

International anti-corruption conventions and Russian jurisprudence

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Abstract

Corruption - one of the "eternal" problems of development of human society. Corruption can not be considered an internal problem of a single country, it is a problem of the entire world community. The common motive for corruption is greed. Greed contains a very intense and concentrated mental energy that drives a person to act. Classified by the greed of the first degree (criminal motive as a qualifying legal circumstance), second degree (criminal motive which is a separate element of the crime), third degree (criminal motive as an optional statutory aggravating circumstance). If we find the content causes greed, we will be able to prevent its causes and to rehabilitate its consequences.

The problems associated with the implementation of international anti-corruption conventions are far from exhausted in the present article. Of course, work on the implementation of the provisions of international agreements in the Russian criminal legislation should be continued after the ratification of the conventions and making the necessary changes to the Criminal Code. We believe that the process of implementation of international legal norms of the Russian legislation can be quick and momentary. This is a complex and lengthy process, in which the main thing - not the speed of decision-making that can be ill-advised and hasty, and hard to follow on this path, the direction of the legislative process on Russia's fulfillment of its international obligations in this area. In addressing the problem of matching Russian criminal law the main international standards, in our opinion, is not a transfer of the Russian Criminal Code artificial, alien to the Russian criminal law structures, as reflected in Russian legislation conceptual ideas of international instruments for the effective fight against crime, including corruption, as well as to create conditions for cooperation among states in this area.

Keywords: *Corruption, Anti-Corruption convention, Implementation, Criminal Code of Russian Federation, Motives corruption incrimination.*

INTERNATIONAL ANTI-CORRUPTION CONVENTIONS AND RUSSIAN JURISPRUDENCE

Corruption - one of the "eternal" problems of development of human society. There are many different views on its causes, factors of development and the impact on various aspects of the life of society, to generalize that under this article it is impossible. We note only that corruption - a complex complex phenomenon, which highlighted the economic, political, social, moral, and, finally, the legal aspects. It is widely accepted international character of this negative social phenomenon, which is expressed both in its universality (corruption somehow exists in all societies with different political and

economic systems) and in the emergence of transnational varieties of corrupt practices significantly reduce the effectiveness of the international political, economic and cultural interaction. In today's world the fight against manifestations of corruption can only be successful in terms of its effective combination of national and international components. Corruption can not be considered an internal problem of a single country, it is a problem of the entire world community.

The last two decades have seen a real "boom" of the international anti-corruption law-making. Adopted by many global and regional international conventions on the fight against corruption, as well as instruments of "soft" international law (program, declarations, resolutions and so on.), dedicated to the issue. [1] These international instruments have a significant impact on national law and practice anti-corruption worldwide. It should be noted that the problem of corruption in Russia, with all its "universality" has a special significance. Being one of the most pernicious effects of any state, corruption has become for Russia at the beginning of the third millennium, the main obstacle to political, economic and spiritual revival, has become a real threat to national security, the main obstacle in the way of any change. According to international studies the situation with corruption in Russia is close to catastrophic. So according to the authoritative international organization "Transparency International", engaged in the research of corruption around the world, "Corruption Perceptions Index" (CPI) [2] for 2007 Russia occupies the 143rd position, along with Gambia, Indonesia and Togo in the list generated on the principle of "most corrupt - in the end." In 2006, Russia was in the "sorrowful list of" 121th place in 2005 -126th, in 2004 - 90. Realizing the convention of "corruption rating" as a whole, international experts should be, unfortunately disagree. Becoming one of the elements actually functioning state, an integral part of its relationship with citizens, the corruption spawned monstrous distortions not only in the management and operation of public institutions, but also led to a major shift in the minds of citizens, who are increasingly losing confidence in the government and faith in justice. However, for various reasons, the Russian society is not yet fully realized the gravity of corruption and, therefore, does not seek to create for her harsh legal environment. In the context of the weakness of civil society and the lack of political will on an important impulse that can make a difference, it should be the need to fulfill

international commitments made by Russia as a participant in the global anti-corruption strategy. Certainly positive point is that the state finally listened to the recommendations of experts in 2006, the main anti-corruption international conventions (UN Convention against Corruption in 2003 and the Convention of the Council of Europe Criminal Law for korruptsiyu1999 city) have been ratified and, as a consequence, steel part of the Russian legal system. Ahead of the implementation of difficult and complex task - a full-scale adaptation of Russian legislation into line with international anti-corruption standards. Joining a major international legal agreements raises the question of compliance with the Russian legislation, including criminal law, international requirements. Following the principle of good faith fulfillment of international obligations requires the timely and adequate implementation of international treaties of the Russian Federation in the Russian legal system. We believe the right decision, that the implementation of the two anti-corruption conventions ratified must occur simultaneously and comprehensively. The UN Convention, as noted earlier, is developing the idea of other international instruments, including the Convention of the Council of Europe. A number of provisions of the two conventions are very similar, which allows their implementation "in the package." In addition, the Council of Europe Convention on the criminalization of corruption is an important part of the emerging European system of law, participation in which is necessary for Russia as a participant, albeit to a limited extent, the integration processes on the European continent. Entered into force on the European Convention already has its own mechanisms of control and monitoring of anti-corruption - operating group of States against Corruption (GRECO) at the national level has considerable experience in an implementation. The UN Convention against Corruption is a "young" document, which is yet to develop appropriate mechanisms for the implementation and enforcement of its provisions.

Problems of the relationship between international and domestic criminal law and the implementation of international criminal law are separate issues, but it should make some comments. In our view, the implementation of the implementation is often ignored or incorrectly interpreted the very meaning of international obligations arising from anti-corruption conventions. Their main task is to ensure the effective application of international standards in national law and practice. In our opinion, the norms analyzed

conventions belong to the so-called transnational criminal law (Transnational Criminal Law), the existence of which has long been recognized in the Western doctrine. [3] Transnational criminal law has a number of significant differences from international criminal law in the narrow sense of the word, which includes only the small number category "core crimes", that is, international crimes, criminalized norms of jus cogens (aggression, genocide, war crimes, crimes against humanity). In contrast, transnational crime is in its origin and the legal nature of the national and ipso facto are dependent on the characteristics of the national criminal law systems. Consequently, when implementing the Convention's norms, data should not seek to maximize unification of national legal definitions of the crimes (which, on the contrary, is characteristic of core crimes), and the maximum account of the features of the national legal system, the "embedding" of transformation in her international norms, do not have direct effect. Only in this way these norms can "earn", and consequently will ensure the implementation by States of their international obligations. This situation is perfectly illustrated by the "Guide to the implementation" of the UN Convention against Corruption: "Guide is not intended to provide definitive legal interpretation of the articles of the Convention. Its content is not authoritative and, in assessing each specific requirement should consult directly with the wording of the relevant provisions. It should also be approached with caution verbatim incorporation of the Convention into domestic law, which, as a rule, should be provided with higher standards of clarity and specificity for their effective implementation, integration into the overall legal system and legal tradition and enforcement. Also, before you use the language or terms used in the Convention, the drafters of domestic legislation are advised to check their compliance with the descriptions of other offenses and definitions of other concepts adopted in the legislation of the country". This manual has been reflected on the implementation of the main idea of the implementation with the tradition and experience of national legal systems. The UN Convention, despite its global nature and the lack of opportunity for States Parties to make any reservations, yet very flexible international instrument in terms of national legal approaches to the criminalization of conventional crimes. It secured two types of international obligations: 1) mandatory rules on mandatory criminalization of acts, which focused very core of corruption; 2) The provisions of

recommendation describing alternative formulations of corruption crimes, providing them at the discretion of the criminalization of states (for example, the composition of illicit enrichment). Another character is the Council of Europe Convention, which contains mandatory obligations to criminalize, but leaves room for reservations. In this regard, it looks remarkably ill-considered decision of the Russian legislator, ratifying without any reservation, in the presence of significant and intractable conflict with the Russian legislation. A detailed comparative analysis of anti-corruption conventions and norms of Russian criminal law was held before us and many well-known experts. [4] In our opinion, the whole Russian criminal law on liability for corruption offenses in their conceptual basis of the relevant international requirements and standards. Of the Criminal Code Russian Federation in 1996, adopted in a deep political, economic and legal reforms, made significant changes in the regulation of liability for official crime. It is in this Code, new offenses, many of which are provided for in international conventions (commercial bribery, illegal participation in entrepreneurial activities, etc.). Significant changes were made, including in the direction of differentiation of responsibility in the rules on bribery and abuse of power - the most dangerous corruption crimes. It should be noted and a number of new offenses are inextricably linked to corruption (it is primarily a question of rules on liability for the legalization (laundering) of assets acquired by criminal means). However, careful analysis of the norms of the Criminal Code Russian Federation in relation international conventions shows that the Russian criminal legislation still contains a number of serious conflicts with international instruments under consideration, the resolution of which, according to earlier implementation of these principles, it is of paramount importance. Next, we will focus only on the most pressing and controversial issues.

Among the priority issues facing the Russian legislator in the process of implementation, stands the question of the subjects of corruption crimes. The global trend is the expansion of the concept of the subject of official crimes. The Russian Criminal Code Russian Federation also uses the term "officer" with an extremely narrow interpretation. This in Note 1 to Article 285 of the Criminal Code does not meet the definition of the term "public official" (Part A Section 1, Article 2 of the UN Convention), significantly narrowing the range of subjects that may be responsible for corruption

offenses. Thus, for public officials may be assigned civil servants, who for the functions they perform, or their employment status is not formally belong to the officials (for example, assistant to the State Duma and the Federation Council of the Federal Assembly of the Russian Federation, the advisers of the Government of the Russian Federation, etc.). However, they are at their official position, and may have a significant impact on the implementation of the officials of their duties and their decisions. Currently, according to Note 4 to the Article 285 of the Criminal Code Russian Federation, it follows that they can be prosecuted only under Article 288 ("Assignment of powers of the official") and Article 292 ("Falsification of official documents") of the Criminal Code Russian Federation. Part-ii Section-A Article 2 UN Convention apply to persons performing public that is socially important functions for the public (public) institutions or enterprises, or provides a public (public) service. This group, in our opinion, are the executives and other employees who are assigned organizational and administrative or administrative functions in state and municipal enterprises and organizations, including the Central Bank of Russia and its territorial divisions, as well as representatives of the interests of the Russian Federation and its subjects in the management bodies of joint stock companies with state participation. Considered face their criminal acts committed with the use of official powers, can cause substantial harm to the legitimate interests of the state, society and citizens. These are the official managers themselves crime of the Central Bank of Russia and its field offices, as well as Russian Joint Stock Company "UES", "Gazprom" and "Russian Railways" and the like, as well as representatives of the state in commercial organizations. As is known, the Russian criminal legislation classifies this category of persons to subjects Chapter 23 of the Criminal Code Russian Federation, that is, in fact, their crimes are matters of private prosecution. It is clear that the approach adopted by the Convention is much broader than is used in Chapter 30 of the Criminal Code Russian Federation the concept of official (application to Article 285 Criminal Code RF). As, no doubt, at one time reaching national criminal legal theoretical thought, in modern conditions, it seems, is as obvious anachronism. I think that we should agree with prof. B.V.Volzhenkin that "it's time to opt out of the use of the Criminal Code of the concept of official recognizing the subject of crimes against the interests of the public service of any public employee

no matter which category it belongs" [5]. It is noteworthy that the new federal law "On state civil service" no division of federal civil servants and civil servants of subjects of the Russian Federation for the officials and other persons. In addition, the long overdue issue of the need for inclusion in the subject malfeasance heads of state and municipal enterprises, as well as state representatives in the management bodies of joint stock companies. In our view, an important aspect of implementing procedures should be a clear realization of the idea of differentiation of responsibility is on the basis of the subject of crime and public administration (in particular, the allocation of such a dangerous form of corruption as the abuse of the judges). Unfortunately, in the Criminal Code Russian Federation lies a fundamentally different idea - the differentiation of responsibility for bribe or illegal payment. We are fully in agreement with the I.A.Klepitskiy and V.I.Rezanov that enshrined in Russian legislation differentiation of responsibility for bribery does not hold water. [6] Comparison of the wording of the international conventions and the Criminal Code Russian Federation shows that the responsibility for commercial bribery established in Article 204 of the Criminal Code Russian Federation is somewhat narrower than the responsibility for the "bribery in the private sector," provided for in international conventions. Thus, the subject of bribery, according to the Convention, may be "illegal benefits" (Article 21 of the UN Convention, Article 7 and 8 of the European Convention), and not just the "property benefits". According to the Convention a criminal offense relates "promise to transfer the subject of bribery" that the Russian Criminal Code is regarded as a criminal not punishable preparation of a crime.

Widely interpreted in international documents and offenses related to "bribery" (active and passive bribery of public officials). Under the "bribery" Convention understand not only the actions of the cottage, taking bribes, but also the promise, offering improper benefits to active bribery and, therefore, the adoption of promises and proposals to the passive bribery (Article 15 of the UN Convention Against Corruption, Art. 2 and 3 of the Convention of the Council of Europe, Article 8 of the UN Convention Against Transnational Organized Crime). Within the framework of the Russian criminal law the responsibility for such acts can only be as a prep for within the institution unfinished crime. Offer a bribe, demand bribes, along with other actions to create the

conditions for obtaining and bribery, has long stood out as preparation for typical cases of bribery in the theory of domestic criminal law. These provisions of international conventions shows the influence of French criminal law. It was the French Criminal Code uses the terms "active" and "passive" bribery, as broadly describes the objective side of these offenses, including the promise, offering bribes, and according to the requirements thereof - Art. 432-11, 433-1, 433-2 of the Criminal Code of France in 1992. In accordance with Article 30 of the Criminal Code Russian Federation, criminal liability arises only for preparations to commit grave or especially grave crimes. [7] Thus, the responsibility for the promise and offering bribes, as well as for the adoption of such promises and offers is only possible with qualified bribery (Ch. 2, 3, 4 Art. 290 and Ch. 2, Art. 291 of the Criminal Code RF). S.V.Maksimov proposed to solve this contradiction by amending Article 30 of the Criminal Code Russian Federation so that responsibility comes also for the preparation of a crime of medium gravity. [8] This proposal seems questionable. Equally significant legislative change, of course, requires criminological justification. The large-scale criminalization of acts of public danger which, at least, doubtful, of course, would be contrary to the general trend of humanization of criminal legislation, the decriminalization of low-risk acts. Another way of solving this problem lies in the inclusion of these actions in the objective side of bribery (commercial bribery) or in the construction of certain "truncated" formulations, providing for liability for a promise or offer a bribe (the subject of commercial bribery). That he looks better in this case. Of course, such "truncated" forms of bribery should be classified as crimes of small and moderate.

You should also state the difference between the international conventions and the Criminal Code Russian Federation on the issue of the subject of bribery in the public and private sectors. Indeed, in International law under such a subject is defined as "any undue advantage for themselves or for others", while according to the Criminal Code Russian Federation (Art. 204 and 290) for a bribe, or the subject of commercial bribery refers to "money, securities, other property or benefits (services) of material nature". Of course, the language of the Convention is more general, however, in our opinion, we should not exaggerate this contradiction. In essence, the "undue advantage" in the vast majority of cases it is the nature of the material. In the Russian literature of the criminal

law disputes, in essence, it is just a matter of sexual services as a subject of bribery. In other cases, the nature of the property bribes are usually obvious.

The most significant space of the Russian criminal legislation in terms of its compliance with international anti-corruption instruments is, in our view, the lack of rules on responsibility for "bribery of foreign public officials (ambassadors and etc.)" and responsibility for "bribery of officials of international organizations." These kinds of transnational and international corruption are extremely dangerous and are subject to criminalization under international conventions (Art. 5, 9, 10, 11 Council of Europe Conventions, Article 16 of the UN Convention Against Corruption, Article 8 of the UN Convention Against Transnational Organized Crime). There is an obvious gap of Russian criminal law. We agree that it G.I. Bogush must be eliminated by the introduction of special provisions in the law on liability for transnational bribery, and they should be placed in a new chapter of the Criminal Code Russian Federation, which would bring rules on liability for crimes against international pravovoporyadka. As a temporary measure, we consider the possibility of placing the rules on international bribery in Section 30 of the Criminal Code Russian Federation, realizing at the same time, some of this legislative decision blameworthiness. [9]

Despite a number of problems, all the acts of corruption provided for in international conventions or already exist in the current Criminal Code Russian Federation, or can be criminalized without violating the structure and principles of the Russian criminal law. Perhaps the only exception is the provision under Article 20 of the UN Convention ("Illicit enrichment"). The concept of illicit enrichment is defined as follows: "a significant increase in the assets of a public official exceeding his lawful income, which it can not reasonably explain". Regarding the inclusion of this provision in the text of the Convention in the work of the Special Committee on the Convention developed a fruitful discussion. Delegations of the Russian Federation, members of the European Union and other countries have expressed their strong desire to delete Article 13. The documentation of the Special Committee lacks any justification for such a negative position. I think that it was caused by the fact that such a rule is not entirely consistent with the provisions of the presumption of innocence and introduces elements of criminal law objective imputation. It should be noted that, like other standards, the

Convention requires the intentional nature of the act ("when the crime committed intentionally"). In this case, it is unclear in relation to any act must be installed wine in the form of intent, as "a significant increase in the assets" is not an action (or inaction) of a person, and its consequences. Actions (inaction) is presumed and does not require proof that contradicts the principles of classical criminal law on the responsibility of the person responsible only for their own actions (inaction). However, this provision was included in the final text of the Convention. There is no doubt the fact that the implementation of this provision will cause considerable difficulties. The manual for the implementation of the UN Convention draws attention to the fact that "illicit enrichment" or the appearance of goods, the origin of which the official could not explain ("unexplained wealth"), already criminalized in some countries. Examples are Article 10 Ordinance on Prevention of bribery Hong Kong, Article 34 of the Act of Botswana on Corruption and Economic Crime, Article 37 of the National Law of the Republic of Indonesia to combat corruption criminal character number 31 in 1999. However, no examples of such solutions in the known legal systems omitted. In our opinion, the criminalization of illicit enrichment is not possible without violating the conceptual foundations of Russian criminal law. With the possible prosecution of illicit enrichment, as it were presumed origin of the official income due to the act of corruption. Such presumption of Russian criminal law and procedure are unknown. In a fair statement I. Kamynin, the appearance in the Criminal Code Russian Federation provisions of the Convention on illicit enrichment "prevents the fundamental principle of presumption of innocence, puts the onus of proving the wrongfulness of violations committed by law enforcement agencies and eliminating the possibility of a decision on the basis of conflicting and dubious conclusions". [10] The introduction of a legal structure with very vague criteria able to generate numerous abuses, including corruption. Rightly questioned the need for the criminalization of illicit enrichment N.A Egorov. [11] Of course, the mere presence of an official from the revenue that it could not reasonably justify a serious violation of professional ethics, may entail disciplinary responsibility for the very existence of such funds. A definite way out would be to establish liability of public servants for failure to declaration of income and assets or provide false information about their origin, but that rate must precede the establishment of such a

mandatory declaration in the legislation and, more importantly, the implementation of such a system in practice. Given the above, we consider it inappropriate at this stage in the establishment of the Russian criminal law liability for "illicit enrichment", in accordance with Article 20 of the UN Convention Against Corruption. Since the Convention establishes that the State party is considering the establishment of responsibility for the act "subject to its constitution and the fundamental principles of its legal system", the Russian Federation, in our opinion, should refrain from implementing its legislation in this provision.

The common motive for corruption is greed. According to some experts, self-interest is "material benefit" [12], while others defined it as "reckless egotistical desire," [13] "character trait of personality" [14], "pursuit of acquiring financial gain" [15], or as "physical or moral advantage." [16] We think that the motive of greed should be legally defined as an acquired character of personality and careless trait and excessive and egotistical desire, or greed for material gain. Greed contains a very intense and concentrated mental energy that drives a person to act. Classified by the greed of the first degree (criminal motive as a qualifying legal circumstance), second degree (criminal motive which is a separate element of the crime), third degree (criminal motive as an optional statutory aggravating circumstance). [17] The content of the term "self interest" is determined by the following formula:

PERSONAL GAIN = GAIN + LOVE = INDIVIDUAL PSYCHOLOGICAL ANTAGONISM

(cause of splitting and duplication of personality, that is, various forms of diseases of the soul psychological character).

If we find the content causes greed, we will be able to prevent its causes and to rehabilitate its consequences.

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[2] Corruption Perceptions Index (CPI) compiled by Transparency International ranks countries in terms of the degree of corruption among public officials and politicians. It is a composite index, a "poll of polls"

based on data from expert and business surveys on corruption conducted by various independent and representative organizations. The CPI reflects views and analysts from around the world; including those of experts who live in the country for which the study was conducted. Transparency International commissions the CPI from Johann Graf Lambsdorff, professor at the University of Passau, Germany. The list is headed by Denmark in 2007 and closed fishing rod and Myanmar (179 places) recognized this study the most corrupt countries in the world (http://www.transparency.org/policy_research/surveys_indices/cpi)

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