



Bundeskriminalamt

Global Crime Hotspots - Impact on Germany

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Objectives, Models and Perspectives of Transnational Criminal Law with the European Union as an Example

Summary of the Presentation

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I. Subject and Purpose of the Lecture

The technical, economic, and political changes due to globalization have led to a general increase in transnational crime, which poses new challenges for the criminal law. This is particularly true of the new, global crime hotspots – central to the BKA Autumn Conference 2009 – that push traditional criminal law to its functional as well as its territorial limits. These global hotspots not only have a serious impact on the country of origin and the Federal Republic of Germany but also affect at the same time and to a similar extent numerous other States, both in the European Union and around the world. These hotspots make very clear that international crime and international flashpoints can only be curtailed with the help of close European and international cooperation.

To date, there has been practically no systematic development of the possibilities and concepts of European and international cooperation in criminal law. This is especially true of European Criminal Law, which developed successively through activities attributable to various actors on the European stage. Today, its sources can be found in provisions of the Treaty on European Union, regulations and directives, framework decisions and decisions, regulations of the European Council, as well as other international treaties and national implementing laws. The content of these sources of law consists of a supranational law of sanctions, harmonized national criminal law, European law of cooperation in criminal matters, regulations concerning new European institutions, and a complex system for the protection of human rights in the various national and supranational legal systems. Taken together, they form more a patchwork of provisions than a system of criminal law. An overarching, systematic concept of European Criminal Law is not discernible. Even entry into force of the Treaty of Lisbon will not do away with these conceptual deficits of European Criminal Law. From now on, however, the Treaty of Lisbon will offer new opportunities for the further development of European criminal law. These opportunities can only be taken advantage of, however, on the basis of a conceptual reevaluation of European Criminal law, which also just so happens to be necessary in order to curtail new international criminal hotspots.

Thus, the *purpose* of the lecture is to develop a system of European Criminal Law that fosters the classification and transparency of existing regulations and by so doing presents suggestions for the further systematization and refinement of European criminal law under the Treaty of Lisbon.

- The first part of the lecture will examine the specific objectives that distinguish European Criminal Law from traditional national criminal law and that serve as a rationale, as legal policy target-setters, and as assessment criteria for European Criminal Law.
- The second part will analyze the potential models and systems that would enable European Criminal Law to achieve these objectives. It will investigate as well how

these various models should be assessed and improved in order to gain new insights and building blocks for future reform measures.

- The third part will showcase the calls for reform that result from this new approach to the further development of European criminal law. In addition, with a view to the special objectives of the BKA Autumn Conference, the special models of and possibilities for the implementation of law in failed states will be touched upon briefly.

II. European Criminal Law: Objectives and Models

1. The *objectives of European Criminal Law* correspond, for the most part, to the traditional tasks of national criminal law, namely, the provision of security and the protection of liberty. Beyond these two general tasks that are characteristic of criminal law, however, European Criminal Law aims to legitimize and shape a specifically European approach.

- In the course of *providing security*, European Criminal Law must pursue two uniquely European objectives: on the one hand, the prevention and prosecution of the growing phenomenon of cross-border crime by means of an effective, transnational criminal law (e.g., in the areas of economic crime and/or organized crime); on the other hand, the protection of newly emerging European institutions and values (e.g., the protection of the financial interests of the European Union and/or the integrity of European civil servants).
- European Criminal Law also has specific objectives and “*propria*” with regard to the second task of criminal law, namely, *protecting the civil rights and liberties of its citizens* against state-sponsored measures of law enforcement that go too far. In particular, it must protect its citizens against any impairment of their individual rights and liberties that – as a result of European integration of national criminal law systems – could arise due to an application of a foreign criminal law that has lower standards of protection than the solutions adopted in national criminal law (as can be the case with the European arrest warrant). In addition, specific problems of democratic legitimacy and control must be resolved that occur during the integration of criminal justice systems when highly coercive criminal law provisions are developed and applied by international institutions.

2. These specific objectives of European Criminal Law and, in particular, the creation of a transnationally effective criminal law can be achieved with the help of *two contrasting models of law*: the “cooperation” models and the “supranational” models. Numerous hybrid and intermediate forms can be found on the spectrum between these two basic models.

- The cooperation models of state collaboration in criminal matters are characterized by purely national criminal justice systems that make the judgments rendered in one country's criminal justice system applicable in another country's system. Traditional exchanges of information between authorities and mutual legal assistance as well as the mutual recognition of decisions are based on just such an approach involving the cooperation of nation-states.
- In the "opposing" supranational criminal law model, a single criminal justice system is, from the very start, vested with a greater territorial scope of application. In this model, decisions in the course of international cooperation are no longer rendered decentrally on the basis of disparate national regulations; rather, they are central and supranational and generally apply to a newly created, larger penal area. This model is evident, in particular, in the power to impose (administrative) sanctions throughout the European Union (for example, in the context of antitrust violations and the protection of the financial interests of the EU by means of administrative sanctions).

3. Each of these two models has its advantages, weaknesses, and limits. The cooperative approach is better suited to maintaining national sovereignty and subsidiarity; it is, however, less effective. In contrast, the supranational model, which offers better solutions as regards the effective safeguarding of security and liberty, clashes more strongly with the principles of subsidiarity and the democratic legitimacy of criminal law. The disadvantages of purely cooperative and purely supranational regulatory models can be reduced, however, by various hybrid forms with special regulatory techniques.

III. Consequences

The relevant question at present is no longer whether the future European Criminal Law will be a supranational or a national criminal law; rather, the crucial question is to what extent, in which areas, and with which techniques the presently dominating cooperative model of European Criminal Law should be refined by individual supranational elements.

Based on the current status of the European Union, the results of this study militate in favor of the expansion of selected – cooperative legal, judicial-organizational, and criminal procedural – supranational subsystems within the existing cooperative framework. This is particularly true with regard to a better systematization and expansion of the law of cooperation (based on the principle of direct recognition and detailed European requirements for international cooperative measures), the creation of a European Prosecutor with limited enumerated powers, the control of the European Prosecutor by a European Court, the integration of repressive activities of criminal prosecution by OLAF and Europol into the architecture of the newly-emerging hybrid European criminal justice system, the development of European

criminal defense, as well as deliberations about expanded powers of Europol, especially as far as prevention is concerned. In this context, the individual rights and the rights of participation of European citizens must receive more attention than they have in the past. The entry into force of the Treaty of Lisbon will pave the way for the development of a European Criminal Law that is more effective than the regulations hitherto but one that at the same time provides for better protection of the liberty of European citizens, enjoys democratic legitimacy, and preserves the legitimate sovereign interests of the Member States.

The conceptional deliberations concerning the objectives and models of an effective, transnational criminal law – both within and beyond European Criminal Law – are also of use for the special problems that arise at international flash points as a result of failed states. Here, however the role of the United Nations must be taken into consideration. Not only are special cooperative models in the form of treaties with still-existing governments possible (that – as, for example, currently in Guatemala – give up sovereign rights in exchange for support from international commissions), but, in order to protect globally-shared security interests, supranational solutions may – under certain conditions – be considered that derive from resolutions of the United Nations Security Council (as seen for example, in the current efforts to contain terrorism and piracy in the Gulf of Aden). The development of these supranational approaches goes beyond international criminal law and raises the question of the need for an international police law. The view towards international flash points and failed states thus confirms the potential value of the concept of objectives and models of transnational criminal law developed here, a concept that can be applied in a corresponding fashion to the international problems incurred in the area of police law.