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The evolution of the idea of international criminal justice and international criminal justice bodies

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Abstract. The present academic paper is devoted to the genesis of idea of international criminal justice and international criminal justice bodies. The author examines historical facts, philosophical works, scientific publications of professors of near and far abroad on international law, analyzes international treaties in order to determine chronology of the evolution of international criminal justice and its bodies from idea to legal regulation within the framework of modern international criminal law. Thus, within the framework of academic paper, the works of Ch. Bassiouni, A. Volevodz, F. Martens, G. Moynier, A. Dorskaya etc. were studied and analyzed. Special attention was paid to the work of Hugo Grotius "On the Law of War and Peace" ("De jure belli ac pacis") and his understanding of justice, as well as Cicero's ideas about the "true law". The author also studied the provisions of the Versailles Peace Treaty, documents of the League of Nations regarding the draft Convention on the creation of an international criminal court, a brief review of the constituent documents for the establishment of ad hoc tribunals and the International Criminal Court. Based on the analysis, author offers his own vision of the definitions of "international criminal justice" and "international criminal justice bodies".

Key words: international criminal justice; international criminal justice bodies; international criminal law; international criminal offenses; The League of Nations; International Criminal Court; ad hoc tribunals.

Халықаралық қылмыстық төрелік және халықаралық қылмыстық төрелік органдары идеясының эволюциясы

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Түйіндеме. Осы ғылыми мақала халықаралық қылмыстық төрелік пен халықаралық қылмыстық төрелік органдары идеясының генезисіне арналған. Автор халықаралық құқық бойынша жақын және алыс шетел профессорларының тарихи фактілерін, философиялық еңбектерін, ғылыми жарияланымдарын зерттейді, халықаралық қылмыстық төрелік пен оның органдарының идеядан қазіргі халықаралық қылмыстық құқық шеңберінде құқықтық реттеуге дейінгі эволюциясының хронологиясын айқындау мақсатында халықаралық шарттарды талдайды. Сонымен қатар, ғылыми мақала аясында Ш. Бассиони, А. Волеводз, Ф. Мартенс, Г. Муанье, А. Дорская және т. б. зерттеушілердің еңбектері талданды. Гуго Гроцийдің «Соғыс және бейбітшілік құқығы туралы» («De jure belli ac pacis») еңбегіне және оның төрелікті түсінуіне, сондай-ақ Цицеронның «шынайы заң» туралы идеясына ерекше назар аударылды. Сонымен қатар, автор Версаль бейбітшілік шартының ережелерін, Ұлттар Лигасының Халықаралық қылмыстық сот құру туралы конвенция жобасына қатысты құжаттарын зерттеді, ad hoc трибуналдары мен Халықаралық қылмыстық сот құру жөніндегі құрылтай құжаттарына қысқаша шолу жасады. Жүргізілген талдау негізінде автор «халықаралық қылмыстық төрелік» және «халықаралық қылмыстық төрелік органдары» анықтамаларына өз көзқарасын ұсынады.

Негізгі сөздер: халықаралық қылмыстық төрелік; халықаралық қылмыстық төрелік органдары; халықаралық қылмыстық құқық; халықаралық қылмыстар; Ұлттар лигасы; Халықаралық қылмыстық сот; ad hoc трибуналдары.

Эволюция идеи международного уголовного правосудия и органов международного уголовного правосудия

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Аннотация: Настоящая научная статья посвящена генезису идеи международного уголовного правосудия и органов международного уголовного правосудия. Автор исследует исторические факты, философские труды, научные публикации профессоров ближнего и дальнего зарубежья по международному праву, анализирует международные договоры с целью определения хронологии эволюции международного уголовного правосудия и его органов от идеи до правового регулирования в рамках современного международного уголовного права. Так, в рамках научной статьи были изучены и проанализированы работы Ш. Бассиони, А. Волеводза, Ф. Мартенса, Г. Муанье, А. Дорской и др. Отдельное внимание было уделено труду Гуго Гроция «О праве войны и мира» («De jure

belli ac pacis») и его пониманию правосудия, а также идеи Цицерона об «истинном законе». Также автором были исследованы положения Версальского мирного договора, документы Лиги Наций касательно проекта Конвенции о создании международного уголовного суда, проведен краткий обзор учредительных документов по созданию ad hoc трибуналов и Международного уголовного суда. На основе проведенного анализа автор предлагает свое видение определений «международное уголовное правосудие» и «органы международного уголовного правосудия».

Ключевые слова: международное уголовное правосудие; органы международного уголовного правосудия; международное уголовное право; международные уголовные преступления; Лига Наций; Международный уголовный суд; ad hoc трибуналы.

Introduction

The main goal of the present academic paper is to examine the evolution of the idea of international criminal justice in order to clarify the content of definitions of “international criminal justice” and “international criminal justice bodies”. In this regard, the objectives of this paper are the following:

1) examination of historical facts, philosophical works, scientific publications of professors of near and far abroad on international law and international criminal law;

2) analysis of international treaties in order to determine chronology of the evolution of international criminal justice and its bodies from idea to legal regulation within the framework of modern international criminal law (documents of League of nations, Nuremberg Charter, Rome Statute);

3) development of own vision of the definitions of “international criminal justice” and “international criminal justice bodies”.

Materials and methods

Within the framework of the present academic paper, the works of Ch. Bassiouni, A. Volevodz, F. Martens, G. Moynier, A. Dorskaya etc. were studied and analyzed. Special attention was paid to the work of Hugo Grotius “On the Law of War and Peace” (“De jure belli ac pacis") and his understanding of justice, as well as Cicero's ideas about the “true law”. The author also studied the provisions of the Versailles Peace Treaty, documents of the League of Nations regarding the draft Convention on the creation of an international criminal court, a brief review of Nuremberg Charter and the Rome Statute. In the process of writing this academic paper, methods of analysis, deduction and comparison were applied.

Discussion

The notion of restoring justice for the most serious criminal offenses that affect and encroach on the foundations of international peace and security, the inalienable

rights and freedoms of all mankind, appeared long before the formation of ad hoc tribunals in Nuremberg and Tokyo to punish war criminals in the middle of the last century.

This notion has been embodied in the idea of international criminal justice.

In the science of international criminal law, there is no consensus on the definition of "international criminal justice", as well as the relationship with the term "international criminal justice bodies". Dr. Ph. Martens believed that international criminal law contains a set of legal norms that determine the conditions for international judicial assistance of states to each other in the exercise of their punitive power in the field of international communication (Nakashidze, 2007). In other words, international criminal justice was limited only to the provision of legal assistance by states to each other without the participation of any supranational international structures.

Dr. Volevodz A.G. claimed that international criminal justice is one of the international cooperation spheres, which consists of the implementation by the courts established by the international community with the participation of the UN, on the basis of or in pursuance of international treaties, activities to consider and resolve on the merits of cases of international crimes as well as other crimes related to their jurisdiction. (Volevodz, 2009).

There are works in the western academic literature that criticize and practically deny the idea of international criminal justice as an effective institution. For example, in the work of F. Megre, the opinion is expressed that international criminal justice is not a "natural" mandate of international law. The International Law project has experimented with alternative utopias, and criminal justice is just one of them (Megre, 2016).

Thus, at present, the academic community does not agree on the understanding of international criminal justice and its bodies.

What does "international criminal justice" mean and what are the bodies responsible for its implementation? In order to answer this question, the author proposes to analyze the relevant doctrinal and normative sources through the prism of the history and philosophy of law and propose the appropriate editions of the definitions.

As the Italian legal scholar Bassiouni Ch. rightly emphasizes in his work, in the 1st century BC Cicero postulated in De Republica the view that "in fact, the true law, namely, right reason, which is in accordance with nature, is applicable to all men, **is immutable and eternal**. It will not establish one rule in Rome and another in Athens". This postulate reflected the concept of natural law of the Greek Stoics, who represented the world as a single community. Later, the Romans recognized the existence of a civitas maxima (doctrine of "greatest citizens" united by common foundations), for which they developed jus cogens, a law binding on all. However, none of these concepts were intended to apply to humanity as a whole (Bassiouni, 2010).

Further, according to Dr. Ch. Bassiouni, this concept of the narrow universality of law lasted until the establishment of the League of Nations in the twentieth century. However, in our opinion, although the normative definition of international law was included in the Statute of the Permanent Court of International Justice in 1919 through

the wording "general principles of law recognized by civilized nations", we should not forget about the doctrinal sources that declared the existence of international law and the inevitability of punishment for violation of the law (note - including the basic understanding of the "true law" according to Cicero), regardless of citizenship and place of commission of a particular crime.

In our opinion, it was Hugo Grotius who laid the foundation for the idea of international criminal justice in the "On the Law of War and Peace" in the 17th century. Grotius's stated that "every state has the right and duty to punish a person who has committed a criminal act, regardless of where it was committed and the citizen of which state this person is, because every crime encroaches on the legal order, which incorporates all states" (Grotius,1994; Podshibyakin, 2010). In our opinion, this provision reflects current basis of the definition of "aut dedere aut judicare" principle (either extradite or persecute) - integral part of the international system for restoring human rights and freedoms violated by the commission of genocide, crimes against humanity, war crimes and aggression.

The subsequent development of the idea of international criminal justice, as noted by a number of legal scholars, is associated with Gustave Moynier, President of the International Committee of the Red Cross, and legal scholar L.A. Kamarovsky.

After the end of the Franco-Prussian War, Moynier proposed a draft Convention on the Establishment of an International Judicial Body for the Prosecution of Persons Guilty of Violations of the Geneva Convention for the Amelioration of the Situation of the Sick and Wounded in Warring Armies of August 22, 1864, which declared formation and activities of such a court (Moynier, 1872).

It should be noted that if Grotius associated his idea of international criminal justice with the exercise of the jurisdiction of states in relation to crimes that "encroach on the legal order that includes all states", then in the nineteenth century the idea receives a new development in the form of doctrinal proposals by Moynier and Kamarovsky **about creation of special bodies of international criminal justice**.

Further development of the idea of international criminal justice was reflected in the provisions of the Versailles Peace Treaty of 1919. According to this document, the victorious countries had the right to prosecute those guilty of war crimes **through the creation of a special military tribunal**.

Thus, in accordance with Art. 227 of the Treaty of Versailles, the Allied Powers publicly accuse Wilhelm II of Hohenzollern, former German Emperor, of a serious crime against international morality and the inviolability of treaties.

A special tribunal will be set up to try the accused, which will provide him with the guarantees necessary for the right to defense. In its decision, the tribunal will be guided by the highest motives of international politics in order to confirm adherence to international obligations and the legitimacy of international morality. Within the framework of Art. 228 of the Versailles Peace Treaty the obligation to bring to justice those guilty of violating the laws and customs of war was also enshrined (Versailles Peace Treaty, 1919).

A list of 896 persons who fought on the side of Germany and were accused of committing war crimes was prepared. As a result, the German Supreme Court

considered only 12 cases, and in 6 of them the defendants were acquitted (Dorskaya, 2012). A special international military tribunal was not established.

The idea of creating a single body of international criminal justice was also expressed by the French government after the assassination of Alexander, King of Yugoslavia, in Marseilles in 1934. Thus, the French Government sent a letter to the Secretary General of the League of Nations emphasizing the need to ensure the effective suppression of political crimes of an international character and containing a statement of the principles on the basis of which an international convention against terrorism could be laid down. The letter included a proposal to establish an international criminal court to try those accused of terrorist acts covered by the "Convention".

The Council of the League considered this issue and on December 10, 1934, adopted a resolution expressing the opinion that the norms of international law concerning the suppression of terrorist activities were not at present sufficiently precise to guarantee effective international cooperation in this area. In this regard, a Committee of Experts has been set up to study this question with a view to drawing up a preliminary draft of an international convention for the enforcement of the suppression of conspiracies or crimes committed for political and terrorist purposes.

During the second session the Committee submitted draft Convention on the creation of an international criminal court.

The Convention for the creation an International Criminal Court provided for the trial by an international tribunal of "persons accused of any offense referred to in the Convention to Prevent and Punish Terrorism". The International Criminal Court was to be a permanent body, but to sit only when it was considering a crime within its jurisdiction.

The substantive criminal law to be applied by the court shall be the applicable national law, which is the least restrictive. In determining applicable law, the court had to take into account the law of the territory in which the crime was committed and the law of the country in which the accused was brought before the court (Article 21). In addition, the Convention provided for the selection of judges, the internal organization of the court, the procedure to be followed when considering a case, etc. (International Law Commission, 1949).

However, these conventions never entered into force. In our opinion, the creation of an institutional body of international criminal justice during the period of the League of Nations was more of a utopian idea, since the member states were not ready to transfer their sovereign jurisdictional rights to bring persons to justice for committing acts of terrorism or for other crimes. The idea of creating an international criminal court, expressed during the existence of the League of Nations, was strikingly different from the modern understanding of an international criminal justice body. First of all, the main difference is the subject jurisdiction (note - terrorism is not an international crime, but is recognized as a crime of an international character), since at present the competence of such bodies includes precisely international crimes (genocide, crimes against humanity, etc.). Secondly, the applicable law. If, in the understanding of the drafters of the Convention on the creation of an International Criminal Court, perpetrators of crimes were subject to prosecution on the basis of national laws, then

the modern model of an international criminal justice body is based on the norms of international law.

Nevertheless, it is fair to note that national law can be applied in the administration of international criminal justice, but under a hybrid model of international criminal justice, and only in respect of those violations for which national law provides for responsibility and which do not constitute international crimes. This was demonstrated by the example of the Special Tribunal for Sierra Leone.

Thus, the provisions on an international military tribunal under the Versailles Peace Treaty and the norms of the League of Nations Convention on the creation of an International Criminal Court were not implemented, **the idea remained an idea** until the end of World War II.

On November 20, 1945, an international trial was opened in the German city of Nuremberg for the case of the main Nazi war criminals of the European Axis countries.

The period of the Nuremberg trials played a significant role in the history of the formation of the current International Criminal Court: the principles formulated in the text of the Statute of the Tribunal are universally recognized in international law, and found a place in the Rome Statute, the founding document of the International Criminal Court (hereinafter referred to as RC). All seven principles are to some extent enshrined in the provisions of the RS. For example, principle III, concerning the inevitability of punishment of high officials of the state, was enshrined in Art. 27 of the Statute "Inadmissibility of reference to official position" (Rome Statute, 1998).

In the early 50s of the last century, the first draft of the ICC Statute appeared, but work on it was not completed, since the implementation of the ideas of lawyers depended on the leaders of states and some politicians who did not want to admit even the theoretical possibility of appearing before such an international court (Podshibyakin, 2008).

Despite the active attempts of Trinidad and Tobago to promote the idea of creating an international criminal justice body, it owes its establishment to the atrocities that one after another shocked the world community at the end of the 20th century - the armed conflicts in Yugoslavia and the genocide in Rwanda. Knowledge of mass acts of violence, which became a manifestation of the policy of so-called ethnic cleansing, prompted the UN Security Council (in accordance with Chapter VII of the UN Charter) to decide on the establishment of the International Criminal Tribunal to prosecute those responsible for serious violations of international humanitarian law committed in the territory former Yugoslavia since 1991 (hereinafter - ICTY). The fundamental decision to establish such a tribunal was taken by Security Council resolutions No. 808 of February 22, 1993 and No. 827 of May 25, 1993. Similarly, in November 1994, the UN Security Council decided to establish an International Criminal Tribunal to try those responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and of Rwandan citizens responsible for genocide and other similar violations committed in the territory of neighboring states in the period from January 1 to December 31, 1994 (hereinafter referred to as ICTR) (Kulzhabayeva and Salykova, 2021).

Bringing to justice for committing and inciting to commit such a particularly grave international crime, for the first time in history, showed the norm of jus cogens, namely the prohibition on committing genocide, in action.

The work of the ad hoc tribunals, although subject to much justified criticism, has been very effective, suffice it to say that most of the accused have been tried.

Results and conclusions

Thus, the idea of international criminal justice and the creation of a permanent body for its implementation has come a long way to being recognized and regulated by most states of the world. Returning to the issue of the concept of "international criminal justice" and "international criminal justice body", based on the analysis of the relevant doctrinal and normative sources through the prism of the history and philosophy of law, the author proposes the following version of these definitions:

"**International criminal justice** - the activities of international criminal justice bodies to investigate, consider, bring to justice those guilty of committing universally recognized international crimes and other crimes falling under their jurisdiction, as well as to restore the rights of victims of such crimes1, prevent such crimes in subsequent".

"**The body of international criminal justice** is an institution established on the basis of or in pursuance of a relevant international treaty, the competence of the structural units of which includes the procedure for investigating, considering, prosecuting persons guilty of committing universally recognized international crimes and other crimes falling under their jurisdiction, as well as on the restoration of the rights of victims of such crimes, the prevention of such crimes in the future".

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