20. См. подробнее: Drzewicki K. National legislation as a Measure for implementation of International Humanitarian Law // Implementation of International Humanitarian Law/ Research Papers by participants in the 1986 Session of the Center for Studies and Research in International Relations of the Hague Academy of International Law. Hague: Institute Asser, 1989. P. 110; Sassyli M. Op. cit. P. 34; David E. Principes de droit des conflicts armés. Bruxelles: Bruylant, 1994. P. 164; Батырь В. А. Имплементация норм международного гуманитарного права в военном законодательстве Российской Федерации // Автореферат на соискание ученой степени кандидата юридических наук. – М.: Военный университет, 1999. С. 16.
21. David E. Le droit á la santé comme droit de la personne humaine // R.Q.D.I., 1985.
22. David E. Principes de droit des conflicts armés, 2003.
23. Drzewicki K. International Humanitarian Law and Domestic Legislation with Special Reference to Polish Law. Hague: Institute Asser, 1985
24. Drzewicki K. National legislation as a Measure for implementation of International Humanitarian Law.
25. Sassyli M. Mise en aeuvre du droit international humanitaire et du droit international des droits de l'homme // Schweizerisches Jahrbuch des Volkerrechts. Vol. XLIII. 1987.
26. Scelle G. Règles générales du droit de a paix // R.C.A.D.I. 1993, vol. 46.
28. Цит. по: Waelbroeck M. Traitus internationaux et juridictions internationales dans les pays du Marchè Commun. Bruxelles, 1969.

E.K. Nogoibaeva,
International and Business Law Department,
Head and Assistant Professor,
American University of Central Asia
N.K. Myrsalieva,
LL.M form Indiana University School of Law – Indianapolis,
International and Business Law Department,
American University of Central Asia

Correlation between International Law and National Legislation in the Kyrgyz Republic

"The High Contracting Parties undertake to respect and to ensure respect for the present Conventions in all circumstances"[1]

Since the collapse of the Soviet Union, the Kyrgyz Republic has adhered to various international bilateral and multilateral treaties, thus recognizing its obligations under international law to observe these provisions in good faith[2]. However, in practice most of these international treaties are not observed. An unfortunate consequence of which is the frequent violation of the core of human rights. One of the causes of such sad reality is the inadequate and ineffective implementation of

the international treaties in the Kyrgyz Republic. The purpose of this research is to examine the issue of the *implementation* of the international treaties in the national legislation of the Kyrgyz Republic, with a special focus on international humanitarian law.

The term *implementation* covers all possible measures that must be taken by States to ensure that the rules of international law are fully respected and enforced[3]. Therefore, the process of implementation is very broad and includes various measures such as the adoption of laws or regulations, the development of educational programs, the recruitment and training of personnel, establishing special structures and the introduction of planning and administrative procedures[4]. The following analysis concentrates on the preparatory stage of such implementation processes that must be undertaken by High Contracting Parties[5] during peacetime[6], i.e. evaluating existing national legislation in the light of the obligations created by the international treaties. These activities must be carried out by the legislative structures of the state including parliament and relevant ministries to bring national legislation into compliance with the provisions of international law.

International humanitarian law embraces a set of rules and principles that govern and regulate the conduct of belligerent parties during an armed conflict and provides for the protection of those who are not taking part in hostilities such as a civilian population, wounded and sick, medical personnel and others. The laws themselves encompass numerous treaties and documents[7] that regulate the different aspects of hostile activities and protection. The role of the treaties of humanitarian nature has been always of vital importance, and therefore these treaties have been given special treatment under international law.[8] Despite the fact that we are living in the 21st century, there are still armed conflicts happening in the world, with dramatic consequences for the whole international community. New types of armed conflicts challenge the application of international humanitarian law and require its further development. Due to ongoing nature of conflicts, the main objective of international humanitarian law is not to outlaw the wars, but to humanize them, and to alleviate the suffering of the victims. In order to achieve that, States, therefore, must ensure their enforcement by taking various implementing measures during peacetime and in time of armed conflicts.

One of the most important factors in implementing international humanitarian law provisions is to ensure that the means exist on the national level to bring the perpetrators of the international humanitarian law violations to justice. Therefore, High Contracting Parties to the Geneva Conventions and their Additional Protocol I of 1977 undertake to enact any legislation necessary to provide the effective penal sanctions for the persons committing, or ordering to be committed, any of the grave breaches, as enshrined in these Conventions and Protocol.[9] Thus, under these documents and international customary law,[10] the Kyrgyz Republic is obliged to adopt implementing measures to repress the grave breaches of the Geneva Conventions of 1949 and their Additional Protocol I of 1977. The thesis work analyzes the issue of the implementation process of the international humanitarian law provisions on the repression of the grave breaches in the national criminal legislation of the Kyrgyz Republic. In order to promote the best possible implementation and to discharge their obligations incumbent upon the states by virtue of the treaties to which they are party, States must, while in peacetime, adopt a range of the legislative, administrative and practical measures. Thus, they have to equip themselves with legislation with makes it possible to punish those who commit grave breaches and to prevent, inter alia illegal use of the Red Cross and Red Crescent emblems.[11]

This article examines the current status of the legislation of the Kyrgyz Republic on the repression of grave breaches of international humanitarian law, evaluates the existing problems and obstacles that prevent effective implementation of provisions and suggests some solutions and recommendations to improve the current situation.

The article frames the relationship between the international law and the national legislation in the Kyrgyz Republic and discusses the differences between the formal incorporation of the monist theory and practical application of the dualist theory. It also defines the place of international law in the hierarchy of the legal norms in the legislation system of the Kyrgyz Republic and points out at the legal gaps that exist in regulating this issue.

Relationship between international law and national legislation (monist and dualist approaches)

The doctrine of international law recognizes three main theories on the relationship between international law and national legislation. The first one is known as dualist (pluralist) theory, according to which international law and municipal law are two separate legal systems, which exist independently of each other.[12] International law and municipal law cannot purport to have an effect on, or overrule, the other,[13] because the respective norms have a different foundation and different legal addressees.[14] This theory has been strongly supported by such scholars as Dionisio Anzilotti[15], H. Triepel. They argued that international law regulates relations among the states, whereas 'municipal norms do so within the State system to which they belong'[16], therefore 'States cannot implement treaties merely by enacting a statute that would make them applicable in the municipal legal system, as this 'would be tantamount to ordering what is impossible."[17] Today in the world it is very hard to find examples with pure dualist or monist approach legal systems. United Kingdom of Great Britain and Northern Ireland can be viewed as an example of dualist theory approach.[18] Obligations under *international* treaties are given effect in UK domestic legislation by statutes which either directly enacts the provisions of an *international* instrument by setting out the treaty as a schedule to the Act, or elaborate substantive provisions to give effect to a treaty without the text being directly enacted.[19] An Act of Parliament giving effect to a treaty in English Law can be repealed by subsequent Act of Parliament; in these circumstances there is a conflict between international law and English law, since international law regards the United Kingdom as still bound by the treaty, but English courts cannot give effect to the treaty.[20]

Another approach on the relationship between international law and national law is called a monist theory. This doctrine "understands both international and municipal law as forming part of one and the same legal order"[21], with domestic law derived from the broader framework provided by the international law.[22] One of the leaders of the monist doctrine is Hans Kelsen, who views the "state as a construct of international law, conceived in terms of the basic rights and privileges derived from[23]" international law. Example of the *monist* countries would be the Netherlands or Switzerland, since they view the national legislation and the international law as equal parts of a unified system.[24] An international norm that Switzerland has adopted is binding on and acquires immediate national validity. There is no need therefore to take any special steps to transform it into national legislation, such as by the enacting special laws in each case. International norms thus become part of the Swiss legal system from the moment they emerge or come into effect.[25]

But very often, it's very difficult to define which approach the country has adopted, usually most of the countries incorporated mixture of both approaches such as the US. Some define US as monist[26] country, others as dualist.[27]

Analyzing Kyrgyz legislation, it can be concluded that formally the Kyrgyz Republic incorporated monist approach to international law, because it views international treaties, principles of international law as a constituent part of its legislation.[28] The only requirement of the constitution is that the Kyrgyz Republic has to be party to these international treaties and agreements by the procedure prescribed by the law.[29] The existing constitution of 1998 contains slightly different provision, which states that only ratified by the Kyrgyz Republic international treaties and agreements shall be the constituent part of the legislation of the Kyrgyz Republic.[30] According to this provision all other international treaties and agreements that were not ratified by the Kyrgyz Republic, but have taken effect by other means,[31] could not be considered as constituent part of the legislation, their status was undecided. This provision creates some difficulties in admitting the legality of such treaties. With the new edition of the constitution, which will take an effect in the year of 2005[32], this issue has been clarified and legal gap seems to be eliminated, but only on the level of the constitution.[33]

Even though the Kyrgyz Republic incorporated formally a monist approach to international law, there are still some problems with direct application of those provisions. Although some authors believe that such approach may become an important factor in enforcing rules of international law in CIS region,[34] so far in practice it has not been realized. The practice still follows dualist approach, i.e. judges or administrative agencies would rarely, especially in criminal law[35], apply directly the provisions of international treaties or principles, particularly the international customary law in making their decisions, unless such provisions have been directly incorporated in the national legislation. Since a part of humanitarian law, related to repression of the grave breaches due to its nature, is most closely related to a criminal and administrative legislation, the present paper would concentrate mainly on the two branches of law for the purposes of the present research.

According to article 1 (2) of the Criminal Code of Kyrgyz Republic, any new law that contains *corpus delicti* has to be included in the present Code. Such provision is fairly justified due to specific nature of criminal law. Criminal law being the strictest law and having punitive character "has to be very precisely formulated for what crimes the person will be considered guilty"[36] and be subject to criminal sanctions. Consequently, for effective implementation and enforcement of international law provisions, no other way, but direct inclusion of such provisions in the domestic legislation, especially in the cases with criminal law is envisaged in the legislation of the Kyrgyz Republic. Even though, the Kyrgyz Republic recognizes international treaties as a constituent part of its legislation and allows their direct application, the practice, however, follows dualist approach, according to which provisions of international law ought to be included and reflected in domestic legislation for them to be effective.

Hierarchy of legal norms in the legislation system of the Kyrgyz Republic

In accordance with the Constitution of the Kyrgyz Republic, constitution has the supreme power in the legal system of the Kyrgyz Republic[37], which means that all other laws, statutes, decrees, enactments and other decisions in the Republic have to be in compliance with the

constitution.[38] If the law is declared unconstitutional by the decision of the Constitutional court of the Kyrgyz Republic, this law is considered to be not valid anymore.[39] This section of research paper studies and analyses the place of international law provisions in the hierarchy of legal norms in the system of legislation of the Kyrgyz Republic.

The main sources of international law are international treaties, international customs and general principles of law, recognized by civilized nations.[40] Although, this is not a complete list of sources of international law[41], but the main ones that are stipulated by the Statute of International Court of Justice. The principles of international law are the basic rules governing the conduct of subjects of international law and constituting the most important, fundamental and generally recognized international law norms, which have a supreme legal force and are of a universal nature.[42] The Kyrgyz Republic expresses its full observance of universally recognized principles of international law.[43] Art. 12 (3) of the Constitution of the Kyrgyz Republic states that "generally accepted norms and principles of international law shall be a constituent part of the legislation of the Kyrgyz Republic", which means that they are directly applicable in practice as any other law or normative acts of the Kyrgyz Republic.

Neither constitution nor other laws such as the Law "On normative legal acts of the Kyrgyz Republic" of 1996[44], or Law "On international treaties of the Kyrgyz Republic" of 1998[45] specifically mention anything about an international custom, however, these documents mention that the Kyrgyz Republic stands for the full and strict observance of norms of international law[46], and since the international customs are part of international law, moreover, they are legally binding provisions, it is presumed and implied that the Kyrgyz Republic stands for full and strict observance of an international customary law as well.

Article 12 (3) of the Constitution of the Kyrgyz Republic stipulates that "international prescribed by the law, to which the Kyrgyz Republic is a party, shall be a constituent part of the legislation of the Kyrgyz Republic." Art. 16 of the Law "On international treaties of the Kyrgyz Republic" states that "if it is necessary to enact new laws or other acts in order to implement international treaty of the Kyrgyz Republic, appropriate ministries, state committees and administrative units shall make draft proposals of legal acts to the President of the Kyrgyz Republic or to the Government of the Kyrgyz Republic", which means that international treaties of the Kyrgyz Republic have superior power than regular laws of the Kyrgyz Republic. This provision is further specified in the Law "On normative legal acts of the Kyrgyz republic" of 1996, where it is stated that if there is an incompliance of the law of the Kyrgyz Republic with international treaty, to which Kyrgyz Republic is a party or generally recognized norms of international law, than rules of these treaties and norms will be in use, meaning if there is a collision between the provisions of international treaty and the laws of the Kyrgyz Republic, than the priority will be given to norms of international treaty. This provision is further reflected in the different laws of the Kyrgyz Republic.[47] However, if international treaty contains norms that require changes of some parts of the Constitution of the Kyrgyz Republic, than the consent on its being binding is possible only after certain changes are made to the Constitution[48], which means that the Constitution has superior legal power than norms of international treaty.

However, there is one legal gap in these legal normative acts, as it leaves the question of the correlation between norms of the constitutional laws and the international law

provisions. It is not clear which rule would apply in the case of their collision: the rule that applies to regular laws of the Kyrgyz Republic or the rule that applies to the constitution? Whether norms of International treaty would prevail or not? In the Kyrgyz Republic there are constitutional laws[49] that might have collisions with the norms of international treaties. In this regard, the Kyrgyz Republic, ought to clarify its status concerning international customs, stipulating that the Kyrgyz Republic stands for full observance of international customs as evidence of general practice accepted as law along with the general principles of international law and international treaties, to which the Kyrgyz Republic is a party.

Another issue that needs to be clarified by the Kyrgyz Republic is the relationship between norms of the constitutional laws and the norms of international law. It should choose the policy to follow, whether to give a priority to norms of international treaties or to constitutional laws.

References

1. Article 1 common to all four Geneva Conventions of 1949.
2. Article 26 of the Vienna Convention "On the Law of International Treaties" of 1969.
3. Advisory Service on International Humanitarian Law: from law to action, ICRC.
4. National implementation of International Humanitarian Law and the ICRC Advisory Service, www.icrc.org
5. Under the Geneva Conventions of 1949 and their Additional Protocol I of 1977, High Contracting Parties means States, which ratified these treaties.
6. Advisory Service on international humanitarian law, Implementing international humanitarian law; from Law to Action, ICRC, www.icrc.org
7. Geneva Conventions of 1949, their Additional Protocols of 1977, Hague Conventions of 1907, Statute of International Criminal Court of 1998, Statute of Movement of the Red Cross and Red Crescent, resolutions of the General Assembly and IRCE conferences etc.
8. As an example, automatic succession to human rights treaties, the prohibition to terminate or suspend the provisions on the protection of human rights provided by treaties of humanitarian nature in response of breach by another party, further see chapter II 1. Establishing the full regime for the repression of grave breaches of international humanitarian law.
9. Article 49 of the 1st Geneva Conventions of 1949.
10. *Tadic* case, Appeals Chamber of the ICTY.
11. Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, United Nations, General Assembly, 57th session, sixth committee, item 152 of the agenda. Statements by the ICRC, New York, 2 October 2002.
12. Peter Malanczuk, *Akehurst's modern Introduction to international law. Dualist and Monist theory, seventh* revised edition (T. J. International Ltd, Padstow, Cornwall, 1997) p. 63.
13. Malcolm N. Shaw, *International Law*, fourth edition (A Grotius Publication Cambridge University Press, Cambridge 1997) p. 100.
14. Giorgio Gaja, "Positivism and Dualism in Dionisio Anzilotti" 3 European Journal of International law (1992) p. 134.
15. Ibid, p. 133.
16. Ibid, p. 134.
17. Ibid, p. 134.
18. Khalastchi, Ruth, Review of European Community & International Environmental Law: *The relationship between international and national law*; 1999, Vol. 8 Issue 3, p301, 8p.
19. Ibid.
20. Peter Malanczuk, *Akehurst's modern Introduction to international law. Dualist and Monist theory, seventh* revised edition (T. J. International Ltd, Padstow, Cornwall, 1997) p. 65.

21. Peter Malanczuk, Akehurst's modern Introduction to international law. Dualist and Monist theory, seventh revised edition (T. J. International Ltd, Padstow, Cornwall, 1997) p. 63.
22. George Slyz, International Law in National Courts, 28 N.Y.U. J. INT'L L. & POL. 65 (1996), http://www.nyu.edu/pubs/jilp/main/issues/28/d.html
23. Kofi Darko Asante, New York University Journal of International Law and Politics Winter, 1994 Note election monitoring's impact on the law: can it be reconciled with sovereignty and nonintervention? 26 NYUJILP 235
24. Relation between international and domestic law, Joint opinion of the Federal Office of Justice and the Directorate for International Law of 26 April 1989 in "Verwaltungspraxis der Bundesbehцrden", http://www.eda.admin.ch/sub_dipl/e/home/thema/intlaw/relat.html accessed on March 1st, 2004.
25. Ibid
26. Odhiambo-Abuya, The pain of love: spousal immigration and domestic violence in australia – a regime in chaos?, pacific rim law and policy journal, may 2003.
27. Joseph Bruce Alonso, International law and the united states constitution in conflict: a case study on the second amendment, Houston Journal of International Law Fall, 2003.
28. Ar.12 s. 3 of the Constitution of the Kyrgyz Republic, adopted on the 12th session of Supreme Counsel of Republic of Kyrgyzstan of 12th convocation from May 5th 1993, set out in the law of the Kyrgyz Republic No. 40 "on a new edition of the constitution of the Kyrgyz Republic110" of 2003.
29. Ibid
30. Art. 12 s. 3 of the Constitution of the Kyrgyz Republic, adopted on the 12th session of Supreme Counsel of the Republic of Kyrgyzstan of 12th convocation from May 5th 1993, set out in the new edition of of the laws of the Kyrgyz Republic No. 1, of 16 February and No. 134 of 21 October 1998.
31. Art. 12, 13, 14, 15 of the Vienna Convention on the of Treaties of 1969, accessed by the Kyrgyz Republic by the law No. 49 on July 5th, 1997.
32. Law of the Kyrgyz Republic No. 40 "On new edition of the Constitution of the Kyrgyz Republic" from 2003.
33. Amendments are still to be made to other laws, as an example art. 1 of the criminal procedural code, art. 1of the Criminal Code, art. 6 of the civil code etc.
34. G. M. Danilenko, *Implementation of international law in Russia and other CIS countries,* p.4, http://www.nato.int/acad/fellow/96-98/danilenk.pdf
35. According to art. 1 (2) of the criminal procedural code of the Kyrgyz Republic universally recognized principles and norms of international law and international treaties are constituent part of criminal-procedural law.
36. S.W. vs. United Kingdom. Decision of European Court for human rights from November 22, 1995
37. Ar.12 (1) of the Constitution of the Kyrgyz Republic 1993, adopted on the 12th session of Supreme Counsel of Republic of Kyrgyzstan of 12th convocation from May 5th 1993, set out in the law of the Kyrgyz Republic No. 40 "On the new edition of the Constitution of the Kyrgyz Republic" from 2003.
38. *Ibid.* Ar.12 (3).
39. Art. 14 of the law of the Kyrgyz Republic No. 1335-XII "On Constitutional court of the Kyrgyz Republic" from December 18th, 1993.
40. Art. 38 of the statute of International court of justice.
41. Бекяшев К.А.б Международное публичное право, Источники международного права, 2-е издание, "ПРОСПЕКТ", Москва 1999, стр. 23.
42. A.A. Timoshenkova, *International law and national legislation in the military field,* http://www.findarticles.com/cf_dls/m0JAP/2_11/89021705/print.jhtml
43. Art. 9 s. 4 of the Constitution of the Kyrgyz Republic of 1993.
44. Law of the Kyrgyz Republic No. 34 "On legal normative acts of the Kyrgyz Republic" from 1 July 1996.

45. Law of the Kyrgyz Republic No. 89 "On international treaties of the Kyrgyz Republic" from 21 July 1999.
46. Preamble of law of the Kyrgyz Republic "On international treaties" of 1999.
47. Art.2 ss.3 of Criminal procedural code of the Kyrgyz Republic of 1999.
48. Article 19 of the Law of the Kyrgyz Republic "On international treaties" from1999.
49. See as an example Constitutional Law of the Kyrgyz Republic # 141 "On the status of the judges of the KR" of 2008; Constitutional Law of the Kyrgyz Republic # 135 "On the state of emergency" of 1998.

Э.Э. Озюнлю,
канд. ист. наук,
Кыргызско-Турецкий университет «Манас»

Следы культуры Центральной Азии в Османской военной структуре: «субашы»

Звание «субашы» произошло от слова «сюбашы». Слово «сю», составляющее начальный слог этого термина, в старотурецком языке выражало значение «командир армии», «армия»[1]. В уйгурском языке это слово имело форму «сюю»[2]. Соединившись со словом «баш», оно начинает использоваться в значении «командир армии» или «военачальник»[3]. У тюрок армия ассоциировалась с потоком воды, и для того чтобы выразить это значение, было использовано слово «сю». Выражение «сю акты – вода текла» передавало движение армии, проходящей или протекающей, как поток воды[4].

Впервые термин «сюбашы» встречается в тюркских источниках в VIII веке, особенно в письменных памятниках коктюрков. В 710 г. во время похода тюргешей армией командовал сюбашы Ини Ил-Каган. Моюн-Чор также имел звание сюбашы[5]. В государстве Огуз-Ябгу, находящемся на территории Сейхуна, это слово использова-

[1] **Düvanü Lûgat-it-Türk Tercümesi**. Том III Перев. Besim Atalay), изд. TTK, Анкара 1992. С. 208.; Hüseyin Namık Orkun, **Eski Türk Yazıtları**, изд.TTK, Анкара, 1994, С. 100-101; J.H.Kramers, "Sü-başı", **İA**. Т. 11. – С. 78.

[2] Ahmet Caferoğlu, **Eski Uygur Türkçesi Sözlüğü**, издательство "Эндерун". Вып. 3, Стамбул, 1993, – С. 141.

[3] J.H.Kramers, "Sü-başı". С. 78.; Mücteba İlgürel, "XVII. Yüzyıl Balıkesir Şer'iyye Sicillerine Göre Subaşılık Müessesesi", **VIII.Türk Tarih Kongresi (Ankara, 11-15 Ekim 1976), Kongreye Sunulan Bildiriler**. Т. II, Анкара, 1981. – С. 1275; Abdülkadir Donuk, Eski Türk Devletlerinde İdarî-Askerî Unvan ve Terimler. Стамбул, 1988. – С. 93.

[4] **Düvanü Lûgat-it-Türk Tercümesi**. Т. I / Перев. Besim Atalay. Анкара: Изд. TTK 1992. С. 15; также см.: Reşat Genç, **Kaşgarlı Mahmud'a Göre XI. Yüzyılda Türk Dünyası**. Анкара: Изд. Турецкого культурно-исследовательского института, 1997. – С. 101.

[5] Saadettin Gömeç, **Kök Türk Tarihi**, Анкара: Акчаг, 1999. – С. 103.