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Differentiation of Responsibility for International Crimes in Criminal Law of the Azerbaijani Republic

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Abstract: The article deals with matters of responsibilty for international crimes, which grossly violate fundamental principles of international law and generally trench on peace and security of humanity. Classification of international crimes and condemnation of those who were guilty of committing them at the international level for the first time had place on the basis of the Nuremberg Trials Statute in 1945. International crimes were classified as crimes against peace, humanity and war crimes. The Azerbaijani Republic's current Criminal Code (CC) was approved on the 30th of December 1999 and came into effect on the 1st of September 2000; it was the first that transformed international norms of responsibility for international crimes. Thus, the Special part of the CC of 1999 is opened by the section VII, which settles criminal responsibility for aggressive war, genocide, crimes against humanity and war crimes.

Key words: Criminal Responsibility · International Crimes · Aggressive War · Genocide · Crimes Against Humanity · War Crimes · Criminal Law

INTRODUCTION

International crimes practically affect the whole international society, therefore states according to the UN Charter have the right to take collective suppression actions, up to using military force and also to establish international tribunals for ccriminal prosecution [1, art. 39-51]. Thus, UN Charter, which declared and confirmed principles of respect for main rights and freedoms of a human, of peaceful solution of all questions at issue in the modern international law, established three tribunals: International criminal tribunal for the former Yugoslavia, 1993 (ad hoc); International criminal tribunal for Rwanda, 1994 (ad hoc) and International Criminal Court, 1998 (on a permanent basis), which function to the present day [2, 18, 20].

The distinctive feature of international crimes is that they are committed by states or states' representatives who use the state mechanism for criminal purposes. Therefore such crimes implicate the responsibility of a state as a subject of international law and personal responsibility of perpetrators within international and national jurisdiction. In this respect one should differentiate notions of "international sanctions", applied to subjects of international public law (they can be only states and international organizations) and criminal law sanctions, applied to responsible subjects within international criminal law (they can be natural persons and in some states also legal persons). H. Kelsen believed that although international sanctions and criminal law sanctions are the same in their nature, because they are volitional acts, do not have personified nature and are guaranteed by legal force of the authority used, but international sanctions can be applied only to states [3, 106]. The necessity of differentiation of international and intrastate jurisdictions in the matters of responsibility for international crimes and crimes of international significance is also noted by D.Y. Harris, M. O'Boyle, E.P. Bates, C.M. Buckley [4, 333-335].

Main Part: Most of CC approved at the turn of XX-XXI centuries (for example, CC of France 1992, CC of Spain 1995, CC of Poland 1998) put international crimes norms into separate chapters and sections. The lawmaker of the

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Azerbaijani Republic also systematized all international crimes in the one section of the CC 1999, namely in the section VII (Crimes against peace and humanity), on the assumption of the common object of endeavor-social relations aimed at the protection of peace and security of humanity.

For the first time the classification of international crimes had place in article 6 of Nuremberg tribunal Charter, with such three groups: 1) Crimes against peace; 2) Crimes against humanity; 3) War crimes. In addition, the Charter defined list of actions belonging to each group of international crimes [5]. At the time the most complete list of international crimes can be found in the Rome Statute of the International Criminal Court (ICC). But the Rome Statute of the ICC, instead of a laconic and conventional term "international crimes", uses less advantageous, to our mind and somewhat amorphous term-"the most serious crimes of concern to the international community as a whole" (art.5) and gives the following classification: a) The crime of genocide; b) Crimes against humanity; c) War crimes; d) The crime of aggression [6].

As we have said before, the lawmaker of our republic systematized all international crimes in one and the same section VII of CC, which opens the Special part. Also, as distinct from CC of the Russian Federation of 1996 [7, Section 12, Chapter 34-"Crimes Against Peace and Mankind's Security"], classification of international crimes, for the first time stipulated in art. 6 of the Nuremberg tribunal Charter and then fixed in the Rome Statute of the ICC, found its legislative recognition also during structuring of section VII of the Ajerbaijani Republic CC. Thus, in the section VII of the Azerbaijani Republic CC, having two chapters: chapter 16, art. 100-113 (Crimes Against Peace and Humanity); chapter 17, art.114-119 (War Crimes), there is the following crimes classification: crimes against peace-art.100, 101 and 102; genocide-art.103, 104; crimes against humanity-art. 105-113; and war crimes-art.114-119 [8; 9, 76-88]. We can see an almost widespread compliance with art. 6 of the Nuremberg tribunal Charter and with the Rome Statute of the ICC. The main difference is the place of genocide in the international crimes classification. Also it is worth noting that in Russian and English translations of the Azerbaijani Republic CC the titles of section VII and article 16 are rendered incorrectly as "Crimes Against Peace and Security of Humanity" [8].

All actions belonging to the section VII of the Azerbaijani Republic CC of 1999 are declared to be felonious according to both national criminal law and international criminal law. In total, section VII of the CC sets the responsibility for 32 crime components (for instance, the Russian Federation CC has only 20 international crime components, art.353-360 [7]), absolute majority of which are grave or especially grave crimes (87,5%). But not all of the actions belonging to section VII of the CC are international crimes. For instance, in section VII of CC only 24 among 32 components are international crimes (75%), the rest is crimes of international character. From the perspective of objective side construction, the absolute majority of international crimes in the Azerbaijan legislation are formal components. Subjects of these crimes are sane natural persons, who has reached the age of 16 years, in some components there is a special subject. All actions are characterized by an intended form of guilt. 95.8% of all international crimes belong to the categories of grave and especially grave crimes. One more peculiarity of international crimes is that lawmaker, when differentiating criminal responsibility for them, reasons from their danger to society. For instance, 91.7% of international crimes components are main components and only 8.3% of them are aggravations.

The fact that international crimes typically belong to the category of grave (45.8%) and especially grave (50%) crimes also influenced the scheme of sanctions for these crimes. Thus, 58.3% of international crimes sanctions are single and the only type of punishment according to them is deprivation of freedom for determined period. And 41.7% of sanctions are alternative and they designate, instead of deprivation of freedom for determined period, the most severe type of punishment-life imprisonment.

Although criminality, international crimes and crimes of international character are established by international law, international criminal-legal and criminal-procedural statuses of these acts differ. For instance, as distinct from crimes of international character, there are no periods of limitation for criminal prosecution and serving punishment for international crimes, criminal law has retroactive effect in matters of responsibility and punishability of international crimes. But the Azerbaijan's lawmaker, having included some crimes of international character into section VII of CC and using a bad legal trick when putting terms in the General part of CC, virtually equalled crimes of international character to international crimes.

Further we shall consider main problematic issues connected with differentiation of responsibility for international crimes in criminal law of the Azerbaijani Republic.

The Crime of Aggression: The Special part of CC of 1999 opens with art.100, which was the first to settle criminal responsibility for planning, preparation, unleashing and conducting of aggressive war. It is worth noting that originally the Rome Statute had no definition of "aggression": states agreed that ICC should perform its jurisdiction concerning this crime after states would approve such definition and make corresponding amendments to the Rome Statute of the ICC. At last, at the I Conference concerning review of the Rome Statute of the ICC, which had place from 31st of May till 11th of June 2010 in Kampala (Republic of Uganda), the international legal definition of aggression was approved in consensus. So, at this conference additions and changes in the Rome Statute were adopted. In particular, a new article 8-bis (The crime of aggression), complemented after the article 8, gave the definition of aggression and also acts falling under the notion of aggression. Also the Rome Statute was complemented by an article 15-bis (Performance of jurisdiction over the crime of aggression / Passing of the situation by the state, proprio motu), which noted that the Court shall perform jurisdiction over aggression after the 1st January of 2017, according to decision of the majority of state-members [10]. The ICC possesses the exclusive jurisdiction over the crime of aggression. The specificity of this crime is that some person can be found guilty of planning, preparation, unleashing and conducting of aggressive war only after the aggression act will be officially recognized. And recognition of some state as an aggressor is UNSF's prerogative (art. 39 of the UN Charter) [1]. When the court of some state recognizes the existence of aggression on the part of another state, international law considers it to be performance of the first state's criminal jurisdiction concerning a foreign state, *i.e*. nowadays art. 100 of the Azerbaijani Republic CC (notwithstanding the fact that Republic of Armenia showed aggression against Azerbaijan and 20% of Azerbaijan's territory is occupied) and norm of criminal responsibility for aggressive war can not be applied in practice [11, 12].

Genocide: The term "genocide" was first used by Raphael Lemkin in his book Axis Rule in Occupied Europe, published in late 1944 [13].

In art. 103 of the Azerbaijani Republic CC, criminal responsibility for genocide is settled for the first time and its definition exactly corresponds to the international legal definition of genocide in Genocide convention of 1948 [14, art.1] and comparison of descriptions of genocide performance methods in art. 103 CC of 1999 and art. 1 of Convention of 1948 gives also full identity. Some problems in practice are generated by legislative differentiation of criminal responsibility for depopulation (art. 105) and genocide (art. 103). As distinct from genocide, art. 105 of CC gives no definition of depopulation and also it is referential. Therefore during criminal legal analysis of depopulation components it is necessary to compare with genocide's components (art. 103) and that leads to some difficulties with qualification of these acts in practice. The matter is, these two types of crimes coincide in target, objective aspect, subject and criminal intent. The distinction is drawn by facultative features. If victims of genocide are people as representatives of some certain national, ethnic, racial or religious group, then victims of depopulation are residents of a certain inhabited locality. The common thing in objective side of crimes compared is actions aimed at complete or partial annihilation of many people connected into a certain community. And the main difference of objective side of genocide (art. 103) and depopulation (art. 105) in the Azerbaijan CC is the construction of objective side and method of annihilation of people group as part of genocide, which is fixed by law. From the viewpoint of objective side, depopulation is a substantive constituent component. It is worth noting that art. 7 of the Rome Statute of the ICC describes this crime, as well as genocide, as the formal component: "actions aimed at complete or partial annihilation of population" and we consider this to be more correct.

The differentiation criterion of criminal responsibility for genocide and depopulation is a special purpose of genocide. As we have already said before, a perpetrator when committing genocide has a goal to annihilate a national, racial, ethnic or religious group. All these group features are of no importance for depopulation, the differential population composition makes no interest for a perpetrator. But when there is the annihilation of some village, region or small town, which is homogeneous from ethnic, national, racial or religious viewpoint, a competition between two norms may arise during the action qualification-art. 103 (genocide) and art. 105 (depopulation). We think that is the case of qualification of murderous events in Khojali town (Azerbaijan, Nagorno-Karabakh), which took place on the night of 25/26 February 1992. Khojali was a very important strategic locality between Khankendi city and Askeran province and inhabited only by the Armenians after the bum's rush of the Azerbaijani. Also Khojali had the only airport of Nagorno-Karabakh. That is why annihilation of Khojali's indigenous population suited Armenia's

strategic plans of acquisition of an Azerbaijan territory's part and establishment of a marionette separatist quasi-state formation there. After acquisition of Khojali individual Armenian forces' attacks against Nagorno-Karabakh civilians turned into sweeping hostilities, which resulted in occupation of not only Nagorno-Karabakh administrative district territory, but also seven other neighboring regions of Azerbaijan-territories of regions Agdam and Fuýûlî partially and Lachin, Kalbajar, Zangilan, Kubadly, Djibriel fully. Annexion of the specified Azerbaijan's territory is going on to the present time and four Resolutions of UNSF (822, 853, 874, 884) on its liberation have not been implemented for over 20 years.

Khojali's population, consisted, from the viewpoint of nationality, of the Azerbaijani and also of several newly emigrated families of Meskhetian Turks (which were hunted from Uzbekistan) and from the viewpoint of ethnic and religious features it was also homogeneous (Turks, Muslims). That is why annihilation of Khojali's population can be qualified both as genocide and as depopulation. We believe that art. 105 (depopulation) should be considered as a general norm and art. 103 (genocide) as a special norm and according to the rules of competition between general and special norms, an act should be qualified according to a special norm. That is the reason why Azerbaijan law enforcement agencies initiated a criminal case of Khojali events as of the genocide. Anyway, the lawmaker considers these two actions' nature and degree of danger to society to be commensurable and prescribes equally severe sanctions for them in the form of deprivation of freedom for the period of 10 to 15 years or life imprisonment [8, art. 103, 105].

Genocide's place in the international crimes system is quite disputable. As William A. Schabas notes absolutely fairly: "Although the word appears in the drafting history of the Charter of the International Military Tribunal, the final text of that instrument uses the cognate term "crimes against humanity" to deal with the persecution and physical extermination of national, ethnic, racial and religious minorities. Prosecutors also used the term occasionally in their submissions to the Nuremberg Tribunal, but "genocide" does not appear in the final judgment, issued on 30 September-1 October 1946" [15]. The common subsumee, to out mind, attaches conditions for approaching genocide as a part of the system of crimes against humanity, as in the Nuremberg tribunal Charter (art. 6) and the Azerbaijani Republic CC first revision of 1999, where genocide was included into the system of crimes against humanity (note to the art. 103). Although neither international law nor Azerbaijani Republic legislation point out expressly that the genocide is a component of sweeping or systematic attacks against civilians, the genocide (and also crimes against humanity) can be implemented only as a part of sweeping or systematic attacks against some groups of people. The circumstance specified and the common subsumee, as we believe, allow to define genocide in the system of crimes against humanity, not outside of it, as it was said in the note to art. 105 of the CC. Genocide's independent status in the Rome Statute of the ICC is caused by the international society's wish to highlight this act's extreme danger even within the system of international crimes.

Legislation of some states (for example, Ethiopia, Slovenia, Poland) stipulates criminal responsibility for performing of similar actions also in relation to a social or political group, which is generally broader than the international legal definition of genocide in Convention of 1948. A broad interpretation of genocide is also given in art. 357 of Latvia's CC: the notion of genocide also includes "social group of people, groups of people of certain common beliefs" [16, 313].

Crimes Against Humanity: Modern understanding of crimes against humanity has an autonomous status, *i.e*. these acts can be performed both in peace time and in war time and this is not necessarily connected with committing of crimes against peace or war crimes. Article 5 of International Criminal Tribunal for the Former Yugoslaviya also notes, "that crimes against humanity must be committed in armed conflict, whether international or internal in character" [17, 43]. It is worth noting that nowadays the most complete list of crimes against humanity can be found in the Rome Statute of the ICC.

In full conformity with art. 7 of the Rome Statute of the ICC, art. 16 of the Azerbaijan CC settles responsibility for the following types of crimes against humanity: depopulation (art.105); slavery (art.106); deportation or forced movement of population (art.107); sexual abuse (art.108); forced pregnancy (art.108-1); pursuit (art.109); forced disappearance of a human (art.110); racial discrimination (apartheid) (art.111); deprivation of freedom with defiance of international law standards (art.112); tortures (art.113). Crimes against humanity include different acts. The main difference of crimes against humanity from ordinary crimes, along with similarity of actions, belonging to objective side of some crime

component (murder, cruel bodily injury, deprivation of freedom, torture, rape and so on), is a sweeping or systematic nature of crimes against humanity. European Court of Human Rights, when investigating Hungary citizens' claims on events of 1956, noted that murder of many people which are not combatants should be considered as a crime against humanity [4, 339].

War Crimes: The legal ground of the war crimes category individualization is that they abuse laws and hostilities conventions established by international law, trenching upon not only peace (peaceful coexistence), but also security of all mankind. However, we consider an opinion of some scientists, that "war crimes are so serious, that they attract attention of international authority, they can be qualified as crimes against humanity" [18, 20; 19, 60], to be not quite correct, because crimes against humanity and war crimes are individual types of international crimes, each of them, having a common subsumer, has its own subsumee of endeavor.

It is worth noting that a matter of war crimes qualification is one of the most complicated in the international criminal law. As Guido Acquaviva thinks, "A better categorization of war crimes would perhaps consist in considering objective criteria linking similar crimes." Then he offers the following classification of war crimes: "i) attacks against civilians or civilian of objects; ii) unlawfull taking of life (murder of civilians or murder of prisoners of war); iii) unlawfull attacks to personal integrity (for example, torture, wounding of civilians or prisoners of war, sexual violence); iv) limitations of personal freedoms (for example, deportation, slavery, forced labour; forced enlisting, hostage taking); v) illicit appropriation of property (for example, plunder, appropriation of cultural property); vi) deportation and forcible transfer of persons; vii) violations of rules on means of combat (for example, ordering that no quarter be given, use of human shields, use of prohibited weapons) and viii) violations of rules on belligerent occupation" [20, 120]. But the specified author considers even this categorization of war crimes to be insufficient and suggests to mark actions inside of each category depending on the nature of armed conflict: international or non-international.

Some scientists, along with war crimes, distinguish also war crimes of international character. For instance, V.G. Panov thinks that "incidental crimes, committed by individuals because of mercenary and other personal motives (robbery, murder, acts of outrage against population in the region of hostilities and so on), *i.e.* such ones that are not connected with a state and represent "excessive acts" should belong to war crimes of international character [21, 120]. We believe that such classification of war crimes cannot be considered as a good one. War crimes, along with aggression, genocide, crimes against humanity, are international crimes. Therefore use of the expression "war crimes of international character" is inappropriate. It is correct to classify these actions as crimes of international character connected with armed conflicts. Also the latter differ from war crimes from the point of view of both material features and procedural ones. Crimes of international character connected with armed conflicts do not trench upon peace and security of mankind generally (material difference); they are not subject to international judicial authorities jurisdiction, limitation periods may be applied to them (procedural differences). Lawmakers of most countries include them into the system of crimes against military service. By the way, that was the position of the Azerbaijani Republic lawmaker for the previous CC of 1960.

In history of AR's criminal law the term "war crimes" was mentioned for the first time only in CC of 1999, namely in the title of article 17 included in chapter VII (crimes against peace and humanity). What concerns suppression of war crimes with the help of AR's criminal law, we can say that there is no need to make substantial corrections in the CC, because such crimes' components not only coincide with the whole list contained in the Rome Statute, but also are somewhat broader [19, 56]. The system of war crimes in AR's CC contains following types: mercenary activities (art.114); abuse of laws and customs of war (art.115); violation of International Humanitarian Law norms during armed conflict (art.116); omission to act or issuance of criminous orders during armed conflict (art.117); war robbery (art.118); improper use of signs which are under the guardianship (art.119). Among them only acts (omission to act) included in art.115, 116, 117 and 119.2 fall under the ICC's jurisdiction, i.e. practically only they have the status of international crimes.

The AR's lawmaker also expanded list of war crimes, having eliminated differences in lists of criminal actions committed during international and non-international (internal) armed conflicts (clause 1 of note to art. 114 of CC). For instance, use of hunger among civil population as a mean of military operations during non-international armed conflicts was declared to be a war crime (art. 116.0.4 of CC), as distinct from the Rome Statute of the ICC, which gives the specified action a status of a war crime only during international armed conflicts.

Unfortunately, analysis of art. 116 (violation of International Humanitarian Law norms during armed conflict) of the CC shows an evident departure from the principle of criminal responsibility differentiation. For instance, objective side of art. 116 includes various actions or omission to act which violate norms of International Humanitarian Law norms during armed conflict. Among them we can see not only actions classified as grave breaches in Geneva Conventions and Additional Protocols and included into list of art. 8 of the Rome Statue of the ICC, but also actions, character and degree of danger to society of which is comparatively lower (for example, unjustified delay of returning army prisoners and civilians to their country-art. 116.0.15). To our mind, when the lawmaker refused responsibility differentiation and combined different (from the viewpoint of gravity) actions, which are also put by international criminal law into different categories of international crimes, in one norm, he should have created an alternative sanction, containing a broad limit between minimal (7 years of deprivation of freedom) and maximal (life imprisonment) punishment. Besides, toughening of criminal policy concerning crimes of international character connected with armed conflicts (i.e. practically giving them a status of war crimes in the Azerbaijan CC) impedes the process of criminal law unification.

It is evident that the main principle of combining of international crimes and crimes of international character connected with armed conflicts is their recognition as criminous ones according to international law norms. At the same time there was not heeded the thing that the classification was created for international law (in particular during approving of the Rome Statute) and art. 8 included the gravest actions, which actually should be recognized as war crimes.

And to summarize the matter of war crimes, we would like to attract attention to the following thing. As J. Fitzpatrick believes, women during armed actions should have double protection: as combatants or civilians and because of their sexual difference. This finds support also in international acts: the four 1949 Geneva Conventions and the two 1977 Additional Protocols. Even earlier document-1929 Geneva Convention relative to the Treatment of Prisoners of War also notes peculiarities of women's rights protection during armed conflicts: "women shall be treated with all consideration due to their sex" (article 3). Besides, the following thought of J. Fitzpatrick is worth attention: "differences in treatment of prisoners of war except on limited grounds, including the "sex of those who benefit from" the distinctions" [22, 547].

CONCLUSION

Nowadays matters of international criminal law are gaining in scientifical and practical significance and that causes a special actuality of studying separate institutes and peculiarities of this branch of international public law, also during scientifical investigations of intrastate criminal law. After the USSR's dissolution the Azerbaijani Republic obtained true independence and having become a subject of international law, acceded to many international agreements on crime control. Fulfilling of international liabilities for agreements norm implementation and also Armenia's armed aggression against Azerbaijan, which led to annexion of 20% of the territory, had a serious impact on formation of Azerbaijan's new criminal legislation. The Azerbaijani Republic CC in force in its Special part for the first time settled criminal responsibility for international crimes and many provisions of the General part were brought into conformity with international criminal law. However, like all novels, the institute of responsibility for international crimes in CC of 1999 has some weak points, some of them were shown in this article, so we came to the following resume.

Resume: International law integration influence effects only criminalization or decriminalization and also recommendations for differentiation of criminal responsibility. But in practice the differentiation of criminal responsibility is performed only by a national lawmaker, because laws settling criminal responsibility and prescribing punishment of a crime committer may be applied only after inclusion to criminal legislation (art. 1.3. of the Azerbaijani Republic CC).

The Azerbaijani Republic, which has not ratified the Rome Statute of the ICC up to this day, nevertheless, transformed its norms into its own CC. Moreover, in comparison with other states in post-Soviet territory (for example, the Russian Federation CC), the Azerbaijani Republic CC contains the most complete list of international crimes, which is due to armed conflict in Nagorno-Karabach against Azerbaijan citizens, where these crimes were committed. Also some of international crimes committed have continuing character and, therefore, last to the present time: aggression (art. 100), deportation (art. 107), pursuit (art. 109), violation of laws and customs of war (art. 115).

The Azerbaijani Republic CC of 1999, in comparison with CC of other states in post-Soviet territory, contains the most complete list of international crimes, emphasizing them in the hierarchic construction of the Special part and

putting onto the first place. However, the current title of section VII (Crimes Against Peace and Humanity) of the Azerbaijani Republic CC does not completely reflect the subsumer of actions included into this section, in particular, war crimes.

Like it is in international law, the Azerbaijani Republic lawmaker differentiates criminal responsibility for international crimes and crimes of international character. However, in some cases the Azerbaijani Republic CC, as distinct from international law, makes departures from the level of differentiation of criminal responsibility for international crimes and crimes of international character. To out mind, our legislation's imperfection of titles, descriptions and indefiniteness of categories of international crimes and crimes of international character in section VII of the CC, unnecessarily toughens up criminal responsibility for crimes of international character (art. 101, 102, 114, 118, 119.1 of the CC), because the CC General part's norms track the unitary criminal policy concerning actions included into section VII: they fall under universality principle (art. 12.3 of CC), absence of limitation periods for crime commission (art. 75.5, 80.4 of CC) and also retroactivity of criminal law (Constitutional Law of the Azerbaijani Republic of 12th of May 2006, approved on the basis of p. 2 art. 15 of International Covenant on Civil and Political Rights of 1966 and p. 2 art. 7 of European Convention on Human Rights and Fundamental Freedoms of 1950). Whereas crimes of international character included by the lawmaker into other sections chapters of the Azerbaijan CC (except for terrorism and financing of terrorism) fall only under the universality principle.

Toughening of criminal responsibility for aggression, genocide, crimes against humanity and war crimes in the Azerbaijani Republic's criminal law may be also seen in the fact that criminal responsibility for the specified actions starts from the age of 16, whereas according to the Rome Statute of the ICC-from the age of 18. Besides, as distinct from the Rome Statute of the ICC, the Azerbaijan's criminal law does not differentiate criminal responsibility for war crimes committed during international armed conflicts and non-international armed conflicts, which also shows the toughening of the state's criminal policy concerning war crimes.

The Azerbaijani Republic's CC adheres to a standard classification of international crimes (art. 6 of the Nuremberg Tribunal Charter, art. 5 of the Rome Statute of the ICC) and reflected it in systematization of section VII of CC. But the place of genocide in legislative classification of international crimes remains disputable.

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