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under the Government of the Russian Federation

LEGAL FRAMEWORK FOR IMPLEMENTATION OF ANTI-CORRUPTION CONVENTIONS

Monograph

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Editor-in-Chief
Doctor of Law, Professor
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The issue of legal mechanisms of the implementation of the anti-corruption conventions is investigated in domestic literature for the first time. The definition of corruption in the international acts and the national legislation is found out and the ways of implementation of the provisions of anti-corruption conventions into the legislation of states are identified.

Characteristic features of the implementation of the international anti-corruption norms in the Russian Federation and foreign countries are shown. The value of legal aid on criminal cases of corruption offenses is revealed. On the basis of studying of practice of anti-corruption activity and theoretical generalizations the directions of improvement of the mechanism of the implementation of the anti-corruption conventions are determinated.

For science researchers and practitioners, graduate students, and all those who is interested in the interaction of international law and the national legislation in the sphere of counteraction of corruption.

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INTRODUCTION

Contemporary international law employs a broad interpretation of corruption as a mercenary abuse of an official position not limiting it to bribery of public officials. The documents of United Nations Organization and regional international organizations, including those of the Council of Europe, currently define corruption as abuse of power for private gain or in the interests of third parties or groups[1].

At the national level, there are different approaches to definition of corruption. Ii is not used in legislation of some countries, in particular, of Denmark and Finland. These countries hold, consequently, the first and the third positions in the Transparency International Corruption Perceptions Index for 2014. Therefore, there is no direct dependence between the presence of legal definitions of corruption in the legislation and the effectiveness of anti-corruption measures. At the same time, it is apparent that legal definitions of corruption, undoubtedly, contribute to fight against it.

In the majority of countries, the concept of corruption is defined through components of separate offences. For example, in France, the concept of corruption covers the complex of approximately 20 components of criminal offences. They establish such qualifying elements as provision of unjustified benefits (Article 432-14 of the Criminal Code), misuse of property or trust of the company (Articles 425-4, 437-3, 460, 464 of the Companies Act) etc.[2]

The legislation of some countries determines the concept of corruption or, as in Great Britain, "corruption directed action" (Article 2 of the British "Prevention of Corruption Act of 1916"), but does not provide its detailed description.

In US legislation, the concept of corruption is interpreted in a broader sense. It covers unlawful actions with participation of not only physical persons, but also of legal entities, public and private structures, both in the USA, and beyond its borders (see, for example, Paragraph 371 of Title 18 of the United States Code).

Another approach to the concept of corruption is used in Spanish legislation. In addition to formal legal criteria it includes ethical criteria of honesty, neutrality, independence, openness, service to public interests etc. (the Law on measures to reform the civil service No. 30 dated 2 August, 1984).

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1 Article 2 of the United Nations Convention Against Corruption, article 6 of Inter-American Convention Against Corruption; article 2 of the Civil Law Convention on Corruption of the Council of Europe etc.

2 For details see: Donatella Della Porta et Yves Mény, *Démocratie et corruption en Europe*, Découverte. 1995; Yves Mény. La corruption de la République. Ed. Fayard. 1992.

In general, the trend to expand the concept of corruption can be noted in the legislation of the majourity of countries worldwide. It goes beyond the scope of bribery and covers such corrupt practices as nepotism, patronage, numerous forms of misappropriation of public funds.

The difficulty in finding a legal definition for corruption is caused by multivariance of its contemporary manifestations. It constantly **evolves** depending on implemented countermeasures. Sociological research indicates its qualitative change with spontaneous corrupt conduct having the character of deviation being substituted with regular actions performed according to certain rules. The so-called **institutionalization** of corruption takes place as evidenced by incorporation of corruption practices into institutionally stable forms both in public and private spheres.

The instruments for corruption prevention efficient 8-10 years ago are currently insufficient. This happens, for example, in case of declaration of assets of relatives of public officials. The corresponding assets are now being executed on the names of legal entities, including the foreign ones, with corrupt officials using these assets without any risk of being caught.

There is a growing trend in **depersonalization of** interaction between bribe-givers and bribe-takers. Different forms of mediation in bribery are actively developing that contributes to growth of corrupt services market.

Corruption enters the new **transnational level**, thus dictating the need for acceptance of global international legal measures.

Such dynamics of contemporary development of corruption requires the periodic review of its normatively set definitions in international and national law.

Taking into account such approach to addressing the issue of legal framework for implementation of anti-corruption conventions, the authors of this monograph proceed from the need of definition of corruption in the broadest possible context.

Corruption is improper use by a public official or other person of his/her position for improper personal gain or for the benefit of third parties, provision of such benefits by other persons, as well as mediation and other forms of assistance to commissioning of the aforementioned acts. This definition is the most universal compared to the traditional ones[1], and can be applied both to public and private spheres.

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[1] See, for example: International Handbook on the Economics of Corruption (Elgar Original Reference) by Susan Rose-Ackerman (2007); Controlling Corruption by Robert E. Klitgaard (1991), Corruption by Matthew Rudoy (2011), Political Corruption: Concepts and Contexts by Arnold J. Heidenheimer and Michael Johnston (Sep 17, 2001), Legal Mechanisms for Prevention of Corruption in Management of Public Resources. Khabarovsk, 2002, The materials of the conference "Sociology of Corruption" (20 March, 2003, the Institute of Scientific Information for Social Sciences of the Russian Academy of Sciences); A.N. Tchatschin. Corruption in Russia: Strategy, Tactics and Methods of Control". M., 2009.

The formation of international legal mechanism of anti-corruption enforcement passed through several stages. At **the first stage** (in the 1950s-1960s) the international organizations, and, above all United Nations, started paying attention to the need of combating bribery of State officials in the sphere of international commercial and financial operations. In some countries, such as Belgium, Great Britain, Germany, India, Korea, Portugal, Singapore, the United States, Thailand, Finland, France, Japan etc., at the same time the fight against corruption became one of priorities of State policy.

The second stage may be attributed to the 1970s when, within the context of establishing the new international economic order, the United Nations attempted to elaborate the legal definition of corruption and to prepare the international agreement to combat unlawful payments and other types of corrupt practices. It is exactly in this period when the idea to make such acts criminally punishable according to national legislation of UN member states is evolving. Thus, United Nations General Assembly Resolution No. 3514 (XXX) dated 15.12.1975 condemned all the forms of corruption, including bribery in international business transactions. Although all those attempts have not resulted in the adoption of a general convention, they were reflected in other international legal instruments.

The third stage is observed in the 1980s-1990s when again the work on elaboration of measures to combat illicit payments and other corrupt practices is being expanded. The UN efforts in this direction resulted in the adoption by United Nations General Assembly of the Declaration against Corruption and Bribery in International Commercial Transactions which among other issues contained the International Code of Conduct for Public Officials. Simultaneously, both UN and regional international organizations started the work on preparation and adoption of the documents governing international cooperation in combating corruption. These activities resulted in adoption of a considerable number of international treaties and documents of the organs of international organizations which defined the main instruments and resolve the tasks of fight against corruption in certain spheres of public and social life[1].

Though the chronological framework of standard-setting activities of different international organizations coincided, the nature of the adopted

[1] See, for example: Les Conventions contre la corruption en Afrique (2007); Convenciones Anticorrupcion en America (2006), Report of the United Nations Secretary-General, Existing international legal instruments, recommendations and other documents addressing corruption, (Report to the Commission on Crime Prevention and Criminal Justice, 10th session, Vienna, 8-17 May 2001, E/CN.15/2001/3); Balmelli, Tiziano, Jagg Bernard (editors), Les traités internationaux contre la corruption : L'ONU, l'OCDE, le Conseil de l'Europe et la Suisse, Lausanne, Berne, Lugano, Edis, 2004

documents was different in universal and regional international organizations. While in the 1980s-1990s inside the UN and other universal organizations, mainly, "soft-law" instruments (resolutions, declarations etc.) were being elaborated, regional international organizations, alongside with resolutions, started to adopt the international treaties of a binding nature[1].

The fourth stage starts in the 21st century when in 2003 the first universal UN Convention Against Corruption is adopted which crowns the earlier conducted law-making work.

Currently 177 states are its members, including Russia since 2006[2]. Taking into account the total number of UN Member States (193), one can talk about a very high degree of universality of this document. It is not such a common practice for the United Nations**.**

On the other hand, the analysis persuades us that the winding road towards formation of the system of international legal instruments in the sphere of response to corruption did not allow to reach the appropriate level of coordination of legal means of combating corruption at regional and universal levels. It is evident that greater coherence of a vast volume of international documents, as well as elaboration of the corresponding principles and instruments of coordination of efforts at different levels of international response to corruption are required.

International legal instruments of response to corruption may be classified according to the spheres of their implementation and legal force as following**:**

Universal binding international legal instruments (UN Convention against Corruption, 2003) and universal "soft-law" international instruments (resolutions, declarations, recommendations, codes of conduct of the United Nations and other international organizations).

Regional binding international legal instruments – regional anti-corruption conventions and regional "soft-law" international instruments (resolutions, declarations, recommendations and codes of conduct).

Therefore, two established implementation mechanisms must be taken into account: ***international and domestic mechanisms of implementation of international legal instruments.***

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1 The Inter-American Convention against Corruption adopted by the Organization of American States on 29 March 1996, the Convention on the fight against corruption involving officials of the European Communities or officials of member States of the European Union of 26 May 1997, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OECD) of 21 November 1997, the Council of Europe Criminal Law Convention on Corruption of 27 January, 1999, The Council of Europe Civil Law Convention on Corruption of 4 November, 1999 etc.

2 See: http://www.unodc.org/unodc/en/treaties/CAC/signatories.html. As of 1 April 2015.

International implementation mechanism is developed by common consent of State Parties of international legal instruments. Domestic mechanism is based on norms and legal traditions of a legal system of every State which may considerably vary from each other. However, the current world is characterized by the growing cooperation of international and domestic norms and mechanisms enforcing the rule of law both within and among the states. Such cooperation relies on the system of norms as a complicated legal complex regulating not only interstate and other international relations, but also certain domestic relations. The sphere of international law application expands under the impact on legal norms of a wide spectrum of objective factors, including globalization of international life, internationalization of a great number of domestic norms and institutions, rapprochement of international law and certain national institutions due to regulation of single-type social relations, development of democratic principles of human rights and fundamental freedoms protection.

In modern times, humankind awareness of its unity in dealing with global challenges becomes the objective factor. One of such problems is implementation by states of joint actions in the sphere of resistance to corruption. Undoubtedly, accomplishment of this objective should be based on corresponding international conventions adopted in accordance with generally recognized principles and standards of international law. Such principles include the mandatory requirement to comply with international obligations. This principle together with other international law mandatory requirements prevails in the hierarchy of international law standards[1]. Its content is connected with such provisions as compulsory nature of fulfillment of international legal obligations undertaken by the parties; good faith in their fulfillment; performance of contractual obligations resulting from every existing agreement; "Inadmissibility of arbitrary unilateral denial of obligations undertaken under the agreement, legal liability in case of violation of international obligations. The aforementioned provisions are fundamental for the establishment of global security and rule of law. In this sphere, the problematic issue with regard to anti-corruption action is the definition of framework of coordination and power actions of the states connected with management of international treaties, international law in general and integration of its generally accepted principles and norms. Adoption of legal and organizational measures for implementation of international legal standards seems to be definitely connected with the in-

[1] See: O.I. Tiunov, The Principle of Good Faith in Fulfillment of International Obligations. In the book: International Law and Domestic Legislation. Institute of Legislation and Comparative Law under the Government of the Russian Federation. M.: Eksmo, 2009. pp. 208–224.

creasing role of the domestic aspect of those norms. In this respect, the subject of international law regulation as a sophisticated legal complex is represented not only by interstate and other international relations, but also, as we mentioned earlier, certain domestic relations. According to a well-known researcher H. Hart, there is a need for studying the concepts and interests related to the law in their interaction[1]. As for the opinion of the outstanding scientist I.I. Lukashuk, the significant attribute of the framework for international community law effect is expansion of its impact on domestic law and considerable strengthening of the role of domestic legal norms in implementation of international legal standards.

The purpose of the present work is to study compliance with international anti-corruption conventions by means of application of implementing mechanisms.

[1] Hart H.L. Concept of Law. Second Edition – Oxford. – pp. 235–237.

Chapter I
INTERNATIONAL LEGAL DOCTRINES REGARDING THE METHODS OF IMPLEMENTATION OF ANTI-CORRUPTION CONVENTIONS

Implementation of anti-corruption conventions is the major component of global anti-corruption interaction of states and other subjects of international law.

The expression "anti-corruptions" includes, in particular, the following international treaties of the Russian Federation targeting anti-corruption: UN Convention against Corruption, 2003, the Council of Europe Criminal Law Convention on Corruption 1999, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of OECD, 1997 etc. The aforementioned international treaties of the Russian Federation Constitute the "carcass" of international cooperation in the sphere of anti-corruption enforcement. At the same time, the international legal base for combating corruption is not limited by the aforementioned conventions. Thus, for example, anti-corruption measures are secured in the United Nations Convention against Transnational Organized Crime as of 15 November, 2000. Different issues of anti-corruption enforcement are reflected in a huge number of other universal, regional and bilateral international treaties, whether with or without participation in them of the Russian Federation. For example, anti-corruption conventions are adopted within the frames of the Organization of American States and the African Union. What may be of academic interest for the purposes of the present study, are the international treaties of the Russian Federation which are directly dedicated to anti-corruption enforcement, i.e. the international treaties that have already entered into force and in relation to which the Russian Federation expressed its consent with their binding nature.

By means of implementation of international anti-corruption conventions the State develops its legislation, enriches it with new content, aligns it with the universally recognized principles and norms of international law, and creates the environment for building a State based on the Rule of Law. In modern historical period, State legislation is an important agent conducting international legal anti-corruption norms into domestic relations. The development of the Russian legislation cannot be fully accomplished without taking international legal norms into account, as in modern world there is a close relationship between international and domestic legal systems.

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