

LEGAL ASPECTS OF PROSECUTION FOR WAR CRIMES: THE PROBLEM OF APPLICATION OF LEGAL NORMS

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Abstract

When studying the problems related to the application of international law in the prosecution of war crimes, the relationship between international and domestic law in general should be clarified. This issue is a key element in solving the problem of law enforcement as a whole. It should be noted that there is an approach in jurisprudence that an international norm of a criminal nature can be applied both directly and indirectly. In the case of indirect application, it is intended to be applied through the relevant norm of national law. The direct application of a norm of international criminal law means the application of this norm by a national or international law enforcer independently, without any reservation or restriction.

One of the key issues in the application of international law is the provision of a system of punishment for activities prohibited by that act. According to the already established general rules of international and domestic law, if the norm of national law does not comply with or contradicts the norm of international law, then the norm of international law must be applied. All civilized countries of the world follow this rule. A criminal law introduced or amended in accordance with an international obligation shall not initially contradict the provisions of an international legal act. However, this issue is within the competence of the legislator.

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The problem of the relationship between international and domestic law is relevant both in theory and in practice. The coherent development of international and national law, globalization and integration processes are among the factors determining this urgency. As for the prosecution of war crimes, it should be noted that the effective fight against the prevention of such crimes is carried out against the background of the interaction of international and national law. No state can effectively fight crime without the help of international law.

In studying the problems associated with the application of international law in the prosecution of war crimes, we consider it expedient to take a brief look at the relationship between international and domestic law in general.

Consideration of the relationship between international law and domestic law requires the study of historically formed and currently studied theories in this area [1, p.20]. International and domestic laws are legal systems that operate independently, but are interconnected and interact with each other. However, this approach is not unequivocally accepted in the science and practice of international law. There are three main theories that explain the relationship between international and domestic law - dualism, monism and coordination.

According to the theory of dualism, international and domestic law is not only different areas of law, but also different rules of law [8, p.289], individuals are subjects of domestic law, and states are subjects of international law, if the will of the state is the source of domestic law.

Thus, without deviating from the topic of research, it should be noted that although many authors consider dualism and monism to be outdated and do not correspond to modern realities, it is these theories that express the position of most states on the application of international law to national law.

One of the current problems of international criminal law is related to the application of international legal norms on liability for war crimes.

It should be noted that there is an approach in jurisprudence that an international norm of a criminal nature can be applied both directly and indirectly. Indirect application means application through the relevant norm of national legislation [4, p.74-80]. In accordance with this approach, we also consider it expedient to study the application of international norms on liability for war crimes in the above-mentioned ways.

First of all, let's start with indirect application. Because indirect application is more typical for international criminal law, that is, international criminal law is applied in compliance with the requirements of national criminal law. In case of indirect application, the regulation of liability for war crimes is also determined.

The distinguishing feature of many international acts is that they set out the requirement of national law for liability for international crimes. This was done to facilitate the exercise of their national jurisdiction over criminals by States.

Such a tradition is still reflected in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Under the Convention, States Parties must adopt the necessary legislation in accordance with their constitutional procedures to give legal effect to the provisions of this Convention (art. 5) [11, p.402].

In essence, this trend has become increasingly common. States have already begun to bear specific obligations under the international acts to which they are parties, and they have begun to adopt separate norms in their national legislation that criminalize and punish relevant acts. For example, under the 1968 Convention on the Non-Applicability of Limits to War Crimes and Crimes against Humanity, States Parties to the Convention, in accordance with their constitutional procedures, ensure that the statute of limitations does not apply to the prosecution and punishment of war crimes and crimes against humanity undertake to take any legislative and other measures (art.4) [7, p.323].

In some cases, international law provides an instruction in national criminal law that requires an act to be declared a crime. For example, under the Convention on the Prohibition and Destruction of the Development, Production, Collection and Use of Chemical Weapons of 13 January 1993, each State Party shall, in accordance with its constitutional procedure, take the necessary measures to fulfill its obligations under the Convention. In particular, it prohibits legal entities and individuals in its territory or in its jurisdiction from engaging in any activity prohibited by this Convention, and also establishes criminal liability for such activity (art. 7) [9, p.470].

One of the key issues in the application of international law is the provision of a system of punishment for activities prohibited by that act. The requirement in national criminal law to penalize an act implies that such an act is automatically criminalized in national criminal law, because it is impossible to imagine an abstract punishment without defining the criminal act itself. In addition, current sources of international criminal law, in essence, prefer the substantive and legal significance of changes in national legislation. Thus, there is a tendency to expand the possibility of indirect application of international criminal law in international criminal law.

Thus, the expanded possibility of indirect application of the norms of international criminal law is provided for in the Rome Statute. Under the Rome Statute, the International Criminal Court complements the national criminal justice system. According to the preamble of the Rome Statute, it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes [3, p.214].

Many national criminal laws, including the AR, provide that criminal law is exercised in strict accordance with criminal law. In this case, the national criminal law of many countries (France, Russia, Austria, etc.) contains an instruction that this legislation is based on the norms and principles of international law. At the same time, the constitutions of most countries include

provisions on the priority of international law over national law (for example, Article 151 of the Constitution of the Republic of Azerbaijan (AR)).

The national court, as a rule, applies the norm of national criminal law, determines the responsibility and punishment, as well as in accordance with the requirements of national criminal law. For such an application of a domestic law, its conformity to international criminal law is characteristic.

According to the already established general rules of international and domestic law, if the norm of national law does not comply with or contradicts the norm of international law, then the norm of international law must be applied. All civilized countries of the world follow this rule. A criminal law introduced or amended in accordance with an international obligation shall not initially contradict the provisions of an international legal act. However, this issue is within the competence of the legislator.

Many national criminal laws provide for the possibility of referring to an international instrument when determining whether an act is a crime under international law at the domestic level. In other words, national criminal law norms are usually summarized as blanket norms. This issue implies the indirect application of the norms of international criminal law on war crimes.

According to the Criminal Code of the AR, the use of weapons, means and methods of warfare prohibited by interstate agreements to which the AR is a party is a violation of international humanitarian law, is a war crime. Thus, the indirect application of the norms of international criminal law on war crimes is possible through the reference of national criminal law to an international act.

Let us note another trend in the indirect application of international criminal law. According to this trend, the applicant of international law can apply the norm of international criminal law through national law. Such an opportunity is enshrined in Article 21.1 of the Rome Statute of the International Criminal Court. Pursuant to this article, the Court shall apply the national law of States which, under ordinary circumstances, may exercise its jurisdiction over the offense [10, p.525].

Indirect application of the norms of international criminal law by the International Criminal Court is possible subject to the following conditions - the impossibility of applying the substantive norms of the Rome Statute and the impossibility of applying the norms, principles and treaties of international law.

The expansion of the possibility of indirect application of international law through their inclusion in national criminal legislation, as a result, leads to the universalization of the concept and legal nature of war crimes in the national criminal justice systems of different countries. Indeed, if the principle of priority of international law prevails for the vast majority of States, then the national legislature is obliged not only to commit this act and to establish criminal liability in domestic law, but also in accordance with the act of international law. Otherwise, national law should not be applied. The result of this process is the convergence of the material and legal bases of liability for crimes recognized in international criminal law as war crimes in the domestic legislation of states with different legal systems.

It should be noted that international criminal law is one of the important factors in the universalization of national criminal law on a global scale [2, p.510].

The direct application of a norm of international criminal law means the application of this norm by a national or international law enforcer independently, without any reservation or restriction.

The direct application of international criminal law is not widespread. This is due to the fact that most of the norms of international law of a criminal nature require national legislation to recognize this or that act as a crime.

The possibility of direct application of the norm on war crimes is provided in the documents of the Nuremberg tribunal. Thus, according to Principle II of the Charter of the Nuremberg Tribunal, the failure to impose a domestic law penalty for any act recognized as a crime under international law does not release the perpetrator from criminal liability and punishment [5, p.375].

At present, the possibility of direct application of international law on war crimes is limited, as the national legislation of most countries has implemented the relevant provisions of international criminal law in one form or another. However, there is such an opportunity.

Let us consider the methods of direct application of modern international criminal law on liability for war crimes.

First, the norm of international criminal law on war crimes can be applied by an international law enforcement agency (is an international judicial body). Such an opportunity is provided for in most international conventions when determining the rules for resolving legal disputes. Although the direct application of the norms of international conventions is possible, controversial moments are inevitable, especially in matters of a procedural nature (extradition, criminal prosecution, etc.). However, at the time of the substantive dispute, it is also possible to apply the norm of international law directly, as these documents do not stipulate otherwise. This means that the act can be directly recognized as a war crime under international criminal law, without any reference to national criminal law.

This issue is confirmed by Article 38 of the Charter of the UN International Court of Justice. This article states that the Court, who must resolve disputes in accordance with international law, first of all applies international conventions, those conventions that are recognized by the disputing states and establish rules on them [6, p.94]. Accordingly, it is possible to refer to international documents that characterize the act as a war crime.

Second, a national court may apply a rule of international criminal law that is important to a state, unless there is a relevant provision in the national law of that state. This rule is due to the fact that the constitutions of most countries, including the AR, recognize the norms of international law as an integral part of the national legal system of the country (for example, Article 148.2 of the Constitution of the AR).

Issues related to the possibility and necessity of direct application of international acts on war crimes have been repeatedly emphasized in the legal literature.

Thus, from what we have seen in this paragraph on the application of international law in the prosecution of war crimes, it can be concluded that there are two ways to apply the rules of international criminal law on liability for war crimes: a) indirect is applied or the national norm is a reference to an international legal instrument); and b) directly (a national law enforcement or international body directly applies the norm of international criminal law itself).

In case of conflict of norms of international and national criminal law, priority should be given to the current norm of international criminal law. This is a rule generally accepted by all civilized nations of the world.

The fact of the expanded possibility of indirect application of the norms of international law on war crimes through national legislation objectively brings together the national criminal law systems of different states.

References:

1. Aliyev A.I. International Public Law. Methodical book. Baku, 2004, 2008 p. (in Azerbaijani)
2. Fletcher J., Naumov A.B. Basic concepts of modern criminal law. Moscow, 1998, 510 p. (in Russian)
3. Bartram S. Brown. Research Handbook on International Criminal Law. Edward Elgar Publishing, 2011, 544 p.
4. Bassiouni M. Cherif. International Criminal Law: Sources, Subjects and Contents. Martinus Nijhoff Publishers / Brill Academic Publi; 3rd ed. edition, 2008, 1086 p.
5. Christine van den Wyngaert, Steven Dewulf. International Criminal Law: A Collection of International and Regional Instruments. Fourth Revised Edition. Martinus Nijhoff Publishers, 2011, 2200 p.

6. Evans D.Malcolm. International Law. Oxford University Press, 2014, 873 p.
7. Jacobs L.Steven. Confronting Genocide: Judaism, Christianity, Islam. Lexington Books, 2009, 350 p.
8. Klabbers Jan. International Law. Cambridge University Press, 2013, 350 p.
9. Michael Bothe, Natalino Ronzitti, Allan Rosas. The New Chemical Weapons Convention: Implementation and Prospects. Martinus Nijhoff Publishers, 1998, 613 p.
10. Schabas A.William. The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press, 2016, 1589 p.
11. Schabas William. Genocide in International Law: The Crime of Crimes. Cambridge University Press, 2009, 741 p.

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