war crimes committed by the warring parties of the armed conflict, and the reflection of a number of essential principle procedural provisions and norms of the Rome Statute of the ICC in the RA Criminal Procedure Code. The solution to this problem is represented in the

[96] Volevodz A.G., Criminal case on the war crimes in Ukraine: based on which it was initiated in Russia? // Criminology: yesterday, today, tomorrow. 2014. N3(34). Pp. 52-57.
[97] Le Monde. 24 February. 2000. P.34.
[98] The powers of the ICC and the procedure for its work are determined by the Rome Statute of the ICC, Elements of Crimes, Rules of Procedure and Evidence, Rules of Court, Regulations of the Secretariat, Agreement on Privileges and Immunities, Financial Rules, etc.

projection of these provisions on the RA Criminal Procedure Code and the development of a corresponding algorithm of actions. In this case, the national criminal justice authorities need to proceed from the fact that, firstly, the evidence collected during the investigation in the ICC can be considered in the future only as documents and is unlikely to be considered as direct evidence, especially if the Republic of Armenia will not be a party to the international criminal process, if such will take place, and secondly, in order to fix the collected evidence, the national criminal justice authorities need to use technical means as much as possible[99].

Such an approach will ensure in the future, on the one hand, effective investigation of war crimes committed by representatives of the opposing side and criminal prosecution of those responsible for their commission, and on the other hand, proceeding from the national interests of the RA and not allowing interference in the internal affairs of the RA, it will create an opportunity conduct their own investigation[100] of crimes committed by their own military personnel, eliminating the possibility or minimizing situations in which the ICC, according to the principle of complementarity, could accept for proceedings and extend its jurisdiction to a particular criminal case, thereby limiting state sovereignty and creating a threat to the country's national security.

According to the provisions of Article 1 of the Rome Statute of the ICC, the Court shall be a permanent institution and shall have the power to exercise jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute, and shall be complementary to national criminal jurisdictions".

It is up to the national criminal justice authorities to organize the investigation of war crimes at the national level and the collection of evidence-based information on war crimes committed by the opposing side of the armed conflict, and the ICC only complements to the national justice authorities, but does not act in their place.

Consequently, the ICC is in principle empowered to consider the case only in cases where the national authorities do not conduct appropriate investigations or conduct, in order to protect the

[99] Volevodz A.G. Speech at a meeting of the Scientific Advisory Council of the Investigative Committee at the Prosecutor's Office of the Russian Federation // Bulletin of the Investigative Committee of the Russian Federation. 2009. No. 3 (5). P. 65-72
URL:http://www.old.mgimo.ru/files/145637/109d12f01d26f2fd4037dd39e707f457.pdf

[100] This will indicate that the national bodies of the Republic of Armenia duly relate to the observance of the norms of international law governing the fundamental rights and freedoms of a person, regardless of his nationality, and will serve as one of the arguments on the basis of which Az.R may be denied satisfaction complaints both to the ECHR and, possibly, to the ICC.

person concerned from criminal liability for war crimes (paragraph 3 of Article 20 of the ICC Charter).

Thus, based on the above, the list of war crimes in the RA Criminal Code is significantly limited, and the above circumstances indicate the incompleteness and fragmentation of Section XIII "Crimes against the Peace and Human Security" of the RA Criminal Code and necessitate the elimination of illogicality, incompleteness and insufficient consistency.

The existing situation can change dramatically if the Republic of Armenia brings the legislation on war crimes in line with modern international requirements. So, if a political decision is made to ratify the Rome Statute of the ICC, it will be necessary to amend the current legislation of the Republic of Armenia.

In order to bring the military-political leadership of the Republic of Azerbaijan to responsibility for committing war crimes, due to legal certainty and evidentiary prospects, it is necessary to introduce appropriate amendments to the RA Criminal Code, RA Criminal Procedure Code, RA Code of the Execution of Criminal Penalties and other laws, which will provide the Republic of Armenia with the opportunity to carry out criminal prosecution for war crimes, minimizing the cases where a situation, according to the principle of complementarity, can be accepted for the production of the ICC.

However, national implementation legislation is necessary for those provisions of treaties that are not in themselves executive and therefore require legislation to be applied.

It is necessary, on the basis of a three-stage division, taking into account the generic object, as part of Section XIII of the RA Criminal Code "Crimes against the Peace and Human Security", to form three separate chapters on the specific object, "Crimes against Peace", "Crimes against Humanity", "War Crimes", separating the crimes within each chapter from each other according to the direct object of the criminal encroachment and, for example, in the chapter "War Crimes" on the mixed mode of implementation, reflect both the norms of customary international humanitarian law providing for responsibility for war crimes and 50 different corpus delicti with taking into account their list given in Article 8 of the Rome Statute of the ICC, and in the chapter "Crimes against Humanity" - crimes taking into account their list given in Article 7 of the Rome Statute of the ICC, etc. It is also necessary to adopt the positive experience of international criminal justice regarding the institution of complicity, the JCE doctrine and the doctrine of responsible commanders, and

bring the provisions of the national CPC on the conditions of acceptance for production and the procedure for investigating war crimes in accordance with the procedure for investigating war crimes provided for by the Rome Statute of the ICC.

It seems that one of the best options for the Republic of Armenia will be the ratification of the Statute, signed on October 1, 1999, and active participation in the activities of the ICC. It is necessary already today, in the absence of a decision to ratify the ICC Statute, in accordance with Artcile 88 of the ICC Statute, stating that the participating States ensure the existence of procedures envisaged by their national law for all forms of cooperation with the ICC, begin lawmaking activities to provide legal support for the investigation of war crimes in the legislation of the Republic of Armenia, which provides for the intensification of work on the implementation of the provisions of the Statute ICC, preparation of draft laws on introducing amendments and additions to the legislation of the Republic of Armenia aimed at ensuring cooperation between Armenia and the ICC, and bringing the legislation of the Republic of Armenia in line with the Rome Statute of the ICC, eliminating the gaps in the RA Criminal Procedure Code, ensuring the possibility of independent investigation of war crimes falling under jurisdiction of the ICC.

With this approach, the Republic of Armenia, by virtue of the principle of pacta sunt servanda (i.e., the principle of good faith fulfillment by the state of its obligations under the relevant international agreement, which is stipulated in Article 26 of the Vienna Convention on the Law of Treaties of 1969), taking into account the fact that the grounds for the exercise of universal jurisdiction over war crimes are also present in customary law[101], has every legal basis to initiate criminal proceedings on the facts of war crimes, including committed on the territory of the Republic of Artsakh and without any bilateral agreements or treaties with the Republic of Artsakh, as an act of goodwill in the fight against war crimes, with the consent of the state authorities of the Republic of Artsakh, capable of exercising effective control, maintaining law and order and independently conducting effective investigations , in general order to investigate cases in the territory of the Republic of Artsakh, on the principle of in absentia (i.e. in the absence of the suspect or accused in the territory of the state conducting the criminal case).

[101] Treaty law covers only serious violations; customary law covers all the violations of laws and customs of warfare that are war crimes.

While there are no such legal mechanisms, the administration of justice against representatives of the military-political leadership of the Republic of Azerbaijan for committing crimes against the peace and security of mankind remains only a subject of academic theorizing.