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Cross-Border Crimes: Problems of Definition and Features (Ukrainian Criminal Law experience)

1. Introduction

Cross-border crime has become extremely widespread in all regions of the world. Ukraine declares its desire to become part of the European security space. Therefore, not only cross-border crimes on Ukraine's borders with neighboring countries are important for the crime prevention system, but also tendencies of crime on the EU's external and internal borders.

Today, the definition "cross-border" is used in theory and practice both in relation to individual offenses and as whole criminal delinquency. In particular, in the context of the border security services operational activities. For example:

- para 7 of the EU Action Plan on Justice and Home Affairs includes the fight against cross-border organized crime, in particular, human

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trafficking, drug trafficking, trafficking in stolen vehicles, excisable goods and nuclear materials, money laundering³;

- Strategy for the development of the system of the Ministry of Internal Affairs of Ukraine for the period up to 2020 emphasizes strengthening cooperation between the State Border Guard Service of Ukraine (SBGS) and the National Police on combating cross-border crime⁴;
- Integrated Border Management Strategy for the period up to 2025 emphasizes to ensure effective combating of cross-border crime⁵.

Threats to border security can be political, military, economic, and so on. However, in legal terms, the vast majority of them are offences. Thus, cross-border delinquency (and the most dangerous part of it – cross-border crime) is a contemporary threat to national security, and cross-border criminal offenses require careful analysis.

This article purpose is to analyze the conceptual problems of cross-border offence defining, peculiarities of its criminal law dimension, and objective features of the most common cross-border crimes in Ukrainian Criminal Law interpretation.

To achieve this goal, the following tasks were formulated:

- to characterize cross-boundary as a phenomenon in the international law context;
- to present the author's approach to the cross-border crime concept and features;
- to characterize general objective characteristics of cross-border crimes; having taken this into account, to present of the most common cross-border crimes specificities.

Within this study the methods of formal logic, dogmatic, comparative law have been used. Their combination made it possible to form an author's approach to cross-border crime as a contemporary criminal law

³ EU Action Plan on Justice and Home Affairs (2001). URL: https://zakon.rada.gov.ua/laws/show/994_494.

⁴ Strategy for the development of the system of the Ministry of Internal Affairs of Ukraine for the period up to 2020 (2017). URL: <https://zakon.rada.gov.ua/laws/show/1023-2017-%D1%80>.

⁵ Integrated Border Management Strategy for the period up to 2025 (2019). URL: <https://zakon.rada.gov.ua/laws/show/687-2019-%D1%80>.

phenomenon, to present the peculiarities of its understanding, definition and classification in the criminal law of Ukraine.

2. Cross-boundary as a legal concept

The term “cross-border” is contained in a number of international legal acts. But it is not directly defined. Therefore, its meaning can be understood through a comparison of their provisions.

Thus, Art. 17 of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005)⁶ deals with cross-border measures as different from multilateral ones, that is, cross-border in the sense of this Convention means “bilateralism”.

In turn, in Art. 13 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)⁷ the term “cross-border” means physical cross border transportation (in this case – of cash and appropriate bearer negotiable instruments).

In environmental conventions, this term also means physical movement across the border, but not only of neighboring states. Thus, the introduction to the Stockholm Convention on Persistent Organic Pollutants (2001) states that “persistent organic pollutants... are transported, through air, water and migratory species, across international boundaries and deposited far from their place of release”⁸.

In item 1 Art. 1 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992)⁹, in Art. 1 of the Convention on Environmental Impact Assessment in a Transboundary

⁶ Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005). URL: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680083746>.

⁷ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005). URL: <https://rm.coe.int/168008371f>.

⁸ Stockholm Convention on Persistent Organic Pollutants (2001). URL: https://www.wipo.int/edocs/lexdocs/treaties/en/unep-pop/trt_unep_pop_2.pdf.

⁹ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992). URL: <https://unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf>.

Context (1991)¹⁰ transboundary impact is determined by the different jurisdictions of the parties where the accident took place / where the activity took place, and where its consequences occurred.

In the same sense, the understanding of cross-border in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) is presented. Herewith, Art. 2 of this Convention emphasizes that “at least two States are involved in the movement”¹¹.

In Art.1 of the European Convention on Social Security (1972)¹² attention is focused on the existence of different jurisdictions and physical movement between them (in the context of the return of an employee from one jurisdiction to another within a specified period).

In the same sense, the concept of “cross-border” UN Security Council Resolution N°2341 (2017) which deals with the protection of critical infrastructure from terrorist threats, operates. This document addresses the issues of securing “important cross-border infrastructure” used, for example, for generation, transmission and distribution of energy, air, land and maritime transport, banking and financial services, water supply, food distribution and public health¹³.

It follows that “cross-border” means the nature of the operation of certain facilities that are able to meet the interests and needs of more than one country. In this case, persons / items / services / information under one jurisdiction are physically moved across its border. But the question of jurisdiction neighborhood is not fundamental.

Accordingly, the “cross-border” nature of certain objects refers to an indefinite range of countries, including those that do not have a common border, as there is a cross-border movement from the country of origin

¹⁰ Convention on Environmental Impact Assessment in a Transboundary Context (1991). URL: <https://unece.org/environment-policy/environmental-assessment/text-convention>.

¹¹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989). URL: <https://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>.

¹² European Convention on Social Security (1972). URL: <http://www.worldlii.org/int/other/COETS/1972/7.html>.

¹³ UN Security Council Resolution N°2341 (2017). URL: https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2341%282017%29&referer=/english/&Lang=E.

through transit countries to consumer countries. And all three groups of countries are interested in the proper functioning of cross-border facilities. An important aspect of cross-border is the need for cooperation to ensure such normal functioning.

In the legislation of Ukraine, the “cross-border” concept meaning can be clarified through cross-border cooperation. It is defined as joint actions aimed at establishing and deepening economic, social, scientific, technological, environmental, cultural and other relations between entities and participants in Ukraine, and relevant subjects and participants of such relations from neighboring states (Art. 1 of the Law of Ukraine “On Cross-Border Cooperation”)¹⁴. According to the domestic legislator thought, cross-border applies to neighboring states divided by a common section of the state border. Along with this, a feature of cross-border can be considered the legal regulation of relations between neighboring states, both national acts and bilateral agreements. These agreements are concluded between the subjects of cross-border cooperation, to which the legislation of Ukraine includes territorial communities, their representative bodies and their associations, local executive bodies of Ukraine, interacting with relevant bodies of neighboring states¹⁵. This means that cross-border issues can be regulated at the interstate and interregional levels. There must be a position of neighboring countries legislators.

Thus, in international law acts, the concept of cross-border has several features. The main from them are:

- movement from one jurisdiction to another (across borders / jurisdictions) of persons / items / services / information;
- or, a source and a consequences from cross-boundary impact are considered to different jurisdictions.

Features of cross-border can be found even in regions that are not geographically border. First, states can be divided by sea. Secondly, air travel is important. Direct cross-border aviation and even transcontinental communication opens up opportunities for cross-border crime¹⁶.

¹⁴ On Cross-Border Cooperation: Law of Ukraine. URL: <https://zakon.rada.gov.ua/laws/show/1861-15#Text>.

¹⁵ Ibidem.

¹⁶ Filippov S.O. (2019), Combating cross-border crime: the global context and realities of Ukraine, p. 30.

But, in Ukrainian law “cross-border” is defined by the countries neighbourhood and legal regulation special format – a combination of national and bilateral levels.

3. Cross-border crime (offence): concepts and features

The term “cross-border” in relation to the offence (crime) is used in Part 2 of Art. 7 of the UN Convention against Transnational Organized Crime, which refers to “cross-border transfer of substantial quantities of cash and appropriate negotiable instruments” (to combat money laundering) in the part of “detect and monitor the movement of cash and appropriate negotiable instruments across borders”¹⁷.

Accordingly, in the professional sources quite often the terms “transnational crime” and “cross-border crime” are used as synonyms. The ground of that is their understanding as generalized for all crimes committed in more than one country or those that threaten two and more states interests.

Such approach to transnational and cross-border crimes is used in international lists of offences, for example:

According to the UN classification, there are 19 transnational crimes groups, including international terrorism, human trafficking, especially women and children, chemicals and nuclear materials trafficking, illegal arms trafficking, illegal migration, piracy, money laundering, etc.

Art. 83 of the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union states that the European Parliament and the Council may lay down rules “in the field of particularly serious crimes with a cross-border dimension... Such areas are terrorism, human trafficking and women and children sexual exploitation, drug trafficking, arms trafficking, money laundering, corruption, counterfeiting, cybercrime and organized crime”¹⁸.

¹⁷ UN Convention against Transnational Organized Crime (2000). URL: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THEREO.pdf.

¹⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01. URL: https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj.

FRONTEX official position regarding cross-border crimes is: cross-border crime is understood as "any serious crime with a cross-border dimension committed at or along, or which is related to, the external borders". FRONTEX is expected to address not only migrant smuggling or trafficking in human beings, but also serious crime that adversely affects the security of the external EU borders. This may include, for instance, smuggling of stolen vehicles, drugs, firearms, tobacco products, mineral oils and alcohol (excise goods) or trafficking of hazardous materials. It could also concern the environmental crime such as waste or wildlife trafficking.¹⁹

Based on the EU Methodology used by Europol to assess threats from serious crime and organized crime (SOCTA), the criteria for distinguishing between cross-border crime in the EU are, in particular, the cross-border scale, which follows (alternatively): a) by the nature of the offenses; b) the consequences of the offenses; c) the special need to combat them on a common basis. Therefore, for practical criminology reasons, it can be noted that a cross-border crime feature is the threat to border security, which is opposed by the institutional system created at the border of many states.²⁰

Analysis of the supporters of the separation of cross-border offences positions grounds on two approaches to their understanding distinguishing:

- broad approach, according to which a cross-border crime is a type of transnational crime. It is endowed with two main features – a) the spread of offences or their consequences in more than one state; b) criminalization of such acts in at least one state. In this case, crossing the border can be both actual (for example, currency smuggling) and virtual (transfer of criminally obtained funds through banking institutions);
- narrow approach, according to which there are specific features of cross-border crime. The cross-border offences main characteristic is their commission place – customs and border control zone, i.e.

¹⁹ Cross-border crime. URL: <https://cutt.ly/9bbcJpL>.

²⁰ Filippov S.O. (2019), Combating cross-border crime: the global context and realities of Ukraine, pp. 62, 66–67.

the concentration of criminal elements in a limited specific space close to the state border.²¹

It is seen that a broad approach indicates a terminological redundancy. If cross-border offences features coincide with the transnational crimes features then why we have to distinguish between cross-border crimes. Therefore, it is advisable to rely on a narrow approach, in which it is necessary to add institutional aspects. Thus, O. Filippov cites M. Porter`s position: cross-border crime is characterized by crossing of-fender the border or committing a crime, the investigation of which requires the efforts of law enforcement agencies of neighboring countries.²²

In 2010 the CIS Model Law on Border Security was adopted. It defined cross-border organized crime as a type of organized crime committed in the border areas of two or more states and associated with systematic (regular) illegal border crossing (Model Law №35 – 10). Thus, cross-border crime definition in its content is narrower than transnational crime. The cross-border crimes themselves are a type of transnational crimes that have their own characteristics that are significant for their investigation.²³

The concept of “cross-border network crime” is illustrative one in this context. Its content should not be associated with qualifications, but only with the method of committing and concealing the crime. The cross-border nature of network crimes affects, first of all, the increase in the complexity of their disclosure, investigation and prevention. Although the offender does not actually cross borders, establishing his identity requires interaction between law enforcement agencies of all states through whose territories information was transmitted.²⁴

²¹ Melnychuk T.V. (2009), Cross-border crime: essence, types and some problems of counteraction in Ukraine's European integration conditions. URL: <http://www.academia.edu/>.

²² Filippov S.O. (2019), Combating cross-border crime: the global context and realities of Ukraine, pp. 55–56.

²³ Khizhnyak D.S. (2018), Methodological foundations for the investigation of transnational crimes: a model approach, p. 141.

²⁴ Osipenko A.L., Kushnirenko S.P. (2008), Legal and organizational framework for international cooperation in countering cross-border crimes committed using the Internet.

We believe that the cross-border crime institutional dimension is derived. It emphasizes the need for coordination of different countries law enforcement agencies to identify the fact of an act, disclose it and criminal prosecution organization. However, this underlines criminal law features of a cross-border act – the commission of an act in one state with the following onset of consequences in another state, as well as transferring of an object/offender across borders.

Thus, cross-border offences emphasize the state borders transparency. Also they are a statistic unit of cross-border crime measurement. Cross-border crime is a unique type of transnational crime, which is distinguished on a territorial basis. This is a relatively stable set of crimes that affect the interests of states that have common borders. After all, cross-border crime is localized in border areas on both sides of the border, but by economic nature is directed deep into the country.

4. Cross-border crimes objective characteristics

The issue of “single” or “double” / “multilateral” criminalization of transnational acts is related to crime consideration in different jurisdictions. The International Classification of Crimes for Statistical Purposes draft, proposed by the United Nations Office on Drugs and Crime, is quite significant in this respect. This draft includes standardized concepts and definitions aimed at the analysis of transnational crime improving.

Acts can be considered as crimes given the victim presence, *modus operandi*, the offender`s motivation, the consequences severity, and so on. Accordingly, different approaches to the formation of criminal law allow using the only denominator for understanding crime – an event that is defined as a crime under current law. In view of this, the crime in the International Classification draft is proposed to be considered as a punishable deviation, as defined by national criminal law.

Every crime corresponds to a concrete offender, a corporation or an institution responsible for criminal behavior. However, the assignment of a crime to a particular group is based on a description of the behavior, not a specific act legal assessment.²⁵

²⁵ International classification of crimes for statistical purposes. Principles – Structures – Application. Draft. UNODC (2014). URL: <https://qps.ru/SQe8x>.

In the case of a cross-border crime, this means its definition taking into account the objective characteristics of the committed act. Note that an act cannot be defined as cross-border one in national criminal law. Exactly from its objective features such cross-border specific will actually follow.

In addition, given the peculiarities of the subjective characteristics of cross-border crime its actual nature may follow from the specifics of complicity. It takes place in case a crime is committed by organized criminal group that carries out criminal activities in more than one state. For example, the Criminal Code of Ukraine establishes criminal liability for participation in transnational organizations engaged in illegal transplantation of human organs and tissues. It is the indication of the peculiarity of complicity that makes it possible to classify this crime as transnational / cross-border offence.

In this article, to the cross-border crime objective characteristics we refer: a) harmed public interests; b) offender`s modus operandi; c) the victim; d) items transferred across the border.

Harmed public interests. The norms that provide for criminal liability for cross-border crimes are included in various sections of the Special Part of the Criminal Code of Ukraine. Therefore, it is not possible to separate a common public interest for all types of cross-border crimes. Each of them has certain specificity depending on which sphere of public relations is harmed. Thus, cross-border crimes threaten life and health, will, honor and dignity of a person, and also legal procedures for moving certain goods/items across borders. However, a cross-border crimes unique feature is that their commission violates state interests in the sphere of border security.

However, in the criminal law of Ukraine there are categories of offences can be called conditionally cross-border ones. For example, this applies to human trafficking. This crime can be classified as cross-border offence only if it is related to the victim transportation across the state border of Ukraine.

At the same time, smuggling of migrants (illegal transferring in persons across the state border of Ukraine – Art. 332 of the Criminal Code) and illegal crossing of the state border of Ukraine (Art. 332-2 of the Criminal Code) are recognized as cross-border crimes under any circum-

stances. Because of they always do harm directly public interests concerning procedure for crossing the state border of Ukraine established by law.

Thus, the public interests violated through cross-border crimes are complex by their nature. And the set of social values under destructive criminal influence always includes state border security and inviolability.

Offender`s modus operandi. Cross-border crimes mainly belong to crimes whose illegal nature does not depend on the consequences onset. Common features of the offender`s modus operandi of these crimes lie in the sphere of the state or customs border violation. This gives reason to share cross-border crimes into two types, depending on whether there is a transferring across the state (customs) border of a person (persons) or items:

- I. Illegal transferring of persons across the state border of Ukraine:
 - 1) crimes related to the transferring across the state border of Ukraine of certain persons (Art. 143, 149, 332 of the Criminal Code);
 - 2) illegal crossing of the state border of Ukraine (Ar. 332-2, 334 of the Criminal Code);
- II. Illegal transferring across the state (customs) border of Ukraine of certain items (Art. 159-1, 199, 201, 201-1, 203-1, 204, 209, 258-5, 267, 269, 300, 301, 301-1, 305, 306, 321, 358, 441 of the Criminal Code).

The victim. Some cross-border crimes are characterized by the presence of the victim. In particular, this applies to such crimes as human trafficking (Art. 149 of the Criminal Code); illegal transplantation of human organs and tissues (Art. 143 of the Criminal Code). In these crimes the victim is a person which is intended to further any type of exploit.

A person who is illegally transferred across the state border of Ukraine (Art. 332 of the Criminal Code) acquires the status of a victim if a method dangerous to his life or health was used during the transfer. Because in this case the offender's acts create a real threat of death or the health of victim. It may be, for example, the injection of a sleeping (narcotic) substance, victim transportation in a specially equipped hiding place of the vehicle, which threatens the victim with suffocation from

carbon monoxide, overheating²⁶, crossing a fast-moving mountain river, indicating a fuzzy route in a wooded or mountainous area, etc.

We should also pay attention to the fact that the most vulnerable victims are separately mentioned in the criminal legislation of Ukraine: for example, young and minor children, persons who are in a dependent state. Cross-border crime commission against such victims leads to more severe punishment.

Items transferred across the border. If offender violates the legal procedure for transferring certain items across the state or customs border of Ukraine, then such items acquire a criminal law status.

The following normative definition patterns of items criminal law status for cross-border crimes should be noted: such items, as a rule, are prohibited for free use; there are items for which special transferring cross-border procedures are established.

Thus, the criminal liability establishment for these items transferring solves the task of ensuring public safety.

Another important circumstance is that the Ukrainian legislator follows the path of expanding criminal prosecution for cross-border economic acts. For example, we are talking about goods smuggling re-criminalization.

5. Conclusions

As a result of Ukrainian experience consideration regarding the cross-border crime definition and features as a criminal law phenomenon, the following theses were formulated:

- cross-boundary is a general legal concept, however, it is understood differently in international and Ukrainian law. In Ukraine, an emphasis is placed on neighboring states;
- there are no standards for cross-border crime definition in international law, therefore, broad and narrow approaches to such definition are presented in scientific sources. It is advisable to give priority to a narrow approach;

²⁶ Streltsov Ye.L., Prytula A.M. (2015), Criminal and legal protection of the state (customs) border of Ukraine. p.18.

- the main criminal law features of a cross-border crime are objective ones. The cross-boundary nature of crime in Ukrainian criminal law stems from offender's *modus operandi*. The crimes classification into unconditionally and conditionally cross-border ones is suggested.

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Summary

The article touches upon a set of issues related to the cross-border crime definition and features. Cross-border crime can be defined as a criminal-legal, criminological and criminalist concept. The author's approach is that it is exactly criminal-legal dimension of this problem that is primary one. A criminal-legal understanding of cross-border crimes is suggested. It is analyzed by comparing the provisions of a number of international and national acts in the context of cross-boundary as a legal concept and characteristics of offences.

There is emphasized that cross-border crimes constitute a relatively stable set of crimes that threaten the interests of states in the sphere of border and national security.

The cross-border crimes objective features are considered. They include public interests, offender's modus operandi, the victim, items transferred across the border. It is concluded that the cross-boundary nature in the criminal law of Ukraine stems from the peculiarities of the offender's actions. The classification of crimes into unconditionally and conditionally cross-border is suggested. Such a division is associated with the obligatory/optional nature of such an objective feature as border crossing.

Keywords: border security; international standards; cross-border crime; objective features of a cross-border crime; cross-border crime victim