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PROMOTING PUBLIC AWARENESS OF THE FIGHT AGAINST TRANSNATIONAL CRIMES, THE ROLE OF POLICE AND JUDICIAL COOPERATION AND RESPECT FOR FUNDAMENTAL RIGHTS

June 20th 2023, University of Donja Gorica – Podgorica, Montenegro

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FROM INTRODUCTORY SPEECHES

Teresa Russo, Associate Professor in European Union, Department of Legal Sciences – University of Salerno. Chair Holder of the Jean Monnet Chair *"Promoting Public Awareness on Enlargement, EU Values and the Western Balkans' Accession"* (EUVALWEB), co-funded by the European Union.

"This cycle of two international conferences (both online and in person) organised alternately in Italy and in one of the Western Balkan countries, namely Montenegro, aims to encourage the active participation of public audiences, legal practitioners, policymakers, experts in the Chair's field, NGOs, and civil society representatives, as well as to promote the dissemination of the EUVALWEB Chair's activities in Italy and abroad. Furthermore, they wish to propose possible solutions and strategies through cultural dialogue, which, in my opinion, is the only tool capable of generating synergies and producing scientifically interesting results"

Dragan K. Vukčević, Dean of the Faculty of Law of the University of Donja Gorica and President of the Montenegrin Academy of Sciences and Arts.

"Transnational crime is one of those networks that is very effectively established in areas of its interest. This network should be countered with a network of education, training, and mutual connections between institutions fighting against transnational crime"

Riccardo Serri, Deputy Head of the Delegation of the European Union to Montenegro.

"The rule of law is the essence of everything. When we talk about the rule of law, we usually say that it needs to be significantly strengthened. This actually means that an empowered and independent judiciary and administration are needed to implement all the necessary social changes. In addition to changing legislation, a change in consciousness is also needed"

FOREWORD

by Ivana Jelić[*]

I am delighted to write the foreword for this important publication, which was produced as proceedings from the conference in the form of a special joint edition of *EUWEB Legal Essays. Global and International Perspectives* and *Studia Iuridica Montenegrina*.

The conference on the pertinent topic "*Promoting public awareness of the fight against transnational crimes, the role of police and judicial cooperation and respect for fundamental rights"* was held last June at the University of Donja Gorica, within the Jean Monnet Chair in *Promoting Public Awareness on Enlargement Policy, EU Values and the Western Balkans' Accession*. The conference gathered researchers and practitioners from different countries, with different backgrounds and EU affiliations, but sharing similar challenges in fighting transnational organised crimes. The cooperation of the University of Salerno and the University of Donja Gorica, through the project supported by the European Union, is an academic answer to existing challenges by promoting dialogue, education, public awareness, and contributing to the realisation of the rule of law.

Fighting against organised crime is the responsibility of every authority and the duty of the whole society. The fight against transnational crimes is an important component of the European legal value system, which is related to the realisation of the rule of law. Another important component, which is at the same time a challenge for most countries, is the fight against corruption. Both harm the three pillars of the Council of Europe system: human rights, the rule of law, and democracy. They must be addressed promptly and effectively. However, we live in societies that are not immune from those challenges. Therefore, the role of universities, and civil society in general, in promoting European standards and interstate cooperation is very important.

In the spirit of the presumption of the same level of human rights protection in the EU member states as the one existing in the Council of Europe member states, where the European Court of Human Rights set forth legal standards by interpreting the European Convention, it is to be concluded that the fight against organised crime is a fight against negation of human rights and denial of the European legal order. A crucial role belongs to transnational cooperation, where police and judicial cooperation are indispensable.

The publication before the readers consists of eight individual papers covering different aspects of transnational organised crime through the prisms of its character as a global problem, judicial and police cooperation, and respect for human rights in fighting the problem. Here, a special role belongs to criminal law, which, as Professor Russo emphasised, became "*a topic of widespread interest*" and "*a high degree of convergence in criminal law and procedure*" is needed. International cooperation in fighting transnational organised crime should give a reply to "*increasing co-operation of organised crime groups at international level,*" where "*the implementation of the EAW can be assessed as a major achievement in the fight against TOC,"* as concluded by Dr. Wagner. Prevention and suppression of organised criminality should be followed by continuous analysis of the legislative framework, *inter alia*, and constant monitoring of

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its phenomenological dimensions, as elaborated by Professor Djurišić. In the context of fighting transnational crimes and dealing with cases with a foreign element, cooperation with EUROJUST is important in its multiplicity, as explained by State Prosecutor Djaletić. The role of international judicial cooperation in criminal matters with an emphasis on Montenegro and the process of its integration in the EU, as described by UN consultant Mr. Mitrović, is crucial in fighting transnational crime and in line with the country's foreign policy priorities. A brief critical overview of judicial cooperation in the Western Balkans, authored by Dr. Šaranović and dealing with different aspects of the phenomenon through ex-Yugoslav heritage and present-day circumstances, highlighted the EU principle of subsidiarity in the context of the EU enlargement. Challenges in the rule of law implementation in the context of human rights protection in the realism of transnational organised crime, as analysed by Professor Vukčević, were assessed from the constitutionalist's point of view while dealing with the ECHR as a living instrument in the case law of the Strasbourg Court. Finally, and not less importantly, the issue of human rights respect while fighting transnational organised crime, which seriously endangers our rights and freedoms, was treated as the concluding paper of the publication. As elaborated by international legal consultant Mr. Marković, who analysed the issue in particular dealing with rights protected by Article 8 of the ECHR and Article 1 of Protocol 1 thereto, the crux is to search and find the balance, as well as to strengthen international police and judicial cooperation.

In addition, in the papers before the readers, the importance of cooperation between the EU and acceding countries in the field concerned has been highlighted. In this regard, harmonization with the EU law is of the highest importance and a *conditio sine qua non* for acceding countries, such as Montenegro.

This useful reading offers both academic and professional analysis and considerations of important issues in the fight against transnational organised crime. I am glad to have the opportunity to cordially support this project, convinced that it will contribute to a better understanding of the importance of international cooperation and institutional dialogue in combating transnational organised crime and consequently will help the development of legal culture.

TRANSNATIONAL ORGANISED CRIME AS A GLOBAL PROBLEM

THE EVOLUTION OF EUROPEAN CRIMINAL COMPETENCE IN THE FIGHT AGAINST TRANSNATIONAL CRIME

by Teresa Russo[*]

SUMMARY: 1. Preliminary Considerations on Globalisation, Transnational Crimes and European Area of Freedom, Security and Justice. – 2. The Achievement of European Criminal Competence Through the Court of Justice's Case-Law. – 3. The Path to the Introduction of a Formal Legal Basis – 4. The Treaty of Lisbon and the Indirect Criminal Competence. – 5. Some Conclusive Remarks.

1. Preliminary Considerations on Globalisation, Transnational Crimes and European Area of Freedom, Security and Justice

Transnational crime is now recognised as a global issue that must be addressed through collaboration among States and their judicial and law enforcement authorities[1]. In this direction, States have developed a series of regulatory responses within international organisations, both at the global and regional levels[2]. However, the European Union (EU) has even created the European area of freedom, security, and justice, endowing itself with police and judicial cooperation tools, as well as a specific criminal law competence in the field. In light of this, a discussion with professors and lawyers of criminal law and criminal procedure, held as part of the activities of the Jean Monnet Chair EUVALWEB, revealed that, because these two disciplines are primarily within the competence of the Member States, a number of issues arise in terms of effectiveness in the fight against

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[1] See, among others, C. STEER, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, in E. VAN SLIEDREGT, S. VASILIEV (eds.), *Pluralism and Harmonization in International Criminal Law*, Oxford, 2013; J. HAKEN, *Transnational Crime in the Developing World*, Washington D.C., 2011; T. OBOKATA, *Transnational Organised Crime in International Law*, Oxford-Portland, 2010; D. SIEGEL, H. BUNT, D. ZAITCH (eds.), *Global Organised Crime: Trends and Developments*. Berlin, 2003; W. SCHOMBURG, *Are We on the Road to a European Law-Enforcement Area? International cooperation in Criminal Matters: What Place for Justice?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8, No. 1, 2000, pp. 51-60; P. WILKITZKI, *International and Regional Developments in the Field of Inter-State Cooperation in Penal Matters*, in M.C. BASSIOUNI (ed.), *International Criminal Law*, Vol. II, Procedural and enforcement mechanisms, New York-The Hague, 1999.

[2] With respect to the United Nations' global framework, notable examples are: *UN Convention on Psychotropic Substances* (1971); *UN Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973); *UN Convention against Transnational Organised Crime* (2000), as well as its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000), its *Protocol against the Smuggling of Migrants by Land, Sea and Air* (2000), and its *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (2001); *UN Convention Against Corruption* (2003). Regarding the regional framework, the efforts of the Council of Europe in the field led to: *Criminal Law Convention on Corruption* (ETS No. 173, 1999) and its *Additional Protocol to the Criminal Law Convention on Corruption* (ETS No. 191, 2003); *Civil Law Convention on Corruption* (ETS No. 174, 1999); *Convention on Action against Trafficking in Human Beings* (CETS No. 197, 2005); *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (CETS No. 198, 2005); *Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health* (CETS No. 211, 2011); *Convention against Trafficking in Human Organs* (CETS No. 216, 2015); *Convention on Offences Relating to Cultural Property* (CETS No. 221, 2017).

transnational crimes at the international and European levels. This is because, while globalisation has altered how crime can and should be dealt with[3], traditional criminology has difficulty identifying legal definitions of common crimes. There is a lack of a broader concept of crime, which is hampered by application and procedural difficulties at the national level[4].

There is also a terminological problem that concerns the same definition of transnational crime. The term was coined by the United Nations to describe certain criminal phenomena that cross international borders, violate the laws of several states, or have an impact on another country[5]. It was a criminological term, with no claim to providing a juridical concept[6]. Furthermore, it has been considered primarily a functional rather than normative descriptor with definitional problems: a generic concept covering a multiplicity of different kinds of criminal activity, including organised, corporate, professional, and political crime. The use of the adjective "transnational" is also discussed, because in fact not all transnational crime crosses State boundaries. What is relevant is the ripple effect these crimes can have on other States, thus generating the legitimate concern of international society to combat them on a common basis[7]. Therefore, transnational crime has been deemed to describe conduct that has actual or potential cross-border effects of national and international concern. Such crimes must be differentiated from international crimes[8], which are recognised by and can therefore be prosecuted under international law and domestic crimes that fall under one national jurisdiction. This is true to the extent that, prior to the adoption of the Convention on Transnational Organised Crime, the UN had, without obtaining satisfactory and unequivocal answers, asked member states to list cases of transnational organised crime

[3] Globalisation establishes a very complex relationship with crime: negative and positive, as well as preventative. Negative relationship because it is globalisation itself that produces negative collateral consequences by encouraging the introduction and rapid growth in the number of crimes. Positive relationship because, simplistically, globalisation is also the "cure" because it has fostered to fight crime through cooperation and coordination of efforts between states. Preventative relationship, because globalization has emphasised the importance of prevention in the fight against transnational crime and adoption of preventive measures. In this sense, see E.C. VIANO, *Globalization, Transnational Crime and State Power: The Need for a New Criminology*, in *Rivista di Criminologia, Vittimologia e Sicurezza*, Vol. 3-4, No. 3-1, 2009-2010, pp. 63-85. According to J. WILSON, *Transnational Crimes*, in A. LAUTENSACH, S. LAUTENSACH (eds.), *Human Security in World Affairs: Problems and Opportunities*, 2023, pp. 335-349, transnational crimes may be committed by individuals working alone but more often they involve organised groups or networks of individuals working in more than one country. Criminal organisations are taking advantage of the opportunities created by globalization – easier, faster and cheaper communication technologies, deregulated financial markets, and more open borders that allow increased flows of people and money.

[4] See again the considerations of E.C. VIANO, *op. cit*., p. 79.

[5] In the 2002 Report of the UNODC, *Results of a pilot survey of forty selected organised criminal groups in sixteen countries*, www.unodc.org/pdf/crime/publications/Pilot_survey.pdf, it is possible to read that: "*The concept of transnational crime – essentially criminal activity that crossed national borders – was introduced in the 1990s. In 1995, the United Nations identified eighteen categories of transnational offences, whose inception, perpetration and/or direct or indirect effects involve more than one country*". The offences listed included money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit arms trafficking, aircraft hijacking, sea piracy, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illicit drug, trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public or party officials.

[6] G.O.W. MUELLER, *Transnational crime: Definitions and Concepts*, in P. WILLIAMS, D. VLASSIS (eds.), *Combating Transnational Crime. Concepts, Activities and Responses*, 2001, p. 13.

[7] In this sense, see N. BOISTER, *Transnational Criminal Law?*, in *European Journal of International Law*, Vol. 14, No. 5, 2003, pp. 953-976.

[8] See for all, M.C. BASSIOUNI (ed.), *International Criminal Law*, Vol. 1: Sources, Subjects and Contents, Ed. 3, 2008.

in their jurisdictions. Even in the drafting of the Convention, then, the perspective had prevailed to focus on the characteristics of the actors rather than those of the acts[9].

With the adoption of the 2000 United Nations Convention against Transnational Organised Crime (UNTOC), as stated in the Foreword, "*the international community demonstrated the political will to answer a global challenge with a global response*"[10]. The Convention served as a novel instrument to tackle the worldwide issue of crime: the first attempt to compile all the ideas and strategies required to combat organised crime globally into a single, legally binding text. Transnational crime is becoming more widely acknowledged as a serious threat to human security in addition to posing a threat to state security. Both the concept of transnational offences and the reference to serious crimes are contained in this convention. The crimes to which the UN Convention is applicable are listed in its art. 3, para. 1. There is no closed list. Apart from the four distinct offences (affiliation with an organised criminal group, money laundering, corruption, and obstruction of justice) that State Parties must include in their national legislation, any other offences that meet the definition of "*serious crimes*" are encompassed under this regulation. Serious crimes are defined by art. 2, lett. b as those that carry a minimum sentence of four years in prison. Nonetheless, serious crimes covered by the UN Convention will only be considered if two requirements are met: they must be transnational in nature and involve the actions of an organised criminal group. Art. 3, para. 2 lists a number of situations in which the crime in question must be considered transnational; while this is the most evident instance of "transnationality", it is not required for the crime to have been committed in more than one State. If the offence was primarily planned, directed, or controlled in another State, then all situations in which it is fully committed in one State are also covered. Even though all of the events leading up to a crime, including its commission, may have taken place in the same State, the crime may still be classified as transnational if it meets one of two criteria: either the organised crime group involved operates internationally, or the crime has a significant impact on another State.

In accordance with art. 36 of the UNTOC Convention, the European Community (EC) at the time was the first international organisation to sign it[11]. Combating organised crime was, in fact, one of the EU's top priorities in its endeavour to establish an area of freedom, security, and justice. This idea, which was introduced in the Amsterdam Treaty, is an attempt to address the growing belief that organised crime is proliferating throughout

[9] For a reconstruction of the drafting process, see D. VLASSIS, *Drafting the United Nations Convention against Transnational Organised Crime*, in P. WILLIAMS, D. VLASSIS (eds.), *Combating Transnational Organised Crime: Concepts, Activities and Responses*, London, 2001.

[10] Insightful comments on the convention can be found, *ex multis*, in V. MUSACCHIO, A. DI TULLIO D'ELISIIS, *Commentario breve alla Convenzione di Palermo sulla criminalità organizzata*, Padua, 2021; C. ROSE, *The Creation of a Review Mechanism for the UN Convention Against Transnational Organised Crime and Its Protocols*, in *American Journal of International Law*, Vol. 114, No. 1, 2020, pp. 51-67; G. POLIMENI, *The Notion of Organised Crime in the United Nations Convention against Transnational Organised Crime*, in S. CARNEVALE, S. FORLATI, O. GIOLO (eds.), *Redefining Organised Crime. A Challenge for the European Union?*, Oxford-Portland, 2017, pp. 59-63; F. BALSAMO, M.A. ACCILI, *Verso un nuovo ruolo della Convenzione di Palermo nel contrasto alla criminalità transnazionale. Dopo l'approvazione del Meccanismo di Riesame ad opera della Conferenza delle Parti*, in *Diritto penale contemporaneo*, No. 12, 2018, pp. 113-128; N. BOISTER, *The Cooperation Provisions of the UN Convention Against Transnational Organised Crime: A "Toolbox" Rarely Used?*, in *International Crime Law Review*, Vol. 16, No. 1, 2016, pp. 39-70; S. REDO, *The United Nations Criminal Justice System in the Suppression of Transnational Crime*, in N. BOISTER R.J. CURRIE (eds.), *Routledge Handbook of Transnational Criminal Law*, 2015; D. MCCLEAN, *Transnational Organised Crime: A Commentary on the UN Convention and its Protocols*, Oxford, 2007.

[11] See the Working Paper, *The European Union and the United Nations Convention against Transnational Organised Crime*, Civil Liberties Series, of September 2001, LIBE 116.

the EU with never-before-seen virulence. Nearly everywhere in the world, the rapid advancement of communication technologies and the globalisation of economies have resulted in a rise in activities linked to highly organised criminal groups. However, in the European Union, this phenomenon was posing a particularly serious problem due to the Single Market and the Schengen system, which had established a nearly borderless region. Despite the general understanding of the urgent need to address these new challenges of crime, only the Treaty of Lisbon's implementation signalled a turning point. After a protracted and laborious process, this Treaty on the reform of the European Union provided significant, albeit incomplete, answers for the formalisation of the Union's criminal competence in the areas of particularly serious crime with a cross-border dimension, raising a number of concerns that will be addressed in the conclusions of the current work.

2. The Achievement of European Criminal Competence Through the Court of Justice's Case-Law

It would be incorrect to view the EU's criminal competence as a Lisbon Treaty-era accomplishment. Quite the contrary; it started to take shape at the close of the 20th century when the Court of Justice acknowledged that community obligations to incriminate date back to broad principles of Union law, both written and unwritten[12]. In fact, it is possible to distinguish different stages of this competence in the EU integration process. During the first phase of negative integration, the Court of Justice frequently ordered national judges to disregard substantive criminal law rules that were deemed incompatible with Union law. This is done to prevent the single market's fundamental freedoms or other European policies' goals from being hampered, which has resulted in the legislatures of Member States repealing the offending rules, for example on gaming and betting[13]. Even

[12] See Court of Justice of the European Communities, Judgment of 21 September 1989, Case C-68/88, *Commission v. Greece (Greek Maize)*. In particular, Court of Justice of the European Union, Judgment of 8 July 1999, Case C-186/98 *Nunes and de Matos*, paras. 12-14 and Court of Justice of the European Communities, Judgment of 2 February 1977, Case 50/76, *Amsterdam Bulb*, paras. 32-33, where the Court first stated that that Member States have an obligation to cooperate loyally in criminal matters according to principles of efficient and equal cooperation. Subsequently, the Court of Justice of the European Union, Judgment of 13 September 2005, Case C-176/03, *Commission v. Council*, paras. 47-48, it admitted that criminal law and criminal procedure are not within the scope of Community competence. But, however, this does not prevent the then EC legislature from taking measures in relation to the criminal law of the Member States, if the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities are essential measures to combat serious crimes (with respect to the case at issue serious "environmental" crimes), when it is required that the rules which it lays down on protection are fully effective. Hence, "*The Court conferred express criminal competence upon the Community with this judgment. Striking points within this judgment are the effectiveness of Community law and the achievement of Community aim*'s" from the standpoint of B. YAKUT, *Post-Lisbon Criminal Law Competency of the European Union*, in *Marmara Journal of European Studies*, Vol. 17, Nos. 1-2, 2009, p. 15. Cfr. N. NEAGU, *Entrapment Between Two Pillars: The European Court of justice Rulings in Criminal Law*, in *European Law Journal*, Vol. 15, No. 4, 2009, pp. 536-551. See for discussions, M.J. BORGERS, T. KOOIJMANS, *The Scope of the Community's Competence in the Field of Criminal Law*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 16, No. 4, 2008, pp. 379-397; S. PEERS, *EU Justice and Home Affairs Law*, Oxford, 2007, pp. 389-427; F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea. I princìpi fondamentali nelle relazioni interordinamentali*, Padua, 2007; V. MITSILEGAS, *Constitutional Principles of the European Community and European Criminal Law*, in *European Journal of Law Reform*, Vol. 8, Nos. 2-3, 2006, pp. 301-324.

[13] Court of Justice of the European Union, Judgment of 6 March 2007, Joined Cases C-338/04, C-359/04 and C-360/04, *Placanica and Others*, in which it was found that the imposition of a prior police authorisation, whose absence would entail the materialisation of the offence of abusive exercise of gaming

on migration, the Court has occasionally evaluated whether the scope or type of an afflictive measure imposed by State law was consistent with the principles of equality and proportionality[14].

The second stage of integration was positive since states must take all necessary measures, some of which may even be criminal in nature, to guarantee the efficacy of EU law. From a reverse "positive" standpoint, the Court of Justice confirmed that Member States must take all necessary steps to ensure the effective implementation of European rules, such as imposing penalties that are "*effective, appropriate to the gravity of the offence and dissuasive*", as a peculiar declination of the principle of loyal cooperation. This competence was reaffirmed in 2005 when case law once again recognised the legitimacy of criminal harmonisation directives in specific cases pertaining to matters falling under the purview of the Union's first pillar, even before the Lisbon Treaty came into effect. Specifically, Directive 2008/99/EC[15] requires Member States to include criminal sanctions in their national legislation for serious violations of Community law's environmental protection provisions, or Directive 2009/52/EC[16] of the European Parliament and of the Council, which sets minimum standards for sanctions and measures against employers of third-country nationals staying illegally.

Although the Union did not yet have criminal competence, in these phases the possibility that the European Community could bind States to the introduction of criminal sanctions or norms that implicate them gave rise to a debate. The same Court stated that, while the *ius puniendi* falls under the exclusive jurisdiction of national authorities, it was also possible that obligations originating from the European Community could activate this sovereign power[17]. In addition, the famous landmark Court ruling in the *Greek Maize* Case from the late 1980s formulated Member States' obligations to protect the Community's financial interests, including using criminal law. The principle of effective and equivalent protection for the protection of the Union budget was established by this ruling, and the Directive on the fight against fraud to the Union's financial interests by means of criminal law (also known as the "PIF Directive")[18] still uses language from that judgement, such as that on "*effective, proportionate and dissuasive*" sanctions. Therefore, as frequently occurs in the development of EU law, the European Court of Justice's jurisprudence may have provided the true catalyst for changes to EU competences even earlier.

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or betting activities, was considered incompatible with the rules of the single market as it was liable to unduly restrict the freedom of establishment.

[14] Court of Justice of the European Union, Judgment of 19 January 1999, Case C-348/96, *Calfa*; Court of Justice of the European Union, Judgment of 30 April 1998, Case C-24/97, *Commission v. Germany*; Court of Justice of the European Communities, Judgment of 3 July 1980, Case 157/79, *Pieck*.

[15] Directive 2008/99/EC of the European Parliament and of the Council, *on the protection of the environment through criminal law*, of 19 November 2008, in OJ L 328, of 6 December 2008. See, R.M. PEREIRA, *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden, 2015.

[16] Directive 2009/52/EC of the European Parliament and of the Council, *providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, of 18 June 2009, in OJ L 168, of 30 June 2009. See K. AMBOS, P. RACKOW (eds.), *The Cambridge Companion to European Criminal Law,* Cambridge, 2023.

[17] Court of Justice of the European Union, Judgment of 28 January 1999, Case C-77/97, *Unilever*; Court of Justice, *Amsterdam Bulb*, cit.; Court of Justice, *Commission v. Greece (Greek Maize)*, cit.

[18] Directive (EU) 2017/1371 of the European Parliament and of the Council, *on the fight against fraud to the Union's financial interests by means of criminal law*, of 5 July 2017, in OJ L 198, of 28 July 2017.

3. The Path to the Introduction of a Formal Legal Basis

However, establishing a legal basis explicitly dedicated to the Union's criminal competence required a lengthy and laborious process[19]. The Treaty establishing the European Economic Community of 1957, did not include any rules in the area of judicial cooperation. The development of the Union's competences in the field of criminal law dates to the 1990 Convention implementing the 1985 Schengen Agreement[20] which was outside the community system. Then, because the terms "*political cooperation*" and "*European Union*" were employed for the first time, the Single European Act represented the first embryo of political unity between the twelve Member States at the time. A "*Political Declaration of the Governments of the Member States*" concerning the free movement of persons[21] contained an early (though very vague) indication of potential police and criminal cooperation. They also cooperated in the fight against terrorism, crime, drugs, and the trafficking of antiques and works of art. To avoid any misunderstanding about the "non-existent" cession of sovereignty, it was specifically stated in the subsequent Declaration "*on Articles 13 to 19 of the Single European Act*" that "*Nothing in these provisions shall affect the right of Member States to take such measures as they deem necessary to control immigration from third countries and to combat terrorism, crime, drug trafficking, and trafficking in works of art and antiquities*". Furthermore, these mechanisms were devoid of any implementing instruments.

Then, legal cooperation in criminal matters obtained a new institutional place within the formal framework of the EU with the implementation of the Treaty of Maastricht, which established the European Union, in the so-called "third pillar". The EU Member States formally recognised judicial cooperation in criminal matters as a matter of common interest (art. K, para. 1, sub-para. 7). This did not, however, change the fundamental aspect of the intergovernmental nature of decision-making concerning cooperation in criminal matters. Both the requirement of unanimity and the Member States' sole authority to take the lead in creating third-pillar legal instruments in this area were preserved. Although Title VI of the Treaty on European Union contained provisions on cooperation in the fields of justice and home affairs (JHA), the Treaty did not specifically address the competence of harmonising criminal law. However, this did not stop the Union from enacting a number of international legal conventions (most notably, on the

[19] As discussed by many scholars, among them J. OBERG, *Union Regulatory Criminal Law Competence after Lisbon*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, No. 3, 2011, pp. 289-318; E. BAKER, *Governing through Crime: The Case of the European Union*, in *European Journal of Criminology*, Vol. 7, No. 3, 2010, pp. 187-213; F. CALDERONI, *Organised Crime Legislation in the European Union. Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organised Crime*, Heidelberg, 2010, p. 27 ff.; A. WEYEMBERGH, V. SANTAMARIA (eds.), *The Evaluation of European Criminal Law*, Brussels, 2009; V. MITSILEGAS, *The Competence Question: The European Community and Criminal Law*, in E. GUILD, F. GEYER (eds.), *Security Versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot, 2008, p. 153 ff.; S. WHITE, *Harmonization of Criminal Law under the First Pillar*, in *European Law Review*, Vol. 31, No. 1, 2006, pp. 81-92; V. MITSILEGAS, *Defining Organised Crime in the European Union: The Limits of European Criminal Law in an Area of "Freedom, Security and Justice"*, in *European Law Review*, Vol. 26, 2001, pp. 565-581; J.W. BRIDGE, *The European Communities and the Criminal Law*, *in Criminal Law Review*, 1976, pp. 88-97.

[20] The abolition of internal border controls required greater cooperation between national police, customs and judicial authorities concerned with the Union's external borders, on issues such as terrorism, organised crime, immigration and asylum, as set out in the "Schengen *acquis*".

[21] The Declaration reads as follows: "*In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of third-country nationals*".

protection of the Union's financial interests), whose obvious goal was to specify the elements of specific criminal offences and the appropriate penalties for them[22].

Subsequently, JHA components were included in the Community legal framework proper (i.e., the first pillar) by the 1997 Treaty of Amsterdam. This gave the European Commission the authority to suggest laws and policies regarding borders, immigration, asylum, visas, and civil court cooperation. The EC Treaty's Title IV, concerning "*Visas, asylum, immigration, and other policies related to free movement of persons*", was then invoked to address those issues. Conversely, cooperation between the police and courts in criminal cases was still governed by intergovernmental decision-making and fell under the third pillar. Nonetheless, the Amsterdam Treaty established a new goal for the EU: "*an Area of Freedom, Security, and Justice*" through the adoption of a new legal tool known as a "Framework Decision" that reflected the paradigm shift to bring Member States' laws and regulations closer together. While leaving the choice of form and methodology to the national authorities, framework decisions would bind Member States with regard to the intended outcome. They had no immediate effect, but were acts of Union law, even though criminal law remained restricted to intergovernmental cooperation under what was then the third pillar of the Union (rather than the Community method)[23]. Nevertheless, the Amsterdam Treaty clearly recognised the Union's authority to harmonise criminal law for the first time by adding new provisions specifically addressing the matter (art. K.6, para. 2, lett. b)[24].

Later, "*closer cooperation between judicial and other competent authorities of the Member States*" was emphasised in the Treaty of Nice. The changes include "*enhanced cooperation*" in areas referred to in Title VI of the Treaty on European Union (art. 40-40b TEU), extension of the co-decision procedure to areas such as illegal immigration and short-term visa policy as well as immigration and asylum, and cooperation through Eurojust (art. 31 TEU)[25]. The changes aimed to enable the European Union to develop into an area of freedom, security, and justice more quickly. In addition, the Nice European Council officially "proclaimed" the Charter of Fundamental Rights in December 2000. The right to liberty and security (art. 6), the right to asylum (art. 18), protection from removal, expulsion, or extradition (art. 19), non-discrimination (art. 21), and Title VI on

[22] See for example, Council Act, *drawing up the Convention on the protection of the European Communities' financial interests*, of 26 July 1995, in OJ C 316, of 27 November 1995, broadly known as the "PIF Convention". The Convention is assisted by two protocols: the Council Act, *drawing up a Protocol to the Convention on the protection of the European Communities' financial interests*, of 27 September 1996, in OJ C 313, of 23 October 1996; Council Act, *drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests*, of 29 November 1996, in OJ C 151, of 20 May 1997.

[23] In the following years, the Council adopted a large number of framework decisions in the area of criminal law and cooperation, see *infra* note 36.

[24] See, among others, M. ZBINDEN, *Les institutions et les procédures de prise de décision de l'Union européenne après Amsterdam*, Bern, 2002; S. PEERS, *Justice and Home Affairs: Decision-Making after Amsterdam*, in *European Law Review*, No. 2, 2000, pp. 183-191; P. MAGRINI, *L'evoluzione delle politiche europee nel settore della giustizia e degli affari interni: da Schengen a Tampere via Amsterdam*, in *Diritto pubblico comparato ed europeo*, No. 4, 2000, pp. 1817-1828; D. O'KEEFE, P. TWOMEY (eds.), *Legal Issues after the Treaty of Amsterdam*, London, 1999; J. MONAR, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, in *European Law Review*, Vol. 23, No. 4, 1998, pp. 320-335; G. SOULIER, *Le Traité d'Amsterdam et la coopération policière et judiciaire en matière pénale*, in *Revue de science criminelle et de droit pénal comparé*, No. 2, 1998, pp. 237-254.

[25] The European Judicial Co-operation Unit, or Eurojust, was established in accordance with Council Decision 2002/187/JHA, *setting up Eurojust with a view to reinforcing the fight against serious crime*, of 28 February 2002, in OJ L 63, of 6 March 2002, which followed the Nice amendments to Title VI of the EU Treaty.

justice are just a few of the topics that are covered by the 54-article Charter and are pertinent to justice and home affairs. As is well known, the Treaty of Lisbon, which came into effect on December 1, 2009, gave the Charter the same legal standing as the Treaties (see art. 6 TEU). As one of the elements of a space of freedom, security, and justice, the Lisbon Treaty also established the European Criminal competence, which is finally covered in Chapter 4 regarding the "*Judicial Cooperation in Criminal Matters*".

4. The Treaty of Lisbon and the Indirect Criminal Competence

As a result, the Lisbon Treaty is a watershed moment because it abolishes the division of the pillars and unites the entire area of freedom, security, and justice in Title V of the Treaty on the Functioning of the European Union (TFEU). Furthermore, it enshrines the core of EU criminal competence in art. 83, para. 1 TFEU, on the basis of which the European Parliament and Council may establish "*minimum rules*" concerning criminal offences and penalties in the field of serious cross-border crime, with the directive replacing the instrument of the framework decision. While this European criminal competence remains indirect, it now obligates Member States to implement the provisions in which it is expressed, with the threat of an action for failure to fulfil obligations and a Court of Justice sentence. The majority of substantive criminal law framework decisions have now been repealed by directives based on art. 83, para. 1 TFEU[26].

The recognition of the absolute necessity of combating transnational crime in the European sphere, first and foremost through substantive law texts capable of ensuring sufficiently homogeneous areas of criminal unlawfulness and punitive treatment in the various Member States, has resulted in the conferral of an autonomous character on the Union's criminal competence under consideration here. A competence that legitimises itself by combating the most insidious manifestations of the crime at hand. The aforementioned EU criminal competence has acquired a marked functionalist autonomy, in that it no longer primarily serves the needs of coordination between the authorities responsible for combating crime (whereas, on the contrary, such needs were the basis of third-pillar criminal competence under arts. 29 and 31 TEU until 2009)[27]. Of course, this

[26] Under art. 83, para. 1 TFEU, by repealing previously existent framework decisions, the following legislative acts have been adopted at the EU level: Directive 2019/713 of the European Parliament and the Council, *on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA*, of 17 April 2019, in OJ L 123, of 10 May 2019; Directive (EU) 2017/2103 of the European Parliament and of the Council, *amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of "drug" and repealing Council Decision 2005/387/JHA*, of 15 November 2017, in OJ L 305, of 21 November 2017; Directive (EU) 2017/541 of the European Parliament and of the Council, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, of 15 March 2017, in OJ L 88, of 31 March 2017; Directive 2014/62/EU of the European Parliament and of the Council, *on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA*, of 15 May 2014, in OJ L 151, of 21 May 2014; Directive 2013/40/EU of the European Parliament and of the Council, *on attacks against information systems and replacing Council Framework Decision 2005/222/JHA*, of 12 August 2013, in OJ L 218, of 14 August 2013; Directive 2011/92/EU of the European Parliament and of the Council, *on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*, of 13 December 2011, in OJ L 335, of 17 December 2011; Directive 2011/36/EU of the European Parliament and of the Council, *on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, of 5 April 2011, OJ L 101, of 15 April 2011.

[27] In this sense, see A. BERNARDI, *La competenza penale accessoria dell'Unione Europea: problemi e prospettive*, in *Diritto Penale Contemporaneo*, No. 1, 2012, p. 44. See also R. SICURELLA, *Il diritto penale*

autonomous development of European criminal competence does not deny the long-known virtuous synergies between criminal harmonisation and judicial cooperation; rather, it expresses the desire to give the new European rules aimed at combating the most serious forms of cross-border crime additional purposes, sometimes with symbolic implications. In fact, it is primarily through these rules that a common sense of justice is established, an ideal of retributive fairness aimed at affirming the substantial equality of Union citizens in their dual capacities as perpetrators and passive subjects. Furthermore, it is through the criminal laws under consideration that a "feeling of belonging to Europe as a political, legal, and cultural whole" is affirmed, expressive of homogeneous values and aimed at firmly striking at those behaviours that, by their inherent seriousness, overshadow its image as an "entity of law"[28].

While Art. 29 of the Treaty of Maastricht established a core set of offences (which were not always clearly defined), Art. 83 TFEU addresses minimum standards for serious cross-border crime known as "Euro-crimes", which include terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of payment instruments, computer crime, and organised crime. "*Serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis*", it stated. Furthermore, in para. 2 of art. 83 TFEU, the so-called "accessory indirect criminal law competence" was introduced, which states that where the approximation of criminal laws and regulations of the Member States proves essential to ensuring the effective implementation of a Union policy in an area that has been subject to harmonisation measures, minimum rules concerning the definition of criminal offences and sanctions in the area concerned may be laid down by means of directives[29]. This rule is more complicated because the competencies are not identified for specific sectors but must be exercised in areas that have already been subject to harmonisation measures, a condition that does not appear to adequately fulfil the Union's delimiting function of criminal law intervention. The requirement of "essential" becomes important at this point: the latter, by subordinating the judgement of necessity of criminal intervention to the "*effective implementation of a Union policy*", as variously interpreted, opens the way for some to "*possible extensive attitudes to the detriment of subsidiarity and extreme ratio of criminal intervention*"[30].

Furthermore, under art. 83, para. 1, sub-para. 3 TFEU, based on criminal trends, the Council may issue a decision identifying additional areas of serious crimes, acting unanimously after receiving approval from the European Parliament, as it has done recently in the case of violations of EU sanctions. The European Union has imposed sanctions on third-country, entities, and legal and natural persons, such as arms embargoes, import and export bans, the freezing of funds and economic resources, and travel bans. While the adoption of EU sanctions is centralised at the EU level, Member States are responsible for their implementation and enforcement. Significant differences between national systems, particularly in terms of offences and penalties for violations of EU sanctions, are thought to undermine their efficacy and the credibility of the EU. As a result, the Council decided to classify violations of Union restrictive measures as a type

europeo dopo Lisbona. Dall' "ossimoro polisenso" al diritto penale di un sistema di ordinamenti integrati. Ancora a metà del guado, in *Archivio Penale*, 2021, No. 1, https://archiviopenale.it/File/DownloadArticolo?codice=6ccd8889-ad15-40e4-8f29-6f3f1d0dbc60&idarticolo=27098

[28] *Ibidem*.

[29] This ancillary or annex competence developed by the case law in the area of environmental crime and ship-source pollution has been now expressly codified in art. 83, para. 2 TFEU.

[30] In this sense, see A. BERNARDI, *op. cit*.

of crime that meets the requirements of art. 83, para. 1 TFEU[31]. Following the Council's decision to include violations of EU sanctions among the areas of "*particularly serious crime with a cross-border dimension*", the European Commission issued a proposal for a directive in December 2022, aiming to approximate the definition of criminal offences and sanctions for violating Union restrictive measures[32]. To summarise, "European criminal policy" now necessitates not only the expansion of domestic incriminatory offences or the introduction of new ones, but also, as anticipated in the 2011 Commission Communication[33], the effective implementation of EU policies through criminal law.

5. Some Conclusive Remarks

The evolution of the Union's criminal competence in the fight against transnational crime allows for some critical reflections in the conclusions. While the advancement of European integration has created new opportunities for illegal activities of various kinds, there has also been a push in the opposite direction in terms of accelerating the integration process in the specific area of crime fighting. As a result, the role of criminal law within European institutions has changed dramatically over the years, becoming a topic of widespread interest. The EU's ambition to create an integrated common judicial area is predicated on the cooperation of law-enforcement authorities and a high degree of convergence in criminal law and procedure. The Lisbon Treaty has broadened the legal basis because the criminal justice cooperation is an important component of European integration and serves to promote respect for fundamental rights, based on the principle of mutual recognition of judgements and judicial decisions, including, if necessary, harmonisation of the Member States' laws and regulations in this area.

The mutual recognition of judicial decisions model was advanced by the political impulses provided by the European Council in Cardiff in 1998 and Tampere the following year on the basis of another key principle of European construction, namely mutual trust[34]. According to EU Court of Justice practice, there is a necessary implication that Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even if the outcome would be different if its own national law were applied[35]. This because judicial cooperation in

[31] Council Decision (EU) 2022/2332, *on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in art. 83, para. 1 TFEU*, of 28 November 2022, in OJ L 308, of 29 November 2022.

[32] Proposal for a directive of the European Parliament and of the Council, *on the definition of criminal offences and penalties for the violation of Union restrictive measures*, of 2 December 2022, COM/2022/684 final, 2022/0398(COD).

[33] Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, COM/2011/0573 Final.

[34] The concept of mutual trust was expanded upon in the 2001 *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters*, in OJ C 12, of 15 January 2001, which stated: "*The implementation of the principle of mutual recognition of decisions in criminal matters presupposes mutual trust of the Member States in each other's criminal justice systems. This trust is based in particular on the common ground of their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law*". There is an obvious differentiation that results from the 2005 *Hague Programme: strengthening freedom, security and justice in the European Union*, in OJ C 53, of 3 March 2005, where one part is defined as "*confidence-building and mutual trust*", even more so in the 2010 *Stockholm Programme – An open and secure Europe serving and protecting citizens*, in OJ C 115, of 4 May 2010, where there is a broad articulation distinguishing the two concepts.

[35] Court of Justice of the European Union, Judgment of 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*; also, with respect to the application of the European Arrest Warrant, see Court

criminal matters, but also in the entire area of freedom, security, and justice, is based on a relationship between Member States, between national judicial authorities and enforcement authorities, based on the commonality of fundamental values that constitute mutual trust and refer not only to the values of art. 2 TEU, but also, pursuant to art. 67, para. 1 TFEU, to respect for fundamental rights, as well as the different legal systems and traditions of the Member States. As a result, common minimum standards are required for one EU country's judicial decisions to be recognised by the others. The EU worked to protect the fundamental rights of suspects and accused persons[36]. When designing and implementing criminal law, the EU must strike the right balance between measures that protect the rights of suspects and accused, on the one hand, and measures that facilitate the investigation and prosecution of crime, on the other.

The Court of Justice continues to provide guidance on when this mutual trust breaks down, as in the case of the extension of the optional ground of non-execution of the European Arrest Warrant[37]. However, as stated, "[a] *more holistic vision of what EU criminal justice should encompass is also one which clearly defines what it should not. It must naturally be strongly guided by the principle of subsidiarity. Nevertheless, some concept of the EU as a community and its citizens as equal stakeholders in certain interests would contribute to a more positive and comprehensive means of defining the legitimate subject-matter, and bounds, of any EU criminal justice area. Such a definition is the necessary first step to forging any such area*"[38]. Conversely, the high level of fragmentation in the European legal framework risks affecting legal certainty and eventually leading to contradictory outcomes, playing right into the hands of the very

of Justice of the European Union, Judgment of 29 January 2013, Case C-396/11, *Radu* and Court of Justice of the European Union, Judgment of 28 June 2012, Case C-192/12 PPU, *Melvin West*. According to S. MONTALDO, *I limiti della cooperazione in materia penale nell'unione europea*, Naples, 2015, p. 368, the required trust is divided into two levels: trust in the counterpart authority's work and the information that may be transmitted; and trust in the foreign criminal justice system as a whole, including the adequacy of the procedural institutions that characterise it, the suitability of the penalties, and the ability to protect fundamental rights to a satisfactory degree.

[36] Directive (EU) 2016/1919 of the European Parliament and of the Council, *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings*, of 26 October 2016, in OJ L 297, of 4 November 2016; Directive (EU) 2016/800 of the European Parliament and of the Council, *on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, of 11 May 2016, in OJ L 132, of 21 May 2016; Directive (EU) 2016/680 of the European Parliament and of the Council, *on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*, of 27 April 2016, in OJ L 119, of 4 May 2016; Directive (EU) 2016/343 of the European Parliament and of the Council, *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, of 9 March 2016, in OJ L 65, of 11 March 2016; Directive 2013/48/EU of the European Parliament and of the Council, *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, of 22 October 2013, in OJ L 294, 6. November 2013,; Directive 2012/13/EU of the European Parliament and of the Council, *on the right to information in criminal proceedings*, of 22 May 2012, in OJ L 142, of 1 June 2012; Directive 2010/64/EU of the European Parliament and of the Council, *on the right to interpretation and translation in criminal proceedings*, of 20 October 2010, in OJ L 280, of 26 October 2010.

[37] See the case of a real risk of inhuman or degrading treatment for detention conditions in the Court of Justice (Grand Chamber), 5 April 2016*, Aranyosi and Căldăraru* (C-659/15 PPU), Joined Cases C-404/15 and C-659/15 PPU and in the Court of Justice (Grand Chamber), 15 October 2019, *Dorobantu*, C-128/18.

[38] M.L. WADE, *Developing a Criminal Justice Area in the European Union*, 2014, p. 53, the study was conducted on behalf of the Directorate General for internal policies policy, Department C: citizens' rights and constitutional affairs, www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493043/IPOL-LIBE_ET(2014)493043_EN.pdf.

organised criminal groups it was designed to combat[39]. Finally, cooperation between the EU and the acceding countries in the fields of justice and home affairs is critical to the enlargement process. Its goal is to assist countries in meeting the political criteria set by the Copenhagen European Council (institutional stability, rule of law, and respect for human rights) [40], which is made more difficult when some Member States face multiple implementation challenges. Furthermore, given Ukraine's status as a candidate country for accession, the war in Ukraine raises new concerns about the enlargement of the European Union and its area of freedom, security, and justice.

[39] According to L. PICOTTI, *Sui tre volti del diritto penale comunitario: passato e future,* in C. GRANDI (ed.), *I volti attuali del diritto penale europeo. Atti della giornata di studi per Alessandro Bernardi,* Pisa, 2021, p. 124: "*starting from the identification and graduation of 'European' or 'Europeanised' legal goods deserving of common criminal protection, from the requirements of 'European' offensiveness that make it necessary to exercise the Union's criminal jurisdiction in compliance with the principle of criminal, as well as European, subsidiarity, as well as of the principle of proportionality of penalties and of the other possible 'punitive' sanctions (including against entities), with respect to the different offences to the different legal goods, according to an overall coherent framework, which overcomes the sectoral fragmentation that still characterises much of the Union's criminal policy*". See also V. MONGILLO, *Strengths and Weaknesses of the Proposal for a EU Directive on Combating Corruption*, in *Sistema Penale*, No. 7, 2023, p. 19.

[40] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on the EU Strategy to tackle Organised Crime 2021-2025*, of 14 April 2021, COM(2021) 170 final, para. 1.3: "*It is essential to step up international cooperation including through the activities of the relevant justice and home affairs agencies, in particular in relation to the neighbourhood and enlargement countries*" and "*to equip partners with the tools allowing them to root out complex criminal structures potentially affecting the EU*".

CRIMINALISTICS AND CRIMINAL JUSTICE ASPECTS OF PROVING AND SOLVING CRIMINAL OFFENCES

by Johann Wagner[*]

SUMMARY: 1. Transnational Organised Crime (TOC). – 2. Is Organised Crime the Same as Mafia? – 3. What is Organised Crime? – 4. Classic Areas of TOC. – 5. Relevant Offence Fields and Legal Foundations. – 6. Ethnic Organised Crime Groups and Their Offence Fields. – 7. Conclusions.

1. Transnational Organised Crime (TOC)

Organised forms of crime are to be found in nearly all countries around the world, and from the criminals' point of view, they are extremely lucrative industries with an estimated turnover of about one trillion US dollars annually. According to the economic reports from 2012, the southern Italian syndicates alone generated sales of approximately 140 billion euros and that despite the negative effects of economic and financial crises[1]. The organised crime (OC) groups and individual criminals operating in the EU are highly diverse. They range from large 'traditional' OC groups to smaller groups and loose networks supported by individual criminals, who are hired and collaborate on an *ad hoc* basis. Approximately more than 5,000 OC groups operating on an international level are currently under investigation in the EU[2]. This figure does not necessarily reflect an overall increase in TOC activities in the EU compared to 2013, when Europol reported on the activities of 3,600 internationally operating OC groups in the EU. This increase is primarily a reflection of a much-improved intelligence picture. The increase also points to the emergence of smaller criminal networks, especially in criminal markets that are highly dependent on the Internet as part of their *modi operandi* or business model. Overall, the number of TOC groups operating internationally highlights the substantial scope and potential impact of serious and organised crime on the EU.

The progressing globalisation of economic and financial systems, rapid developments in communications and cyberspace[3], as well as the dynamic political and economic integration processes in Europe, accompanied by a multitude of crises and the greatest wave of irregular migration since the Second World War, will inevitably affect the interior and exterior security situation. No other profession has such a good international network of organised structures in the area of cross-border criminality. In addition to the global systems of economy and finance, another field has developed, namely organised forms of crime. These organisms sometimes have more economic power than a state that has to abide by such structures reluctantly, which is at least a natural defensive attitude of the normal population. The countries of origin of organised forms of crime are usually

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[1] R. WIRTSCHAFT, *Organisierte Kriminalität boomt – Mafia is the largest bank in Italy*, 2012, http://www.n-tv.de/wirtschaft/Mafia-ist-groesste-Bank-Italiens-article5179561.html

[2] Europol, *EU Serious and Organised Crime Threat Assessment – Crime in the age of technology*, 2017, p. 14.

[3] R. LACKES, M. SIEPERMANN, *Cyberspace*, in *Gabler Wirtsschaftlexikon*, 2014, online on Internet: "Cyberspace (also called virtual space) is a non-real world that can only be used by a computer. In the real sense Cyberspace refers to a computer-generated three-dimensional world, also called Virtual Reality", http://wirtschaftslexikon.gabler.de/Archiv/75127/cyberspace-v9.html

characterised by a weak political system and very often coupled with an inadequately developed and functioning legal system in which the rule of law is only partially implemented or not at all.

As a result, legal, social and society norms are pushed back and replaced by violence and the right of the strongest, coupled with an unrestrained pursuit of profit and power. Crime structures adapt almost without any problems to the economic and social framework conditions of the respective country. The combined absence of rule of law and non-enforcement of monopoly of power by a state, together with the ability of criminal groups to completely isolate themselves from society, provide the perfect breeding ground for infiltration into a society and thus guarantee the success of their criminal actions[4]. These developments initially have a local origin and can develop rapidly in the country and then in a cross-border context. For this reason, it can be unequivocally ascertained that organised forms of crime appear not only in the national context but are also operating predominantly across borders[5]. On the one hand, the steady increase in cross-border passenger and freight traffic allows only selective controls. On the other hand, the elimination of stationary border controls within the *Schengen* area promotes these developments and minimises the risk of discovery. Corresponding numbers of cases within the continually increasing cross-border passenger and goods transport system are documented in the *Eurostat* passenger transport statistics[6].

Much faster than most states with their law enforcement and investigative authorities, these criminal structures are able to take advantage of the speed at which the international market operates and all kinds of technical advances in state-of-the-art communication technologies. These criminal groups often form complex business-oriented alliances and linkages, strengthened by agreements that serve to influence the decision-making processes in politics, society and the economy in a transnational manner. Other significant characteristics of these criminal structures are their fundamental rejection of state monopolies, intimidation and scaremongering of dissenters, as well as a hierarchical system coupled with the conditioned behaviour of the members, based on their own code of conduct with the possibility of sanctioning in cases of non-compliance. In its entirety, three recurring causes are observed: poverty, regulation[7] and greed[8].

"*We want to be tough on crime, but equally tough on its causes*"[9], according to Blair[10], it would certainly be possible to find ways of relieving and developing positive changes in order to combat poverty and normative constraints. However, the endeavour to change

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[4] G. EMPEROR, *Kriminologie*. "In order to record the organised crime, the Federal Criminal Police Office has developed a comprehensive system of indicators, which clearly highlights the description elements of the planning, preparation and implementation of the criminal acts as well as the exploitation of the prey. The following indicators point to the forms of organised crime: [...] a long-term consolidation of a plurality of persons as a profit-oriented solidarity of interests, with a high degree of exchangeability of their members and systematic foreclosure to the outside [...]", 1996, p.410. H.D. SCHWIND, *Kriminologie: Eine praxisorientierte Einführung mit Beispielen*, "the total foreclosure to the outside (silence against law enforcement authorities)", 2010, p. 624.

[5] M. SOINÉ, *Strukturen der Organisierten Kriminalität in Europa – aus der Sicht des Bundesnachrichtendienstes*, in G. GEHL (ed.), *Europa im Griff der organisierten Kriminalität?*, 2006, p.9.

[6] Eurostat, *Passenger transport statistics provide information on a range of passenger transport modes, such as road, rail, air and maritime transport*, 2016, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Passenger_transport_statistics&oldid=317881.

[7] In this case, regulation should be understood as an instrument for overseeing and at the same time suppressing the society by means of normative constraints.

[8] D. SOUTHWELL, *Die Geschichte des Organisierten Verbrechens*, 2007, p. 9.

[9] *Ibid*.

[10] T. BLAIR, *Leader's speech*, in *BrtishPoliticalSpeech*, 1995, http://www.britishpoliticalspeech.org/speech-archive.htm?speech=201.

the characteristic trait of greed is a whole different concept and one that is far more difficult to achieve.

The detection and investigation, structural analysis and consequent combating of transnational OC groups present huge challenges for national law enforcement agencies and intelligence services, which ideally should cooperate closely. This phenomenon must be combated by all available means according to the rule of law, in order to continue to guarantee the free democratic constitution in Germany and the democracies of the other EU member states[11].

2. Is organised crime the same as Mafia?

Organised forms of crime are often equated with the expression *Mafia*; but this is inappropriate. The colloquially manifested concept of *Mafia* cannot be equated with organised crime and is not correct in this respect, since organised crime is, from a holistic viewpoint, a heterogeneous and not a monolithic structure[12]. Rather, the respective organised crime groups have resulted independently in different countries with their respective forms of governance, in different epochs, cultures and structures with different names and traditions[13]. However, no other coalition of an organised crime group is more famous than that of the Italian *Mafia*, although this term does not exist in a real sense[14]. Technically speaking, *Mafia* stands for the emergence of criminal groups in Sicily, which continue to commit serious crimes in organised forms and procedures. However, in order to understand the origins of the *Mafia*, one must know and understand the cultural, sociological and political developments of Sicily[15]. A possible historical explanation can be derived from the long-standing foreign domination by the dynasty of the Bourbons, according to which nationalist groups in the south of Italy wrote the saying: "*M.a.F.l.a. - Morte alla Francia, Italia anela!*" (The death of France is longing for Italy)[16], or

[11] E. THURICH, *Pocket politik. Demokratie in Deutschland*, 2011. P. THIELBÖRGER, *Free and Democratic Order – the designation for the highest fundamental values of democracy in Germany*, 2011, "the Constitution uses twice the concept of a free and democratic order [Art. 18, Art. 21 (2) GG]. This refers to the democratic order in Germany in which democratic principles [Art. 20 GG] and supreme basic values, which are inviolable. Above all, the dignity of the individual person [Art. 1 GG]. In German democracy freedom and equality prevail over the law. A dictatorship is excluded. In regular general elections, the people themselves determine who should rule it. It has the choice between competing parties. Those who receive the majority of electors will then be governed - but only for a certain period of time. For democracy is only rule on time. A party that is once at the helm must also be able to be descended", http://www.bpb.dxe/nachschlagen/lexika/pocket-politik/16414/freiheitliche-demokratische-grundordnung.

[12] M. SOINE, *op. cit.*, p. 13.

[13] D. SOUTHWELL, *op.cit.*, p. 8.

[14] *Ibid*.

[15] *Ibid*. Retrospective Summary.
"Over long periods of time, self-proclaimed and non-state-legitimate structures exerted power relations on society, almost as in the exertion of the state's power monopoly. In the 19th century large landowners took over this role and equipped their workers with weapons to protect their interests, in order to violently counteract the misery and the competing rebellion. These armed men then very quickly learned to take advantage of the power given to them in order to extort their sacrifices and make financial profit from them. The decisive step towards the *Mafia* was carried out until the second half of the 19th century, since the Italian central government, which was then responsible, was unable in enforcing an effective state control over Sicily. The landowners and their armed subordinates gained so consequently more and more influence and control in the region, society and structures such as church, government and newspaper publishers. This is how the organisation of the *Mafia* came about as part of this development process, just as it is known to a large extent today. Nevertheless, a clear definition of the term *Mafia* cannot be derived so easily since there are quite different description approaches".

[16] O. BOSSERT, *Cosa Nostra – Die Geschichte der Mafia*, in *KrimLEX*, 2006,

comparatively "*M.a.F.l.a. - Morte Ai Francesi, Invasori, Assassini!*" (Death to the French, Invaders, Murderers!)[17]. Further references are also found in the Sicilian dialectic. Here, *Mafia* is equated with boldness or boastfulness, but the word presumably derives from the Arabic word '*mahyah',* which has roughly the same meaning[18].

Mafia-like structures are viewed from the outside as strictly isolated and familial constructs and are bound both territorially and thematically. Southwell describes the myth '*Mafia*' as a consolidated part of Italian culture, such that the general viewer gets the impression that this is part of the national cultural heritage[19]. Organised forms of crime emerged independently of one another in terms of time and territory, and they developed individually in different cultures and political systems. In all of these developments similar or even identical patterns can be observed, such as a clear hierarchy, a strong seclusion to the outside, a code for their members, a strong potential for violence, operating within an indeterminate time period, no cooperation with state authorities, as well as greed and profit striving coupled with the re-investment of criminally generated profits. There were, for example, organised forms of criminality in the former Soviet Union, which, were little known at all, due to the partitioning of the Communist system. These criminals, called 'thieves in the law', organised themselves in syndicates and were active almost in all criminal areas, which promised financial profit[20]. After the fall of the Iron Curtain and the dissolution of the former Soviet Union, the almost limitless possibilities of expansion were immediately recognised, and there was nothing to hinder an extension to the West and the extension of the thematic areas. The 'thieves in the law' have always enjoyed great respect in the Russian-speaking population, and they are forbidden to cooperate with government authorities, found a family or even carry out a regular job.

As a second example, the *Yakuza* is said to be a group of criminals and criminal family clans in Japan[21]. They are among the oldest and most established criminal organisations in the world[22]. The influence of this TOC group extends to all areas of Japanese politics, in commerce, industry, banks, media, all social classes, not least based on the binding compliance and practice of old rituals.

Further examples of powerful and influential TOC groups are:

- *La Cosa Nostra* USA, *Medellin* cartel in North, Central and South America
- Chinese *Mafia* - *Triads* in Asia
- Albanian *Mafia*, Russian *Mafia*, and others in Europe

The political developments and the dramatic changes that have taken place during the last 20 years have led to the emergence of new, internationally-operating structures, such

http://www.krimlex.de/artikel.php?BUCHSTABE=M&KL_ID=118

[17] S. RUNCIMAN, Universal Encyclopaedia - Revolt of the citizens of Palermo against the rule of Karl I of Naples-Sicily (from the house of Anjou), which on Easter Monday broke out into Vespers in 1282 and spread throughout Sicily, 1976, http://universal_lexikon.deacademic.com/301913/Sizilianische_Vesper

[18] Schüler-Wahrig, *Foreign words dictionary*, 2008, p. 228.

[19] D. SOUTHWELL, *op.cit.*, p. 12.

[20] *Ibid.*, "Thieves in law – Russian: воры в законе – wory w sakone", p. 146.

[21] *Ibid.* "*Ya-Ku-Za*" is originally a dialectical term for the number combination 8-9-3, a series of numbers from a Japanese card game, which is the epitome of worthlessness. Thus, it is to be understood that the *Yakuza* proudly consider themselves the 'worthless' of the society and take out people who have been expelled from Japanese society. Characteristics for the *Yakuza* are extensive tattoos, as well as often missing fingertips, which *Yakuza* members have to separate themselves in case of misconduct. The more fingers are missing, the more wrongs are internally condemned, p. 90.

[22] *Ibid* p .92.

as the successor states of the former Soviet Union, South East Europe and North Africa, as shown by Libya's example[23].

3. What is Organised Crime?

Actions described in today's juridical understanding as, organised forms of criminal machinations, can be traced back to human history by means of their patterns. People have always agreed to pursue their goals through the use of force or other unlawful procedures. The description of organised crime was decisively influenced by different developments of the individual societies, as well as a differentiated legal, economic and sociological view from the respective political systems[24]. As a result, today a variety of organised crime definitions have been developed, sometimes brief and concise, but conversely sometimes very detailed and extensive. An immediate and comprehensive response to a possible questionnaire, asking ultimately, what organised crime is, appears initially to be relatively simple, but becomes more difficult and complex on closer inspection. The term organised crime is very comprehensive and complex and difficult to grasp in a uniform definition. This is, *inter alia*, in the sense that the Member States have not been able to reach an agreement on an EU-wide or globally unified definition of this concept and is used accordingly. The reasons for the different developments are that organised crime structures have developed over long periods of time in different political and legal systems with special regional and cultural influences[25]. This, at the same time, is an explanation for why the individual countries have different characteristics in the descriptions of organised crime compared to the definitions of international organisations. A first attempt by experts to put organised forms of criminality into words dates back to 1968 in Germany. In the journal "Criminalistics", a specialised magazine for criminal science and practice, a German detective superintendent asked the question: "*Nip things in the bud - but how?*".[26] On the basis of his statements related to the example of combating French criminals who were active at this time in Germany, it was noted that there would be no organised criminality in its literal meaning in Germany.

In 1973, a study was published commissioned by the Council of Europe to analyse the relevant aspects of organised crime and the possibility of professional crimes in Europe at that time[27]. This work focused mainly on the specific situation in Germany and the Netherlands. A main conclusion was that there were great differences between the conventional levels of understanding with regard to organised crime (compared to the Sicilian-Italian *Mafia* and the American *Cosa Nostra*) both in qualitative and quantitative terms. It was described for the first time as the notion of a general European 'criminal industry' with simultaneous negation of organised crime[28]. This new term was used to describe a criminality form that was largely commercial and widely used, and it also pointed out that this 'criminal industry' had reached new dimensions and the actors

[23] M. SOINÉ, *op.cit.*, examples are the Sicilian *Mafia*, the Neapolitan *Camorra*, the *Ndrangheta*, the American *Cosa Nostra*, the Chinese triads such as *Kung Lock, Wo Hop To, Sun Yee On, 14K,* p. 9.
[24] T. JÄGER, Thomas (2013): *Transnationale Organisierte Kriminalität*, 2013, http://www.bpb.de/apuz/168912/transnationale-organisierte-kriminalitaet?p=all
[25] *Ibid*.
[26] A. LUCZAK, *Organisierte Kriminalität im internationalen Kontext: Konzeption und Verfahren in England, den Niederlanden und Deutschland*, 2004, p. 188.
[27] H.J. KERNER, *Professionelles und organisiertes Verbrechen. Versuch einer Bestandsaufnahme und Bericht über neuere Entwicklungstendenzen in der Bundesrepublik Deutschland und in den Niederlanden*, 1973.
[28] A. LUCZAK, *op.cit.*, p. 188.

involved had developed new work practices. In the following years, these discussions were pushed forward mainly by officials from the Federal Criminal Police Office and the association of German Criminal Officers. One of the first results of this discussion process, a special documentation on the 'development of modern strategies to combat organised crime' was published in 1975[29]. From this period onwards, it became clear that these organised forms of crime constituted an urgent threat to the internal security of the Federal Republic of Germany if appropriate countermeasures were not immediately taken. In the following years, both the intensity of the discussions held and the number of new discussants increased. In 1988, a first attempt at an empirical investigation carried out by the detectives *Rebscher* and *Vahlenkamp*, produced an up-to-date picture of the current situation with recognisable trends of development in the area of organised crime in Germany[30]. On the basis of their investigations and skilful interviews, the two experts came to the conclusion that the phenomenon of 'organised crime' in the USA could scarcely be compared with organised crime in Germany. Two basic structural forms were presented as a major result of this work:

- networks of offenders and/or groups of criminals with the aim of establishing purpose-based alliances, and
- independent groups of offenders.

In the 1990s, further empirical studies followed, of which the results were mainly based on the interviews of experts, and progressively a consensus was built that the state and society as a whole are at risk. In these discourses, the aspects of TOC and a Europe with permeable borders were then successively linked. A process of consciousness development began, that the existing border controls and their mechanisms were classified as inadequate, but on the other hand would offer a considerable potential for security-related issues. This was, so to speak, the starting point that stationary and mobile border controls were recognised as strategically important elements in combating cross-border crime. Almost automatically, the key words such as *Mafia*, drug trafficking, protection racket, weapon smuggling, trafficking in human beings and prostitution, but also rocker gangs and bet syndicates are associated with TOC. These are, however, only sub-areas of TOC and their various appearances and they do not explain the fundamental individual characteristics therein. This impression is strengthened by a broad social acceptance of the terms, such as *'Russian Mafia'* or *'drug Mafia'*.

This makes it difficult for the impartial viewer to identify a clearly defined and recognisable phenomenon of this type of crime. Thus, the term 'organised crime' has to be described only in its characteristic elements and components, in order to prevent the risk of misinterpretation.

In three basic statements, von Lampe describes the nature of organised crime as follows:

1. Organised crime, such as the official German definition, is essentially the planned commission of criminal offences.

2. According to a different view, criminal acts are not primarily organised, just the people committing them.

3. According to a third view, the central moment of organised crime is the exertion of power, either by criminals alone or in an alliance of criminals and social elites[31].

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[29] H.P. JANSEN, *Zentrale Ermittlungsdienststellen als organisatorische Voraussetzung für die wirksame Bekämpfung krimineller Gruppen*, in BUND DEUTSCHER KRIMINALBEAMTER (eds.), *Entwicklung neuzeitlicher Strategien zur Bekämpfung des organisierten Verbrechens*, 1975, pp.71-83.

[30] A. LUCZAK, *op.cit.*, p. 190.

[31] K. VON LAMPE, (2013): *Was ist organisierte Kriminalität?*, in *Aus Politik und Zeitgeschichte*, *63.*

According to the first point and the general and specific features of the German definition of the conceptuality of organised crime, the criminal area of gang crime also shows similar, or even the same, facts and characteristic features[32]. These include, *inter alia*, the description of a group of offenders, the proceedings of division of labour and planning. However, regarding organised crime the element of co-operation has no time boundaries, whereas in the case of gang crime, it is aligned to a specific period of time and thus limited. It is irrelevant if the period for the commission of criminal offences is not clearly defined.

The term 'gang' presupposes the amalgamation of at least three persons, who have joined with the intention of committing in the future and for an uncertain duration an unspecified number of serious crimes of the type of offence referred to in the criminal code. A particular 'strong individual commitment to the gang' or 'taking actions in an overarching interest' is not necessary[33].

Regarding Lampe's second point, criminals are organised in a group to commit crimes. Thus, the term organised crime is intended to explain the form that criminal organisations take, in that they are groups with defined and recognisable structures. The Federal Bureau of Investigation (FBI) defines organised crime as "[…] *any group having some manner of a formalised structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole*"[34].

In his third point, *Lampe* describes power as the central element of organised crime. The exertion of power is ensured here on the one hand by threat of force or by the effective exercise of violence by individual criminals, or also by mutual interaction between individuals of social elites. In the first case *Lampe* speaks of illegal governance, respectively extra-legal governance[35]. It is about special manifestations in social classes, which cannot be regulated by state authorities in their competence to apply the monopoly of power, because the appropriate capacities for combating these criminal structures are not sufficient. This is highlighted by the fight against the drug cartels in Mexico, thre production of opium and heroin in Afghanistan, or irregular migration from North Africa, mainly organised in the northern part of Libya. Another option would be that a state has little interest in regulating the legal grievances, whether for traditional reasons such as parts of society deliberately isolating themselves and rejecting the rule of law, or for reasons of considerations in terms of investments and returns (cost matrix)[36].

> In other constellations, TOC structures are finding an ideal breeding ground or shelter because the respective national legislation is not in alignment with the EU's neighbouring countries. For example, TOC groups use Switzerland as an international hub for cigarette smuggling to the detriment of EU member states. As a *modus operandi*, cigarettes under customs control are illegally removed from the transit procedure and subsequently smuggled into the EU member states declared as empty packaging. In 2013, the EC noted in its reports that the illegal tobacco trade is classified as a global threat and the EU is losing more than 10 billion euros

Jahrgang, v. 38-39/2013, p. 3.

[32] Article 129 of the Criminal Code (*StGB*) - Formation of criminal associations. Section 7 - Offences against public order, http://dejure.org/gesetze/StGB/129.html

[33] Bundesgerichtshof, BGH GSSt 1/00, Beschluss v. 22.03.2001, HRRS-Datenbank, Rn. X. Federal Supreme Court, BGH GSSt 1/00, Decision of 22nd March 2001, HRRS-Data Base, Rn. X.

[34] Federal Bureau of Investigation, *Definition "organised crime"*, 2016.

[35] K. VON LAMPE, *op. cit.*

[36] R. ISAK, Redi, *Der Kanun in Albanien – Gewohnheitsrecht im modernen Staat?* Diploma thesis submitted at the University of Vienna, 2011, p. 37-39, https://core.ac.ux\k/download/pdf/11594738.pdf

annually due to non-paid taxes and duties[37]. As a consequence, the illegal cigarette trade is associated exclusively with organised crime groups. Despite the generation of billions of Euros of criminal profits, Switzerland plays down the role of international cigarette smuggling[38]. For example, the EU and Switzerland have been discussing for years the enforcement of relevant EU member states' judicial assistance agreements and the conduct of requested extraditions of criminals living in Switzerland, which are attributed to TOC in the field of international cigarette smuggling.

4. Classic areas of TOC

The German definition in line with the joint guidelines of the Ministers of Justice and Home Affairs of the states on the cooperation in the prosecution of TOC (1990) is:

Organised crime is the planned commissioning of criminal offences through striving for profit and power, which are individually or in their entirety of considerable importance, if more than two parties work on a longer or indefinite duration:

a) using commercial or business-like structures,

b) by use of force or other means of intimidation, or

c) influencing policy, the media, public administration, the judiciary or the economy[39].

In the first part the definition describes the general characteristics and in the second part (a-c) the special characteristics of TOC. Thus, the investigative proceedings in the field of TOC are based on specific perpetrator characteristics and are not offence oriented. Furthermore, the definition does not include offences attributable to terrorism.

For differentiation: gang crime *versus* organised crime according to the German Criminal Code, Section 129 – Forming Criminal Organisations:

(1) Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits' members or supporters for it or supports it, shall be liable to imprisonment not exceeding five years or a fine. […][40].

TOC uses almost every criminal field offered to them that promises high profit margins, which are listed as criminal offences in the German Code of Criminal Procedure

[37] COM(2013) 324 final, *Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products - A comprehensive EU Strategy*, 2013, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0324

[38] R. MEINRADO, Inquiry to the Swiss National Council regarding international cigarette smuggling in connection with OC. Rationale, "It is true, on the other hand, that the smuggling of cigarettes in Switzerland does not meet any conditions for legal aid in criminal matters. This is, however, always granted if the foreign procedure concerns a treaty, which would be qualified as a tax fraud in fiscal matters in Switzerland (art. 3 (3), second sentence, of the Federal Law on International Acts in Criminal Matters, IRSG, SR 351.1). Art. 24 (1) of the Regulation on international legal assistance in criminal matters (IRSV, SR 351.11) defines the tax fraud as the tax fraud as defined in art. 14 (2) of the Federal Law on Administrative Criminal Law (VStrR, SR 313.0). The fraudulent withdrawal of duties using falsified or false documents fulfils the facts of the tax fraud, for which legal assistance may be granted. In the case of large cigarette smuggling attributable to organised crime, the Customs Administration has always been able to provide legal assistance", https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20003441

[39] Justiz Online, *Gemeinsame Richtlinien der Justizminister/–senatoren und der Innenminister/–senatoren der Länder über die Zusammenarbeit bei der Verfolgung der Organisierten Kriminalität*, 2016, http://www.jvv.nrw.de/anzeigeText.jsp?daten=510&daten2=Vor

[40] German Criminal Code art. 129– Forming Criminal Organisations. Section 7 - Offences against public policy, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1204

(herein later referred to as *StPO*) in section 100a[41].

5. Relevant Offence Fields and Legal Foundations

The portfolio of serious offences, which can be attributed to organised crime, is classified into areas of crime and refer to section 100a *StPO*, which are listed in alphabetical order.

The following legal bases are relevant for the following areas of crime:

- Asylum Procedures Act - smuggling of human beings;
- Commodities control act - environmental crime;
- Criminal code – *inter alia*, crimes against property, violent crimes;
- Foreign trade legislation - smuggling related to economic sanctions;
- General fiscal law – avoidance of taxation and customs offences;
- International Criminal Code;
- Medicines law – crime of counterfeiting;
- Military weapons control act – illicit trafficking of military weapons;
- Narcotics law – illicit trafficking of drugs and drug smuggling;
- Residence Act - trafficking in human beings and people smuggling;
- Weapons law - illicit trafficking of small arms and light weapons (SALW), arms smuggling.

6. Ethnic Organised Crime Groups and Their Offence Fields

The Federal Criminal Police Office assesses the capacities of TOC groups based on the number and weighting factors of relevant indicators from the list of 'general indicators for the detection of organised crime relevant issues'[42]. The Federal Criminal Police Office conducts evaluations of the actual phases after preparation and planning of the respective crimes. Both the duration of the investigation and the use of the resources used play a decisive role in determining the indicators. The Federal Criminal Police Office clearly points out that a low potential of a TOC group does not necessarily indicate a small degree of organisation and professionalism.

The crimes to be prosecuted under German jurisdiction in section 100a *StPO* are often committed by certain ethnic groups by tradition and not infrequently because of a division of the classical areas with other TOC groups. According to the Federal Criminal Police Office, the nationality of the persons responsible for the assignment, who have the leadership function in the TOC groups, is decisive[43]. These leaders need not necessarily represent the ethnic majority within a group. According to the 2014 Federal Criminal Police Office national situation report, the following ethnic organised crime groups are mainly concerned with the following areas of crime and are given here as exemplary and

[41] German Code of Criminal Procedure (StPO), as amended by the notice of 7 April 1987 (Law Gazette I, 1074, 1319), which was last amended by art. 2 (3) of the Law of 21 January 2015 (Federal Law Gazette I, p.10) has been amended. The translation includes the amendment(s) to the Act by art. 3 of the Act of 23rd April 2014 (Federal Law Gazette Part I p. 410), https://www.gesetze-im-internet.de/englisch_stpo

[42] Bundeskriminalamt-BKA German Federal Criminal Office, *Organised crime. National Situation Report 2014*, 2015, p.11-17 https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/OrganisierteKriminalitaet/organisierteKriminalitaetBundeslagebild2014.html

[43] *Ibid*.

not exhaustive[44]:

- German-dominated organised crime groups
  Illicit trafficking of narcotics and drug smuggling, criminality in connection with economy, avoidance of taxation and customs offences, property criminality, money laundering, violent criminality, environmental criminality, counterfeit criminality, pimping, people smuggling, corruption, arms trafficking and smuggling, cybercrime
- Turkish-dominated organised crime groups
  Illicit trafficking of narcotics and drug smuggling, violent criminality, criminality in connection with economy, pimping, THB and people smuggling, avoidance of taxation and customs offences, property criminality, cybercrime, counterfeit criminality
- Polish-dominated organised crime groups
  Property criminality, avoidance of taxation and customs offences, illicit trafficking of narcotics and drug smuggling, counterfeiting
- Italian dominated organised crime groups
  Illicit trafficking of narcotics and drug smuggling, money laundering, avoidance of taxation and customs offences, counterfeit criminality, arms trafficking and smuggling, criminality of property, criminality in connection with economy
- Serbian dominated organised crime groups
  Property criminality, criminality in connection with economy, illicit trafficking of narcotics and drug smuggling, THB and people smuggling, violent criminality

The respective different forms of organised crime are multifaceted and diverse. Their ideas are clearly structured and hierarchically organised and strengthened by ethnic and cultural solidarity, language and dialectics, habits and customs, as well as social and family ties. In addition, there are interrelationships between criminals of different intellectual ability, whose work-sharing interactions are determined by the implementation of the respective criminal interests. Such phenomena have recently been observed in the areas of THB and people smuggling by operating crime gangs in Libya to the EU member states and Syria to Turkey, respectively Cyprus and Greece, organised by purely purposive interests.

7. Conclusions

TOC comprises a huge potential of threats to national law enforcement services and other security agencies involved in border security and management, both of EU member states and non-EU countries with regard to their defined needs in terms of national security and public order. According to the glossary of the Federal Agency for Civic Education, TOC has been used since the 1980s as an internationally accepted term for complex and rational forms of crime that operate across national boundaries[45]. This excludes all relevant offences, which are related to terrorism and the phenomenon of foreign terrorist fighters. The most important areas of TOC are all serious offences with regard to section 100a *StPO*, or their corresponding relevant offences.

[44] BKA, *Organisierte Kriminalität*. *National overview of the situation in 2014*, 2015, pp. 13-17. The frequency of the number of cases recorded in the *PKS* is determined by the frequency of the respective offence fields.
[45] BPB, *Glossary – Organised (transnational) Crime*, http://www.bpb.de/politik/grundfragen/deutsche-verhaeltnisse-eine-sozialkunde/138404/glossar?p=129.

In December 2006, during the 14th OSCE Ministerial Council meeting in Brussels, extensive measures were taken in the fight against TOC[46]. At the beginning of 2006, however, it was recognised that the defined activities were unlikely to be achieved when appointed officials from OSCE participating States started to discuss the complexity of TOC[47]. Despite intense expert discussions carried out during the course of meetings, initially the assigned 'experts' faced enormous difficulties in finding a level of common understanding for the description of organised crime. The reason was simple: the 'experts' followed the respective national definitions, sometimes paired with a basic understanding of the definitions of Interpol and Europol. Since there was no common international definition available, this led to the misunderstandings of the participating organised crime experts and fundamental misunderstandings.

The comparison of descriptions for organised crime illustrates that a simple and absolutely certain implementation of the definitions for organised crime is complicated and difficult to manage. Both the content and the scope of the definitions of the respective EU member states and international organisations are very different. While the UN expresses itself with a one-sentence definition, other EU member state institutions or international organisations need almost a full page. On the one hand, in the analysis of the respective definitions, it turned out that the multiple use of the conjunction *'or'* promotes the inclusion of many different forms of criminal offences, instead of facilitating a clear and simple understanding of what organised crime is. On the other hand, the linking of the individual qualification characteristics with the conjunction *'and'* is also not uncomplicated, since it invariably raises the question of how many of these criminal offences must at least be listed in order to affirm organised crime as defined. Von Lampe is questioning the degree to which criminal offences can be organised rather than how organised the actual criminal offenders are in order to cover a specific portfolio of scene-type crimes[48]. A description of organised crime should then usually refer to a criminal organisation, that is to say a group with formal structures, as in the definition of the FBI. A distinction between forms of organised crime and non-organised crime is therefore likely to be drawn between complex associations of criminals on the one hand and individually acting perpetrators on the other.

A further aspect of the description of TOC is to include the increasing co-operation of organised crime groups at an international level, which can take place either in accordance with long-term agreements or through specific project-related agreements. This can result either in an occasional collaboration as well as in a longer cooperation between organised crime groups based on labour division agreements, involving different nationalities, ethnic groupings and different languages. *Behrens* and *Brombacher*[49] assess TOC as one of the biggest threats to security in the 21st century and map out two dominant types for a better understanding of organised crime that relate to structural or procedural aspects of organised crime as a quest for profit. In this way, they strengthen the thesis of *Von Lampes* that organised crime as a structure refers to the organised commissioning of criminal offences and not to the organisational forms of the members of the respective organised crime groupings.

Without any doubt, the implementation of the European Arrest Warrant (EAW) can

[46] OSCE Decision No. 5/06 Organised Crime. MC.DEC/5/06 OSCE (2006).
[47] From 2005 to 2009, the author was the Senior Border Adviser in the OSCE Secretariat and was present in all relevant meetings as the leading OSCE expert.
[48] K. VON LAMPE, *op. cit.*, p. 3.
[49] T. BEHRENS, D. BROMBACHER, *Transnationale Organisierte Kriminalität*, in T. JÄGER (ed.), *Handbuch Sicherheitsgefahren*, 2015 pp. 135-145.

be assessed as a major achievement in the fight against TOC[50]. As a result of the framework decision from 2002, this option increases the effectiveness of international police cooperation in the implementation of criminal proceedings and has been established as an EU-wide instrument for the enforcement of national arrest warrants in EU member states. The EAW implies faster and simpler surrender procedures and an end to political involvement and EU countries can no longer refuse to surrender, to another EU member state, their own citizens who have committed a serious crime or are suspected of having committed such a crime in another EU member state, on the grounds that they are nationals. A high level of mutual trust and cooperation between EU member states made simplifying and improving the surrendering procedure possible.

The purpose of the EAW, specifically in the area of TOC expanded possibilities, is to apprehend the 'back-men' and elute them from their organised crime structures and national protection area and bring them to justice. The country requested for extradition may in principle not check the legality of the arrest warrant. The main problem was the extradition of one's own nationals to another state for the purpose of criminal prosecution and/or execution of sentences.

The EU member states and their neighbouring countries are increasingly exposed to a large number of very serious threats in which TOC groups are engaged, *inter alia*, in trafficking in human beings and people smuggling, illicit trafficking of small arms and light weapons and drugs, child pornography, money laundering and tax evasion, just to mention a few of the most important areas. Additional threats have arisen through terrorism and its radicalised foreign terrorist fighters, as well as violent extremism.

Europol has a particular role to play in coordinating the work of the national police services of all EU member states in the areas of TOC and other specific transnational threats and ensuring an all-encompassing information exchange. Europol is the leading EU police agency in the fight against TOC defined as a transnational threat. Frontex, on the other hand, needs to be strengthened in its competences in order to work more effectively against TOC groups in the areas of irregular migration, trafficking in human beings and people smuggling, and thus other closely related offences, such as the production and distribution of false documents and here in particular counterfeit travel and identity documents.

[50] The European Arrest Warrant (EAW) is applied throughout the EU since 1st January 2004. It replaced lengthy extradition procedures within the EU's territorial jurisdiction. It improves and simplifies judicial procedures designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence or spell in detention, http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm.

ORGANISED CRIMINALITY

by Jelena Đurišić[*]

SUMMARY: 1. Issues of the Definition of Organised Criminality and the Criminal Justice Reaction.

1. Issues of Definition of Organised Criminality and Criminal Justice Reaction

Certain serious forms of criminality, such as organised criminality, present a challenge to many modern democratic societies to such an extent that in relation to them and their prevention and suppression, the entire criminal justice systems of many countries, and society as a whole, have been put to the test. First of all, it is about establishing a balance between the protection of society from criminality on the one hand, and the protection and provision of basic, universally accepted human rights and freedoms on the other[1].

Organised criminality is a phenomenon that, apart from the field of law, has various implications in numerous other fields, has an extremely negative effect on the entire society and practically leaves no one indifferent[2]. In this sense, for a successful fight against such a serious form of criminality, the cooperation and timely action of competent institutions, both nationally and internationally, must be synchronised and constantly improved.

When analyzing serious forms of criminality, it is always important to start from a rational and scientific approach that requires a deeper knowledge of them, a realistic assessment of their severity and the dangers they pose both for individuals and for society as a whole, but also the possibilities and limits of criminal law in combating them, especially taking care that it does not become a threat to certain rights and freedoms of citizens. In this sense, it is indisputable that the danger and harmfulness of organised criminality are extremely high, but it is very important to realistically assess the possibilities and scope of the criminal law response in relation to such a serious form of criminality, that is, they should not be underestimated, but neither should they be overestimated[3].

The successful definition and determination of the main characteristics of organised criminality is multifold important for its successful prevention, both from the aspect of adopting quality strategies and from the aspect of the operational activities of competent authorities, especially when it comes to a quality normative framework that is relevant to this issue[4].

With certain specific legal solutions that would not call into question the basic principles of criminal law, nor threaten basic human rights and freedoms, criminal law is

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[1] I. BODROŽIĆ, *Review of the book "Criminal Law Suppression of Organised Crime, Terrorism and Corruption" by Z. Stojanović and D. Kolarić*, in *Safety*, v. 1/2015, 2015, p. 231.

[2] M. ŠKULIĆ, *Organised Criminality – Term, Manifestations, Criminal Offense and Criminal Procedure*, Belgrade, 2015, p. 19.

[3] Z. STOJANOVIĆ, D. KOLARIĆ, *Criminal Law Suppression of Organised Crime, Terrorism and Corruption*, Belgrade, 2020, p. 13.

[4] A. STEVANOVIĆ; *Organised Criminality – Key Elements of the Term: Legal and Criminological Determinants*; Annual of the Faculty of Security, Belgrade, 2018, p. 283.

certainly capable of suppressing these forms of criminality to the extent that criminal law can otherwise contribute to suppressing criminality in general. In this sense, it is extremely important to emphasise that for a successful fight against organised criminality, it is necessary to continuously provide favorable conditions for the wider application of the existing criminal law and to arrive at an adequate model of its use in order to suppress organised criminality as successfully as possible[5].

Also, it is important to point out that the term organised criminality was recognised in professional literature as one of the "*most controversial terms*"[6]. Such an attitude was most often influenced by its different criminological and legal definitions, sometimes by wrong interpretations, and the fact that the term "organised criminality" itself was not initially created as a product of scientific consideration, but received its content previously in media representations, certainly had a special significance in this context[7]. In this sense, and as it is often pointed out in the literature, it was precisely the lack of clear and generally accepted criteria that would successfully define the term itself that led to sharp academic disagreements, which later had their repercussions on the normative level as well[8].

In addition to the fact that organised criminality can manifest itself in different ways in every society, it is well known that it represents a dynamic category with a constant tendency to change and complicate its manifestations, which further complicates its adequate definition[9]. In the context of the above, it is also important to point out that the term organised criminality itself is a criminological and not a criminal law term that represents a special combination of several punishable behaviors that, under certain conditions, grow into a specific type of crime with a high degree of danger to society, which is why its direct statistical monitoring is impossible[10]. It is a phenomenon that has numerous characteristics that criminologists arrive at on the basis of a certain generalization of certain characteristics that occur in some criminal organizations around the world, where the shaping of these characteristics depends on the authors themselves or researchers[11].

As is well known in the theory and science of criminal law, it is very difficult to come up with a unique criminal law definition of organised crime, especially for the reason that its concept can be understood and even defined too broadly and vaguely. As stated in theory and science, the problem of the impreciseness of the concept of organised criminality could be alleviated to some extent by accepting the division into organised criminality in a narrower and broader sense[12].

As can be concluded, the importance of properly defining this phenomenon is only an initial step in the field of its better familiarization, especially its phenomenological

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[5] Z. STOJANOVIĆ, D. KOLARIĆ, *op. cit.*, p. 14.

[6] Đ. IGNJATOVIĆ, *Organised crime in the 21st century – controversies and dilemmas*, in J. ĆIRIĆ (ed.), *Suzbijanje organizovanog kriminaliteta kao preduslov vladavine prava*, 2016, p. 40 stated according to: A. STEVANOVIĆ, *op. cit*., p. 284.

[7] *Ibid.*

[8] P. GOUNEV, T. BEZLOV, *Examining the links between organised crime and corruption*, 2010, p. 23. stated according to: A. STEVANOVIĆ, *op. cit.*, p. 284.

[9] S. MIJALKOVIĆ, M. BAJAGIĆ, *Contemporary armed conflicts – definition, eitiology and phenomenology*, in *Kultura Polisia*, v. 9, 2, 2012, p. 23. stated according to: A. STEVANOVIĆ, *op. cit.*, p. 284.

[10] Đ. IGNJATOVIĆ, M. ŠKULIĆ, *Organised Criminality*, Belgrade, 2012, p. 17.

[11] Z. STOJANOVIĆ, D. KOLARIĆ, *op. cit*, p. 109. In this sense, the US doyen of criminology, Howard Abadinsky, gave the most comprehensive definition of organised criminality.

[12] See more in Z. STOJANOVIĆ, *Organised crime and issues of protection and realization of human rights*, in *Human rights and contemporary trends in criminal policy*, 1989, pp. 122-125, where this division is encountered for the first time in our literature; stated according to: Z. STOJANOVIĆ, D. KOLARIĆ, *Criminal law suppression of organised crime, terrorism and corruption*, 2020, p. 14.

characteristics, but at the same time the most significant step in terms of its successful recognition and suppression[13]. Also, it is necessary to continuously analyze all the possibilities of the existing legal mechanisms that must be used in order to suppress this phenomenon, to improve and modernise them. Certainly, it is quite clear that criminal law and punishment are necessary and irreplaceable in the fight against organised criminality, while also keeping in mind the important principle that criminal law represents the last resort in the line of defense of society against criminality, and accordingly it is important to point out that for the successful fight against organised criminality and its suppression, preventive action through the application of a series of measures and standards from other areas and branches of law, as well as the establishment of adequate solutions that are outside the scope of criminal law, is of exceptional importance.

In the end, it is important to point out that for the successful suppression of organised criminality, it is necessary to constantly monitor its phenomenological dimensions, which especially apply to its actors and new emerging forms in society, given that, unlike any other type of criminality, it has a pronounced ability to adapt to various newly emerging social - political and technological circumstances[14]. In this sense, for a successful fight against such a serious form of criminality, such as organised criminality, the cooperation and timely action of competent institutions, both on the national and international level, must be synchronised and constantly improved.

[13] M. ŠKULIĆ, *Organised criminality, concept and aspects of criminal* procedure, 2003, p. 23.
[14] A. STEVANOVIĆ, *op. cit.*, p.283.

JUDICIAL AND POLICE COOPERATION IN FIGHTING TRANSNATIONAL AND ORGANISED CRIME

MONTENEGRO AND THE EUROJUST

by Jelena Đaletić[*]

SUMMARY: 1. EUROJUST as a Bypass for National and International Gaps in Mutual Legal Assistance: Montenegrin View.

1. EUROJUST as a Bypass for National and International Gaps in Mutual Legal Assistance: A Montenegrin View.

Global events, in the form of various conflicts, unfortunately often lead to an increase in crime. The formation of organised criminal groups is motivated by the creation of power circles, which in turn are created by money. Large sums of money are obtained through the most serious criminal offenses. Close cooperation between law enforcement agencies provides an adequate and strong response to these criminal structures in the form of confiscation of all income and property acquired through crime, which reduces their power. When the power disappears, the purpose of the existence of criminal organizations vanishes.

We strive for joint success in the fight against crime. State prosecutors of different countries must have legal bases on which they base their international cooperation in this fight against crime. However, perpetrators of criminal offenses do not need formal conditions for cooperation; they organise and collaborate worldwide.

The unpredictable and planetary operation of criminal organizations has shown us that state prosecutors must strengthen their mechanisms of direct cooperation. Since Montenegro is not a member of the European Union, the traditional system of international legal assistance in criminal matters is applied. International legal assistance is provided on the basis of multilateral (Conventions of the Council of Europe and the United Nations) and bilateral agreements, and if there is no international treaty, domestic legislation is applied. Bilateral agreements, especially with countries in the region, provide the possibility of effective cooperation, as a large number of international legal assistance cases formed in Montenegro involve individuals residing in the countries of the region.

The Law on International Legal Assistance in Criminal Matters of Montenegro regulates the conditions and procedure for providing international legal assistance in criminal matters, and this law actually elaborates the norms contained in ratified conventions.

To provide international legal assistance, it is necessary to send a request, whereby the domestic judicial authority addresses the competent judicial authority of a foreign state, in order to collect certain information, data, and evidence necessary for effective proceedings in national criminal cases. The central communication organ for international legal assistance cases is the Ministry of Justice of Montenegro. However, among other things, with the Second Additional Protocol to the European Convention on Mutual

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Assistance in Criminal Matters from 1959, it is also possible to send and receive requests directly, i.e., competent judicial authorities can communicate directly.

In the case of direct cooperation, certain challenges may arise in terms of "identifying" the competent authority to whom the request should be sent, the form of the request, the content of the request in terms of its effective execution by the competent authority of the requested state, etc.

The possibility of overcoming these challenges in practice is enabled through cooperation with Eurojust – the European Agency for Judicial Cooperation in Criminal Justice. Through this agency, Montenegrin prosecutors have the opportunity to cooperate with prosecutors from EU member states, as well as with colleagues from third countries that have concluded cooperation agreements with Eurojust. The network of contact points for cooperation with Eurojust is spread across all continents.

The State Prosecutor's Office of Montenegro achieves significant and successful cooperation with Eurojust. The cooperation was established based on the Law on Ratification of the Cooperation Agreement between Montenegro and Eurojust. Since December 2017, Montenegro has had its office at Eurojust. Since this date, the state liaison prosecutor for Eurojust has been performing work tasks, precisely in this office.

The multiple important aspects of cooperation through Eurojust are recognised in various forms. Through Eurojust, support is provided to Montenegrin prosecutors in dealing with cases with a foreign element. From receiving advice on how to initiate the process of international legal assistance, to the possibility of direct communication with colleagues from the states to which it is intended to send a request, and discussion of certain segments of this international request process through participation in coordination meetings and participation in joint investigative teams with colleagues from the EU member states' prosecutors' offices, these are just some of the advantages and benefits that cooperation through Eurojust provides.

Aware of the fact that the success of the fight against international crime depends on the intensive cooperation of prosecutors at the regional, European, and global level, we must strengthen mutual trust, which is the basis of successful prosecutorial cooperation, which shows that crime, no matter how complex its forms, cannot be more organised and stronger than united prosecutors.

INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS IN MONTENEGRO

by Ognjen Mitrović[*]

SUMMARY: 1. Navigating the Present and Predicting the Future in the International Judicial Cooperation System in Montenegro.

1. Navigating the Present and Predicting the Future in the International Judicial Cooperation System in Montenegro.

The area of international judicial cooperation in criminal matters, i.e., criminal justice cooperation with an element of foreignness in Montenegro, can be viewed from the perspective of current application and through the prism of European integration. The present state refers to the traditional procedure of mutual legal assistance (MLA), while through the process of European integration, our country is in the lobby of the procedure, which in the European Union is called judicial cooperation in criminal matters.

The two terms mentioned jointly form the field of international judicial cooperation in criminal matters in a broader sense. Although they are closely related, there is a clear difference between them. The first is based on the conventions and standards of the Council of Europe (CoE) and the United Nations (UN), which are already applied in Montenegro and are recognised in national legislation through the Law on Mutual Legal Assistance in Criminal Matters and the Law on Confiscation of Property Derived from Criminal Activity, i.e., through chapter VIII of the latter which refers to international cooperation. Both of these laws refer to the corresponding application of the Criminal Procedure Code. It is also very important to mention Article 9 of the Constitution of Montenegro, which stipulates that confirmed and published international agreements and generally accepted rules of international law are an integral part of the internal legal order, and what is even more important - they have primacy over domestic legislation and are directly applied when regulating relations different from the internal legislation. With this, the Constitution, as the highest legal act in the country, extends the normative framework for MLA to numerous bilateral and multilateral agreements that are applied in Montenegro. Moreover, it places them above national laws. Montenegro has acceded to all the key conventions of the CoE and the UN, but it also achieves cooperation in this area on a bilateral basis, mainly with neighbouring countries.

On the other hand, the area of judicial cooperation in criminal matters represents the perspective of Montenegro in the context of application, but also indicates the current state in terms of the transposition of EU instruments into the national legal system and preparation for their implementation. Namely, through the process of European integration, Montenegro is gradually transferring the legal acquis of the EU into its legislation. Significant steps in this regard have already been taken with the adoption of the Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union, as well as through the training program implemented in 2019 and 2020. This law introduced into the domestic legal system instruments such as the European

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arrest warrant, the European investigation order, the Decision on financial penalties, the European protection order, etc. It is important to note that these mechanisms are based on the principle of mutual recognition of the decisions of EU member states and as such differ from those currently applied in our country, as well as that the mentioned law will be applied from the day of Montenegro's accession to the European Union.

When it comes to the institutional framework, it consists of Courts and Prosecution Offices, then the Ministry of Justice, INTERPOL and the Ministry of Foreign Affairs. Courts and Prosecution Offices achieve international cooperation through receiving and sending requests (rogatory letters) for MLA, and at the same time they are preparing for a new, more demanding role within the process of judicial cooperation in the EU. The Ministry of Justice, in addition to the competence for drafting laws in this area and the process of European integration, also has the role of a central authority, i.e. mediator between domestic and foreign judicial authorities in the procedure of the MLA. By using INTERPOL as a channel of communication that was introduced for the sake of a more efficient procedure of the MLA and recognised as such in the law, there is a synthesis of judicial and police cooperation, i.e. using channels of international police cooperation in order to achieve judicial cooperation with an element of foreignness. The Ministry of Foreign Affairs also enters the institutional framework, through the work of the sector dealing with international legal affairs. This is of particular importance in cases where there is no bilateral or multilateral basis for cooperation, but it takes place on the basis of reciprocity. This state of affairs requires diplomatic communication, which is carried out precisely through the aforementioned sector of the Ministry of Foreign Affairs. In addition, some countries such as Germany and France insist on diplomatic communication in extradition cases.

This closes the circle of institutions that formally participate in the MLA process, but opens a special chapter of international judicial cooperation, namely networks and bodies for informal communication and cooperation. There are numerous organizations that facilitate and speed up the sometimes slow and cumbersome MLA. One of them is the European Union Agency for Criminal Justice Cooperation - EUROJUST. Before Montenegro signed the agreement with this EU agency, cooperation on a bilateral basis took place through contact points, and since 2017 and the entry into force of the aforementioned agreement, Montenegro, in addition to contact points, also has a liaison prosecutor for EUROJUST and a national correspondent for terrorism issues. This mechanism represents a very important and effective means of judicial cooperation, especially in important and urgent cases. The importance of such cooperation is emphasised by the European Commission in almost all of its reports on Montenegro within the sub-area of Judicial Cooperation in Civil and Criminal Matters of Negotiating Chapter 24 – Justice, Freedom and Security.

Speaking further about networks, it is worth mentioning the European Judicial Network in Criminal Matters (EJN). It is a network that functions under the auspices of EUROJUST and is predominantly composed of representatives of EU member states, in which Montenegro has observer status. It is also a very important instrument of judicial cooperation, and it is particularly suitable for dealing with urgent cases, as shown by numerous examples from practice. Through the participation of their two contact points in the plenary and regular meetings of this network, Montenegrin practitioners are simultaneously familiar with the specifics of the application of instruments of judicial cooperation in EU countries.

A somewhat younger, but no less important body is the GlobE network, which recently operates with the support of the United Nations Office on Drugs and Crime (UNODC). GlobE has been in existence for a little more than two years, and the plan is

to form a sub-component of this network with the aim of providing support to the Western Balkans region in the fight against organised crime and corruption. The formation of this regional component of the GlobE network would have exceptional value and serve as an example for other regions around the world.

In conclusion, it is clear that mutual legal assistance and judicial cooperation in criminal matters in Montenegro are interconnected aspects of a unique process. Proper development is essential for both. Despite Montenegro's future EU membership, the procedure of mutual legal assistance, aligned with CoE and UN conventions and standards, will persist, requiring dedicated attention. Simultaneously, in line with our country's pronounced foreign policy priority, it is imperative to meticulously equip and shape personnel for the implementation of EU instruments based on the principle of mutual recognition.

FREE MOVEMENT OF CRIME

by Nikola B. Šaranović[*]

SUMMARY: 1. A Brief Critique of Judicial Cooperation in the Western Balkans.

1. A Brief Critique of Judicial Cooperation in the Western Balkans.

Free movement of people, goods, services, and capital. These four fundamental freedoms, on which the European Union's single market is based, are not unlimited. They are regulated by norms, which make the single market a space of justice, freedom, and security.

Unlike the prescriptive concept of the EU's four freedoms, the title "Free Movement of Crime" is descriptive. It serves as a figure of speech for contrast, used to illustrate the situation in the Western Balkans compared to that in the European Union.

The difference is understandable: neither have the Western Balkan countries reached a level of economic-social integration, nor have they achieved the level of political-legal integration of EU member states. However, this does not mean that there is no freedom of movement of crime in the European Union, nor that there is no freedom of movement of people, goods, services, and capital in the Western Balkans. The point is that Western Balkan countries are not showing readiness to establish a regional space of justice, freedom, and security, which would be an advancement of some kind of regional market. This demonstrates their lack of readiness for what they aspire to on a larger scale. And they aspire, at least declaratively, to membership in the European Union.

The best illustration of this unreadiness is judicial cooperation. In the European Union, it operates on the principle of mutual recognition of decisions. In the Western Balkans, it is still regulated by international instruments, bilateral agreements, and national laws. Finally, in the EU this area is called judicial cooperation, while in the Western Balkans it is still international legal assistance. Analyses have shown that Western Balkan countries do not use even the existing mechanisms to their full potential. On the contrary, some examples of clear violations of obligations from bilateral agreements have been recorded, unimaginable in the European Union. Instead of an area of justice, freedom, and security, the Western Balkans appear to be an area of politics, irresponsibility, and insecurity.

The "evidence explosion" from the SKY app has revealed the extent of transnational crime in our region. It is a devastating fact that there is a Balkan cartel, but there are no joint investigative teams between the Western Balkan countries. If we add to this the question of the legal validity of evidence from the Sky app raised in the professional community, then the law, instead of being a mean of achieving justice, becomes an obstacle to it.

On the other hand, instead of regional cooperation, Western Balkan countries are developing "bilateral cooperation" with the European Union, concluding agreements with the EUROJUST unit and sending liaison prosecutors to The Hague, designating contact

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points for the European Judicial Network in criminal matters, and recently concluding working arrangements with the European Public Prosecutor Office. The European Union, for its part, finances and implements multi-million projects to strengthen the rule of law, often overlapping and thematically repeating. This money is frequently spent on expertise-for-the-sake-of-expertise, resulting in project-for-the-sake-of-project realization.

Once, the countries of the Western Balkans had a level of judicial cooperation like the European Union has today. This was in the former Yugoslavia. Today, they do not use the capital of origin from the common Yugoslav legal system (except for Albania, which was not part of it), nor the capital of a common language and the absence of linguistic barriers (excluding Kosovo and partly North Macedonia). This reveals a paradox: these countries strive for judicial cooperation with those further away (EU), without developing to the fullest extent international legal assistance with those closer (WB). One of the reasons is that there is a variable between EU member states that does not exist in the Western Balkans, a guiding principle of judicial cooperation: it is called *trust*.

There is also a certain passivity among the Western Balkan countries and an expectation that every answer will come from Brussels. The exception is (and this claim is not subjective) Montenegro. It is the only country whose Ministry of Justice is a regular host of the Regional Forum on Judicial Cooperation in Criminal Matters, which brings together representatives of the ministries of justice, courts, and prosecutors of the Western Balkan countries. This forum has, among other things, been dedicated to the revision of bilateral agreements, and every topic on the forum's agenda is illuminated by EU standards. Montenegro has met the challenges in this area by adopting the Law on Judicial Cooperation in Criminal Matters with EU member states as early as 2018. This law represents a small codification of EU instruments, including the European arrest warrant, the European investigation order, the European protection order, and other instruments. It is envisaged that the Law will start to be applied on the day of Montenegro's membership in the EU.

This proactive approach by Montenegro is in line with the basic principle of the European Union: the principle of subsidiarity. According to it, higher instances should not take away the initiative from lower instances, which they can achieve with their own means and potential.

The higher instance in this sense is the European Union, and the lower instances are the Western Balkan countries. To become part of the EU, the EU needs to become part of them.

RESPECTING HUMAN RIGHTS IN FIGHTING TRANSNATIONAL ORGANISED CRIME

RESPECT FOR HUMAN RIGHTS AND THE CONCEPT OF TRANSNATIONAL ORGANISED CRIME (CHALLENGES IN THE RULE-OF-LAW FIELD)

by Mladen Vukčević[*]

SUMMARY: 1. Introduction. 2. Legal and Theoretical Views. – 3. Relevant Constitutional Provisions and Other Acts in National and International Law. – 4. Conventional Law. – 5- Concluding Remarks.

1. Introduction

Social phenomena research models are more difficult to be predicted than those ones in the natural sciences and that is why these are often questioned in the modern world. The above also stands for the study of human rights, the catalogue of which is continually expanding, especially internationalization hereof, which dates back to the end of World War II. Since then, human rights are no longer a "matter of the state", but quite the contrary: new rights are introduced on an international level, while existing ones are standardised along with the establishment of new forms of protection hereof. After all, the history of humanity, when taking into account a long period of time, may be presented as a quadrilateral, including the following: prescription, realization, violation and protection of human rights. All of this also applies to the respect for human rights in the fight against transnational organised crime, since, even in such circumstances, human rights must be respected, that is, which means that these must not be violated in the name of efficiency in the actions taken by judicial and police authorities.

The field of my legal interests, that is, the issue of human rights and transnational organised crime, shall be presented from three aspects, chosen from the three disciplines I teach (Introduction to Law, Constitutional Law and Human Rights). Therefore, this paper shall analyze the following three levels: legal and theoretical, constitutional and legal, and the level of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which is increasingly being applied in our judicial practice.

2. Legal and Theoretical Views

In order to effectively exercise state power, various policies (legal, economic, educational, etc.) are implemented; in addition, various mechanisms and instruments are established for the purpose of improving effectiveness of the aforementioned policies. In the context of legal policy, the policy of crime combating is taking an increasingly important place, as is the policy of combating transnational organised crime. The above stems from the fact that the compression of time and space in which we live produces new forms of criminality. The danger of violation of human rights justified by the efficiency of the actions taken by state bodies is especially emphasised in the age of unexpected technological development and that is why the following often quoted legal question can be asked here: Who will protect us from the guardians ("*quis custodiet ipsos custodet*"). All this sharpens the relationship between the following two values: the first

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one – suppression of crime and the second one – respect for human rights, despite the need to achieve a balance between these two for the good of citizens. The same stands for transnational organised crime which shows that erasing borders and facilitating the flow of people and ideas has to be considered in two aspects. Therefore, legal experts define the aforementioned relations more closely as follows: 1) positively (from the aspect of cooperation between states) and 2) negatively (from the aspect of easier circulation of criminal activities)[1].

The term transnational organised crime is a recent one, which is confirmed by the fact that in these regions we can only find it as a lexicon term in encyclopaedia dated less than a decade ago.[2] However, the aforementioned circumstances did not result in a precise definition of this type of crime. Thus, Lampe and Knickmayer argue that the above presents a considerable challenge for anyone dealing with this topic and refer to it as "confusing term" approached from many sources, the meaning of which is subject to constant changes and which, despite numerous attempts, has so far resisted any acceptable attempt to be defined in a binding sense[3].

The modalities of manifestation of transnational organised crime require the establishment of new legal instruments and the improvement of the existing ones, the appearance of which as well as the "underlying convention" may be associated with the period at the end of the last and beginning of this century. Thus, the basic source of international law in this regard is the United Nations Convention against Transnational Organised Crime, which was adopted in the form of a resolution of the United Nations General Assembly (55/25 of 15 November 2000). It was opened for signing at the conference in Palermo held in the period from 12 to 15 December 2000 and became effective on 29 September 2003. Along with the Convention, the following three protocols were adopted: the Protocol on Prevention, Suppression and Punishment of Trafficking in Human Beings, Especially Women and Children, the Protocol against Smuggling of Migrants by Land, Sea and Air and the Protocol against Illicit Manufacturing and Trafficking in Firearms, Parts of Firearms and Ammunition[4]. However, in the text of this convention, in art. 2, which prescribes the use of the term, the meaning of the term "transnational organised crime" is not fully and explicitly defined, which confirms the extent to which it remains indeterminate. In connection with the above, it should be pointed out that many international documents (multilateral and bilateral agreements, other types of agreements and memoranda, etc.) are not binding ones, which further complicates the fight against transnational crime.

The aforementioned view is confirmation of law development in the modern age, while this example confirms that law development must be increasingly reflected in the development of new legal institutes and legal procedures, as well as in innovative forms of police cooperation. The above is also necessary within this form of criminality since

[1]Teresa Russo, Professor of Law at the University of Salerno, presentation at the conference "*Raising public awareness of the fight against transnational crime, the role of police and judicial cooperation and respect for human rights*", organizers: Faculty of Law at the University of Donja Gorica and Department of Legal Sciences, University of Salerno, Podgorica, 20 June 2023.

[2]The term "transnational organised crime" is not found in the Legal encyclopedia, edition of Savremena admistracija, Belgrade, 1984, nor in the Legal Lexicon, edition of the Lexicographic Institute Miroslav Krleža, Zagreb, 2007, and is contained in the General Legal Dictionary, edition of Narodne Novine, Zagreb, 2015, p. 1400.

[3] K. VON LAMPE, S. KNICKMEIER, *Organisierte Kriminalität, Die aktuelle Forschung in Deutschland*, Berlin, 2018, p. 8. See also Z. STOJANOVIĆ, *Politics of Crime Suppression*, Third Edition, Belgrade, 2023, p. 107.

[4] The Convention became an integral part of the legal system of Montenegro, by ratification during the existence of the Federal Republic of Yugoslavia (Official Gazette of the FRY, International Treaties, No. 6/2001).

there are differences depending on the type of criminal acts in which it is manifested and the way it is organised in certain parts of the world. Therefore, it can be concluded that we are witnessing the diversity, high level of planning, complexity and sophistication of this type of criminality in which a large number of actors participate striving to illegally obtain significant funds and other material benefits.

The specificity of this type of criminality lies in the fact that it strives to influence state functioning, try to be part of it, and manage social processes. In addition, it is characterised by constant adaptation ("flexible criminal technology") to the extent that it becomes resistant to various forms of social reaction[5]. Furthermore, it is characterised by infiltration into various areas of society (banks, companies, media, etc.) either individually or simultaneously in several areas. Therefore, for the fight against this form of criminality, we need new ways of legal and police thinking, as well as a continuous dialogue between legal science and practice in the context of law application (judicial, prosecutorial, and police). However, for the purpose of affirmation of awareness in relation to this problem and the solution hereof, non-legal knowledge is also needed (informatics, economics, media, etc.). Therefore, complicated illegal puzzles require not only legal responses, which especially refer to "new democracies" and divided societies in politically unstable regions, such as the one Montenegro belongs to. For example, there are almost 10–15% of foreigners who live in Montenegro for various reasons—running away from the horrors of war, looking for a job, or as tourists—and among them are those who see this circulation as an opportunity for illegal behaviour, including, of course, the citizens of Montenegro. That is where the following questions arise: do we have the instruments, legal and other, to analyse the aforementioned issues and react hereto effectively while protecting human rights simultaneously, or are we moving towards or halting on our way towards a rule-of-law society? Unfortunately, European reports do not continually indicate a negative response to both questions, primarily at the political level.

The aforementioned indicates that the academic community, especially in relation to legal science, should have a dialogue on this topic, improve teaching plans, strengthen cooperation, and research this type of crime from a multidisciplinary point of view. This type of view still does not have a proper place in legal textbooks or, generally speaking, in literature. And it should always be emphasised that this topic is primarily the subject of criminal law but also of a whole set of other legal disciplines from the fields of international and domestic law. This is precisely why different disciplines are connected by the importance of doing justice and showing respect for human rights, i.e. having aspiration to hold monopoly over state power in a legitimate and legal way, which presents an essential state feature[6].

3. Relevant Constitutional Provisions and Other Acts in National and International Law

The constitutional and legal aspects of this topic have their basis in the preamble and normative part of the Constitution of Montenegro[7]. In the preamble, it is prescribed that the citizens of Montenegro are determined to live in a state where, among others, the basic and inseparable values are respect for human rights and the rule of law. At the same time, the fight against transnational organised crime is an important segment of the process of building the rule-of-law principles, which are based on respect for human rights.

[5] Z. STOJANOVIĆ, *op. cit.*, p. 107.
[6] B. KOŠUTIĆ, M. VUKČEVIĆ, *Introduction to Jurisprudence*, Second Edition, Podgorica, 2023, p. 46.
[7] Official Gazette of Montenegro, p. 107.

In addition to the preamble, the normative part of the Constitution confirms the importance of human rights. arts. 1, 6 and 9 of the Constitution of Montenegro are important in the context of this topic and are contained in the first part of the Constitution (Basic Provisions), whereas the central part of defining human rights and freedoms is presented in its second part (Human Rights and Freedoms), starting from art. 17 and concluding with art. 81. The aforementioned indicates that the content, number and diversity of human rights, together with other factors, confirm the democratic character of the highest legal act of Montenegro.

Starting from the definition provided in the preamble, in art. 1 of the Constitution the rule of law is defined as a fundamental principle of the state organization of Montenegro, whereas the guarantee of human rights and freedoms is an integral part of the rule of law, together with other elements that constitute the state organization of Montenegro (separation of powers, independence of the judiciary, respect for constitutionality and legality, free elections, etc.). The foundation of human rights and freedoms is defined in art. 6 of the Constitution, which prescribes the principles of guarantee, inviolability and obligation to respect rights and freedoms, whereas the state of Montenegro is defined as their guarantor and protector.

Art. 9 of the Constitution stipulates that confirmed and published international treaties and generally accepted rules of international law present an integral part of the internal legal order, that these have primacy over national legislation and that these are directly applied "*when regulating relations differently from national legislation*". This provision requires a brief overview. Namely, unlike other constitutions in which the primacy of international law is related to "the legal order", our constitution maker, by using the (too narrow) term "national legislation" does not imply the primacy of international law over the Constitution, by-laws and other acts of state authorities. Such a concept is further narrowed by the explanation that it exists only in cases in which the aforementioned sources of international law regulate relations "*differently from national legislation*". For these reasons, the term "legislation" should be interpreted more broadly, in a material sense, and not in a strictly formal or procedural sense. Such reading of the constitutional norm shall expand the space for enforcement of international legal regulations in the part referring to transnational organised crime, whereas the cited provision should be adapted to European constitutional standards when and if the revision of the constitution happens.

The following provisions from the second part of the Constitution are of particular relevance for the topic of this paper: the provisions related to limitation and temporary limitation of human rights and freedoms (arts. 24 and 25), a set of constitutional rights related to guarantees in proceedings before the courts (arts. 29-38 of the Constitution), Articles that guarantee the right to privacy (art. 40 of the Constitution) and the right to the inviolability of the home (art. 41 of the Constitution), as well as the Article related to the protection of personal data (art. 43 of the Constitution).

This approach of our constitutional maker confirms the idea that "*constitutionalism is a limitation of power in the interest of freedom*" (K. Friedrich). Following the provisions of the European Convention and comparative constitutional solutions, our Constitution includes an obligation of cumulative fulfilment of the three conditions for the limitation of rights and freedoms (only by law, only if needed in a democratic society and only for the purpose for which these rights have been prescribed). The above is needed for the purpose of avoiding arbitrariness as well as inappropriate attempts to limit rights, since there is a thin line between limitation and violation of human rights.

In relation to the catalogue of human rights determined in the Constitution, here we are at the legal dividing line between the principles of criminal law science and academic

hesitation on one side and police and a part of prosecutorial structures that prefer efficiency in acting (collection of evidence and adjudication). We are at the crossroads between the rights of those who are identified as the actors of transnational organised crime and the need of the state to deal with them more efficiently, having in mind the social danger of this type of crime, even at the cost of "*urgency may be the source of a norm*". In that regard, there are also frequent political and media requests for the establishment of special courts and special investigative agencies that present a kind of "normative optimism," i.e., the belief that it is enough to prescribe something in order to achieve it. Therefore, both sides (science and practice) must be aware that abuses are possible.

For the normative aspect of this topic, in addition to the constitutional one, it's also important to know the legal definition hereof: from the Criminal Code, the Criminal Procedure Law, the Law on Mutual Legal Assistance, the Law on Confiscation of Assets Acquired through Criminal Activity, the Law on Data Confidentiality, the Law on Personal Data Protection, the Law on Border Control, the Law on Human Rights and Freedoms, the Law on the Protector of Human Rights and Freedoms and other laws.

In addition to the constitution and laws, agreements, protocols, memoranda and joint statement signed by the Government of Montenegro and the Ministry of Interior with the governments and ministries of interior of other countries present an important segment of normative regulation of transnational organised crime. The aforementioned documents are named differently, although some of them include the names of criminal offences from the part of criminal legislation referring to transnational organised crime. However, what all these have in common is the trait of being "transnational" and "organised" (in the context of crime). However, it is interesting that only one of these documents explicitly uses the phrase "transnational organised crime" [8].

[8]Agreeent between the Government of the Republic of Montenegro and the Government of the Republic of North Macedonia on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics, psychotropic substances and precursors, illegal migration and other criminal offences, signed on 10 June 2003; Agreement on cooperation between the Government of the Republic of Montenegro and the Government of the Republic of Albania on cooperation in the fight against terrorism, organised crime, trafficking, as well as other illegal activities, signed on 31 October 2003; Agreement between the Ministry of Interior and the Ministry of Interior of the Government of the Republic of Montenegro on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics, psychotropic substances and precursors, trafficking in human beings, illegal migration and other criminal offences, as well as cooperation in other areas within their jurisdiction, signed on 03 December 2003; Agreement between the Government of the Republic of Slovenia and the Government of Montenegro on cooperation in the fight against organised crime, trafficking in human beings and illegal migration, trade in illicit drugs and precursors, terrorism and other forms of crime, signed on 13 October 2006; Agreement between the Government of Montenegro and the Council of Ministers of Bosnia and Herzegovina on cooperation in the fight against terrorism, organised crime, illicit trafficking in narcotics, psychosomatic substances and precursors, illegal immigration and other criminal offences, signed on 07 September 2007; Agreement between the Government of Montenegro and the Government of the Republic of Bulgaria on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics, psychotropic substances and precursors, illegal migration and other criminal offences, signed on 05 April 2005; Agreement between the Government of Montenegro and the Government of the Republic of Italy on the fight against crime, signed on 25 July 2007; Memorandum of Understanding between the Department for Public Security of the Ministry of the Interior of the Republic of Italy and the Southeast Europe Police Chiefs Association (SEPCA) regarding the strengthening of cooperation in the fight against organised crime, signed on 15 May 2011; Agreement between the Government of Montenegro and the Republic of Cyprus on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics and psychotropic substances, illegal migration and other criminal offences, signed on 21 March 2015; Joint statement of intent between the Federal Ministry of Interior of the Federal Republic of Germany and the Ministry of Interior of Montenegro on prevention in the fight against transnational crime and capacity building, signed in 2015; Agreement

The existing normative framework relevant to this topic should be supported by the Strategy for Combating Transnational and Organised Crime, the adoption of which, together with the adoption of the corresponding Action Plan, is being postponed and still in its draft phase. Therefore, the process of adopting this strategy should be accelerated, especially since it has been defined as one of the important tasks in the process of accession to the European Union and a step towards the operationalization of the European Union Strategy for combating organised crime (2021-2025).

4. Conventional Law

The relationship between respect for human rights and suppression of transnational organised crime cannot be fully understood if the analysis hereof does not include consideration of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols. The following convention rights are of special importance for the aforementioned relationship: the right to liberty and security (art. 5), the right to a fair trial (art. 6), the right to privacy (art. 8) and the right to property (art. 1 of Protocol No. 1). However, the foregoing does not exhaust the list of relevant convention rights, starting with the fact that all of these are characterised by the features of substantive indivisibility and reciprocity.

Art. 5 of the Convention guarantees the right to liberty and security, i.e., the prohibition of deprivation of liberty except for the cases specified therein and in accordance with the procedure prescribed by law. This article also provides other guarantees for a person deprived of liberty (the right to be informed of the reasons for the arrest in his native language, the right of appeal to the decision on deprivation of liberty, etc.). In addition, when persons who were participating in illegal actions that bear the traits of transnational organised crime are deprived of liberty, strict compliance with the aforementioned rights must be ensured. Otherwise, pursuant to paragraph 5 of this article, a person who is deprived of liberty contrary to the provisions hereof is entitled to a complainable compensation.

With regard to art. 6 of the Convention, it should be taken into account that around 80% of the total number of cases from Montenegro that have been brought before the European Court of Human Rights are related to the right to a fair trial. These are of great importance in the context of respect for human rights in the fight against transnational organised crime, since it must be taken into account that when deciding on criminal charges against a person, everyone has the right to a fair and public hearing within a reasonable time before an independent and impartial court, according to the law. Especially "ordinary courts" and the Constitutional Court have taken this convention right into account in order to prevent violations of human rights and reduce the number of applications addressed to the Court in Strasbourg.

The cases related to respect for private and family life, correspondence and inviolability of home referred to in art. 8 of the Convention are important for the context of this paper. For example, the use of data from encrypted messaging applications (EncroChat, Sky, etc.) and its validity in court proceedings present a central topic in numerous European judicial systems. This issue raises a number of questions, such as the following ones: the legal basis for "hacking" mentioned applications; whether these can be evidence or only operational data; at which stage of the proceedings these can have the power of evidence; whether these are valid if being taken individually or must be

between the Government of Montenegro and the Federal Council of Switzerland on police cooperation in the fight against crime, signed on 07 September 2016.

supported by other evidence, which includes the manner in which they were obtained, i.e., how the collection of evidence was reasoned; dilemmas about their reliability; the right to challenge the legality of evidence collection in the proceedings, etc. There is case law of the European Court of Human Rights related to the cases from the region (*Dragojević v. Croatia* (2015), *Bašić v. Croatia* (2016)) referring to the method of data obtaining, all of which open up new challenges and lead to the search for new answers. The situation is further complicated by the fact that the Convention does not contain rules on the legality and illegality of evidence; however, it only assesses whether the use of evidence is contrary to its provisions. All this should be related to one of the basic principles of interpretation of the Convention, according to which the Convention is a "living document" that is constantly being developed and adapted in accordance with ongoing changes in social circumstances.

Sensitivity is also visible in the application of art. 1 of Protocol 1 to the Convention, according to which every person is entitled to peaceful enjoyment of his or her possessions and that he or she shall not be deprived of his or her possessions except for situations in which it is centred around a public interest and in circumstances prescribed by law and general principles of international law. This provision becomes actualised in situations of temporary or permanent confiscation of property acquired by criminal activity, situations related to the distribution of such property to family members, separation of such property from previously acquired property, as well as all other procedural problems arising from the above. It seems that the media has the greatest interest herein, but, at the same time, it also has the greatest task in terms of disclosure, investigation and interest in those who adjudicate. In such cases, experiences from Italy are of great importance, as are experiences from international cooperation on this topic, such as, for example, the experience from a French-Montenegrin seminar that has been recently organised with the aim of improving knowledge in the field of confiscation of property acquired through criminal activity. Confiscation activities must not be the only focus of the media when it comes to the fight against this socially negative phenomenon. Otherwise, the practice of pompous announcements of property confiscation and then just silent abandonment of this issue shall be continued, whereas the discrepancy between public expectations and efficient satisfaction of justice shall be increased.

5. Concluding Remarks

Taking into consideration the content of this paper, appropriate conclusions have been reached. These conclusions further point to possible directions in terms of both the study of this topic and concrete activities aimed at the fight against organised crime, however, with respect for the human rights of actors in this form of crime. e content of this paper, appropriate conclusions have been reached. These conclusions further point to possible directions in terms of both the study of this topic and concrete activities aimed at the fight against organised crime, however, with respect for the human rights of actors in this form of crime.

Having in mind the above, the following can be concluded:

- respect for human rights and activities aimed at suppressing transnational organised capital represent a complex relationship and a demanding legal and social task for all authorities involved in solving hereof. The same stands for the analysis of all aspects of this problem, which, within legal science, in addition to criminal law, include other legal disciplines, not only legal and theoretical ones, but also the ones from positive law;

- suppression of transnational organised crime and respect for human rights should be the subject of a special legal discipline and other forms of acquisition, deepening, and verification of legal knowledge—at faculties, in the Centre for Training in Judiciary and State Prosecution, in preparation programmes for taking professional and bar exams, as well as at various professional conferences;
- when considering the revision of the Constitution, Article 9 of the Constitution should be upgraded, along with ensuring the (unconditional) primacy of international law;
- when it comes to laws, the qualifications of criminal offences related to transnational organised crime should be reviewed, as should the penal policy related to them. First of all, this refers to the review of solutions provided in certain laws, especially the ones from the Criminal Code and the Code of Criminal Procedure. The list of changes in legislation should also include the solutions provided in the Law on Personal Data Protection, the Law on the Protector of Human Rights and Freedoms of Montenegro, as well as in other acts regulating human rights;
- As for the ongoing year, it is necessary to adopt the strategy of the Government of Montenegro for the fight against transnational and organised crime for the period 2023 – 2026;
- it is necessary to upgrade the curricula of the faculties of law, the faculties of security and the Police Academy in order to familiarise students with modern approaches to this topic and the influences that fall under the process of internationalization in the context of the definition and protection of human rights;
- certain segments of this topic should be analyzed within master's theses and doctoral dissertations, as well as within various columns in legal journalism. In such a way, comprehensive legal analyzes shall produce wider resonance by promoting awareness of the importance of the fight against transnational organised crime;
- new forms of international judicial and police cooperation should be developed, as should the instruments related to the fight against this form of crime.

SEARCHING FOR A JUST BALANCE

by Milorad Marković[*]

SUMMARY: 1. Issues for Consideration at the International Level of Fighting Transnational Organised Crime and Protection of Human Rights.

1. Issues for Consideration at the International Level of Fighting Transnational Organised Crime and Protection of Human Rights

Respecting human rights in the fight against transnational organised crime is an extremely broad and demanding topic. It is as broad as the concept of human rights and as demanding as the fight against transnational organised crime itself.

In this context, human rights do not only refer to individuals who are perpetrators of transnational organised crime, but also to their human rights before, during, and after criminal proceedings. It concerns the human rights of all of us, from citizens to victims of transnational organised crime.

The fundamental concept should be based on balance. Symbolically speaking, on the scales of *Iustitia*, we measure not only the *pro et contra* arguments of defence and prosecution but also the proportionality of limiting the human rights of perpetrators of transnational organised crime in order to protect the rights of others.

This is a legitimate basis for limiting human rights according to the European Convention on Human Rights and Fundamental Freedoms. Art. 8 of the Convention guarantees everyone "*the right to respect for his private and family life, his home and his correspondence*", with the assurance that "*public authorities will not interfere with the exercise of this right*". However, this right is not absolute, as public authorities will legitimately interfere if it is "*in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

The same applies to the right to enjoyment of property, guaranteed by art. 1 of Protocol 1 to the Convention, as the right of everyone "*to peaceful enjoyment of his possessions*", from which no one can be deprived, with a relativization in the continuation of the article: "[...] *except in the public interest and under the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*".

These two rights are key in the fight against transnational organised crime in two ways: through measures of secret surveillance and confiscation of property obtained through criminal activity. It should be noted that transnational crime is not only about one segment or several of them but is a concept that is changing. Today, transnational organised crime is not the same phenomenon as it was in the 1970s or 1980s. It has been changed by globalization, not as overcoming physical borders, but as its virtualization.

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The latest data shows that 80% of criminal acts in the world have some digital element. Therefore, we must not give narrow meanings to concepts.

Transnational organised crime seriously endangers our human rights. The latest measures of secret surveillance of the use of encrypted applications, among which the most used is SKY, have raised questions about respecting the right to respect for private and family life under art. 8 of the Convention. Without delving into the legal validity of evidence obtained in this way, it is to be believed that the European Court of Human Rights deeply contemplates the balance between the human rights of the accused and the human rights of everyone else.

In this regard, there is also the mechanism of confiscating property acquired through criminal activity, which is one of the most effective tools in the fight against transnational organised crime. In terms of art. 1 of Protocol 1 to the Convention, it is beyond doubt that the fight against transnational organised crime represents a "public" and "general" interest, as a legitimate basis for limiting the right to peaceful enjoyment of property.

In all of this, the need for strengthening international police and judicial cooperation emerges. We must not be partially focused on this. Such cooperation must be systemic. This implies the internationalization of criminal law and human rights in this context. The European Union and more and more Western Balkan countries should have a common approach to this.

In conclusion, none of the above can derogate from the right to a fair trial under art. 6 of the Convention; on the contrary, the balance we strive for can only contribute to the full realization of this principle.

AFTERWORD

by Teresa Russo

This Conference, which brought together academics, practitioners, students, and civil society representatives, highlighted the widespread belief that transnational organised crime can only be combated on a shared basis by developing a legal culture that promotes democracy, the rule of law, and human rights. Transnational crime, particularly transnational organised crime, poses several threats to all national legal systems and limits societies' economic and social development. It eludes precise regulatory typification, encompassing different conducts that are all serious and criminally relevant.

At the global level, international judicial cooperation developed within the United Nations through the instrument of conventions undoubtedly serves as the normative reference framework from which to begin, but it is at the regional level within the European Union and the Council of Europe that both preventive and repressive cooperation instruments have been developed that are readily applicable, thanks to the support of the Luxembourg and Strasbourg Courts.

Specifically, the European Union, relying on mutual trust in the common values that make up the identity of its legal system, as affirmed by the Court of Justice, has made the European Area of freedom, security and justice, and in particular judicial cooperation in criminal matters and police cooperation, the beating heart of its internal and external policies, i.e., with cross-cutting application, for example in the common foreign security policy and in relations with third states. Even more so with candidate states, where democratic reform of national systems, along with respect for the rule of law, human rights, and minorities, is a prerequisite for the start of negotiations. However, as evidenced by certain national reform policy choices, as well as international events, these objectives have become a real challenge for both existing member states and the European Union.

Cooperation between national judicial and police authorities, as well as between them and relevant Union agencies, combined with mutual recognition of judicial decisions and, where necessary, harmonisation of national criminal law, form a jigsaw puzzle of imperfectly fitting pieces. Differentiated integration in the form of enhanced cooperation remains one of the most commonly used instruments in this area, and proposals from some states as well as Union institutions support the prospect of greater flexibility.

The establishment of differentiated legal regimes clearly does not aid in the fight against transnational crime, which creeps into the cracks of the non-unitary system. On the other hand, overcriminalization to ensure effective implementation of EU law does not appear to be the appropriate response because, once again, it seeks to prioritise security over freedoms.

The European institutions have adopted a number of directives and regulations to increase the Union's efficiency in combating the most serious transnational crimes, but this must be done in tandem with the protection of all parties' procedural rights. Furthermore, the approach cannot be limited to criminal law but must be multidisciplinary, with "unity in diversity" as the fundamental concept to be respected.

As some of the young students pointed out, the different languages of the Union's peoples cause problems not just in terms of communication but also because of the different legal cultures of the Member States. In addition to the excellent translation

service of the Union's acts and the specification present in each act in the part on definitions, the Court of Justice continually emphasises the importance of the Community concept for framing the various questions submitted to its jurisdiction. Furthermore, it should not be forgotten that diversity is a value to be preserved because, as envisaged, the Union respects the richness of its cultural and linguistic diversity (Art. 3, para. 3) and is inspired by Europe's cultural, religious, and humanist heritage (Preamble of the TEU), while also respecting national identities inherent in their fundamental political and constitutional structure, including the system of local and regional self-government.

The Western Balkan countries as EU accession candidates (or potential candidates such as Kosovo) represent a geostrategic area for the Union's completion, but they also require their own regional identity in terms of promoting regional cooperation among the states in the area and resolving local conflicts. The Jean Monnet Chair on *Promoting Public Awareness, EU Values, and Western Balkans' Accession* (EUVALWEB) aims to bring future Union citizens closer together through cultural dialogue, scientific initiatives, and educational activities, not only to increase knowledge of the political and legal issues underlying enlargement but also to foster a culture of shared values while respecting different national identities.

Thus, let's work together to shape our future. This is one of the main goals set by the European Union, and it is also mine.