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PROBLEM OF QUALIFICATION'S COMMITTING VIOLENCE AGAINST PRISONERS OF WAR

A war crime can be defined as guilty, socially dangerous, a wrongful and punishable act, what consist in violation of established fundamental principles of jus cogens, international humanitarian law of rules conducting of international armed conflict and international character, crime of which defined acts in international crime law. The Criminal Code of Ukraine doesn't use term "war crimes", but assumes responsibility for them in section XIX Special Part of the Criminal Code of Ukraine "Crimes against the order of military service (war crimes)" and section XX of the Criminal Code of Ukraine "crimes against peace, human security and international law".

The main international legal instrument, which defines the legal status of prisoners of war during the war, it's the Geneva's Conventions from August 12, 1949 about protection of war victims and Additional Protocols to them: 1) Additional Protocol to the Geneva Conventions of 1949 relating to the protection of victims of International armed conflicts (Protocol I) dated 8 June 1977 [1]; 2) Additional Protocol to the Geneva Conventions of 1949 relating to the protection of victims of armed conflicts not of an international character (Protocol II) of 8 June 1977 [2].

Geneva Convention about handling of prisoners of war in 1949 obliges treat humanely prisoners of war. In particular, no prisoner of war is not can be subjected to physical violence or scientific or medical experimentation of any kind whatsoever character, not justified by considerations of a prisoners of war treatment and their interests. Prisoners of war similarly should be always use a protection, especially from any acts of violence or intimidation. Application to them repressions are prohibited (Art. 13). Neither of physical or moral torture and any other coercion measures can not be applied to prisoners of war for obtaining from them any information. Prisoners of war may refuse to answer. Prohibited threaten to expose the abuse or any persecution or restriction (Art. 17)

Also, according to Art. 130 Geneva Convention III, to the "serious violations" regarding prisoners of war include: premeditated murder; torture or inhuman treatment, including biological experiments; intentionally inflicting great suffering or serious injuries; harm to health; forcing a prisoner of war to serve in the armed forces of the enemy army [3].

Comparing the offenses envisaged international instruments, to actions that under Art. 434 and Art. 438 CC we can state, specified in these articles of the Criminal Code acts covered by prohibited international legal instruments violence of prisoners of war.

Firstable, raises the question of qualifications specified in internationally legal instruments forms of violence against prisoners of war and from a position of competition and conflicts of the Criminal Code. The most common cases are general and special competition rules.

The rules under Art. 434 of the Criminal Code could be considered on the basis of specific special subject of crime (soldier), relatively of Article 438 of the Criminal Code that provides for the crime was committed common subject. Assuming so, this kind of competition is accepted to decide in accordance with the generally accepted theory of criminal law principle: competition in the general and special rules is applied special rate, that greatest extent reflects the characteristics and features of this criminal act.

So in all of cases the military committed during the armed conflict, in the area of military operations violence against of prisoners of war. Such actions should be categorized under Art. 434 of the Criminal Code "Ill-treatment of prisoners of war" if such acts are not committed in an area of fighting and not a soldier, they should qualify under Art. 438 of the Criminal Code as cruel treatment of prisoners of war or civilians. However such a stance is quite controversial. Firstable, the cruel treatment of prisoners of war and civilians which under Art. 438 Criminal Code a form of violation of the laws and customs of warfare, that is the subject of this crime, in most cases, is a person who takes part in an armed conflict - it's soldier. Secondly when compared sanction article 434 of the Criminal Code and Art. 438 of the Criminal Code, it generally turns out that the ill-treatment of prisoners of war that there has been repeatedly, or associated with particular cruelty committed by the military (Art. 434 Criminal Code), it's a less dangerous crimes against cruel treatment of prisoners of war committed by no serviceman (Art. 438 Criminal Code).

Thus, the qualification cases of violence of the prisoners during the armed conflict with the rules on competition (on the basis of special subject) seems quite controversial.

Perhaps to distinguish between crimes stipulated by Articles 434, 438 of the Criminal Code on circumstances committing feature - the armed conflict.

According to existing international law there are two types of armed conflict: 1) international armed conflicts; 2) armed conflicts not of an international character.

From this point, the situation should be considered a commit an offense -

armed conflict of an international character - obligatory for crime provided for in articles 438 Criminal Code and armed conflict not of an international character - Article 434 Criminal Code.

International legal documents, including the 1949 Geneva Conventions on the protection of war victims, although armed conflicts to distinguishes between international and non-international, but equally providing for liability for violence against prisoners of war, regardless of whether it occurs during the international armed conflict, or international character. According to international legal instruments, including the III Geneva Convention,

prisoners of war may be a person (combatant), that fell under the sway the opposite side during the war that the armed conflict of an international character.

During the armed conflict not international character liability for violence against persons, who were under the power of the adverse Party (Which is are not considered as prisoners of war) are regulated by other documents, including the Additional Protocol II. Thus, the meaning of Art. 434 Criminal Code turns out that the ill-treatment of prisoners of war and envisages the crime situation - international armed conflict,so qualification violence against prisoners of war by commit an offense situation - armed conflict - is also controversial. Thus, it follows to establish that this legislative construction creates significant problems with the qualifications of these criminal acts.

It appears that the establishment of criminal responsibility for the violence against the prisoners of war at the same time in two articles Criminal Code (st.434,st. 438 of the Criminal Code) are an unjustified and creates significant difficulties in compliance with taken by Ukraine obligations under the 1949 Geneva Conventions and other international treaties.

But in conditions when there are still inconsistencies in the current Criminal Code of Ukraine Articles 434 and 438 Criminal Code, the delimitation should be carried out with the two mandatory feature: 1) the subject of crime; 2) the nature of armed conflict (international or non-international) [4].

According to Art. 434 Criminal Code act should be qualified as crimes committed by soldiers and situations of armed conflict not of an international character. In all the other cases, the act must be qualified under Article 438 Criminal Code.

List of referenes

1. Додатковий протокол до Женевських конвенцій від 12 серпня 1949 року, що стосується захисту жертв міжнародних збройних конфліктів (Протокол I), від 8 червня 1977 року. Протокол ратифіковано із заявою Указом Президії Верховної Ради УРСР N 7960-XI від 18.08.1989 р.

2. Додатковий протокол до Женевських конвенцій від 12 серпня 1949 року,що стосується захисту жертв збройних конфліктів неміжнародного характеру (Протокол I), від 8 червня 1977 року. Протокол ратифіковано заявою Указом Президії Верховної Ради УРСР 7960-XI від 18.08.1989 р

3. Женевська конвенція про поводження звійськовополоненими від 12 серпня 1949 року Конвенцію ратифіковано із застереженнями Указом ПВР УРСР від 03.07 1954 р.

4. Бажанов М.И. Множественность преступлений по уголовному праву Украины / Бажанов М. И. – Х: Право, 2000 128с.