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IMPLEMENTING MECHANISMS OF THE UN CONVENTION ON GENOCIDE IN THE CRIMINAL LEGISLATION OF THE PARTICIPATING STATES: GENERAL COMPARATIVE ANALYSIS

Abstract. The UN Convention on the Prevention of Genocide of 1948 is the main legal source for determining the composition of this crime. Today, the parties to the international treaty are 156 states that have implemented or are implementing conditions in the implementation of its provisions. Using comparative analysis of the criminal laws of different states, it is shown in this connection how the process of improving the effectiveness of the norms of the Convention in national legal systems is taking place. At the same time, it is confirmed that individual participating States not only formally reproduce the norms of the Convention but also purposefully implement procedures for their addition and improvement within the framework of internal jurisdictions. The result of the study is the fact that the implementation of the standard established by the Convention acquires a stable and consistent nature, and particularly for the post-Soviet republics.

Keywords: The UN Convention, genocide, implementation, criminal codes, a crime.

Implications of the Convention provisions implementation for the States Parties

The special Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260 (III) states in ArticleV that"the Contracting Parties undertake to enact, in accordance with their 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 of any of the other acts enumerated in article III." [1, p.781]. It follows from the meaning and content of the above provision that in assuming such an international obligation, a State Party to the Convention must ensure that it iseffectively implemented(enforced) throughout its territory not only by all the authoritative acts at its disposal in accordance with its constitutional and other rules and regulations not inconsistent therewith.In international law,this system of measures is referred to as "implementation" or, speaking broadly, "a mechanism of harmonizing or coordinating international and national lawsby employing recognized legal arrangements (methods)."Accordingly and in line with the norms enshrined in the Convention, a State Party shall undertake and carry out its actions aimed not as much at avoiding conflicts as atmaking national legislation that would not "conflict" with provisions of the international treaty in question.

As the current international practice shows, a more universal mechanism of implementation of this act by a State Party is to integrate its provisions into such State's national criminal law. Currently, the most common and applicable implementation methods include incorporation, reception and modification (expansion) of existing norms of criminal law in pursuance of an international treaty.

Principal mechanisms of the Convention provisions implementation in the States Parties' criminal laws

The Convention recognizes as wrongful and punishable not only genocide itself but also other acts that directly "flow" out of it,such as conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.

The enumerated initial forms of participation in genocide (or the so-called "inchoate crimes"), however, are not always covered by the norms of criminal laws of the States Parties. This is true, for

example, for the majority of the post-Soviet countries such as Russia, Kazakhstan, Latvia, Moldova, Belarus, Armenia, etc. However, some of the parties to the Convention, including Azerbaijan, Austria, Bulgaria, Spain, Macedonia, Poland and the United States, considered it necessary to either partially take into account this contractual obligation or expand legal consequences of its violation. In this regard, Article 104 of the Criminal Code of Azerbaijan of 30 December 1999 contains a direct and explicit incitement to commit genocide [2, P.132]. Paragraph 2 of §321 of the Austrian Penal Code includes such *corpus delicti* as conspiracy to commit genocide (it is defined as any conduct whereby(any) person agrees with another person to commit one of those *acti rei* specified in paragraph 1) [3, P.347].Articles 416.2 and 416.3 of the Bulgarian Criminal Code of15 March 1968 criminalize both preparation for and explicit and direct incitement to, committing genocide [4, P.284]. In addition, according to Article 419 of the Criminal Code of the same Balkan state, culpable is any officer who, subject to distinctions in the previous articles (416, 418), closes his or her mind to a situation where his or her subordinates commit any of the crimes specified in Section III [5, P.284] (here it should be noted that this part of the Bulgarian Criminal Code is entitled "Liquidation of Groups of the Population (Genocide) andApartheid").

Criminal Codes of Spain, Australia, Macedonia, Poland and the United States also extend the boundaries of liability with additional elements essentialto the offence of genocide. Thus, the Spanish Penal Code of 23 November 1995, which contains the only Article 607 under Section II "Crime of Genocide", designates as another essential element a sexual assault on members of a national, ethnic, racial or religious group [6].§3 of Article 118 of the Polish Criminal Code of 6 June 1997,likewisethe Bulgarian lawmaker, partly provides for the essential elements in the form of preparation for genocide [7, P.128]. The Macedonian Criminal Code of23 July 1996 sees creation of a group with the purpose of committing genocide as a qualifying element [8]. And finally, the US Federal Criminal Code of4 May 1962 stipulates in §1091 that the crime of genocide can be committed both during peacetime and wartime [9], and also contains §1093 "Definitions"where the notions of "children", "ethnic group", "national group", "racial group", "religious group", "members", etc. are defined [10].

Recently, "there is a clear tendency towards a more extensive interpretation of the object of genocide"[11] in national criminal laws,"which can be caused by various reasons in different states"[12].For instance, this way was chosen by lawmakers in such countries as Latvia, Belarus, France, Poland, Lithuania,says R.C. Clarke in his paper entitled "Together Again? Customary Law and Control over the Crime" (2015), [13,P.487],as well as Estonia. Thus, Article 71 of the Latvian Criminal Code of 8 July 1998 includes in the object of genocide not only "national, ethnic, racial or religious groups" but also any "social group, a group of people of certain common beliefs" [14]. According to §1 of Article 118 of the Polish Criminal Code, two more new categories are recognized as genocide victims: "political groups and groups with a certain worldview" [15].The Lithuanian Criminal Code of26 September 2000 expands the orbit of genocide victims to also include "social and political groups" [16,C.97].Article 211-1 of the French Criminal Code which entered into force on 1 March 1994 (as subsequently amended) [17, P.165] and Article 127 of the BelarussianCriminal Code of9 July 1999 [18] add"groups identified by any other arbitrary criterion"to the objects of genocide, save for those groups of people specified in Article II of the 1948 Convention.While the Estonian Criminal Code of 1 September 2002, according to some experts, contains a more "unique definition of genocide victims as compared to legislation of other states"[19] – being a "group opposing an occupation regime, or another social group" [20]. It is also noteworthy that the old version FRG Criminal Code (§220a of Section 16 of the Special Part, "Crimes Against Life"),prior to adopting the Act to Introduce theCode of Crimes against International Law, defined the object of genocide as a "certain distinct group"(in another similar version – a "group (community) distinguished by its traditions" [21].

In agreement with the position of N.V. Moshenskaya, for our own part we believe that genocide always means a deliberate crime aimed at exterminating a stable group of people [22].Besides, we also believe that new notions that expand the scope of the genocide object cover such *acti rei* as enumerated in the prevailing international law provisions and, namely, in the Rome Statute of17 July 1998.While establishing generallytrue meaning of the concept of genocide according to Article 211-1 of the French Criminal Code which also extends the scope of the object of crime by including thereto a "...group characterized by any other arbitrary criterion,"V.M. Vartanyan nevertheless admits that there is a good sense to this approach [23,C.62]. In support of his conclusion, he writes: for example, "some community of women starts committing actions aimed at liquidation of male population" [24, P.62]. "From the

international law perspective, such actions cannot be called a genocide of the male population, although they objectively areone" [25, P.62] and "in this case, the French Criminal Code covers such actions as essential elements of genocide"[26,C.62].

However, international practice also knows such a specific way of implementing the 1948 Convention as development, adoption and approval at the highest legislative level of an entire regulatory act. Here, the abovementioned German Act to Introduce theCode of Crimes against International Law of 26 June 2002 is no doubt a vivid example (another frequent name is the International Criminal Code; in German– Völkerstrafgesetzbuch (VStGB). This law, enacted by the German Bundestag, has "enriched" primarily the system of sources for the German criminal law and thereby strengthened the so-called "supplementary penal provisions" (Nebenstrafrecht) of the country and, secondly, in §6, formulated the crime of genocide which now matches the definition provided for in Article II of the 1948 Convention as well as in Article 6 of the Rome Statute of the International Criminal Court. Accordingly, with the adoption of the new Criminal Code, §220a was completely deleted from the old version of the Federal Republic of Germany criminal law which was introduced into its system by the Act of 9 August 1954 and became effective on 22 February1955. It should also be noted that §6 which deals with genocide (Völkermord), along with §7 (crimes against humanity –Verbrechen gegen die Menschlichkeit), for the first time formed a new section in the special part of the International Criminal Code of this state."The German Criminal Code had no"separate section as such prior to its adoption [27, P.33], which speaks for a completely different quality of implementation of the norms of the 1948 UN Convention in the country's national legislation [28,C.33].

Similar criminal laws under which the States being parties to the 1948 Convention implemented their obligations were also adopted in Belgium (simultaneously withit there operates in this Western European country the Criminal Code of 8 June 1867 with numerous amendments reflecting the position of the legislator inXX century and beginning of XXI century) and Canada (in 2000, the Crimes Against Humanity and War Crimes Act was approved and enacted in this North American state.

It is important to emphasize that "responsibility for genocide is not limited to mere criminal one" [29]. But at the same time, Article IV of the 1948 Convention uses the term "punishment" which, apparently, is interpreted by international experts as an element of exclusively criminal responsibility"[30]. As noted by D.A. Dam-de Jong, after adoption of the Convention, the "states went along different paths in addressing the issue of punishment for the crime of genocide"[31,P.237].

As such, it is imposed and implemented in the form of various sanctions by national courts. For example, in the criminal codes of Austria (paragraph 1 of §321), France (Article 211-1) and Germany (§6 of the ICC) the basic constituent parts of genocide include an absolutely definite coercive measure that entails adverse consequences for the offender – life imprisonment ("life sentence" in the French version). However, most of the States Parties to the Convention use an alternative sanction, i.e.custodial sentence besides life imprisonment. National criminal codes provide for different terms of imprisonment: 8 to 15 years (Article 61 of the Estonian Criminal Code; not less than 10 years (Article 264 of the Swiss Criminal Code); 10 to 15 years (Articles 103, 104 of Azerbaijan Criminal Code); 12 to 15 years (Article 393 of the Armenian Criminal Code); 10 to 20 years (Articles 416, 417 of the Bulgarian Criminal Code); 3 to 20 years (Article 71 of the Latvian Criminal Code); 15 to 20 years (Article 607 of the Spanish Criminal Code); 12 to 25 years (Article 118 of the Polish Criminal Code); 16 to 25 years (Article 135 of the Moldavian Criminal Code).In some countries, the sanction provides for possibility of using death penalty for the commission of genocide (Article 127 of the Belarussian Criminal Code). In Kazakhstan, this capital punishment is imposed in case of genocide in wartime (Article 168 of the Criminal Code). In paragraph 2 of §6 of the FRG ICC, there is a norm which "contains no qualified type of genocide but establishes criminal liability for a less serious case of genocide, i.e. a norm containing the rules for determining the amount of penalty (Strafzumessungsregeln)"[32, P.34-35] Paragraph 2 itself reads:"In less serious cases referred to under subsection (1),numbers 2 to 5, the punishment shall beimprisonment for not less than five years"[33]. In the opinion of A.V. Serebrennikova, "In practice, this rule should be applied primarily to genocide which resulted in no deaths"[34, P.35].

Whileanalysing modern criminal laws of states (mainly European and post-Soviet states), it can be noted that "salient features of national legal systems translated into the ways of implementing the norms of international law on genocide, reflecting their belonging to a particular legal family, national legal traditions, the level of public sense of justice, individualities of legislative process" [35].In this regard, L. Kazyrytski particularly emphasizes that Roman law is the basis of legal systems of most of the above states belonging to the Romano-Germanic legal family [36, P.18]. In turn, it recognizes normative legal

act as the main source of law[37,P.18]. However, in this context, we particularly support the position of the Russian scholar N.A. Shulepov, according to whom the experience of implementing the norms on genocide by various states is not only of scientific but also of practical interest, since it can be used by the national legislator in improving the criminal code as to criminalization of international crimes [38]. This is fully relevant to the applicable laws of many states and, in particular, post-Sovietones.

Conclusion

In a strictly legal context, it cannot be overlooked that, while obligingthe States Parties to provide effective measures for implementation, the Convention also affords them open opportunities for "manoeuvre." This means that each State Party can resort to those measures as are conditioned by its autocratic discretion (compulsion) depending on one or another factual circumstance.The above examples and their simultaneous comparative analysis show that wordings of criminal laws either generally match provisions of the Convention or include elements of the crime of genocide in criminal codes without any firmly established form and not only within single article, or not as much formally perceive direct regulations approved in accordance with internal constitutional procedure of an international treaty as they expand their functional content by fixing not one but several instances of*corpus delicti* of genocide.However, such actions – recognition and development of various and, *it should be emphasized*, not contradicting and not excluding each other, legal forms of implementation, as well as their harmonization – in each case are underpinned by political will of the StateParty.

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ГЕНОЦИД ТУРАЛЫ БҰҰ КОНВЕНЦИЯСЫНЫҢ ҚАТЫСУШЫ МЕМЛЕКЕТТЕРДІҢ ҚЫЛМЫСТЫҚ ЗАҢНАМАЛАРЫНДАҒЫ ИМПЛЕМЕНТАЦИЯЛЫҚ ТЕТІКТЕРІ: ЖАЛПЫ САЛЫСТЫРМАЛЫ ТАЛДАУ

Аннотация. БҰҰ геноцидке қарсы іс-қимылдары туралы 1948 жылғы Конвенциясы осы аталған қылмыс құрамын анықтайтын басты заңи қайнар көзі болып табылады. Бүгінде бұл халықаралық шарттың қатысушылары қатарында 156 мемлекет бар. Олардың әрқайсысы өз кезегінде құжаттың ережелерін жүзеге асырып үлгерген немесе орындау үстінде. Осы орайда әртүрлі мемлекеттердің қылмыстық заңдарын салыстырмалы талдау әдісі арқылы қарастыра отырып Конвенция нормаларының тиімділігін ұлттық құқықтық жүйелер аясында қалай арттырылып жатқаны көрсетілген. Сонымен қатар мақалада жеке қатысушы мемлекеттердің Конвенция нормаларын формалды түрде қабылдап қана қоймай, оларды тиісінше өзіндік ішкі юрисдикциялар шеңберінде арнайы мақсат тұтып, толықтырып және жетілдіріп жатқан процедуралары дәлелденеді. Жүргізілген зерттеудің нәтижесінде Конвенцияда бекітілген стандарттың енгізілуі тұрақты және жүйелі сипатқа ие болып отырған фактісі анықталған. Әсіресе, бұл үрдіс посткеңестік мемлекеттерге тән.

Түйін сөздер:БҰҰ Конвенциясы, геноцид, имплементация, қылмыстық кодекстар, қылмыс.

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ИМПЛЕМЕНТАЦИОННЫЕ МЕХАНИЗМЫ КОНВЕНЦИИ ООН О ГЕНОЦИДЕ В УГОЛОВНЫХ ЗАКОНОДАТЕЛЬСТВАХ ГОСУДАРСТВ-УЧАСТНИКОВ: ОБЩИЙ СРАВНИТЕЛЬНЫЙ АНАЛИЗ

Аннотация. Конвенция ООН о противодействии геноциду 1948 года является главным юридическим источником для определения состава данного преступления. Сегодня участниками международного договора являются 156 государств, которые осуществили либо осуществляют условия во исполнение его положений. С использованием сравнительного анализа уголовных законов разных государств в этой связи показано, как происходит процесс повышения эффективности норм Конвенции в национальных юридических системах. Одновременно подтверждается, что отдельные государства-участники не только формально воспроизводят нормы Конвенции, но и целенаправленно реализуют процедуры по их дополнению и совершенствованию в рамках внутренних юрисдикций. Результатом проведенного исследования является тот факт, что внедрение установленного Конвенцией стандарта приобретает устойчивый и последовательный характер, и в частности, для постсоветских республик.

Ключевые слова: Конвенция ООН, геноцид, имплементация, уголовные кодексы, преступление.

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