

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.

* Master of Law, International Legal Consultant.

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.