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About the question of the legal entities responsibility for committing a genocide

This article examines the issue of establishing binary liability for genocide both within the scope of the 1948 UN Convention and the criminal legislation of the countries that signed it. In this regard, the authors emphasize that the presence of a *corpus delicti* and criminal responsibility for legal organizations is based in part on a subject that is one of its components as well as individuals. To ascertain the issue's relevance, a provision was also drafted stating that it must be resolved and referencing the 1985 UN Guidelines on developing a system for crime prevention and criminal justice of a new international economic order and existing international treaties of a universal and regional nature. In conclusion, the authors emphasize that filling the noted gap serves as a counteraction to the preconditions for genocide commission and, therefore, it should be a part of the Convention's duties to its members.

Keywords: convention, genocide, responsibility, legal entities, obligations, individuals, international treaties, states-parties, national legislation, criminal justice.

Introduction

Genocide as an international crime includes the *subject* as one of its constituent aspects. According to Article IV Special UN Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948: "The Contracting Parties undertake to enact, in accordance with its respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III" [1; 781] (the actions to which Article III alludes as forms of participation in genocide include actions that form the objective aspect of this socially dangerous crime is as follows: killing or inflicting substantial physical or mental suffering on members of a particular ethnic or religious group is one definition of genocide; measures taken to prevent the birth of children among a group of people that are meant to lead to their entire or partial annihilation; forcible transfer of children between human groups) [1; 779].

Article IV of the Convention does not seek to define the aforementioned traits, as can be observed from its content. The article refers to individuals who are punishable for genocide and its truncated compositions, while implying by them only individuals, highlighting their general special characteristics due to their position in society or the state.

In this regard, we should consider the subject – the genocide committed by a single person of his own free will or is directly involved in its commission, regardless of social status. S. Kifer, using the example of from January 1, 1994, to December 31, 1994, an analysis of acts of Rwandan residents are held responsible for genocide and other comparable acts perpetrated on the territory of neighboring states, argues that this crime is "practically committed collectively" on Rwandan territory [2; 45], and its participants usually "do not associate themselves and as personally responsible for its commission" [2; 45]. Accordingly, he substantiates and proves the position that each of the participants in acts of genocide must bear individual responsibility for this socially dangerous act, "committed collectively" (i.e., by the state or a legal entity, or a group of individuals), regardless of its actual role in the commission of this socially hazardous act [2; 45]. These statements suggest the idea that in the aspect of analyzing the criminal liability of individuals for the committed genocide, without mentioning it, the requirement to implement national legislation in states that have signed the 1948 Convention is unavoidable, as such, the institution of legal entities, i.e., the possibility of establishing double liability for this crime. "This seems both desirable and possible, since not only the state or government, but also some group of persons, public organization, party or social movement can commit crimes against the peace and security of mankind; such organizations can be, and often are, legal entities" [3; 106].

Meanwhile, other scholars who support the introduction of corporate criminal responsibility in legislation emphasize that the harm caused by a legal entity's activities significantly exceeds the harm caused by an individual [4; 6–9]. This approach is currently enshrined only in the criminal codes of a small number of states, e.g., in Article 90 (Genocide) of Denmark's Penal Code. Part 2 of this article states that these acts (murdering, torturing and injuring members of a national, ethnic, racial or religious group or a group resisting the occupation regime) are prohibited as is forcibly preventing childbearing in the group or forcibly removing children from the group [5; 96].

International criminal law's characteristics and mechanisms for executing the Convention's Article VI's liability rules make it necessary for the foundation of such an institution, according to M.L. Prokhorova and M.G. Gigineishvili [6; 4]. In this regard, Article 168 of the current Criminal Code of the Republic of Kazakhstan dated July 3, 2014 (as well as Article 160 of the Criminal Code in the old, abolished version) clearly defines the three mandatory features that the subject of a crime must have: It can be any natural and sane individual who has reached the age of sixteen [7]. Thus, this provision of national criminal law exempts legal entities from criminal liability if they do not qualify as subjects of a crime, as specified in the preceding article. No mention of genocide can be found in the same section of Kazakhstan's Criminal Code as the other crimes. "According to the convention norms, the perpetrators of genocide are subject to punishment regardless of whether they are members of the government, officials or private individuals" [8; 271], i.e., persons holding positions in the state, civil, military services or law enforcement agencies of the Republic of Kazakhstan or not occupying them at all. According to E.D. Pankratova, "the official position of a person can be used by the court to individualize punishment when considering specific cases" [9; 139].

Experimental

To achieve the stated goal and the tasks arising from it, the authors used modern scientific works of scientists and specialists representing various legal schools, as well as the norms of the current UN Convention on Genocide, the Criminal Codes of Denmark and Kazakhstan. Based on a review of the information contained within these resources and their application in practice, the conclusion regarding the necessity of establishing double accountability for genocide is substantiated. During the development of the topic, the authors resorted to such methods as system analysis, synthesis, formal-logical method, and comparative-legal method. These are all examples of general scientific and special methods of scientific knowledge.

Results and Discussion

Considering the aforementioned, the 1948 UN Convention does not necessitate the formation of legal entity responsibility for the commission of this crime or involvement in it. Article IV relates to those who perpetrate genocide or any other crimes specified in Article III and are condemned, regardless of their rank or position. However, the Convention distinguishes two types of criminal liability in Art. IV: Along with the marked subject, the individual is also a subject of state crimes. The latter is defined as a "state agent", a "state representative", "representing the government as an agent", or an "actual agent acting without legal authority" [10; 30]. Consequently, the states as parties to the Convention, through their own authorized persons, can be held internationally criminally liable. However, to them as to legal entities in the face of transnational corporations, commercial banks, individual state and local bodies, business entities (enterprises) and other functioning institutions created and registered by them in accordance with national legislation, the provisions on liability are still directly not applicable. One thing to remember is that a state subject to international law that commits genocide or other crimes against humanity within the confines of international political and legal culpability may be liable for different consequences. This is how the 1948 Convention "deals with the state's obligation", according to some commentators referencing Bosnia and Herzegovina's case against Serbia and Montenegro [11; 222]. Under Art. IX, it is explicitly stated: "disputes between contracting parties concerning the interpretation, application or implementation of this Convention, including disputes concerning the responsibility of a state for the commission of genocide or one of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute" [1; 782]. In other words, "the Convention obliges states to be responsible before the UN Court for the commission of a crime and does not refuse to punish them" [11; 222]. When it comes to the State's responsibilities under Art. IX, however, if it is provided for in the Convention, it must be expressed unambiguously and plainly or, according to J. Quigley, "should be formulated in such a way as to establish its civil liability" [11; 223], since "the provisions of the treaty on penalties cannot be directed against the state because of its nature" [11; 223]. Only Great Britain, after years of efforts, managed to obtain from the

UN an understandable wording condemning the genocide committed by the state [11; 224]. However, it was also tied to the condition in The Convention's Article IX [11; 224]. From all the above, it ultimately follows that "much leaves much to be desired in the area under consideration in accordance with the norms of the Convention" [12].

Another point of contention is the question of legal entities' direct liability in the absence of formal state participation. There are, perhaps, plenty of grounds for including them among the subjects of crimes in general and, in particular, for committing acts of genocide. Here are just a few examples. American lawyer Michael J. Kelly in his extensive analytical article entitled "Never Again?" German Chemical Corporation Complicity in the Kurdish Genocide" (2013) cites the following facts: On April 15, 1987, an Iraqi plane supported by Saddam Hussein's regime air-dropped a chemical weapon containing poisonous gas on the Kurdistan Democratic Party, headquartered in province of Dohuk Zewa Shkan close to Turkish border, and on the Patriotic Union of Kurdistan, with its office locations near the village of Shergolu and Bergolu in the province of Sulaimaniyah [13; 12]; mustard gas, VX, Sarin and Tabun together formed a lethal cocktail that wiped out 5,000 Kurdish people in the city of Halabaj in one day only [13; 2]. Later, complicity of several German chemical corporations was established in the genocide. The same author, in his other work, also devoted to the subject of responsibility of legal entities for the commission of genocide, but in relation to the population of Darfur (Sudan), proves the participation of China National Petroleum Corporation in the crime [14; 320]. Another researcher, Robert J. McCartney, writes that the US has identified German companies, such as Preussag AG from Hannover, Pilot Plant GmbH from Dryah, Pen Tsao Materia Medica Center Ltd. from Hamburg and Ihsan Barbouti International from Frankfurt as key corporate players assisting the Gaddafi regime in Libya to build a poison gas factory in Rabta, south of Tripoli [15; 16] for pre-deliberately planned actions.

In all noted cases, corporations (companies) did not suffer (or were not attracted) to any type of liability. On the contrary, the rights and privileges granted to them in the face of globalization's accelerating pace and the expansion of free trade have been enormous. Especially German entities have been at the forefront of leveraging these advantages for big profits. **Therefore, considering that Art. IV of the Convention, while it still uses the term "punishment" to refer solely to persons, genocide may only be perpetrated against legal organizations.** It is obvious from the instances that crimes of genocide have occurred under Article III of the Convention. Legal entities might be held accountable for their actions only because of the corpus delicti (and the subject as one of its components). In this regard, first, it is necessary to bring up the "internal reserves" or capabilities of the Convention itself. Member states can therefore use the procedure laid out in Article XVI to revise the treaty. It states that "a demand for the revision of this Convention may be submitted at any time by any of the contracting parties by communication addressed to the Secretary General" [1]. Thereafter, "the General Assembly decides what action to take with respect to such a claim, if it considers it necessary to take any action" [1]. The drafting and adoption of a new Protocol to the Convention on International Trade in Endangered Species (CITES) might be one of these processes. A convention annex like this can either be or not be a part of the convention as a whole. However, the nature of the Convention allows these measures to be applied, provided that the States Parties agree.

A meeting of the UN International Law Commission should be held to explore the topic in further depth. Resolution 174 of the 174th Congress of the United Nations (II) of November 21, 1947, gives the United Nations' governing body, the General Assembly, the authority to review and reform international law in those areas where practice, precedents, and doctrines already exist, and to recommend its findings to the General Assembly, one of the United Nations' most important and deliberative bodies. There are objective reasons to involve specialized non-governmental organizations involved in the process of international law codification at an unofficial level in the solution of the issue under consideration. Among these, the Association for International Law should be highlighted. The purpose of this institution is to study, clarify and develop international law and relevant proposals. When preparing proposals, the experts of these structures will certainly consider its own standards and norms of the UN, arguing for holding legal entities liable. Following the 1985 Guiding Principles on crime prevention and criminal justice, it is necessary to build a new global economic system. This paper discusses the obligations of legal entities. It is stated here: "States parties should consider criminalizing not only persons acting on behalf of an institution, corporation or enterprise, or exercising a managerial or executive function, but also the institution, corporation or enterprise itself, by formulating appropriate measures preventing their possible criminal actions and punishment for them" [16; 34].

To put it simply, it is conceivable to conclude that legal entities can be held responsible for their actions under international law and universal legal system. In this sense, for the Genocide Convention of 1948 examples can serve, in particular, and current international treaties: the International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999); the UN Convention against Transnational Organized Crime (New York, 15 November 2000) and the Council of Europe Criminal Law Convention on Corruption (Strasbourg, 27 January 1999).

The first instrument states: “Each state party shall ensure ... that legal persons liable under paragraph 1 are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include financial sanctions” [17]. According to the second document adopted in accordance with 55th session resolution 55/25 of the United Nations General Assembly, subject to the legal principles of the state party and under Art. 5,6,8 and 23 the liability of legal persons must also be criminal, civil or administrative. Criminal and non-criminal sanctions, including monetary ones, should have a deterrent effect on legal entities [18]. The third regional document under Art. 18 asserts: “Each Party shall take such legislative and other measures as may be necessary to ensure that legal persons can be held liable in connection with the commission of the criminal offenses of active bribery, trading in office and laundering money...” [19].

Other forms of culpability may still be imposed on guilty legal organizations, despite the Convention.

International treaties are not limited to the creation of criminal culpability for legal entities, unlike the Guiding Principles. They also provide, for example, sanctions that should be material in nature (in the form of compensation for damages, fines, confiscation of property, compensation, interest, etc.). There are two reasons for including legal entities in criminal prosecutions under the 1948 Convention: First, so that the wording of the Convention can reflect this and second, in order to give specialized international criminal tribunals the option to apply this legal procedure going forward. Such official recognition, according to A.G. Kibalnik, will make it possible to consistently and effectively implement the tasks of not only international criminal law [20; 40]. *In the future, the establishment of dual responsibility for genocide may be enshrined within the national jurisdictions of the states parties.*

Conclusions

During the study of the United Nations Convention on Genocide, it was revealed that among the subjects for committing genocide or complicity in it, legal entities should be provided directly without the formal presence of the state. This means that the criminal code of almost every state party to the Convention establishes the concepts of personal and guilty liability. A person’s ability to be held accountable and govern his or her conduct is all that is required for the commencement of liability under the law.

Firstly, this position can be justified by the provision that, considering sufficient factual and legal grounds, many transnational corporations and companies still avoid criminal liability within Art. III Convention. Secondly, there will be precedents set if and when this problem is resolved within UN frameworks, advocating for the objectivity of punitive sanctions against legal entities.

When considering punishment for genocide, it is suggested to apply not only criminal measures but also material sanctions against legal entities and to provide such legal procedures in the future by international criminal tribunals specialized in such cases.

The implementation of the proposal under consideration is possible, in particular, by revising the Convention, which is allowed by Art. XVI treaty or by a supplementary Protocol to the Convention, which might have the same force as the Convention’s core provisions if agreed to by all states parties. In the future, the establishment of dual responsibility for genocide *may be* enshrined within the framework of national jurisdictions.

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Заңды тұлғалардың геноцид қылмысын жасағандығы үшін жауапкершілігі мәселесі туралы

Мақала БҰҰ-ның 1948 жылғы арнайы Конвенциясы шегінде де, сондай-ақ қатысушы мемлекеттердің қылмыстық заңнамалары шеңберінде де геноцид қылмысын жасағаны үшін қосарланған жауапкершілікті белгілеуге қатысты мәселені зерттеуге арналған. Осы орайда авторлар қылмыс құрамының және оның элементтерінің бірі болып саналатын субъектіліктің болуы тек жеке тұлғалар үшін ғана емес, сонымен бірге заңды тұлғалар үшін де қылмыстық жауапкершілікті енгізудің нақты негізі болып табылатындығын айшықтайды. Қаралып отырған мәселенің өзектілігін айқындау мақсатында жаңа халықаралық экономикалық тәртіпті дамыту тұрғысында қылмыстың алдын алу және қылмыстық сот төрелігі саласындағы БҰҰ-ның 1985 жылғы Жетекшілік қағидаларына, қолданыстағы әмбебап және аймақтық сипаттағы халықаралық шарттарға сілтеме жасай отырып, оны шешу қажеттілігі туралы ереже тұжырымдалған. Қорытындылай келе, мақала авторлары аталған олқылықтың орнын толтыру геноцидтің алдын алу жағдайларына әрекет ететіндігіне және бұл іс-қимылдың Конвенцияға қатысушы мемлекеттердің міндеттемелерінде көрініс табуы тиіс екендігіне назар аударған.

Кілт сөздер: Конвенция, геноцид, жауапкершілік, заңды тұлғалар, міндеттемелер, жеке тұлғалар, халықаралық шарттар, қатысушы мемлекеттер, ұлттық заңнама, қылмыстық сот төрелігі.

Ж.М. Аманжолов, А.К. Адибаева, А.Е. Рысалдиева

К вопросу об ответственности юридических лиц за совершение преступления геноцида

Статья посвящена исследованию вопроса относительно установления бипарной ответственности за совершение преступления геноцида как в пределах специальной

Конвенции ООН 1948 г., так и в рамках уголовных законодательств государств-участников. Авторами в этой связи отмечено, что наличие состава преступления и субъектов по одному из его элементов является фактическим основанием для введения уголовной ответственности не только для физических, но и для юридических лиц. В аспекте определения актуальности рассматриваемой проблемы также сформулировано положение о том, что его необходимо решить и со ссылкой на Руководящие принципы ООН 1985 г. в области предупреждения преступности и уголовного правосудия в контексте развития нового международного экономического порядка и действующих международных договоров универсального и регионального характера. В заключение авторами акцентировано внимание на том, что восполнение отмеченного пробела служит противодействием предусловиям совершения геноцида, и, следовательно, оно должно включаться в обязательства государств-участников Конвенции.

Ключевые слова: Конвенция, геноцид, ответственность, юридические лица, обязательства, физические лица, международные договоры, государства-участники, национальное законодательство, уголовное правосудие.

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