War crimes in Donbas. Challenges of holding of perpetrators to account

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Introduction

This publication is a continuation of the anthology "Typology of Crimes Committed in Donbas from the Point of View of International Law and the National Legislation of Ukraine and Russia", published in 2019 in the framework of CivilMplus platform's activities.

The central theme of both collected works is an analysis of the existing mechanisms, procedures and practices for prosecuting persons who have committed war crimes or crimes against humanity in the context of the armed conflict in the Donbas, which began in 2014.

Both Russia and Ukraine have ratified all four of Geneva Conventions, as well as both of their Additional Protocols. Both Russia and Ukraine signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968.

These and other international obligations oblige Russia and Ukraine, like other countries, to expose and prosecute regardless the statutory limitations those responsible for serious violations of international humanitarian law (IHL), such as killing of civilians, torture or inhuman treatment, taking and killing of hostages, deliberate infliction of severe suffering or heavy bodily damage and other crimes that are qualified as "war crimes" or "crimes against humanity".

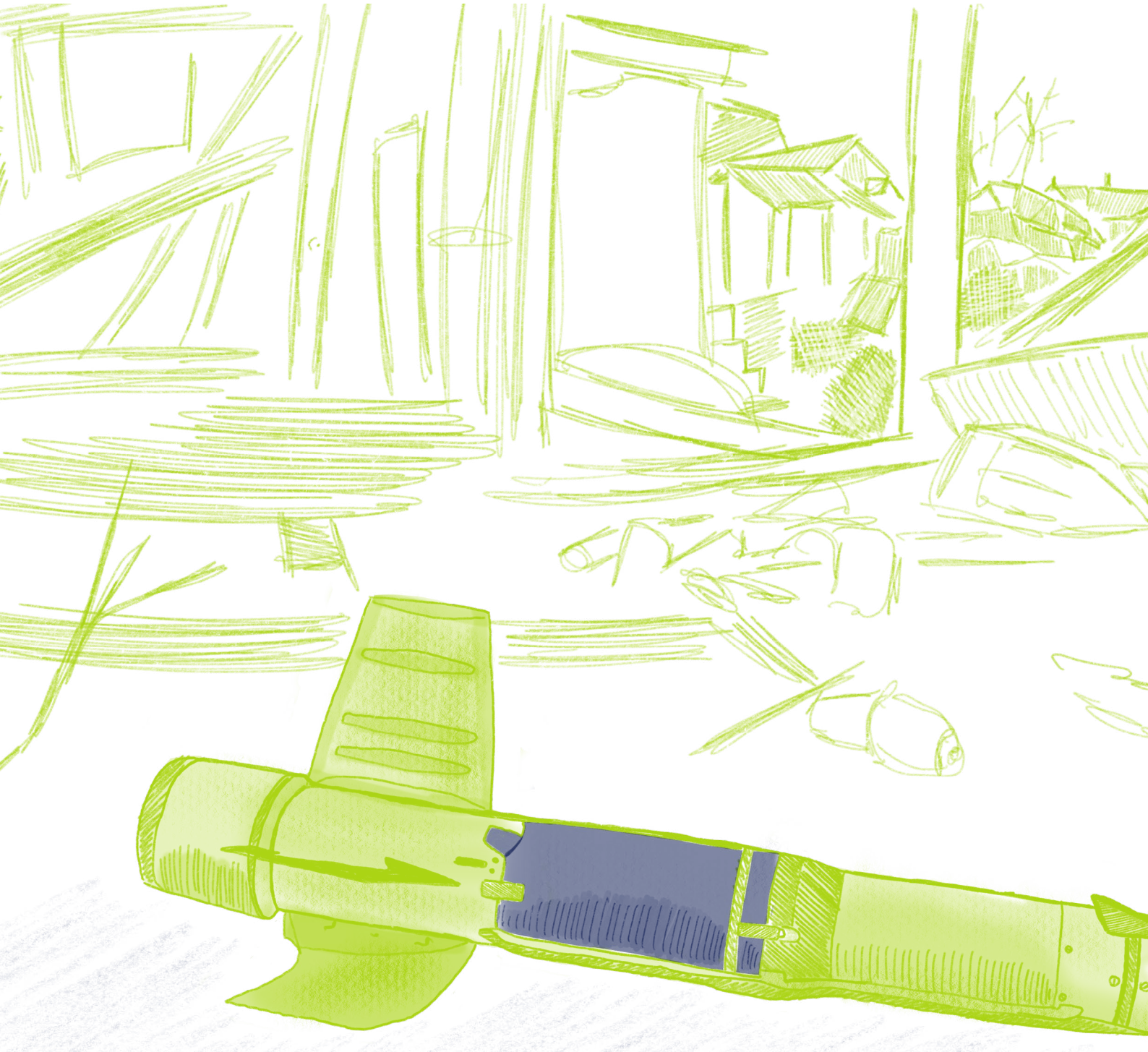
This is the position of the modern international community. Even if today there is no possibility of bringing the perpetrators to justice, history knows many examples when, over the years, the situation changed and the person who committed the crime received their punishment.

The primary obligation to prosecute war crimes perpetrators lies with states. And only in case the state does not want or cannot objectively prosecute the suspect, international mechanisms are activated.

The articles of the collected works are devoted to the features of the investigation of war crimes in Ukraine in the context of an armed conflict in Donbas, the norms of Russian national legislation in terms of holding Russian citizens accountable for violating IHL, overviewing of ECHR decisions regarding war crimes, the mechanism of universal jurisdiction as one of the possible ways to condemn military criminals.

Standing alone there is a publication that provides an overview of the situation with investigation by the Russian state of large-scale and systematic crimes committed by representatives of state power structures during the armed conflict in the Chechen Republic in 1999–2005.

1. Features of the investigation of military crimes committed by representatives of illegal armed formations battling on the side of so called "LPR" and "DPR"



Qualification of war crimes in the national legislation of Ukraine

In the course of the armed conflict in eastern Ukraine, those responsible for the majority of war crimes and crimes against humanity are now able to avoid prosecution.

There are many reasons for this, among which are the impossibility to carry out investigation in the temporarily occupied territories, the lack of physical ability for law enforcement authorities to detain suspected persons in separate areas of Donetsk and Luhansk regions (SADLR) or at the territory of the Russian Federation (RF), and the lack of knowledge in the field of international criminal law among judges, prosecutors and investigators.

Among other things, this state of affairs is due to the inconsistency of the national legislation of Ukraine regarding criminal liability with the provisions of international criminal and humanitarian law.

Currently, liability for acts that are recognized as war crimes under international law is provided for in article 438 of the Criminal Code of Ukraine "Violation of the laws and customs of war". Although this norm is outdated, not thorough and does not cover all varieties of war crimes provided for in Article 8 of the Rome Statute (as a conditional standard), it is still valid and should be applied. However, only once in a national judicial practice there was a verdict passed under this article – on June 1, 2017, the Slavianks City Court sentenced a citizen of Ukraine to 10 years in prison for cruel treatment of prisoners of war, referring to the Geneva Conventions for the Protection of War Victims of 1949. At the same time, the convict was also found guilty under the Article 258–3, "Establishment of a terrorist group or terrorist organization," which is a more common practice in qualifying crimes committed during an armed conflict.[1]

From 2014 to 2018, an anti-terrorist operation took place in the war zone; Ukrainian law enforcement agencies acted within the framework of the rules on anti-terrorist activities, therefore, almost all crimes in the conflict zone, which had signs of a military ones, were qualified as terrorist acts. Thus, the inaccurate legal assessment of the events in 2014, the inconsistency of the provisions of the Criminal Code of Ukraine with modern international law and the trends in its implementation in national legal systems in terms of criminal liability for so-called international crimes, are some of the reasons why the perpetrators did not receive a real and adequate punishment for war crimes.

In order to ensure the full implementation of the provisions of international criminal and humanitarian law in the aspect of criminal prosecution of international crimes, as well as to ensure the fulfillment of international obligations to prevent legal and actual impunity for the commission of such crimes, on December 27, 2019, the draft law No. 2689 was registered in the Verkhovna Rada of Ukraine.[2]

This draft law provides for amendments to the Criminal Code of Ukraine, in particular, the introduction of the principle of universal jurisdiction in relation to crimes of aggression, genocide, crimes against humanity and war crimes. This principle ensures that legislation on such criminal liability does not depend on the place of the crime, citizenship, permanent place of residence of the suspect/victim or damage to the national interests of the state.

It is also proposed to supplement the Criminal Code with articles covering all types of war crimes provided for in the Article 8 of the Rome Statute, as well as other serious violations of the Geneva Conventions of 12 August 1949 on the protection of war victims and their Additional Protocols.

As the experience of other countries shows, the ICC focuses only on top military leaders and officials, the so-called big fish, therefore, the law enforcement agencies of Ukraine, national courts must have all the appropriate legal grounds for the proper qualification and criminal prosecution of those guilty of war crimes, while also ensuring compliance right to a fair trial of victims.

1 www.reyestr.court.gov.ua/Review/66885637

2 http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804

An important addition is the criminal responsibility for "events of the past," which are a crime under international law, but not recognized as crimes under national law, as provided for in the Final Provisions of the Criminal Code.

Currently, the profile Committee of the Verkhovna Rada of Ukraine on law enforcement recommends that, based on the results of the consideration of the draft law by people's deputies in the first reading, it should be taken as a basis.

Features of trial in absentia in Ukraine

In 2014, a criminal procedure of trial in absentia was introduced in Ukraine, which was regulated by the rules amended in the Criminal Procedure Code (CPC) of Ukraine, in particular, the chapter 24-1. According to Article 297-1, a special pre-trial investigation can be applied if the suspect a) is hiding from the investigating authorities and the court with the aim of evading criminal liability and b) is put on an interstate and/or international wanted list. However, as practice has shown, achieving the second point is not so simple.

From the response of the General Prosecutor's Office of Ukraine (outgoing of 10.01.2019 No. 19/4-33вих.19 at the request of the Luhansk Regional Human Rights Center "Alternative")

"In all criminal proceedings involving citizens of the Russian Federation, the Prosecutor General's Office of Ukraine sent orders to put the accused on the international wanted list. However, Interpol in all cases refuses to put them on the International wanted list on the basis of Article 3 of the Statute of the International Criminal Police Organization, according to which it is strictly forbidden to carry out any interference or action in cases of a political, military, religious or racial nature ..." Which means that in fact, the investigation of crimes related to the armed conflict in the Donbas, and the absentee prosecution of perpetrators was blocked due to internal rules of Interpol.

In May 2016, the CPC was supplemented by paragraph 20-1 in section XI "Transitional Provisions", which provided for some simplification of the procedures for special pre-trial investigation and special judicial proceedings, but only before the start of the work of National Bureau of Investigation (after publication in the newspaper "Урядовий кур'єр" notification of its head). According to the provisions of paragraph 20-1, a special pre-trial investigation may be applied to a suspect/accused person who, for more than six months, has been hiding from the investigating authorities and the court in order to evade criminal liability and/or in respect of which there is evidence that he/she is located outside Ukraine, on the temporarily occupied territory of Ukraine or in the area of the anti-terrorist operation. Thus, the grounds for the use of in absentia approach were expanded, and the putting of suspected persons on the international wanted list was no longer a prerequisite.

On November 23, 2018, the head (at that time) of the State Bureau of Investigation, Roman Truba, announced the beginning of the work of the Security Service of Ukraine on November 27 as the central executive body engaged in law enforcement with the aim of preventing, detecting, suppressing, disclosing and investigating crimes within its competence. Consequently, from this date the provisions of paragraph 20-1 have ceased to be in force, which has affected the procedure of absentee proceedings.

On November 30, 2018, a draft law was registered in the Parliament of Ukraine that provided for amendments to the CPC in order to regulate more clearly the issue of conducting special pre-trial investigations and court proceedings that could solve the problem of Interpol refusing to put suspects/accused on the wanted list because of signs of political persecution.

However, MPs did not vote twice for introducing the draft law on the agenda and considering it, despite the fact that the Prosecutor General, Yury Lutsenko, urged the Verkhovna Rada to support amendments to the Criminal Procedure Code (CPC) of Ukraine regarding the extension of the validity of the trial in absentia mechanism.

According to him, for this reason, materials on criminal proceedings against former leaders of the DPR terrorists Igor Bezler (Bes) and Igor Girkin (Strelkov) cannot be transferred to court.

On January 10, 2019, a notice was issued to call for interrogation as a suspect "ex-commander of the DPR militia", "ex-defense minister of the DPR" Igor Strelkov (Girkin).[3]

In particular, Girkin is suspected of criminal offenses under the following articles:

- Part 1 of Article 258-3 (creation of a terrorist group or terrorist organization);
- Part 3 of Article 258 (terrorist act);
- Part 1 of Article 294 (riots);
- Article 341 (occupation of state or public buildings or structures);
- Article 348 (infringement on life of a law enforcement officer, member of a public formation for the protection of public order and the state border or military man);
- Article 349 (taking a government official or law enforcement official as a hostage) of the Criminal Code of Ukraine.

On January 15, 2019, the Prosecutor General's Office of Ukraine issued a charge sheet to a citizen of the Russian Federation, Igor Bezler, on committing crimes under Part 2 of Art. 28, part 2, article 146, part 2 of article 437, part 1, article 438 of the Criminal Code of Ukraine, which was sent to him by the international courier service along with summons.[4]

According to Yuriy Lutsenko, in case the Parliament adopted the relevant decision, the PGOU was ready to complete the proceedings in a short time and to bring to court all materials containing evidence of cruel torture committed by Bezler and his subordinate militants in relation to captured military personnel of the Armed Forces of Ukraine, law enforcement officials and civilians persons.[5]

After the election of Vladimir Zelensky as President of Ukraine, as of March 2020, the Prosecutor General of Ukraine has been changed twice. At the moment, the corresponding bill from the Prosecutor General's Office, which would provide for amendments to the Criminal Procedure Code of Ukraine, is not registered in the Parliament, and the mechanism of trial in absentia is actually blocked. As a result, thousands of people involved in terrorism cases, including the leaders of the so-called DPR and LPR have not yet been convicted, even if in absentia.

Currently, trials consider cases that contain facts of ill-treatment of prisoners by representatives of terrorist groups, but these facts are not the subject of lawsuits, but only complement the picture of a particular case.

Let us give an example of a civil case, which was examined in the Kramatorsk City Court.[6]

A woman appealed to the court. During the occupation of Gorlovka (Donetsk region) by pro-Russian militants under the leadership of Bezler, her son was engaged in volunteer activities – together with friends he bought food and clothing and drove them to checkpoints to the Ukrainian military, as well as to military units of the Armed Forces, which were located in the direction of city of Kharkiv. On June 23, 2014, he was abducted by Bezler militants in a store and taken to the building of the former Department for Fighting Organized Crime. His mother met with Bezler, who confirmed that the person is with them. After some time, the mother learned from her son's friends that he was killed in captivity. This was confirmed by the witness in the case – an adviser to the Deputy Minister of Defense of Ukraine (at that time), who was also held captive by Bezler and was in the next cell with a victim. He personally saw how Bezler shot the young man in the head several times, after which he fell without signs of life. There was no doubt that it was precisely the woman's son, because Bezler called his name and accused him of raising money to buy body armor for the "Right Sector".

3 https://www.gp.gov.ua/userfiles/Povistka.PDF
4 https://www.gp.gov.ua/userfiles/POVISTKA(1).pdf; https://www.gp.gov.ua/userfiles/povistka_07_02(1).pdf
5 https://www.youtube.com/watch?v=LSxIiEelZ8A
6 http://reyestr.court.gov.ua/Review/73223980

The essence of the woman's civil lawsuit was to establish the fact of her son's death due to his volunteer activities in order to obtain the appropriate pension status, as well as to recognize the fact of his death as a result of the aggression of the Russian Federation, since such a formulation is needed to appeal to international organizations to bring perpetrators to justice. The court satisfied the claims in full.

The activities of law enforcement agencies of Ukraine in the investigation of war crimes

On February 4, 2015 Verkhovna Rada of Ukraine has adopted a Statement "On the recognition by Ukraine of the jurisdiction of the International Criminal Court on crimes against humanity and war crimes by senior officials of the Russian Federation and the leaders of terrorist organizations of the DPR and LPR, which led to the grave consequences and the massacre of Ukrainian citizens" (No. 145-VII).[7] According to the Statement the duty to collect the necessary materials and evidence for contacting the International Criminal Court in accordance with paragraph 3 of Article 12 of the Rome Statute, was assigned to the Prosecutor General of Ukraine.

In order to implement the Statement, during 2015–2019, the Prosecutor General's Office of Ukraine prepared and sent to the Office of the ICC Prosecutor 12 information messages about the existing evidence of an aggressive war against Ukraine, the commission of war crimes and crimes against humanity by the authorities and the armed forces of the Russian Federation, including, using the Russia-controlled illegal armed groups of the terrorist organizations Donetsk People's Republic and Lugansk People's Republic.

On December 6, 2019, the annual report of the Office of the ICC Prosecutor[8] on the results of the preliminary investigation was presented, in particular, the situation in Ukraine. According to the report, during 2020 the Office of the Prosecutor will continue to analyze the ability of the national justice system of Ukraine to independently investigate the relevant crimes in order to finally decide which cases need to be investigated by the ICC and in which there will be sufficient investigations that will be conducted by Ukrainian law enforcement agencies.

Until January 1, 2020, the Main Military Prosecutor's Office (as a structural unit of the Prosecutor General's Office of Ukraine), which was dismissed during the reform of prosecution authorities, dealt with the collection of facts of large-scale and global violations of international humanitarian law, serious war crimes and crimes against humanity during the armed conflict in the Donbas.

In October 2019, as part of the General Prosecutor of Ukraine (from January 2, 2020, the Prosecutor General's Office – author's note), a Department of Oversight of Criminal Proceedings of Crimes Committed in Armed Conflict was established. It took over the above functions of the military prosecutor's office, and became the central analytical and coordination center for all high-profile and serious crimes committed in the temporarily occupied territories of the Autonomous Republic of Crimea and Donbas.

According to the Prosecutor General's Office, more than 200 criminal cases will be transferred to the new Department. In particular, we are talking about the Ilovaisk and Debaltseve tragedies, the shooting down of an MH-17 flight plane, the annexation of the Autonomous Republic of Crimea, the "case of sailors", as well as the facts of the outbreak and conduct of armed aggression of Russia, systemic torture and killings of captured Ukrainian military and civilians.

Currently, a strategy is being developed to document war crimes and crimes against humanity, which will become an algorithm of actions for law enforcement agencies in the conditions of military operations and the lack of

7 https://zakon.rada.gov.ua/laws/show/145-19

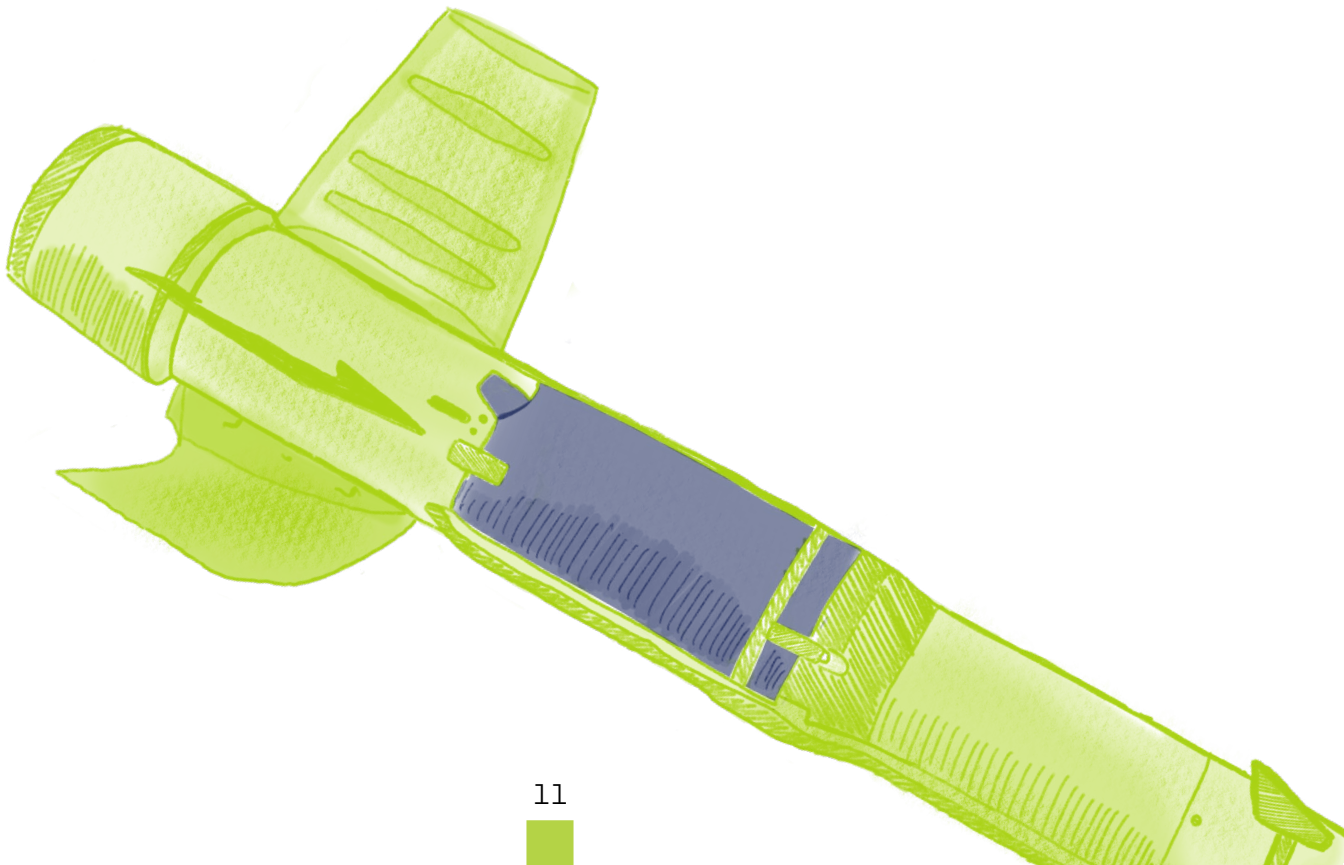
8 https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf?fbclid=IwAR2LjynJd6A-ArmS5DMgAKWjd_ZRXDYx3_wveMJU8trlmIoI9dLLtVi9ly8

control over part of the territory. An important role in this process belongs precisely to Luhansk and Donetsk law enforcement authorities, therefore, prosecutor's offices in Donetsk and Luhansk regions have created departments for supervision of criminal proceedings in respect of crimes committed in an armed conflict, which included 60 prosecutors. The newly created departments will provide procedural guidance and control over the investigation of criminal proceedings in relation to crimes against the foundations of national security of Ukraine, public security, peace, human security and international law and order, and other crimes committed in armed conflict in the temporarily occupied territories of Donbas or related with armed aggression of the Russian Federation against Ukraine.

According to the information of the Prosecutor General's Officel, the created structural units also closely cooperate with public human rights organizations on the issues of documenting war crimes, use open sources of information in their work and communicate with victims or witnesses of criminal acts. In addition, the units coordinate the work of law enforcement agencies in the Donetsk and Luhansk regions in this area of activity.

Viktoriia Novykova,

Deputy Chairman of Luhansk regional human rights center Alternative



2. Criminal prosecution in Ukraine for war crimes and crimes against humanity during the international armed conflict

Until 2014, the topic of aggressive war and the crimes surrounding the war was irrelevant in Ukrainian law. In this regard, legal science did not pay due attention to these crimes, which is why Ukrainian legislation was not ready not only for a legal assessment of hybrid threats, but also for a conventional war. In law enforcement practice, there were also no precedents for developing skills and approaches to the investigation of crimes against peace, humanity and war crimes. Therefore, in 2014, Ukrainian law enforcement agencies and courts faced a lack of necessary rules in the Criminal Code to qualify these crimes and a lack of specialists who could conduct an investigation at the annexed and occupied parts of the state's territory. After the outbreak of aggression in 2014, it was necessary without delay to resume the work of the Military Prosecutor's Office, which was liquidated in 2012.

According to the text of the Rome Statute, war crimes and crimes against humanity, which fall under the jurisdiction of the ICC, are only subject to certain circumstances – a military conflict, the widespread and systematic attacks on civilians, as well as pursuing the policies of a state or an organization aimed at perpetrating of such attacks. Therefore, in order to qualify the murder or hostage-taking as a war crime or a crime against humanity, it is necessary first to prove in the procedural order the existence of circumstances that precede these crimes. If the circumstances specified in the Rome Statute are not proven, the crimes committed will fall under the category of ordinary crimes. It is this problem that has significantly complicated the process of criminal prosecution in Ukraine of persons who have committed war crimes or crimes against humanity. For example, in order to qualify a crime as violence against a population in areas of hostilities, one must first legally acknowledge and prove the fact of hostilities. The situation is exactly the same with other identical crimes – cruel treatment of prisoners of war, violation of the laws and customs of war, etc.

An analysis of the judicial practice of Ukraine from 2014 to 2019 shows that court decisions contain several different approaches to legal assessment of events in the east of Ukraine, and accordingly, crimes committed there, both against peace, humanity, and the military, are defined differently. For example, often in court sentences, war crimes are qualified as follows: the creation of unlawful military units, a terrorist act, intentional murder, rape, torture, etc.

The vast majority of court decisions reflect the official position of the authorities regarding the legal assessment of events in the Donetsk and Lugansk regions.

Despite the fact that already in March 2014, NATO, the Organization for Economic Co-operation and Development, the European Union began to apply international economic and political sanctions against the Russian Federation, which were justified by the fact of aggression, in Ukraine for a long time these events were officially called as the anti-terrorist operation.

Thus, until February 24, 2018, hostilities in eastern Ukraine had the legal status of an anti-terrorist operation, contrary to the Geneva Conventions of 1949 and the UN General Assembly Resolution on Aggression 1974, according to which the annexation and armed invasion of one state into the territory of another is a form of aggression, regardless of whether a formal declaration of war was made.

On April 7, 2014 on the proposal of the head of the Anti-Terrorism Center at the Security Service of Ukraine in the territory of Donetsk and Lugansk regions, an anti-terrorist operation began. Legally, this meant that there were no circumstances in which war crimes or crimes against humanity could be committed. Which was reflected in the work of law enforcement agencies and courts. So, from spring 2014 to 2019 inclusive, Ukrainian courts issued more than 1800 sentences for crimes committed in the zone of armed conflict, the qualifications of which depended on a legal assessment of events in eastern Ukraine. Only in 17 of these sentences the events in Donetsk and Lugansk regions were qualified as aggression, in the rest the circumstances were defined as an anti-terrorist operation and, accordingly, crimes committed under the anti-terrorist operation zone are qualified as terrorist or general criminal, although some of them have signs of war crimes and crimes against humanity. According to the 17 sentences mentioned, in which events in eastern Ukraine were recognized as an aggression, 24 people

were convicted, three were acquitted, among all convicted persons – 6 citizens of the Russian Federation and 18 citizens of Ukraine.

In 2018, the official position of the Ukrainian authorities regarding events in the east of Ukraine changed. With the adoption of the Law "On the features of state policy to ensure state sovereignty of Ukraine in the temporarily occupied territories of Donetsk and Lugansk regions" the anti-terrorist operation was renamed into Combined Forces Operation, and events in the east of the country were named an aggression against Ukraine.

On the one hand, this opened up the possibility of using the norms of international and national law on international armed conflict in investigative and judicial practice, and qualify crimes committed under these circumstances as war crimes and crimes against humanity. However, to date, there remain obstacles in national legislation that do not allow law enforcement agencies and courts to make decisions that are correct from the point of view of the law and give unambiguous qualifications for crimes committed in the circumstances of aggression and opposition to it.

For example, Art. 1 of the Law on Military Civil Administrations provides for that in Ukraine simultaneously in the same place, at the same time, an anti-terrorist operation and resistance to armed aggression take place. Thus, the same events in these laws have two different legal assessments. Which of them should the investigator, prosecutor or judge use in their work? If one of them decides to use the norm on aggression in practice, and qualifies crimes committed in its conditions as military or against humanity, then they will encounter a lack of definition of "aggressive war" in Ukrainian legislation. It is this term that is used in the Criminal Code, but in the text of Art. 437 "Planning, preparation, unleashing and waging of an aggressive war", the Criminal Code does not define or at least sign to which of them an investigator, prosecutor or judge should relate certain actions to an aggressive war.

Apparently the international legal acts that are part of Ukrainian legislation could be applied in order to use their definition of aggressive war to implement the correct qualification of actions in the criminal process. That means that, theoretically, the terms "aggressive war", "armed aggression", "aggression", which are used in international law, could be recognized as identical and to use the definition of aggression in criminal proceedings from the UN Resolution "Definition of aggression" of 1974. But according to this definition it is the state that is the only subject of responsibility. This is possible if such a rule is applied by international judicial bodies with jurisdiction to hold the state accountable. But for national legislation and law enforcement practice, it is desirable to have an expanded definition of aggression, consistent with international law. But in Ukrainian legislation there is no such definition. This cannot stop judicial practice, therefore, in each case, the judge, at their discretion, interprets both the definition of an aggressive war and the circle of persons who may be held criminally liable.

At the same time, in Ukrainian legislation there is a definition of "armed aggression", which is contained in the Law "On Defense of Ukraine". By substance, it echoes the term "aggressive war", which is used in the Criminal Code, but formally these are different terms, and substitution of notions is considered as fraud in judicial practice and foresees the annulment of the sentence.

Thus, in order to hold accountable those who committed war crimes or crimes against humanity in the context of aggression and resistance to it in eastern Ukraine, it is legally necessary to go through two stages – give a legal assessment of the events, recognize the aggression and the existence of a policy or plan within which they are committed, the large-scale and systematic nature of crimes, etc. At the second stage, the direct qualification of crimes as war crimes or against humanity takes place.

The situation in the legislation and law enforcement practice in the first stage is described above, with regard to the second stage – there are also legislative difficulties there. Nowadays, the criminal law contains only 4 elements of war crimes that comply with international humanitarian law. They do not cover the full range of war crimes. In addition, the Criminal Code of Ukraine does not provide for liability for crimes against humanity and for war crimes that constitute a violation of customary international law or humanitarian law.

As of March 2020 in the Verkhovna Rada there are registered two alternative draft laws No. 0892 and No. 2689 aimed at eliminating the above problems. However, in order for the new law to apply to acts committed before its entry into force, it is necessary to amend the Constitution. This is due to the fact that at the moment there is a principle according to which the law is not retroactive in time and applies only to those legal relations that arise after its adoption.

Thus, in order for the investigative and judicial practices to work effectively with respect to aggression in eastern Ukraine and related crimes, namely war crimes and crimes against humanity, it is necessary to unify the terms in different laws that imply aggression, that is, introduce one term. Secondly, it is necessary to adopt a definition of aggression, which will contain clear criteria for this crime and the circle of persons who may be the subjects of this crime. Thirdly, to adopt in the second reading a draft law aimed at criminalizing a wide range of war crimes and crimes against humanity.

Crimes against civilians in the conflict zone were multiple and systematic in 2014–2015, which allows to define them as war crimes and crimes against humanity according to the Rome Statute (Articles 7 and 8). This was due to the fact that aggression against Ukraine was carried out suddenly, the Ukrainian army was not ready to repel this aggression, so thousands of volunteers went to defend the sovereignty of the country in eastern Ukraine. Since at that time there was no system and criteria for selecting people for the front, both genuine defenders of the Motherland and people with a criminal past and present, people for whom war was a comfortable environment for committing crimes, got there.

However, with this unacceptable phenomenon, a struggle began at the state level and already in 2015, most of the volunteer battalions were integrated into the existing security and defense system. They became part of and got under the control of power structures. Another part of the volunteer battalions was disbanded. A small part of the volunteers refused to enter the power structures, but agreed to fully coordinate their actions in the combat zone with the military command of Ukraine. Thus, in the conflict zone, in the territory controlled by the government of Ukraine, it is rare today, but isolated cases of crimes against the life and health of civilians are recorded. However, according to the Rome Statute, they cannot be attributed to crimes against humanity, due to the lack of a key feature provided for in Art. 7 RS – large-scale and systematic attacks. As for war crimes, on the territory controlled by the government of Ukraine, today there are no crimes "within the framework of a plan or policy or large-scale ones", which is also provided as a mandatory sign of war crimes in accordance with Art. 8 of the Rome Statute. This means that crimes committed today in the conflict zone against civilians cannot be categorized as "crimes against humanity" and "war crimes" in the context of the jurisdiction of the International Criminal Court, but must certainly be investigated by national law enforcement agencies and examined by national courts.

Below there is a table of data on the number of criminal proceedings registered and submitted to court for the several military offenses foresaw in the current Criminal Code of Ukraine. The table is compiled on the basis

Type of crime	2014		2015		2016		2017		2018		2019	
	1	2	1	2	1	2	1	2	1	2	1	2
Art. 432 Looting	1	0	0	0	0	0	0	0	0	0	0	0
Art. 433 Violence against a population in a war zone	4	0	5	0	0	0	0	0	0	0	0	0
Art. 434 Poor treatment of prisoners of war	0	0	0	0	1	0	0	0	0	0	0	0
Art.438 Violation of rules of the warfare	1	0	4	0	6	0	0	0	5	0	12	0
Total	6	0	9	0	7	0	5	0	5	0	12	0

of annual reports on the work of pre-trial investigation bodies, which are published on the website of the General Prosecutor's Office of Ukraine. In the columns under the number "1" there indicated a number of recorded crimes, under the number "2" – the number of cases, the investigation of which is completed and the materials are transferred to the court.

The absence of criminal cases recommitted to courts under the indicated articles of the Criminal Code of Ukraine is also confirmed by information from the Register of Judicial Decisions.

However, these data do not mean that Ukrainian justice does not hold anyone accountable for war crimes and crimes against humanity that accompany aggression and resistance to it. Due to the above-mentioned shortcomings of Ukrainian legislation, these crimes are qualified in practice under other articles, as common crimes – murder, rape, torture, kidnapping, etc.

A vivid example of how Ukrainian courts qualify crimes against humanity in the face of imperfect legislation is the high-profile case of crimes committed by a patrol duty company of the Ministry of the Interior 'Tornado' consisting of volunteers. Crimes were committed on the territory of the Lugansk region from December 2014 to June 2015 during the armed conflict. According to the Military Prosecutor's Office, Tornado fighters practiced killing, torture, and rape against the civilian population. The head of the Luhansk region in 2015, Gennady Moskal, who appealed to the police and SSU with a statement about the crimes of fighters, claimed that the Tornado troop never took part in military operations, but was an organized criminal group that practicized kidnapping, murder, rape, robberies, robberies, thefts, looting and other crimes. The militants of the battalion filmed their bullying and crimes, in particular of a sexual nature, on a video that fell into the possession of the investigation.

The Tornado fighters were accused of creating a criminal organization and committing serious and extremely serious crimes in the territory of the Lugansk region in the combat zone, from December 2014 to June 2015. The atrocities committed by them were systemic and numerous and in many ways could be recognized as war crimes and crimes against humanity. However, their actions were qualified under the following articles: Part 1 of Art. 255 (creation of a criminal organization), part 2 of article 365 (abuse of power or official authority by an employee of a law enforcement agency), part 3 of Art. 146 (illegal deprivation of liberty or kidnapping), part 2 of Art. 127 (torture), part 2 of Art. 153 (forcible gratification of sexual passion in an unnatural way), part 2 of Art. 342 (resistance to a representative of the authorities, an officer of a law enforcement agency, a state executive, a member of a public formation for the protection of public order and the state border or a military man), part 3 of Art. 289 (illegal possession of a vehicle) of the Criminal Code of Ukraine.

On April 7, 2017, the Obolonsky District Court of Kiev issued a guilty verdict against 12 soldiers of the disbanded Tornado company. The ex-company commander, Ruslan Onishchenko, was sentenced to 11 years in prison, his deputy, Nikolai Tsukur, to 9 years. Six more accused were sentenced from 8 to 10 years in prison, four Tornado members were sentenced to 5 years of conditional sentence, three of them with a deferred sentence of 2 years and one with a deferred sentence of 3 years. A sum of UAH 7,750 of court costs were collected from each of the convicts, all of them were deprived of the police ranks.

In addition, in 2014–2015, there was a massive commission of crimes against civilians by some fighters of Aidar battalion as well.

So, on August 21, 2014 observers of the OSCE Special Observation Mission in Ukraine reported that they received evidence of violations of citizens' rights by the Aidar battalion, deployed north of Lugansk. The UN report "Sexual violence related to the conflict in Ukraine" documented indicative cases of abuse and sexual violence by fighters of the Aidar battalion.

It follows from the 11th report of the Office of the UN High Commissioner (para. 122)[9] that, as of June 25, 2015, 110 criminal court proceedings

9 https://www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf

have been initiated regarding the crimes of the Aidar battalion (including kidnapping, unlawful arrests, thefts, extortion and ill-treatment).

The chairman of the Lugansk Regional State Administration (2014–2015), Gennady Moskal, argued that, as a rule, these crimes were committed by so-called volunteers who received unregistered weapons from the Aidar commander, wore Aidar chevrons, but were not listed in the documents in the battalion. According to the cases of the so-called "black" Aidar fighters, it is known that as of May 2015, about 50 people were arrested, including for murders, robberies and looting. At that time the police were aware about 150 crimes committed by people related to Aidar. This was stated in May 2015 by the head of the Department of Internal Affairs of the Lugansk region, Anatoly Naumenko.

However, not only Aidar's fighters were under investigation, but also its former commander, Sergei Melnichuk, who was elected as a people's deputy in 2014. The status of a people's deputy complicated the investigation greatly, as the Verkhovna Rada's consent to criminal prosecution was required. In October 2015, the Prosecutor General's Office completed a pre-trial investigation of the criminal case on charges of Melnichuk and 5 others and submitted the case to the court. In addition, in 2016, the Security Service of Ukraine opened yet another criminal proceedings against the former commander of the Aidar battalion, Melnychuk, related to the events of 2014.

Despite the fact that the Parliament lifted the inviolability of deputy from Melnichuk, and in 2019 his deputy term ended, Melnichuk was not convicted, and there is no public information about the fate of the criminal case in court.

As for the evidence of crimes committed against civilians in the conflict zone, the prosecutor's office and the Security Service of Ukraine also opened criminal proceedings against fighters of the Dnipro-1, Donbas battalions and the Sich security agency, which included active fighters of the "Right Sector".

At the same time, the line between ordinary crimes committed by people in military uniforms, war crimes and crimes against humanity is a rather thin one. As a rule, in the war zone all three of the above types of crimes are committed. They can be distinguished by the provisions of Rome Statute, which contains signs allowing to divide war crimes and crimes against humanity from ordinary crimes committed by combatants.

So, according to Art. 7 of the Rome Statute, torture, murder, rape acquire the status of a crime against humanity, if they committed as part of a widespread or systematic attacks on any civilians undertaken in order to pursue a policy of a state or organization aimed at perpetrating such an attack, or in order to promote such a policy. According to Art. 8 of the Rome Statute, war crimes are those if committed within the framework of a plan or policy or in the large-scale commission of such crimes.

An example of committing common crimes by fighters is the case of the Donbas battalion. The crime took place in July 2014, when 6 residents of Zaporizhzhya, Dnipropetrovsk, Odessa, Sumy, Ivano-Frankivsk regions aged 30 to 45 years old came to the east of Ukraine and joined a volunteer battalion. But, unlike the majority, who then went to defend their country, these went to the war to "earn". From August to November 2014, a criminal group terrorized the residents of Dobropillya, Selidovo, Gornyak, Ukrainsk, Krasnoarmeysk. While the their brothers were dying on the front line, here, in the rear, away from hostilities, the Bars and 5 of its members abducted entire families, attacked parents in front of the children, mocked them and demanded a ransom. At the same time they called it "army assistance". Criminal proceedings have been opened on these facts, police officers have proven 28 such episodes.

In this situation, the actions of individual fighters of the Donbas battalion are criminal ones, but do not contain signs of war crimes or crimes against humanity, namely, large-scale, systematic, committed within the framework of a plan or policy of a state or organization, etc.

Thus, in the first two years of aggression against Ukraine, when active hostilities took place, crimes against civilians were committed in the conflict zone, which had signs of war crimes and crimes against humanity. Crimes were committed on both sides of the

demarcation line. In the territory controlled by the Ukrainian authorities, it was possible to stop this phenomenon by integrating and transferring voluntary units under state control, as well as by bringing the perpetrators to justice. Despite the comments on the work of law enforcement bodies and courts with this category of cases, it should be noted that the massive and systemic nature of these crimes has been stopped. To date, isolated cases of crimes against civilians in the conflict zone are recorded, which, of course, must be investigated, and the perpetrators punished.

For the first time in the history of its independence, Ukraine has faced the need to investigate crimes against peace, humanity and war crimes and to prosecute them. As practice has shown, Ukrainian legislation, law enforcement and judicial systems were completely unprepared for this. Thus, the Ukrainian Criminal Code does not define "aggressive war" and does not establish responsibility for crimes against humanity and war crimes, which constitute a violation of customary international law, rather than contractual humanitarian law. In addition, the legislation today evaluates the same events in eastern Ukraine as an anti-terrorist operation and as the resistance to aggression by joint forces. These circumstances do not allow the law enforcement agencies and the courts to form a unified legally competent approach to qualifying events in eastern Ukraine and related crimes of aggression, namely war crimes and crimes against humanity.

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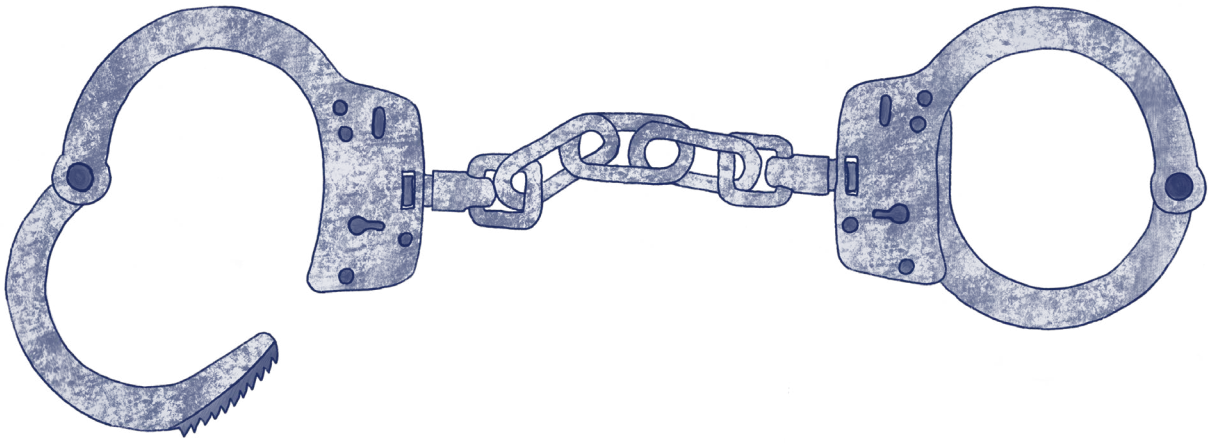

3. Looking for ways to hold accountable those responsible for war crimes and crimes against humanity during the armed conflict in eastern Ukraine

Between April 2014 and August 2019, the Office of the High Commissioner for Human Rights registered 3,339 deaths of civilians as a result of the conflict in eastern Ukraine, including at least 147 children, 1,053 women and 1,804 men. According to reports, more than 7,000 civilians were injured during the same period.[10]

According to a preliminary assessment of the Office of the Prosecutor of the International Criminal Court (hereinafter referred to as the ICC), there were commited at least such war crimes as intentional attack on civilians, civilian objects and objects under protection, intentional killing, torture and inhuman or cruel treatment, rape and other forms of sexual violence.[11]

However, the ICC's ability to hold war criminals accountable is extremely limited. Throughout the history of its work, the Court examined the cases of 45 accused, of which 12 were closed, 2 ended in acquittals, 13 suspects are wanted, 8 have been convicted, and 10 cases are currently being heard in court.[12]

Therefore, in this article, along with the jurisdiction of the ICC, we will consider the possibility of individual criminal liability under Russian law, as well as in other countries, within the framework of universal jurisdiction.

Territorial jurisdiction. Investigation according to the place where the crime was committed

International law obliges Russia, like other countries, to seek out and prosecute those responsible for serious violations of humanitarian law, as well as incorporate into its legislation criminal responsibility for war crimes and crimes against humanity.[13]

According to Art. 1 of the Criminal Code, the only source of the law of crime is the criminal statute. Therefore, without the introduction of criminal responsibility for certain elements of war crimes and crimes against humanity into the Criminal Code of the Russian Federation criminalizing it is impossible to bring individuals criminal responsibility for them.

To date, Russian legislation contains only a few constituent elements of offence that can be attributed to this category of crimes, namely: "Production or distribution of weapons of mass destruction" (Article 355 of the Criminal Code of the Russian Federation), "Use of prohibited methods of warfare" (Part 1 of Art. 356 of the Criminal Code of the Russian Federation), "Use of weapons of mass destruction" (Part 2 of Art. 356 of the Criminal Code of the Russian Federation), as well as the element of offence "Genocide" (Article 357 of the Criminal Code of the Russian Federation) that is rarely used around the world.

Amending the Criminal Code of the Russian Federation requires political will. If Russia does not follow the provisions of the Geneva Convention, does not incorporate specific elements of offence into its criminal law, does not search for and does not prosecute war criminals, it is difficult to talk about the legal consequences of such inaction. The control mechanism in this case is absent, and legal sanctions are not provided.

As for the period of limitations for war crimes and crimes against humanity in Russian law, the Criminal Code of the Russian Federation does not fully meet the requirements of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

For example, the statute of limitations does not apply to such elements of offence in the Criminal Code of the Russian Federation as "Use of prohibited methods of warfare and weapons

10 ICC. Report on the preliminary study of situations in 2019, December 5, 2019 / https:/www.icc-cpi.int/itemsDocuments/2019-PE-Report-UKR.pdf, para 274, last accessed April 5, 2020 .

11 Ibid, p. 279.

12 https:/www.icc-cpi.int/Pages/defendants-wip.aspx#Default=%7B%22k%22%3A%22%22%7D#c6cbd0da-cc12-4701-a455-cb691df92bfd=%7B%22k%22%3A%22%22%7D, last accessed April 5, 2020 .

13 GCI (GC – Geneva Convention), art. 49, 52.; GCII, art. 50, 53; GCIII, art. 129, 132; GCIV, art. 146, 149; GCPI (additional protocol to GC), art. 86.1.

of mass destruction", however, they exist for "Production and distribution of weapons of mass destruction".

A separate problem is that in the Criminal Code of the Russian Federation there is also no such element of offence as "Torture", and paragraph "d" of Part 2 of Art. 117 of the Criminal Code of the Russian Federation "Torment with the use of torture" is limited, since it should be systematic, the torture should committed at least three or more times. In violation of the UN Convention against Torture, this corpus delicti is subject to the period of limitations of 10 years, and the definition of torture is narrower than that provided for in Article 1 of the UN Convention against Torture. Thus, it is impossible to criminalize torture as a war crime or a crime against humanity, and, apparently, if necessary, formulations about causing harm to health will be used.

The practice of applying articles of the Criminal Code of the Russian Federation relating to war crimes and crimes against humanity shows that constituent elements of offence are essentially dormant. According to statistics from the Judicial Department under the Supreme Court of the Russian Federation, from 2014 to the present, no one has been convicted of war crimes or crimes against humanity.[14] The only working article of Chapter 34 of the Criminal Code of the Russian Federation remains "Mercenary" (Article 359 of the Criminal Code of the Russian Federation), however it is formal, provides for responsibility for participating as a mercenary or recruiting such, but from the point of view of international law does not apply to war crimes or to crimes against humanity.

Criminal cases instituted by the Investigative Committee of Russia on the events in Ukraine were instituted under ordinary criminal articles - "Murder", "Terrorism" and others.

This can be attributed to the difficulty of proving the constituent elements of offence, which for war crimes are directly related to an armed conflict of international or non-international character, and for crimes against humanity – (1) large-scale or (1) systematic attack on any (2) civilians, if such an attack is committed (3) purposely.

Not only Russian investigators avoid qualifying crimes as war crimes or crimes against humanity. This trend is also observed in criminal investigations within the framework of universal jurisdiction in different countries, when the general criminal convictions "Murder", "Torture", "Terrorism" are instituted in order to avoid termination of the criminal case due to the lack of evidence of specific elements. The latest TRIAL report draws attention to the fact that investigating authorities qualify crimes as common crimes, most often terrorism, to the detriment of qualification as war crimes or crimes against humanity. This is explained by the desire to simplify the investigation and avoid the risks of acquittal, if not all qualifying signs are proved properly.[15]

Human Rights Watch (hereinafter – HRW) also notes: "Terrorism offenses are easier to prosecute because authorities only have to prove connection between the accused and a labeled terrorist organization. However, terrorism charges do not reflect the extent of crimes committed."[16]

Contractual jurisdiction. International Criminal Court

The International Criminal Court (hereinafter - the ICC) was established on the basis of an agreement – the Rome Statute of the International Criminal Court (hereinafter – the Rome Statute), which was concluded on July 17, 1998 and entered into force on July 1, 2002. The Court has jurisdiction only with respect to

14 Data from court statistics of the Judicial Department under the Supreme Court of the Russian Federation / http://www.cdep.ru/index.php?id=79, last accessed April 5, 2020.

15 TRIAL. Universal Jurisdiction Annual Review 2020.

16 HRW. "These are the Crimes we are Fleeing". Justice for Syria in Swedish and German Courts, 3 октября 2017 / https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts, last accessed April 5, 2020.

crimes committed after the entry into force of this Statute. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State.[17]

Ukraine and the ICC

Ukraine signed the Rome Statute on January 20, 2000, but has not yet ratified it.[18] Nevertheless, the signature entails certain obligations, in particular to refrain from actions that violate the subject and purpose of the agreement until it clarifies its intention to become a party to the agreement.

On April 17, 2014, the Government of Ukraine, in accordance with article 12 (3) of the Rome Statute, filed an application recognizing the jurisdiction of the ICC with respect to alleged crimes committed on its territory from November 21, 2013 to February 22, 2014. On September 8, 2015, the Ukrainian government filed a second application in accordance with article 12 (3) of the Statute on the adoption by the ICC of jurisdiction over alleged crimes committed on its territory since February 20, 2014, without any end date. Thus, the Court can exercise its jurisdiction over the crimes of the Rome Statute committed on the territory of Ukraine from November 21, 2013 to the present.[19]

The ICC, unlike the ECHR, considers the occupied territories as ones that are under the jurisdiction of an occupied, not an occupying, state. Thus, from the point of view of the ICC – Crimea and certain areas of the Donetsk and Luhansk regions of Ukraine also fall under its jurisdiction.

Article 12 (3) of the Rome Statute governs jurisdiction in the occupied territories in such a way as to permit a declaration giving the ICC jurisdiction over such territory.

Russia and the ICC

Russia signed the Rome Statute on September 13, 2000 and began to take steps to ratify it. However, due to different reasons including the armed conflict in Georgia in 2008, the process was not completed. A few days after the ICC prosecutor's office published a Report on a preliminary investigation into the events in Ukraine,[20] on November 30, 2016, Russia withdrew its signature.[21]

William A. Schabas notes that it is believed that the ICC does not exercise jurisdiction over citizens of countries that are not parties to the Rome Statute. However, the argument that the exercise of jurisdiction over citizens by States parties to an international criminal tribunal is a violation of article 34 of the Vienna Convention on the Law of Treaties cannot be sustained because the ICC prosecutes individuals, not the states.[22]

ICC Criminal Prosecution Immunity

The main advantage of the ICC over prosecution in the framework of universal jurisdiction, which we will consider below, is the attitude toward the immunity of senior state officials.

According to Art. 27 (2) of the Rome Statute, immunities related to the official position of a person shall not prevent the Court from exercising jurisdiction over such a person.

From the point of view of law of substance, the highest officials of the state, including during their tenure, can be prosecuted by the ICC. At the same time, the arrest of such persons is fraught with certain difficulties.

17 Article 11 of the Rome Statute.

18 Status of Treaties. Rome Statute of the International Criminal Court / https:/treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#9

19 Preliminary examination. Ukraine / https:/www.icc-cpi.int/ukraine, last accessed April 5, 2020.

20 Report on a preliminary investigation into the events in Ukraine (2016) / https:/www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE-Ukraine.pdf, last accessed April 5, 2020.

21 Status of Treaties. Rome Statute of the International Criminal Court / https:/treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#9, last accessed April 5, 2020.

22 William A. Schabas. The International Criminal Court and Non-Party States, 2010 / Windsor Yearbook of Access to Justice, Vol. 28(1).

Although the Article 98 of the Rome Statute does not provide immunity from prosecution to such persons, it at the same time establishes that States Parties can refuse the cooperation requests of the ICC on arresting and surrendering a person citizen of a third State, if the Court with this request is asking the State Party to act inconsistently with international law. As a rule, this refers to the situation when a senior official of another state is located on the territory of one state and national legislation does not allow the arrest of such a person while they hold office. In this case, the ICC is not entitled to demand an arrest. National legislation implementing the Rome Statute in matters relating to immunity regulates this point in different ways. For example, in Georgia it is forbidden to prosecute persons with immunity, while in the UK this is not an obstacle.[23]

Universal jurisdiction. General provisions

Despite the presence of the ICC and the right of the UN Security Council to establish ad hoc tribunals, a large number of crimes against humanity and war crimes go unpunished. This is facilitated, on the one hand, by the limited jurisdiction of international courts, the veto power of a number of countries on the creation of special tribunals, and on the other hand, by limited resources that allow prosecuting only a small number of criminals.

Universal jurisdiction is a recognized principle of international law, which derives, inter alia, from the Geneva Conventions, which enshrines the obligation to search and prosecute perpetrators of serious violations of humanitarian law,[24] as well as the UN Convention against Torture, which obliges states to establish universal jurisdiction over tortures.[25]

Scope

In the Preamble of the Rome Statute it is stated that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, and that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[26]

Studies show that the number of cases, as well as the number of sentences under universal jurisdiction over the past decade, is constantly growing.[27]

Currently, the situation in Syria is the engine of the development of legislation and practice in the field of universal jurisdiction, since it cannot be referred to the ICC due to the lack of ratification of the Rome Statute, and the creation of the ad hoc tribunal has been blocked by the veto power of Russia and China.[28]

Immunity from prosecution under universal jurisdiction

The official position of the head of state and other senior officials does not exempt them from criminal liability under the Rome Statute,[29] but it is practically impossible bring them to liability within the framework of universal jurisdiction.

The immunity of current senior officials is not an obstacle to an investigation. However, such

23 International Law Commission.Immunity of State officials from foreign criminal jurisdiction, March 31, 2008. A / CN.4 / 596.

24 GCI, art. 49, 52.; GCII, art. 50, 53; GCIII, art. 129, 132; GCIV, art. 146, 149; GCPI, art. 86.1.

25 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 5 (2).

26 Preamble of the Rome Statute of the International Criminal Court, available at: https://www.icccpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

27 The Quiet Expansion of Universal Jurisdiction. Article in European Journal of International Law 30(3):779-817 · March 2019

28 Is Syria Giving Universal Jurisdiction New Life?, 4 марта 2019 / https://www.justiceinfo.net/en/tribunals/national-tribunals/40483-is-syria-giving-universal-jurisdiction-new-life.html, last accessed April 4, 2020.

29 International Law Commission.Immunity of State officials from foreign criminal jurisdiction, March 31, 2008. A/CN.4/596.

a person cannot be detained or charged while in office.[30]

Although this norm is not explicitly spelled out in agreements or declarations, scholars insist that it derives from customary international law,[31] in addition, it is reflected in extensive judicial practice.

So, in 2000, in the Arrest Warrant case, the UN International Court of Justice (hereinafter – ICJ) recognized that the international arrest warrant issued by Belgium for the incumbent foreign minister of the Congo accused of genocide violates the principle of immunity. The court ruled that officials enjoyed complete immunity from arrest in another state for criminal charges, including charges of war crimes or crimes against humanity.[32] For the purposes of universal jurisdiction, there are no exceptions to immunity, even when it comes to war crimes and crimes against humanity.[33]

However, the court emphasized that this does not mean justification of the war criminal, but only that he cannot be prosecuted in criminal proceedings while he is in an official capacity.[34] The court indicated that diplomatic and consular agents, some high-ranking officials in the state, such as the head of state, the head of government and the foreign minister, enjoy immunities from both the civil and criminal jurisdictions of other states.[35]

In 2000, the French Court of Cassation overturned the decision of the Court of Appeal of Paris, which in turn denied immunity to Colonel Kadhafi, head of state of the Libyan Arab Jamahiriya, in connection with allegations of an attack on an aircraft in 1989. The Court of Cassation affirmed that:[36] "the international custom does not allow the implementation of procedural actions in relation to the heads of state of those in office in the criminal courts of a foreign state in the absence of specific [international] provisions in the opposite sense, binding on the parties concerned."[37]

The immunity, of course, does not apply to the leadership of the DPR/LPR, because they do not meet the criteria of the state. However, it applies to the leadership of Russia and Ukraine.

For example, in 2005, the German Federal Attorney granted immunity to Ramzan Kadyrov, who at that time held the post of vice president of Chechnya.[38] Amnesty International insisted that the decision on the arrest warrant should not apply to this situation, since Kadyrov's position could not be attributed to senior government posts, however, this argument did not affect the final decision.[39]

Retroactive effect of criminal law and statutes of limitations on actions

The Universal Declaration of Human Rights establishes that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal

30 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 13.

31 "Cassese, "When May Senior State Officials...", op. cit., pp. 864–866 and 870–874; Gaeta, op. cit. (2002), p. 979-982; Zappalà, op. cit., pp. 601–602; and Weyembergh, op. cit., pp. 186–191 (where the existence of customary law is supported, which provides for the exclusion from the principle of immunity of former heads of state with respect to crimes against humanity, war crimes and crimes against peace; It is noted that such an exception applies in international and national courts; and it is argued that the existence of such an exception cannot be denied on the basis that in practice it has not yet led to the conviction of the head of state (pp. 189–190))."

32 Publication in the media. ICJ rejects Belgian arrest warrant for Foreign Minister of Democratic Republic of the Congo. February 15, 2002 / http://www.unis.unvienna.org/unis/pressrels/2002/afr379.html

33 Arrest Warrant, para. 58.

34 ICJ. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), para. 60.

35 International Law Commission.Immunity of State officials from foreign criminal jurisdiction, March 31, 2008. A/CN.4/596, para 118.

36 International Law Commission.Immunity of State officials from foreign criminal jurisdiction, March 31, 2008. A/CN.4/596, para 100.

37 Court of Cassation, Affaire Kadhafi, Judgment No. 1414 of 13 March 2001, published in ILR, vol. 125, pp. 508–510.

38 Decision of the Federal Attorney General, 28 April 2005, File No. 3 ARP 35/05–2 (not published). Amnesty International. Germany: End Impunity Through Universal Jurisdiction 2008, c. 103.

39 Amnesty International. Germany: End Impunity Through Universal Jurisdiction 2008, c. 103.

offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."[40] International law is part of the legal system of countries party to international treaties, such as, for example, the Rome Statute. Theoretically, if the crimes are such under international law, the national law may adopt a retroactive rule on criminal law regarding war crimes and crimes against humanity. But there is a contradicting norm: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."[41] Since there are no sanctions provided by international law, the accused can theoretically be found guilty, but cannot be subjected to criminal punishment.

Despite the fact that war crimes and crimes against humanity under international law do not have statutes of limitations, universal jurisdiction is exercised through the incorporation of corpus delicti into the criminal law of the respective country. Thus, the German Criminal Code allows prosecution of crimes that occurred after the entry into force of articles criminalizing such acts, i.e. criminal law is not retroactive.

"In Belgium, statutes of limitations do not apply in the prosecution of genocide, crimes against humanity and war crimes. In Finland, statutes of limitations do not apply to genocide. In the Netherlands, statutory limitations do not apply to genocide, torture, crimes against humanity and most war crimes. In Spain, genocide, crimes against humanity, crimes against persons and property enjoying special protection during a military conflict are excluded from the statute of limitations. There are no statute of limitations for crimes in the UK that are subject to universal jurisdiction in accordance with UK law."[42] In Germany, the statute of limitations does not apply to genocide, crimes against humanity and war crimes.[43]

The role of immigration services

The main point of collection of information on the entry into the country of war criminals is the immigration service. The European Union notes that states should ensure that they have enough resources to identify war crimes suspects, as well as victims and witnesses.[44]

HRW notes that if immigration services refuse to grant refugee status under Article 1F of the UN Refugee Convention – committing a crime against peace, war crime, crime against humanity – information about such an asylum seeker should be disseminated, in case or a country has instituted proceedings against him under universal jurisdiction.[45]

HRW notes that in a number of countries (Denmark, the Netherlands, Norway), immigration services play a significant role in identifying war criminals. During the interview, asylum seekers are asked detailed questions about their previous place of work. Subsequently, officials verify the information with lists of suspects accepted by international tribunals.[46] Thus, information about war criminals should be simultaneously transmitted to both the ICC and jurisdiction, where suspects can go as asylum seekers or request a visa for other reasons.

In the Netherlands, migration services transmit information to the prosecutor's office. The same system operates in the UK.

40 The Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A), art. 11 (2).

41 Ibid.

42 Redress/FIDH. Legal Remedies for Victims of " International Crimes", March 2004: http:/www.redress.org/downloads/publications/LegalRemediesFinal.pdf, last accessed April 5, 2020.

43 Amnesty International. Germany: End Impunity Through Universal Jurisdiction 2008, p. 66.

44 2003/335/JHA: Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, preamble.

45 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014.

46 HRW. Universal Jurisdiction in Europe. The State of the Art. Volume 18, No. 5(D). June 2006.

Applicants are also informed that they can testify if they are victims or witnesses of a war crime or crime against humanity.

German immigration officials are asking asylum seekers from Syria to fill out a questionnaire asking if they have witnessed any war crimes and whether they can provide details, including the names of those in charge.[47] The arrest of the suspect is possible only after collecting the necessary evidence in the framework of the criminal case, therefore, high-quality preliminary work is crucial.

Countries provide monthly data on asylum seekers possibly involved in war crimes and crimes against humanity to the European Asylum Support Office (EASO), in which all 30 countries participate (28 EU member states, as well as Norway and Switzerland).[48]

In Germany, the status of all persons who have received refugee status in Germany is checked at least once every three years and can be revoked if new evidence of past criminal activity appears.[49]

Since 2015, French immigration services have been obliged to inform the specialized unit about persons who have been denied refugee status on the basis of article 1F of the Refugee Convention. In practice, such investigations were initiated, including with regard to immigrants from Chechnya.[50]

The international cooperation

In order to successfully investigate cases under universal jurisdiction, international cooperation must be established. Replies to inquiries and evidence must be submitted within a reasonable time.

Collaboration helps to strengthen the signing of a treaty on war crimes and crimes against humanity. Such documents include the League of Arab States Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Economic Community of West African States Convention on Mutual Legal Assistance in Criminal Matters, the European Convention on Mutual Legal Assistance in Criminal Matters, the International Convention for the Protection of All Persons from Enforced Disappearance, the UN Convention against Transnational Organized Crime and the UN Convention against corruption.

In countries where migration services do not actively identify war criminals, victims and witnesses, cases are brought about by the active work of local NGOs.

Difficulties in the investigation

HRW and ECCHR note following difficulties in investigating crimes under universal jurisdiction:

- In a number of countries, there is no separate unit whose investigators would specialize in cases under universal jurisdiction.
- Inability to inspect the crime scene
- Language barriers, while HRW recommends not involving immigrants from countries participating in the conflict as translators, because due to the particular sensitivity of cases, translation may be distorted and confidential information may be transmitted to interested parties.[51]
- The need to understand the historical and political context in which the alleged crimes occurred,
- The difficulty of collecting evidence, including related to elements of war crimes and crimes against humanity.

47 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 10.

48 https://easo.europa.eu/analysis-and-statistics, last accessed April 5, 2020.

49 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 57.

50 TRIAL. Universal Jurisdiction Annual Review 2020, p 31.

51 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 15, 47.

- Long deadlines for replies to international inquiries (in practice, answers were met after a year or a half).[52]
- Retraumatization of witnesses during interrogations. In this connection, it is necessary to adopt legislation on psychological and social assistance to victims during the investigation, trial and after completion of procedures. This contributes to the fight against secondary trauma and strengthens the desire of witnesses to cooperate with the investigation.[53]
- Ensuring the protection of witnesses. Witness protection staff provided security and testimony from a secret location via video conferencing. It is important that the prosecution is supported not only by anonymous witnesses, so that the accused can also exercise their defense.
- Lack of interest by countries that hold evidence.

Witnesses play a key role in proving the commission of crimes. Therefore, providing them with full protection is the key to the success of such an investigation. Many of them continue to live in the country where the crime was committed or will return there after testifying in court. Providing remote protection is almost impossible, so the anonymization of witnesses plays an important role.[54]

On the other hand, the charged with a criminal offence must be ensured the right to a fair trial, an integral part of which is, including Article 6 of the European Convention on Human Rights and Fundamental Freedoms, the right to examine persons testifying against him.[55]

In at least two serious international crimes pending before the Dutch courts, not a single witness testified in court. At the same time, the evidence collected by the investigating judge, and sometimes by police investigators, was read out loud and then entered into the court record.[56]

In these cases, witnesses were questioned in their own country. The prosecutor arranged a trip for them to another city to interrogate them far from their neighbors. At the same time, investigators note that the intimidation most likely came from the accused's family, while the investigators did not know anything about the threats from the authorities.[57] Working with cases before the European Court of Human Rights, including in the North Caucasus, shows that the state almost never resortes to pressure on the applicant or witnesses.

Initiation of a criminal investigation before arrival in the country

The task of states is not so much the establishment of general justice as the creation of conditions under which war criminals can not hide or stay in their country with impunity. That is why communication with the state is of fundamental importance.

Countries are not always willing to spend resources on investigations if the offender is not in the country and it is unclear whether they will ever be. However, this seems to be a dead end, since initiating an investigation after entry may not lead to arrest, as it takes time.

Countries legislatively limit the amount of cases that they can take into production. This is due to the appropriateness of spending of public

52 HRW. Universal Jurisdiction in Europe. The State of the Art. Volume 18, No. 5(D). June 2006.

53 ECCHR. Universal Jurisdiction in Germany? 8 June 2016 / https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Report_Executive_Summary_FDLR_EN.pdf last accessed April 5, 2020.

54 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 19.

55 ECHR, Art. 6: "Everyone charged with a criminal offence has the following minimum rights... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;".

56 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 17 in footnote.

57 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 49.

funds. In the course of the conduct of the case, the costs of interpretation and translation of the testimonies of witnesses and documents, flights and accommodation in the country are to be covered.[58]

However, scientists note that issuing an arrest warrant generally strengthens the international justice system, even if an arrest is not expected in the near future.[59]

Coordination of the search and arrest of the charged

Network Against Genocide

Effective prosecution of the charged requires coordination between states. The first step in improving coordination at the EU level was the establishment in 2002 of the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (hereinafter referred to as the Genocide Network).[60] Network observers are the International Committee of the Red Cross, Amnesty International, HRW, the Coalition for the International Criminal Court and the International Federation for Human Rights.[61]

The Office of the Prosecutor of the ICC and Europol have observer status on the Web, and states that are not members of the European Union can obtain the same status.

The purpose of the Network was to ensure close cooperation between national authorities in the investigation and prosecution of the main international crimes defined in articles 6, 7 and 8 of the Rome Statute. The network is located in The Hague and is part of the Eurojust agency, which in turn consists of prosecutors, judges or police officers with similar powers from each EU state. In 2016, a cooperation agreement with Eurojust was signed by Ukraine.[62]

The network promotes the effective investigation and prosecution of major international crimes at the state level by:

- Exchange of information on criminal investigations and prosecutions of persons suspected of, or committed or involved in the commission of international crimes within the jurisdiction of the International Criminal Court;
- Promoting cooperation and mutual assistance between law enforcement agencies of the Member States and the judiciary;
- Exchange of progressive methods, experience and practical methods of investigation and prosecution of relevant crimes;
- Raising awareness of these crimes and the European Union's commitment to ending the impunity of suspected war criminals.[63]

In 2014, the Network adopted a strategy to combat impunity for crimes of genocide, crimes against humanity and war crimes in the European Union and its member countries.[64] In 2018, Network Guidelines were developed.[65]

58 See Langer, Máximo, Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven', in: Journal of International Criminal Justice, 2015, Vol. 13, p. 245 – 256.

59 Schüller, Andreas, The Role of National Investigations and Prosecutions in the System of International Criminal Justice – Developments in Germany, in: Sicherheit und Frieden (S+F), 2013, Vol. 4, p. 226 (230).

60 COUNCIL DECISION of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA) https://op.europa.eu/en/publication-detail/-/publication/71d3044a-1821-4c7c-a784-4ef89c4eaef8/language-en.

61 http://www.eurojust.europa.eu/Practitioners/Genocide-Network/Pages/members.aspx, last accessed April 5, 2020.

62 Ukraine has signed a cooperation agreement with Eurojust. Jun 27, 2016. https://tsn.ua/en/politika/ukraina-podpisala-soglashenie-o-sotrudnichestve-s-evroyustom-656430.html, last accessed April 5, 2020.

63 Genocide Network Booklet. http://www.eurojust.europa.eu/Practitioners/Documents/GenNetLeaflet-2012-11-15-RU.pdf, last accessed April 5, 2020.

64 Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, 2014 / http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/Strategy%20of%20the%20EU%20Genocide%20Network%20(November%202014)/Strategy-Genocide-Network-2014-11-EN.pdf, last accessed April 5, 2020.

65 Guidelines on the functioning of the network for investigation and prosecution of genocide, crimes against humanity and war crimes / http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/

NGOs have the right to participate in the open part of the Network meeting.[66]

International arrest warrant

In June 2018, the German Federal Court issued an international arrest warrant for Jamil Hassan, who until July 2019 headed the intelligence of the Syrian Air Force.[67] A warrant means that the suspect must be arrested and extradited to Germany. On the basis of similar warrant issued by the investigating judge of Spain, Augusto Pinochet was arrested and extradited to Spain in London.[68]

European arrest warrant

A European arrest warrant is valid in all member states of the European Union. The legislation on the European Arrest Warrant provides for extradition within 90 days from the date of arrest, or within 10 days if the detained person agrees to the extradition.

Article 16 of the Council Framework Decision on a European arrest warrant regulates the resolution of a conflict if several warrants have been issued with respect to one charged.[69]

Persons with respect to whom there is evidence that they have committed war crimes and crimes against humanity are subject to prosecution and, if found guilty, punished, as a general rule, in the countries where they committed these crimes. In accordance with this, States cooperate on the extradition of such persons. In accordance with article 1 of the Declaration on Territorial Asylum of December 14, 1967, states do not grant asylum to any person with respect to whom there are serious grounds for believing that he has committed a crime against peace, a war crime or a crime against humanity.[70]

Features of universal jurisdiction in individual countries

According to TRIAL, to date, prosecution in the framework of universal jurisdiction in practice is carried out by 16 countries, 11 people are accused on trial, 207 people remain as suspects.[71]

Universal jurisdiction will be effective if (1) the state exercising jurisdiction has comprehensive legislation, (2) a well-functioning specialised war crimes unit (3) with previous experience and (4) access to the necessary evidence, including witnesses, and, most importantly, (5) the suspect.[72] In most countries, the discretion of the prosecutor, who can either refuse to initiate an investigation or terminate it at later stages, plays a decisive role.[73]

Among countries investigating cases under universal jurisdiction as of 2020 are Argentina, Austria, Belgium, Finland, France, Germany, Ghana, Hungary, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, Great Britain and the USA.[74]

Guidelines%20on%20the%20Functioning%20of%20the%20Genocide%20Network%20(November%202018)/2018-11_Guidelines-functioning-Genocide-Network.pdf, last accessed April 5, 2020.

66 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 87.

67 ECCHR. Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-to-start-2020-in-germany/, last accessed April 5, 2020.

68 ECCHR. Survivors of Assad's torture regime demand justice – German authorities issue first international arrest warrant Q & A on the legal basis / https://crd.org/wp-content/uploads/2019/02/Profiles_ECCHR_CRD_20190220.pdf, last accessed April 5, 2020.

69 Eurojust. Guidelines for deciding on competing requests for surrender and extradition Revised 2019

70 UN resolution on the Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity (Resolution 3074 [XXVIII], adopted by the UN General Assembly on 3 December 1973).

71 TRIAL. Universal Jurisdiction Annual Review 2020, c. 13.

72 Florian JEßBERGER. Towards a 'complementary preparedness' approach to universal jurisdiction – recent trends and best practices in the European Union. p. 9

73 HRW. Universal Jurisdiction in Europe. The State of the Art. Volume 18, No. 5(D). June 2006, p. 33.

74 TRIAL. См. Universal Jurisdiction Annual Review 2020.

Let us dwell on some where the investigation can be initiated at the initiative of NGOs and before the suspect enters the territory of the country.

Argentina

While the investigation of crimes against humanity during the Franco dictatorship was closed in connection with the amnesty law, the courts in Argentina, where the case is being investigated under universal jurisdiction, agree to the exhumation of those killed in the 30s of the last century.[75]

Argentina is also investigating the Rohingya genocide case, initiated by an NGO.[76]

Germany

The Code of Crimes against International Law (hereinafter – CCAIL), which entered into force in 2002, directly establishes the possibility of criminal prosecution within the framework of universal jurisdiction.[77]

The list of war crimes in CCAIL is divided into sections:

1. War crimes against persons (section 8);
2. War crimes against property and other rights, as well as war crimes against humanitarian operations and emblems (sections 9 and 10);
3. War crimes consisting in the use of prohibited methods of warfare (section 11);
4. War crimes consisting in employment of prohibited means of warfare (section 12).[78]

However, there are a number of gaps in the code, for example, extrajudicial executions are not defined, so they qualify as killings.[79]

The procedure under universal jurisdiction in Germany is similar to the ICC. So, CCAIL provides that at the first stage the federal prosecutor of the German Federal Court monitors the media, NGOs and analyzes situations that may indicate a violation of international criminal law.

Although cases may be instituted based on media monitoring, NGOs also have the right to file a complaint with the federal prosecutor and request that a war crime or crime against humanity be brought.

In the second stage, if the prosecutor has identified violations and they have a connection with Germany, the background "Investigation" may be instituted against unidentified persons. "Communication with Germany" is not a strictly necessary condition, however, the prosecutor has the right to refuse prosecution if the suspect is not a German citizen, the crime was not committed against a German citizen, the suspect is not present in Germany and such presence should not be expected, the crime is being prosecuted by international criminal court or the state in whose territory the crime was committed, whose citizen is suspected of having committed a crime or whose citizen suffered from a crime.[80] To institute proceedings against a specific suspect, it is not necessary that he be in Germany.[81] It is impossible to appeal against the refusal to initiate proceedings; the issue of individual criminal prosecution within the framework of universal jurisdiction refers to discretion of authorities.[82]

75 TRIAL. Universal Jurisdiction Annual Review 2020, p. 17.
76 TRIAL. Universal Jurisdiction Annual Review 2020, p. 19.
77 Section 1. In accordance with this provision, CCAIL shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.
78 Amnesty International. Germany: End Impunity Through Universal Jurisdiction 2008, p. 38.
79 Amnesty International. Germany: End Impunity Through Universal Jurisdiction 2008, p. 39.
80 Amnesty International. Germany: End Impunity Through Universal Jurisdiction 2008, p. 55–56, see also Section 153c, paragraph 1, subparagraph 1 and 2 of the Criminal Code of the Federal Republic of Germany.
81 Amnesty International. Germany: End Impunity Through Universal Jurisdiction 2008, p. 55.
82 ECCHR. Universal Jurisdiction in Germany? 8 June 2016 / https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Report_Executive_Summary_FDLR_EN.pdf, last accessed April 5, 2020.

The third stage "Situation" means the transition to the active phase of the interrogation of witnesses, which may lead to the identification of suspects, in which case the investigation against them is allocated in a separate proceeding.[83]

An investigation is underway in Germany against suspected criminals in Chechnya.[84]

Spain

Spain passed the Organic Law of the Judicial Power (LOPJ) in 1985, it empowered local courts to hear cases of crimes committed outside Spain if they could be defined as genocide, terrorism or other crimes that should be prosecuted in accordance with international treaties in Spain. Thus, they include torture, the prosecution of which is provided for by the UN Convention against Torture, and war crimes and crimes against humanity, which should be prosecuted under the Geneva Conventions.[85] Later restrictions were imposed that the suspect or victims must be Spanish citizens, which significantly narrowed the scope for applying universal jurisdiction.

Canada

Canada has passed the Crimes Against Humanity and War Crimes Act.[86] A case may be brought to court only with the consent of the Attorney General or his deputy.

France

The Criminal Procedure Code of the French Republic explicitly makes it possible to prosecute persons who have committed a crime outside the Republic when it comes to torture, terrorism, willful killing of a minor and others not related to the category of war crimes or crimes against humanity.[87]

France has the Central Office for Combatting Crimes Against Humanity, Genocide and War Crimes, the investigators of which have the right to independently identify suspects, without waiting for statements from NGOs or victims.[88]

A preliminary investigation can be initiated both at the initiative of the prosecutor and after an appeal from an NGO, and it is not necessary that the suspect be in France.[89] A trial may take place in the absence of the accused.[90]

Switzerland

An investigation can be launched upon an NGO complaint before the accused arrives in Switzerland. So, in 2017, TRIAL International complained to the prosecutor regarding the former the Inspector General of Police of Gambia, Ousman Sonko, who is suspected of torture and crimes against humanity. He was later detained at the immigration center, where he applied for asylum, and 9 victims of crimes supported the NGO complaint.[91]

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83 Under Section 120 (1) No. 8 in combination with Section 142a (1) of the Courts Constitution Act (Gerichtsverfassungsgesetz).

84 TRIAL. Universal Jurisdiction Annual Review 2020, p. 48.

85 Ley Orgánica del Poder (LOPJ) Organic Law of the Judicial Power, Art. 23.4. https://www.uv.es/ivasp/LOPJ, last accessed April 5, 2020.

86 Crimes Against Humanity and War Crimes Act (CAHWCA), 2000 (last amended on 2019-09-19) / https://laws-lois.justice.gc.ca/eng/acts/c-45.9/, last accessed April 5, 2020.

87 Code de procédure pénale, 698 – 698 (2) / https://www.legifrance.gouv.fr/affichCode.do;jsessionid=8D7A735D0F327A8D49651831AD29817E.tpdjo04v_2?idSectionTA=LEGISCTA000006151920&cidTexte=LEGITEXT000006071154&dateTexte=20090315, last accessed April 5, 2020.

88 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 70.

89 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 76.

90 HRW. The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, 2014, p. 69.

91 TRIAL. Universal Jurisdiction Annual Review 2020, p. 75.

Switzerland is also investigating the brothers of Syria's former president, Hafez al-Assad, accused of committing war crimes in 1982. The investigation was initiated by an NGO with the support of the victims of the crime after it became known that the suspects had settled in Switzerland.[92]

Sweden

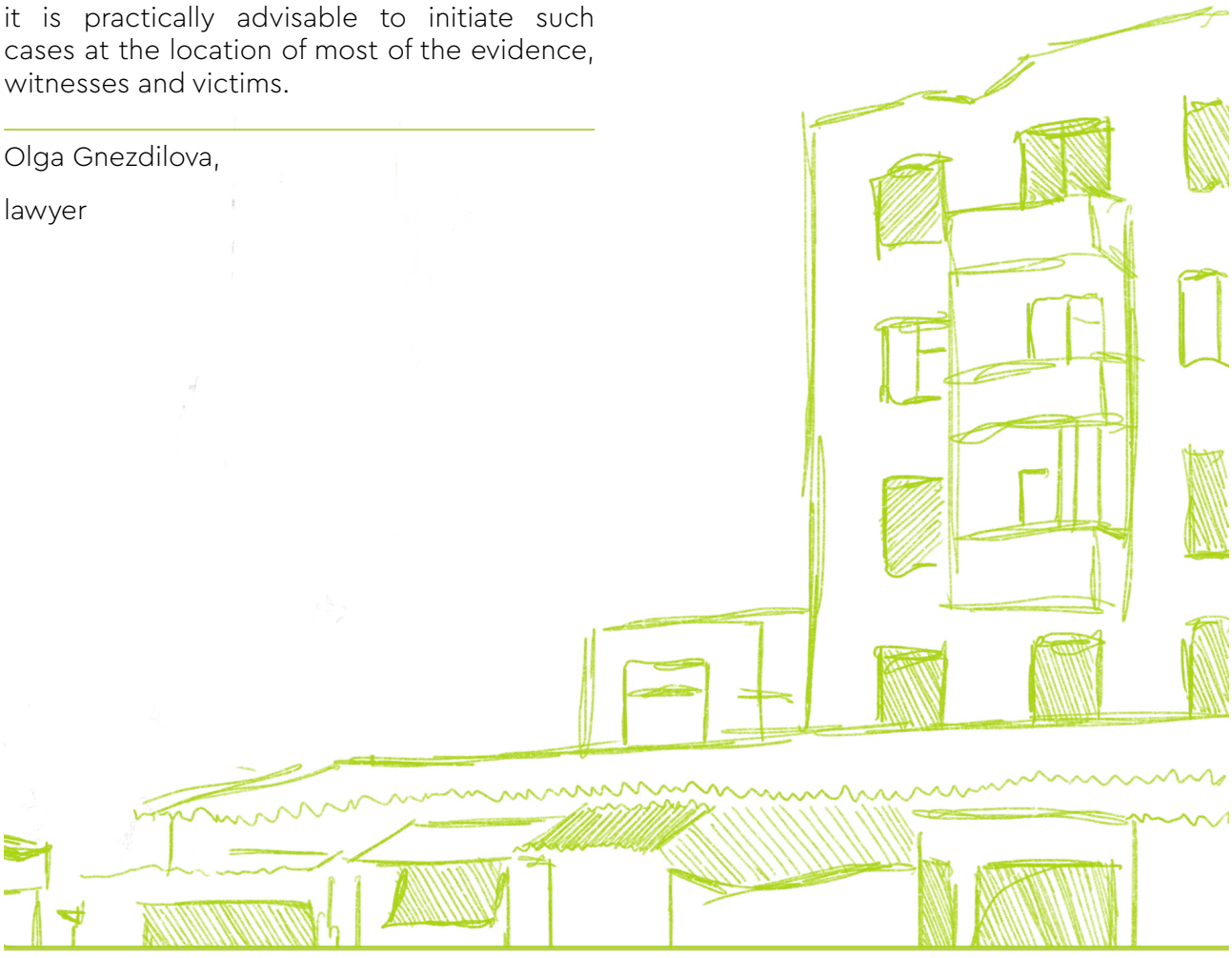
The presence of the suspect is also not required to initiate an investigation.[93]

Conclusion

Thus, universal jurisdiction offers ample opportunity to prosecute war crimes and crimes against humanity. However, the problem of limited resources remains unresolved amid a large number of potential suspects, ongoing and ended armed conflicts. Despite the fact that criminal investigations can be instituted even before the suspect arrives in the country, it is practically advisable to initiate such cases at the location of most of the evidence, witnesses and victims.

Olga Gnezdilova,

lawyer



92 TRIAL. Universal Jurisdiction Annual Review 2020, p. 76–77.

93 Florian JEßBERGER . Towards a 'complementary preparedness' approach to universal jurisdiction – recent trends and best practices in the European Union. p. 8.

4. Features of the national legislation of the Russian Federation in the aspect of bringing citizens of the Russian Federation and citizens of other countries located in the territory of the Russian Federation to account for violation of the norms of international humanitarian law

Introductory remarks

According to experts at least 69 armed conflicts of varying degrees of intensity have been reported to date in the world.[94] It is no secret that many of them are attended by Russian citizens. We are talking first of all about the wars in Syria, the CAR, Mozambique and several other states. But even among such conflicts, the fighting in Donbas (Ukraine) stands out. The involvement of Russian Federation into this conflict has repeatedly become a matter of concern of the international community and was noted in the reports of several international governmental and non-governmental organizations, including the reports of the Prosecutor of the International Criminal Court (hereinafter – the ICC).[95]

It is obvious that such conflicts inevitably involve massive violation of human rights. And this, in turn, actualizes the task of further improving the norms of national law, criminalizing the commission of international crimes, as well as the relevant procedural mechanisms to ensure that these persons are held accountable in the criminal procedure. It should be borne in mind that both citizens of the Russian Federation and foreigners staying on its territory on a temporary or permanent basis may fall under the criminal prosecution. A special category is made up of persons who have actually been granted citizenship of the Russian Federation in order to avoid their extradition to the respective states.

As a result, the legal science and the human rights community are faced with the question, what are the possibilities for Russian law enforcement agencies to fill in the "impunity lacunae", though created outside the Russian state, but through the efforts of its supporters?

Standards of Russian law providing for liability for violation of international humanitarian law. Assessment of their implementation in the criminal legislation of the Russian Federation

Without going into the purely political aspects of the topic, it should be noted that one of the main tendencies pervading international humanitarian law today is its gradual domestication, which has already been addressed in the scientific literature.[96] Russian legislation doesn't stand aside from this process. In 1996 there was introduced a separate chapter 34 "Crimes against peace and security of humanity" in the new Criminal Code, which included, in particular, such compositions of crimes as planning, preparing, unleashing or pursuance of war of aggression (art. 353), public calls for unleashing the latter (art. 354), use of prohibited means and methods of war (art. 356), genocide (art. 357), ecocide (art. 358), mercenaries (art. 359) and several others. In 2014, the rehabilitation of Nazism (Art. 354–1) was added to them, without having, however, an international legal basis and a universal punishment. At the same time, from a legal and technical point of view, the fact that this chapter stands as the last one of the dedicated section of the Criminal Code, draws the attention, as it indirectly attests to the least significance of these crimes (if based on the widespread approach in the academia on the importance of the sequence of sections and chapters of the criminal law). In addition, the Criminal Code contains provisions regarding limitation periods (Part 5 of Article 78, Part 4 of Article 83) and universal jurisdiction (Part 3 of Article 12), which are closely related to the issue under consideration.

Meanwhile, actually only one article in the Criminal Code of the Russian Federation

94 https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf
95 See, for instance: https://www.icc-cpi.int/itemsDocuments/2018-otp-rep-PE-Ukraine.pdf
96 Bogush G.I., Esakov G.A., Rusinova V.N. International crimes. M.: Prospect, 2017. p. 5.

is devoted to violations of international humanitarian law – the use of prohibited means and methods of warfare. This conclusion is due to the understanding of international humanitarian law as a group of norms, the regulation of which is primarily the relationship between the belligerent state and the citizens of another belligerent state. Its objective basis, as O. I. Tiunov pointed out, is "an armed conflict between states and their mutual obligations regarding the regulation of the state of certain individuals in this conflict."[97] However, in recent decades, this approach to international humanitarian law as a branch of general international law aimed at regulating relations between states has become unreasonably narrow. As noted in a decision by the International Criminal Tribunal for the Former Yugoslavia in the Tadic case, "Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife"[98] (paragraph 119). For this reason, it is considered quite possible and even necessary to use the norms and standards of international humanitarian law in circumstances of a non-international armed conflict as well.

In addition, the Russian Federation is a party to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention Relative to the Treatment of Prisoners of War, the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949, as well as Additional Protocols I and II of June 8, 1977 to these conventions*.[99] These international documents, without directly establishing any sanctions for violating their requirements, impose obligations on member countries to criminalize a number of serious violations of international humanitarian law.

In relation to Russia, this means that the existence of a ratified international treaty does not automatically lead to its direct application in the national legal order, since the general rule presumes an international treaty as non-selfexecuting in this area of law.[100] In accordance with Part 1 of Art. 1 of the Criminal Code of the Russian Federation "the criminal legislation of the Russian Federation consists of this Code. New laws providing for criminal liability shall be included in this Code". In continuation of this rule, part 1 of article 3 of the Criminal Code establishes that "the criminal offence, as well as its punishability and other criminal legal consequences, are determined only by this Code".

Moreover, the Plenum of the Supreme Court of the Russian Federation in paragraph 6 of its decision of 10.10.2003 No. 5 "On the application by the courts of general jurisdiction of generally recognized principles and norms of international law and international treaties of the Russian Federation" explains that "international treaties that provide for essential elements of offence should not be applied directly by the courts of the Russian Federation, because such agreements establish the obligation of states to ensure the fulfillment of obligations stipulated by the agreement by establishing the punishability of certain crimes by internal (national) law...In this regard, international legal norms providing elements of offence should be applied by the courts of the Russian Federation in cases where the norm of the Criminal Code of the Russian Federation directly establishes the need to apply an international treaty of the Russian Federation (for example, Articles 355 and 356 of the Criminal Code)".

97 Tiunov O. I. International humanitarian law: a textbook. M .: Norma, 2009. p. 151.

98 Prosecutor v. Tadic (Judgment in Appeal on Jurisdiction) ICTY-94–1 (2 October 1995).

99 *In October 2019, the President of the Russian Federation introduced a bill to the State Duma of the Federal Assembly of the Russian Federation on the withdrawal of the statement regarding recognition ipso facto of the competence of the international fact-finding committee made upon ratification of Additional Protocol I to the Geneva Conventions of 1949, and already on November 12 the relevant law was published and entered into force.

100 Yesakov G.A. Responsibility of commanders in Russian criminal law from the point of view of de lege lata / LEX RUSSICA. 2017. No. 11. p. 95.

Based on this, the Russian scientist G. A. Yesakov draws a reasonable conclusion that it is only possible to hold a person liable for such an act under the Russian criminal law after the relevant norm is established (identified) in it. That norm must fully fulfill the corresponding obligation assumed by Russia, that is, to criminalize to the extent foresaw by international humanitarian law, the corresponding deed.[101]

As we have already mentioned, in Russian law the violation of international humanitarian law is criminalized through Article 356 of the Criminal Code "Use of prohibited means and methods of warfare". Part 1 of it provides for punishment for ill-treatment of prisoners of war or civilians, deportation of civilians, looting of national property in the occupied territory, use of means and methods prohibited by international treaty of the Russian Federation in armed conflict, and Part 2 of the same article punishes the use of weapons of mass destruction prohibited by an international treaty of the Russian Federation.

Meanwhile, the disposition of the Art. 356 seems extremely imperfect. This is especially striking when comparing it with Articles 7 and 8 "Crimes against humanity" and "War crimes", respectively, of the Rome Statute of the ICC;[102] the Russian Federation officially announced its intention not to become a party of the abovementioned Statute on November 16, 2016 despite signing it in 2000. A quick comparison of the two texts – National Law and the Rome Statute – is enough to understand that dozens of elements of offence are left out of scope of Russian criminal law, which cannot be inductively derived from the extremely meager wording of Art. 356. In particular, we mean sexual slavery, a statement that there will be no mercy, apartheid and some other international crimes. In addition, the doctrine provides an extensive list of other claims to this norm, namely: a mixture of the "Hague" and "Geneva" branches of international humanitarian law, the overlook of customary international law, the lack of distinction between international and non-international armed conflict, etc.[103]

Probably, it is for this reason, the special Directorate for the Investigation of Crimes Related to the Use of Prohibited Means and Methods of Warfare, created in 2014 as part of the Investigative Committee of Russia, most often initiates the corresponding criminal proceedings against citizens of Ukraine not in accordance with Art. 356, but based on the norms of the Criminal Code, providing for general delict. For example, the criminal prosecution of a citizen of Ukraine N.V. Savchenko was carried out under Art. 105 of the Criminal Code of the Russian Federation "Murder", to which the well-known international scientist S.V. Sayapin drew attention in his legal opinion.[104] As for Russian citizens and foreign sympathizers of unrecognized "DPR/LPR", including citizens of Ukraine located on the territory of the Russian Federation, the relevant precedents for bringing them to criminal liability under Art. 356, as far as we know, are absent.

A similar situation exists with the use of the Ukrainian "twin" Art. 356, i.e. Article 438 of the Criminal Code of Ukraine "Violation of the laws and customs of war", which during the more than 5-year conflict in Donbas has never been subjected to any kind of correction. This article as well as the Art. 356 of the Criminal Code of the Russian Federation, is not used in the activities of national law enforcement agencies, and the relevant acts committed in the area of the anti-terrorist operation are qualified under other articles of the Criminal Code of Ukraine (torture, rape, etc.), which took place in the case of the battalion "Tornado".[105]

It is significant that the bill of indictment in the case of N. V. Savchenko did not mention the international humanitarian law and did not use the term "armed conflict", but used other concepts that did not have a specific international legal content: "armed clashes", "armed confrontation", etc, although the accused was charged with the murder of "civilians", which, in turn, is possible only in circumstances of armed conflict. When

101 Ibid

102 https://www.un.org/ru/documents/decl_conv/conventions/pdf/rome_statute(r).pdf

103 Bogush G.I., Yesakov G.A., Rusinova V.N. Decree. Op. p. 9.

104 The full text of the conclusion can be found on the page of S. V. Sayapin, available on the website www.academia.edu.

105 Securing implementation of international humanitarian law in Ukraine: Report by Global Rights Compliance LLP. Kyiv, November 2016, p. 65–69.

qualifying an act as an ordinary murder, the terminological phrase "civilians" is meaningless.[106]

The foregoing indicates an extremely weak awareness of post-Soviet law enforcement agencies about the specifics of international humanitarian law, and also underlines once again the imperfection of the existing regulatory framework. From this point of view, the work of an informal working group led by G. A. Yesakov, which operated during 2013 under the auspices of the International Committee of the Red Cross and proposed to separate the Article 356 of the Criminal Code of the Russian Federation into two separate articles, deserves all attention and support.[107] Directly in article 356, it is proposed to establish responsibility for the so-called serious violations of the "Hague" branch of international humanitarian law (the use of prohibited weapons, indiscriminate shelling, illegal use of protected emblems, etc.), while establishing sources of international humanitarian law applicable in determining the conditions of punishment and giving the concept of armed conflict. In turn, article 356-1 should incorporate the so-called serious violations of the Geneva branch of international humanitarian law, such as intentional harm to health, torture, sexual assault, enforced disappearance and others.

At the same time, despite all the problems that arise in law enforcement related to the criminal prosecution of participants of the Donbas conflict precisely for violations of international humanitarian law, it seems advisable to consider the possibility of qualifying their actions as mercenaries (Article 359 of the Criminal Code of the Russian Federation) and/or participation in an illegal armed group (hereinafter referred to as the IAG; Art. 208 of the Criminal Code of the Russian Federation), which are not considered strictly as crimes under international law.

The possibility of prosecuting citizens of the Russian Federation for mercenary and/or participation in illegal armed groups. The problem of compliance of the relevant provisions of the Criminal Code of the Russian Federation with international standards

As you know, the universally accepted definition of a mercenary who does not have the right to be a combatant or a prisoner of war, is contained in Article 47 of Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). In accordance with part 2 of the aforementioned article, a mercenary is any person who: (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) Does, in fact, take a direct part in the hostilities; (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) Is not a member of the armed forces of a Party to the conflict; and (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Arose during the Middle Ages and the Renaissance, this phenomenon received its "second wind" in the 60s of the last century, when various kinds of colonial authorities, which had lost their influence due to numerous national liberation movements, tried to regain once-controlled territories by force.[108]

106 Sayapin S.V. Legal opinion on certain international legal aspects of the criminal case of N.V. Savchenko / www.academia.edu.

107 Bogush G.I., Yesakov G.A., Rusinova V.N. Decree. Op. p. 29.

108 Cassese A. Mercenaries: lawful combatants or war criminals ? / https://www.zaoerv.de/40_1980/40_1980_1_a_1_30.pdf

However, in the 21st century, this phenomenon was transformed from a predominantly African one into an integral element of any modern war, where national authorities, not wanting to be convicted of violating international humanitarian law and fearing lawsuits from relatives of dead soldiers, turn to the services of so-called private military companies (PMCs)), which, while not officially incorporated into the armed forces, do all the "dirty" work for them. And although the European Court of Human Rights in its ruling in the case of *Costello Roberts v. The United Kingdom* of March 25, 1993 emphasized that the state cannot relieve itself of responsibility by delegating part of its obligations to private individuals (paragraph 26), nevertheless the legal status of mercenaries raises a lot more questions than the status of a regular soldier.

Realizing this, on December 22, 2003, the UN General Assembly, developing the provisions of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries as well as welcoming the entry into force of this document, adopted resolution (A/RES/58/162) "The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination", in which in clause 9 it called on states to investigate the possible participation of mercenaries in all cases of criminal acts of terrorist character and bring to justice those found responsible or to consider their extradition, if so requested, in accordance with domestic law and applicable bilateral or international treaties.

Perhaps, precisely because of the vagueness and uncertainty of their legal status, mercenaries feel so at ease in the Donbas. So, according to the estimates of the Ukrainian Helsinki Human Rights Union (hereinafter – UHHRU), most of the violations of conventional and international humanitarian law during the hostilities of 2014-2019 were committed precisely by these people. It is noteworthy that Russians make up more than 10% of all members of armed groups, information on which is available at the UHHRU Documentation Center. In addition to citizens of the Russian Federation, the Center has information about citizens of Belarus (44 people), Kazakhstan (38 people), Serbia (28 people), Moldova (20 people), Germany (19 people), Uzbekistan (15 people), Slovakia (12 people) , France (12 people). There are also data on residents of Italy, Israel, Armenia, Georgia, the Czech Republic, Latvia, Spain, Colombia, Lithuania, Macedonia, Poland, Bulgaria, Azerbaijan, Estonia, Kyrgyzstan, Turkmenistan, who participated in the armed conflict in Ukraine or were part of the paramilitary formations. In total, over 250 foreigners, not counting the Russians.[109]

But the impunity of these people is especially acute in the Russian Federation, where they feel almost like heroes and even unite in public organizations like the "Union of Donbas Volunteers" (the head is the former chairman of the Council of Ministers of the self-proclaimed DPR A. Borodai). What are the possibilities of national criminal law in this area?

Article 359 of the Criminal Code of the Russian Federation defines a mercenary as a person acting with a view to receive material compensation and is not a citizen of a state Party to an armed conflict or hostilities, does not permanently reside in its territory, and is not a person sent to perform official duties. As you can see, the qualifying feature here is "receive material compensation", without proof of which the criminal case is subject to termination due to the absence of corpus delicti. Moreover, the international standard of recognition as a mercenary is higher than the national one. In art. 47 of Additional Protocol I in paragraph c), it is emphasized that the person "is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess (emphasis added) of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party". Meanwhile, as the Ukrainian side notes, "the Documentation Center has not fixed the facts of payment to foreign citizens of remuneration falling under this characteristic. From the available payrolls of the IAG it is clear that the level of payment of foreign citizens does not differ from the level of payments of other participants in the IAG, and that these amounts are even lower than the average salaries in their countries".[110]

109 https://helsinki.org.ua/wp-content/uploads/2017/07/Bro.pdf
110 Ibid

But even if to ignore the cited provision and be guided solely by the disposition of Art. 359 of the Criminal Code, in any case, the investigation is obliged to prove that a person has received material compensation for his/her participation in the hostilities in the territory of a foreign country. Which is extremely challenging to do, given not only the geographical remoteness of the circumstances to be verified, but also the fact that the majority of Russians participating in the Donbas war emphasize their altruistic motivation, which is not usually associated with obtaining financial benefits, but due to the ideas of "Russian world", "the protection of the Russian-speaking population from Bandera" and so on.

It is for this reason, by the way, the international law academia is now actively discussing the possibility to substitute the notion of mercenary with a more flexible concept of "foreign fighters". Those are proposed to be considered as "a foreign fighter is an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship",[111] (the so-called "Geneva definition", first formulated by representatives of the Academy of International Humanitarian Law and Human Rights in Geneva). But this, unfortunately, is still only a project.

It seems that at the moment, Russian law enforcement agencies that are affected by a clear political will, have two options in the process of applying Art. 359 of the Criminal Code. First one, as in the case of the conviction of a Russian fighter of the Azov battalion in the Murmansk region, when any support from the unit (including in the form of ammunition, equipment, etc.) can be considered as "material remuneration", or second one, initiate changes to the criminal law, excluding from it the mention of any material interest. In particular, Ukraine and Uzbekistan, taught by its bitter experience, took the second path. So, after changes to the criminal law in 2015, Art. 447 of the Criminal Code of Ukraine defines a mercenary as a person who is "specially recruited in Ukraine or abroad in order to take part in armed conflict, military or violent actions aimed at forcibly changing or overthrowing the constitutional order, seizing state power, obstructing the activities of state authorities on the territory of Ukraine or the territory of other states violation of territorial integrity." However, it is obvious that this approach has little in common with the requirements of international law, in particular, Additional Protocol I.

For the reasons stated above, it is more rational to follow the path of qualifying the acts of Russian "vacationers" according to Art. 208 of the Criminal Code of the Russian Federation "Organization of an illegal armed formation or participation in it", which is well known to domestic law enforcement officers who have managed to gain rich practice in its field from the time of two Chechen campaigns. It is no secret that the actions of the separatists were qualified first of all under Art. 208, and only then, as the evidence base grew, other articles joined it (for example, hostage-taking). For those who want to give incriminating evidence or conclude a deal with the investigation, the note to this article contains an incentive rule according to which a person who has committed a crime for the first time provided for in this article but voluntarily ceases to participate in an illegal armed formation and surrenders a weapon is exempted from criminal liability, if his actions do not contain a different corpus delicti.

Only in 2014 in Russia under the Art. 208 of the Criminal Code there were convicted 236 people, of which 10 under Part 1 (the creation of an armed formation not provided for by federal law), and 226 persons under Part 2 (participation in an armed formation not provided for by federal law, as well as participation in a foreign territory state in an armed formation not provided for by the legislation of that state, for purposes contrary to the interests of the Russian Federation).[112]

It should also take into account that, from the point of view of simplicity of proof, prosecution under Art. 208 seems optimal, since the

111 Frolova A. Foreign fighters in the framework of international armed conflict between Russia and Ukraine / The use of force against Ukraine and international law / Ed. by S. Sayapin & E. Tsybulenko. The Hague: T. M. C. Asser Press, 2018. P. 241.

112 https://civilmplus.org/wp-content/uploads/2019/06/RG-Perehodnoe-pravosudie_rus.pdf

participants of the illegal armed groups traditionally post content on their pages on social networks that eloquently testifies to their participation in hostilities abroad, including in Ukraine. The use of this kind of evidence has long been familiar in the activities of foreign criminal jurisdictions and international courts, in particular the ICC. So, in early 2019, a Swedish court, on the basis of the principle of universal jurisdiction, sentenced 15 months in prison for committing international crimes of an Islamic Islamist from Iraq B. Saeed-Saeed, mainly based on photo and video materials made in 2015 and posted on his personal page on the social network "Facebook".[113] It is curious that in the same Sweden a special War Crimes Commission has been established, which includes 13 investigators and 2 analysts engaged in collecting relevant information on the Internet about war crimes committed in Syria and the persons involved in them.[114]

What can we say about national courts if the ICC already has a special Cyber Unit, whose main function is to identify people who appear on the Internet records of reckless executions, torture and other crimes committed in zone of a particular armed conflict. As a result, the arrest warrant issued by the ICC on August 15, 2017 against a Libyan citizen, M. Al-Verfally, contains seven episodes of the criminal activity of the latter, taken again from his personal page on Facebook and other electronic resources.[115] For the same reason, one of the main areas of activity of the new "International, Impartial and Independent Mechanism for Syria", established by the UN General Assembly at the end of 2016, has been the constant monitoring of electronic resources to identify individuals appearing in video materials related to the use of violence against to prisoners of war and civilians in the Syrian Arab Republic.[116]

Against this encouraging background, a certain difficulty poses the reservation clause made in part 2 of the aforementioned article: "... participation in the territory of a foreign state in an armed formation not provided for by the legislation of that state, for purposes contrary *to the interests of the Russian Federation* (emphasis added)." Obviously, in each case, the degree of contradiction or, on the contrary, compliance with the interests of the Russian Federation should be established by the court considering the case of participation in an illegal armed formation. However, arguing on this subject, we will be forced to leave the sphere of law and move into the sphere of politics, which lies outside the scope of our study.

The legislation of the Russian Federation, as well as its international obligations to extradite persons who have committed war crimes, to other countries

Considering this problem, it is necessary to clearly distinguish two legal regimes under which persons involved in war crimes in Donbas may be extradited. The main criterion for such a distinction will be the citizenship of the suspects, since it is obvious that in relation to citizens of the Russian Federation on the one hand, and representatives of other states residing at the territory of the Russian Federation, on the other hand, this measure will be applied differently.

Extradition of citizens of the Russian Federation

Part 1 of Article 61 of the Constitution of the Russian Federation clearly states that a citizen of the Russian Federation cannot be extradited to another state.

In principle, states can allow extradition of their own citizens. Even in the Law of the Russian Federation of November 28, 1991, No. 1948-

113 https://www.apnews.com/4ce91121399e467d86d4a5af325cac80

114 https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts

115 https://www.icc-cpi.int/CourtRecords/CR2017_05031.PDF

116 For more details see: Yevseev A.P. Possible ways of implementing international justice for Syria / News of the Kharkiv National University of V.N. Karazin. 2018. Issue 25. P. 134–140.

1 "On Russian Citizenship", such extradition was actually allowed "on the basis of a law or an international agreement" (part 3 of article 1). However, the new Constitution of Russia, adopted in 1993, put an end to this kind of practice. And the already existing Federal Law of May 31, 2000 No. 62-ФЗ "On Citizenship of the Russian Federation" directly prohibits it (part 5 of article 4). For this reason, the extradition of citizens of the Russian Federation who committed crimes on the territory of Ukraine to the national Ukrainian authorities is not possible either for political reasons or, most importantly, for legal reasons.

However, it must be borne in mind that the refusal to extradite a citizen of the Russian Federation does not at all mean that he or she will not be released from liability if he or she committed a crime abroad, as provided for by Russian law. In this case, the so-called principle of citizenship, enshrined in Part 1 of Art. 12 of the Criminal Code of the Russian Federation applies. According to it citizens of the Russian Federation and stateless persons permanently residing in the Russian Federation who have committed a crime outside the borders of the Russian Federation against interests protected by this Code are subject to criminal liability in accordance with this Code if there is no decision of the court of the foreign state regarding these persons. Consequently, the Russians who committed crimes such as those provided for in Articles 208, 356 or 359 of the Criminal Code of the Russian Federation may well be convicted in accordance with the laws in force in the Russian Federation, of course, with relevant political will in place.

It is also hypothetically possible to simulate a situation in which if Russia ratifies the Rome Statute of the ICC in the distant future, it will be possible to extradite its citizens to The Hague, since this kind of extradition will not be considered an "extradition to a foreign state" in the sense of part 1 of art. 61 of the Constitution.

Extradition of foreigners

It is somewhat easier to combat impunity by extraditing foreign citizens residing at the territory of the Russian Federation but who have committed crimes outside its borders. It is advisable to identify two possible scenarios:

- extradition at the request of the interested state (for example, Ukraine) in connection with the need to conduct an investigation, trial or the execution of the sentence in respect of the person. With regard to the Ukrainian case, the provisions of the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 1993, to which both Russia and Ukraine are parties, can serve as a normative basis for extradition. In particular, Part I of Section IV of the said Convention regulates in detail all issues related to extradition of criminals within the CIS. In particular, according to part 2 of article 56 extradition for criminal prosecution shall be carried out for such offences which, under the laws of the requesting and requested Contracting Parties, are punishable and for which a penalty of imprisonment for a term of at least one year or more severe punishment is provided. Obviously, this wording fits perfectly into the "gentleman's set" of those crimes that can be incriminated to members of various kinds of illegal armed groups, acting or acting in Donbas;
- appeal to universal jurisdiction, which is worth dwelling in more detail.

The Geneva Conventions of 1949, which we have cited more than once, stipulate obligations for State Parties to search for persons suspected of serious violations – namely war crimes – regardless of their nationality and place of the alleged crime, and either judge them in their own courts or transfer them for trial to another State Party. Additional Protocol I to the Geneva Conventions extends this obligation to serious violations defined therein.

Thus, universal jurisdiction is always the application of national criminal law to international crimes, regardless of where, by whom or in relation to whom the relevant offences were committed. This is how universal jurisdiction is interpreted, for example, by the German Code of Crimes against International Law, which establishes its applicability

to all crimes listed in it, even if they were "committed abroad and have no connection with Germany."[117] Moreover, the Special Part of the Code establishes liability for genocide (§ 6), crimes against humanity (§ 7), war crimes (§§ 8–12) and related crimes (§§ 13, 14).

The Criminal Code of the Russian Federation corresponds to the principle of Universal jurisdiction, albeit in a truncated form. Part 3 of article 12 stipulates that foreign citizens and stateless persons who do not reside permanently in the Russian Federation who have committed a crime outside the borders of the Russian Federation are subject to criminal liability under this Code in cases where the crime is directed against the interests of the Russian Federation or a citizen of the Russian Federation or stateless person permanently residing in the Russian Federation. Criminal liability is applied as well as in cases stipulated by an international treaty of the Russian Federation or other document of an international character containing obligations recognized by the Russian Federation in the sphere of relations regulated by this Code, if foreign citizens and stateless persons who do not reside permanently in the Russian Federation have not been convicted of foreign state and are prosecuted on the territory of the Russian Federation. At the same time, as the scientific literature emphasizes, this norm contains two principles of the operation of the criminal law: universal one and the so-called real, which is characterized by the recognition of the possibility of causing serious harm to the interests of the Russian Federation even when foreign citizens and persons without citizenships are outside the borders of our country.[118]

Thus, the possibility of applying universal jurisdiction of the Russian Federation to foreign citizens and stateless persons who do not reside permanently in the territory of the Russian Federation is currently limited by the following rules: 1) this kind of jurisdiction, as we have already said, applies only to foreign citizens and stateless persons not constantly residing in the Russian Federation (since the provisions of part 1 of article 12 of the Criminal Code are applicable to citizens and foreigners permanently residing in Russia); 2) the crime must be committed outside the borders of the Russian Federation, because otherwise, Part 1 of Art. 11 of the Criminal Code, fixing the territorial principle is applied; 3) an indictment of a court of a foreign state (in particular, the countries of their residence having a primary "right of pit and gallows") should not be held against these persons, and, finally, 4) the possibility of universal jurisdiction is associated with the existence of a corresponding permitting norm in the international treaty of the Russian Federation. Hence the intention of the legislator to limit this principle of criminal law to an international treaty, and not to international law as a whole.

An analysis of existing international treaties of the Russian Federation shows that due to the imperfection of the wording of part 3 of article 12 of the Criminal Code, universal jurisdiction in the Russian Federation can be applied to only a fairly narrow range of international crimes prosecuted on the basis of the principle "either extradite or prosecute" (lat. Aut dedere aut judicare). These include piracy, serious violations of the Geneva Conventions, torture and some others. At the same time, genocide, crimes against humanity, the crime of aggression and war crimes, as well as war crimes that are not considered a serious violations under the Geneva Conventions and their Additional Protocol I, remain outside its borders, and these are both crimes committed in the course of a non-international armed conflict, and some other acts in international conflicts, not included in the number of serious violations.[119]

With regard to events in Donbas, this means that in a conflict that is consistently considered by the Russian Federation as non-international, there is neither the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, nor the general art. 3 of the Geneva Conventions, nor Additional Protocol II applicable to non-international armed conflicts, do not provide for universal jurisdiction. This fact, however, does not prevent the Investigative Committee

117 Verle G. Principles of international criminal law: a textbook. Odessa: Fenix, 2011. p. 181.
118 The course of Russian criminal law. General Part / Ed. V.N. Kudryavtseva and A.V. Naumova. M .: Spark, 2001.p. 129.
119 Bogush G.I., Yesakov G.A., Rusinova V.N. International crimes. M.: Prospect, 2017. p. 39–40.

of the Russian Federation from periodically conducting selective investigations against representatives of armed forces of Ukraine fighting in Donbas (the so-called "Bastrykin list"). The clearest evidence of this selectivity is the shelling of the city of Kramatorsk, Donetsk region, on February 10, 2015, during which cluster munitions were used, which led to the injury of 60 people, including children, and the death of 17. However, when the representatives of the victims have approached the Investigative Committee the latter refused to institute criminal proceedings, despite the fact that the shelling of the civilian population was a war crime. This, in turn, serves as additional evidence that the shelling was not carried out by Ukraine, as claimed by the Russian media, but from the side of the self-proclaimed DPR.[120]

Brief conclusions

1. The relevant legal traditions of overcoming impunity for international crimes and relevant political will are absent in our country. The disposition of Art. 356 of the Criminal Code contains imperfections. This combination leads to the fact that the provisions of this article, despite numerous armed conflicts in which Russia is involved, are not actually applied. Thus, the only criminal law provision providing for liability for violations of international humanitarian law is stillborn. The legal remedy for this situation is a legal and technical solution, as a result of which Art. 356 will be divided into two separate articles. The existing should be dedicated to the so-called serious violations of the "Hague" branch of international humanitarian law, and in the new article, for the so-called serious violations of the "Geneva" branch of international humanitarian law, using, if possible, the appropriate terminology of the Rome Statute of the ICC.

2. The most promising solution is the prosecution of participants of the armed conflict in Donbas under Art. 208 of the Criminal Code "Organization of an illegal armed formation or participation in it." This conclusion is based, firstly, on the deep-rooted traditions and customs of law enforcement practice developed by Russian law enforcement officers in qualifying acts in accordance with this article, and secondly, on the fact that modern concept of mercenaries as a mean to gain material benefits (article 359 of the Criminal Code of the Russian Federation) is obsolete and does not correspond to the realities of today. Therefore it needs to be adjusted first by the international community, and then by national states.

   Russia has changed the criminal law and bypassed Art. 47 of Additional Protocol I to the Geneva Conventions of 1949. This article contains conservative concept of mercenaries. Therefore these changes will nevertheless run counter to Russia's international obligations. There is a risk related to the prosecution under the article 208 that is connected with the wording of part 2 of the designated article. This part 2 which allows criminal prosecution for participation in illegal armed groups in a foreign country exclusively "for purposes contrary to the interests of the Russian Federation". Obviously, the last phrase is an evaluative concept, the content of which in each case will be determined by the court.

3. With regard to the international obligations of the Russian Federation to extradite persons who have committed war crimes, it is necessary to clearly distinguish between two categories – Russian citizens and foreigners. With regard to the possibility of extradition to a foreign state of representatives of the first category, there is a clear and unambiguous imperative of Art. 61 of the Constitution of the Russian Federation, expressly prohibiting this. Nevertheless, this prohibition does not prevent the conviction of Russians for the relevant crimes, based on the principle of citizenship (part 1 of article 12 of the Criminal Code of the Russian Federation).

120 https://civilmplus.org/wp-content/uploads/2019/06/RG-Perehodnoe-pravosudie_rus.pdf

In relation to foreigners who stained themselves with blood during the hostilities in Donbas, it is quite possible to extradite them at the request of Ukraine on the basis of the 1993 Minsk Convention, subject to the availability of the corresponding political will in Moscow. The application of universal jurisdiction in the Russian Federation to foreign citizens and stateless persons who do not reside permanently in Russia but have committed crimes outside its borders is limited, firstly, by serious violations of the Geneva Conventions, and secondly, by the unsuccessful design of Part 3 of Art. 12 of the Criminal Code, which refere to the international treaty of the Russian Federation, and not to international law per se.

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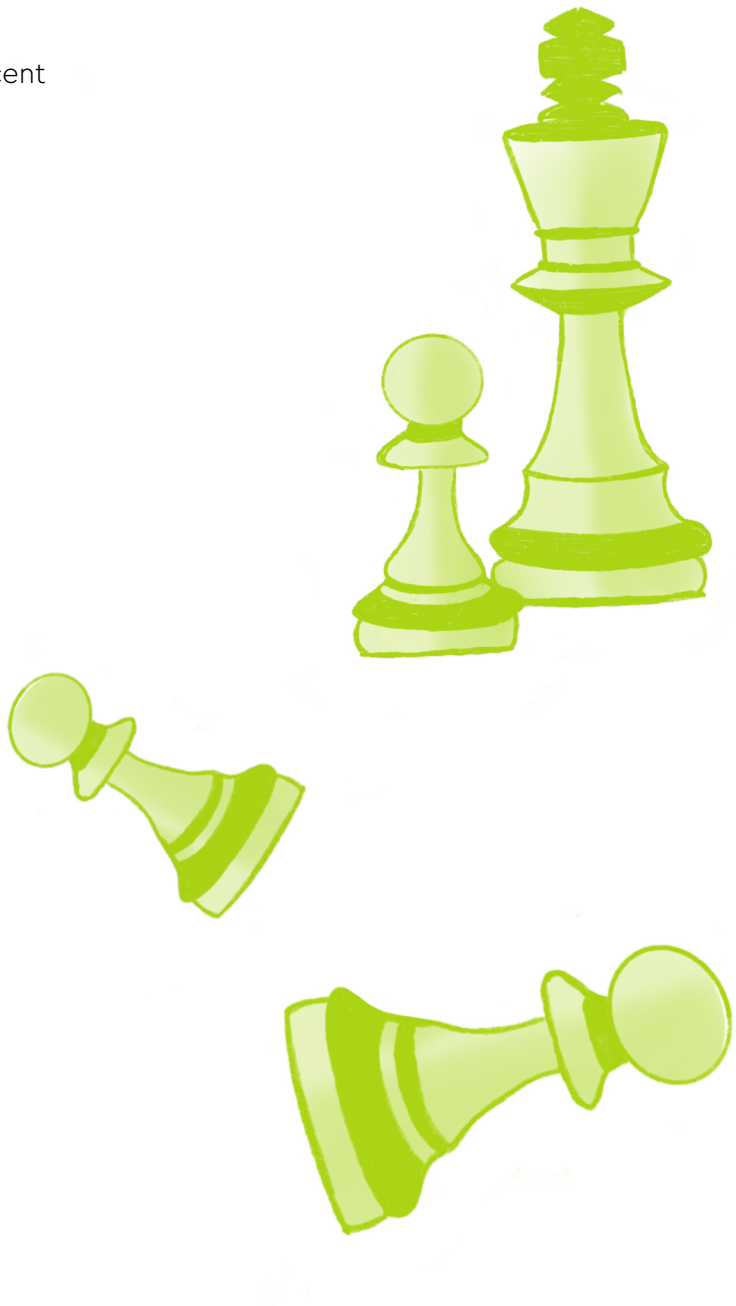
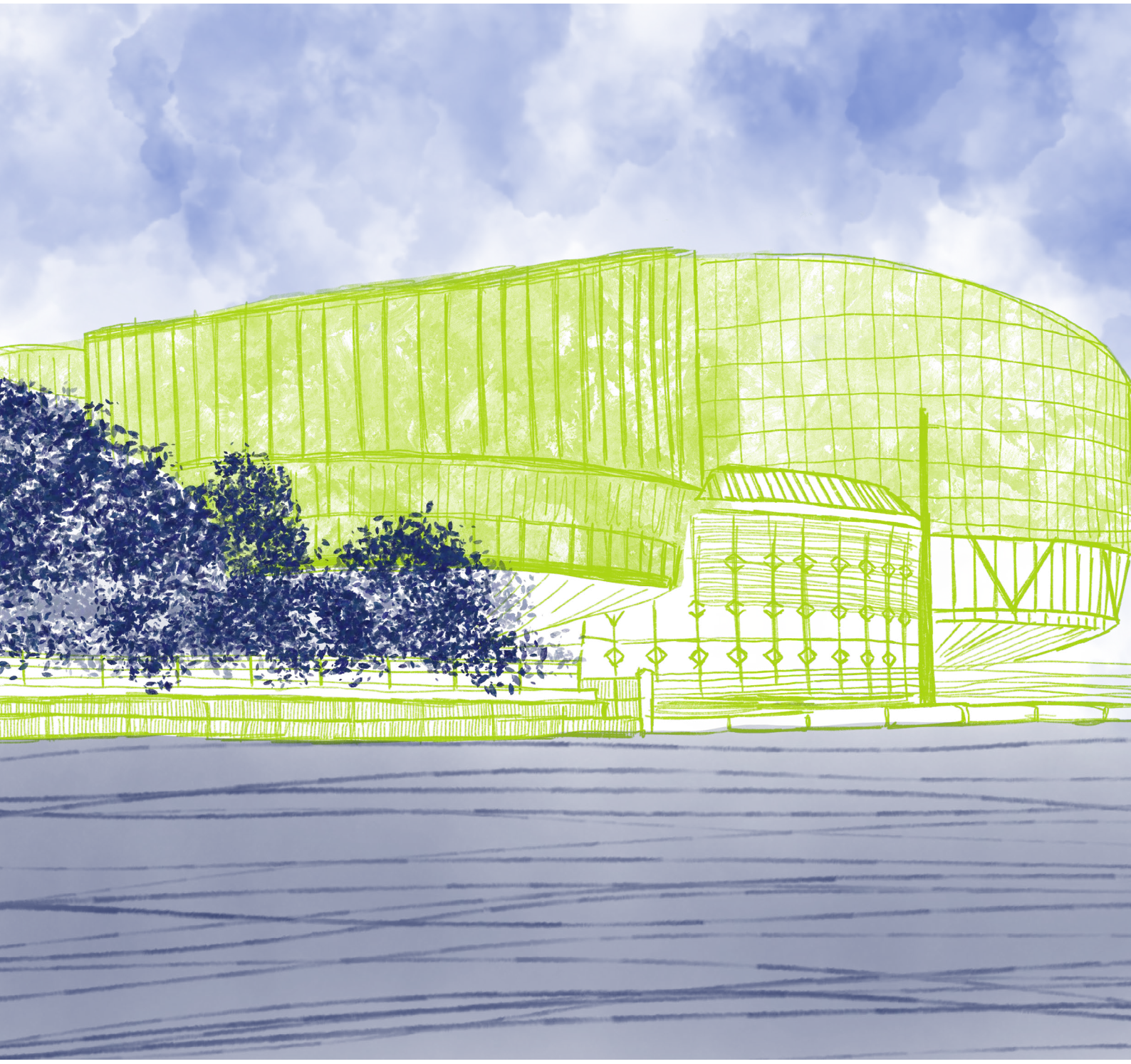


5. Crimes committed in armed conflict in the light of the legal position of the European Court of Human Rights



Introductory remarks

The participation of the Russian Federation in the European system of human rights protection was made possible thanks to the right of citizens enshrined in the Constitution to resort to supranational bodies of justice to protect their rights. So, in accordance with the current edition of part 3 of article 46 of the Basic Law "everyone is entitled, in accordance with international treaties of the Russian Federation, to apply to international bodies for the protection of human rights and freedoms if all available domestic remedies have been exhausted."

Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention; ECHR) has entered into force on the territory of Russia on May 5, 1998. It has become an integral part of the legal system of our country. Moreover, the highest courts of the Russian Federation have taken steps to integrate the national judicial system into the pan-European system for protecting human rights. For example, the Plenum of the Supreme Court of the Russian Federation in Decree of October 10, 2003 No. 5 "On the application by courts of general jurisdiction of generally recognized principles and norms of international law and international treaties of the Russian Federation" indicated that "the Russian Federation as a party to the Convention recognizes the jurisdiction of the European Court of Human Rights as binding on the interpretation and application of the Convention and its Protocols in the event of an alleged violation by Russia of the provisions of these treaty acts, when the alleged violation occurred after they entered into force in relation to the Russian Federation ... Therefore application of the said Convention by the courts should take into account the human rights practices of the European Court of Justice in order to avoid any violation of the Convention."

Ten years later, in a decision of the Plenum of the Supreme Court of June 27, 2013 No. 21 "On the application by the courts of general jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 and its Protocols", it was stated that "the legal position of the European Court on Human rights contained in the final judgments of the Court adopted in relation to the Russian Federation are binding on the courts " (paragraph 2). In addition, the Plenum emphasized that "in order to effectively protect human rights and freedoms, the courts take into account the legal positions of the European Court, set out in the final judgments, which are adopted in relation to other States parties to the Convention. In this case, the legal position is taken into account by the court if the circumstances of the case before it are similar to the circumstances that have become the subject of analysis and conclusions of the European Court."

And although the Constitutional Court of the Russian Federation, in a number of its decisions adopted in recent years, unreasonably weakened the unconditional and binding nature of decisions made by the European Court of Human Rights (hereinafter – the Court; ECHR) in the domestic law and order*,[121] nevertheless, the European Court still remains a powerful factor in Russian politics and one of the few means of democratizing our state and legal life. It is enough to say that in 2019 the Russian Federation took first place in the number of citizens who applied to the Court (25.2% of the total number of complaints filed).

All of the above indicates the extreme importance of studying the practice of the ECHR, which is the "watchdog" of the Convention. But doubling and tripling the appeal to this practice is necessary in those cases when there are no ready-made recipes for resolving certain problems in domestic law or when they are deliberately ignored by the national authorities. This is primarily about those legal positions that the ECHR has developed over decades of its activity in relation to various kinds of crimes committed during armed conflicts.

So, since the entry into force of the Convention, several armed conflicts have occurred on the European continent, including Turkish Cypriot, Nagorno-Karabakh, Georgian-Abkhaz and Georgian-Ossetian, as well as conflicts in

121 This is primarily about the decisions of the Constitutional Court of the Russian Federation, adopted on the complaints of citizens Markin, Anchugov and Gladkov, as well as the oil company Yukos.

the former Yugoslavia (in order to overcome impunity in which it was even necessary to establish a separate international ad hoc criminal tribunal), Transnistria, South Ossetia and eastern Ukraine. Some of them were international (for example, Turkish-Cypriot), while others qualified as armed conflicts of a non-international character. All of them sooner or later fell into the field of view of the ECHR. But even against such a background, the second Chechen war of 1999–2009 stands out, costing Russia tens of thousands of human lives and leading to the fact that the ECHR even formed a whole area in its practice related to "Chechen" cases,[122] which the Court considered more than 250. One of the latest examples of this is the ECHR resolution of April 13, 2017 in the case of *Tagaev and Others v. Russia*, dedicated to the infamous capture of Beslan school No. 1 by Chechen fighters and the disproportionate use of force by Russian federal forces during an operation to storm the building.

The original direction in the activities of the ECHR, the development of which was partially prompted by the Inter-American Court of Human Rights, was the consideration of the so-called historical crimes, that is, such traumatic events of the past that took place, usually, before the accession of one or another countries to the Convention, and sometimes even before the appearance of the Strasbourg Court itself, however, the consequences of which negatively affected human rights today. In such cases, the Court guards the so-called right to truth, which oblivion qualifies them as degrading treatment (Article 3 of the Convention). It is in the latter category, for example, that the Court's judgments in relation to the cases of *Varnava and others v. Turkey*, *Yanovets and others v. Russia* and several others belong.

As one can see, the practice developed by the ECHR in relation to war crimes, human rights in situations of armed conflict in general, is extremely broad and diverse. Therefore, we will try for didactic purposes to group all the decisions made by the Court in relation to this category of cases according to several criteria:

- Cases related to the establishment of jurisdiction over a particular war-torn territory;
- Cases arising from Article 2 of the Convention "The Right to Life";
- Cases arising from Article 7 of the Convention "Punishment solely on the basis of law";
- Cases related to issues of post-conflict settlement (primarily the legality of amnesties for war criminals);
- Cases involving universal jurisdiction and recognition of the jurisdiction of international criminal tribunals.

Let us dwell on them in more detail, bearing in mind, however, that the volume of this publication does not allow us to cover all judicial precedents in an exhaustive way.

State jurisdiction during an armed conflict

On July 7, 2011, the ECHR immediately issued two decisions regarding jurisdictional issues. The first was a ruling in the Al-Skeini case, the second was *Al-Jedda v. Great Britain*. The subject of consideration in both cases was the actions of the British military in the city of Basra (southern Iraq). While the Al-Jedda case dealt with the unlawful detention of Iraqi and British citizens in a British prison, the Al-Skeini case involved the death of civilians during military operations and the patrolling of Iraqi territory by members of the British military. The applicants who applied to the ECHR asked the Strasbourg judges to decide whether their tortured relatives were under UK jurisdiction within the meaning of Article 1 of the Convention.

As a result, the Court answered this question in the affirmative way. Having emphasized that the state's jurisdiction is primarily is territorial nature, the ECHR has nevertheless mentioned some of the most frequently encountered cases when a state exercises its jurisdiction extraterritorially: a) through the actions of diplomatic agents and consular

122 For more details see: Leach P. The Conflict in Chechnya: An Analysis of the Practice of the European Court of Human Rights / Comparative Constitutional Review. 2010. No. 1. p. 143–168.

officials (§ 134); b) when, with the consent, invitation or tacit consent of the government of a particular territory, the state exercises all or part of the public functions specific to that government (§ 135); c) through the use of force by representatives of a state acting outside its territory, which may lead to the fact that a person who is under the control of the authorities of that state is within the jurisdiction within the meaning of Article 1 (§ 136). And then the final conclusion follows: "It is obvious that whenever the state, through its representatives, exercises authority over the person and controls him, and therefore has jurisdiction, the state in accordance with Art. 1 is obligated to ensure this person the rights and freedoms enshrined in Section I of the Convention that are relevant to the situation of that person "(§ 137 of the Al-Skeini judgment).

In the same ruling, the Court allowed itself to state its views on the doctrine of "effective control of the territory", first formulated, as is known, in the decision of the UN International Court of June 27, 1986 in the case of *Nicaragua v. USA*. In particular, the ECHR emphasized that "the obligation to ensure the rights and freedoms established by the Convention follows from the very fact of such control, regardless of whether it is exercised directly through the own armed forces of a state party to the Convention or through a subordinate local administration ... If the fact of such dominance over the territory established, there is no need to determine whether the state exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration retains its position as a result of military and other support of the state party to the Convention entails the responsibility of the state for the policies and actions of this administration"(§ 138 of the said resolution).

Given the above arguments, it will be extremely interesting to trace what position the Strasbourg Court will take in resolving international complaints of Ukraine against Russia in the context of the Donbas war. If the Court considers it proven that the local administrations in the unrecognized DPR/LPR are under the effective control of Russia, then the consequences for this country will be extremely depressing, including from the point of view of the payment of fair compensation to the victims during the hostilities.

The first "wake-up call" is the ECtHR judgment of February 13, 2018 in the case of *Tsezar and Others v. Ukraine*, in which the applicants appealed against the cessation of social payments in the territory uncontrolled by Kiev and the inability to appeal to national courts to appeal against such actions. The ECHR clearly and unequivocally took the position of the respondent state, emphasizing that, firstly, the courts were transferred to neighboring regions, and the applicants were also given the opportunity to register as temporarily displaced persons and receive all the social benefits due to them, and secondly, the state authorities of Ukraine did everything they could, in the circumstances, to address the applicants' situation. "... In the city of residence of these applicants, the Government did not exercise their powers. Apparently, this significantly limited, if not deprived, the Government of the ability to effectively support the functioning of the courts and the payment of social benefits in this territory. The objective factor of the ongoing armed conflict in the applicants' area of residence forced the Government to take legal protection measures that were not necessary in other parts of the country that remained under the control of the Government" (§ 77 of the judgment). Thus, the ECHR, at least, recognized the lack of effective control of the rebellious DPR/LPR by Ukraine.

Special attention is paid to the problem of universal jurisdiction, that is, the ability of the state to prosecute a person who is not its citizen and has committed international crimes, including military ones, outside of the territory of the state in relation to foreign citizens. As noted at Princeton University's 2001 draft on universal jurisdiction principles, the latter constitutes "criminal jurisdiction based solely on the nature of the crime, regardless of where the crime was committed, the nationality of the alleged or convicted executor, the nationality of the victim, or any other relationship with the state that carried out such jurisdiction."[123]

It is known that in recent decades the scope of universal jurisdiction is no longer limited solely to criminal prosecution of a criminal, but it also

123 https:/undocs.org/pdf?symbol=ru/A/56/677

provides the possibility to file a civil lawsuit against the offender demanding compensation for damage in material form. In many respects, the development of civil universal jurisdiction is determined by the decisions of American courts, which, when resolving such cases, rely on the Law on tort claims of foreigners, which has its roots in the Federal Law on the Judiciary of 1789.[124]

How does the Strasbourg Court relate to this practice? Looking ahead, we note that even though it recognizes and considers it appropriate to use the principle of universal jurisdiction in the criminal law sphere, it has a very skeptical attitude towards the civilian dimension of this principle.

In this connection, we refer to the decision of the ECHR of July 12, 2007 in the case of *Jorgic v. Germany*. It dealt with the conviction by the German courts of the citizen of Bosnia and Herzegovina for genocide and war crimes committed during the Yugoslav war of 1991-1995 in the town of Doboy. In his complaint, the applicant, referring to subparagraph a) of paragraph 1 of Article 5 and paragraph 1 of article 6 of the Convention complained that he was found guilty of genocide by German courts that did not have the competence to make such a decision.

In its ruling, the Strasbourg Court has made an impressive analysis of the use of the principle of universal jurisdiction in many Party States that have ratified the Convention, and made numerous references to the practice of the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as the ICTY) and the case of the Chilean dictator A. Pinochet in the Spanish National Court. The Court emphasized that "the argument of the national courts, according to which, taking into account the purpose of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, it is impossible to exclude the competence of states whose legislations provides for extraterritoriality in this matter, in order to make the punishment for genocide facts should be considered as a reasonable and even convincing" (§ 68). In addition, paragraph 1 of Art. 9 of the ICTY Statute confirms the analysis of German courts, since it provides for the parallel jurisdiction of the ICTY and national courts without any restriction in relation to the domestic courts of a country (§ 69).

A much more restrained position was taken by the ECHR in a decision that was taken on March 15, 2018 in the case of *Naït-Liman v. Switzerland*. In it, a native of Tunisia, who received political asylum in Switzerland, tried to seek consideration of his civil lawsuit against the former Minister of Internal Affairs of Tunisia, who was undergoing treatment in one of the Swiss clinics, but who later managed to leave Switzerland at the end of treatment. Swiss courts refused to consider this claim, because, in their opinion, they did not have territorial jurisdiction to consider the case. Ultimately, the ECtHR supported the respondent State.

Having defined jurisdiction as the authority of a body or institution to resolve a legal dispute arising in a particular case in the form of disagreement or dispute, the ECHR indicated that only the Netherlands today recognize universal jurisdiction in civil matters. Outside Europe, universal jurisdiction in civil matters is recognized only in the USA and Canada, and even then with a reservation if the applicant can prove that the torture was committed during the commission of the terrorist act (§§ 183, 184).

In this case, the Grand Chamber has identified several legitimate purposes for rejecting a lawsuit. Firstly, there can hardly be any doubt that suits like those submitted by the applicant, claiming that he had been tortured in Tunisia in 1992, would have created significant problems for the Swiss courts in collecting and assessing evidence (§ 123). Moreover, in the Court's view, the enforcement of a decision satisfying such a claim would have caused practical difficulties and, with high probability, could not have been effectively enforced (§ 124). Finally, the Grand Chamber acknowledged that it could not ignore the potential diplomatic difficulties arising from the recognition of such a civil case by the Swiss courts under the conditions specified by the applicant (§ 127 of the judgment).

124 Zegveld L. Remedies for victims of violations of international humanitarian law / International Journal of the Red Cross: Sat. Art. M .: ICRC, 2003. p. 244.

Violations of Article 2 of the Right to Life Convention

This is perhaps the most numerous category of cases examined by the ECHR on complaints of victims of war crimes. Moreover, a complaint about arbitrary deprivation of life was often intertwined with the accusation that the national authorities did not have an "effective investigation" of these crimes.

The fact is that, according to the practice of the ECHR with respect to the investigation of serious crimes, a certain set of procedural requirements has long been established, but the concept of "procedural obligations" arising from Article 2 of the Convention has appeared relatively recently. Its appearance, as noted in the literature, was largely due to the need for an adequate approach to dealing with complaints related to deaths, where the investigative materials submitted for the ECHR study were not enough to come to a reasonable conclusion about the presence or absence of violation of the obligation to protect life by the respondent Government.[125] This approach has become a very effective tool to prevent the authorities from evading liability under Article 2 by conducting a poor investigation into the circumstances of the deaths or by not providing materials for the examination of the ECHR. Subsequently, the procedural requirements of Article 2 were also extended to cases of disappearance of people in life-threatening situations.

It should be emphasized that, in the interpretation of the Strasbourg judges, the obligation to investigate is the obligation not of "result", but of "means". In other words, the authorized bodies must take all reasonable steps to gather evidence without delay, carry out an objective, complete and comprehensive analysis of the information collected and, on this basis, make an informed conclusion. At the same time, the ECHR specifically stipulates that the provisions of Article 2 of the Convention are fully applicable both in post-conflict territories and in "territories with difficult and unsafe conditions, as well as in the context of armed conflict" (§§ 180 and 210 of the judgment in the case of *Isayeva and Others v. Russia*).

What kind violations of this imperative have the Court recorded in "Chechen" cases, more than 60% of which relate to enforced disappearances during the counter-terrorist operation in the North Caucasus? We mention only a few of them:

- failure to interrogate the applicant (*Estamirov and Others v. Russia*) or to carry out this action with a delay (*Isayeva*);
- failure to identify witnesses and interrogate them (*Isayeva*), or to delay these actions (*Magomadovs v. Russia*), or inability to raise specific issues of relevance (*Isayeva*);
- failure to identify other victims and witnesses of the attack (*Isayeva*), including those who were indicated and named by the applicants (*Khashiyev and Akayeva v. Russia*);
- failure to conduct a criminal investigation or to establish which investigative actions were taken after the discovery of the body (*Musayeva v. Russia*);
- failure to conduct an appropriate autopsy or forensic medical examination (*Chitaevs v. Russia*) or to carry out these actions with a delay (*Akhmadova and Sadulayeva v. Russia*);
- failure to conduct a ballistic examination (*Makhauri v. Russia*) or to hold it with a delay (*Tangiyev v. Russia*);
- non-compilation of a map or plan (*Makhauri*);
- compilation of an inventory of material evidence with a delay (*Zubairaev v. Russia*).

Let us move to the Balkans, where the national authorities of the new states, which formed on the wreckage of the once unified Socialist Federal Republic of Yugoslavia, faced similar problems. So, in the case of *Jelić v. Croatia*, the decision on which was taken on 12.06.2014, the applicant claimed that the domestic authorities had not fulfilled all the obligations arising from Article 2 of the Convention to investigate the murder of her husband during the hostilities of the 1990s. The ECHR, referring to the Rome Statute of the International Criminal Court, as well as the Statutes of the ICTY and

125 Antonov A. Requirements for conducting an "effective investigation" of crimes and some aspects of their implementation in connection with armed conflicts / International Justice. 2015. No. 2. p. 100, 101.

the International Criminal Tribunal for Rwanda (hereinafter – the ICTR), came to the curious conclusion that in relation to war crimes the responsibility of commanders (the so-called command responsibility) should differ from the responsibility of subordinates. It is not enough that in the course of the investigation carried out by the official authorities, the commanders who ordered the applicant's husband should be identified and convicted. It is also necessary to identify specific performers and bring them to justice.

In fairness, we note that the Strasbourg Court does not always adhere to such a humanistic position. So, in the case of *Palić v. Bosnia and Herzegovina*, the ruling of which was promulgated on 02.15.2011, the Court took a diametrically opposite position. In this case, it was about the unsuccessful attempts of the widow of the deceased commander of the Bosnian army to find out the truth about those responsible for the death of her husband. He had gone to negotiations with the Serbs during the fall of Srebrenica in the summer of 1995, but never returned from them. The court not only did not find a violation of Articles 2 and 3 of the Convention, but also emphasized that since the remains of her husband were ultimately identified, it could be considered that the respondent Government conducted an "effective investigation", thereby fulfilling its obligations under the Convention. Separately, the Court mentioned that, given the 30,000 people who went missing during the 1991–1995 war, whose fate is still unknown, the discovery of her husband's remains is a significant achievement in itself.

Since the aggravation of the situation in Northern Ireland in the 80s of the last century, the violation of the right to life has been linked to the excessive use of violence by the military police. There is a standard established by the ECHR in the "Gibraltar" case of 1995. According to it the death of people as a result of the so-called cleansings and armed clashes with terrorist groups when it was unproven the participation of the victims in a terrorist organization or the murder of terrorism suspects under mistakenly perceived threat of an immediate terrorist attack, is recognized as a violation of paragraph 2 of Art. 2 of the Convention. It was in this form that the named approach was used by the Court in resolving some "Chechen" cases. However, in recent years, in the practice of the ECHR, a steady revision of this correct, in our opinion, approach has been outlined.

In this regard, the decision of the Grand Chamber of March 30, 2016 in the case of *Armani Da Silva v. the United Kingdom* should be mentioned. It was about a Brazilian citizen who was mistakenly recognized as a terrorist suspect and shot dead by two intelligence agents in a London Underground car. This sad event occurred the day after the start of the anti-terrorist operation, organized to search for persons who had previously planted four unexploded bombs at three metro stations and on the bus.

In examining this case, the Court stated that "in order for an investigation of an alleged unlawful murder committed by State agents to be effective, it is imperative that the persons responsible for the investigation and its execution be independent of those involved in the event. This means the absence of not only a hierarchical and institutional connection, but also independence in practical activities ... " (§ 232 of the judgment). Further, in full accordance with its previous practice, the Court emphasized that "the authorities should take all reasonable steps possible to obtain evidence regarding the incident, including testimonies, forensic evidence and, if necessary, autopsy results that provide a complete and accurate trauma information and an objective analysis of the findings of a clinical trial, including the cause of death ... Any flaw in the investigation that undermines the ability to establish if death, or the person responsible, may lead to a violation of the established standard of "effectiveness" (§ 233).

At the same time, in this case, the Court answered a slightly different question whether the use of deadly force by the police was justified. In particular, referring to the classic precedent of *McCann and Others v. the United Kingdom* ("hybrid" case), the Court emphasized that "the use of force by state representatives to achieve one of the goals specified in paragraph 2 of Art. 2 of the Convention, meets the requirements of this provision when it is based on good faith, which is perceived for good reason as valid, but subsequently turns out to be erroneous. To adhere to a different point of view is to impose an unrealistic burden on the state and law enforcement officials in

the performance of their duties, possibly to the detriment of their lives and the lives of other people "(§ 244). And further: "The court never came to the conclusion of a violation of Art. 2 of the Convention on the grounds that the person used force, believing that it was necessary for his self-defense. Rather, in cases of alleged self-defense, the Court found a violation when it came to the conclusion, on the basis of reliable information, that the assumption of such a person could not be regarded at that time as reasonable ... "(§ 247).

Nevertheless, the final conclusion reached by the ECHR differed significantly from the above argumentation, since under these specific circumstances the Court considered the refusal to prosecute the police officers involved in the death to be justified. For this reason, a number of judges, including a judge from the Russian Federation D. I. Dedov, expressed their dissenting opinions.

In particular, the joint dissenting opinion of the Russian, Turkish and Polish judges stated that "a country's criminal law on alleged necessary defense meets the requirements of Article 2 of the Convention if it provides for two aggregate conditions for exemption from criminal liability: subjective (sincere conviction, which subsequently it turns out to be erroneous, or, in other words, a real mistake in actual circumstances) and objective (the existence of sufficient grounds on which the belief is justified at the time incident or, in other words, the presence of objective reasons justifying the error). Acts committed in a state of imaginary necessary defense may be exempted from criminal liability if these two conditions are fulfilled jointly. However, in the present case, most judges seem to rethink the prevailing case-law, focusing on the subjective element and reducing the importance of the objective element. In our opinion, such an approach is unacceptable. "In the context of the police, it puts the lives of citizens at risk, because acts committed by policemen in a state of imaginary necessary defense as a result of gross negligence can receive immunity from criminal liability."

Violations of Article 7 of the Convention "Punishment solely on the basis of law"

One of the first cases of this kind, examined by the ECHR in relation to war crimes, was the case of *Streletz, Kessler and Krenz v. Germany*, the decision on which was issued on March 22, 2001.

It is known that, after the reunification of Germany in 1990, a number of trials were conducted over the leadership of the former GDR, among which stood out the trial over the National Defense Council. In the framework of this trial, the top military leadership was brought to justice, including the former Minister of Defense, Kessler, Chief of the General Staff, Streletz, Chief of the legendary Stasi, Mielke, and other generals. They had primary political and legal responsibility for the border regime and, consequently, for the killing of defectors in the area of the Berlin Wall using firearms, automatic firing systems and anti-personnel mines. The defendants tried to prove that although they gave commands to shoot to kill, at that time it was not considered a crime. Moreover, in the military legislation of the GDR there was a significant number of incentive provisions providing for various kinds of rewards for soldiers and commanders, promptly suppressing any attempts of unauthorized crossing of the state border. The Supreme Court, and after it the Federal Constitutional Court (hereinafter – the FCC) of the Federal Republic of Germany, strongly opposed the acquittal of high-ranking officials on the basis of the principle "the law has no retroactive effect."

In particular, the FCC of the Federal Republic of Germany emphasized that "a court must disregard a justification if it purports to exonerate the intentional killing of persons who sought nothing more than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection, because such a justification, which puts the prohibition on crossing the border above the right to life, must remain ineffective on account of a manifest and intolerable infringement of elementary precepts of justice and of human rights protected under international law. The

infringement in question is so serious as to offend against the legal beliefs concerning the worth and dignity of human beings that are common to all peoples. In such a case positive law has to give way to justice."[126] In the end, as is often the case in contentious situations, it came to the ECHR.

In its decision, the Strasbourg Court formulated a legal position according to which "it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law. " (§ 81). In addition, the Court noted that "The broad divide between the GDR's legislation and its practice was to a great extent the work of the applicants themselves. Because of the very senior positions they occupied in the State apparatus, they evidently could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime that had been made internationally. Moreover, they themselves had implemented or maintained that regime, by superimposing on the statutory provisions, published in the GDR's Official Gazette, secret orders and service instructions on the consolidation and improvement of the border-protection installations and the use of firearms. In the order to fire given to border guards they had insisted on the need to protect the GDR's borders "at all costs" and to arrest "border violators" or "annihilate" them (see paragraph 15 above). The applicants were therefore directly responsible for the situation which obtained at the border between the two German States from the beginning of the 1960s until the fall of the Berlin Wall in 1989." (§ 78).

The case of *Kononov v. Latvia* caused a wide public outcry in our country and abroad. Let us briefly recall its plot.

The elderly applicant, V. Kononov, is a former partisan who fought during the Great Patriotic War of 1941–1945 on the territory of the Latvian SSR occupied by the Wehrmacht. In 2004, he complained to the European Court that his conviction in the late 1990s and early 2000s of the Latvian courts for committing war crimes violated the requirements of Article 7 of the Convention. The applicant was prosecuted in Latvia for having taken part in a partisan revenge in 1944 to the dwellers of the village of Mazie Bati. According to Kononov, the local community had given a group of partisans led by Major Chugunov to the German military administration shortly before. After a detailed examination of the parties' arguments, international law relevant to the conduct of the war, and relevant legislation, the third section of the ECHR, in a decision of 24.07.2008, established that the applicant could not then reasonably assume that his actions were a "war crime" according to the rules of war at the time. So, the Court pointed out, there were no substantial international legal grounds to convict him of such a crime. The Court noted that even assuming that the applicant has committed one or more crimes under the general rules of law provided for by national law, the statute of limitations for their commission has long passed, and therefore the Latvian legislation cannot serve as the basis for the conviction of the applicant. Thus, the ECHR ruled that in the case the Government of the respondent State violated the requirements of Article 7 of the Convention (the decision was adopted by four votes in favor and three against). The court also awarded the applicant compensation for non-pecuniary damage.

And then the unexpected happened. Latvia appealed against the decision of July 24, 2008 to the Grand Chamber, which, by a decision of May 17, 2010, came to the conclusions directly opposite to those made earlier. In this case, the Grand Chamber did not plunge into the study of the circumstances of the case as such (like "shot it – didn't shoot it"), however, Kononov himself did not object to his participation in this action, but, on the contrary, was to some extent proud of it. For the court, another thing was important: how much the prosecution of Kononov for this act 50 years after the tragedy was compatible with the norms of this article of the Convention and

126 http://www.jean-monnet.unn.ru/doc/Advanced%20training%202014/Штрелец,%20Кесслер%20и%20Кренц%20против%20Германии.pdf

the case-law of its application, developed over about the same period of time. In other words, the Court had to find out: 1) whether, taking into account the state of the legislation as of May 27, 1944, there were clear legal grounds for convicting the applicant for war crimes and 2) were these crimes provided for by law with the degree of accessibility and predictability, so that on 05.27.1944 the applicant could know for what particular actions or inaction he could be held criminally liable, and regulate his behavior accordingly. The known complexity of this case, besides the need to take into account the historical context, also consisted in a close interweaving of factual and legal circumstances. In order to find out whether there were legal grounds for convicting the applicant for war crimes, one had to give an answer one way or another to the question, if Kononov committed a war crime?

The court rightly began by ascertaining the status of the victims – nine local residents of the village, including three women (1 pregnant and 1 burnt alive). In his decree, the Court simultaneously put forward two mutually exclusive hypotheses: either they were "civilians who took part in the hostilities", or they had the legal status of "combatants" – members of the armed forces (§ 194). However, the European Court then stated that the status of the peasants was not so important, because "if to consider the villagers as "civilians", they were all the more entitled to great protection" (§ 227).

Further, the Court was to ascertain whether at that time (May 1944) there was criminal liability, expressed with sufficient accessibility and predictability, for the act committed by Kononov. Obviously, the clarification of this circumstance plunged the judges into the abyss of controversy that began back in the days of the Nürnberg and Tokyo trials regarding the execution of criminal orders and the possibility of criminalizing ex post facto. It is known that during the Nürnberg trials of 1945–1946 Nazi leaders resorted to the reception, later called the "Nürnberg defense." They argued that they were not responsible for their actions (aggression, crimes against humanity, war crimes), if only for the simple reason that at the time of the commission of these acts the latter were not qualified by international legal instruments that were in force at that time, not to mention the Nazi right as criminal. Meanwhile, the verdict of the International Military Tribunal emphasized that already from 1933 to 1945 the world community was aware of the provisions of the Paris Pact of 1928, the Hague Conventions of 1899 and 1907. "Martens clause" and a number of other sources establishing the rules and customs of warfare rudely violated by Nazi leaders and their Japanese minions.

A similar methodology was applied by the ECHR in the "Kononov case". It has analyzed the development of international humanitarian law, starting with the Lieber Code adopted during the Civil War in the USA 1861–1865 and ending with the 1977 Additional Protocol to the Geneva Conventions.

Ultimately, the Court concluded that "the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by, inter alia, a requirement to comply with international fundamental human rights instruments ... even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights" (§ 236).

Finally, the ruling contained one important conclusion, which was subsequently adopted by many national courts, which considered the issue of holding the former functionaries accountable, and was used in subsequent cases by the ECHR itself. Paragraph 241 stated literally the following: "it is legitimate and foreseeable for a successor State to bring criminal proceedings against persons who have committed crimes under a former regime and that successor courts cannot be criticised for applying and interpreting the legal provisions in force at the material time during the former regime, but in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built."

The ECHR took a somewhat different point of view in the *Vasiliauskas v. Lithuania* case, the decision of the Grand Chamber on which was issued on 10.20.2015. The essence of

the matter is as follows: in 2004 the applicant was convicted of "genocide of the Lithuanian people", since in January 1953 being an officer of the Ministry of State Security of the Lithuanian USSR, he personally executed two partisans of the Lithuanian resistance movement opposing the Soviet regime. However, in this case, by nine votes in favor with eight votes against, the Court nevertheless found a violation of Article 7 of the Convention by Lithuania on the grounds that "in 1953 international treaty law did not include a "political group" in the definition of genocide, nor can it be established with sufficient clarity that customary international law provided for a broader definition of genocide than that set out in Article II of the 1948 Genocide Convention (§ 178). And further:

"in accordance with Article 31 § 1 of the Vienna Convention on the Law of Treaties ... the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention can be extended to cover partisans. Thus, the Court considers that the domestic courts' conclusion ... was an interpretation by analogy, to the applicant's detriment, which rendered his conviction unforeseeable" (§ 183).

Post conflict settlement

It must be noted that international jurisdictional bodies representing various regional systems for protecting human rights have always been extremely wary of the possibility of declaring amnesties for war crimes. So, the ECHR, in its resolution of 05.24.2011 in the case of the *"Association 21 December 1989" and Others v. Romania*, dedicated to the amnesty of former Romanian army soldiers who participated in the suppression of the popular uprising against N. Ceausescu, emphasized: "... an amnesty is generally incompatible with the duty incumbent on the States to investigate acts of torture ... and to combat impunity for international crimes. This is also true in respect of pardon" (§ 144).

However, the case of *Margus v. Croatia* and the decision on it of the Grand Chamber of 05/27/2014, became a real milestone in the practice of the ECHR regarding amnesties. A former member of the Croatian Army during the Yugoslav war of 1991–1995, F. Margush, accused the national authorities of violating a number of articles of the Convention on the grounds that, contrary to the Law on General Amnesty of 09.24.1996, he was nevertheless prosecuted for numerous crimes (murder of four civilians, bodily harm to others citizens and material damage to a number of households) that he committed during the 1991 confrontation shortly after the fall of Vukovar. Having given an impressive review of the practice of applying amnesties almost all over the world, the ECHR came to the dominant legal conclusion that "granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible" (§ 127). Furthermore, referring to the experience of Latin American countries and the relevant judicial precedents, in particular *Gelman v. Uruguay* and *Gomez Lund and Others v. Brazil*, the Court noted that "an increasing trend in international law is the rejection of such amnesties, as they are incompatible with generally accepted obligations of States regarding the prosecution and punishment of serious violations of fundamental human rights." However, the Court emphasized that amnesties can comply with the principle of legality only under extremely limited circumstances: if the state can prove that there is a vital interest in their adoption in order to achieve peace and national reconciliation (§ 139).

Finally, in the practice of the ECHR there are extremely interesting cases in which several problems are intertwined, for example, the possibility of an amnesty for war crimes, universal jurisdiction and punishment solely on the basis of the law.

So, in 2009, the Court ruled in the case of *Ould Dah v. France*, in which it decided that the amnesty law of the state could not prevent another state party from the prosecution of a criminal for torture on the basis of universal jurisdiction in accordance with the UN Convention against Torture, because otherwise would mean the deprivation of the provision of universal jurisdiction in the aforementioned UN Convention of any significance. In this case, the applicant was entitled to amnesty in accordance with the Moorish law on amnesty for torture committed by him as a Moorish soldier. However, when he was in France, he

was detained and convicted by the French courts. Ultimately, the ECHR rejected the applicant's argument that his conviction was due to the retrospective application of the French criminal law contrary to Article 7 of the Convention, since he could not have foreseen that the courts of that country would not take into account the amnesty law.

Conventional or humanitarian law?

The human rights guarantees laid down by the Convention and the ECHR practice are somewhat wider than the level of protection resulting from the restrictions placed on states by international humanitarian law. At first glance, the main watershed flows through peacetime or wartime, in the conditions of which the corresponding acts are committed. Meanwhile, the ECHR is subject to compliance, including in wartime, at least until the State party in whose territory an armed conflict broke out has not derogated the Convention in the special procedure provided for in article 15, paragraph 2, of the Convention.

In addition, the Strasbourg Court is sometimes forced to deal with cases in which, in order to strengthen its own arguments, it has to invoke the norms of international humanitarian law, which are often casuistic and contradictory, as, say, this was the case in the "Iraqi" cases we have already mentioned (*Al-Jedda v. Great Britain*, *Al-Skeini and Others v. Great Britain*). In the latter, the ECHR Grand Chamber not only cited the Hague provisions on the laws and customs of land warfare as "applicable international legal materials", but also used them in the rationale section (§§ 89 and 143 of the judgement).

In addition, persons accused by international criminal justice bodies often try to challenge their extradition to the ECHR, which was especially common in the early years of the ICTY and the ICTR (see, for example, the ECHR judgments in the cases of *Jorgich v. Germany*, *Ahorugeze v. Sweden*). Or on the contrary, they appeal to the Strasbourg Court about the imperfection of the judicial proceedings in the designated tribunals. With regard to the last loophole, the ECHR even had to formulate in the decision on the inadmissibility of the complaint of *Galic v. Netherlands* (2009) the legal position according to which "the ICTY is a "subsidiary body" of the UN Security Council. For its actions and inaction, in principle, the UN is responsible, that is an interstate international organization that has a legal personality that is separate from the state parties and is not a party to the Convention by itself. It follows that the Court does not have jurisdiction ratione personae to examine complaints against the UN, and, therefore, against the ICTY itself." Nevertheless, the problem of discrepancies in the practice of both jurisdictions has not been resolved.

As A.I. Kovler, a deep connoisseur of this issue, points out, the ECHR has until recently tried to avoid the direct application of international humanitarian law in cases involving armed conflict. "Showing reasonable conservatism," the scientist writes, "the Court never gave preference to international humanitarian law as lex specialis, which is above the standards of the Convention, for them their strict application was more important".[127] The UN International Court of Justice, which rarely refers to the provisions of international humanitarian law, takes the same approach. Yes, and as the ICTY itself acknowledged in the decision in the case of Prosecutor v Kunarac and Others, "notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law" (§ 471). Such restraint of international courts in applying each other's legal positions is largely due to the possibility of a conflict of norms that has become almost boundless international humanitarian law and strict prescriptions of the status regime of these courts, especially with regard to the limits of jurisdiction.[128]

In Russian legal science, the idea was expressed about three theories of the relationship between the norms of international humanitarian law and conventional law created by the ECHR: competitive (when the approaches used by different courts are strictly contradictory

127 Kovler A. I. After "Kononov" / Human Rights. ECHR practice. 2010. No. 9. p. 7.
128 Ibid, p. 7

to each other), complementary (when the approaches used by different jurisdictions complement and develop each other) and, finally, integration (when these approaches merge to indistinguishability).[129] Which of these approaches is preferred by the bodies of international justice themselves?

It seems that we can talk about some kind of interpenetration of the legal positions of international courts mainly in the field of law of substance. Thus, in the case of *Al-Adsani v. the United Kingdom*, the Grand Chamber of the ECHR, in order to strengthen its thesis on the prohibition of torture under international law, referred to the ICTY's decision in the case of the *Prosecutor v. Anto Furundžija* and in the case of *Rantsev v. Russia*, the ECHR directly borrowed the concept of enslavement from the decision of the Appeals Chamber ICTY in the case of the *Prosecutor v. Kunarac and Others* (§ 142 of the judgment).

But when it comes to procedural law, here the ICTY judges are much less hospitable towards their Strasbourg counterparts. Thus, in a decision of the Appeals Chamber of the Tribunal of July 19, 2011 in the Hartmann case, it was emphasized that international tribunals are not connected by the positions of regional or international courts, including they are not connected by the practice of the ECHR (§ 159). According to the then President of the ICTY P. Robinson, the decisions of the ECHR do not oblige the international tribunals to anything, but they have the power of convincing authority.[130] However, in another case, the *Prosecutor v. Martic*, the Appeals Chamber called the practice of the ECHR "a useful source in interpreting the right to cross-examination and determining the scope of its permissible limits" (§ 19).

Thus, we can conclude that, firstly, the ECHR is more interested in borrowing the approaches of international criminal tribunals than the latter - in borrowing the approaches of the ECHR, and, secondly, this kind of "convergence" most often occurs in sphere of substantive law, rather than in the development of common approaches to the procedure for the implementation of judicial proceedings.

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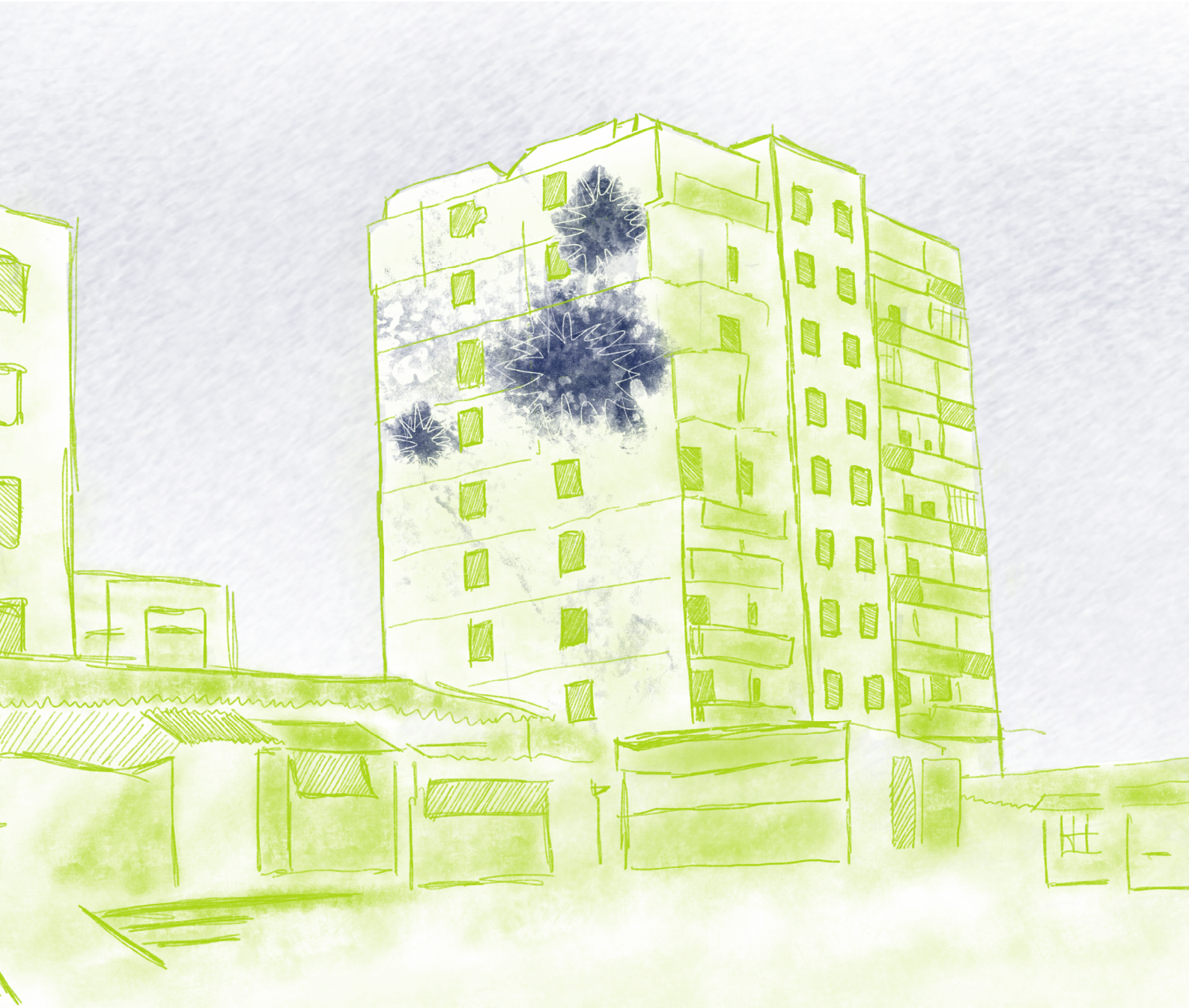
129 Rusinova V. N. Human rights in armed conflicts: problems of correlation of international humanitarian law and international human rights law. M .: Statute, 2015. p. 79–139.

130 Tochilovsky V. The law and jurisprudence of the international criminal tribunals and courts: procedure and human rights aspects. Cambridge: Intersentia, 2014. P. 1367.

6. Systemic impunity. The refusal of the state of Russia to investigate large-scale and systematic crimes committed in the context of the Chechen conflict



This review addresses the lack of punishment for crimes committed by representatives of the Russian side of the armed conflict in Chechnya. It is a thematic extract from several chapters of a previously published monograph,[131] supplemented by new data and considerations. The analysis mainly concerns 1999–2005, i.e. the most intense stage of the so-called "second conflict". It covers the time of direct confrontation between federal forces and armed forces of the unrecognized Chechen Republic of Ichkeria in the fall of 1999 - spring of 2000 and the subsequent period of a grueling guerrilla war.

The following statistical calculations were obtained by applying a special methodology, which allowed us to systematize an array of data on crimes of a specified time span. This methodology included an analysis of all documented violations, based on the corpus delicti and the main contexts of their commission. A total of eight main contexts were chosen, for the analysis of which statistical tables were developed. As a result, generalized data were obtained on the patterns of criminal behavior and their evolution, the number and sex and age composition of victims (in cases where such information is known), the dynamics of the commission of certain types of crimes. To correctly understand the results of this statistical analysis, three important caveats must be made. Firstly, these results do not in any way claim completeness, as they are based on data of obviously incomplete monitoring. Thus, they do not contain all the information about the number of crimes committed during the analyzed period, and about the number of their victims. Secondly, we proceeded from the principle of the presumption of least harm, according to which any non-specificity of the source regarding the gravity of the harm done or the exact number of victims was interpreted in favor of the alleged violators. Thirdly, we do not in any way affirm that all the episodes of crimes analyzed are established facts. Rather, we say that our sources in each case allow us to conclude that there are signs of grave and especially grave crimes against representatives of the civilian population and other persons protected by international humanitarian law. The only group of our sources containing legally established facts are the decisions of the European Court of Human Rights and some of the decisions of the Russian national courts. A more detailed description of the methodology used is contained in this monograph.[132]

The participation of the Russian state in crimes committed by its representatives against the civilian population of the Chechen Republic in the context of the armed conflict of 1999 and subsequent years was expressed primarily (but far from exclusively) in refusing to conduct an effective investigation of the vast majority of such crimes. This relates to all crimes without exception that are inhumane acts in extraordinary scope. We insist that this is not just about inability, but about refusing to conduct an investigation, since the state had all the necessary resources, tools and mechanisms to identify the perpetrators, but did not use them, it seems, due to a lack of appropriate political will (or on the contrary, the presence of political will aimed at ensuring impunity).

The creation of an atmosphere of impunity was directly facilitated by the activities of two state organizations – the JTF command[133] (and, in general, the Armed forces of the Russian Federation) and the prosecution authorities (and subsequently the Investigative Committee) of the Russian Federation. The issuance by the command of the JTF of a number of orders formally aimed at observing the rights of the local population by military personnel was exclusively fake: in reality, the headquarters of the JTF did not take any real action to enforce these orders and stop crimes - we do not know any such case.

The situation was not better in terms of adoption by the command of measures aimed at punishing crimes already committed. Apart

131 S.M. Dmitrievsky, B.I. Gvareli, O.A. Chelysheva. International Tribunal for Chechnya: Legal Prospects of Bringing to Individual Accountability the Suspected of War Crimes and Crimes against Humanity during the Armed Conflict in the Chechen Republic. Collective monograph. In 2 volumes – Nizhny Novgorod, 2009.

132 Ibid., Vol. 2, p. 7 to 11.

133 The joint troop force for counter-terrorism operations in the North Caucasus region of the Russian Federation (hereinafter – JTF) was created on the basis of Presidential Decree of Boris Yeltsin No. 1255 of September 23, 1999, and continues to exist by the moment.

one surprising exception, the sources we studied, do not contain information about the cases where commanders of military units and formations, having fulfilled their duties under international and national law and using the powers presented to them by Russian law, initiated criminal proceedings on their own initiative or at the direction of a higher command against their subordinates who have committed crimes against civilians, or have taken other measures to investigate these crimes. The indicated exception – the scandalous case of Colonel, Yuri Budanov, who abducted and strangled a Chechen girl, Elsa Kungaeva, on March 27, 2000 and was arrested on the initiative of the acting commander of JF Zapad, Major General, Valery Gerasimov, remains completely unique to this day.

In all other cases known to us, an investigation was initiated and conducted by the prosecution authorities – military and territorial. However, up to the beginning of 2001, citizens' allegations of crimes committed by representatives of federal forces against Chechens, as a rule, remained unanswered. Only as a result of lengthy correspondence involving deputies of the State Duma the representatives of human rights organizations managed to initiate criminal proceedings in some cases. Since the first half of 2001, as a result of pressure from international organizations (primarily the Council of Europe, the OSCE and the UN), prosecution authorities began to institute criminal proceedings. However, this measure was cosmetic in nature and had its exclusive task to abate the criticism from the international community. The initiation of criminal cases did not mean that crimes would be investigated, and those guilty would be punished.[134] The authorities of the Russian Federation reported thousands of criminal cases, but in most of them even the essential investigative actions were never performed.

The practice of the European Court of Human Rights on Chechen cases demonstrates its negative assessment of the investigation of crimes committed by representatives of the Russian side of the conflict against the civilian population of the Chechen Republic.

In 46 of the 47 decisions made by the ECHR as of October 9, 2008,[135] the Court found a violation of the negative covenants of the state. Those violations lied in the fact that the Russian authorities did not conduct an effective investigation of the crimes. At the same time, in 27 decisions, the Court found that the refusal of the state to report the fate of the detainees to their relatives and to conduct an effective investigation into the disappearances of individuals is not just a violation of negative covenants. The Court described such a behavior as a form of ill-treatment, and recognized 90 residents of Chechnya as victims of this type of violation.[136]

What is especially important for us, is that the decisions of the Court establish that in none of the cases examined the investigation conducted by the Russian Federation led to the identification and punishment of those responsible. Moreover, even after the adoption of these decisions, the situation did not change: none of the offenders was identified and brought to justice.

Failure to investigate the most widespread inhuman acts

None of the extraordinary in scale inhuman acts have been investigated by the competent authorities of the Russian Federation. Organizers and executors of mass killings, mass extrajudicial executions and fire attacks on civilians remain unpunished to the date. In some of these episodes, criminal cases were instituted, but were either repeatedly suspended "for the inability to identify the persons to be charged as accused", or were terminated due to the "lack of corpus delicti". It is noteworthy that in all cases, criminal cases were instituted a long

134 Conditional justice. On the situation with the investigation of crimes against civilians committed by representatives of federal forces on the territory of the Chechen Republic during the hostilities of 1999–2003. (as of May 2003). – HRC Memorial. – M., 2003. https://memohrc.org/ru/reports/uslovnoe-pravosudie-o-situacii-s-rassledovaniem-prestupleniy-protiv-grazhdanskih-lic

135 Except one decision regarding the misappropriation (Khamidov v. Russia case, application No. 72118/01, decision of November 15, 2007); the Court found that the plaintiff was denied access to the Court.

136 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 351–353.

time after the event of the crime, and, as a rule, after a scandal in the media and protests of international organizations. In other episodes, criminal cases were not initiated at all, while in a number of cases the prosecution authorities directly refused to initiate them.

Here are some of the most characteristic examples. So, on the episode of the bombing of the unprotected village of Elistanji on October 7, 1999, as a result of which the total number of civilians (including children) who died from wounds was 48 people and several dozen civilians were injured, the case file was lost by the prosecution authorities. The initiation of a criminal case on the fact of the events considered here is reliably known only starting from September 5, 2007. On that day, A.A. Kornev, acting prosecutor of the Vedeno district of the Chechen Republic issued the "Resolution on the restoration of criminal case". This resolution states that "on 07.10.1999, as a result of the bombardment of Elistanji village Appazov Ramzan Appazovich born in 1927 died, on this fact, the prosecutor's office of the Vedeno district initiated a criminal case No. 36039." As for when it was instituted, how is it known about its initiation, what were the results of the investigation – the document is silent about this. The impetus for the resumption of the criminal case were the repeated appeals to the prosecutor's office of the Chechen Republic by a representative of the Committee against Torture, lawyer S. Baskhanov, acting in the interests of the relatives of the deceased Ramzan Appazov.

Further, in his decree, Mr. Kornev indicates that on December 17, 2002, a fire broke out in the working premises of the prosecutor's office of the Vedeno district, as a result of which the criminal case was destroyed along with other documents and property. In this regard, Mr. Kornev decided to "reinstate criminal case No. 36039 by setting a preliminary investigation <...> in up to 30 days, that is, until October 05, 2007." However, in the materials of the criminal case there is a letter to the Military Prosecutor of the 3rd Division of Inspectorate of the Military Prosecutor's Office of the JTF, Lieutenant Colonel of Justice, A.A. Kleschev, dated November 24, 2006 No. 23-726-06 to No. 3/7940 dated November 2, 2006, from which it appears that the criminal case file No. 36039 did not burn out at all, but was sent on an unspecified date to the military prosecutor's office No. 20102 , where it was completely lost. On September 6, 2007, criminal case file No. 36039 was transferred to the Shali inter-district investigation department of the Investigation Branch of the Investigative Committee of the Prosecutor's Office of the Russian Federation. The further procedural history of this criminal case is a chain of suspensions and resumption of the investigation (usually after complaints of the representative of the victims), associated with futile attempts to transfer the investigation to the military justice authorities. No one has been prosecuted, no suspects have been identified.

As for the episode of the shelling of four civilian objects on the territory of Grozny on October 21, 1999 (the central market, the maternity ward of the hospital, the main post office and the mosque) with tactical ground-to-ground missiles during which about 140 civilians (including women in childbirth and newborns), and more than 200 were injured, the military prosecutor's office directly refused to initiate a criminal case, and fact checking was carried out more than 6 years after the crime event at the request of a public organization.

On September 21, 2004, the All-Russian civic movement "For Human Rights'' asked the military prosecutor's office to report on the results of the investigation on the events of October 21 in Grozny. On May 17, 2005, the same organization turned to the Military Prosecutor's Office of the joint troop force in the North Caucasus with a report on this crime. On June 27, 2005, a response was received from the Military Prosecutor of the 3rd Division of Inspectorate of the Military Prosecutor's Office of JTF, Colonel of Justice, Y.P. Koreneyev, who claimed that "there is no information about the incident in the database of the JTF MP." There was a complaint submitted to the Prosecutor General of the Russian Federation regarding this answer as unfounded one. In January 2006, the civic movement For Human Rights handed over to the representative of the prosecutor's office a copy of the cited certificate, copies of death certificates and the appeals of victims with descriptions of the events on October 21, 1999, as well as copies of numerous publications on the subject. In response to this message, the For Human Rights movement received a response on June 15, 2007 from the Military Prosecutor's Office of the Joint Troop Force for counter-terrorist

operation in the North Caucasus region of the Russian Federation (JTF). It was signed by the First Deputy Military Prosecutor Colonel of Justice, Kalita V.I., (#3/3029 of May 28, 2007). According to this document, "the evidence confirming the application of a military, missile, bomb or artillery strike at the place of trade, committed by the Federal Forces of the Russian Federation, was not identified". On January 22, 2007, based on the results of the audit, a decision was made to refuse to institute criminal proceedings under paragraph 1 of Part 1 of Article 24 of the Criminal Code of the Russian Federation. The reason for the "events that took place on October 21, 1999 on the central market of Grozny "was as follows: "The audit reliably established that on October 21, 1999, a powerful explosion occurred in the premises of an illegal arms and ammunition depot located on the central market of Grozny, where weapons and ammunition were sold to illegal armed groups."[137]

On the fact of the shooting by Russian planes of a civil convoy near the village of Shaami-Yurt on October 29, 1999, which resulted in the simultaneous death of about 25 and injuries of about 75 civilians, a criminal case (killing two or more persons in a generally dangerous way) was instituted six months after the crime event (May 3, 2000). It was finally discontinued on May 5, 2004 "for the lack of corpus delicti in the actions of the pilots." Despite the decision of the ECHR, in which the death of the applicants' relatives among the victims of this raid was assigned to the Russian Federation, the investigation at the national level was not resumed. No one has been prosecuted.[138] Upon the fact of the shooting of another civilian convoy committed on the same day at the village of Goryacheistochnenskaya, which resulted in the deaths and injuries of at least 31 civilians (including children), and several dozen civilians were injured, no criminal proceedings were instituted.

On December 31, 1999, the Chief Military Prosecutor informed the media that the prosecution authorities refused to initiate a criminal case on the murder of at least 19 and wounding of 3 civilians, rapes and organized robbery of the village which took place on December 1–17, 1999 in the village of Alkhan-Yurt.[139]

In fact, at least 70 civilians were killed in late December 1999 – January 2000 in the Staropromyslovsky district of Grozny a long time after the events, several isolated criminal cases were opened, which were repeatedly suspended and resumed. No criminals have been identified; no one has been prosecuted.[140]

A criminal case (the killing of two or more persons in a generally dangerous way) initiated on September 6, 2000 on bombing of the village of Katyr-Yurt, that took place on February 5, 2000 as an act of collective punishment of the villagers (as established by the ECHR)[141] resulting in the death of at least 167 and injuries of at least 53 civilians was finally terminated on March 13, 2002 due to the lack of corpus delicti. Despite the decision of the ECHR, in which the deaths of the applicants' relatives of the victims of this shelling were assigned to the Russian Federation,[142] the investigation at the national level was not resumed. No one has been prosecuted.

A criminal case instituted in February 2001 regarding the discovery of a mass grave of more than 50 victims of extrajudicial executions at the Khankala military base (and other criminal cases initiated earlier on the facts of unlawful detention of persons whose bodies were found in the grave) did not lead to prosecution of perpetrators. However, given the deliberate destruction by the prosecution authorities of evidence in the very early stages of the investigation, it was difficult to expect another result.[143]

137 They blew themselves up: the military prosecutor's office of the JTF did not admit the fact of rocket attack on Grozny in October 1999. – IA "For Human Rights." Press release. June 15, 2007 || http://sakharov-museum.ru/news/2007/0619-2/.

138 ECHR. The judgment in the case of Isaev, Yusupov and Bazayev v. Russia (statements No. 57947/00, 57948/00 and 57949/00) of February 24, 2005, par. 97.

139 "There are no lawsuits on rumors of atrocities in the Chechen village – the prosecutor." – BBC. December 31, 1999

140 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 70–75.

141 ECHR Resolution in the case of Isaeva v. Russia (application No. 57950/00) of February 24, 2005, par. 220

142 Ibid, par.

143 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 161–176.

The criminal case of the massacre in the village of Novye Aldy in the city of Grozny, during which on February 5, 2000, 46 civilians were killed within a few hours of organized looting (according to official investigations, more than 50), initiated on March 5, 2000, in the period until February 7, 2006 was suspended and resumed at least 10 times.[144] As a result, the indictment was brought against a single person: the warrant officer, Sergei Babin, who was previously conditionally convicted of abuse of office and resigned in 2003. The victims identified him as the executor of one of the killings. After the indictment, Babin was not detained, and escaped from the investigation, which, however, did not prevent him from giving numerous comments to the media.[145]

Failure to investigate systemic crimes

The practice of the prosecution authorities also demonstrates a systematic refusal to investigate "systemic crimes" (as defined by the Dutch jurist, judge of the Tokyo Trial, Bert Röling), i.e. committed on a large scale, mainly to support military efforts, at the request or, at least, with the support or tolerance of government structures.

Examining information on investigating crimes committed in the context of robust criminal command systems has produced shocking results.

The refusal to investigate massive, lasting and repeatable crimes related to the unlawful deprivation of civilian liberty, is very indicative. Those are crimes related to the officially sanctioned practice of "filtering", "sweeping" (punitive operations such as "raiding" related to mass indiscriminate detention of the civilian population based on age and sex) and so-called "targeted operations". Moreover, it is obvious from the statements of the leaders of the state, including the President of the Russian Federation, that the authorities of the Russian Federation were well aware of the scale and seriousness of this type of crime.

When considering this criminal behavior (as, incidentally, of its other types), the ratio of the number of victims to the number of convictions is shocking. Our statistics show that during crimes related to unlawful deprivation of liberty, at least 20,234 civilians were subjected to unlawful detentions at different times, at least 9,743 to ill-treatment and torture, at least 449 to extrajudicial executions, at least 1,463 – enforced disappearances. This amount accounts for only 8 criminal cases known to us brought before the court against the military and police, in which 16 people were convicted (seven were charged with murder). Eight of them were punished with real imprisonment for long periods (of 9 years), 6 – suspended imprisonment, 1 – monetary fine, and 1 was acquitted.[146]

The statistics on convictions of servicemen for crimes against civilians compiled by the Prosecutor General's Office in 2004 do not reflect a single sentence in connection with enforced disappearances.[147] In January 2005, Chechen prosecutor, Vladimir Kravchenko, stated that "seven law enforcement officers were prosecuted last year for crimes related to kidnapping" but no details were provided.[148]

The absolute majority of criminal cases were terminated or suspended after several months "due to the impossibility to identify persons to be brought as accused." In December 2004, the Head of the Office of the Prosecutor General of the Russian Federation for the Southern Federal District, A. Arsentiev, said that out of 1,783 criminal cases instituted on the facts of abductions in Chechnya since the start of the "counter-terrorist operation", 1,469 were suspended.[149]

144 ECHR The judgment in the case Musayev and Others v. Russia (statements No. 57941/00, 58699/00, 60403/00 /) dated July 26, 2007, par. 110.

145 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 413–415.

146 Ibid, p. 363.

147 Letter from the Deputy Prosecutor General of Russia, S. Fridinsky, to Commissioner for Human Rights, V. Lukin # 46/2–1535–04 of August 20, 2004

148 Newspaper. February 1, 2005

149 Almost One Third of All Abductions of People in Russia are Committed in the Southern Federal District. — ITAR-TASS. December 27, 2004.

Even more impressive figures were cited by the Commissioner for Human Rights in the Chechen Republic, Nurdi Nukhazhiev, in his report on the issue of missing persons dated April 21, 2006. Referring to the data of the Republic's prosecutor's office as of April 1, 2006, the Ombudsman stated that since the beginning of the "counter-terrorist operation" 1,949 criminal cases had been opened regarding kidnapping. Of these: 31 cases were dismissed, 1,679 cases were suspended for failure to identify persons to be involved as defendants. Only 87 cases of this category were sent to the courts of the Republic during the same period. It constitutes 4.3% of all cases.[150] However, this figure does not reflect the number of investigated crimes committed by representatives of the federal side against civilians, since, apparently, these statistics include investigated cases related to criminal abductions during the "interwar period", that is in 1996–1999, and already initiated since 2000. Moreover, according to the Ministry of Internal Affairs of the Chechen Republic, to which Nukhazhiev referred, from the number of abducted and missing persons, which, according to the Commissioner, amounted to 2,707 people, from 2000 to 2005, only 190 people were put on the federal wanted list, 2 were detained.[151] It is difficult to add anything to the figures given.

Only two episodes from the number that reached the court fully meet the criteria of "systemic crimes". This is the case of Sergei Lapin (illegal detention and torture of a subsequently disappeared civilian in the Oktyabrsky District Department of Internal Affairs) and the case of three police officers (Colonel Galyamin, Major Vasilyev and Major Mostovoy) who illegally imprisoned three residents of Assinovskaya during a punitive operation on July 3–5, 2001 (the latter were condemned to one and a half years of suspended prison sentence for abuse of power and fraud).[152]

As follows from the available materials, the rest of the individuals (including Colonel Yuri Budanov and members of the gang of the Chechen police officer Asuyev) committed crimes on their own grounds based on personal motives,[153] although, of course, all of them were committed in the context of a large-scale attack on the civilian population, and therefore can be considered as crimes against humanity.

When analysing as a separate group the crimes involving enforced disappearances and extrajudicial executions of detained persons (in all our sources there is information about 1,912 of these victims from among the civilians and 48 from the number of surrendered combatants), then all the investigated cases known to us are narrowed down to a sentence to Lapin (who, however, was not formally found guilty of the disappearance of the victim) and five members of Asuev's gang. Although prosecutors have occasionally reported their success in investigating "kidnappings," we do not know of any examples of de jure or de facto prosecution of a state representative, with the exception of those listed. As regards crimes against surrendered enemy combatants, not one of them was investigated at all.

If we separately consider the investigation of 136 punitive operations (both of the "massacre" type and of the "round-up" type) as a result of which at least 16,245 civilians were unlawfully deprived of their liberty, at least 8,919 civilians were subject to ill-treatment and torture, at least 254 civilians were subjected to enforced disappearances (disappeared after unacknowledged detention), at least 328 civilians were killed (including 117 people subjected to extrajudicial execution after their detention), and at least 219 received serious bodily injuries or mental disorders, there are only two court sentences available as a result.[154]

The first, again, concerns the illegal deprivation of liberty of three Assinovskaya

150 Report of the Commissioner for Human Rights in the Chechen Republic on the issue of missing persons, April 21, 2006

151 Ibid.

152 Conditional justice. On the situation with the investigation of crimes against civilians committed by representatives of federal forces on the territory of the Chechen Republic during the hostilities of 1999–2003. (as of May 2003). – HRC Memorial. – M., 2003. http:/www.memo.ru/hr/hotpoints/chechen/d-do603/index.htm

153 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 201–203.

154 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 363–364

residents during a punitive operation on July 3–5, 2001, for which 3 police officers received punishments not related to real deprivation of liberty. It should be remembered that in total during this operation about 700 people were detained and subjected to ill-treatment, 2 people disappeared without a trace after the detention.[155] The second verdict is no less cynical: on October 4, 2005, by the verdict of the Grozny garrison military court, the commander of one of the units of the Vostok battalion, Muhadi Aziyev – "taking into account his military merits and impeccable service" - in connection with the "cleansing" of the village of Borozdinovskaya on June 4, 2005 was convicted under Art. 286 of the Criminal Code (abuse of office) for 3 years of *suspended* prison sentence with a probation period of 1 year.[156] In total, as a result of this punitive operation, 11 villagers were illegally deprived of their liberty and then another civilian was killed, 4 households were burned, about 250 ethnic Avar men were illegally detained and collectively punished by beatings and assault on human dignity.[157]

Finally, if we consider the system of behavior in the form of attacks on the civilian population and indiscriminate attacks in the form of fire attacks, the victims of which as a result of 255 episodes of the use of lethal force were at least 1386 killed civilians, at least 55 civilians who died from wounds and at least 1,119 civilians received bodily damage, we are aware of only two criminal cases investigated, the result of which was the punishment of those responsible.

So, on August 22, 2001 in the area of the settlement Petropavlovskoe as a result of the erroneous (according to the investigation) use of means of destruction by a conscript military S. (serving as an operator-gunner of an armored personnel carrier), the Kamaz vehicle was fired at. As a result two civilians died: A.A. Javathanov and A.S. Javathanov and two more civilians were injured. Military court judged that S. was guilty of an offense under Part 3 of Art. 349 of the Criminal Code of the Russian Federation (violation of the rules for handling weapons), and sentenced him to 3 years in prison with a sentence in a penal colony.

On January 22, 2001, in Grozny, two army conscripts A. and P. launched indiscriminate shooting and detonated grenades. As a result of the actions of serviceman P., a civilian – B. Uguyev – died and 2 more civilians were injured. In addition, serviceman Perelomov, was shot dead by servicemen A. A military court found A. serviceman guilty of an offense under Art. 105 Part 1 of the Criminal Code of the Russian Federation (murder of one person), and he was sentenced to 12 years of imprisonment in a maximum security prison. It is not reported about the serviceman P., obviously, he is Perelomov, who was shot dead by fellow serviceman.[158] Thus, in this case we are not talking about the punishment for the murder of a civilian, but for the murder of another soldier. The court laid the responsibility for the death and injury of civilians on the deceased offender.

It is also known that in a number of cases the military personnel involved in delivering artillery strikes qualified as a violation of the rules on the handling of weapons, resulting in death by negligence, were released from criminal liability in connection with the act of amnesty.

Obviously, our data on court decisions is not complete. Nevertheless, it should be noted that lawsuits related to landmark crimes against civilians in Chechnya, as a rule, became the subject to strict public scrutiny.

155 Ibid, p. 86–90.

156 Alamov M.S. Report on the conduct of a public investigation on the legal statement of Shaikhiyev Ali Magomedovich, Shaikhieva Aishat Magomedovna, Umarova Tamum Hamidovna (registration number in action register-21 material dated 06/26/05), Grozny, October 30, 2006. – Nizhny Novgorod Regional Public Organization "Committee Against Torture"

157 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 103.

158 Prosecutor General of the Russian Federation. Reply to the deputy's request of the Deputy of the State Duma of the Federal Assembly of the Russian Federation, S. A. Kovalev, 04/25/03. No. 52–3804–03 / Published: Conditional justice. On the situation with the investigation of crimes against civilians committed by representatives of federal forces on the territory of the Chechen Republic during the hostilities of 1999–2003. (as of May 2003). – HRC Memorial. – M., 2003, p. 37. || http://www.memo.ru/hr/hotpoints/chechen/d-d0603/index.htm.

Including because human rights organizations monitored the investigation of those crimes that they had documented. Thus, although the actual number of convictions for the indicated crimes is obviously higher than the above, it is unlikely that it will significantly change the flagrant correlation of the scale of the crimes committed with the number of court decisions.

Refusal to investigate senior officers' participation in crimes

The authors only know one court decision in which the national court of the Russian Federation appears to have duly established the fact of the participation of a higher command in crimes committed against the civilian population of Chechnya. This is the conviction of the Court of the North Caucasus Military District of June 14, 2007 on the case of the Russian Military Intelligence Spetsnaz under the command of Captain Eduard Ulman (for details of the case, see below). However, there are certain reasons to believe that in this case, the preliminary investigation bodies and the court did not establish the entire chain of decision-making and issuing an order to the direct executors, limiting themselves only to identifying its lower level links.

In other court decisions that were issued on this type of crime, liability was established exclusively for direct perpetrators.

The verdict for Mukhadi Aziev, who, according to the court, "unlawfully issued an order to search private households and to detain relatives and friends of wanted militants",[159] can hardly be considered an example of duly established participation in crimes, due to the fact that the preliminary investigation and the court shied away from establishing the liability of this person for the murder, mass enforced disappearance of villagers and the destruction of civilian property. It is hardly worthwhile to consider the establishment by the North Caucasian military court of the responsibility of Colonel Yuri Budanov for the illegal order to abduct Elsa Kungaeva, since the convict himself actively participated in the execution of the material elements of this crime, being present at the scene and threatening the victims.

The same can be said about the investigating authorities: in all cases known to us (primarily due to documents submitted by the Russian Federation to the ECHR), even if prosecutors made real attempts to identify the perpetrators, they concerned only those who directly "pulled the trigger". The investigators were not interested in the organizers of crimes. The issues of the participation of higher command in planning, ordering, aiding and abetting, participation in the general criminal intent (and even more so – the issues of responsibility of higher officials for refusing to prevent or punish the crimes of subordinates) – were not raised during the preliminary investigation by prosecutors. At least, no such charges were brought against anyone (with the exception of the defendants in the Ullman case, see below), and not a single higher commander who took part in the destruction of the material evidence of the crime was interrogated as a suspect.

Representatives of the prosecutor's office, as a rule, avoided interrogating senior officers, even as witnesses, even when their testimony was necessary to determine the circle of direct perpetrators. Exceptions to this rule are few and very significant as well.

In connection with the investigation of the criminal case of the mass killing of civilians during the shelling of the village of Kartyr-Yurt on October 8 and 26, 2001, the persons who planned and directly supervised this operation were interrogated as witnesses: the commander of Joint Force "Zapad", Vladimir Shamanov, and his deputy on the internal troops, the commander of the DON-100, Major General Yakov Nedobitko.[160] The interrogation was carried out more than a year and a half after the event of the crime took place and more than a year after the initiation of the criminal case. In the framework of the investigation into the disappearance of Khadzhi-Murat Yandiyev in June 2004 and in September 2005, Colonel General Alexander Baranov was interrogated

159 Sentence on the case of "sweeping" in the village of Borozdinovskaya. – Demos. Center for the Promotion of Research on Civil Society Issues. / News. 10/27/2005, 9:32 p.m. || http://www.demos-center.ru/news/7134.html.

160 ECHR Resolution in the case of Isayeva v. Russia (application No. 57950/00) of February 24, 2005, par. 66–76.

as a witness. On February 2, 2000 in the presence of television journalists he ordered Khadzhi-Murat Yandiyev to be executed.[161] The first interrogation was conducted more than 4 years after the crime took place and more than 3 years after the start of the investigation. Earlier, in May 2004, the operation commander, Yakov Nedobitko, was interrogated as a witness. The interrogations of these persons were carried out only after the complaint of Yandiyev's mother to the ECHR was communicated to the Russian government.[162] The first criminal case was dismissed due to the lack of corpus delicti; no charges were brought against anyone on the second criminal case.

Statistical assessment of impunity

Thus, there is a glaring gap between the number of victims of crimes committed within the framework of individual sustainable criminal behavior systems and the number of convictions. Is it possible to evaluate it using statistics tools?

There is a unique document that allows to compare the number of crimes and their victims, reported by our sources, with the absolute number of sentences and convicted persons for the same period. The time span covered has a length of more than 3 years, sufficient to speak about the representativeness of the sample and the correctness of the conclusions drawn. Therefore, for this period, we can "measure" the rate of the crimes committed on the one hand, and the level of impunity on the other.

The aforementioned document is the response of the General Prosecutor's Office of the Russian Federation (signed by the Deputy Prosecutor General of the Russian Federation, S.N. Fridinsky) dated April 25, 2003 to the request of State Duma deputy, Sergei Kovalev. It contains comprehensive information "on the results of the consideration of crimes committed by military personnel and other representatives of the security forces against civilians during the counter-terrorist operation"[163] at the time of its preparation.

In order to adequately assess the degree of inaction of state bodies that this document reveals, you must first refer to the data on the scale of the crimes committed during the indicated period (i.e., from the beginning of the armed conflict in Chechnya until receiving the prosecutor's response to the deputy's request). Taking into account that the preparation of statistics on sentences took some time from the Prosecutor General's Office, we will limit our calculations to September 1999–2002 b.d.i.

According to our sources, during this period the following number of criminal episodes is recorded:

- 287 attacks on the civilian population and indiscriminate attacks in the form of fire attacks (including during which mass deaths and injuries of civilians were recorded);
- 121 attacks on the civilian population in the form of punitive operations (including episodes of massacres of civilians and mass raids, during which unlawful detentions, ill-treatment, torture, killings, enforced disappearances, looting and destruction of civilian property were committed);
- 892 offenses involving the unlawful deprivation of civilian liberty outside the context of punitive operations (including unlawful detention, ill-treatment, torture, killings and enforced disappearances, looting and destruction of civilian property during detention);
- 8 episodes of crimes committed against persons who ceased to take part in hostilities and find themselves detained by the opposite side (including ill-

161 ECHR Resolution in the case of Bazorkina v. Russia (application No. 69481/01) of July 27, 2006, par. 63.

162 Ibid, par. 43.

163 Prosecutor General of the Russian Federation. Reply to the deputy's request of the Deputy of the State Duma of the Federal Assembly of the Russian Federation, S. A. Kovalev, 04/25/03. No. 52-3804-03 / Published: Conditional justice. On the situation with the investigation of crimes against civilians committed by representatives of federal forces on the territory of the Chechen Republic during the hostilities of 1999–2003. (as of May 2003). – HRC Memorial. – M., 2003, p. 37. || http://www.memo.ru/hr/hotpoints/chechen/d-d0603/index.htm.

treatment, torture, killings and enforced disappearances);

- 128 episodes of murders committed outside the contexts listed above (including those involving robberies);
- 49 episodes of ill-treatment and torture committed outside the contexts listed above (including those involving robberies);
- 27 episodes of appropriation and destruction of civilian property, not associated with the above crimes;

In total – 1,512 criminal acts, including those lasting and including episodes of mass killing and injuring of civilians.

During these criminal acts:

- at least 2,198 civilians were killed,
- at least 35 civilians died as a result of ill-treatment, torture and denial of medical care,
- at least 743 civilians were subjected to enforced disappearances,
- At least 1,458 civilians were injured, received bodily and mental damage,
- at least 9624 civilians were subjected to ill-treatment crimes,
- At least 18,556 civilians were unlawfully deprived of their liberty.

For the same period, according to the information of the General Prosecutor's Office, military courts examined 42 criminal cases in which 51 servicemen were found guilty of crimes against residents of the Chechen Republic, including 7 officers, 22 soldiers and a sergeant under contract, 19 servicemen on compulsory military service and 3 warrant officers; courts of general jurisdiction examined 7 more criminal cases against 17 police officers. Thus, it turns out that we are talking about sentences to 68 criminals.

However, it is necessary to exclude from this list cases of traffic accidents (violation of the rules of driving combat vehicles), since these acts cannot be recognized as international crimes in connection with the requirements for the subjective element, and crimes against fellow servicemen (due to non-compliance of the object of the crime). Such criminal episodes, of course, were not taken into account in the statistical analysis. It is also necessary to combine the three court decisions, as they relate to the complicity of three persons in the same crime.

As a result of this "curtailment," there are still 38 criminal episodes involving killing or mortal wounding of 22 civilians, various degrees of bodily harm to 12 civilians, ill-treatment of 11 civilians, rape of 2 civilians, illegal detention of 5 civilians persons, 2 cases of destruction or damage to civilian property and 13 cases of robbery, extortion and other forms of misappropriation of civilian property, including money.

For these crimes 60 people were brought to trial: 6 officers, 3 warrant officers, 18 soldiers and sergeants under contract, 17 soldiers and sergeants on compulsory military service, and 16 police officers.

Of these, 21 people were sentenced to serve sentences related to real deprivation of liberty (in this case, 4 police officers convicted of robbery were released in the courtroom, as the punishment defined for them was equal to the term of pre-trial detention), 32 people were sentenced to different terms suspended prison sentence, 1 person was released in connection with an amnesty, 1 person was sentenced to pay fine in form of money, 2 in the form of a restriction on their service, and 3 people were acquitted.

Thus, the detection of crimes committed by state representatives against the civilian population of Chechnya from 1999 to 2002 as of April 2003 was as follows:

- murder (2,198 victims killed, crimes committed against 22 victims were cleared) - 1%;
- causing wounds and other serious bodily harm (1458 victims, crimes cleared – in relation to 12) – 0.8%;
- crimes of ill-treatment (9624 victims, crimes cleared in relation to 13, including rape of 2 women) – 0.1%;
- unlawful imprisonment (18,556 victims, crimes cleared – in relation to 5) – 0.027%;

- enforced disappearances (9,624 victims, no crimes were cleared) – 0%.

If we proceed from the correlation of criminal acts recorded in our sources for this period (regardless of the scale and number of victims of each of them, from a single unlawful detention to mass killing) – 1,512, with the number of crimes cleared – 38, the relevant ratio constitutes 2,5%.

Thus, the coefficient of impunity, even with the most advantageous for the state method of calculation, was expressed in April 2003 as a shocking figure – 97.5%.

And such "achievements" in the fight against crimes committed by state representatives against civilians, were gained by the investigating and judicial authorities of the Russian Federation more than three years after the start of the "counter-terrorist operation"!

Considering that the real number of victims among the civilian population is significantly higher than the data contained in our sources, the real ratio between the crimes committed and the investigated should look even more deplorable.

But maybe in the following years, the situation has changed dramatically for the better and the detection rates of crimes against the civilian population of Chechnya have plummeted up?

The available information does not allow us to come to this conclusion.

In the future, the prosecution authorities never provided the public with a list of convictions for crimes of this category, probably bearing in mind the "self-revelation incident" resulting from a response to Kovalev's request. However, almost all convictions related to the commission of serious crimes against civilians became the focus of attention of the media and human rights organizations. Unfortunately, there are very, very few of them.

Firstly, these are the court decisions mentioned above: the verdict in the case of Colonel Yuri Budanov, the verdict in the case of Sergey Lapin, the verdicts in the cases of the gang of Ruslan Asuyev and the verdict in the case of Muhadi Aziev.

Secondly, this is a small number of court decisions, which we did not review above. In particular:

- two sentences issued by the Grozny garrison military court to servicemen under contract of reconnaissance group of military unit 98311, Alexei Krivoshonok and Pavel Zinchuk. On May 13 and 16, 2006, on November 16, 2005, Krivoshonok and his fellow servicemen, consumed alcohol, stopped the car for checking documents, killed 3 civilians in it and tried to kill another witness of the crime. Krivoshenok was found guilty under paragraph "г" of Part 2 of Art. 111 and Part 2 of Art. 167 of the Criminal Code and sentenced to 7 years in prison with a sentence in a penal colony, Zinchuk was found guilty under paragraphs "а", "и", and Part 2 of Art. 105 of the Criminal Code and sentenced to 18 years in prison with a sentence in a maximum security penal colony. The third participant of the crime, captain Alexei Pyatnitsky, as the senior of the group is accused only under Art. 332 of the Criminal Code of the Russian Federation (failure to carry out an order): he, according to the investigation, ignored the order of the command, which forbade inspecting cars outside stationary posts, and also did not stop the criminal actions of his subordinates. The court decision in his regard was not reported164.
- the sentence issued on July 7, 2006 by the Grozny garrison military court to a former warrant officer of the RMI Spetsnaz of the Ministry of Defense of Russian Federation, Valery Makarov (Chernomaz), who killed the 16-year-old Movaldi Salatkhanov in July 2000. Makarov was found guilty under Part 1 of Art. 105 of the Criminal Code

164 Elena Olenina. Sentence to a contract soldier who killed three civilians in Chechnya: 18 years in prison. Details - Caucasian Knot. 04/07/2008, 00:58; Musa Muradov. Seven years for not finished witness. – The businessman. May 17, 2006 No. 86(3417).

and sentenced to 11 years in prison with a sentence in a maximum security penal colony;[165]

- the sentence of the Court of the North Caucasus Military District of June 14, 2007 against military personnel of the 621st detached unit of the RMI Spetsnaz of the military unit 87341 (MD RMI 22nd special operations brigade) of Major Alexei Perelevsky, captain Eduard Ulman, lieutenant Alexander Kalagansky and warrant officer Vladimir Voevodin. On January 11, 2004, during a special operation in the mountain region of Shatoi, a group under the command of Ulman mistakenly opened fire on an UAZ car in which there were 6 civilians, including a pregnant woman. One person was killed immediately, two were injured. Having figured out that they were civilians, the scouts provided first aid to the wounded and reported the personal data of the victims to the command post of the operation. A few hours later Perelevsky, who was the deputy commander of this military unit, and who was at the command post of this operation as a senior operations officer, ordered to shoot all the civilians remaining alive.The order was executed. Perelevsky himself told the court that he only forwarded to Ulman the order of the head of the operation – JTF deputy commander for the airborne troops, Colonel Vladimir Plotnikov. Plotnikov denied his guilt, Perelevsky's testimony was not confirmed by witnesses. In the absence of three defendants (a restraint measure was taken in the form of recognizance not to leave, as a result of which Ulman, Kalagansky and Voevodin escaped the court), the court sentenced Perelevsky to 9 years in prison, Ulman, Kalagansky and Voevodin – to 14, 11 and 12 years in prison, respectively. Earlier, the jury twice acquitted the servicemen, twice because the latter acted in accordance with the binding order of their superior, acquittals were quashed by the Supreme Court of the Russian Federation.[166]
- sentence issued on December 27, 2007 by the Court of the North Caucasian Military District against officers of the division of the Internal Troops named after Dzerzhinsky (military unit 3186): Lieutenant Sergey Arakcheev and Senior Lieutenant Evgeny Khudyakov. The court found the defendants guilty of the murder of three Chechens with previous concert (Part 2 of Art. 105 of the Criminal Code of the Russian Federation). In addition, Khudyakov was found guilty of the abuse of power (Part 3 of Art. 286 of the Criminal Code of the Russian Federation). The court sentenced Khudyakov to 17 years in prison, and Arakcheev to 15 years in prison in a maximum security penal colony. For both accused there was selected a preventive measure in the form of recognizance not to leave. Evgeny Khudyakov did not attend the trial and was convicted in absentia. Convict Sergei Arakcheev was taken into custody in the courtroom. Earlier, the jury twice acquitted the servicemen for their non-involvement in the crime, but acquittals were quashed by the Supreme Court of the Russian Federation.[167]
- the sentence issued on February 8, 2008 by the Grozny Garrison Military Court against the Colonel of the internal troops, Alexei Krogun. On his order the reconnaissance

165 http://www.pytkam.net/web/index.php?go=Content&id=253&SNS=f1efe3a355745587ecd5b8867ef7de8e.

166 Four servicemen were found guilty in the "Ullmann case" and sentenced to long imprisonment. – NEWSru.com / Russian News / Thursday, June 14, 2007 11:46; The guilty verdict in this case was not published, and was announced only in the form of an setting and resolving part, since the information contained in the narrative part is a state secret. The acquittal of May 11, 2004 was published on the Internet at: http://74.125.77.132/search?q=cache:cFT8MlTINMUJ:kolokol.ru/chechnya/70893.html+http://www.kolokol.ru /chechnya/70893.html&hl=en&ct=clnk&cd=1&client=opera. The repeatedly voiced version of the possible involvement of the JTF command in issuing a criminal order to kill the victims is most detailed in a number of publications by the famous military observer, Vadim Rechkalov. For the most complete exposition, see: Vadim Rechkalov. Captain Ullman's Truth. – Moscow Komsomolets. May 30, 2005 and May 31, 2005 || http://www.compromat.ru/main/chechya/ulman1.htm. A brilliant analysis of the special operation in which the Ulman group participated, with the application of maps, as well as a consideration of possible motives for giving a criminal order, see: Vadim Rechkalov. Ich fahre auf den Krieg. The Life and Misadventures of Captain Ulman, special intelligence officer, commander of group 513 in the country, in prison, in the Chechen war. || http://lifecontrary.ru/?p=113 (the material was deleted at the time of publication, see the saved copy).

167 Lawyer Dmitry Vladimirovich Agranovsky. The case of Arakcheev and Khudyakov. How it was. || http://warrax.net/89/9/arakcheev.html. This material contains a detailed review of the judgment by the defense.

group fired at three residents of Chechnya, collecting wild garlic in the forest. One of them was killed. The convict explained that he issued the order because of poor visibility. The court found Korgun guilty under Part 2 of Art. 293 of the Criminal Code (negligence, resulting in the death of a person or other serious consequences) and sentenced to three years in prison;[168]

- the sentence passed on July 30, 2008 by the Grozny garrison military court against a contract serviceman, Aleksey Tikhonov, who killed a taxi driver in January 2005. Tikhonov did not want to pay the driver and throwed a military grenade in his car. The court recognized Tikhonov as insane and exempted him from criminal liability by referring him to compulsory psychiatric treatment.[169]

Undoubtedly, military courts and courts of general jurisdiction have also issued other judicial decisions related to crimes against civilians of which we are not aware. However, the list of sentences relating to serious crimes related to the deprivation of life is fully or substantially limited to the above decisions.

Considering that large-scale commission of crimes against civilians continued on the territory of Chechnya during 2003–2005, it can hardly be assumed that their real general disclosure ever exceeded the level of April 2003.

Inconsistency in punishment and gravity of offence

When analyzing the court decisions, it is striking that in some cases the leniency of the criminal sanctions chosen by the court comes into flagrant discrepancy with the gravity of the acts committed. Let us once again draw attention to the fact that almost two-thirds of the sentences for the crimes under consideration, issued in the period up to 2003, are not connected with the actual deprivation of liberty of the convicted. A detailed analysis of this aspect of the issue of impunity can be found by the reader in the report of the HRC "Memorial" "Conditional justice".[170]

The role of investigative bodies

The failure of the Russian authorities in establishing responsibility for the crimes that pose interest to us is attributed not so much to the performance of judiciary authorities as with the activities of the prosecution ones (and subsequently the Investigative Committee) that conduct preliminary investigation. It was these authorities, with the rarest exceptions, that either refused to institute criminal proceedings altogether, or conducted their investigation with the obvious aim of protecting criminals from criminal liability.

The European Court of Human Rights, usually conservative in its statements, in a number of its decisions gives a scathing criticism of the preliminary investigation of crimes. Thus, evaluating the investigation into the massacre of civilians in Novy Aldy on February 5, 2000, the Court concluded that the prosecution authorities were in solidarity with the killers. In its decision in the case of *Musayev and Others v. Russia*, he, it in particular, stated:

The Court considers that in the present case the investigation body faced a task that could by no means be considered impossible. The killings were committed in broad daylight and a large number of witnesses, including some of the applicants, saw the perpetrators face to face. Their detailed accounts of the events were made public by various sources. The relatives of the victims demonstrated their

168 Scandal in Chechnya: a scout who shot peaceful Chechen women was sentenced to probation. – NewsRu.com. 02/09/2008, 12:21.

169 Julia Sukhonina. The contract serviceman paid the taxi driver with a grenade. – The businessman. August 1, 2008 No. 134 (3951).

170 Conditional justice. On the situation with the investigation of crimes against civilians committed by representatives of federal forces on the territory of the Chechen Republic during the hostilities of 1999–2003. (as of May 2003). – HRC Memorial. – M., 2003, p. 7–13. http://www.memo.ru/hr/hotpoints/chechen/d-do603/index.htm

willingness to cooperate with the authorities by allowing the exhumation and forensic analysis of the bodies and by forming an action group to coordinate their efforts. The injuries and the circumstances of the victims' deaths were established with a sufficient degree of certainty. Numerous bullets and cartridges were collected, some of them being suitable for identifying individual guns and even bearing serial numbers that allowed the origin of their production to be traced. Information about the alleged involvement of particular military units was available to the prosecuting authorities no later than one month after the incident. Despite all that, and notwithstanding the domestic and international public outcry caused by the cold-blooded execution of more than 50 civilians, almost six years after the tragic events in Novye Aldy no meaningful result whatsoever has been achieved in the task of identifying and prosecuting the individuals who had committed the crimes. In the Court's view, the astonishing ineffectiveness of the prosecuting authorities in this case can only be qualified as acquiescence in the events (italics added by author).[171]

In this case, the ECHR notes the failure of the investigation to complete the most necessary procedural actions.[172]

Another fact of similar level of cynicism relates to the history of the investigation into the "cleansing" of the village of Borozdinovskaya on the night of June 2–3, 2005, during which 1 civilian was killed, 4 households were burned down, 11 civilians were unlawfully detained and disappeared without a trace, and about 250 people were also detained and brutally beaten and were subjected to offence to human dignity.

The court found that the operation was carried out by servicemen of the Vostok battalion, commanded directly by Lieutenant Mukhadi Aziev. The latter was convicted under Art. 286 of the Criminal Code (abuse of power) for 3 years of *conditional* imprisonment with a probation period of 1 year (44.7.2.3). Neither he nor his subordinates were charged with the abduction of 11 disappeared civilians, and "the investigation checks the possible involvement in these actions, both military personnel and members of the illegal armed groups."[173]

Meanwhile, from the very beginning, the preliminary investigation authorities had a document that irrefutably testified that it was precisely the subordinates of Mukhadi Aziyev who had detained the disappeared persons. On July 19, 2005, advocates of the Committee Against Torture NGO representing the interests of the victims sent a requested the Head of the Ministry of Internal Affairs of the Chechen Republic to provide a copy of the text of the message received on June 5, 2005, at 8.30 pm, from the duty officer Shelkovsky District Department of the Interior.

In response there were provided the copies of the full text of the message received by the standby unit of the Shelkovsky District Department of the Interior, registered at Reports Registration Book-535 (registered at 20:15) and the Office of the Ministry of Internal Affairs of the Chechen Republic, in which the following was stated:

"Shelkovsky district. 06.06.05, at 20:30, the CR MIA SU received the message from the duty officer of Shelkovsky District Department of the Interior that on 06.06.05, from 15:00 to 20:30, servicemen of the Vostok battalion of the Ministry of Defense of the Russian Federation in the quantity of 70–80 people were moving in two armored personnel carriers, three armored vehicles URAL, 6–8 vehicles UAZ and cars. They were performing special activities aimed to detain and destroy members of illegal armed groups in the village Borozdinovskaya. They have detained residents of the village Borozdinovskaya on suspicion of committing crimes: ..."

The following text contains the personal data of all 11 persons considered to be "disappeared"!

171 ECHR The judgment in the case Musayev and Others v. Russia (statements No. 57941/00, 58699/00, 60403/00 /) dated July 26, 2007, par. 164.

172 Ibid, para. 158–163.

173 Answer of the public prosecutor's office of JTF of 21.04.06. to the deputy request of the head of the fraction of the Communist Party of the Russian Federation of the State Duma of the Federal Assembly of the Russian Federation, G.A. Zyuganov.

Somewhat below it is indicated:

"A check is being made of detainees for involvement in participation in an illegal armed formation"

and there is a list of officials who visited the scene: the district prosecutor, Vasilchenko, the Head of the District Department of the Interior, Magomayev, investigators of the prosecutor's office, Vishnevsky and Dutov, etc.[174]

All the requests to join those copies to the case record and make an investigation body to demand the originals were ignored by the military prosecution authorities for several years, they have not provided any answers to lawyers and organizations representing the interests of the victims.

Thus, in both cases, not only the inaction of the prosecution authorities is obvious, but also the direct concealment of persons allegedly responsible for committing crimes under international law and especially grave crimes under national law – mass killings and disappearances. And we are talking about crimes, each of which had a huge international resonance.

Against the background of such an attitude to the investigation of episodes of mass deaths of civilians, it is not surprising that the investigation of less scandalous criminal acts, for example, crimes against persons unlawfully deprived of liberty, is not surprising. This sabotage is expressed in the following actions:

- systematic refusal or unacceptable delays (sometimes for months or even years) of criminal proceedings;
- the systematic refusal of the military prosecution authorities to investigate criminal cases, even when the involvement of military personnel is obvious (which makes it virtually impossible to conduct investigative actions involving witnesses and suspects from among the military personnel and also on the territory of military units);
- the systematic refusal to conduct even the most necessary investigative actions in order to identify criminals;
- a systematic refusal to carry out such investigative actions even in those numerous cases when, according to witnesses and victims, the specific military units involved in the crime, the numbers of armored vehicles and vehicles, and even the personal data of commanders and executors, including the refusal to record these testimonies, are known;
- systematic refusal to indict even when specific perpetrators of crimes are known;
- in a systematic violation of the rights of victims, including the refusal to familiarize victims and their legal representatives with criminal case materials, which leads to the inability to appeal against illegal procedural decisions.

Besides. Separate facts of the direct destruction of the most important evidence are known, as was the case with the mass burial in the dacha village Zdorovie.[175]

All of the above applies not only to crimes involving unlawful imprisonment, but also to all other types of crimes. The exceptions to this rule are sporadic. It is only those few exceptions that were transferred to the court that were considered by us above.

Government's refusal to provide conditions for effective investigation

The failure of the investigation of the vast majority of the crimes examined by us is explained not only and not so much by the conformism of prosecutors. Despite obvious evidence of the magnitude and gravity of the offences, as well as the failure of their investigation, the executive authorities of the

174 Alamov M.S. Report on the conduct of a public investigation on the legal statement of Shaikhiyev Ali Magomedovich, Shaikhieva Aishat Magomedovna, Umarova Tamum Hamidovna (registration number in action register-21 material dated 06/26/05), Grozny, October 30, 2006. – Nizhny Novgorod Regional Public Organization "Committee Against Torture".

175 Dmitrievsky S.M. et al., Op. cit., vol. 2, p. 161–175.

Russian Federation (starting from the President of the Russian Federation and ending with the leadership of the General Prosecutor's Office of the Russian Federation) did not take any adequate steps aimed at increasing the effectiveness of the investigations.

This applies both to providing the preliminary investigation bodies with the necessary resources, and to the most important structural, organizational and personnel decisions.

While the massive nature of the crimes committed required the authorities to take extraordinary measures to provide the material, technical, expert and human resources to the investigation, the prosecution authorities in Chechnya were not only formed according to the state of the "ordinary" region, but also did not have the most necessary even by peacetime standards resources. The apotheosis, and at the same time a symbol of this absurdity, is the only forensic medical examiner who studied more than 50 bodies from a mass grave in the dacha village Zdorovie, and had nothing but a scalpel and gloves.[176]

The systematic practice to transfer an investigation to the territorial prosecutor's office of crimes, the commission of which there was every reason to suspect military personnel, deserves special mention. In general, it is undoubted that the absence of a single, at least coordinating, body capable of ensuring an effective investigation of crimes regardless assumptions of civil or military identity of offenders, the practice of "transferring" criminal cases from military to territorial prosecutors and vice versa is the result of an appropriate policy pursued by the leadership of the General prosecutors. Despite the obviousness of these problems and the competent recommendations of international organizations to resolve them (including the recommendations of the High Commissioner of the Council of Europe on the creation of mixed prosecutor groups), no significant structural changes were made in the investigation bodies.

The systematic practice to transfer to the territorial prosecutor's office the investigation of crimes there was every reason to suspect military personnel deserves special mention. In general, it is undoubted that the absence of a single, at least coordinating, body capable of ensuring an effective investigation of crimes regardless assumptions of civil or military identity of offenders. The practice of "transferring" criminal cases from military to territorial prosecutors and vice versa is the result of an appropriate policy pursued by the leadership of the General prosecutors. Despite the obviousness of these problems and the competent recommendations of international organizations to resolve them (including the recommendations of the Commissioner for Human Rights of Council of Europe on the creation of mixed prosecutor groups), no significant structural changes were made in the investigation bodies.

But most importantly, as a result of the authorities' refusal to take the most important structural and organizational decisions, an atmosphere was created and maintained in which even conscientious, sincerely seeking to solve crimes, prosecutors had neither the opportunity nor real powers to do this. Moreover, in many cases, such an investigation was associated with mortal risk.

The Russian jurist, Grigory Vishnya, points out in his Ph.D. written on the basis of the work of the military prosecutor's office in Chechnya, and based on his own experience of working in this body:

"In some cases, military prosecutors and investigators have to deal not only with overcoming conspiracy of silence in military collectives, but also with direct opposition from the command to the disclosure of crimes committed by servicemen."[177]

What realities are hidden behind the wording "direct opposition of the command", Anna Politkovskaya very clearly showed in her famous essay "Armored Mud". This article is devoted to

176 Ibid, p. 162.

177 AR B557 Vishnya, G.I. (Grigory Ivanovich). Features of legal groundwork for identifying and clearing of crimes in an armed conflict of a non-international nature: Based on the materials of the military prosecutor's office of the Chechen Republic: Ph.D. in Legal Sciences Dissertation abstract. Specialization 12.00.09 – Criminal Procedure; Forensics; Law enforcement intelligence operations / G. I. Vishnya; Thesis Director – Sokolov A.N. – Kaliningrad, 2003.

the truly heroic behavior of two officers of the territorial prosecutor's office, who in the fall of 2001 tried in vain to protect the population of the village of Avtury from systematic robbery by the Russian military.[178]

The military prosecutors were not in a better position. They had to live and work among those whose crimes they were supposed to clear. The main bodies of the military prosecutor's office were stationed at the Khankala military base, where hundreds of detained civilians were transported, and where there were unofficial places of detention. Obviously, any attempt to suppress the activities of this de facto concentration camp and effectively investigate the circumstances of the mass burial of previously detained persons nearby (in the Zdorovie village) would pose a mortal threat for prosecutors.

Of course, in these conditions there could be no question of the independence of the persons who conducted the investigation "over those involved in the events in question" (ECHR standard).

In such circumstances, immediate political decisions were required that could, firstly, simply protect the prosecutors from criminals, and secondly, give them the efficient mechanism for the enforcement and operational support of investigative actions. Such a solution could, for example, be the creation of a military police, independent from the command of the group, or any other similar formations. The highest executive and legislative branches of the Russian Federation had enough authority and resources to resolve this issue as soon as possible. However, nothing of the kind has been acquired for many years of armed conflict.

In this regard, a number of orders of the General Prosecutor's Office and the JTF Commander, aimed, as alleged, at crime prevention, were purely declarative in nature, as they were not supported by any effective organizational measures and measures to effectively monitor their observance.

In our deep conviction, those isolated cases where the perpetrators were properly prosecuted are only a bone thrown by the Russian authorities to the international community, and even to the people of Chechnya on the eve of various kinds of political procedures, such as a referendum on the adoption of a pro-Russian constitution, elections of the head of the Republic and etc. However, the Russian government clearly did not plan to turn these isolated cases into a system. Apparently, such behavior can be explained either by the complete agreement of the leadership of the state with the current situation of impunity, or the unwillingness of this leadership to conflict with the military (which would inevitably lead to an effective investigation of "systemic" crimes) The few security officials who unexpectedly found themselves in the dock for crimes, the commission of which was considered the norm of behavior in Chechnya, invariably considered themselves victims of political games. And this is perhaps the only statement in which we are fully in solidarity with the criminals.

As a result, the authorities of the Russian Federation did not take the necessary, reasonable and sufficient measures in order to provide organizational, material and power support for an effective investigation of crimes against the civilian population of the Chechen Republic.

Consideration of international crimes as ordinary crimes

Finally, despite the obvious connection between the criminal acts we are considering and the armed conflict, and the presence of signs of their mass and systematic nature, all of them were invariably considered by the preliminary investigation and court bodies not as international crimes, but as crimes under domestic law. As the UN International Law Commission has shown, this approach inevitably underestimates their severity and seriousness. Even persons duly held accountable under national law were convicted of a "less serious crime," which did not cover the entire measure of their criminal conduct.[179]

178 Anna Politkovskaya. Armored Mud. – New Newspaper. December 27, 2001

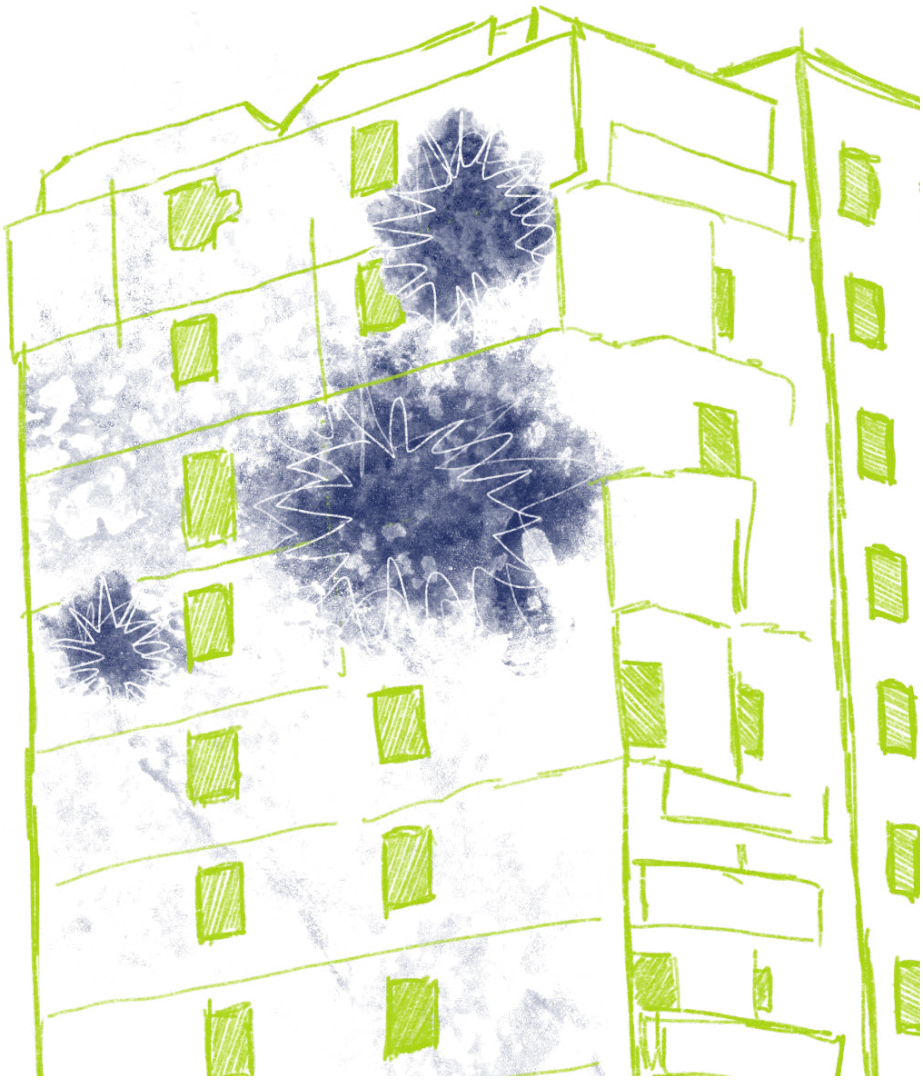
179 Draft Code of crime against the peace and security of mankind, Art. 12. Commentary, paragraph 10.

We summarize what has been said.

The authorities of the Russian Federation did not take any effective measures to investigate large-scale and systematic crimes committed by representatives of state power structures during the armed conflict in the Chechen Republic in 1999–2005. Moreover, with the rarest exceptions, the efforts of the authorities can be described as the constant and consistent sabotage of such an investigation. It seems that such systemic impunity was part of the policy, or, if you will, of the unofficial sustainable practice of the Russian authorities.

Stanislav Dmitrievsky,

Head of the Documentation Center named after Natalya Estemirova



Annex

Speech of Oleg Orlov at the hearings of the PACE Committee on Legal Issues and Human Rights on the human rights situation in the Chechen Republic, held in Strasbourg on 01/28/2020

The review of the situation with the investigation by the Russian state of large-scale and systematic crimes committed in the context of the second Chechen conflict, carried out in the published work of S. Dmitrievsky, as well as the conclusions drawn by the author, are based on research data, the results of which are given in a collective monograph[180] published in 2009 . More than 10 years have passed since then. And to our great regret, it can be stated that during this time the situation with the investigation of crimes has not changed in any way, none of the criminals has been identified and brought to justice. The conclusions made by S. Dmitrievsky remain relevant even after a decade.

To confirm this thesis, we publish an excerpt from a speech by Oleg Orlov, a member of the Council of the Memorial Human Rights Center (Moscow) at the hearings of the PACE Committee on Legal Issues and Human Rights on the human rights situation in the Chechen Republic, held in Strasbourg on 01/28/2020.[181]

"... The same thing happens with the investigation of cases of enforced disappearances and killings of civilians during military operations and special operations in the Chechen Republic, according to which the European Court of Human Rights (hereinafter ECHR) ruled that Russia violated the norms of the Convention for the Protection of Human Rights and Fundamental Freedoms. None of these criminal cases were investigated at the national level, the perpetrators were not found, the fate of the disappeared people was not established.

In total, the *Khashiev and Akayeva v. Russia* case group (formed by the Committee of Ministers of the Council of Europe) currently contains 275 cases mainly related to enforced disappearances, as well as killings of civilians during the military conflict and special operations in the Chechen Republic. In all these cases, the ECHR ruled that Russia was guilty of violating the norms of the Convention for the Protection of Human Rights and Fundamental Freedoms. The implementation of these judgments of the Court is under the control of the Committee of Ministers of the Council of Europe.

In all rulings, the Court found that there was no effective investigation into enforced disappearances. Representatives of our organizations worked directly in many of these cases, including representing the interests of victims in criminal investigations. As a rule, investigators conducting such cases restricted themselves to sending inquiries to various law enforcement agencies about whether they have detained the abducted and interrogating the relatives and friends of the abducted person. As a rule, the inspection of the place of abduction was not carried out in a timely manner; as a result, the possibility of timely withdrawal of evidence was lost. Investigators shied away from conducting investigative actions with law enforcement officers, for whom there was evidence of involvement in a crime.

The ineffectiveness of the investigation of criminal cases initiated on the facts of

180 S.M. Dmitrievsky, B.I. Gvareli, O.A. Chelysheva. International Tribunal for Chechnya: Legal Prospects of Bringing to Individual Accountability the Suspected of War Crimes and Crimes against Humanity during the Armed Conflict in the Chechen Republic. Collective monograph. In 2 volumes – Nizhny Novgorod, 2009.

181 The full text of Oleg Orlov's speech is available on the Memorial Human Rights Center website https://memohrc.org/en/reports/prava-cheloveka-v-chechenskoy-respublike-vystuplenie-op-orlova-v-parlamentskoy-assamblee

enforced disappearances was exacerbated by the fact that often the military prosecutor's office and military investigation refused to accept materials for production, requiring the civil prosecutor's office and civil authorities to prove the involvement of the military in these crimes. The fact that often there was information about roadblocks at which people disappeared, about military units that carried out "cleansing operations", and the numbers of armored vehicles on which the kidnapped was taken, military prosecutors and military investigators usually considered evidence of military involvement to be insufficient. But only the military prosecutor's office or military investigation authorities could collect indisputable evidence of military involvement. It was a vicious circle.

The investigation of such criminal cases, as a rule, was repeatedly suspended "due to the failure to identify the person to be charged", was repetitively resumed and suspended for the same reasons.

There is a picture of an imitation of the investigation instead of the real work of the investigating authorities aimed at clearing the crime.

After the ECHR issued its ruling, the investigation into the criminal case of enforced disappearance was usually resumed. In the Chechen Republic, the Investigative Directorate of the RF IC for the Chechen Republic there was created a Department for the Investigation of Particularly Important Crimes, for which complaints were filed to the ECHR. Among criminal cases that were transferred to this department there were the ones on which the ECHR issued a decision. Investigators of this department, as a rule, notified the victims of the resumption of the investigation, informed them of its progress. But there was no effective investigation. The investigator made several formal steps, such as sending new requests to various law enforcement agencies, new interrogations of the victims and their relatives. At the same time, the investigator often did not take into account the conclusions of the ECHR ruling and did not eliminate the shortcomings in the investigation to which the ECHR pointed out. Then the criminal investigation was again suspended. We do not know a single criminal case on enforced disappearances, which would be sent to a court from this department.

There were also cases when, after the ruling of the ECHR, the criminal cases were not resumed at all, or resumed without informing the applicants. In rare cases, it turned out that the applicant who won the case at the ECHR was not recognized as a victim at all in the criminal case.

Sometimes, after the decision of the ECHR, the applicants filed complaints about the ineffective investigation in the Russian courts under Art. 125 of the Criminal Procedure Code of Russia, which allows appealing against actions or inaction of state bodies. The applicants drew attention to the failure of the investigator to carry out specific investigative actions and to the fact that the findings of the ECtHR judgments were not taken into account in the new investigation. The courts concluded that under Art. 125 of the Criminal Code, courts have no authority to assess the need for specific investigative actions. Thus, we can say that there is no effective judicial control over the effectiveness of the investigation of these crimes in Russia.

None of the criminal cases of enforced disappearance of people for which the ECHR issued a ruling was cleared, the perpetrators were not found, the fate of the disappeared people was never established. In those cases when the bodies of the abducted were later found, the killers were not identified.

It is worth noting that similar violations also occur in the investigation of cases of killings of civilians during the military conflict and special operations in the North Caucasus. In these cases, the fact of death was often established by national authorities, and the ECHR recognized that the state is responsible for the deaths. These cases are also part of the Khashiyev and Akayev case group.

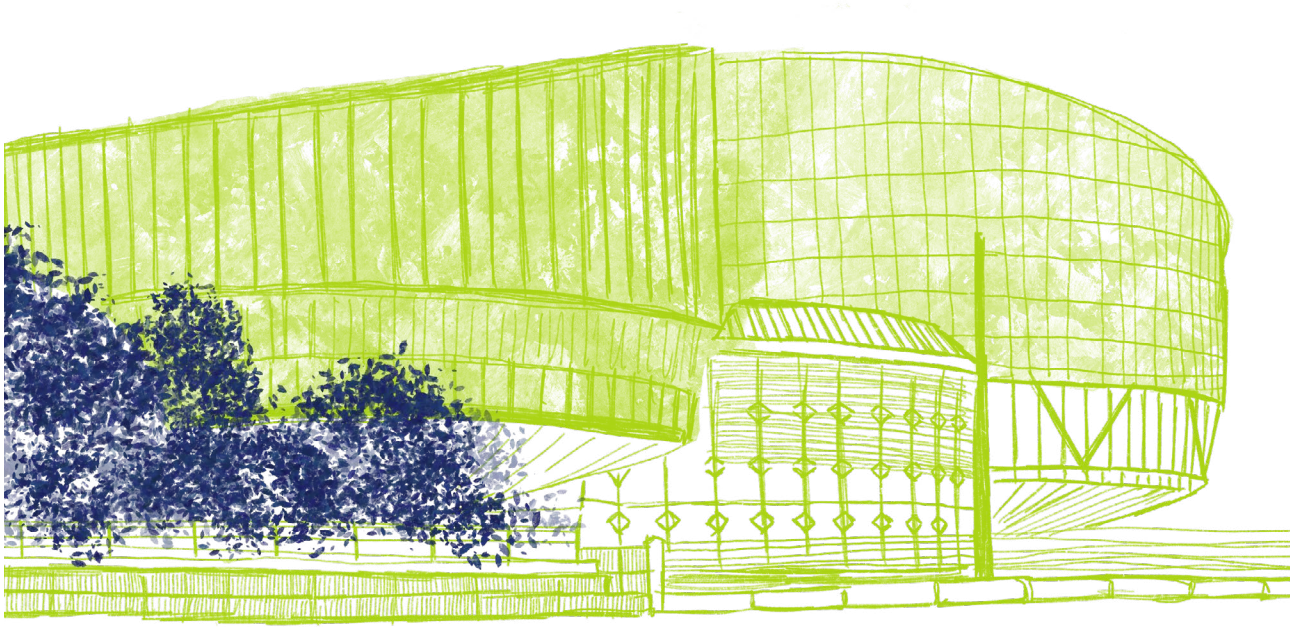
The most striking example of failure to comply with the ECHR judgments in such cases is the story of the failure to investigate the bombing of the Chechen village of Katyr-Yurt in February 2000. As a result of the bombing, at least 46 civilians were killed and 95 were injured. The ECHR issued successively three rulings on this event with an interval of several years. In the second and third ruling of the ECHR, it recognized that after the previous ruling of the ECHR the authorities did not conduct a new effective investigation. Now the ECtHR

is considering a new fourth complaint on this event, again regarding the ineffectiveness of the investigation conducted after the third decision of the ECHR.

Many facts from the ECtHR judgments in Katyr-Yurt are not disputed by the national authorities of Russia. The authorities do not deny that after the militants entered the village and occupied the homes of civilians (against the will of the latter), the military consciously decided to bombard houses in which along with combatants civilians remained. Authorities do not deny that many residents did not have time to leave the village before the start of the military operation and that they were actually held hostage by the militants. Authorities do not deny that civilians died as a result of the bombing. The investigation established the names of the military who planned and conducted this military operation.

However, the Russian authorities dispute the legal conclusions of the ECHR that this military operation violates the state's obligations in the field of the right to life. The authorities believe that in a military conflict, such a military operation was necessary. It is this conclusion that the investigators and national courts come to again and again in the course of new investigations of this case after the decisions of the ECHR.

We can say that the Katyr-Yurt case is a symbolic example of a dispute between the ECHR and the Russian authorities on the need to comply with international humanitarian law during a military conflict. This dispute takes place in other cases of killings of civilians in the North Caucasus, examined by the ECHR. ..."



This publication is developed in the framework of the activity of CivilM+ platform.

CivilM+ is an independent international civil society platform, which mission is to active integration of civil initiatives to restore the Donetsk and Luhansk oblasts as peaceful, integrated and developed regions as part of a democratic Ukraine and a united European space, with the active participation of the region's population and those who have left the region due to the conflict.

The CivilM+ platform offers its participants the opportunity to collaborate as part of joint initiatives and projects, to develop and express joint positions, provide mutual support and solidarity, systematise knowledge, raise levels of qualification and improve coordination.

Platform CivilM+ was launched in December 2017 thanks to the joint effort of the civil society representatives from Ukraine, Russia, Germany and France.

More about the platform and it's members on the web-site civilmplus.org

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