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STATE IN THE REALITIES OF INTERNATIONAL CRIMINAL ACTS

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Abstract

The article examines and assesses a) the departure of the UN Sixth Committee from the initial installation of the introduction of the Nuremberg principles into the system of international law *jus cogens*; b) the flawedness of the exclusion of the very possibility of qualifying the behavior of the state as internationally criminal is substantiated; c) the methodologically vulnerable aspects of the study of the topic of state responsibility for international criminal acts in the International Law Commission are indicated and possible ways of overcoming them are proposed.

Keywords: *Nuremberg principles, weak transitivity of guilt in a collectively committed crime, denazification of Germany as punishment of the Third Reich, motives for not including the Nuremberg principles in the rank of jus cogens, gaps in international criminal law, non-state subjects of an internationally criminal act, subject - bearer of internationally significant force*

Preamble to the topic

After the introduction on October 1, 1946 in Nuremberg by the International Military Tribunal (hereinafter referred to as the IMT or Tribunal) of the verdict against the leaders of Nazi Germany and the adoption in 1948[1] of the UN Convention for the Prevention of Genocide, crimes against humanity are not only not excluded from international practice, but its regular repetition becomes political in everyday life. At the same time, the subjects of such crimes are often covered by gaps in international law, including in terms of the institution of the state as a possible actor in such an act. In theory, the issue rests not only on unresolved problems of international law, but also political motives, often hidden in the interlines of documents and discourses on the topic. Decades of discussion of the problem within the framework of the International Law Commission (ILC)[2] in 1996 culminated in the completion of a document entitled "Draft Code of Crimes against the Peace and Security of Mankind" (UN doc. A / 51/10).[3]

[1] https://www.un.org/ru/documents/decl_conv/conventions/genocide.shtml

[2] The UN ILC is directly accountable to the Legal Committee established on December 11, 1946 (also known as the Sixth Committee) of the GA. In our text, for the name "International Law Commission", the forms "ILC" and "Commission" will also be used in parallel.

[3] If it is not detrimental to the text, the title of the document will be used briefly as Code.

But he also left open the question of the criminal responsibility of states, which is key to international justice. The Commission decided to confine itself to considering questions of individual responsibility for internationally criminal acts. In 2001, the United Nations Legal Affairs Committee (Sixth Committee), under whose auspices the ILC operates, of the UN General Assembly (hereinafter referred to as the UNGA or GA) presented a new report on the topic (A/56/589 and Corr.1). On its basis, the UN General Assembly adopted resolution 56/83[4] "Responsibility of States for internationally wrongful acts." The document “Responsibility of States for Internationally Wrongful Acts” presented by the ILC, on which the UN General Assembly resolution 56/83 was adopted, differs significantly from the draft Code, in the development of which it was developed.

We set the task to trace the transformation of the idea of the place of the state in the realities of international criminal offenses and to identify the vulnerable aspects of the study of the topic in the ILC. The article is aimed at revealing the gaps in international law that serve as a legal shelter for states that commit grave crimes against humanity. The Republic of Azerbaijan (AR) acts in this way, which implements the policy of genocide of the Armenians of Transcaucasia, initiated by the Turks and the Azerbaijani Democratic Republic (ADR), and then continued by the Azerbaijani Soviet Socialist Republic (AzSSR).

The subject of a genocidal act

In a general setting, consideration of the topic in theory faces the problem of sharing guilt between the participants in a collectively committed serious crime (subjects under jurisdiction can be individuals, spontaneous or organized crowds, gangs, organizations, and finally, the state). The complexity of the issue in legal phenomenology is manifested in determining the measure of responsibility on the one hand of the state and its subordinate institutions and, on the other hand, of individuals - ideologists, organizers, performers and accomplices - in a jointly committed act. The interval of divergent opinions about the division of guilt between them is wide, at the beginning and at the end of which there are the names of two Romans - the ancient Roman historian of the first century Cornelius Tacitus, who is sure that "where there are many guilty, no one should be punished", and the Italian lawyer of the XIX century Pellegrino Rossi, who considered such reasoning stupid, since the perpetrators go unpunished. The complexity of the task is already evident in domestic legal proceedings, which may also have jurisdiction over crimes that pose a danger to peace and general security. National justice will not face serious conflicts if the state itself, which was in charge of the case, is not complicit in the crime. But if it is itself the subject of criminal liability in the case, then the imperative of global security indicates the inevitability of the establishment of a supranational institution of justice endowed with appropriate powers.

[4] https://legal.un.org/ilc/publications/yearbooks/russian/ilc_2001_v1.pd

The very idea of such an institution arose historically relatively recently, when the danger of the *jus ad bellum* principle characteristic of the classical system of international relations became obvious. The first in 1872, after the end of the Franco-Prussian war of 1870-1871, it was voiced by the President of the International Committee of the Red Cross (ICRC) Gustave Moynier, who proposed by a special Convention to establish an International Judicial Body to punish the perpetrators who violated the Geneva Convention of 1864 on improving the situation of the sick and wounded in the warring armies. Then this idea was outlined by the Russian international lawyer Count L. A. Komarovsky, who expressed the conviction that the foundation of such a court was only a matter of time and that not only theoretical, but "much more practical needs will force states to embark on the path of its implementation".[5] The next step in the development of the idea of a supranational institution of justice was the Hague Convention on the Laws and Customs of War on Land, adopted in 1907, which provided for the liability of the signatory states to pay damages in the event of their violation of the conditions of land war established by the Convention.

Vespansian Pella's doctrinal breakthrough

At the beginning of the twentieth century, the idea of legal responsibility of states, as they say, was in the air. It is well known that a breakthrough in this topic was made in 1925 by Romanian international lawyer Vespasian Pella. In his work "Collective Responsibility of States and Criminal Law of the Future" he defended the idea of the legality and necessity of criminal responsibility of states. The theorist of international law saw the realization of this idea as a decisive condition for the preservation of international peace and stability. Pella believed that the state as a subject of law is endowed with an objective, independent of the will of people, with a substantive status not inherent in ordinary organizations (legal persons), the establishment and dissolution of which are made by the subjective will of people. "The fact," writes Pella, "that not only the leaders alone, but also the State as a whole can be the object of criminal measures, can contribute to the development of resistance to criminals who are at the head of the State".[6] But this breakthrough realized by Pella was destined to remain only a breakthrough in theory. Smoldering in the ontological depths of the phenomenon of international crime, the contradiction between law and politics, power and justice, truth and expediency made itself felt.

The State as a subject of international crime at the Nuremberg Trials

The horrors experienced by mankind during the Second World War seemed to lead to the realization of the need to urgently introduce into the system of international criminal jurisdiction the doctrinal ideas of V. Pella. The victorious powers did not

[5] Kamarovsky 1881.

[6] Pella 1957: 83.

question that it was Nazi Germany[7] that was the main culprit of the crimes committed against humanity. But at the Nuremberg Trial (1945-1946), which was historically the most appropriate moment for the development of this fundamental topic for international justice, they actually bypassed it in terms of theory, despite the fact that in the sections of the verdict relating to its justification, the accusations addressed to the Third Reich prevail. This is what the defendants' lawyers referred to in their argument that the subject of international law can only be a State and not a natural person, which, as they submitted, cannot be such in principle. The defendant for the crimes committed against humanity during the war, as the defense argued, can only be the Third Reich. The Tribunal sets out their argument as follows: "It was argued that international law only dealt with the acts of sovereign States without imposing punishment on individuals, and it was further argued that where the act in question was an act committed by a State, the persons who practically carried it out were not personally responsible, but stood protected by the doctrine of State sovereignty".[8] To this the Tribunal responded unequivocally: "In the Tribunal's view, both these contentions must be rejected".[9] The Tribunal referred "to the long-recognized fact" that "international law imposes duties and responsibilities on individuals in the same way as on States".[10]

In support of this thesis, the prosecutors cite Article 227 of the Treaty of Versailles, which provided for "the establishment of a special tribunal, composed of representatives of the five Allied and Associated Powers at war with Germany during the First World War, to prosecute the former Emperor of Germany 'for gross violations in the field of international morality and for failure to respect the sanctity of treaties'".[11] Chief Justice Stone's statement in Ex Parte Quirin (1942, 317 U.S.) is also mentioned: "From its inception, this court has applied the laws of warfare as including that part of international law which prescribes the status, rights and duties of enemy states as well as their individual agents in time of war".[12] A generalization of the key legal theory issue addressed in this proceeding is provided by the theoretical argument that "crimes against international law are committed by human beings, not by abstract categories, and it is only by punishing the individuals who commit such crimes that the established rules of international law can be respected".[13]

The pathos of the Prosecutors' arguments prior to the above specification of the punishable subject essentially boiled down to the substantiation of the following two

[7] In the course of the process, the idea of the criminal responsibility of states was raised more than once.

[8] Nuremberg Trials: 608-609.

http://militera.lib.ru/docs/da/np8/index.html

[9] The Tribunal, in part of its justification, also refers to its Charter adopted in London, which states that "individuals have international obligations that exceed the national duty of obedience imposed by an individual state." See Nuremberg Trials: 608-609.

[10] Nuremberg Trials: 608-609.

[11] Nuremberg Trials: 608.

[12] Nuremberg Trials: 609.

[13] Nuremberg Trials: 608-609.

theses: a) the responsibility of the State as a possible subject of a crime against humanity is generally recognized; b) the consideration of the acts of individuals as potential subjects of an international crime needs legal justification. It is in the context of substantiating the second thesis, "to show that individuals may also be punished for violations of international law", that the Tribunal turned to relevant case law, taking the first thesis for granted. But the Tribunal's generalization that "only (emphasis added - A.M.) by punishing individuals who commit such crimes can the provisions of international law be respected" suggests a devaluation of the role of the State in criminal acts. But the Tribunal's verdict suggests otherwise. The fact is that the formula "only by punishing individuals" in the verdict did not at all exempt from punishment the subjects referred to in the verdict as "abstract categories".

The punishment of the Third Reich as a state

The Allied Powers were unanimous in the denazification of Germany, which included the liquidation of all Nazi organizations. It is true that the Tribunal did not limit itself to this and brought charges against civil servants and members of organizations found criminal by the Tribunal. In the latter case, the Tribunal referred to Article 10(d) of its Statute, where the list of acts considered as a crime includes membership in "certain categories of criminal groups or organizations whose criminal nature will be recognized by the International Military Tribunal".[14]

Article 10(d) of the IMT Statute in fact provides a definite solution to the division of the guilt of the participants in a collective crime according to the principle of descent from the organization to its structural components, in this case from the State to institutions and then from them to individuals. But the principle of descent has not been interpreted as an attitude of strict transitivity or equal apportionment of common guilt among persons who were members of the criminal organization recognized by the Tribunal. Moreover, the principle of descent "according to apportionment of guilt" did not imply total liability of individuals. The involvement of a member of the accused organization in acts of a criminal nature, in the formation and promotion of the ideology of the organization could not be disregarded, which explains the absence of a universal formula for the apportionment of guilt from the organization to its members.[15] The Tribunal adhered to the position of individualization of the degree of guilt up to the

[14] Verdict of the International Military Tribunal (Nuremberg Trials: 638).
http://militera.lib.ru/docs/da/np8/index.html

[15] It was with this in mind that on March 5, 1946, law number 104 was issued in the American zone. According to the law, persons over 18 years of age were required to fill out and submit to the judicial authorities a questionnaire containing 131 questions, on the basis of which they were assigned to one of five categories of Nazi involvement. The law provided for penalties of varying severity, ranging from imprisonment to prohibition from holding statutory office. The questionnaire identified the following categories of persons: (1) major perpetrators; (2) guilty (activists, militarists, profiteers); (3) minor perpetrators; (4) fellow travelers; and (5) innocent. A similar process was set in motion in the Soviet zone of occupation with an emphasis on the class reorganization of society. The purification of Germany from Nazism was considered complete in 1948.

recognition of innocence of its individual members. The transmission of guilt and responsibility for a criminal act along the line of ascent from individuals and intermediate stages to the highest organs of the organization was not strictly transitive. A crime committed by a member not commissioned by the organization or not arising from its objectives was understood as an act committed outside the responsibility of the organization.

The non-transitivity of guilt in the relationship between the organization and its members, both top-down and bottom-up, points to an ontological distinction between the subjectivities of the organization and its individual members, which could not but find a certain manifestation. While declaring that "only by punishing individuals[16] who commit such crimes can the provisions of international law be respected", the IMT verdict nevertheless devotes a special section to "Accused Organizations", which lists the organizations to be punished: "...the Gestapo, the SD, the SS, the SA, the Imperial Cabinet, the General Staff and the High Command of the German Armed Forces".[17] But the Tribunal did not limit itself to punishing individual organizations. The victorious countries, as noted above, were unanimous that the verdict should not bypass the Third Reich and negotiated the course of denazification of Germany. So, not only the individual organizations of the German state structures, but the Third Reich itself did not escape punishment. Germany was temporarily deprived of state sovereignty and divided into four occupation zones. The deprivation of Germany's sovereignty and its division into occupation zones, which eventually led to the formation of two German states, were undoubtedly acts of punishment of Nazi Germany as a real (not abstract!) entity. The very presence of the occupation troops in the status of victors (but not liberators!) determined the meaning of this presence as an act of punishment of the German state. It is equally obvious that, in their totality, these acts against the defeated Third Reich were the punishment of Germany as a nation-state, which determined the further history of the German nation both during the existence of two German states with different socio-political systems and after their unification.

The difficult road to the Draft Code of Crimes against the Peace and Security of Mankind

Although in fact the Third Reich was punished, the very concept of punishing the institution of the state remained legally undeveloped. But the Nuremberg spirit that swept the post-war political world strongly pointed to this flaw in the international legal system. It is not by chance that on October 23, 1946, only three weeks after the closing of the Nuremberg Trials, the UNGA addressed the issue of early incorporation of the applicable principles of the Charter of the Nuremberg Tribunal into the body of

[16] This attitude was most unequivocally manifested in Allied Control Council Directive No. 38 of October 12, 1946, "Arrest and Punishment of War Criminals, Nazis and Militarists, Internment, Control and Supervision of Potentially Dangerous Germans." https://memorial.krsk.ru/DOKUMENT/USSR/19461012.htm/

[17] Nuremberg Trials: 639.

international law. It was a question of elevating the "Nuremberg principles" to the rank of general principles of customary law. The letter from US President Harry Truman to Francis Biddle, the US judge at the Nuremberg Trials, regarding his report to the UNGA was particularly pathos. In it, Truman made clear the ultimate purpose of placing the issue on the UNGA agenda, which, in his view, was that "the United Nations will reaffirm the principles of the Charter of the Nuremberg Tribunal in the context of a general codification of crimes against the peace and security of mankind." It was in this "Nuremberg atmosphere" at the initiative of the United States that the UNGA adopted resolution 95(I) on December 11, 1946 under the title "Reaffirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal".[18] After the Nuremberg Trials, it seemed that the UN energetically undertook the task at hand. By resolution of December 11, 1946, the Sixth Committee of the UN was established, whose functions included the theoretical elaboration of topics relating to the progressive development of international law. Further, on November 21, 1947, in order to implement this function of the Committee, the UNGA, by Resolution 177 (II), established the ILC with the task of drafting a Declaration of Rights and Duties of States (Code on Crimes against the Peace and Security of Mankind). On December 6, 1949, the UNGA, "in view of the emergence of new developments in the field of international law", on the basis of the draft Declaration of the Rights and Duties of States received from the ILC, decided "to transmit to the Member States of the Organization for consideration the draft Declaration and all documentation relating thereto ... and to request them to communicate their comments and observations not later than July 1, 1950".[19] The ILC carried out this assignment, but the draft was not approved by the GA. By its resolution 488(V) of December 12, 1950, it again invited Member Governments to submit their comments on the draft Code to the ILC, and the latter to take them into account in finalizing the text. In 1954, the Commission submitted an updated version of the Code to the UNGA, but even this version was not adopted, since resolution 897(IX) of December 4, 1954,[20] found that it did not overcome the problems associated with the phenomenon of aggression,[21] a concept which was still to be clarified by the Ad Hoc Committee established for this purpose by GA resolution 2330(XXII) of December 18, 1967. It was not until 1978, after the definition of aggression had been defined on December 14, 1974 (resolution 3314 (XXIX)), that the GA returned to the issue of the

[18] https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_r.pdf

[19] https://undocs.org/pdf?symbol=ru/A/RES/375(IV) КМП

[20] https://undocs.org/en/A/RES/897(IX)

[21] Resolution 897 (IX) states: "... Bearing in mind that, by its resolution 895 (IX) of 4 December 1954, the General Assembly decided to entrust an ad hoc committee of nineteen Member States of the Organization with the task of drawing up and submitting to the General Assembly at its eleventh session a detailed report on the definition of aggression and a draft definition of aggression, decides to postpone further consideration of the said draft code of crimes against the peace and security of mankind until such time as the said ad hoc committee shall have the opportunity to consider the draft code of crimes against the peace and security of mankind...". https://undocs.org/pdf?symbol=ru/A/RES/896(IX)

draft Code of Crimes against the Peace and Security of Mankind and, by resolution 36/106 of December 10, 1981, invited the ILC to return to work on its draft. The GA obliged the Sixth Committee, on the basis of and as proposals on the subject were received by the Committee, to continue its consideration of the existing draft Code with a view to producing a codified text. The ILC, within the framework of which discussions were held on theoretical issues for the progressive development of international law, periodically reported to the UNGA on its work, which finally adopted the Draft Code in 1996.[22] The above chronology of the drafting of the Code shows how difficult the path of drafting was. The motivations behind the ILC members' arguments were probably not only purely theoretical. The political motives accompanying the discussions may not have been explicitly articulated. They are usually carefully concealed in the subtexts of near-scientific arguments in a way that sometimes remains elusive.

State responsibility for an international crime as a key question of international criminal law

Why, after Nuremberg, did the idea of reducing the punishment of the state to the punishment of natural persons become firmly established? G. Donnedieu de Vabra[23] was of the opinion that the reason for this was the deprivation of German sovereignty. The elimination of its entire state structure meant the abolition of its subjectivity. The topic was removed from the political and legal agenda after the completion of denazification and the formation of two German states that were not successors of the Third Reich. A kind of retreat from the closure of the topic of punishment of the Third Reich was the assumption by the FRG (and since 1990 by the united Germany) of the obligation to pay reparations for material damage caused by Nazi Germany to the victorious states and individuals.[24] It is true that its political subtext - to represent the entire German nation - cannot be overlooked.[25]

Be that as it may, these processes according to Donnedieu de Vabra have overshadowed the vital task for global security of legally criminalizing a crime against humanity committed by a state as the main subject of international relations. But there is another explanation for why the issue of criminal responsibility of states has been pushed back on the ILC's agenda. Already in 1951, the Committee on International

[22] Yearbook of the International Law Commission 1996. https://bit.ly/4azXnh0

[23] Г. Donnedieu de Vabra (1880-1952) - famous jurist, chief judge at the Nuremberg trials from France, consultant in drafting the UN Convention "On the Prevention of Genocide".

[24] The reparations act emphasized compensation for victims of the Holocaust according to the Reparations Agreement between the FRG and Israel signed in 1952.

[25] The FRG, formed on the basis of the unification of the occupation zones of the United States, Great Britain and France, on the basis of the so-called doctrine of Foreign Ministry State Secretary Walter Hallstein in 1955-1970 claimed to "solely represent all Germans in the international arena". The doctrine failed in practice with the fact that the GDR was recognized by many countries and its admission to the UN in 1970. Chancellor Brant had to retreat from this doctrine in 1970 and also recognized the Oder-Neisse border.

Criminal Justice[26] in its report formulated the conclusion that the International Criminal Court is not competent to deal with the issues of responsibility of states for international crimes committed by them due to their political nature. Here is an excerpt from the report: "...the Committee considered first of all the question whether States could be subject to the jurisdiction of the court. Regardless of whether the rules of substantive international criminal law currently allow for the criminal responsibility of States as such, it was pointed out that the responsibility of States for acts constituting international crimes is essentially political in nature and that it is therefore not for the court to decide such questions ... it is important to reaffirm and affirm the newly established principle that natural persons may be recognized as defendants for criminal acts".[27] A majority of the Committee voted in favor of this concept of criminal responsibility of States. But such a categorical verdict of the Committee on International Justice proved unconvincing to the ILC. It could not ignore the obvious fact that any act of a state in the global arena, especially of a criminal nature, cannot be purely political and not contain a legal component. It is not by chance that the ILC, which returned to work on the Draft Code in 1983, asked the General Assembly to clarify the inclusion of States in the category of subjects of jurisdiction for crimes against humanity, bearing in mind the political nature of the issue,[28] and in 1984 decided to limit the development of the Draft Code to the criminal liability of natural persons. This was a postponement of the issue, not a removal of the topic from the ILC's agenda. The motives for this slowness in developing the topic were not the complexity of the problem. Underlying political circumstances, as pointed out by experts, were at work.[29] And it is understandable that in the 1996 "Draft Code of Crimes against the Peace and Security of Mankind", the Commission, in Article 4, fixed that the "responsibility of individuals for crimes against the peace and security of mankind ... does not in any way affect the responsibility of States under international law" provided for in the Code. It began drafting the Code again in 1998, after Special Rapporteur Arangio-Ruiz (Italy) was replaced by James Crawford (Australia).

In 2001, the ILC completed the second reading of the draft article on the topic under development and submitted to the UNGA a report on its work under the title "On the Responsibility of States for Internationally Wrongful Acts". The conceptual differences of the new version of the Code from previous and doctrinal works on the topic (especially from the ideas of V. Pella) testify to the shift that the very political and,

[26] Unlike the Commission, which is composed of internationally recognized specialists in criminal law, the Sixth Committee is composed of representatives of States. It must be assumed that it was through the latter that political motives permeated the drafting process.

[27] Doc. UN A 2136, para. 87, p. 11.

[28] Yearbook of the International Law Commission 1983: 17.

[29] Igor Fisenko, in his article "State Responsibility for International Crimes", was the most outspoken in this regard: "The competence of international judicial bodies is based on the consent of the disputing parties, and States always have a negative attitude towards the possibility of bringing such an issue to the court of a third party not under their control". https://elib.bsu.by/bitstream/123456789/30449/1/1998_3_JILIR_fisenko_r.pdf

behind it, the methodological vision of the topic has undergone. The Special Rapporteur explains this fact as follows: "The 1996 draft considered the following two relevant aspects ... on State responsibility: on the one hand, certain obligations are qualified as obligations towards the international community and not only towards individual States; on the other hand, certain particularly serious breaches of such obligations should entail particularly severe sanctions. Despite the general willingness on the part of most States (emphasis added - A.M.) to accept these general principles, the idea of holding a State responsible for a "crime" has been and remains deeply controversial. In addition to objections from a significant number of States (emphasis added - A.M.), the provision on international crimes raises problems arising from the compatibility of the concept of crime with the legal framework of inter-State relations, as well as the need to ensure ... due process, which are correlates of criminal responsibility but were absent from the 1996 draft.[30] It is unlikely that ensuring the compatibility of "the concept of crime with the legal framework of interstate relations" was an insurmountable task for the ILC. Previously, in many more serious cases, the ILC had been able to achieve by consensus language acceptable to all its members, such as in the definition of "aggression". The insurmountable obstacle was surely the objections of "a significant number of States", which prudently objected to the application of the notion of "crime"[31] as a possible qualification of the conduct of States, so as not to face an international court as having committed a criminally punishable international crime. The Commission nevertheless chose to avoid "the use of the problematic term 'crime'". It is left to speculate that the "significant states" included politically significant states. One can only guess that the "significant number of states" included politically significant states. Thus, the decisive point in the conceptual transformation of the vision of the problem was the Commission's rejection of the idea of characterizing an internationally criminal act of a State as a crime. Nevertheless, in order to avoid an apparent break with its previous statements, the Commission assigned the third chapter of the second part of the instrument to "serious breaches of obligations", where a serious breach is understood to mean a breach by a State of an international obligation that "arises from a peremptory norm of general international law".[32] The responsibility of States for internationally wrongful acts was thus categorized as a "secondary rule" of international law.

The Special Rapporteur himself, Arangio-Ruiz, was opposed to this transformation of the topic. In his report, the "primacy" among the subjects of criminal acts, in the spirit of V. Pella, was given to the State. Especially categorical were his provisions formulated in Article 16 of his report concerning the crime of aggression: "The rule of international law prohibiting aggression applies to the conduct of a State towards another State. Consequently, only a State can commit the crime of aggression in violation of a rule of international law prohibiting such conduct ... Thus, the violation

[30] James Crawford. Articles on the Responsibility of States for Internationally Wrongful Acts. C. 7. https://bit.ly/3v5MCCL

[31] Ibid, p. 8

[32] Yearbook of the International Law Commission 2001. Articles 40 and 41 https://bit.ly/3Ru76Nb

by a State of a rule of international law prohibiting aggression gives rise to the criminal responsibility of persons who played a decisive role in the planning, preparation, initiation or execution of the aggression. The words “State-sponsored aggression” make it clear that such a State-sponsored violation is a necessary condition for the criminal responsibility of a person for the crime of aggression to arise".[33] Arangio-Ruiz disagreed with the Commission on another important issue. He presented proposals for a mechanism to implement State responsibility for international crimes as a concretization of Article 19 of the Draft Code, which defines the concept of international crime.[34] Although it was clear that without the development of such a mechanism, the Code would lose its practical value, the Commission decided not to reflect the Special Rapporteur's proposals in the document. This was perhaps the breaking point in the reorientation made by the ILC in the vision of the topic and the methodology for its development. The concept of "crime" as a possible qualification of state behavior was ousted from the conceptual system of the topic. And even after this radical revision of the Code, some states opposed its convention, while others, as James Crawford notes, generally favored leaving the Code as "an ILC text approved ad referendum by the General Assembly.[35]

The importance of a codified definition of the responsibility of the State for an international crime is predetermined by the place of the State in international relations, its status as the axial subject of these relations. The criminality of an individual as a party to acts against humanity is derived from the civilizational orientation of the State, which determines its behavior as a subject of criminal acts against other States and peoples. A single individual simply cannot physically commit such crimes. That is why logic rebels against the attitude that international justice should punish only individuals, bypassing the main author of an international criminal act - States. Until 2001, the texts of the Draft Code had been transformed in a creeping reorientation towards the removal of the charges against the State. The theoretical basis was an extract from the Nuremberg verdict that "crimes against international law are committed by human beings and not by abstract categories". The approach was first put into practice at the Tokyo International Military Tribunal and later at the ad hoc tribunals - the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Tribunal for Lebanon. However, a closer look reveals that the reference to this thesis in isolation from the factual verdicts against the Third Reich and a number of organizations under its control is a departure from the philosophy of the Nuremberg Tribunal. Its verdict was aimed not only at the liquidation of the Nazi organizations it had

[33] Yearbook of the International Law Commission 2001: 16.

[34] These are articles 51-53 of the Special Rapporteur's Report. See Yearbook of the International Law Commission 1996: 90-92. https://legal.un.org/ilc/publications/yearbooks/russian/ilc_1996_v2_p2.pdf

[35] We have no information about which states have been working hard in the ILC and the General Assembly to remove the characteristic of "crime" from the list of possible characteristics of state behavior. But logic suggests that they should be States that do not rule out the use of force and extremely brutal methods to realize some of their claims. They can also be states that need conflicts as instruments for managing international processes.

classified as offensive, but also of the state that had spawned them. The pathos of the thesis from the verdict, which appears in almost all documents and articles devoted to the topic, was not to absolve the state from responsibility for the crimes committed, but to parry, in the context of the trial, the defense lawyers' argument that the defendants were protected by the doctrine of state sovereignty. Circumvention of this fact opens the door to all kinds of manipulations. And the main thing in them is to ignore the sentences passed and enforced on the Third Reich and Nazi organizations. Thus, the task of elevating the Nuremberg principles to the rank of *jus cogens* was removed from the agenda.

A "soft departure" from the starting ideas, as Special Rapporteur James Crawford writes in the article we have already mentioned, had developed by the sixties, when "there was support for the idea that the ILC should refocus its attention on 'identifying the general rules governing the international responsibility of the State'." This eventually led to the ILC Report (A/56/589 and Sogg.1) removing the very possibility of a State being charged with and adequately sentenced for an international crime. Prior to the adoption of the Code in 1996, the lawfulness of attributing such conduct to a state was obvious to all ILC drafters. The Code left the question of attribution of criminal conduct to the state open. And that is understandable. It was obvious to any non-biased ILC jurist that the State was "the principal subject of international crimes".[36]

To the vulnerability of the methodology for examining State responsibility for international crimes in the ILCs

The failure to apply the "problematic term 'crime'" to state behavior is only one flaw in the 2001 Code. It is clear, for example, that any international instrument on state responsibility for wrongful acts will be ineffective without taking into account the factor of force and its conventional legal understanding (preferably with the precision of codification).[37] Otherwise, one will have to deal only with the consequences of the "work" of this, as it is sometimes called, mole of history. Both the Code and UNGA Resolution 56/83 bypass the phenomenon of force, a factor that constructs the global world order. In classical international law, the place of force was defined by the principle of *jus ad bellum* - in the right of a sovereign state to go to war without justification. I.Kant's project of perpetual peace with the ideas of republicanism, abolition of armies and creation of a federation of states with a unified legal system was conceived to limit the place of uncontrolled force in international relations. But it remained a mere blueprint. The Briand-Kellogg Pact for the Prohibition of Aggressive War, adopted in 1928, also proved unworkable. The establishment of the UN after World War II, which

[36] Formulation by I. Fisenko from his article "Responsibility of States for Internationally Wrongful Acts". Belarussian Journal of International Law and International Relations 1998, No. 3. C. 20. https://bit.ly/3RplRAH

[37] Both the Code and UNGA Resolution 56/83 are silent on this factor, although there is no doubt that the high quality lawyers involved in drafting these documents were aware of it.

included in its charter a prohibition on the use of force and threat of force, had the same goal[38]. But the use of force and wars do not stop.

All this leads to the necessity of attributing a special place in international relations to subjects endowed with particularly great power, which allows them to influence world processes, determine their course, and be a subject in conflicts. Meanwhile, the reports developed by the ILC consider only the state as a subject of international relations and a possible bearer of power. In this, the ILC follows the logic laid down in the foundations of the UN as a state-centric organization. This approach may have been justified for the modern era. But its flawed nature is now obvious. The introduction of the concept of force into the conceptual system of international criminal issues will reveal the existence of a whole club of actors responsible for international criminal acts. The state turns out to be one of them in the list, in which, apart from it, non-state formations - international organizations, movements, clans and transnational financial and economic giants, etc. - can appear. This list is open to any entities endowed with power commensurate with the "substance of international relations", sufficient to cause disturbances in them and thus to be an actual subject of international relations, regardless of whether they are recognized as such.

The state-centricity of the "classical times" perceptions of the world order and the traditional international political structures corresponding to them (primarily the UN) conceal the significance of non-state actors in world processes, overshadowing the relevance of the legal understanding of their international criminal acts.

The existence of non-state entities endowed with sufficient material and other potential to be a party to international conflicts and a subject of international unlawful acts (including criminal ones) is an obvious fact, and the involvement in the subject of international criminal law of the concept of "bearer of internationally significant force" as a characteristic of potential subjects of international offenses is a matter of time. Paraphrasing the statement of the international lawyer Count L. A. Komarovsky, convinced in his time of the inevitability of the establishment of the International Court of Justice (see reference 6 of our article), we can say that in this case too, not only theoretical, but much more practical needs will force the international community to embark on the path of its realization. Only in this way will the idea of elevating the Nuremberg Principles to the rank of *jus cogens* before the UN be realized, taking into account the obvious fact that "material force must be overturned by material force",[39] and not by declarations and constructions "in order to induce ... a State to fulfill its obligations".[40]

[38] It is noteworthy that the UN, which has taken on the mission of prohibiting the use or threat of force, has itself been structured "on the basis of force": it is the most powerful states that are permanent members of the Security Council, where they have veto power.

[39] Marx, Engels 1953: 422.

[40] UNGA Resolution 56/83. Responsibility of States for internationally wrongful acts. Part III, Chapter II, Article 49.

Another methodological gap in the reports of the UN Sixth Committee on the topic under consideration is also evident. We are referring to the absence in them of the topic of the responsibility of a people (nation) as a non-abstract subject of possible relevance to international criminal acts. For common sense, there is no explanation as to why a people, being the source of statehood, endowed with the right of self-determination, electing the highest legislative and judicial authorities, independently deciding on the form of its State existence, should not be held responsible for internationally criminal offenses committed by the State established by it and the authorities elected by it. It appears that a people (nation) is endowed with virtually unlimited domestic rights, but is exempt from all responsibility both to the world community as a whole and to another people against whom the State it established has committed a criminal act.

A comprehensive analysis of the legal gaps in the documents submitted by the Sixth Committee of the UNGA is beyond the scope of this article. It is a special topic. We aimed to show those obvious flaws of these documents, which create the atmosphere of the global legal environment in which the states, set up for crimes against humanity feel cozy, like, for example, the Republic of Azerbaijan.

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