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

by Mladen Vukčević[*]

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

[*] Ph.D., full-time Professor of Constitutional law at the Faculty of Law, University of Donja Gorica.

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.