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Implementation of UN and EU recommendations on criminalization of organized crimes

Реалізація рекомендацій ООН та ЄС щодо криміналізації організованих злочинів

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Abstract

Article presents comparative analysis of features and characteristics of organized criminal associations recommended for further criminalization by provisions of Palermo Convention and Framework Decision 2008/841/JHA. Certain peculiarities of the abovementioned provisions implementation in more than 50 states (Asia, America and Europe) have been outlined.

We expressed and proved the hypothesis stating that criminalization of actions performed by the members of organized groups and criminal organizations by different states separately is partly explained with consideration of different international legal acts by national legislators: Palermo Convention and Framework Decision 2008/841/JHA.

On the basis of analysis of key global models used to criminalize the socially dangerous actions with aim to counteract the organized crimes (collusion, participation,

Анотація

Метою статті є встановлення особливостей та способів реалізації рекомендацій ООН та ЄС щодо криміналізації організованих злочинів в країнах Азії, Америки та Європи, а також визначення перспектив використання сучасних основних світових моделей криміналізації організованих злочинів. Для дослідження кримінального законодавства, рекомендацій міжнародних спільнот, доведення висловлених гіпотез, формулювання висновків використано такі методи: порівняльно-правовий, системного аналізу та діалектичний.

В результаті дослідження законодавства понад 50 зарубіжних країн встановлено, що криміналізація в одних країнах дій учасників організованої групи, а в інших – злочинної організації частково зумовлена врахуванням законодавцями цих країн рекомендацій різних міжнародних правових актів: в одних випадках – Конвенції ООН проти транснаціональної організованої злочинності від 15 листопада

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entrepreneurship, marking/registration) we justified the following opinion: 1) within the limits of criminal associations countering collusion and participation models are considered to be the most efficient; 2) use of entrepreneurship model allows to justify the need for establishment of responsibility for legal entities involved in criminal associations functioning or utilization of relevant criminal measures; 3) registration/marking model may be efficient for counteracting the extended terrorist organizations.

Key words: organized crime, organized group, criminal organization, structured group, participation, criminalization, models of organised crime offences.

Introduction

The concept of accompliceship is deemed to be one of the most comprehensive and problematic in the criminal law theory. Certain complications emerge when norms regulating liability of members of organized criminal associations are used – mostly due to the sophisticated structure of relevant criminal provisions and its equivocal interpretation in law enforcement activity. Therefore it is important to establish efficient legal mechanisms preventing creation of criminal associations and relevant membership expansion. It drew the attention of a lot experts on this issue (Sidorov, V., Baleev, S., 2019, p. 333).

On the one hand, these mechanisms must be ultimately simple and precise, on the other – comply with relevant analogues in foreign criminal legislation to optimize the process of its implementation by the international community. Efficient solutions require proper understanding of foreign practices to promote transposition of relevant legislative provisions with the purpose to adapt, harmonize, unify, approximate etc.

Methodology

Comparative method was used as a primary one for this research aimed at cross-reference of foreign criminal legislation provisions, United Nations Convention against Transnational Organized Crime (hereinafter the Palermo

Convention) (November 15, 2000) and Council of Europe Framework Decision 2008/841/JHA on the fight against organised crime (hereinafter the Framework Decision 2008/841/JHA) (October 24, 2008). Systemic analysis was used to study the experience of foreign states in criminalization of criminal associations, dialectical method – to study the criminal legislation in the context of different legal systems through different types of relations.

This research is based on analysis of relevant provisions of criminal legislation of foreign states – Austria, Albania, the United Kingdom, Argentina, Belgium, Bulgaria, Bosnia and Herzegovina, Brazil, Vatican, Greece, Georgia, Denmark, Estonia, India, Ireland, Iceland, Spain, Italy, Canada, Cyprus, Latvia, Lithuania, Liechtenstein, Luxembourg, Macedonia, Malta, the Netherlands, Germany, New Zealand, Norway, Romania, Serbia, Slovakia, Slovenia, the USA, Thailand, Trinidad and Tobago, Turkey, Hungary, Poland, Portugal, Finland, France, Croatia, Czech Republic, Montenegro, Switzerland, Jamaica, CIS states etc.

Ключові слова: організована злочинність, організована група, злочинна організація, співучасть, криміналізація, моделі організованих злочинів.

Results and discussion

Foreign criminal legislation contains different terms to define criminal groups and various approaches to criminalization of performed activity. E.g., these groups may appear in

different acts as «criminal association», «criminal organization», «unlawful association», «asociaciones ilícitas».

National legislation of different states stipulates use of different legal approaches to organized crime combating.

Requirements regarding the criminalization of activity of organized criminal group and organization members are entrenched in international legal acts. Palermo Convention (November 15, 2000) mentions an organized criminal group – group with fixed structure comprising three or more members that exists for a certain period of time and acts in concert with aim to commit one or several grave crimes, as defined by the Palermo Convention, for receipt (direct or indirect) of financial or other material benefit. Still, grave crime is defined as crime followed by imprisonment (four years as the shortest term) or other strict punitive measures, group with fixed structure – group which hadn't been chaotically gathered for immediate commission of a crime, without requirement to formalize the roles of its members, previously

agreed continuous nature of membership or well-developed structure.

Framework Decision 2008/841/JHA (October 24, 2008) offers to criminalize the socially dangerous acts related to criminal organization defined as structured association with more than two members who take concerted actions with aim to commit crimes followed by established punitive measures (imprisonment (four years as the shortest term) or other strict punitive measures) for receipt (direct or indirect) of financial or other material benefit.

Still “structured association” (Palermo Convention (November 15, 2000) must be understood as association with the following features: intentional establishment for immediate crime commission; there is no need to officially determine the roles for its members, continuous membership and extended structure.

Comparison of criminal and legal features of the abovementioned associations (Table 1) makes it possible to conclude that these units are quite similar in its nature if not identical).

Table 1.

Features of organized criminal group and organization (Palermo Convention and Framework Decision 2008/841/JHA)

Features	Organized criminal group (Palermo Convention)	Criminal organization (Framework Decision 2008/841/JHA)
Quantitative composition	Three and more persons	More than two persons
Structure	Structured group - group which hadn't been chaotically gathered for immediate commission of a crime, without formalized roles of its members, permanent composition or well-developed structure	Structured association – association which hadn't been chaotically gathered for immediate commission of a crime, without requirement to formalize the roles of its members, permanent composition or well-developed structure
Duration of functioning	Exists within certain period of time	Established for certain period of time
Aim	Commission of one or several grave crimes, as defined by the Convention, for receipt (direct or indirect) of financial or other material benefit. Serious crime is followed by imprisonment (four years as the shortest term) or more severe measures	Commission of crimes followed by established punitive measures (imprisonment (four years as the shortest term) or other strict punitive measures) for receipt (direct or indirect) of financial or other material benefit
Coherence of actions	Members take concerted actions	Members take concerted actions

These criminal associations possess certain common features:

- 1) comprise three or more members;
- 2) are structured: a) are not chaotically gathered for immediate commission of a crime; b) without strictly formalized roles of its members; c) without requirement to establish permanent composition; d) without requirement to present well-developed structure;
- 3) exist within certain period of time;
- 4) members act in full coherence;
- 5) specialization – commission of grave crimes
- 6) act with intention to gain (directly or indirectly) financial or other material benefit.

The key difference is the purpose of its existence – organized criminal group may intend to commit one or several grave crimes or crimes defined as grave by the Palermo Convention (November 15, 2000), criminal organization – only several grave crimes.

Therefore, the abovementioned international legal acts mention the very same criminal

association. International community recommends to criminalize membership (participation) in criminal associations with identical parameters marked by different terms.

Taking this into consideration, it appears to be consistent that many states have criminalized the activity of organized criminal group (the United Kingdom, Bulgaria, Georgia, Latvia, New Zealand, Norway, Romania, Serbia, Finland, Czech Republic, Scotland) or criminal organization (Austria, Albania, Belgium, Brazil, Vatican, Greece, Estonia, Ireland, Iceland, Spain, Italy, Canada, Cyprus, Luxembourg, Macedonia, Malta, the Netherlands, Germany, Slovenia, Thailand, Trinidad and Tobago, Turkey, Hungary, Poland, Portugal, Croatia, Montenegro, Switzerland, Jamaica). Only Bosnia and Herzegovina, Latvia, Lithuania, Liechtenstein, Slovakia and CIS states (Azerbaijan, Belarus, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan and Uzbekistan) have envisaged criminal liability for both categories – members criminal organizations and organized groups.

Table 2.

Criminalization of organized group and criminal organization in foreign countries

Types of criminal associations	States with criminalized members' actions
Organized criminal group	the United Kingdom, Bulgaria, Georgia, Latvia, New Zealand, Norway, Romania, Serbia, Finland, Czech Republic, Scotland
Criminal organization	Austria, Albania, Belgium, Brazil, Vatican, Greece, Estonia, Ireland, Iceland, Spain, Italy, Canada, Cyprus, Luxembourg, Macedonia, Malta, the Netherlands, Germany, Slovenia, Thailand, Trinidad and Tobago, Turkey, Hungary, Poland, Portugal, Croatia, Montenegro, Switzerland, Jamaica
Organized group and criminal organization	Bosnia and Herzegovina, Latvia, Lithuania, Liechtenstein, Slovakia and CIS states - Azerbaijan, Belarus, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan and Uzbekistan

It may partially explained by the fact that the majority of countries where criminal organizations' activity is criminalized are EU member states (Austria, Belgium, Greece, Estonia, Ireland, Spain, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Germany, Poland, Portugal, Slovakia, Slovenia, Hungary, Croatia); some pre-accession countries (Albania, Iceland, Macedonia, Turkey, Montenegro) or potential EU candidate countries (Bosnia and Herzegovina). That is why these states have taken into consideration the

recommendations of Framework Decision 2008/841/JHA (October 24, 2008) on the fight against organised crime. Criminal legislation of other states which criminalized the activity of organized criminal groups corresponds to provisions of Palermo Convention (November 15, 2000).

Each of these approaches establishing legal restrictions for organized criminal communities has its pros and cons – if only organized criminal group or criminal organization falls under

criminalization, there is no need to distinguish between these but different manifestations of criminal groups' intentions (distinguished by the level of social danger) will be classified as establishment or membership in a criminal association. Criminalization of both – groups and organizations – may complicate the differentiation between organized criminal group and criminal organization but allows to establish the members' liability more precisely and objectively (Voznyuk A., 2017, p. 42).

The abovementioned recommendations must be taken into consideration while constructing specific national models of relevant legal norms. But it is still worth paying extra attention to advice given by foreign experts who stress that domestic legislators must refer to content and spirit of Palermo Convention (November 15, 2000) and avoid the common practice of simply translating its text or verbatim incorporation in new laws or amendments. States – signatories of Convention – must ensure the compliance of new norms with national legal traditions, principles and basic laws. It allows to avoid any potential discrepancies and uncertainty in the course of its interpretation by the judges (Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2004).

However, it should take into account national peculiarities of organized criminal associations. Because organized criminal enterprises in different countries have different structure, composition, rules of functioning, etc (Atuesta, L., Pérez-Dávila, Y., 2018, p. 241; Crocker, R., Webb, S., Skidmore, M., 2019, p. 433) and therefore require special approaches to establishing the grounds of responsibility for organized crime (Sciandra, E., 2017, p.163; Stephen, T. & Karaivanov, A., 2009, p. 572),

The abovementioned provisions of international legal acts envisage importance of organized crime combating; despite being harshly criticized by foreign scholars studying the issue (Finckenauer, J., 2005, p. 75; Hagan, E., 2006, p. 127; Orlova & Moore, 2005, p. 281), still they are an optimal model of legal norms establishing the grounds for holding persons, involved in organized criminal activity, liable for committed crimes.

Establishment of criminal liability for creation of criminal associations and membership (participation) is just a way to implement only one model of criminalization of socially dangerous activity stimulated by organized criminal units (Kruisbergen, E., Leukfeldt, E. Kleemans, E. & Roks, R., 2019, p. 575) (Table 3).

Table 3.

Crimes related to activity of criminal associations (subject to criminal liability in foreign states)

Socially dangerous actions	Countries which established criminal liability¹⁰²
Membership in criminal associations	Argentina, Bulgaria, Belarus, Brazil, Georgia, Denmark, Estonia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Netherlands, Germany, Poland, Portugal, Romania, Slovakia, Trinidad and Tobago, Hungary, Finland, Czech Republic, Switzerland, Jamaica, Japan, CIS states etc
Collusion for accompliceship	United Kingdom (Wales, Northern Ireland), India, Cameroon, Singapore, Slovenia etc
Membership and relevant collusion	Australia, Austria, Albania, England, Andorra, Belgium, Bosnia and Herzegovina, Vatican, Greece, Indonesia, Ireland, Iceland, Spain, Canada, Leichtenstein, Macedonia, Malaysia, Malta, Netherlands, New Zealand, Norway, Pakistan, Serbia, USA, Thailand, Croatia, Philippines, France, Montenegro, Sweden, Scotland etc

While states with Romano-Germanic law system use mostly the membership model, other (Anglo-American Law) prefer the collusion model. However, in some countries with long tradition of collusion model it has become typical to

criminalize the membership in organized criminal associations. We can take Great Britain as an example – for quite an extended period only the collusion for crime commission was criminalized. In 2015 British parliament passed

¹⁰² The list of states is not exhaustive.

the law which clearly identified the participation in activity of an organized criminal group as a crime. Currently person is held criminally liable – therefore, commits a crime – if he/she takes part in activity of an organized criminal group with reasonable suspicion that this specific activity itself is of criminal nature and is subject to imprisonment (minimum term – 7 years) (Levi, 1998, p. 335; Wilson, 2015, p. 239; Gilmour, S, 2008, p. 18).

Scholars tend to distinguish even more complex classification of the abovementioned models - A. Schloenhardt and other foreign experts determine four subcategories of criminalization models:

- 1) collusion model (effective in all Australian states and territories, also in Singapore, Malaysia, Brunei and Papua New Guinea);
- 2) membership (participation) model (Australia, Canada, New Zealand, NSW (Australia), PRC, Macao, Chinese Taipei (Taiwan));
- 3) entrepreneurship model (based on RICO Act; used in many US states and in Philippines);
- 4) marking/registration model Hong Kong, Singapore, Malaysia, Japan, New South Wales, Queensland, North and South Australia) (Schloenhardt A., 2009, p. 318; Boister, 2012, p. 137; Albanese & Reichel, 2016, p. 75-92).

Some countries use several models or none of the abovementioned. In this context A. Schloenhardt notes that in Indonesia, Cambodia, Thailand, Lao People's Democratic Republic (Laos), Vietnam and separate Pacific islands perpetrators are not held liable for crimes corresponding to these models. In other jurisdictions of Asia-Pacific region combinations of different models are used to establish the liability of criminal organizations (Schloenhardt A., 2009, p. 317).

Membership (participation) and collusion models are the most popular in the world. Requirements and recommendations regarding criminalization of collusion for crime commission, establishment of criminal associations and relevant membership are entrenched in international legal acts – Palermo Convention (November 15, 2000) and Framework Decision 2008/841/JHA (October 24, 2008).

Scientists rightly point out the potentialities of these models in combating organized crime, as

well as their shortcomings (Khiyavi, A., & Shamloo, B., 2019, p. 221; Rostami, A., Mondani, H., Liljeros, F. et al., 2018, pp. 318-325; Schloenhardt, A., 2011, p. 148).

To counteract various criminal organizations we propose to use collusion and participation models. But use of entrepreneurship model allows to justify the need for setting criminal responsibility for legal entities involved in criminal organizations functioning or to take relevant legal measures (Finckenaue, J., 2005, p. 65; Hagan, F., 2006, p. 128). Registration/marking model may be efficient for counteracting the extended terrorist organizations which currently operate globally.

Conclusions

Comparative analysis proves that identical criminal associations in criminal legislation of different states in some cases are very similar in legal sense and still absolutely different in other. Criminal legislation of certain states presents various criminal associations with both different and the same generalizing terms (e.g. “criminal association”; within the single state jurisdiction). When we confront the criminal-legal features of organized group mentioned in Palermo Convention and criminal organization determined Framework Decision 2008/841/JHA, an obvious conclusion is drawn that these are criminal associations of identical nature. Therefore these international legal acts contain the very same interpretation of criminal association. International community recommends to criminalize membership in criminal associations with identical parameters which are defined differently. Criminalization of actions performed by the members of organized groups and criminal organizations by different states separately is partly explained with consideration of different international legal acts by national legislators: Palermo Convention and Framework Decision 2008/841/JHA.

Theory of criminal law distinguishes four models of criminalization of socially dangerous acts to ensure the organized crimes countering:

- 1) collusion model;
- 2) participation model;
- 3) entrepreneurship model;
- 4) marking/registration model. Each model stipulates use of special approach to ensure the counteraction. None of them is perfect due to its own pros and cons. But if applied in a balanced way, these models definitely may cover all

spectrum of potential criminal-legal influence on criminal associations including the organized ones.

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