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**International cybersecurity measures.**

**Comparative legal review of elements of international crimes according to the national criminal legislation of Kazakhstan and Rome statute**

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**Международные меры кибербезопасности.**

**Сравнительно-правовой анализ элементов международных преступлений в соответствии с национальным уголовным законодательством Казахстана и Римским статутом**

**Abstract**

*This article covers two main topics discussed among international law subjects. First topic is connected with the main measures taken by international and regional organizations to combat the cybercrime and keep the cybersecurity and another topic questions whether the Criminal Code of Kazakhstan covers international crimes fully and sufficiently in its chapter number 4 “Crimes against peace and humanity”. The purpose of the article is to analyze if cyber measures taken in the world are sufficient and the issue of Kazakhstan becoming a state party to the Rome Statute on the legal basis. In order to answer this question the following literature was used: articles by Sergey Sayapin, book “Principles of international criminal law - 4th edition Gerahrd Werle, Florian Jeßberger”, and expert opinion. The experts’ opinions were provided through the method of interviewing attorney of ACBA Jokhar Utebekov and prof. Medeu Kurmangali. The question put in the beginning and the aim this article set in the start are answered in the conclusion part of the article.*

**Key words:** *criminal law, cybersecurity, cybercrimes, international measures, criminal code, Rome Statute, customary rules, general principles of international criminal law, crimes against peace and human security*

**Аннотация**

*В этой статье рассматриваются две основные темы, обсуждаемые субъектами международного права. Первая тема связана с основными мерами, принимаемыми международными и региональными организациями для борьбы с киберпреступностью и поддержания кибербезопасности, а другая тема касается того, в достаточной ли степени Уголовный кодекс Республики Казахстан охватывает международные преступления в своей главе № 4 “Преступления против мира и человечности”. Целью статьи является анализ того, являются ли принимаемые в мире меры в киберпространстве достаточными, а также вторая часть статьи ставит задачу решения вопроса о присоединении Казахстана к Римскому статуту на правовой основе. Для ответа на этот вопрос была использована следующая литература: статьи Сергея Саяпина, книга “Принципы международного уголовного права - 4-е издание Герарда Верле, Флориана Йессбергера” и экспертное заключение. Мнения экспертов были предоставлены с помощью метода интервьюирования адвокат АГКА Утебекова Джохара и проф. Медеу Курмангали. Ответы на вопросы, поставленные в начале, даны в заключительной части статьи в разделе результаты.*

**Ключевые слова:** *уголовное право, кибербезопасность, киберпреступления, международные меры, уголовный кодекс, Римский статут, обычные нормы, общие принципы международного уголовного права, преступления против мира и безопасности человека*

**INTRODUCTION**

It is essential and necessary to observe this topic as there is a huge debate on the level of UN institutes whether the Budapest Convention is not enough itself to regulate the cybercrimes and state interactions while it happens. Some countries propose a new UN legislation that could cover all the essential questions that Budapest convention failed to do/ But others strongly disagree on this topic. Also another essential topic that is discussed in the article if the national Kazakhstani criminal law at some specific level comes in conformity with the international criminal law norms. However, it should be mentioned here that Kazakhstan is not a party state to the International Criminal Statute. At this point it leads to the statement that international customary rules contributed to the country to be in consistency with the rest of the world’s legislation. Moreover, the principles of Professor Werle play an enormous role in the implementation process in the state. The aim of the paper is to find out whether the norms established in the Code are stated clearly, fully and propose steps to make its functioning better. Moreover, in this analysis it will be considered the works dedicated to the implementation of Werle’s doctrines in the Central Asian region and the doctrines itself, and on the basis of this literature find the gaps to overcome, and identify new ideas, solutions to make the legislation more reliable, protection of parties in the disputes more just and full. The analysis has set the tasks as to make an evaluation of previous works published on this topic, identify their strong, weak points, and on the basis of that write this article. Consequently, it will help to close the gaps and make further research on weakly developed topics.

**METHODOLOGY**

On the basis of above given literature some questions that shall be answered and information shall be provided must be highlighted. They are:

1. In order to give one main point for the reader all the ideas will be gathered and aimed at one common goal of the article.
2. The code articles will be analyzed on the basis of equal criteria to evaluate rules similarly and get objective results.
3. After analyzing current gaps existing in the code potential developing crimes will be included.
4. International experience will be observed and on the basis of its recommendations will be provided.
5. 2 Experts opinions will be provided: one of them is a practicing attorney in the criminal field and one is a professor working with a theoretical criminal base at university.
6. Moreover, some recommendations will be given to make the code more full, reliable, practical to the extent of standards used abroad.

Below are given the steps on how to achieve the goal: First, research will be made and then already existing and published articles will be considered. Secondly, the focus will be placed on the Rome Statute, then on the analysis of articles of national legislation. Consequently, it will be identified for which norm custom was used. Thirdly, the expert opinions will be taken into consideration who are currently working in the sphere of criminal law. Finally, as a result some ideas and solutions will be suggested.

**ANALYSIS**

The CCPCJ 2018 27th session has focused on cybercrime, which was requested by the UN’s Economic and Social Council. States held a session on the topic of criminal justice responses to prevent and counter cybercrime. Some of the key challenges discussed were the evolving nature of cybercrime, fears of a digital underground economy that trades in data and facilitates other forms of crime or terrorism, and difficulties in legal proceedings related to cloud computing and data access. In responding to cybercrime, states highlighted the need to update procedural law, facilitate access to electronic evidence, establish public–private partnerships, build capacity and exchange best practices.

In 2018, the EGM approved a four-year work plan to collect and consolidate member-state recommendations and conclusions. One obstacle that EGM faced was that some states highlighted the need for the universal UN treaty or protocol on cybercrime.

it is clear that individual states and regions have taken steps towards establishing their own legislative frameworks to govern cybercrime. However, a gap continues to exist at the international level, where there is no legally binding instrument that all countries can refer to. The EGM’s 2018 report made two recommendations:

* either member states should develop a new international legal instrument on cybercrime within the framework of the UN that takes into account the concerns and interests of all member states,
* or they should use and/or join existing multilateral legal instruments on cybercrime, such as the Budapest Convention, as these are considered by many states to be best-practice models guiding appropriate domestic and international responses to cybercrime.

On the basis of ICC project official website the international crimes established in the Kazakhstani Penal Code of the Republic of Kazakhstan (2014) (later “Code”) are:

* Aggression;
* War crimes;
* Genocide;
* Crimes against Humanity.

In the below given analysis I will consider each crime in correspondence with the national legislation of Kazakhstan. For each crime the table is provided. Table is divided into 2 main colonies:

1) information about crime under Rome Statute

2) information about crime under Kazakhstani legislation.

The interpretation of the information given in the table is written below. After analyzing 4 crimes the conclusion is written.

1. Genocide analysis

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| **Legislation name** | **The wording of the norms in Rome Statute** | **The wording of the Code Penal Code of the Republic of Kazakhstan. (2014)** |
| Disposition of the norm: | Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such;   * Killing members of the group * Causing serious bodily or mental harm to members of the group * Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part * Imposing measures intended to prevent births within the group * Forcibly transferring children of the group to another group | Genocide, that is the intentional offences, aimed to the complete or partial annihilation of national, ethnic, racial or religious group by means of murder of the members of the group, infliction of serious harm to their health, violent impeding to the childbearing, coercive delivery of children violent migration or the creation of other living conditions intended to the physical annihilation of members of this group. |
| Analysis: | * Act must be committed. * Mental health is included. | * Act is directed to complete or partial annihilation * No mention of mental health. |
| Circumstances that aggravate. |  | The same act made in wartime are punished by imprisonment for a period of 15 up to 20 years or life imprisonment with or without deprivation of citizenship of the Republic of Kazakhstan. |

The Code does not cover the harm to mental health. If Kazakhstan becomes the party state to the Statute, mental health also will be the objective side of this crime. Moreover, Art.5 of Statute says, the court has jurisdiction with respect to the genocide and other 3 crimes mentioned above. Consequently, If Kazakhstan becomes the party to the Rome Statute, the mental health element shall be implemented to our Code to the extent that this lack may trigger the jurisdiction of ICC, the principle of complementarity and cause conflict between domestic and international legislations. Lawyer Kleffner states (Birkett, 2019) that “when domestic law criminalizes a narrower range of conduct than the Statute, State risks relinquishing their competence to investigate and prosecute as ICC may declare them to be “unable to so” as it happened in Tajikistan’s case. Consequently, as one supporting reason of being party to Rome Statute is making our Code complied with Statute rules and by doing so widening the range of our Code to protect mental health during the genocide.

1. Crimes against humanity and war crimes

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| **Legislation name** | **Rome Statute art 7 (The wording of the norm)** | **Code: (The wording of the norm) Penal Code of the Republic of Kazakhstan. Chapter 4. (2014)** |
| Disposition of the norm: | Crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed any civilian population, with knowledge of the attack: | There is no such rule in our CODE. However, the Statute codifies the list of crimes under the term ‘crimes against humanity”, and Code contains some of them. As it can be seen, according to the Statute article these crimes must be committed as a part of widespread or systematic attack directed at any civilian population with being aware of such attack. |
| Let’s analyze the norms existing in the Code with regard to the crimes established in the Statute. | | |
| Analysis: | ROME STATUTE KAZAKHSTANI RULES  (however below listed crimes under KZ criminal code are not covered by the crimes against humanity and war crimes)   |  |  | | --- | --- | | * Murder | * Murder (art. 99) | | * Extermination |  | | * Enslavement | * Human trafficking (art. 128) | | * Deportation or forcible transfer of population |  | | * Imprisonment or other severe physical liberty in violation of fundamental rules of international law |  | | * Torture | * Torment (art. 110) | | * Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity | * Rape (art. 120) * Violent sexual actions (art. 121) * Sexual relation or other Sexual actions with a person who has not attained 16 years of age (art. 122) | | * Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in para 3, or other grounds |  | | * Enforced disappearance of persons | * Kidnapping (art. 125) | | * The crime of apartheid |  | | * Other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health. |  | | |

As it was mentioned before the vital criteria of the crime against humanity was its systematic attack character against civilian population. The close norms to these rules taken from the Code 1) has no such character, criteria 2) are taken from other chapters except the 4th chapter “International crimes”. On the basis of that and taken in to account the principle of “nullum crimen sine lege” (no analogy of crimes) crimes established in the code cannot be equal to those from statute. For instance, killing 2 people (which will be qualified by art. 96 of the Code cannot regulate when civilians are killed, and by genocide rule is also not applicable as there might be no elements of the crime).

1. Crimes of aggression

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| **Legislation name:** | **ICC Statute art 8. (The wording of the norm:)** | **Code art. 160, 161: (The wording of the norm:)** |
| Disposition of the norm: | Crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of UN.  Act of aggression means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State:   * Invasion * Bombardment * Blockade of the ports * An attack by the armed forces to the territory of another State. * The use of armed force which is in territory of another state with the agreement of the receiving state. | Art 160: Planning, Preparation, Unleashing or prosecution of aggressive war.  Art. 161: propaganda and public calls for the unleashing of aggressive war. |
| Analysis: | The subject of the crime is given. It must be the holder of the specific power and authority. Act of aggression states that it must be committed between two states which will lead to the deprivation of State rights like sovereignty, independence, equality. That is why this article correlates with the UN Charter. | In our Code there is no given clear characteristics of the elements. To be precise the subject of the crime identification is missing in the act of aggression. Therefore, it is hard to define whether an aggressive war happened against another state or Kazakhstan, and who has committed it person in power or without. |

It is hard to identify whether these 3 articles are interconnected between each other. However, even if Kazakhstan does not become the party of ICC, the art. 8 will be anyway obligatory for the State to the extent that any state party to the UN is bound to respect the sovereign rights of each other and prevent from committing acts of aggression on each other’s behalf. At this point the analysis of this crime gives 2 potential ways of qualification: 1) action between States 2) action against State. On the behalf of two ways such conclusions can be made. Coming to the 1) option: the responsibility of Kazakhstan as a state for committing an act of aggression against another state will be regulated under the rules of International law before the ICJ Court for the breach of international law principles, obligations and conventions. Coming to the 2) option: it is necessary to include the definition of the term itself in the Code and make it more clear: what kind of act, who are the subjects, against whom, what is the protected object, what is the consequence, how the damage shall look like and etc. Coming to the responsibility of Kazakhstan as a state for committing an act of aggression against another state it will be regulated under the rules of International law before the ICJ Court for the breach of international law principles, obligations and conventions.

At this point it is clearly seen that Kazakhstani Code includes the rules related international crimes on the basis of international customary rules or another codified legislation as Genocide Convention, Prohibition of Weapon usage Hague Conventions, UN Charter and other Conventions related to International Humanitarian Law. From the analysis made above between rules of Statute and Code the close attention shall be paid to the bold gaps and moments where it needs more information or details. For instance, making summary, in the part of Genocide there is no mention of harm to the mental health. In the part of Crimes against humanity there is no rule covering all listed crimes in Statute plus covering the criteria. In the war crimes there is no full information about the crime. The Code of Kazakhstan covers really good crimes such as ecocide, mercenary activities, the use of prohibited means and methods of war prosecution, etc. However, the inclusion of norms established in the Statute cannot be ignored to the extent that they also play a relevant and essential role in the field dedicated to international crimes. Moreover, as Sergey Sayapin mentioned in his article there is no rule related to apartheid and cybercrime. Even if the Statute does not cover the cybercrime yet, noting that potential risks of its consequences are high. The role of it in the Code will also be analyzed in this article in its further redactions.

**DISCUSSION**

For this analysis the expert opinion will be asked for. The questions that will be asked are established in the first column of the table.

As an expert famous attorney in the criminal field Jokhar Utebekov and Prof. Phd in Law Medeu Kurmangali were invited. In the second column of the table their answers are provided.

* 1st table – Jokhar Utebekov’s answers
* 2nd table – Medeu Kurmangali’s answers

1st table

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|  | **Questions:** | **Answers in English:** |
| 1. | Do you think the criminal code of Kazakhstan in the part of those 4 crimes are full and sufficient? Yes/No answer. | No, it is not. |
| 2. | Can you base your opinion? | The war between Russia and Ukraine has highlighted more than ever the fact that many of the norms of international law and national law need to be revised taking into account innovations and new means of warfare. For example, drones, electronic warfare, etc. Outdated Geneva Conventions no longer correspond to the means of warfare, in terms of the norms of information propaganda in war, etc. |
| 3. | If the answer is no, what can legislators do? What lacks and what is needed? |  |
| 4. | How to incorporate these changes? | We need initiatives from non-governmental organizations, human rights defenders, which would be aimed at state holders in the person of the Prosecutor General's Office, the Ministry of Defense and, of course, members of Parliament. Lobbying activities such as holding round tables and conferences are required. And it must be proved to the authorities that these changes are necessary. |
| 5. | Can you give the proper example of another country where the criminal code functions well? | No, unfortunately, I do not have knowledge in comparative criminal law, but it is probably necessary to overview first-world countries like Canada, Australia, New Zealand, Western Europe. |
| 6. | Do you think Kazakhstan should be part of the Statute? Yes/ no answer. | Yes, absolutely. I strongly support this idea. |
| 7. | Why do you think so? | Avoiding the signing and ratifying the Rome Statute even surprises me taking into account the background of Kazakhstan position and actions: Kazakhstan has ratified a huge number of different international conventions and is almost the leader among post-Soviet countries. |
| 8. | Can you predict what happens if Kazakhstan does not implement any changes and keep the code as it is? | I am afraid that we will face problems in the course of humanitarian and armed conflicts, and it is not necessary that this takes place on the territory of Kazakhstan, but we may be involved in such conflicts and we will have to react in fact to the conflicts that arise. It is necessary to reform the code and norms of the Geneva Conventions in advance. I will repeat once again about the situation with Ukraine and Russia, where they are the main factors. |
| 9 -10 | Can you tell about your predictions of what will happen if Kazakhstan becomes the party state to the statute?  To what kind of areas, it will affect and how? | This will undoubtedly affect international humanitarian law, human rights and crimes like crimes against humanity, etc. |

2nd table

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|  | **Questions:** | **Answers in English:** |
| 1. | Do you think the criminal code of Kazakhstan in the part of those 4 crimes are full and sufficient? Yes/No answer. | No, it is not. |
| 2. | Can you base your opinion? | The Criminal Code of the Republic of Kazakhstan does not contain all the elements of international crimes. But as you know, these international crimes can be grouped into 4 groups and all of them are systematically and fully absent in the country's legislation.  Our criminal enforcement legislation, in particular, the Criminal Code, fragmentally perceives some important elements of international crimes. As far as I remember, there are about 10-15 main compositions. |
| 3. | If the answer is no, what can legislators do? What lacks and what is needed? | Our legislator has 2 options for action.   1. could implement the elements of international crimes without changes from the provisions of the Rome Statute. 2. adopt a separate code of crimes against the measure of humanity's safety or a code on international crimes.   Following the example of the German legislator. There is the Criminal Code itself and a separate code on international crimes. |
| 4 | How to incorporate these changes? | I have already said how to implement it. Implementation in 2 meanings.  The first meaning is only making the necessary amendments to the legislation by reference or incorporation.  The second implementation option also assumes its actual implementation in practice. That is, its implementation in the internal national sphere of the state. |
| 5. | Can you give the proper example of another country where the criminal code functions well? | The same Germany with its own separate code. |
| 6. | Do you think Kazakhstan should be part of the Statute? Yes/ no answer. | Yes. |
| 7. | Why do you think so? | The advantages of Kazakhstan's accession to the Rome Statute in the perspective of legislation will give an opportunity to improve our legislation.  The legal policy of Kazakhstan's accession to the Rome Statute will enable us to have a legal basis for participating in the fight against international crimes. |
| 8. | Can you predict what happens if Kazakhstan does not implement any changes and keep the code as it is? | Nothing much will happen. Kazakhstan is currently involved in the international fight against crimes through multilateral and bilateral treaty institutions.  And if there is no legal basis, then through diplomatic channels based on the principle of reciprocity – but this applied for transnational crime. And international crimes, according to the functioning of the international mechanism for combating international crimes, are additional or optional mechanisms. They can be dealt with on the basis of national law. |
| 9. | Can you tell about your predictions of what will happen if Kazakhstan becomes the party state to the statute? | I have already partially answered this question. |
| 10. | To what kind of areas, it will affect and how? | It will affect 2 sides.  1 – Kazakhstan will be in the club of states that are linked to international crimes. And our rating may increase.  2 – politically negative. Our relations with the United States, which is pursuing a policy of countering the creation of an effective system of international criminal justice in the fight against international criminal crimes, may deteriorate. |

Analyzing the expert opinions, it can be seen that legislation of Kazakhstan is not functioning well today as it does not include full terms and crimes. In the future, it can lead to problems in the case of aggression, international fights and crimes.

**INTERNATIONAL EXPERIENCE**

The example of high equality legislation can be observed in Germany – Code of Crimes against international Law (CCAIL). The Federal Parliament passed the code through the act on 26 June 2002. The scope of application of this act is provided in order to prevent problems of forum shopping of jurisdiction and applicable law. This Act will be applied to all criminal offenses against international law even when the offense was committed abroad and bears no relation to Germany. It includes the crimes such genocide, crimes against humanity, war crimes, other crimes (to be precise: violation of the duty of supervision, omission to a report crime). In Germany there is also the Statute Implementation Act which allows Germany to cooperate with the ICC in accordance with the Rome Statute and their CCAIL. This enables them to avoid the ICC ruling that Germany is unable or unwilling to prosecute.

**RECOMMENDATIONS**

On the basis of above given analysis it is recommended to continue the international cooperation in the sphere of regulation cybercrimes and promoting cybersecurity. This article concludes that UN treaty on the topic of cybercrime should be drafted as cybercrimes brings the same level of threat that terrorism or international crimes can cause. Therefor states have to regulate at some point this sphere and combat against it by using any possible legal measures.

On the basis of the above analysis, it is recommended to legalize all missing international crimes. Make the Code in full conformity with Rome Statute and follow upcoming developing crimes through state practice. As an example, one crime can be explained:

These days soldiers are faking that they are a civilian population until the other party releases the weapon and believes that they are not in danger. However, right after that moment “civil population” starts attacking. That is how soldiers break the rules of warfare. This kind of crime should be legalized and established in the Criminal Code. This is the new method of breaking the rule.

1. So, the first recommendation is to implement the already existing in Rome Statute rules in Criminal Code.
2. Implement and establish new developing crimes on the basis of war practice.

We need initiatives from non-governmental organizations, human rights defenders, round tables and conferences at universities and legal surroundings. And it must be initiated to Parliament.

**RESULT**

Currently, Kazakhstani legislation is stuck in the moment where the code lacks determination of elements of some crimes (that list is given in the part of analysis). However, these days fights demonstrate that new measures and methods are starting to be used in warfare – and the criminal code of Kazakhstan is not ready for such challenges. So, the Criminal Code of Kazakhstan in the part of crimes against peace and humanity is not sufficient enough and Kazakhstan should become the state party to the Rome Statute. Right after incorporating the rules of Rome Statute the task is to foresee developing crimes in international criminal law.

Another topics analysis suggest that Universal UN treaty should be drafted taking into account the threats cybercrime puts on the world.

**References**

Sayapin, S. (2019). The Implementation of Crimes Against the Peace and Security of Mankind in the Penal Legislation of the Republic of Kazakhstan. *Asian Journal of International Law, 10*, 1 - 11.

Sayapin, S. (2022). The Impact of Professor Werle’s Doctrine of International Criminal Law in Post-Soviet Central Asia.

Werle, G., & Je berger, F. (2020, October 9). *Principles of International Criminal Law*. Oxford University Press. Retrieved December 24, 2022, from https://books.google.ru/books?id=kT78DwAAQBAJ&source=ttb&redir\_esc=y

International Criminal Court Project. (n.d.). *Kazakhstan*. International Criminal Court Project. Retrieved December 24, 2022, from https://www.aba-icc.org/country/kazakhstan/

Rome Statute of the International Criminal Court Rome Statute of the International Criminal Court (17AD).

Penal Code of the Republic of Kazakhstan. Chapter 4. (2014). [Penal Code of the Republic of Kazakhstan - "Adilet" LIS (zan.kz)](https://adilet.zan.kz/eng/docs/K1400000226)

The Budapest Convention (ETC No. 185)

J Birkett, D. (2019, June). *Twenty Years of the rome statute of the International Criminal Court ...* Retrieved December 25, 2022, from https://www.researchgate.net/publication/345450208\_Twenty\_Years\_of\_the\_Rome\_Statute\_of\_the\_International\_Criminal\_Court\_Appraising\_the\_State\_of\_National\_Implementing\_Legislation\_in\_Asia/fulltext/5feaba87299bf14088565c41/Twenty-Years-of-the-Rome-Statute-of-the-International-Criminal-Court-Appraising-the-State-of-National-Implementing-Legislation-in-Asia.pdf