CRIMINAL RESPONSIBILITY FOR STEALING IN INTERNATIONAL LAW

INTRODUCTION

Property rights are recognized as special institution and protected on international and domestic levels.

It should be recalled that there are the 6 forms of stealing in the Criminal Code of the Russian Federation: theft (Article 158 of the Criminal Code of the Russian Federation), fraud (Article 159-1596 of the Criminal Code of the Russian Federation), misappropriation (Article 160 of the Criminal Code of the Russian Federation), embezzlement (Article 160 of the Criminal Code of the Russian Federation), robbery (Art. 161 of the Criminal Code of the Russian Federation), armed robbery (Art. 162 of the Criminal Code of the Russian Federation). All of them have practically the same set of qualifying characteristics and differ among themselves in the method of seizing someone else’s property. Also, in addition to abovementioned forms, stealing of items of particular value (Article 164 of the Criminal Code of the Russian Federation) is distinguished.

Analysis of international criminal law allows us to make the following list of crimes against property in the form of stealing:

- computer-related fraud (Article 8 of the Convention on Cybercrime of November 23, 2001);
- embezzlement, misappropriation or other diversion of property by a public official (Article 17 of the UN Convention against Corruption of October 31, 2003);
- stealing of cultural property of peoples (Article 5 of the Convention for the Protection of the World Cultural and Natural Heritage of November 16, 1972; paragraph 1 of Annex III to the European Convention on Offenses relating to Cultural Property of June 23, 1985; Article 1, 5 Agreements on cooperation of the CIS member states in the fight against theft of cultural property and ensuring their return, October 5, 2007 etc.).

If we assume that the abovementioned list of offences is a system and compare it with the national system of the crimes in question, then there is obviously a certain discrepancy between them. The specificity, as it seems, is due, first of all, to the needs and peculiarities of the implementation of the protective function of international criminal law, as well as the danger of the acts being committed.

LITERATURE REVIEW

The works of Russian (BEZVERKHOV, 2002; BOYTSOV, 2002; BRATANOV, 2001; ERMAKOVA, 2014, p. 36-38; ILINYKH, 2018; KLAK, 2008, p. 155-157; KONYAKHIN, 2011; KOCHOI, 2000; LASHIN, 1997, P. 29-31; LEBEDEVA, 2014, p. 15-17; LOPASHENKO, 2019; ROZENCVAJG, 2011; SHULGA, 2009; YANI, 2002), and foreign (FREIBERG, 1996; WEISEL, 2002; RATCLIFFE, 2001; SUTTON, 1996; HALL, 1952; KLAUS, 2006; BENNETT, WRIGHT, 1986; WHITE, 1990; WONG, 1978; CLARK, CECIL SCOTT, 1976; ELLEN, 1999; BALLEISEN, 2017) scientists were used as sources for the current research.

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METHODOLOGY
The object of the research is social relations developing in the sphere of securing property rights, for example, relations regarding the possession, use and disposal of property belonging to the owner (individual, legal entity, state) (OGORODNIKOVA, 2015, p. 227-228).

In the process of preparing the article, the authors used doctrinal method to study and describe elements of crimes against property in international law. Comparative method was used to critically analyze Russian and international regulation of discussed crimes. Linguistic method also helped to achieve new results as there are no bilingual comparison of wording of some international treaties.

RESULTS

1. Computer-related fraud. The direct object of this crime is property relations.

Actus reus is presented in Art. 8 of the EU Convention on Cybercrime of November 23, 2001 and consists of depriving another person with a fraudulent or dishonorable intent of procuring, without right, an economic benefit for himself or another person from his property by: a) any input, alteration, deletion or suppression of computer data; b) any interference with the functioning of a computer system.

Computer related fraud is materially defined crime and is complete from the moment of taking possession of the corresponding property, as a result of which the rights of owner or other legal possessor of this property are violated.

The mental requirement for abovementioned crime is direct intent and a special purpose, which is formulated in the Convention as “a fraudulent or dishonorable intent of procuring, without right, an economic benefit for himself or another person”.

The Convention 2001 is silent about status of perpetrators; hence, we assume it can be any person able to bear criminal responsibility.

Even though Russian Federation is not a party to EU Convention on Cybercrime, Article 159 of the Criminal Code of the Russian Federation textually recalls the provisions of the Convention and criminalizes computer related fraud, defining it as stealing of someone else’s property or the acquisition of the right to someone else’s property by entering, deleting, blocking, modifying computer information or otherwise interfering with the operation of means of storing, processing or transmitting computer information or Telecommunication networks.

2. Embezzlement, misappropriation or other diversion of property by a public official (article 17 of UN Convention against corruption)

The main direct object of these Offences is property relations, and relations in the sphere of implementation of the established procedure for exercising powers by public officials can be recognized as an additional object.

Actus reus is characterized by the commission by a public official of at least one of the following alternative actions: 1) embezzlement of the named object; 2) its misappropriation; 3) its other diversion of property.

It is important to point at inaccurate translation of terms in Convention against Corruption. In Russian version the word «хищение» (histchenie) what means stealing is used instead of «растрачива» (rastrata) what is equivalent to embezzlement (art. 17). This leads to misunderstanding of one element of actus reus. Article 71 of the discussed Convention claims Russian and English texts equally authentic. In order to solve this conflict, we need to follow the rule of interpretation in article 31, 32 of the Vienna Convention on the Law of Treaties.

1 In contrast to EU Conventional approach, Model Criminal Code of CIS member states (1996) contains similar but not identical crime, namely larceny by using computer technology (art. 243). Even though it seems like computer-related fraud, its definition does not limit the methods of illegal transmission of property rights and includes different ways of stealing. At the same time, the reference to “the use of computer technology”, on the contrary, reduces the possibility of applying this norm in comparison with the methods specified in the Convention, since computer technologies are not limited only to PC.
In cases when application of articles 31 and 32 does not remove difference in meaning, the interpretation should be done with regard to object and purpose of the treaty (Art. 33 of VCLT).

Embezzlement, misappropriation or other diversion of property by a public official are materially defined crimes and are complete from the moment of taking possession of the corresponding property and thereby causing damage to the owner or other official possessor of this property.

The UN Convention against Corruption emphasizes that mens rea requires direct intent and special purpose - to gain benefits for oneself or another person or entity.

The attention should be paid to the fact that the perpetrator must be a public official, the definition of which is contained in Art. 2 of the named Convention.

Despite the fact that the Criminal Code of the Russian Federation contains various forms of stealing, it still does not fully comply with UN Convention against Corruption. The further offences fall within the anticorruption spirit of the Convention: abuse of power (Article 285 of the Criminal Code of the Russian Federation), misappropriation of budgetary funds (Article 285 of the Criminal Code of the Russian Federation), inappropriate spending of state extra-budgetary funds (Article 285 of the Criminal Code of the Russian Federation), excess of power (Article 286 of the Criminal Code of the Russian Federation). In order to eliminate the inconsistency, it is advisable to include the corresponding norm of article 17 of the Convention against corruption either in Chapter 21 of the Criminal Code of the Russian Federation, dedicated to crimes against property, or in Chapter 30 of the Criminal Code of the Russian Federation, which deals precisely with various manifestations of abuse of power.

3. Stealing of cultural property

This crime affects not only property rights, but also public relations in the field of preservation of cultural heritage, and to a certain extent - and public morality. This type of crime has two objects because it is the cultural property which is stolen. (Knyazkina A.K., 2008, p. 248-253). It has not only material value, but also cultural.

In order to qualify crime as stealing of cultural property first we need to estimate the stolen object. There are numerous definitions of cultural property and cultural heritage in international treaties, such as art. 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954; art. 1 of the Convention concerning the Protection of the World Cultural and Natural Heritage, November 16, 1972; art. 1 of the Convention on Measures Aided at Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, November 14, 1970; art. 2 of the Council of Europe Convention on Offenses relating to Cultural Property, May 14, 2017; art. 2 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995; art. 1 of Agreement on the export and import of cultural property, September 28, 2001; art. 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage, October 17, 2003, etc. Besides universal and European regulation, cultural heritage is protected by number of treaties of Commonwealth of Independent States, for example, the Model Law on Culture, December 4, 2004; the Model Law on Cultural Heritage Objects, May 17, 2012; the Model Law on the Safeguarding of the Intangible Cultural Heritage, November 29, 2013. Cultural heritage is a wider term than cultural property. When talking about cultural property states differentiate “their” and “foreign” objects. (BIECZYNSKI, 2017, p. 260), but etymological analysis of these terms is beyond the scope of this paper.

Actus reus of stealing of cultural property includes further elements:

a) illegal seizing of cultural property and (or) turning it in favor of guilty person with mercenary aim and without compensation;

b) cause of damage to their owner or other legal possessor.

Moreover, stealing can be committed in various ways. So, in Art. 4 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict prohibits theft, pillage or misappropriation of cultural property in any form. A similar list of offences is given in paragraph
19 of the UNESCO Recommendations “On the Protection of Movable Cultural Property”, namely, theft, pillage, receiving or illegal appropriation of movable cultural property.

Article 3 of the Convention on means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property criminalizes these actions when committed in violation of the rules adopted by the States parties.

The most extensive list of acts that form the actus reus of the crime in question is provided for in Annex III to the CoE Convention on Offenses against Cultural Property. A slightly different list of crimes committed against cultural property is presented in Art. 3-11 of the CoE Convention on Offenses Relating to Cultural Property, May 19, 2017 also known as Nicosia Convention.

Speaking about the structure of the crime in question, one should bear in mind the variety of different forms of its commission, which has a direct impact on the understanding of the moment when the crime is committed. For example, the theft is materially defined crime and will be recognized as completed from the moment of taking possession of cultural property and causing damage to the owner or other legal possessor of this property. The extortion of cultural property is formally defined crime, and therefore will be terminated from the moment the corresponding act is committed. Mens rea for discussed crimes requires intention of the perpetrator to commit stealing and understanding that the object of theft (or illegal import etc.) has cultural values. Lack of relevant knowledge will not allow to qualify the action as a crime against cultural property.

The perpetrator is a sane person who has reached the age specified by national legislation. In particular, according to the Criminal Code of the Russian Federation, the person bears responsibility for stealing of items of exceptional value from the age of 16, while the age of responsibility for “ordinary” theft or robbery is 14 years. In Art. 164 of the Criminal Code of the Russian Federation establishes liability for stealing of items of exceptional historical, scientific, artistic or cultural value. It seems that this rule is very limited, since art.164 criminalizes only stealing, and does not cover other illegal actions relating to cultural property prohibited by international law. In this regard, the wording of Art. 248 of the Model Criminal Code of CIS member states (1996) “Stealing of items of special value” is better, because it differentiates between responsibility for the theft of items or documents of special historical, artistic or cultural value (part 1), and responsibility for robbery or extortion in order to take possession of the named items (part 2).

CONCLUSION
Comparing the provisions of international treaties and Russian criminal legislation, it can be concluded that in contrast to Russian Criminal Code, there is no well-structured system of crimes against property on universal level. Taking into consideration studied sources of law, it seems possible to offer a general vision of the named system of stealing in international law:

1) computer-related fraud (Article 8 of the Convention on Cybercrime of November 23, 2001);
2) embezzlement, misappropriation or other diversion of property by a public official (Article 17 of the UN Convention against Corruption of October 31, 2003);
3) stealing of cultural property.

After analysing the norms on stealing in international and Russian acts, it can be concluded that, on the one hand, there are more forms of stealing in Russian Criminal Code (six in contrast to three), but, on the other hand, Russian legislator has not fully implemented some provisions of the Convention against corruption. First of all, this concerns embezzlement, misappropriation or other misuse of property by a public official. In Russian Criminal Code these conventional crimes correspond to similar crimes like misappropriation and embezzlement (only part 3 of Art. 160 of the Criminal Code of the Russian Federation criminalizes behaviour of public official), as well as a abuse of power (Article 285), misappropriation of budgetary funds (Article 285¹), inappropriate spending of state extra-budgetary funds (Article 285²), excess of power (Article 286). But these articles are not in the Crimes against property Chapter and are not equivalent to the definition of embezzlement, misappropriation or other misuse of property by a public official as it provided in the
Convention against Corruption. Thus, it should be recognized that in this aspect the legislation of the Russian Federation does not fully comply with international standards and needs to be harmonised. Moreover, In Russian version of the Convention against Corruption the word «хищение» (histchenie) what means stealing is used instead of «растрата» (rastrata) what is equivalent to embezzlement (art. 17). This leads to misunderstanding of one element of actus reus. This inaccuracy leads to misunderstanding and should be eliminated.

The cultural property is protected by Russian Criminal Code, art. 164 of which provides liability for stealing of items of exceptional historical, scientific, artistic or cultural value. This norm limits the protection, as other forms of embezzlement are not criminalized by this article.

Taking everything into consideration, we may conclude that there are aspects which need further optimization in order to harmonise Russian criminal law in part of crimes against property.

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Criminal responsibility for stealing in international law
Responsabilidade criminal por roubo no direito internacional
Responsabilidad penal por robo en el derecho internacional

Resumo
Este artigo está focado na análise comparativa de crimes contra o patrimônio, como são definidos em tratados internacionais e código penal russo. A base metodológica do estudo é um conjunto de métodos doutrinários, comparativos e linguísticos. Foi realizada uma análise comparativa da legislação penal internacional e nacional que prevê a responsabilização pelo roubo de bens. As formas de roubo foram determinadas e seus elementos foram descritos. Como resultado do estudo, pode-se concluir que não há um sistema bem estruturado de crimes contra o patrimônio em nível universal. Embora exista uma compreensão comum de crimes contra o patrimônio no direito nacional e internacional, o Código Penal da Federação Russa não compartilha a abordagem dos tratados internacionais na questão de formular alguns elementos do actus reus.

Palavras-chave: Furto. Propriedade. Formas de roubar. Fraude. Apropriação indevida de propriedade.

Abstract
This paper is focused on comparative analysis of crimes against property as they are defined in international treaties and Russian Criminal Code. The methodological basis of the study is a set of doctrinal, comparative and linguistic methods. A comparative analysis of international and national criminal legislation providing liability for stealing of property was carried out. The forms of stealing have been determined and their elements have been described. As a result of the study it can be concluded that there is no well-structured system of crimes against property on universal level. Even though there is common understanding of crimes against property in domestic and international law, the Criminal Code of Russian Federation does not share the approach of international treaties in the matter of formulating some elements of actus reus.

Keywords: Theft. Property. Forms of stealing. Fraud. Misappropriation of property.

Resumen
El presente documento se centra en el análisis comparativo de los delitos contra la propiedad tal como se definen en los tratados internacionales y en el Código Penal de la Federación de Rusia. La base metodológica del estudio es un conjunto de métodos doctrinales, comparativos y lingüísticos. Se llevó a cabo un análisis comparativo de la legislación penal internacional y nacional que prevé la responsabilidad por el robo de bienes. Se han determinado las formas de robo y se han descrito sus elementos. Como resultado del estudio, se puede concluir que no existe un sistema bien estructurado de delitos contra la propiedad a nivel universal. Aunque existe un entendimiento común de los delitos contra la propiedad en el derecho interno e internacional, el Código Penal de la Federación de Rusia no comparte el enfoque de los tratados internacionales en lo que se refiere a la formulación de algunos elementos del actus reus.

Palabras-clave: Robo. Propiedad. Formas de robo. Fraude. Apropiación indebida de bienes.