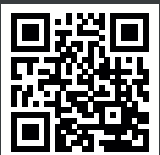




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VOLUME I**

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ON INTERDISCIPLINARY SCIENTIFIC RESEARCH**
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**Assoc. Prof. Dr. Jose R. Hernandez-Carrion
Dr. Mehmet Emin Kalgı**

5. INTERNATIONAL EUROPEAN CONFERENCE ON INTERDISCIPLINARY SCIENTIFIC RESEARCH

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FULL TEXTS BOOK VOLUME II

Edited by

**Assoc. Prof. Dr. Jose R. Hernandez-Carrion
Dr. Mehmet Emin KALGI**

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THE COUNCIL OF EUROPE AND THE INTERNATIONAL COOPERATION PREVENTING AND FIGHTING AGAINST INTERNATIONAL ORGANIZED CRIME

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ABSTRACT

Understanding the world and Humanity changes due the Globalization phenomenon allows to identify the special conditions created that promote the implementation and the dissemination of the International Organized Criminality, in short time, affecting the International Community in all dimensions. As one of the most serious threats to the Rule of Law, violating the national legal systems and the International Law, being especially dangerous to the states and human lives in a global context. The International, regional and (most of) national juridical and judicial systems recognize the International Organized Criminality as an emergent problem that needs to be in the top of the political agenda and of the action by the Institutions aiming to prevent and fight their evolution, their dangerous damages and consequences to all their target – human and institutional. Although all difficult but effective legal, political, economic, and social work in this fight, mainly by the United Nations in cooperation with International Organizations and States, the Council of Europe assumed their responsibility to protect their State Members, their citizens, and the rest of the world by inherence. There is an enormous political and legal work, with a straight position based on their main structure document, the European Convention on Human Rights, but with the specialized work teams, understood as need in each case. Consequently, the Council of Europe has a continuous production of legislation and management of procedures and activities, as well as International political and governance diplomatic relations in networks, in compliance with the International Law facing the challenge that context obliges permanently. Since 1959, with the Convention on Mutual Assistance in Criminal Matters, the strategic action promoted is the multidimensional International Cooperation between all “actors” in the International Community, preventing the violation of the International Law, generated conditions to apply the International Penal Law and developing policymaking articulated with the real contexts and needs. Within International Community, the Cooperation is the best key to join procedures to transcend the difficulties and constraints to achieve to the prevention and fight against the International Organized Criminality. This scientific research is being developed based on juridical, criminal, and

political methodology, mainly qualitative, but presenting statistic data to demonstrate the results discussed.

Keywords: International Organized Criminality; Council of Europe; International Cooperation; International Law; Strategies

INTRODUCTION

This research work was developed aiming to present and debate the emergent phenomenon affecting the world – States and Individuals – the *International Organized Crime*, which consequences and damages have evaluated in short time, with the most serious effects worldwide, obliging to effectively prevent and combat this complex crime.

Based on the most updated data, the analysis is developed in scientific methodology to achieve to demonstrate the effective realities around the world, the need of apply the legal instruments, the judicial mechanisms, and in particularly the legal (re)action of Europe, and a study case of Portugal position.

The most updated (published) world data, the more relevant International, European and Portuguese legal (Penal Law) instruments and mechanisms, were our principal research base to produce this scientific paper.

MATERIALS

In the world we live in, and in which 2017 “*the richest 1% of the world’s population account for 82% of global wealth*”, and in 2018 “*half the world’s population live on \$5.50 a day, struggle to meet basic needs*”, motivated mainly due the fact in 2018 “*over 60% of global workforce is in informal economy*” (The Global Illicit Economy, March 2021, pp. 12-13)¹, and in 2020 “*25–30% of corporate profit shifting into tax havens by USA multinationals*”, as well as in the same year, “*10% of the world’s GDP may be held in offshore financial assets*”, having as the only possible result estimated “*money laundering by criminals accounts for 2.7% of global GDP*”.

If we join to this context the fact that in 2019 there had been 25 military conflicts in Africa, and worldwide 54 military conflicts, as well as in 2017 it was calculated that the number of guns in civil “hands” were about 857 millions (The Global Illicit Economy, March 2021, pp. 12-13), we have here elements more than sufficient to promote the action and evolution of the crime, particularly the organized crime, at internal level of States, as at a global level.

In 2020 there were 79,5 millions of people that have been forced to move at a global scenery, as there were 281 millions of international migrants. If we complete with the fact that “*in 2019, 55,5% of world population live in cities*”, so in 2020 there was 1 billion of people living “*in slums or informal settlements*”

¹ *Global Initiative Against Transnational Organized Crime, The global illicit economy: Trajectories of transnational organized crime*, March 2021: <https://globalinitiative.net/analysis/global-organized-crime/> – consulted in 2022-02-10.

in cities” (The Global Illicit Economy, March 2021, pp. 12-13), we have here all need element to promote the evolution of the criminality.

According with the analysis of the The Global Illicit Economy (March 2021 pp. 60-61) o the “Human exploitation, 2000–2020” the data of this type of criminality allow us to understand that in 2014 the “*amount of online child sexual exploitation material identified globally it’s more than 1 million reports*”, having as conclusion that in 2019 “*almost 17 million Child sexual abuse material reports, accounting for nearly 70 million images and videos.*”

The same report informs that in 2015 “*it’s estimated that over 5 350 migrants died in 2015 globally, including 3 771 deaths crossing the Mediterranean Sea*” and that “*1 004 356 it’s the total sea arrivals to Europe – five times higher than the previous year*”, generating the “4.5 million, the number of Venezuelans who have left the country since 2015”. In 2019 it was estimated that “*70 countries have created border walls*”, between “*USA–Mexico: To cross the Sasabe Desert to Arizona, migrants pay about \$4 500 to the ‘coyote’ (smuggler) who is appointed by cartels*” and “*they pay a further \$700 in a ‘tax’ to the criminal groups*”. These data elements show us that there has been an increase of the human slavery. This report indicates that in 2016 there were “*40.3 million people are in modern slavery. 16 million are exploited in the private sector, including for domestic work, construction, or agriculture. 15 million in forced marriage. 4.8 million are victims of forced sexual exploitation and 4 million in forced labour imposed by state authorities*”.

The attempt to dismantle these slavery networks took in 2019 the “*authorities in the Balkans arrest 72 suspected traffickers and 167 migrant smugglers*”.

Regarding that report, there is an analysis of the “*Environmental crime markets, between 2000 and 2020*”, presenting, for instance, that in 2019 the “*illegal logging accounts for 15–30% of all global timber production, valued at between \$51 billion and \$152 billion per year*”, and for instance in 2016 “*\$15.1 billion it’s the value of exports of gold from African countries to UAE, weighing 446 tonnes. Much of the gold is assumed to be smuggled, not recorded in the exporting states, and that up to 87% of Colombia’s and 91% of Venezuela’s gold exports are illegally produced*”.

The analysis that is done about the “*Wildlife crimes, 2000–2020*” (The global illicit economy, March 2021, pp. 68-69), it’s possible to note that crimes against nature are higher. For example, it’s estimated that in 2019 “*8 tonnes of pangolin scales (from more than 14 000 animals) and over 1 000 elephant tusks are seized at a Hong Kong customs facility in January*” and “*30 metric tonnes of pangolin products are found in Borneo in February*”. Moreover, the “*12 tonnes: the volume of pangolin found in a Singapore seizure in April, equivalent to 36 000 slaughtered pangolins*”. In 2014, the criminality against wildlife used the internet to their activities and “*on online platforms, over 33 000 endangered animals and wildlife products are offered for sale in 2014 over a period of six weeks in 16 countries on 280 online marketplaces; total value: \$10.7 million.*” This criminal activity was responsible in 2014 of “*9 000%: increase in rate of rhino poaching from 2007 to 2014. Poaching peaked in 2014, and more than 1 000 rhinos continue to be poached every year*”, so, it’s foreseeable that “*\$100 000: estimated price for around a kilogram of rhino horn on the black market – a higher value by weight than gold or platinum*”.

That report regarding the analysis presented about the “*Global drug market evolutions, 2000–2020*”, preview that in 2018 “*1 723 tonnes it’s the global cocaine production*”, and that the “*number of deaths from opioid overdose increase by 120% between 2010 and 2018*”. Here it’s stated that “*7 610 tonnes*

it's the estimated global opium production in 2019", being *"China, a top producer of fentanyl, bans the production and sale of fentanyl and many of its variants"* and in *"September 2019, the UK records its largest-ever heroin seizure (1.3 tonnes)"* (The Global Illicit Economy, March 2021, pp. 76-77).

Finally, concerning the *"illicit goods, 2000–2020"*, this report highlights that, for instance, in 2013 there was *"\$1 billion: the estimated annual value of illegal trafficking of small arms and light weapons"* and there was *"\$461 billion: the value of global exports of counterfeit and pirated goods"*. In the same line, concerning 2017, the International Chamber of Commerce's estimated that *"\$1.77 trillion, the value of the annual global counterfeit goods market"*, being *"over 456 billion cigarettes a year are sold illegally, resulting in a loss of \$40 billion each year in taxes globally"*. Regarding the pharmacy industry, in the *"Operation Pangea XIII"*, in 2020, the *"police, customs and health regulatory authorities from 90 countries seize 4.4 million units of illicit pharmaceuticals, and 37 000 unauthorized and counterfeit medical devices valued at \$14 million."* (The Global Illicit Economy, March 2021, pp. 90-91).

METHODS

This research was developed applying a qualitative methodology, analyzing strategically statistic data, as recent as possible, to achieve the results duly reasoned in detailed and updated information. So, the methods of analyzing the data and the information on the books and online allow us to research the study subject, avoiding study manipulated information and, by inference, produce this scientific paper.

Regarding the main study subject of the research and this paper - The Council of Europe and the International Cooperation preventing and fighting against International Organized Crime – we studied the legal and the political context, focusing on the International Law and the Council of Europe (re)action in a worldwide perspective.

RESULTS

The data we present about these worldwide criminal activities motivate us to try to understand at a world level, how is considered the level of perception of security by people face of the criminality they perceive and considering the performance of internal and international security forces and the performance of justice both at the internal level of the States and at the international level.

These data about the security sense are presented, within other instruments, by *"Global Organized Crime Index – 2021"*²

The first step to analyze is concerning the *"Criminal market scores"*, where it's clear through *"Figures 1.1. and 1.2."*, the position assumed by 10 States with higher criminal activity as well as which are the areas that characterize it.

² Global Organized Crime Index – 2021 - The consultation can be done on the website - <https://globalinitiative.net/analysis/ocindex-2021/> – consulted in 2022-02-10

Figure 1.1. Criminal market scores

COUNTRY	CRIMINAL MARKETS (AVERAGE)	HUMAN TRAFFICKING	HUMAN SMUGGLING	ARMS TRAFFICKING	FLORA CRIMES	FAUNA CRIMES
1. MEXICO	8.00	7.5	8.5	8.0	7.5	7.0
2. COLOMBIA	7.20	7.5	7.0	8.0	6.0	7.0
3. NIGERIA	7.05	7.5	6.0	8.0	6.0	6.5
3. MYANMAR	7.05	6.5	7.5	8.0	7.0	8.0
5. IRAN	6.95	7.5	8.0	8.0	4.5	4.0
6. SAUDI ARABIA	6.90	8.5	7.5	8.0	5.0	7.0
6. AFGHANISTAN	6.90	8.5	8.0	8.5	6.0	4.0
8. UNITED ARAB EMIRATES	6.75	8.5	6.5	6.5	5.5	7.5
9. KENYA	6.65	7.5	7.0	7.5	6.0	7.0
10. TANZANIA	6.55	6.5	6.5	5.5	7.5	8.0

Reference: "Global Organized Crime Index – 2021 – pp. 154"

Figure 1.2. Criminal market scores

COUNTRY	CRIMINAL MARKETS (AVERAGE)	NON-RENEWABLE RESOURCE CRIMES	HEROIN TRADE	COCAINE TRADE	CANNABIS TRADE	SYNTHETIC DRUG TRADE
1. MEXICO	8.00	7.5	8.0	9.0	8.0	9.0
2. COLOMBIA	7.20	9.0	5.0	9.5	8.0	5.0
3. NIGERIA	7.05	8.0	6.0	6.5	8.0	8.0
3. MYANMAR	7.05	6.5	9.5	3.5	4.5	9.5
5. IRAN	6.95	8.5	9.0	5.5	6.0	8.5
6. SAUDI ARABIA	6.90	7.0	6.5	5.5	6.5	7.5
6. AFGHANISTAN	6.90	8.0	9.5	1.0	7.0	8.5
8. UNITED ARAB EMIRATES	6.75	6.0	7.0	6.0	6.5	7.5
9. KENYA	6.65	7.0	7.5	6.0	6.5	4.5
10. TANZANIA	6.55	6.5	7.5	5.0	7.0	5.5

Reference: "Global Organized Crime Index – 2021 – pp. 155"

The second aspect is related with the type of crime, and this analysis shows us how it organizes itself to practice its activity, which stands out from "Figure 1.2." which shows us the reality of the 10 States with the worst ranking in this aspect.

Figure 2. Criminal actor scores

COUNTRY	CRIMINAL ACTORS (AVERAGE)	MAFIA-STYLE GROUPS	CRIMINAL NETWORKS	STATE-EMBEDDED ACTORS	FOREIGN ACTORS
1. CONGO, DEM. REP.	9.00	9.0	9.0	9.0	9.0
2. CENTRAL AFRICAN REPUBLIC	8.38	9.0	8.0	8.5	8.0
3. HONDURAS	8.25	8.5	8.0	8.5	8.0
4. COLOMBIA	8.13	9.5	9.0	7.0	7.0
4. MYANMAR	8.13	9.0	7.5	8.5	7.5
6. IRAQ	7.75	6.5	7.5	8.0	9.0
7. SYRIA	7.63	4.5	9.0	10.0	7.0
7. LEBANON	7.63	6.0	7.0	9.5	8.0
7. VENEZUELA	7.63	9.5	5.0	9.0	7.0
7. JAMAICA	7.63	8.0	7.5	8.0	7.0
11. PARAGUAY	7.50	6.0	7.5	8.0	8.5
12. TURKEY	7.38	8.0	7.5	9.0	5.0
12. PHILIPPINES	7.38	8.0	6.0	8.0	7.5
12. SUDAN	7.38	6.5	7.5	8.0	7.5
12. SOUTH SUDAN	7.38	4.5	8.0	9.0	8.0
16. NIGERIA	7.25	5.5	9.0	7.5	7.0
16. IRAN	7.25	7.0	7.5	9.5	5.0
16. AFGHANISTAN	7.25	7.5	8.5	9.0	4.0
16. KENYA	7.25	7.0	7.5	8.0	6.5
16. SOUTH AFRICA	7.25	7.0	7.0	7.5	7.5

Reference: "Global Organized Crime Index – 2021 – pp. 164"

Finally, we present the global position of the 20 countries with the best ranking in the world on their "Resilience" to criminal activity., which stands out from "Figure 3."

Figure 3. Resilience scores

COUNTRY	RESILIENCE (AVERAGE)	POLITICAL LEADERSHIP AND GOVERNANCE	GOVERNMENT TRANSPARENCY AND ACCOUNTABILITY	INTERNATIONAL COOPERATION	NATIONAL POLICIES AND LAWS	JUDICIAL SYSTEM AND DETENTION	LAW ENFORCEMENT
1. FINLAND	8.42	9.0	8.5	9.0	8.0	8.0	8.0
1. LIECHTENSTEIN	8.42	9.0	8.0	7.5	9.0	9.0	8.0
3. NEW ZEALAND	8.38	8.5	8.5	8.5	8.5	8.0	8.5
4. DENMARK	8.21	9.0	9.0	8.5	9.0	7.5	8.0
5. ICELAND	8.04	7.0	7.5	8.5	8.5	8.5	8.5
6. AUSTRALIA	7.96	8.0	8.5	9.0	8.0	8.0	8.0
7. NORWAY	7.92	8.0	8.5	9.0	8.5	8.0	8.5
8. UNITED KINGDOM	7.88	8.0	7.5	8.0	8.5	8.5	7.5
9. ESTONIA	7.83	8.0	8.0	8.5	8.0	8.0	7.0
10. ANDORRA	7.75	7.0	7.0	8.0	8.0	8.0	8.0
10. URUGUAY	7.75	8.0	9.0	9.0	7.0	7.0	8.0
12. SINGAPORE	7.71	7.5	7.5	9.0	8.5	9.0	9.0
13. GERMANY	7.67	7.0	7.5	8.0	8.0	7.5	7.5
14. KOREA, REP.	7.54	8.0	7.0	8.0	8.0	8.5	8.0
15. LUXEMBOURG	7.50	8.0	6.5	9.0	7.0	7.5	7.0
16. SWEDEN	7.46	7.0	9.0	8.5	7.0	7.0	6.5
16. JAPAN	7.46	6.0	7.5	9.0	7.5	8.0	7.5
18. NETHERLANDS	7.42	7.5	8.0	8.0	7.5	7.5	7.5
18. AUSTRIA	7.42	7.0	6.5	7.0	8.0	8.0	8.5
18. LATVIA	7.42	7.5	6.0	8.5	8.0	7.5	7.5

Reference: "Global Organized Crime Index – 2021 – pp. 170"

It is in this way and within the resilience that is made worldwide, in Europe and in Portugal, that we will appreciate these facts that we have described above.

DISCUSSION

This research and this paper are developed mainly with the data that allow to study the that criminal activity, whether internally in each State or within the scope of action at a regional or global level, is very often perpetrated by Criminal Organizations, meaning, by groups of people who organize themselves structured way with the ultimate purpose of the practice of criminal activity.

The actual question, that we bring into discussion, concerns the analysis that the domestic criminal law, in Portugal, makes about the conceptualization of "Criminal Organization", so that we can then proceed to make the same analysis on the perspective of international criminal law.

1. THE INTERNATIONAL CONTEXT: The Council of Europe, the International Cooperation preventing and the International Organized Crime

Considering the need to conceptualize the International Organized Crime, it's important to understand that the concept is not objective and divergent to the scientific community, to the juridical and judicial "actors". Within the International Law, especially in one of their structural sectors, the International Criminal Law is the main element and need to apply the Law by the Justice against the International

Organized Crime. However, due the differences and the incompatible laws and procedures, there are difficulties in articulate the International Criminal Law. Another elementary actor is the International Political and the Governments of the states around the world. Mainly with the Globalization in the last hundred years, the International Crime is an undoubtable reality that has had an evolution so enormous around the world, with the worst consequences and damages to human beings, institutions, States and to the international community. This serious and hard context have obliged the States security authorities and the International Security, mainly developed, and implemented by the International Organizations, to be present all the time in the most different realities and contexts of the world, as this crime is everywhere threatened everyone. The most severe difficulties and the needs to face, to prevent and to fight the International Organized crime has promote the International Cooperation as political, policing, criminal investigation, and the law enforcement as the application of the International Crime Law. The Council of Europe is the International Organization that had one of the most important roles of the promotion of this concept as a position by the different “actors” within the International Community regarding this crime and all the inherent complexity.

There are different categories of the criminal behavior: organizational; corporate or institutional, political and the named “white-collar-crime”, generating governmental positions nonofficial, that are not the more adapted, promoting a dangerous obstruction in the Justice. (Albanese, 2015, p. 20)

In the nowadays globalized world we live, where the communicational global networks are the easy to accede, predominantly secret and impenetrable, including by the policy authorities, it’s important to understand that “the world internationalization and the borders open have created new opportunities to the criminals in sectors that generate higher profits, as those explored by the organized crime”. The States have faced different blocks to the emergent official reply to this phenomenon, particularly in last decade, being imperious the adaptation to the permanent changes of the international market. So, the mechanisms and the instruments used to implement this illegal activity is based on the manipulation of the juridical, judicial, and political institutions, blocking the efficient reaction in due time. (Picca, 2021, pp. 70-71)

So, the “*organized criminality is, in juridical plan –juridical-criminal – a diffuse and confusing concept and mirrors an unlimited persecutory global dynamic in today's society (...)*” Valente, 2019, p. 12) By other side, this crime has been treated by Media in a alarm way, generating negative and dangerous reactions within the society, who recognize the fear and incertitude. Consequently, the Public Opinion has transcript the reactive behaviors, in some situations with violence, discrimination, xenophobia, or by the other side, the inhibition of the global effective action. There is an inherent e imminent danger and constraints to the political, governmental, policies action, as well as the law enforcement and the judicial intervention.

In the prevention and the fight against the International Organized Crime, we consider there is an undoubtable strategy – the articulation and cooperation – between States and International Organizations aiming the protection of the International Security. Meaning there is the need of a collaborative and active role, accomplishing the common objectives. Considering the International Responsibility, all are obliged to participate and promote the application of the International Law as the more important instrument within the legal context and prevent the damages to the international society and the States citizens.

In this research and scientific production, we consider important to do the distinction of *criminal associations* and *criminal gangs*. Regarding the legal and political perspective, the first distinguish criterium is based on the *illegality* and the *culpability* having in his origin the criminal policy, being asymmetric and multidimensional. Due the “*fact – they generate the damage of values[es] subsumable to norm[s], but the facts, values and, consequently, norms reflect a serious material difference.*” (Valente, 2019, p. 12) The “*crime is today largely transnational due to the increasing globalization of the planet, which does not exclude regional variations. (...) it is crucial to keep in mind that “it witnesses social change” and “that it intervenes in the evolution of criminality”*” (Picca, 2021, p. 33)

If “*all penal codes have the crime of criminal association*” (Valente, 2019, p. 18), the Organized Crime is “*recognized as one of the main threats to the Rule of Law*”, with a framework that is determined by its characteristic of association or as a criminal network, contemplating an internal hierarchical organization and always acting with the objective of promoting terror and violence. (Nunes, 2021, pp. 27-30). And, although all controverses that the definition presents, scientists, and researchers, in particular the legalists and criminologists, state the challenge the world and humanity face as “*you cannot fight what you don't know and, in our rational knowledge, you don't know what you don't define.*” (Zúñiga, 2009, p. 28)

Therefore, in addition to determining the need for intervention, in due time, using the appropriate legal instruments for each case, it is essential that more than the concept, the practice of this permanent fight against Organized Crime acts a conscious action in favor of promoting and the effective protection of Human Rights, on a universal level, as well as the Fundamental Rights of each State.

1.1. INTERNATIONAL ORGANIZED CRIME – Activities

From the unknown and/or unforeseeable dangerous, motivated by the technologic and scientific evolution, in same line of the strategies development, we consider it's relevant identify the more significant activities of the International Organized Crime. In his global dimension, their activities are implemented individually and/or in group, supported by international illegal networks, promoting illegal acts in multilevel of the Law and of the Justice.

So, these activities are diverse, as: Extortion, Smuggling, Piracy, Traffic – Human, Drugs, Influences; of weapons, of wildlife; of natural resources; of money; among others – and yet, the very complex and pertinent Cybercrime. Regardless of their nature and form, all the actions of Organized International Crime move large amounts and remittances of Money, mostly immeasurable, and affecting in a particular and serious way the economies of States and the International Economy, generating illicit enrichment, an underworld of impoverishment and, still, in the most diverse ways, the exploitation of millions of human beings

1.2. INTERNATIONAL ORGANIZED CRIME: United Nations and the Council of Europe International Legal Instruments

“The Organized crime does not exhaust criminal action in a space limited to the State. Its tentacles spread across several states connected by land or sea. The investigation of organized crime, notwithstanding the various conventions on judicial cooperation in criminal matters and the principle of

universality of criminal law in certain matters.” (Valente, 2009, p. 179) Therefore, “the legal regime of the State's international responsibility for internationally wrongful factors is a classic but complex issue of international law” as “a system of guarantee and effectiveness”. (Tavares, 2021, p. 632-636)

Although all international legal instruments that have been designed, approved, and ratified to prevent and fight against International Organized Crime, we can emphasize the *United Nations Convention against Transnational Organized Crime* (2000) and their three Protocols (United Nations)³ that is the main important legal instrument in a universal level to prevent and to combat this Crime. The UN State Members who ratified this document are more prepared to assume this mission and reply to this serious challenge and prevent the most serious damages.

Regarding the *European Court of Human Rights* (ECHR) created in 1959 by the Council of Europe has an international dimension, has the competence to rule on individual complaints, and complaints from States, alleging violations of civil and political rights enshrined in the *European Convention on Human Rights*.⁴ As Professor Manuel da Costa Andrade state: “*the pronouncements of the European Court of Human Rights (ECtHR), signaling the violation of Human Rights and reaffirming their validity and validity, with the well-known shock waves on the institutions and practices of States, (...) provoked by the emergence of a new paradigm of inter-constitutionality or multilevel protection (...) has precisely here one of its pillars – the ECHR (...) which has profoundly transformed the lives of peoples and individuals. (...) invariably and unequivocally for the better.*” (Andrade in Albuquerque, 2019, p. VII)

1.3. INTERNATIONAL ORGANIZED CRIME: Jurisprudence of the Council of Europe

The European Court of Human Rights has been a fundamental *actor* in the international scenery of the applying the justice combating the International Organized Crime through their jurisprudence.

We understand it is very important to present objective examples of two Court's case-law to illustrate the relevance within the main subject of this research and scientific production. There are several and important Recommendations of the Council of Europe, as the Rec. 2005, concerning the definition of the Justice collaborator, criminally accused, or condemned, due being part of a criminal association or organization. The testimony is very important to have information about those associations or organizations, promoting an international cooperation with authorities of different States, preventing the International Organized Crime, particularly the serious consequences and damages that would be done

³ The *United Nations Convention against Transnational Organized Crime* was signed by the UN General Assembly on 15 November 2000 and entered into force on 29 September 2003. The Convention is complemented by Three Protocols that address specific areas of crime organized: the Protocol on the Prevention, Suppression and Punishment of Trafficking in Persons, Especially Women and Children; the Protocol on Combating Trafficking of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. It is noted that countries must ratify the Convention before acceding to any of the protocols - UNODOC <https://www.unodc.org/lpo-brazil/pt/crime/marco-legal.html>. Consulted in 12 February 2022.

⁴ The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights, was adopted in Rome on November 4, 1950, and in legal order on September 3, 1953. Drafted after World War II, based on the Universal Declaration of Human Rights (1948), came to innovate with its version of protection of Fundamental Rights in Europe and, also, as a mechanism to control their respect by the States Parties of the Council of Europe, and with the European Court of Human Rights as a system for the protection of such rights.

to individuals or institutions. This is one objective of the Council of Europe, but specially a particular action included in the European Court of Human Rights Jurisprudence. (Conceição *in* Albuquerque, 2019, p. 1093)

The Case of *Fuchsmann v. Germany* – Application nº 71233/13 – Judgement 19-01-2018: The case concerned the publication of a newspaper article on the website of *The New York Times*. In the article the applicant had been mentioned by name and, based on reports by the US Federal Bureau of Investigation (hereinafter “the FBI”) and European law-enforcement agencies, the applicant’s alleged ties to Russian organized crime had been publicized. The applicant’s attempt to obtain an injunction order before the domestic courts had been unsuccessful. The Conclusion was: “In the light of all the above-mentioned considerations, the Court considers that the Court of Appeal, in balancing the right to respect for private life with the right to freedom of expression, considered and applied the criteria set out in the Court’s case-law. The Court reiterates that, where a balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts. Such strong reasons are lacking in the present case. The Court of Appeal struck a reasonable balance between the competing rights and acted within the margin of appreciation afforded to it. There has accordingly been no violation of Article 8 of the Convention. For these reasons, the court, unanimously, Declares the application admissible; Holds that there has been no violation of Article 8 of the Convention.”⁵

These are simple examples of the European Court of Human Rights Jurisprudence, being an important legal instrument, developing mechanisms to identify, judge and punish the law breakers, so important in nowadays context of needs to prevent and combat the International Organized Crime

2. THE CONCEPTUALIZATION OF CRIMINAL ORGANIZATIONS IN PORTUGAL

The Article 299º of the Portuguese Penal Code provides specifically the criminal offense intended to punish those who promote or found criminal organizations, those who are part of this type of criminal organizations, or support them, as well as those who lead or direct them.

The first question in this context is about the birth of this type of criminal offense in Portuguese Criminal Law.

According to *Figueiredo Dias* in his *Coimbra Penal Code commentary – Vol. II, p. 1155*⁶, the concept penalization of this legal type of crime appears for the first time in the Napoleonic Penal Code as a “crime of criminal association”, and from there it passed to the Portuguese Penal Code of the year 1852, through the insertion of Article 263º. crime of “association of evildoers”.

⁵ *Case Law HDOC* in <https://hudoc.echr.coe.int/eng?i=001-177697>. Consulted in 12 february 2022.

⁶ Dias, J. (1999). *Comentário Conimbricense do Código Penal, Parte Especial. Tomo II*. Coimbra Editora. Portugal. pp. 1155-1174.

Marques, G. & Martins, L. (2006). *Direito da Informática (2.ª Refundida)*. Coimbra. Almedina Ed. Portugal. p. 6.

Based on the comments made to the Penal Code of 1852 by *Beleza dos Santos in RLJ - Revista de Legislação e Jurisprudência – 70º, pp. 97 and following*⁷, based on this legal type of crime, intending to react against groups criminologically well-determined, at that time, it was known for their acting way, in the crime field as “social gangsterism”, that had its origin in the groups called in France as “Chauffeurs”, who were integrated by the called malefactors, vagabonds and beggars.

Aiming to integrate this unlawful criminal type it was required that the association was formed by the purpose of attacking people, or their personal properties, and, their creation as organized entity would express by convention or any other facts, mainly those that identify their own collective will according to the autonomous organization of each person who are those members.

Following the emergence in the light of the day of the Penal Code of 1886, this aim type of unlawful appears in Article 263º as an association whose Organization or existence is visible by the convention or any other facts that had been formed to commit crimes, now covering the criminal legislation an express reference to the increased danger that these criminal associations brought to the legal interests that were criminally important to protect and that resulted from this organized crime.

So, in the nowadays context of the Penal Code, under the heading of “Criminal Association”, Article 299.º that covers the Groups, Organizations and Criminal Associations as a specific type of crime. Since the Penal Code of 2007 Reform, this legal type of crime is provided by Article 299º, establishing the following:

1 - Whoever promotes or founds a group, organization or association whose purpose or activity is aimed at the practice of one or more crimes is punished with imprisonment from one to five years;

2 - The same penalty applies to anyone who is part of such groups, organizations or associations or whoever supports them, namely by providing weapons, ammunition, instruments of crime, guarding or places for meetings, or any assistance for the recruitment of new elements;

3 - Whoever heads or directs the groups, organizations or associations referred to in the previous numbers is punished with imprisonment from two to eight years;

4 – The aforementioned penalties may be specially mitigated, or the punishment may not take place if the agent prevents or makes a serious effort to prevent the continuation of groups, organizations or associations, or communicates their existence to the authority so that it can prevent the commission of crimes;

*5 - For the purposes of this Article, a group, organization, or association, is considered to exist when a group of at least three people is involved, acting in concert over a certain period of time.*⁸

The recognizing of this autonomous criminal type of offense is clear that intends to criminalize both - those who promote, or those who found the organization with the purpose of committing one or more crimes who are part of these organizations, who support them, and in an aggravated way, who leads or directs them.

⁷ Santos, B. (1937) in *RLJ - Revista de Legislação e Jurisprudência: 70º - n.º 2593*. Coimbra Ed. Portugal. pp. 97 and following.

⁸ *Código Penal*: Consulted in website of Procuradoria-Geral Distrital de Lisboa do Ministério Público https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=109A0299&nid=109&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo

It's important to state that the current version of this legal type of crime provides in its number 5 that to be considered a criminal organization, it must be composed of a minimum of three people. Thus, the national legislator took sides in this dispute about the minimum number of people to be faced with this type of crime that the organization comprises a minimum of *three people*. Before this legal classification, it was discussed in the doctrine whether just two people would not be enough, since it was understood that the right number of people did not matter, but their concerted action during a certain period, as, for example, assumed *Figueiredo Dias e Costa Andrade in CJ – Coletânea de Jurisprudência, X, pp. 4-11*⁹.

So, now we'll present an analysis of this type of crime, from the Objective and Subjective perspectives of the unlawful:

2.1. The protected legal interest

The legal interest that the criminal legislator protects here is the public peace. It's important to have in mind that the criminal legislator introduced this legal type of crime in a chapter of the Penal Code under the heading "Crimes against public order and tranquility", and within this, in a section called "Crimes against public peace".

The lawmaker recognized that the criminal organizations immediately pay attention to their existence with public peace in view of their special danger, considering their objective of existence, which is nothing more than the commission of crimes, thus jeopardizing public safety and tranquility, only because of their existence as criminal organizations and, therefore, through this legal type of crime, the criminal legislator wanted an anticipation, as soon as there was an intervention, prior to the practice of any crime committed by it.

So, it's the authentic legal type of abstract danger crime, as defended by *Victor de Sá Pereira & Alexandre Lafayette in Código Penal – Anotado e comentado – 2.ª Edição – pp. 830-835*.¹⁰ We cannot forget the very high danger of a criminal organization represents to the society where his criminal activity may be committed, as explained by *Figueiredo Dias, Jorge – 1999 – Comentário Conimbricense do Código Penal – Parte Especial – Tomo II*.¹¹

2.2. The illegal objective type

The modality of action of this objective type of criminal unlawful includes the existence of an organization that assumes that, at least there is the will of two of all participants of the group, that represents a single will, totally autonomous, different, and superior to the wills and interests of each of the elements that compose it. So, by this reality, the criminal organization faces an autonomous center of factual imputation of the actions that the organization pursues in the name and in the interest of the

⁹ Dias, F. & Andrade, C. (1985). *CJ – Coletânea de Jurisprudência*. Ano X. Tomo 4. Coimbra Editora. Portugal. pp. 11 and following.

¹⁰ Pereira, V. & Lafayette, A. (2014) *Código Penal – Anotado e comentado*. 2.ª Edição. Quid Juris. Portugal. pp. 830-835.

¹¹ Dias, J. (1999). *Comentário Conimbricense do Código Penal – Parte Especial*. Tomo II. Coimbra Editora. Portugal, pp. 1155-1174.

whole, in fact, as it defends *Victor de Sá Pereira & Alexandre Lafayette in Código Penal – Anotado e comentado – 2.ª Edição – pp. 830-835*¹².

Regarding the question of the minimum number of people necessary for it to be considered an organization, the Portuguese legislator finally decided on the different opinions that the doctrine discussed in whether two people were enough, or if this number should be at least three people. So, it was added the n. 5 to that Article 299°, through the Law n. 59/2007, 4th September¹³. Finally, it was determined that there is criminal organization if the group would have, at least, three persons, meaning the legislator followed the ideological line of the jurisprudence and doctrine that is dominating in Germany. With this same change the legislator carried and established that it is a criminal organization if it is acting “acting in concert for a certain period of time”, that is, the organization needs a certain duration so that it becomes an autonomous entity of wills, in relation to each of the people who integrate it, showing in this way that the autonomy of the group overlaps with a simple punctual agreement of wills, that is, there is a need for a certain stability and continuity of the criminal group, as it, as defends *Victor de Sá Pereira & Alexandre Lafayette in Código Penal – Anotado e comentado – 2.ª Edição – pp. 830-835*.¹⁴

Concerning the criminal scope of the group, this is part of the objective type of the need illicit for the criminal organization to be subsumed under Article 299 – the Organization must have the “finality or activity to be dressed to the practice to one or more crimes” being in his context considered the unlawful criminal, as his scope is criminal.

We call the special attention about the fact that the organization may not even commit any specific crime, the criminal law being sufficient that its “purpose or activity is directed to the practice” of crime or crimes, because what is at stake here is the special danger that the existence of a criminal organization constitutes, that is, the criminal law is sufficient, in an abstract way, with its existence as a danger to society.

As for the modalities of the criminal organization action, Article 299 integrates and treats separately the activity of each agent within it. It starts by creating a punitive type for those who develop or found the organization, that is, for those who carry out activities that can promote the foundation of the organization, that is, those who actively participate in its foundation, or in the deviation of an organization towards this specific type of objectives, the “purpose or activity is directed towards the commission of one or more crimes”.

Regarding the figure of a member of the organization, in which number 2 of that Article 299 specifically establishes its punishment, it is necessary to consider that a member is the individual who is subordinate to the specific organization and who carries out his activity in compliance with the will of the same, whether that activity is principal or ancillary. It is therefore essential to be considered a member of the organization that he/she is subordinate to the will and purpose of the organization, being therefore

¹² Pereira, V. & Lafayette, A. (2014). *Código Penal – Anotado e Comentado*. 2.ª Edição. Quid Juris Editora. pp. 830-835.

¹³ The consultation of the *Law n° 59/2007*, September 4th - website Procuradoria-Geral Distrital de Lisboa do Ministério Público in the link: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=930&tabela=leis&ficha=1&pagina=1&so_miolo= – consulted in 2022-02-10.

¹⁴ Pereira, V. & Lafayette, A. (2014). *Código Penal – Anotado e Comentado*. 2.ª Edição. Quid Juris Editora. pp. 830-835.

recognized as an integral part of it, that is, for him/her to be an agent of this crime as a member of the organization, it is sufficient that he/she knows and accept the criminal purpose of the organization and perform general or specific tasks there, always in favor of the organization and regardless of these tasks performed.

Concerning the person *who heads or directs* the organization, the Number 3 provides for a more serious penal framework than that provided for all other members of the criminal organization, which can range from two to eight years in prison. This serious criminal framework is related to the fact that the one who heads or directs the organization is a member with special qualifications among the rest, qualities that allow him to take the fate of the criminal organization in his own hands, and for this special capacity as leader of the group, the legislator recognizes him as being particularly dangerous compared to the other members, creating a more serious penal framework.

2.3. The illegal subjective type

The crime predicted here is intentional (Victor de Sá Pereira & Alexandre Lafayette, 2014), presupposes that the agent has the full perception of all the objective elements of the criminal offense, as we already mentioned, meaning that, this Organization has the objective of commit crimes. Regarding the volitional element, all forms of intent are incorporated here, namely eventual malice.

2.4. Contest

Another aspect that is important to highlight is the fact that the criminal offense provided for in Article 299 is an autonomous offense, that is, it always applies when the illegal acts provided for therein and analyzed above occur. As *Cavaleiro de Ferreira* teaches, in *Lições de Direito Penal I*, 4.^a Ed, pp. 502 and following¹⁵, this means that there is always an effective concurrence of criminal association cumulatively with the crimes that the organization may commit and that are provided for in the Criminal Law.

2.5. Law Enforcement Over Time

The criminal offense of “Criminal Organization”, that we have been analyzing, is a permanent crime, which means that the crime only ends when the Organization ends, and therefore, taking into account the provisions of subparagraph a) of number 2 of the Article 119 of the Penal Code, the beginning of the statute of limitations, that is, the impossibility of having a criminal procedure, only happens when the criminal organization ceases the consummation of its criminal activity, meaning this fact that if there is a succession of laws in time, the new law applies for as long as the criminal organization continues to function. (*Figueiredo Dias, Jorge – 1999*)¹⁶.

¹⁵ Ferreira, M. (1992) in *Lições de Direito Penal I*. 4. Ed., Verbo. pp 502 and following.

¹⁶ Dias, J. (1999). *Comentário Conimbricense do Código Penal – Parte Especial*. Tomo II. Coimbra Editora. pp. 1155-1174.

2.6. Law Enforcement in Space

This criminal offense applies to all specific situations that may occur in the national territory, which means that, although a criminal organization does not have its "headquarters" in Portugal, it means that if it comes at any time to develop its criminal activity of a "criminal organization" in Portuguese territory, taking into account the provisions of Article 7 of the Penal Code, is included in this Article 299 (Figueiredo Dias, Jorge – 1999)¹⁷.

Having made this analysis of Article 299 of the Portuguese Penal Code and the preview of the crime of "criminal association", which includes the criminal offense of the criminal organization, we will now analyze the same issue from an international perspective.

CONCLUSIONS

Regarding the concentration of the worldwide richness, of groups of people, or in States with higher capacity of wealth than others, having in consideration the higher percentage of world population that live with serious low-income, in underdeveloped States, as well in conflict areas in the World, it's easy to understand that it's created the best context of the culture for criminality.

This fact it's highlighted by the international data, especially the *Global Initiative Against Transnational Organized Crime*, where are described the main activities of the International Organized Crime. Effectively, through the *Global Organized Crime Index* we note that at a global level the States where are, more or less, pressure by this specific crime. The same report exhibit which are the means that States use to resist and control the Organized Crime, as well as the means to implement their resilience to this Crime.

Finally, in this research work, we studied and present how Portugal reacted to the International Organized Crime, by the penal law, criminalizing the Criminal Organizations, as well as how Europe are reacting to this phenomenon.

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