

Legal Transplants:  
Traditional Models Against Criminal  
Collectives

# *The content*

- Introductory remarks
- Methodology
- Results and analysis
- Discussion
- Concluding remarks

# *Introductory remarks*

- What is a legal transplant?
- Why do we focus on criminal collectives?
  - Criminal law – traditionally for individuals
  - Crime (organised) – often committed by associations
  - Internal organisation – difficulties re: individual liability
  - Participants beyond provisions on complicity/attempt
- How are we going to do it?

# *Methodology*

- What do we want to achieve?
- How are we going to do it?
- What are we going to compare?
- Use of terms – objective and subjective elements!

# *Comparison of the models*

- Objective elements
  - A criminal collective
  - Aims of a criminal collective
  - Forms of participation in a criminal collective
- Subjective elements
  - Knowledge about the collective
  - Knowledge about the aims
  - Intentions

# *Germany (§ 129 StGb)*

- A criminal association
  - A union
  - A certain period of time
  - Three persons
  - Subordinated will
- Aims of a criminal association
  - Aims or activities directed towards commission of criminal offences
  - “Joint decision”

# *Germany (§ 129 StGb) (cont.)*

- Forms of participation in a criminal association
  - Founding a criminal association
    - Leaders?
    - Backers?
  - Membership in a criminal association
  - Recruiting for a criminal association
  - Supporting a criminal association
- Subjective elements
  - Depending on the a form of participation

# *England and Wales*

- Agreement

- Two non-exempted parties
- Reached decision
- Pursue some unlawful object

- Objective of the agreement

- A course of conduct to be pursued
- If carried in accordance with intentions
- Will necessarily amount to (involve) a crime



# *England and Wales (cont.)*

- Participants in the conspiracy
  - Conspirators
  - Exemptions (spouse, under the age..., victim)
- Subjective elements (*mens rea*)
  - Knowledge: the agreed objective of the conspiracy and the circumstances surrounding it
  - Knowledge: the parties to the agreement
  - Intention: the agreement be carried out and the agreed offence be committed

# *UN conspiracy (UNTOC, Art 5)*

- Agreement
  - Two or more persons
  - Reached decision
  - Serious crime to be committed (w./spec. Purpose)
  - + an act in the furtherance of the agreement
- Objective of the agreement
  - Serious crime to be committed

# *UN conspiracy (UNTOC, Art 5)*

## *(cont.)*

- Participants in a conspiracy
  - Two or more persons (?! the name of the offence)
  - No exemptions
- Subjective elements of a conspiracy (*mens rea*)
  - Knowledge of the object of the agreement
  - Knowledge of the parties to the agreement
  - Intentions of the conspirators

# *UN organised criminal group (Art 5)*

## *(cont.)*

- An organised criminal group
  - Structured
  - Three or more persons
  - Existing for a period of time
  - Acting in concert
- Aims of the organised criminal group
  - Committing one or more serious (UNTOC) offences
  - Obtain (directly or indirectly) financial or other material benefit

# *UN organised criminal group (Art 5)*

## *(cont.)*

- Forms of participation in an organised criminal group
  - True participation
  - Quasi-participation
- Subjective elements
  - Reflecting the objective elements of the offences

# *Transplanting traditional models From Germany and E&W to UN*

- Initially – no involvement of Germany or E&W
- Initiated by Judge Falcone (Italian)
- Drafted by Poland
- Germany (MPIICC) + ind. States → GA → IEG 5 versions
- UK – at a later stage, proposed a solution different to all other proposals
- UK proposal, amended by Japan – the final wording.

# *Conspiracy (UN vs. E&W)*

## Similarities

- Based on an agreement
- The agreement does not have to be detailed

## Differences

- Objective of the agreement
  - Narrower application of the UN model
    - 4 + years special maximum
    - Knowing what was agreed constitutes a crime
- Intentions of the conspirators
  - Intent to participate as co-perpetrators

# *Participation in a criminal organisation*

## *(UN vs. Germany)*

### • Similarities

- Three or more persons
- Existing for a certain period of time
- Minimum level of internal organisation
- Not necessary that they committed criminal offences
- Founders and leaders and membership

### • Differences

- Aim (serious vs. any criminal offence)
- Supporters and recruiters??? (unclear)



# *Participation in a criminal organisation*

## *(UN → Bosnia and Herzegovina)*

- The definition – copied – translated – pasted
- Problems
  - Group formed for an immediate perpetration of offences
  - Organisers and leaders and membership – only if the organisation at least attempts...
  - Recruiters and supporters – not criminalised
  - Membership without involvement in a particular criminal activity – not criminalised

# *Conspiracy*

## *(UN → Bosnia and Herzegovina)*

- Exists in BiH since 1951
- No changes made in the latest reforms
- Broader scope of application
  - Offences punishable by 3 +
  - Agreed commission of any criminal offence
- Not to be merged with the committed offences

# *Conclusions*

- Transplantation does happen
- Traditional models – a base
- Countries with longer tradition make minimal efforts
- Transitional countries look up to the international models
- Transplantation follows without critical assessment and understanding of the traditional models
- Problems inevitable

*Thank you!*

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