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Facing Organized Crime - between the Need for Security and the Protection of the Human Rights*

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Abstract:

The organized crime is nowadays one of the greatest threats to public safety both at the European and national level. Often, it manifests itself by committing the most serious crimes such as those against the European Union's financial interests, money laundering, trafficking of prohibited substances, trafficking of persons etc. The gravity of those acts requires a prompt response both to prevent and to combat such acts and to investigate or punish the guilty persons. This implies the adoption of specific measures, but they should not infringe the principle of proportionality in restriction of the fundamental rights. The EU's legislation, within Directive 2006/24 / EC and the Romanian legislation, within Law 82/2012 and the draft-law on cyber security, contain, in the name of public safety considerations, a lot of provisions which imply unjustified restrictions of the fundamental rights. The analysis that will be done in this study will focus on the identification of root causes, so that in the end to be able to propose solutions. Therefore, I consider that, in order to avoid such situations it is necessary for the states to play an active role within constitutional limits, to identify the main features of the organized crime, in order to distinguish this type of crime to the other ones less dangerous, to use at a terminological level in laws phrases and expressions clearly, that leaves no room for interpretation, and to focus the attention towards the protection of the fundamental rights and freedoms and not on developing sophisticated means of preventing, investigating and punishing such acts.

Keywords*: rights and freedoms, proportionality, organized crime, security*

1. Introduction

The relationship between the fundamental rights and freedoms, on the one hand, and criminal law, on the other hand, has always required special attention. This is because the criminal law often involves restriction of the fundamental rights for certain subject proceedings, threatened to different sanctions in case of breaking the law.[1] The extent of these restrictions is not precisely defined, but it is rather relative, from one case to another, and it must respect some rules seen as fundamental principles of any such measures.

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[1] See V. Paşca, *Excesul de reglementare penală şi consecinţele sale*, in Anale UVT, nr. 2/2010, pp. 27-33.

If, in general, the determination of a specific maximum limit allowed in the restriction of the fundamental rights is not an easy task, things get even more interesting in the case of the organized crime which, in general, are crimes with a strong social impact. No doubt that in this area there is a general tendency to resort to a kind of a more incisive action. This is because, on the one hand, the phenomenon of the organized crime has met a special scale in recent years, being a permanent threat to the whole world, and, secondly, because its means and ways of action are the most diverse. Under these new challenges, the success depends on the ability of the national and European authorities to prevent such acts and to be always one step ahead of criminals.

But this is not easy to achieve, especially without some "collateral damage" as the citizens who, in the name of public safety, must suffer some restrictions in the exercise of their rights.

Since organized crime networks have been a major source of funding and supporting global terrorism, a continuous fight against such organizations has begun. The evaluation standards of such measures in combating this global phenomenon supposed transition to a new stage. In the opening of the judicial year 2002, even the then President of the European Court of Human Rights said: "*Our perception of last year is colored by the tragic events of 11 September and their aftermath. Terrorism raises two fundamental issues which human rights law must address. Firstly, it strikes directly at democracy and the rule of law, the two central pillars of the European Convention on Human Rights. It must therefore be possible for democratic States governed by the rule of law to protect themselves effectively against terrorism; human rights law must be able to accommodate this need. The European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law. The second way in which terrorism challenges democracy and human rights law is by inciting States to take repressive measures, thereby insidiously undermining the foundations of democratic society. Our response to terrorism has accordingly to strike a balance between the need to take protective measures and the need to preserve those rights and freedoms without which there is no democracy*".[2]

Faced with the organized crime, states are often in front of a very difficult mission because if an error occurs, the consequences can be dramatic, given precisely the dangerousness of such acts. In this way, the need to protect fundamental rights and freedoms of citizens in a community overlaps with the need to punish those responsible for acts of organized crime.

Providing an effective manner of balancing the two previously mentioned interests, primarily, involves an analysis of the principles behind those interests. No doubt that beyond such principles as that of legality, equality and non-discrimination, a special place in such a mechanism has the principle of proportionality. The so-called "proportionality test", extremely necessary and useful in assessing the maximum permitted level in restricting the fundamental rights, becomes a genuine guarantor of rights. The principle of proportionality is undoubtedly a general principle of law, and at the same time a constitutional principle, but transposed into the criminal sphere, it means taking into account the right balance between the offense committed and the penalty to be applied.

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[2] Speech given by Mr. Luzius Wildhaber, President of the European court of human rights, on the occasion of the opening of the judicial year, Strasbourg, 31january 2002, disponibil pe: http://www.echr.coe.int/Documents/Annual_report_2001_ENG.pdf.

The notion of punishment in this context is not restricted only to the final sanction imposed on a convicted, but covers equally to the criminalization of social behavior and procedural means through which, in one way or another, the prosecution process is settled. This is because according to the proportionality principle, a certain penalty applied concretely to the offender will never be considered proportionate if it violates the procedural rules. The phrase "the end justifies the means'' is inconsistent with this principle, and, as I will show, below this incompatibility is preserved even in the matter of the most serious crimes.

Human rights are "individual subjective rights essential to the existence, dignity, freedom, equality, happiness and free development of the human being."[3] Protecting the rights of citizens requires equally protecting the rights of those who are the subject of a criminal investigation. Can we achieve this aim given the complexity of such crimes? In other words, can we protect ourselves, the many and honest in society and, at the same time, protect even those who try to harm us?

The answer would certainly be yes, but, beyond the suspect's rights to a fair trial and the right not to be deprived of liberty except under conditions provided by law, in the context of the subject of the present study it is also important to take into account the necessity of protection of other rights such as the right of free speech, the right to privacy and family life or the right not to be subjected to inhuman and degrading treatment, etc. These are inherent rights of every person, their protection against arbitrariness is a guarantee of the rule of law, and, whether the restriction of rights is sustainable in some conditions, the decrease of the legal rights and fundamental freedoms in the sense of reducing the volume of their content is not accepted.[4]

The method of analysis of the relationship between the fundamental rights and freedoms, the seriousness of the offense and the solutions to be adopted, should start from setting the reference item or items, those pillars of proportionality test and which, in fact, there are really relevant issues in a particular situation.[5]

In this context the discussion is based on the following certainties:

The organized crime offenses require special attention because of their seriousness in a society. The term "criminal organization" means that specially constituted group to commit certain offenses with the precise purpose of obtaining profit.[6] Since the means of committing those crimes grew considerably in the last decade no doubt that we need a proper response, but I appreciate that not every response.

The civil rights that are to be protected must be treated in the new European context, marked by intensifying the fight against organized crime. If, at the beginning of the European Union Community, objectives were achieved mainly through national laws which criminalize and punish certain actions, over time, as the crimes level grew, in European Union felt the need to create both the legislation and the institutions to ensure a better protection of the common fundamental values.

On the other hand, the human rights, starting with the oldest documents that were mentioned, namely the Universal Declaration of Human Rights of 1948, and continuing

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[3] See C. L.Popescu, *Protecția internațională a drepturilor omului. Surse, instituții, proceduri*, All Beck Publishing House, Bucharest, 2000, pp. 5.

[4] See D. Micu, *Garantarea drepturilor omului*, All Beck Publishing House, București, 1999, pp. 141.

[5] See P. Hulsroj, *The principle of proportionality*, Ed. Springer, Hornbaek, 2013, pp. IX.

[6] See Elisabeth Symeonidou-Kastanidou, *Towards a new definition of Organised Crime in the European Union,* în european Journal of Crime, Criminal Law and Criminal Justice, 2007, pp. 96.

with all other treaties and conventions that followed, have not been made keeping in mind the peace and political stability. They rather were designed to allow Member States, in certain circumstances, particularly in wartime, to take certain decisions to be able to resolve the various crises and conflicts to come.[7]

Thus, in recent years, actions against the financial interests of the EU has begun to escalate, such as the organized crime, trafficking in arms, drugs, and other such acts that jeopardize the safety of the citizens at the Community level. In the face of this new challenge, both the European Union and the Member States must adopt an active attitude in protecting its citizens, firstly by imposing a set of measures at the legislative level, capable of preventing such acts.

The difficulties in implementation of such conducts are given by the fact that the European Union was not conceived as a European unitary state or a federal state, but rather as a union of countries that share several objectives, including the protection of the fundamental rights and freedoms.[8] Therefore, often, the transposition of the European decisions into the national law of the states was made differently and, certainly, besides the fact that this was an obstacle in the fight against such grave acts, sometimes it led to disproportionate decisions, which affected the common people.

In conclusion, global fear imposed by such acts must not lead to an excessive restriction of the fundamental rights, although, I would say that this is an important factor in assessing the proportionality of such measures. From the perspective of the discussion, in the present study, both the prevention solutions proposed and procedural safeguards concerning what it entails interest me, this spotlights especially the balancing, on the one hand, the seriousness of the actions targeted by the measures, on the other hand, and the need to protect fundamental rights and freedoms.

The identification of the main reasons why this area is so vulnerable helps us to propose better legislative solutions that will constitute a disproportionate restriction of the fundamental rights.

2. The causes of the disproportionate restriction of the fundamental rights in the relationship with the criminal offenses of the organized crime

Protecting the fundamental rights and freedoms of the citizens was the main aim of the European Community since its birth. The need to respect and defense them has become part of everyday speech, throwing in the European public space a number of definitions, concepts and mechanisms that were meant to pave the way towards achieving this primary objective.

In this way, the human rights received an important place in the system. Specifically, however, the need to ensure the rule of law, to impose certain behavior on citizens or to prevent and combat crime, led to an unjustified restriction of the rights of the persons who had no involvement in any offense, and all this was happening in the name of public safety.

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[7] See in this sens The Report of the Eminent Jurists Panel on Terrorism, counter-terrorism and Human Rights, Geneva, 2009.

[8] See G. Antoniu, *Legea penală română în condițiile post-aderării,* Criminal Law Review, nr. 2/2008, pp. 10.

The causes are multiple and they focus specifically on the erroneous perception that the Member States and the European community have had its own role. Addressing sensitive community problems, such as that of organized crime, strictly in terms of earnings, led to neglecting the importance of the means of the action used.

The perfunctory treatment of the particularities of the organized crime, in order to distinguish this type of crime to the usual ones, the use of ambiguous phrases and expressions, without being able to determine exactly who is addressed to and not focusing the attention on the protection of the rights and fundamental freedoms but on developing sophisticated as means of preventing, investigating and prosecuting them may constitute the other relevant sources. No doubt that the gravity of the acts committed determines the seriousness of the means of action used, but this should not be taken to extremes.

2.1. Misunderstanding the active role in the protection of the fundamental rights

To be total, the protection of the fundamental rights and freedoms implies both refraining from bringing an unjustified restriction on their exercise and creating a set of rules to prevent any interference from others in their field. This, undoubtedly, shows the existence of two types of obligations: negative obligations and positive obligations.

Detailed analysis of the European Convention on the Human Rights readily reveals that it contains a number of provisions mainly on what the states shall never do. These prohibitions are part of the so-called "negative obligation".

Essentially, this requires states to refrain from any act likely to unduly restrict fundamental rights and freedoms of its citizens. In this way it provides a set of criteria and benchmarks, in order to recourse, depending on the particular situation, to smaller limitation of the rights.

For example, if we consider art. 8 paragraph 1 of the Convention which set out the right to respect the private and family life, we see that, immediately, in paragraph 2, it presents the special conditions under which this right may be subject to restrictions.[9] The wording of the text begins with an assertion of banning the arbitrary restriction of this right. This means that the state can criminalize certain conduct which would constitute a restriction of the right provided in Article 8, only where it is strictly circumscribed to the conditions listed in paragraph 2, in other words, if it is justified on grounds of public interest.[10]

The situation is somewhat similar if we take into consideration Article 10 of the Convention in which the freedom of expression is protected, which in accordance with paragraph 2 of the same Article, may be restricted only if strictly necessary in a democratic society for public safety reasons.

Of course, we can find other examples,[11] but what is important to emphasize in the context of discussions related to the organized crime is that, in principle, the seriousness

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[9] Art. 8 par. 2 of The Convention on Human Rights: *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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.*

[10] See A. Ashworth, *Positive obligation in criminal law*, Hart Publishing, Oxford and Portland, Oregon, 2013, pp. 196.

[11] See art. 2 or art. 5 of The Convention on Human Rights which are based on the same principles.

of such acts may impose a broader discretion on the restriction of certain rights, but in any form it can not lead to their removal. This is because one of the criteria of individualization is the nature and dangerousness of the offense.

I considered it appropriate to remind it in this research, because they are true assessment criteria on the conditions of any restrictions, whether by action or inaction, thus helping the development of effective criminal rules in the fight against crime organized.

As noted, however, protecting the fundamental rights and freedoms means not only refraining from undoing harm to them, but, at the same time, it requires active protection by adopting a set of measures to ensure prevention from such acts.

These tasks of the European Community and of the Member States have given rise to the so-called "positive obligation", under which, the states must not only stop to do harm but also to manifest an active role in the protection of the fundamental rights.[12]

The source of these obligations is considered mainly The Court's case-law[13], although some reference about them can be detached even from the Convention text. In this respect, art. 1 states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". These provisions could be interpreted as a primary obligation of the states to take actions to provide effective protection of the rights.

At the same time, the need for security of the citizens is undoubtedly a need for effective prevention of the crimes, and this objective can be achieved by implementing a whole system for fighting organized crime. This is much more difficult to achieve and that is why it requires a careful choice of pathways and means of combating the organized crime.

These two types of obligations should not be viewed independently but rather as two interdependent elements in functioning joint action in the fight against the organized the crime groups.

Therefore, it is essential to identify the most effective measures leading towards this end with a minimized restriction of the fundamental rights. Determining this limit is the key element in the development of proportionate measures in terms of the restrictions that they impose.

The organized crime evolved in the last decade and that implies that the means of preventing and combating the phenomenon did not provide the expected results. The cross-border dimension in the context of the discussion of such facts cannot be neglected. So, if, at first, it primarily affected the State where there were the so-called organized crime groups, due to technological development, this has become a threat to international security very quickly. Facing this new challenge at the international level we have sought some legislative solutions and the very idea of the cooperation mechanisms to prevent, combat, investigate and punish them.

But often, because of the special characteristics of such facts, the final form of documents was not fully consistent with the principles and the reasons which prompted their adoption. In other words, although the preamble acts at the Community level or in the explanatory memorandum of the internal laws are constantly reiterated, the need to protect and respect the fundamental rights and freedoms are constantly reiterated, the

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[12] See Anthony Amatrudo și Leslie William Blake, *Human rights and the criminal justice system,* ed. Routledge, New York, 2015, pag. 21

[13] See Court decision from 4 may 2011 in case Kelly vs. U.K. available on http://hudoc.echr.coe.int.

paradoxical situation was reached that the act itself constitutes a threat to them. This was due to the promotion, on behalf of public safety, of excessive and disproportionate measures.

The real aim was to find ideal solutions through the balancing, on one hand, the need to resort to effective means of combating crime and, on the other hand, to protect the human rights.

As an expression of the fight against organized crime, and in order to ensure an effective prevention against such acts, and given the active role of the Union, Directive 2006/24/EC was adopted.[14] This concerned the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communication networks. Essentially, it contained a number of provisions regarding the type of data to be kept, the persons who have access to them during the storage, the time they are kept, etc.

What should be noted in terms of this study is that the main objective of its adoption, as it is clear from the provisions of art. 1, is to assist the prevention and combating of the serious crime, as defined by Member States.[15] No doubt, its target was also the organized crime offenses.

The question was whether these regulations and respect the privacy and family life[16], the right to protection of personal data[17] and to what extend they do that and whether the interferences in the aim of these rights are proportionate to the aim pursued. Moreover, the Court of Justice of the European Union has been called upon to analyze the compliance of this Directive with EU law.

By its judgment from 8 April 2014[18], the Court ruled that the provisions examined constitute a disproportionate interference in the sphere of the fundamental rights and, therefore, the whole directive was invalid.

Among other things, the Court held that although, unquestionably, its aim is to prevent the commission from very serious crimes, a general interest in the sense of its constant jurisprudence[19], this does not mean that any restriction is permissible.

For this reason, it proceeded to a thorough verification of the conditions of the proportionality of the measures, leading to the conclusion that the total lack of limits, both on individuals and on the means of communication, a lack of objective criteria for limiting the people who have access to such data and the lack of transparency of proceedings makes from these measures an unwarranted restriction of rights.

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[14] Published in Official Journal of The European Union, Nr. L 105 from 13 April 2006.

[15] Art. 1 from The Directive 2006/24/CE *"This Directive aims to harmonize Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law".*

[16] See art. 7 from The Charter of fundamental rights of the European Union.

[17] See art. 8 from The Charter of fundamental rights of the European Union.

[18] Judgement of The Court Of Justice of the European Union in Cases C-293/12 and C-594/12, available on http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62012CJ0293&from=RO.

[19] Judgement of The Court Of Justice of the European Union in Cases C-145/09 from 23 November 2010 available on http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0145&lang1=en&type=TXT&ancre.

In Romania there were also a number of similar measures to that invalid directive and the intervention of the Constitutional Court was equally prompt. Thus, by Decision 440/2014, it was admitted the exception of unconstitutionality of Law no. 82/2012 on the retention of data generated or processed by providers of public communications networks and by Decision 17/2015, it was admitted the objection of the unconstitutionality of the law on cyber security.

If, in the case of the first one, the reaction of the Constitutional Court was expected, given the fact that the law under review was no more than a transposition into the national law of the provisions of Directive 2006/24 / EC, which as it was showed before was invalidated, the second one has been declared contrary to the Constitution because it limited the exercise of the rights that broke the rights balance that should exist between the individual and the community interests, and there were not sufficient safeguards to prevent abuses.

So, here are some examples that demonstrate without any doubt that misunderstanding the active role in protecting the fundamental rights, often can lead to the development of solutions at the legislative level to come into contradiction with the fundamental principles. At the same time, the excessive need for security can sometimes generate particularly serious consequences in terms of intrusion into the sphere of the rights.

Therefore, I consider that the correct understanding of the role of these positive obligations in protection should be linked with the negative obligations derived from the extensive case law of the Court. Thus, for example, the right to liberty and security provided in art. 5 of the Convention would effectively prohibit the arbitrary arrest, meaning that it is imperative that it be justified on the grounds of public order if there is reasonable suspicion that the person committed the act. But, this can only be achieved while the state provides, through the rules governing the criminal proceedings, the access to the file for the accused, the right to be informed about the accusation, and it ensures the possibility of recourse to an effective remedy against such measures etc.

Likewise, on the previous examples on respect for private life and correspondence, both the Luxembourg Court and the Constitutional Court have ruled that such measures are not disproportionate 'ab initio'. This was only following the failure of the Community and the state to double these assets with other measures meant to establish a set of safeguards against misusing of such means.

2.2. Defining the concepts and offenses of the organized crime in a vague and ambiguous way

The principle of legality also implies the obligation to lay down clear and concise provisions in order to determine, with certainty and without doubt, the conditions of its application and the persons to whom it is addressed.

Unfortunately, the matter of the organized crime does not contain such clear rules, but it rather uses a series of ill-defined concepts, which do nothing but generate confusion. In addition to this, the disparity of the international decision and their transposition into the national law of the Member States in different ways, are important obstacles to achieve its goals. Although, at first glance, these issues would seem to have little importance, as I will show below, they can create extremely negative consequences on individuals, paving the way for undue restriction of their rights and freedoms.

At the international level, more acts in the matter of the organized crime have been issued in the name of the so-called general Preventions.

Such an example is the Joint Action no. 733/1998[20] adopted by the Council, under Article K.3 of the Treaty on European Union, concerning the criminalization of participation in a criminal organization in the Member States of the European Union.

Within that, the criminal organization was defined as: *a structured association of more than two persons, established over time, acting in concert to commit offenses punishable by deprivation of liberty or the enforcement of a custodial freedom of maximum four years or a more serious penalty, whether such offenses are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.*[21]

A the same time, The United Nations Convention of 15 November 2000 in New York against the Transnational Organized Crime defined the organized criminal group as: *"a structured group of three or more persons, existing for a certain period and acting in concert with the aim of committing one or more serious crimes or offenses covered by this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."*[22]

Another document that was adopted was The European Framework Decision no. 2008/841/JHA[23] against the organized crime. It passed mainly along the same lines defining the criminal organization as *"a structured association, established over time, of more than two persons acting in concert to commit offenses punishable by deprivation of liberty or by application of a measure safety of imprisonment with a maximum of at least four years or a more serious penalty in order to obtain, directly or indirectly, a financial or other material benefit"*[24]

The analysis of these documents highlights the use of terms that are not clearly defined and it has an ambiguous meaning. So, for the existence of a criminal organization, an association "for a certain period of time" is required, but without specifying for how long or even some criteria that make it at least determinable. The significance of the concept of "structured group" or the "structured association" is also ambiguous, leading to the possible of inclusion in it even of some associations that actually do not involve a structured group of organized crime.

The repeated use of the phrase "each State shall take the necessary measures"[25] to combat the organized crime, may be another reason for adopting too restrictive solutions. Beyond the fact that this expression has appeared in the European acts because these decisions were an indirect source of criminal law[26] and the states had the obligation to transpose them into their national law within a certain period of time, however, it can create some confusion. So, what is the meaning of that term and what is the extent to which a particular measure will be deemed necessary. It is a matter of discretion of each state but it can lead to unnecessarily and exaggerated restrictive measures of the rights.

All these definitions are too vague and generic. For example, it is quite difficult, at present, to make a clear distinction between the organized criminal groups and the

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[20] Published in the Official Journal of The European Union L351/1 din 21.12.1998.

[21] Art. 1 from the Joint Action no. 733/1998 adopted by the Council.

[22] Art. 1 from The United Nations Convention against Transnational Organized Crime.

[23] Published in Official Journal of The European Union, L 300 from 11 November 2008.

[24] Art. 1 par. 1 from Framework Decision no. 2008/841/JHA.

[25] See art. 2 from The Framework decision 2008/841/JHA.

[26] See F. Streteanu, *Tratat de drept penal. Partea generală*, vol. I, C.H.Beck Publishing House, Bucureşti, 2008, pp. 119.

casual associations, as criminal organizations committing crimes do not see it as a means to achieve a goal but rather as a way to increase profits. At the same time, it is hard to qualify some occasional associations who commit petty theft as a criminal organization.

The non-use of a criterion on the consequences that such acts could produce or produce leads to the qualification as criminal organizations virtually any combination of three or more people, something that I do not consider it was the intention when drafting such acts.

Unfortunately the Romania legislation does not clarify all the problems identified at the European level. The Law 39/2003[27] on organized crime and the new criminal code in art. 367 contain, largely, the same provisions as the international documents.

For example, a very interesting problem, generated precisely by this ambiguity and vagueness of the law, was to state that, if in the new penal code has occurred or not, the decriminalization of the offense of initiation, membership or support of a group that is not a criminal organization according to the law.[28]

Some courts have interpreted this change as a decriminalization law[29]. Despite the fact that it was not a single decision, all the High Court of Cassation and Justice by Decision. 12/02 June 2014[30] stated that "the facts provided by art.323 of the previous Criminal Code and Art.8 of Law no. 39/2003, in the previous regulation to amendments by Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, can be found in the criminalization of art.367 of the Criminal Code, not being decriminalized."

Such discussions have not only theoretical but also a practical importance, given the consequences in the sphere of the fundamental rights involved in acts of the organized crime. Beyond the high limits of punishment of such crimes, it raises an issue of admissibility of special investigative means, involving a significant restriction of rights.

It is, therefore, preferable to adopt clear legislative solutions, even in the wording of the law defining the concepts and the introduction of a differentiation between organized groups constituted true criminal organizations and casual associations, often consisting of teenagers who have nothing in common with the real organized crime.

2.3. Treating superficially the peculiarities of the organized crime and the general application of the measures of preventions

As noted in the preceding paragraph, the use of ambiguous concepts and inconsistency of the regulation can lead to the adoption of some preventive measures involving a disproportionate restriction of the human rights.

If, at first, the organized crime represented a local threat, at the level of Member States,[31] focusing primarily on criminal offenses of violence against members in order to

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[27] Published in The Official Journal Nr. 50 from 29 January 2003.

[28] By art. 126 of Law 187/2012 was amended the Law 39/2003 in that the art. 8 was repealed. Article 8 provides that: Initiating or setting up or joining or supporting any form of a group, to commit crimes, which is not a criminal organization under this law, shall be punished, where appropriate, according to art. 167 or 323 of the Criminal Code.

[29] See decision 43/A from 5 March 2014 of ICCJ available on http://legeaz.net/spete-penal-iccj-2014/decizia-43-2014.

[30] Published in The Official Journal nr. 507 din 08/07/2014.

[31] See F.D. Căşuneanu, *Măsuri de combatere a grupului criminal organizat adoptate la nivelul Uniunii Europene,* in Dreptul, nr. 3/2012, pp. 196.

impose fear, after the enlargement of the European Union and the opening of the markets, they received a totally new role.

Thus, the criminal groups commit crimes against the financial interests of the states or the community, trying, in this way, an economical and political domination. Precisely because of these new features the remedies are required to be different. Often, both in literature and in the legal practice, it was considered to be defining elements of criminal organizations, the fact that they are composed of three or more persons acting in a coordinated way, for a certain period of time, having a well defined hierarchical structure and seek the profit.[32]

Perhaps in the past, these factors were sufficient to define the existence of an organized crime group, but nowadays, the real crime is defined in a completely different way. The above features can also be found within a specialized group to commit burglary. This is he real size of the organized crime phenomenon and can, nowadays, such acts justify the adoption by the Community of some prevention measures affecting the fundamental rights of all citizens?[33]

The answer is categorically NO. Firstly, the criminal organizations, although they may meet the conditions listed above are distinguished by their purpose. They have as their main objective to strengthen their influence they exert on the political level. In this way, they seek to grant an appearance of legality as they carry out operations by resorting to the well known technique of money laundering.

Dominating the political powers in a state, they get the economic power too, so, all the gains are the natural consequence of fulfilling the first objective. At the same time, the criminal group has an independent existence, different from its members, which gives them some stability and which makes them harder to destroy.[34]

Facing these new challenges, the need for security requires reliance on the complex means of action, namely the monitoring of the financial operations, ongoing monitoring of the suspects, the use of the undercover investigators in such organizations, the confiscation of the products, etc. All these shall lead to restrictions of the fundamental rights guaranteed in the Community.

Therefore, a clear delineation of these organized crime groups from other groups, which commit crimes, is needed, and, in this way, the application of the principle of proportionality has more chances of success.

The need for security has led not only to adopt special legislative solutions but also to create specialized bodies. For example, the Europol was created to ensure a better cooperation at the European level between the states, getting a better protection of people against the organized crime.[35] In this way it was allowed to the judicial bodies to conduct their control not only on the suspects but even on those they had contacted, even though the latter had no relation to the alleged facts.

Monitoring financial transactions through an obligation imposed to all the bodies involved in such transactions in accordance with Directive 60/2005[36] raises, again, a question of proportionality. Money laundering has been declared, since the Tampere

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[32] See A. Tiliciu, *Infracțiunea de constituire a unui grup infracțional organizat prevăzută de articolul 367 din noul Cod penal*, in Caiete de drept penal, nr.2/2014, pp. 73-84.

[33] I mean for example, at Community level the Directive 24/2006 / EC or at national level the law regarding cyber security, both declared contrary to the fundamental principles.

[34] E. Symeonidou-Kastanidou, *op.cit.*, pp. 102.

[35] See the Preamble and Art. 2.1 of the Convention on Europol.

[36] Published in The Official Journal of European Union L309/15 din 25 noiembrie 2005.

European Council[37], as the heart of organized crime and, that is why, drastic measures in all the Member States are required to be taken against such acts.

Confiscation of the proceeds of the criminal acts was considered a proportionate measure[38] by the ECHR.

The conclusion expressed above is that the new particularities of the criminal organizations must be found in nowadays society so that the prevention measures do not have a general application, but a particular one, only in the investigation of such acts. This means, concretely, the application of the principle of proportionality in this area.

3. The need for security can not impose any rights suppression

Article 15 of the European Convention on the Human Rights states that: *" In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."*

In other words, the system established under the Convention, in principle, is not against taking more stringent measures in some exceptional circumstances. Therefore, it would be essential to clarify whether, indeed, the current global context is equivalent to one of state of war or if the organized crime is a public emergency threatening the life of the nation. This is because only such situations can generate exceptional measures. Apart from these, there are certain rights that can not be derogated.

No doubt that neither the seriousness of some acts of the organized crime nor the possible consequences of these, are not sufficient to allow the restriction of any rights.

I refer in particular to the right to a fair trial guaranteed in art.6 of the Convention and the right not to be subjected to an inhuman and degrading treatment, guaranteed by art. 3 of the Convention. Of course, it refers more from the perspective of persons subject to criminal investigations whose rights are required to be respected equally, whether it is acts of the organized crime or other.

As Lecomte du Nouy Pierre said: "There is no other way to human solidarity than the respect for human dignity"[39]. Therefore, in case vs. Gafgen vs. Germany [40], it has been said that torture and inhuman treatment are prohibited even if the situation is at the limit. In other words, no derogation from art. 3 is allowed.

That negative obligation of the states referred to in art. 3 of the Convention acquires an absolute character and aims to prevent the use of techniques in the investigation of crimes that could constitute inhuman and degrading treatment. The Organized Crime can not be an exception from this rule.

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[37] The European Council from Tempere took place in 2001.

[38] Paragraph 27.30 of the ECHR judgment of 22 January 1994 in Case vs. Raimondo Italy, available on http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR_Serbia/ECtHR%20Judgements/English/RAIMONDO%20v%20ITALY%20-%20ECHR%20Judgment%20_English_.pdf.

[39] Citted by Philippe Richard, *Droits des l'homme. Droits des peuples*, Ed. Chronique sociale, 1995, pp. 15.

[40] See The ECHR judgment of 3 June 2010 in Case vs. Gafgen Available in Germany, available on http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99015#{%22itemid%22:[%22001-99015%22]}.

Therefore, in this article 3 of the Convention we do not deal with the proportionality assessment, since no derogation is possible, but it is important to clarify whether or not an act constitutes inhuman or degrading treatment. Even if in practice it was difficult to determine whether a particular action has been such a prohibited treatment, the Court still found a violation of art. 3 in that the State failed to ensure optimal procedural framework.[41] In other words, it failed to fulfill its positive obligations arising from the Convention.

In addition, the state must ensure the punishment of those resorting to such techniques criminalizing torture and to carry out effective official investigation that could lead to punishing those responsible.

At the same time, the right to a fair trial is meant to ensure that the persons accused of crimes have the real opportunity to defend themselves, thus respecting the presumption of innocence. In this respect he is entitled to be informed as soon as possible about the charges against him, he has the right to an attorney, the right to consult the case file and propose evidence etc.

Even the most serious allegations can not suppress these inherent rights of any accused person. This is because the system imposed by the Convention is intended to guarantee the rights it contains but also this protection must be effective. Therefore, never can any breaches of the procedural rules in the criminal proceedings be overlooked, meaning just they are some breaches of the procedural rules in the criminal proceedings through a simulated show centered on the accused.

However, some aspects can be identified that may cause practical problems regarding the respect of the right to a fair trial. I mean the fact that often, to investigate acts of the organized crime, it takes recourse to a series of special techniques such as undercover investigators, witnesses with protected identity using, etc. They, no doubt, generate some problems for the defense.

Their use does not mean a violation of the right to a fair trial where the entire procedure provides sufficient guarantees and a real possibility for the accused to prove the contrary to those presented in the context of such evidence. In many occasions, to determine concretely to this Court was considering a balancing of the interests of the accused with that of other people whose rights are being protected.[42] The trial will be fair if the right to defense can be exercised according to law and the evidence on which the accused does not have access corroborated with other evidence that puts no definite question mark.

Also the question of violation of the right to a fair trial was put when confiscating the products derived from illegal acts. This is because the condemned is required to prove that those goods are not the product of a criminal activity but they were acquired lawfully. The Court stated that the principle does not preclude such an approach, provided that the accused had an effective opportunity to bring evidence in their acquisition licit purposes in a public proceeding with the assistance of a lawyer, etc.[43]

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[41] ECHR judgment of 18 December 1996 in Case Aksoy v Turkey available on onhttp://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58003#{%22itemid%22:[%22001-58003%22]}.

[42] See ECHR judgment of 16 February 2000 in case of Jasper v. United Kingdom available on http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58495#{%22itemid%22:[%22001-58495%22]}

[43] See ECHR judgment of 23 September 2008 in case of Grayson and Barnham v.The United Kingdom, available at http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/

See that the need for security must not be taken to the extreme limits there are rights which can not be derogated, except of course for war. While the Court tried on its endless jurisprudence on the right to a fair trial to include multiple implications of such a concept, a number of inconsistencies can be found, as it was shown by many critics in literature.[44]

4. Conclusion

Even if we admit that the phenomenon of the organized crime has certain peculiarities and, thus, it requires special measures we still have to set certain limits within this area.

The need for security can not determine the acceptance of measures leading to the total suppression of the fundamental rights. Alternative means of combating the organized crime should be used with caution, in order not to affect both the criminals and the honest people.

It is, therefore, essential that these regulations include definitions of concepts and offenses in a clear way that leaves no room for ambiguity. The ambiguity of the laws is the first step towards using these facilities not to protect the individuals but for society subjugation, by the possibility for the state to interpret it according to their own interest.

The generalization of applied measures is not a solution and that is why the application of these measures should only be done in these types of crimes, so that innocent people not to be affected.

The main focus should be directed towards the protection of the fundamental rights and freedoms and not on developing more sophisticated means of prevention, investigation and punishment of such crimes. If this is the starting premise, there are chances that all these joint efforts at the international level lead towards success in fighting the organized crime.

In conclusion, just to achieve a balance between the individual rights and freedoms of the citizens and the need to prevent such serious and complex action, it is imperative to use the proportionality test not only with regard to the proposed solution but also linked to the whole mechanism leading to it.

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