

VICTIM OF THE OFFENCE STIPULATED BY ARTICLE 137 OF THE CRIMINAL CODE OF THE REPUBLIC OF MOLDOVA

Judging by content of the 137th article of the Criminal Code of Moldova, the legislator conditioned the situation, status and role of the victim in the system of social relationships. The designation of these indicators in the penal norm represents the exclusive prerogative of the legislator, therefore having the purpose to identify the limits of the penal responsibility. Thus the quality of the victim regarded by the 137th article of the Criminal Code is directly related to the person categories protected by the Geneva Conventions of 1949.

The investigation of the circle of subjects that are protected by the penal law gives us rights to attribute to the category of conditions described by the victim the wounded, sick and shipwrecked ones. Prisoners, civilians, members of the Red Cross, members of organizations assimilated to and any other person that is under the power of the enemy represent the role of the victim in the system of social relationships or reflects its social status. By analyzing these categories, we have resolved the problem of application of the criminal norm regarding the offender and the victim.

The specialty literature faces controversial opinions on determination of the state of victim in the criminal law. The first category of authors [1] considers that there is an inseparable link between the notions "offence victim" and "special legal object of offence", for these reasons the offence victim is subject to study in the notional context of the offence object as a constitutive element of the offence. The second category of the authors [2] considers that the offence victim is a part of the notion of the offence subject, known as a passive subject category, a unanimously recognized opinion in the Romanian specialty literature.

From the place of its investigation, it is certain that the offence victim represents a subject of social relation, the defense of which is exercised through the exact incrimination. As for Article 137 of the Criminal Code of the Republic of Moldova, the legislator has circumstanced some states, social features of the victim as well as his/her posture in the system of social relations. On the category of the states, in which the victim is, we may attribute *the wounded, sick and shipwrecked. Prisoners, civilian persons, members of civil medical personnel, members of the Red Cross, members of the similar organizations, any other person fallen into the power of the enemy* represent the role of the victim in the system of social relations or reflects its social status.

The designation of the indicators that characterizes certain conditions, features of the victim in the criminal norm represents an exclusive prerogative of the legislator, with the purpose of identifying the borders of criminal liability. This position has a practical significance, while only when the circle of subjects of social relations is correctly determined affected by the offence, may be resolved a problem of the limits of application of the norm on the offender and the victim.

The quality of offence victim stipulated under Art. 137 of the Criminal Code of the Republic of Moldova is directly proportioned to the categories of the persons protected in the light of the four 1949 Geneva Conventions. *In concreto, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* [3], *Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* [4], *Convention (III) relative to the Treatment of Prisoners of War* [5], *Convention (IV) relative to the Protection of Civilian Persons in Time of War* [6]. Therefore, we share the concept of Professor A. Barbaneagara [7], according to whom Art. 3, which is common for the 1949 Geneva Conventions and Art. 4, par. 2 of *Protocol (II) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts* [8], establish the minimal standard of humanita-

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rian treatment for the protected persons applicable to any type of armed conflict, regardless of its character: international or national.

In the sense of Art. 8, par. 1, Part II, Section I of *Protocol (I) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts* [9], "wounded" and "sick" are considered to be persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. This category also covers maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.

Hence, to be included in these categories of the protected persons, one needs to meet two cumulative conditions:

1. The person is in need of medical assistance;
2. The person refrains from any act of hostility.

Pursuant to Art. 8, par. 1, Part II, Section I of *Protocol (I) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts*, the "Shipwrecked" mean persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

The offence victim stipulated by Article 137 of the Criminal Code of the Republic of Moldova may be likewise a war prisoner. The concept of the derives from the notion of combatant [10]. In this context, the term of combatant must be interpreted *stricto sensu*, meaning only members of armed forces that participated directly in the fight. Consequently, the sanitary and religious military personnel, though belonging to the armed forces, cannot be seen as war prisoners. *Per a contrario*, the civilians who participate this or other way in the war operations may be considered war prisoners. Thus, an eloquent example may serve a renowned case during World War I, named in the specialized literature "Marna taxi drivers case" [11], when at the request of the military authorities, the private owners of cars have transported troops and light materials to strengthen the front. During this activity, they have lost the quality of civilians and became combatants.

Pursuant to Article 4 of *Convention (III) relative to the Treatment of Prisoners of War* of August 12, 1949, the following categories of combatants enjoy the humanitarian protection as prisoners of war:

1. Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - a) that of being commanded by a person responsible for his subordinates;
 - b) that of having a fixed distinctive sign recognizable at a distance;
 - c) that of carrying arms openly;
 - d) that of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible

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for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

In accordance with Article 4, B of *Convention (III) relative to the Treatment of Prisoners of War* of August 12, 1949, the following shall likewise be treated as prisoners of war:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

The quality of war prisoner is related to the following two conditions [12]:

1. To have fallen into the power of the enemy;
2. To belong to one of the abovementioned categories.

Besides these two conditions, we insist on the third one, according to which the capture of a war prisoner may take place only in the period of active hostilities. This condition derives from the sentence of the Penal Chamber of the Cassation Court of France of February 16, 1951 in the Bittrich and Guttman case [13], in accordance with which the court decided that a German general arrested after the capitulation of his country on May 7, 1945 cannot be considered a war prisoner. Reserve soldiers also benefit from the status of war prisoner. Thus, the Dutch special Cassation Court pronounced on February 20, 1950, a sentence against some German officers, who have executed the summary on the reserve officers in 1940 after the capitulation of Holland, considering this fact to be a war crime [14].

The resistance movement members as well as members of armed forces in the uniform acting within the enemy's territory for the purpose of information obtaining and destruction of the military objects are to be considered war prisoners. Given that these persons enjoy the protection, the extermination actions of the command members that acted within the territories under Germany's control in World War II were pronounced to be illegal by Nurnberg Military Tribunal and Marshall Keitel who had issued the respective order, was sentenced to death by hanging on October 1, 1946 by the same court.

Spies, saboteurs, merchants and officers who have committed the war crimes, after the competent tribunal had pronounced the sentence against them [16].

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Furthermore, we will research civilian persons as potential victims of the inhuman treatment. It is necessary to point out that the definition of the concept "civilian persons" was developed by the Session II of the Conference of government experts, having the purpose of making the concept of civilian persons seen individually and the civilian population as a whole, which was reflected in the provisions of Article 50, p.1 of *Protocol (I) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts*, according to which a civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt, person shall be considered to be a civilian. Referring to Art. 5 of *Convention (III) relative to the Treatment of Prisoners of War* of August 12, 1949, all persons who are on the territory of the parties to the conflict that are not members of the armed forces are included in the category of "civilians", not by the criterion of their nationality that does refer only to the category of protected persons against the enemy of the Detaining Power, but only to their inoffensive character. Thus, except the "armed forces", to which the Protocol gives a new definition, all persons who are on the territory of the parties to the conflict are "civilians". Also, to avoid any eventual divergences in carrying-out of the military operations and distinguishing a civilian person from the member of the armed forces, the Protocol considers any person to be a civilian, if there is any doubt, whether s/he is or not.

Paragraph 2 of Art. 50 of the Protocol stipulates that the civilian population comprises all persons who are civilians, but pursuant to paragraph 3 of Art. 50 of the same Protocol the presence within the civilian population of individuals who do not come within the definition of civilians do not deprive the population of its civilian character.

Being related to the needs of application of the humanitarian international law in the case of an armed conflict and immunization of the persons who do not participate directly in hostilities, the definition given to the civilian persons and civilian population is evaluated in the specialized literature [17] as a functional one.

The civil medical personnel are to be recognized as victims of the crimes of inhuman treatment. The notion of the civil medical personnel [18] means a totality of employees who are to take care of the sick and wounded of the army or of the civilians in the rehabilitation and diagnostics units. Thus, the totality of employees empowered exclusively by the party to the conflict on realization of the actions on prevention of diseases, search, evacuation, transportation, diagnostics, treatment, first assistance to the wounded, sick and shipwrecked. This category includes also officers from the administration of the medical units (hospitals, blood transfusion centers, centers and institutions of preventive medicine, centers of medical insurance, pharmaceutical products and supplies deposits), as well as the totality of employees responsible for functioning and administration of the medical vehicles. Not to deny the foregoing, we point out that pursuant to Art. 8, par.3 of *Protocol (I) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts*, the expression "medical personnel" means both the civil and military personnel. Unfortunately, applying Art. 137 of the CC of the RM as for the special category, the members of military medical personnel cannot be considered to be victims, in spite of the fact that the 1949 Geneva Conventions insure the corresponding protection to them. To be convinced of this, we refer to Art 25 of *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, according to which members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands. Since the Conventions provide efficient protection to these categories of persons as well, it is evident to exclude the word "civilian" from the expression "civilian medical personnel", so that the range of applicability will extend on members of the military medical personnel, and the medical personnel will cover both the civilian and military personnel.

Also, the victims of inhuman treatment may be members of the Red Cross and members of the similar organizations. Pursuant to Art. 3, par. 2, which is common to the 4 Geneva Conventions of August 12, 1949, the International Commit-

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tee of the Red Cross is an impartial humanitarian body that offers its services to the Parties to the conflict. More exactly, the International Committee of the Red Cross is recognized to have a series of attributions during the armed national and international conflicts as well as in the cases of national tension and disorders. It represents a principal organization authorized by the states by the agreed legal instruments, to provide protection and assistance to the victims of the armed conflicts. Thus, the representatives of the Red Cross have the following means and methods to exercise protection and assistance to the war victims: visits to the detention places of a strictly humanitarian character, it restricts exclusively to the applied treatment and not to reasons of their detention; search of the disappeared persons and support to reunification of separated families; humanitarian assistance. It is necessary to mention that the Geneva Conventions and their additional Protocols contain more than 20 dispositions devoted to the medical assistance and materials to which the victims of the armed conflicts are entitled.

Generalizing the provisions of the 4 Geneva Conventions of August 12, 1949, we should single out the following criteria of humanitarian assistance providing:

- it is provided exclusively to the war victims;
- it has a non-discriminative character;
- it is destined to cover the most urgent needs of the affected persons, that is providing of medicines, food, clothes, etc.;

it is provided only with approval of the authorities who detain control over the territory, where persons who need help are located.

Nationally, the Red Cross Society of Moldova of the status of autonomous non-governmental organization, which carries out its activity in accordance with its Charter approved by the Decision of the Government of the Republic of Moldova No. 153 of March 09, 1992 "on registration of the Charter of the Red Cross Society of Moldova" [19]. As it results from the provisions of Art. 1 of the *Law of the Republic of Moldova* No. 139-XV of May 10, 2001 *on the Red Cross Society of Moldova* [20], the foundation of this organization has been caused by the necessity of realization of the auxiliary humanitarian functions based on the 1949 Geneva Conventions and the 1977 Additional Protocols to them.

However, the incrimination norm stipulated by Art. 137 of the CC of the RM sets up the requirement that the victim of inhuman treatment offence isn't such kind of person, who indirectly exercises some attributions of this organization, but only its members. Pursuant to Art. 7 of the Charter of the Red Cross Society of Moldova, the status of member may be given to the individual and collective members, but Art. 8 establishes that member of the Company may be any citizen, regardless of nationality, confession, political concepts, party membership, who recognizes this Charter, works in one of the Society organizations, pays systematically membership dues or who provides other medical assistance. Pursuant to Art. 10 of the Charter, the Committee (meeting) of the primary organization grants the quality of the Society member based on the written or oral request of the applicant.

Thus, we may conclude that member of the Red Cross and the similar organizations means a person of the international organization of the Red Cross and other international or national voluntary societies of medical or humanitarian assistance recognized legally and authorized by the party to the conflict. For example, among the organizations similar to the Red Cross, we may attribute the Red Crescent, Doctors Without Borders, UN authorities [21]. The main internal mechanism of supervision of conformance to the humanitarian law in the Republic of Moldova is the National Committee of Consulting and Coordination for implementation of the humanitarian international law founded on September 9, 1996. Among the members [22] of the National Committee of Consulting and Coordination for implementation of the humanitarian international law, we may point out the officers of the Ministries of Foreign Affairs, Education, Health, labor, Social Protec-

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tion and Family, Defense, Justice, of the State Chancellery, the Service of Information and Security, of the Committee of Trade Unions Federation, of the Red Cross of Moldova.

“Any other person fallen into the power of the enemy” may be a victim of the offence of inhuman treatment. So an obvious question appears: who are these persons? By the exclusion method, we deduct that they are other than those stipulated expressly in the incrimination norm to give an explicit answer to this question, it is necessary to make a generalization of all categories of the persons, to which special protection is provided through the criminal rule. The point that provides the unit *ad integrum* of the victims given in Art. 137 of the CC of the RM is evident by the characteristics of *hors du combat*. The Romanian equivalent of the French expression will elucidate the victim particularities, i.e. a person that due to certain reasons does not participate actively or directly in the hostilities, that is outside the fight. Therefore, we share the opinion of the author V. Grosu [23], according to which there is no intermediary status – all those who are outside the fight are protected by the criminal law (citizens of the states, stateless persons, refugees, who have or do not have diplomatic immunity).

Therefore, we consider that the expression “any other person fallen into the power of the enemy” refers first to the category of the religious personnel. This affirmation has at least two arguments:

- *Primo*: the religious personnel does not participate actively or directly in the hostilities;
- *Secundo*: the religious personnel belongs to the categories of the persons protected based on 4 1949 Geneva Conventions and 2 1977 Additional Protocols.

According to Art. 8, paragraph 4 of *Protocol (I) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts*, “religious personnel” means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

- a) to the armed forces of a Party to the conflict;
- b) to medical units or medical transports of a Party to the conflict;
- c) to medical units or medical transports described in Article 9, paragraph 2 of the Protocol; or
- d) to civil defence organizations of a party to the conflict.

Also, “any other person fallen into the power of the enemy” must also mean journalists and correspondents. Thus, Art. 13 common to the 1949 Geneva Conventions (I) and (II) foresees that when captured war correspondents are wounded, sick or shipwrecked, they will enjoy the same treatment as enemy combatants that would be in the same situation, provided they have received authorization of the armed forces they accompany. Moreover, pursuant to Art. 4 of Convention (III) relative to the Treatment of Prisoners of War of August 12, 1949, the war correspondents are included in the personnel category who have the right in the case of capture or imprisonment to the treatment reserved to the war prisoners. Although, the general legal regulation of the measures on protection of journalists is considered to be Art. 79 of *Protocol (I) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts*. Being a part of Part IV dedicated to the civilian population, art. 79 stipulates that the journalists are similar to the civilians in the protection they are provided when they are in the power of the party to the conflict. Thus, the offered protection is catalyzed by the lack of an action that would contradict their status of civilians and does not presuppose refusal to the rights given to the war correspondents accredited under the auspices of the armed forces, otherwise they would benefit from the status of war prisoners.

In conclusion to the foregoing, the syntagma “any other person fallen into the power of the enemy” means the person who does not participate actively or directly in the hostilities and is not expressly stipulated in the incrimination norm, that is other than wounded, sick, shipwrecked, prisoners, civilian persons, civil medical personnel members, members of the Red Cross, members of the organizations similar to these. Although the provision of Art. 137 of the Criminal Code of the Republic of Moldova on the offence crime is non-exhaustive, we consider that the legislator has not infringed the condi-

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tions of the incrimination legality; or, incrimination has not received allure of an uncertain provision. It is due to the fact that the norm stipulated in Art. 137 of the CC of the RM is a blanket rule, but the whole analysis of the 4 1949 Geneva Conventions and 2 1977 Protocols Additions to them does not reveal the true will of the legislator.

Key words: Criminal Code, victim, Geneva Conventions, prisoners, civilians, members of the Red Cross, armed conflict, combatant, war crimes, inhuman treatment, civil medical personnel

NOTES

- ¹ Brinza S., Ulianovschi X., Stati V. and others. Criminal Law. Vol. II.- Chisinau: Cartier, 2005, p. 34; Moscalciu I. Consumer – victim of offences committed in the sphere of products and services consumption// National Law Journal, 2007, No. 5, p. 47.
- ² Dorbinou V., Cornea N. Criminal Law. Special Part. Vol. II – Court theory and practice. Bucharest: Lumina-Lex, 2000, p. 678; Nistor-reanu Gh., Boroi Al. Criminal Law. Special Part. 2nd Edition.- Bucharest: ALL Beck, 2002, p. 47.
- ³ Concluded in Geneva on August 12, 1949, in effect for the Republic of Moldova from November 26, 1993.
- ⁴ Concluded in Geneva on August 12, 1949, in effect for the Republic of Moldova from November 26, 1993.
- ⁵ Concluded in Geneva on August 12, 1949, in effect for the Republic of Moldova from November 26, 1993.
- ⁶ Concluded in Geneva on August 12, 1949, in effect for the Republic of Moldova from November 26, 1993.
- ⁷ Barbaneagra A., Alecu Gh., Berliba V., and others. Criminal Code of the Republic of Moldova. Comments. – Chisinau: Sarmis, 2009, p. 264.
- ⁸ Adopted in Geneva on July 10, 1977, in effect for the Republic of Moldova from November 26, 1993.
- ⁹ Adopted in Geneva on July 10, 1977, in effect for the Republic of Moldova from November 26, 1993.
- ¹⁰ Purda N., International Law Humanitarian. University course – Bucharest: Lumina-Lex, 2004, p. 273.
- ¹¹ Ibidem, p. 275.
- ¹² Balan O., Rusu V., Nour V. International Humanitarian Law. – Chisinau: Criminology University, 2003, p. 135.
- ¹³ Purda N., Op. cit., p. 275.
- ¹⁴ Idem
- ¹⁵ www.hausarbeiten.de/faecher/vorschau/116526.html
- ¹⁶ Geamanu G. International Criminal Law. – Bucharest, 1996, p. 161.
- ¹⁷ Purda N., Op. cit., p. 299.
- ¹⁸ Barbaneaga A. Penal responsibility for crimes against peace and humanity security, war crimes: Thesis of Habilitate Doctor of Law. – Chisinau, 2006, p. 179.
- ¹⁹ Monitor No. 3/82 of March 30, 1992.
- ²⁰ Monitorul Oficial al Republicii Moldova No.64-66/463 of June 22, 2001.
- ²¹ Brinza S., Ulianovschi X., Stati V. and others. Op.cit., p. 34.
- ²² Barbaneaga A. Penal responsibility for crimes against peace and humanity security, war crimes: Thesis of Habilitate Doctor of Law. – Chisinau, 2006, p. 189.
- ²³ Brinza S., Ulianovschi X., Stati V. and others. Op.cit., p. 34.