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К ВОПРОСУ О СУБЪЕКТАХ МЕЖДУНАРОДНО-ПРАВОВОЙ ОТВЕТСТВЕННОСТИ ЗА МЕЖДУНАРОДНЫЕ ПРЕСТУПЛЕНИЯ И ПРЕСТУПЛЕНИЯ МЕЖДУНАРОДНОГО ХАРАКТЕРА

В настоящей статье авторами исследуются проблемы законодательного регулирования международно-правовой ответственности за международные преступления и преступления международного характера. Акцентируется внимание на разграничении указанных видов преступлений, проводится детальный анализ возможности выступать в качестве субъекта их совершения, а также возможности привлечения к соответствующей уголовной ответственности физических лиц, государств и юридических лиц. Подчеркивается необходимость формирования перечня международных преступлений. Актуализируется необходимость законодательной проработки на национальном уровне вопроса о включении юридического лица в состав субъектов совершения отдельных видов преступлений международного характера. Статья в большей мере носит теоретический характер, но разрешение обозначенных пробелов будет способствовать повышению эффективности борьбы с международной и национальной преступностью.

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TO THE QUESTION OF SUBJECTS OF INTERNATIONAL LIABILITY FOR INTERNATIONAL CRIMES AND CRIMES OF INTERNATIONAL CHARACTER

In this article the authors study the problems of legislative regulation of international legal responsibility for international crimes and crimes of international character. Attention is paid to the differentiation of these types of crimes, a detailed analysis of the possibility to act as a subject of their Commission, as well as the possibility of bringing to appropriate criminal responsibility of individuals, States and legal entities, the need to form a list of international crimes is emphasized. The need for legislative elaboration at the national level on the inclusion of a legal entity in the composition of the subjects of certain types of crimes of international character is actualized. The article is more of a theoretical nature, but the resolution of these gaps will help to improve the effectiveness of the fight against international and national crime.

Nowadays scientists have not reached a common understanding of the distinction between international crimes and crimes of an international nature. Theoretical differences are supported by normative differences, contradictions in this issue of international and national legislation, which negatively affects the practice of the implementation of these institutions. In this regard, the topic of this article looks very relevant.

International crimes are the most serious, illegal, socially dangerous acts that infringe the international legal order, violate the fundamental norms of international law and affect the interests of the entire international community [1, p. 7]. There is currently no list of international crimes. The International Law Commission is working to codify crimes against the peace and security of mankind. In 1996, after the second reading, the draft Code of Crimes Against the Peace and Security of Mankind was approved. It provides for five international crimes: genocide, aggression, war crimes, crimes against humanity, crimes against UN and associated personnel. The jurisdiction of the International criminal court («ICC») extends to four of the above-mentioned crimes. The exception is the last of them [2, p. 198]. This situation has a negative impact on the international community's fight against the perpetrators of international crimes.

International crimes are different from international crimes. The latter include acts provided for by international treaties that infringe not only on the national legal order, but also on the interests of the international community in the development of normal international relations [3, p. 434]. In contrast,

international crimes encroach on the basis of the security of all mankind, on peace between peoples and States [2, p. 144]. The most obvious distinguishing feature of international crimes from international crimes consider them a lesser degree of severity and percentage of danger for mankind. However, it should be recognized that there is no clear boundary between these types of crimes. In some cases, if there are signs of mass and systematic acts can move from one category to another. For the present study, it is important that criminal responsibility for an international criminal offence is based on the rules of international criminal law, and for crimes of an international character — on the rules of national criminal law.

Considering an individual as a subject of an international crime, scientists define it according to the classical scheme: as a person who committed an international crime, who has reached the age of 18, sane, able to be aware of his actions and lead them [4, p. 139]. The subjects of international crimes, according to article 5 of the Statute of the International criminal court (hereinafter-the Statute) are individuals and officials who commit international crimes [5, art. 5].

General rules on the subject of international crimes are set out in article 25 of the Statute:

the court has jurisdiction over individuals;

a person who commits a crime that is under the jurisdiction of the court is individually liable and liable to punishment;

the court has jurisdiction only over persons who have reached the age of 18 at the time of the alleged Commission of the crime;

the Statute applies equally to all persons, without any distinction on the basis of official position [5, art. 25]. For example, the official position of a head of state or government, member of Parliament or government, etc., does not exempt a person from criminal liability under the Statute. Moreover, this is not even grounds for punishment mitigation.

In the practice of the International Criminal Court (hereinafter ICC) is in the direction of extension of the liability of several persons for committing international crimes. In particular, the responsibility for crimes against humanity, in accordance with the norms of the Statute, involves persons who do not hold official positions, but have the opportunity to exert and exert a certain kind of influence, so that a crime against humanity is committed. A striking example of this practice is the criminal proceedings in the case «The Prosecutor vs Saif Al-Islam Gaddafi». In deciding to prosecute Seif al-Islam Gaddafi, the ICC pointed out that the latter, although he does not hold an official post, but at the same time is the successor of Muammar Gaddafi, is recognized as the most influential person among all those close to him.

The ICC had strong evidence that al-Islam Gaddafi's safe was in control of the main critical structures of the state apparatus, in particular the material, technical and financial areas, with the authority of the Prime Minister. Using his power, coordinating his actions with Muammar Gaddafi, he planned to suppress the protests of the civilian population against the Gaddafi regime. As a result, safe al-Islam Gaddafi contributed to the implementation of the plan to suppress the civilian population. The implementation of his managerial functions led to the Commission of these crimes. Contribution to the organization and implementation of crimes safe al-Islam Gaddafi is recognized by ICC weighty, because he could prevent the Commission of crimes, refusing to perform their functions [6].

A similar expansion of the subject of criminal responsibility is observed with respect to the commander, where the offence under the jurisdiction of the ICC is committed by forces under his command. At the same time, the commander did not exercise proper control over subordinates [5, art. 28].

For the Commission of international crimes, the individual assumes responsibility, which is individual and derives directly from the rules of international law. A natural person acts in a personal capacity or as an official of the state in this case does not matter. When an individual is criminally responsible for an international crime, he or she is subject to the jurisdiction of international judicial bodies. However, in some agreements may provide for concurrent or alternate jurisdiction [7, p. 180]

In addition to individuals, States are recognized as the subject of international crimes. The international criminal responsibility of States is not connected with responsibility of the individual. For the same international crime responsibility can simultaneously be carried by both individuals and the state as a whole. The theory of international criminal law has developed a position according to which there are circumstances in which violations of the fundamental norms of inter-state communication are so serious that the reaction of the world community extends to the state [8, p. 12–13]. At the same time, the criminal responsibility of States currently exists only in the doctrine and its practical implementation is not expected in the near future [9, p. 16]. Bringing a state to international criminal responsibility does not exclude the responsibility of individuals under international criminal law. We believe that this situation is fair and in accordance with the basic principles of international law.

There is a close connection between the responsibility of the individual and the responsibility of the state in the Commission

of International Crimes, which led scientists to the conclusion that «ultimately, the criminal responsibility of individuals for crimes of an international nature is one of the manifestations of the political responsibility of a state that loses its jurisdiction over its own citizens» [10, p. 177].

From the point of view of the theory of international criminal responsibility of individuals — an independent institution of international law, separate from the Institute of state responsibility. When an individual bears international criminal responsibility, the first thing that is taken into account is the individual's own actions, acting as a member of the human community, against this community in General and the foundations of its organization in particular [11, p. 24]. To date, the institution of international criminal responsibility of the individual is generally recognized. Individuals may violate international law, and then they are responsible under international law.

In the modern legal literature, there are different views on the nature of the responsibility of natural persons who have committed international crimes. L. N. Galenskaya on the issue of recognition of public legal personality of individuals expresses the opinion that the international criminal responsibility of individuals, in the Commission of the most serious international crimes, means their international legal personality [12, p. 27].

V. Shurshalov believes that an individual can be a subject of specific international legal relations, and not be a subject of international law [13, p. 36]. We agree with the statement of S. Chernichenko, who believes that «...an individual, being a subject of law, may not be a subject of any certain legal relations, as for the emergence of these legal relations, in addition to the existence of legal norms, it is necessary to have a certain legal fact. This is the same as not being a subject of law, it is impossible to be a subject of legal relationship» [14, p. 271].

N. Ushakov argues that «there is no international criminal responsibility of individuals in the sense defined by the international criminal court, acting on the basis of international criminal procedure. Criminal liability of individuals existed and will exist only as liability under national criminal law. Guilty individuals are subject to prosecution by national courts in compliance with national procedural rules that apply to all criminal offences» [15, p. 23].

In our view, the international community is ripe for the realization of the idea of bringing an individual who has committed an international crime to international criminal responsibility in accordance with international law, even if their actions are in accordance with national law. Normative consolidation of this rule will allow to develop uniform world approaches to criminal responsibility and punishability of physical persons for Commission of international crimes, irrespective of the position expressed in the national legislation of the concrete state. At the same time, the mechanism of bringing individuals to international criminal responsibility should exclude the possibility of using the pretext of protecting the rights of the population to invade and start a war against the state.

In our view, individuals who have committed an international crime should be subject to international criminal responsibility in accordance with international law, even if their actions are consistent with national law.

With regard to the criminal responsibility of legal persons for international crimes, international law recognizes them as subjects of international crimes. For example, in Strasbourg on January 27, 1999, the European Convention on Criminal Liability for Corruption was adopted, which refers to the liability of legal entities for corruption offenses [16, art. 18].

It is also necessary to take into account the fact that currently the criminal liability of legal entities is provided for by the legislation of a number of foreign countries (UK, Germany, France, Italy, Belgium, Austria, Holland, Ireland, Denmark, USA, Canada, India, China, South Korea, etc.). In the post-Soviet space, criminal liability of legal entities is provided only in the Republic of Moldova, Latvia and Lithuania. Prospects for the introduction of criminal liability of legal entities are actively considered and discussed in Russia, as well as in Ukraine and Kazakhstan. It is noteworthy that a positive solution to the issue by these States is already available in principle, since the draft criminal codes contain the relevant rules on the responsibility of these persons. This problem requires elaboration at the national level due to the relevance and progressiveness of the idea of criminal liability of legal persons for certain categories of crimes.

Relevant in the context of the analyzed problems is also the question of the relationship between international and domestic law. The question of the confrontation (conflict) of international and domestic law, as systems, based on their functional purpose, can not have a basis. International and domestic law, as systems, can never come into conflict. The supremacy of international law in the international sphere in these circumstances entails that judges of state courts must take into account local law but apply international law. Whether he can do it or not depends on the legislation of a particular country. The supremacy of international law in the international sphere means that if nothing can be done, a state that has committed a violation of its international obligations at the international level will bear international responsibility and will not be able to invoke the state of domestic law by absolutization (justification) [2, p. 61–

62]. The rules of domestic law, which enshrine the promotion of policies of genocide, apartheid and racial discrimination, do not justify the actions of the perpetrators and do not absolve them of responsibility under international law. And these rules themselves, allowing, encouraging or prescribing the implementation of policies that are contrary to international law, and the violation of which constitutes an international crime, are invalid from the point of view of international law [17, p. 118].

The Nuremberg Tribunal, in its decisions, categorically rejected the doctrine that acts committed by state bodies are imputed only to the state itself, which further completely excludes the individual guilt of the perpetrators of these acts. The Nuremberg trials established the principle of individual criminal responsibility for crimes against international law. It was pointed out that such crimes were committed by human beings and not by abstract categories, and that it was only by punishing specific individuals who committed such crimes that the establishment of international law could be respected. Thus the Nuremberg Tribunal proceeded from the fact that «official position of defendants, to be exact their position as heads of the States or responsible officials of various government departments, shouldn't be considered as the basis for release from responsibility or mitigation of punishment» [18, art. 7].

The Charter of the Nuremberg Tribunal unambiguously approved the principle that «the fact that the defendant acted on the order of the government or the order of the chief, does not exempt him from responsibility, but can be considered as an argument for mitigation of punishment, if the Tribunal recognizes that it is required by the interests of justice» [19, p. 30].

Subsequently, this principle was fixed by the international law Commission in the Nuremberg principles with only one reservation, that directly in Principle IV of this document, it is not said that the order as such can be considered as a mitigating circumstance: «The fact that a person acted in pursuance of the order of his government or chief, in no way exempts this person from responsibility under international law, if a conscious choice was actually possible for him» [20, p. 81]. Thus, the international law Commission, in principle IV, reaffirmed the provision that the execution of an order of a government or a superior does not in any way relieve a person of responsibility under international law if a conscious choice was actually possible for him.

The situation is different with regard to the responsibility of individuals for crimes of an international nature. Crimes of an international character, as we have already considered before, constitute crimes against international law and, accordingly, are defined as «provided for by international treaties, and which infringe not only on the national legal order, but also on the interests of the international community in the development of normal international relations» [1, p. 434].

A distinctive feature of crimes of an international nature from other crimes against international law is that they have an international character not in composition, but in the circumstances of the Commission, that is, these crimes are punishable by the internal law of the state, but due to certain circumstances having an international character [1, p. 435].

For crimes of an international character, individuals are responsible only to national criminal courts, and the principle of inevitability of punishment is implemented through the extradition of perpetrators. Moreover, almost all conventional crimes are provided for in the norms of the national criminal law of States. Given that the responsibility of individuals for crimes of an international character is exercised by the national courts of States, the General concepts and institutions of the domestic criminal law of States are directly applicable to such responsibility. Taking into account the internationally wrongful nature of such crimes, the principle of universal jurisdiction applies to them, which in turn implements another principle — «the inevitability of punishment for the committed act».

States are not responsible for crimes of an international nature and fully contribute to the punishment of those responsible for such crimes. They cooperate with each other in the provision of mutual legal assistance in criminal matters, in particular in the extradition of criminals. The basic principle in the prosecution and punishment of individuals for crimes of an international character should be the principle of «either extradite or judge» [1, p. 440].

The possibility of holding legal persons criminally responsible for crimes of an international character depends entirely on the national legislation of the country. In the Republic of Belarus, this possibility is excluded in view of the above-mentioned approaches of the legislator to the subject of crimes.

Based on the results of the study it seems appropriate to formulate the following conclusions:

1. The subject of an international crime shall be natural persons, legal persons and States. Bringing a state to international criminal responsibility does not exclude the responsibility of individuals under international criminal law. For the Commission of international crimes, the responsibility of the individual is of an individual nature and derives directly from the norms of international law. Acts as a natural person in a personal capacity or as an official of the state in this case does not matter. It should be subject to the jurisdiction of international judicial bodies.

2. The question of the confrontation (conflict) of international and domestic law, as systems, based on their functional purpose, can not have a basis. The rule of international law in the international sphere in these circumstances entails that judges of state courts must take into account local law but apply international law.

3. Criminal responsibility for crimes of an international character shall be exercised by the national courts of States using the General concepts and institutions of domestic criminal law. In this regard, for the Republic of Belarus, the subjects of criminal responsibility for crimes of an international character are exclusively natural persons. This provision does not fully meet the trends in the development of international law, creates the ground for evading criminal responsibility of individual organizations (extremist and other orientation) for committing crimes of an international character. The Belarusian legislator should pay attention to the fact that criminal liability of legal entities is provided by the legislation of a number of foreign countries (including Germany, the USA, Canada, Latvia, Lithuania, etc.). The problem of normative consolidation of the possibility and regulation of the mechanism of bringing legal entities to criminal responsibility for committing crimes of an international character requires study at the national level.

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