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Subjects of the Crime in the light of international treaties in wartime (comparative analysis)

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Abstract

The issue of optimizing the mechanism of prosecution of the subjects of the crime in connection with Russia's war against Ukraine launched in February 2022, as a result of which impunity of war criminals is gaining momentum and leads to violation of legislation, both in Ukraine and in the world, in particular in such countries as: Poland, Germany, Bulgaria, Romania, Moldova, etc. In this regard, the purpose of this editorial is twofold: on the one hand, it seeks to present volume 41, number 76 of "Cuestiones Políticas" and, on the other hand, is to highlight the issue of the subject of the crime, its signs and main features, enshrined in international legal acts. It was concluded that the analysis of international treaties gives grounds to affirm that the subject of the subject of the crime is quite widely disclosed and attention is paid to the separation of the concepts of subjects of international crimes and subjects of crimes of international character; the difference between these concepts is fundamental and very important. Taking into account the attitude of the international community to the concept of the subject of crime, possible areas for improvement of the current legislation are outlined.

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Keywords: subject of the crime; legal person; crime of an international character; juvenile person; combating crime.

Sujetos del Delito a la luz de los tratados internacionales en tiempo de guerra (análisis comparativo)

Resumen

La cuestión de optimizar el mecanismo de enjuiciamiento de los sujetos del delito en relación con la guerra de Rusia contra Ucrania iniciada en febrero de 2022, como resultado de lo cual la impunidad de los criminales de guerra está ganando impulso y conduce a la violación de la legislación, tanto en Ucrania como en el mundo, en particular en países como: Polonia, Alemania, Bulgaria, Rumanía, Moldavia, etc. En este sentido, el propósito de este editorial es doble: por un lado, busca presentar el volumen 41, el número 76 de “Cuestiones Políticas” y, por el otro, consiste en resaltar el tema del sujeto del delito, sus signos y principales características, consagrado en los actos jurídicos internacionales. Se concluyó que el análisis de los tratados internacionales da fundamento para afirmar que el tema del sujeto del delito se divulga con bastante amplitud y se presta atención a la separación de los conceptos de sujetos de los delitos internacionales y sujetos de los delitos de carácter internacional; la diferencia entre estos conceptos es fundamental y muy importante. Teniendo en cuenta la actitud de la comunidad internacional ante el concepto de sujeto delictivo, se esbozan posibles áreas de mejora de la legislación vigente.

Palabras clave: sujeto del delito; persona jurídica; delito de carácter internacional; persona juvenil; lucha contra el delito.

Exordium

International criminal law is defined as a set of principles and norms that regulate public relations in the protection of international law against international crimes and crimes of international nature. Analysis and comparison of international normative-legal acts gives answers to a number of questions: (a) which states of the international community take into account international criminal norms in national legislation; (b) how effective in prevention and combating crimes in a particular state implementation of international legislation is; (c) the main trends in development and improvement of the national law of different states on the basis of international criminal law.

It is clear that such terms as “crime”, “subject” and “punishment” have an intrastate origin. They define legal categories in the sphere of criminal law which are the most important for the society. In view of the current trends in international criminal law, the concept of “crime” and therefore the concept of the “subject of crime” are gaining some other international legal dimension. But, in our opinion, absence of a single international determination of these concepts gives an opportunity for a unique interpretation of international legal documents.

Therefore, the purpose of the presentation is to separate provisions of international normative-legal acts, which regulate the issue of the subject of crime and its main features in order to further outline the main directions for improvement of this concept in Ukrainian legislation.

International standards regarding characteristics of the subject of crime

Like any socially dangerous act provided for by the criminal law, a crime in the international law has its constituent parts; among these parts, as noted above, we are most interested in the subject of crime. Actually, the wording “the subject of crime” is extremely rare in international treaties.

For example, the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Republic of Slovenia on Cooperation in the struggle against crimes (came into force on 24 November, 2012) does not use the term “subject of crime”; the wording “persons who have committed a crime or involved in its commission” is used instead.

Directly in the text of Art. 4 “Exchange of information” it is stated that the Parties shall exchange personal data and information with respect to persons who have committed a crime or are involved in an offense, namely, information on: surname, former surname, first name, other names (fictitious names, nicknames), gender, date and place of birth, place of residence, citizenship or previous citizenship, etc.; information on the data of an identity document, that is, a passport or other travel document (number, date of issue, issuing authority, place of issue, validity period, territory of validity); information on data related to fingerprints or palm prints of a person involved in the commission of a crime, a DNA profile or sample, person’s description, a photo card; information on other personal data collected and sent by competent state authorities, etc. (Law of Ukraine, 2012).

Agreement between the Ministry of Internal Affairs of Ukraine and the Ministry of Internal Affairs of Georgia on cooperation in the struggle against crime, came into force on 20 October, 2011, does not mention the wording

“subject of crime” directly, but indirectly article 4 of the abovementioned Agreement establishes the provision that states, in accordance with the national legislation, shall take all necessary measures to reveal, detain, arrest or provide information about persons who are sought, that is, a subject of crime is a physical convicted person (Law of Ukraine, 2012).

In accordance with the Memorandum of understanding between the Ministry of Internal Affairs, the Prosecutor General’s Office, the Security Service, the State Customs Service, the State Tax Administration of Ukraine and the Association of Police Chiefs, the Royal Prosecutor’s Office of England and Wales, the Customs and Her Majesty’s Customs and Excise, the National Criminal Intelligence Service on cooperation in combating serious crimes, subject of crime is defined as “a person who violates the law” or “identification of the location and identity of such person” (Law of Ukraine, 2018). The term “suspect” is found below in the text of the document. Also, provision concerning the appearance of persons to competent authorities is defined clearly: “a person who fails to come after receiving an invitation or refuses to come shall not be subject to punishment and shall not be subject to any preventive measures in the territory of the Party requested.”

The memorandum between the Ministry of Internal Affairs of Ukraine and the Ministry of Internal Affairs of Montenegro on cooperation in the sphere of combating crime (Law of Ukraine, 2018), which came into force on 13 June, 2013, defines the range of crimes (by generic object), which are related to cooperation, respectively, the notion of the subject of crime can be seen from the list of crimes. Also, in the Memorandum mentions the following concepts: persons involved in organized crime; typical behavior of criminals and criminal groups; persons suspected of committing crimes; persons who evade criminal responsibility or punishment.

We support the opinion that the state is the subject of international crimes. Criminal responsibility for commission of such crimes is borne by the so-called agents of the state (otherwise such persons are called representatives of the state) - persons acting on behalf of the state, or actual agents without legal authority. In its turn, the subject of crimes of international nature is presented as physical convicted persons who at the moment of the committed crime have reached a specific age.

Position of the international community regarding responsibility of legal entities is clearly defined. To illustrate an example, it is worth referring to the judgment of the Nuremberg Military Tribunal, which recognized the SS, SD, and the leadership of Nazi Germany as criminal organizations. However, the lawmaker in the Criminal Code (hereinafter referred to as the CC) of Ukraine does not recognize a legal entity as the subject of crime, and submits in Art. 18 a comprehensive list of features of this element of body of a crime. In our opinion this position requires optimization and improvement.

As with general criminal offenses, when crimes of an international nature are committed, the question of a special subject of crime may arise, which is presented as persons separately identified in certain international legal acts: hired officers, officials, etc.

The issue of criminal sanity as one of the features of the subject of crime is also quite controversial. There is no single international instrument that would regulate all the complexities of the above-mentioned feature. If there are doubts about mental integrity of a person or recognition of a person as partially sane, necessary is opinion of specialist physicians about the mental state of persons who have committed a crime of international nature. The issue of a person's sanity or its legal insanity is decided by the court, taking into account the respective opinion of experts.

The subject of crime as a juvenile person in international legal standards

The greatest attention in the international legal space is paid to minors as subjects of crime. It is quite clear because children are the future not only of nations, but also of the whole world. There are a large number of legal acts in the sphere of protection of children's rights (in our case, persons who have reached the age of criminal responsibility but have not reached the age of majority).

Minor persons have some additional privileges along with a wide range of rights and freedoms, which are granted to any adult person - the subject of crime. Such privileges are specifically provided for in the Declaration of the Rights of the Child. The program provisions of this Declaration recognized that minors, due to their physiological and psychological immaturity, need additional social care. However, the specified Declaration had an exclusively advisory nature.

Over time, the described situation worsened (including a decrease in the standard of living of the population, an increase in "child" crime, lack of proper preventive measures) and required an immediate solution. That is why the Convention on the Rights of the Child was adopted on 20 November 1989, which is also called the "World constitution of the Rights of the Child". Ukraine joined the mentioned Convention adopted by the UN General Assembly on 27 September 1997. Along with other rights, the Convention provides a number of provisions that apply to minors as the subject of crime:

1. immediate access to legal and other necessary assistance for the child;
2. the right to challenge the legality of the child's deprivation of liberty before the competent institutions;

3. the right to maintain communication with his/her family through correspondence, telephone calls, dates, etc.;
4. arrest, detention or imprisonment shall be applied to the child only in exceptional cases, if other ways for preventive and curative measures have been exhausted and have not yielded the expected positive result;
5. minor subjects of crimes shall not be punished in the form of death penalty (from which our state and most countries in the international arena refused) and life imprisonment without the possibility of such dismissal;
6. on par with adults (majors), a child cannot be subjected to torture and other cruel, inhuman or degrading treatment or punishment (Convention on the rights of the child, 1989).

According to the provisions of the Convention, the participating states (192 countries) including Ukraine is obliged to assist in creation of laws, bodies and institutions directly related to children who are considered to have violated criminal legislation, are accused or found guilty of committing a crime: establishing the minimum age of criminal responsibility, providing for the application of educational measures to such children without the involvement of court proceedings, strict observance of the rights of the child and provision of legal guarantees.

Moreover, along with other international legal treaties, the Convention has the highest legal force, because by ratifying it, the participating states have committed themselves to bring their national legislation regarding the child as the subject of crime (criminal offense) into compliance with the provisions of this document. As for the international documents listed above, they define the general provisions on minors as subjects of crime and emphasize the need to strictly observe their rights, in connection with the fact that the latter have not reached the age of majority, taking into account the unstable psychological and psychophysiological processes (Leheza *et al.*, 2022).

The UN Standard Minimum Rules (also known as the Beijing Rules) establish mainly the principles of justice in relation to minors, and measures to ensure that they serve a fair punishment. The purpose of the UN Standard Minimum Rules is to ensure the consistency of any measures of influence on minors with the peculiarities of the offense and peculiarities of the offender. The document also contains a list of guarantees for observance of the rights of minors, including the right to a fair and impartial court, the right to a fair court decision, the right to use alternative measures of influence on minors, etc. In fact, these guarantees are reflected in the national legislation of Ukraine (CC of Ukraine, CPC of Ukraine) and national legislations of other countries, but in the Beijing Rules the international community re-

emphasizes the necessity of their observance and obligatory provision (Khavroniuk, 2006).

The provisions of the Council of Europe Recommendation on New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice (2003) had a significant impact on the criminal legislation of many European states (CM/REC recommendation, 2008). According to the mentioned provisions the principle of guilt should better take into account the age and maturity of the offender and correspond to his/her level of development. Subsequently, in the recommendation of the Committee of Ministers of the Council of Europe a number of significant and important provisions for the development of the concept of the subject of crime were defined for member states regarding European rules regarding juvenile offenders who are subject to sanctions or restrictions (2008) (CM/REC recommendation, 2008). In particular, regarding public sanctions and restrictions applied to minors:

- a wide range of public sanctions and restrictions selected for different stages of a minor's development must be applied at all stages of the process;
- priority is given to sanctions and restrictions that can have an educational impact and provide a restorative response to offenses committed by minors;
- cases in which imposing a sanction or a restriction requires the minor's consent;
- which bodies are responsible for appointment, modification and implementation of the respective sanction and restriction, as well as their respective duties and obligations;
- conditions and procedures used to modify the respective imposed sanction and restriction;
- procedures for regular external supervision of the work of bodies such sanctions or restrictions are imposed by;
- the decision to impose or cancel a public sanction or restriction shall be taken by a judicial body, and in the case when the decision is taken by an administrative body appointed by the law, it shall be subject to judicial review;
- depending on the progress made by the respective minor, the competent authorities shall (if provided for by national law) have the right to reduce the duration of the sanction or restriction, to mitigate the imposed conditions or obligations provided for by this sanction or restriction, or to terminate them;

- the rights of minors to personal benefits, such as education, professional training, protection of physical and mental health, personal safety and social protection, should not be limited by imposition and application of sanctions and restriction;
- if minors do not comply with the conditions and obligations of public sanctions and restrictions applied to them, this should not automatically lead to deprivation of their liberty. Where possible, previous restrictions or public sanctions should be replaced by new or modified ones (CM/REC recommendation, 2008).

Conclusions

Summing up the above on the subject of crime, we can make the following *conclusions*: the legal responsibility of legal entities is not new for most countries of the world. Such norms are found in international normative legal acts signed by Ukraine. Therefore, it is worth taking these facts into account and improving the norms of Ukrainian legislation regarding the responsibility of legal entities.

The analysis of international treaties gives grounds for asserting that the issue of the subject of crime is disclosed quite widely, special attention is paid to the separation of the concepts of subjects of international crimes and subjects of crimes of an international nature; the difference between these concepts is fundamental and extremely important.

In view of the increase in the number of crimes committed by minors, the international community provides a wide range of measures, in addition to criminal punishment, which shall be applied to them, as well as lowering the age of criminal responsibility for some types of crimes.

It has been established that as early as 1954, according to the decision of the UN General Assembly, the Commission on International Law developed a draft code of international crimes. In 1991 at the regular session, the commission approved the draft Code of Crimes against the Peace and Security of the Mankind (in the first reading). Here it was only about a certain type of offenses that make up only a part of socially dangerous phenomena, which are the subject of regulation of international criminal law.

Therefore, the need to create a document that would solve one of the biggest problems of international law enforcement, namely unification of criminal legislation, appears quite urgent. It is obvious that the norms established in the Code will not be binding for a sovereign state, but the signing of an international document will be a kind of expression of each country's attitude to those crimes that go beyond the state borders.

Thus, international legal principles and norms establish the special status of a minor who has violated the criminal law and, as a result, require special attitude to such persons in all states, without exception, that have ratified the relevant documents. According to the criminal norms enshrined in the Rome Statute of the International Criminal Court (1998) (Rome Statute of the International Criminal Court, 1998), a person is not subject to criminal liability if at the time of committing an act or inaction he/she was deprived of an opportunity to realize the illegality of his/her behavior or its nature in general, or to coordinate his/her actions with the requirements the law due to: a) mental illness or disorder; b) being in a state of intoxication, with the exception of cases when a person was exposed to intoxication voluntarily under such circumstances in which he/she knew that as a result of intoxication he/she could commit an act that constitutes a crime, or when he/she ignored the danger of committing such an act.

Bibliographic References

- CM/REC recommendation. 2008. 11 of the Committee of Ministers of the Council of Europe to member states regarding European rules regarding juvenile offenders who are subject to the imposition of sanctions or measures (adopted by the Committee of Ministers on November 5, 2008 at the 1040 meeting of Deputy Ministers). Available online. In: [sc.gov.ua/uploads/tinymce/files/1%20\(2008\)%2011.docx](https://sc.gov.ua/uploads/tinymce/files/1%20(2008)%2011.docx). Consultation date: 10/12/2022.
- CONVENTION ON THE RIGHTS OF THE CHILD. 1989. Available online. In: https://zakon.rada.gov.ua/laws/show/995_021. Consultation date: 10/12/2022.
- KHAVRONIUK, Mykola. 2006. Criminal legislation of Ukraine and other states of continental Europe: comparative analysis, problems of harmonization. Kyiv, Ukraine.
- LAW OF UKRAINE. 2012. Agreement between the Ministry of Internal Affairs of Ukraine and the Ministry of Internal Affairs of Slovenia on cooperation in the fight against crime. Official Gazette of Ukraine. Kyiv, Ukraine.
- LAW OF UKRAINE. 2012. Agreement between the Ministry of Internal Affairs of Ukraine and the Ministry of Internal Affairs of Georgia on cooperation in the fight against crime. Official Gazette of Ukraine. Kyiv, Ukraine.
- LAW OF UKRAINE. 2018. Memorandum between the Ministry of Internal Affairs of Ukraine and the Ministry of Internal Affairs of Montenegro on cooperation in the fight against crime. Official Gazette of Ukraine. Kyiv, Ukraine.

- LEHEZA, Yevhen; PISOTSKA, Karina; DUBENKO, Oleksandr; DAKHNO, Oleksandr; SOTSKYI, Artur. 2022. "The Essence of the Principles of Ukrainian Law in Modern Jurisprudence" *Revista Jurídica Portucalense*. Available online. In: [https://doi.org/10.34625/issn.2183-2705\(32\)2022.ic-15](https://doi.org/10.34625/issn.2183-2705(32)2022.ic-15) <https://revistas.rcaap.pt/juridica/article/view/28026>. Consultation date: 10/12/2022.
- ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT.1998. Available online. In: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> Consultation date: 10/12/2022.



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