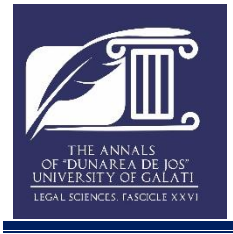


The Establishment of Organized Criminal Group

Ion RUSU[1]

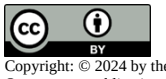
Abstract: When we analyze the process of globalization - at least in the current phase - the shortcomings consist in the fact that, in addition to cutting-edge technology with its benefits, globalization carries with it a certain indifference to the stage of development of the areas and countries where it enters, deepening the gaps. At the same time, it promotes, with or without permission, especially through the media, crime, violence, promiscuity, and the exacerbation of sex. In this way, the values of democracy and, above all, the formation of human behaviors are affected. Information networks, ultra-sophisticated communication channels, the Internet, with its wide availability and audience, ease of use and cost efficiency, induce, beyond the undeniable technical performances, a mediocre mass culture, a prefabricated, standardized, simulated and narcotic culture, expressed, mainly imagistic, far from artistic thrill, from human sensibility, in general, and from the system of traditional values. Methods: communication, education, cultivating respect for social values. Result: carrying out effective activities to prevent and eradicate delinquent phenomena requires, firstly, thorough knowledge of the causes that generated them, the research of which is also the basic objective of this article.

Keywords: globalization; development; human behaviors; delinquent phenomena; values

1. Introduction

The offense with the marginal title "*The establishment of an organized criminal group*" consists of the act of a person who initiates alone or together with other persons an organized criminal group, joins, or supports such a group, in any form.

[1] Professor, PhD, Danubius University of Galati, Romania, Address: 3 Galati Blvd., Romania, E-mail: av.ionrusu@yahoo.com.



The act is more serious, being punished more severely, when the crime falling within the scope of the organized criminal group is sanctioned by the law with the penalty of life imprisonment or imprisonment of more than 10 years.

If during the criminal investigation, the person who committed one of the acts incriminated in the text facilitates the discovery of the truth and the prosecution of one or more members of an organized criminal group, it will benefit from halving of the punishment limits.

At the same time, the person who committed the act will not be punished, if he denounces the organized criminal group to the authorities, before it is discovered and the commission of any of the crimes included in the purpose of the group has begun.

Regarding *the constitutive plurality,* in our older doctrine it was shown that "(...) The conclusion of an agreement between several persons, for the purpose of committing a crime, is less than a preparatory act, because it belongs to the conception phase and because we have a plan of execution, and not a preparation of the means of execution.

This agreement proves an obvious start against the law, so that the incrimination of such an agreement, as an independent crime, becomes perfectly justified in law.

From a political-criminal point of view, it is also justified to react against any incitement that would aim at committing crimes. The fight against crime must strike the criminal manifestations, even in their embryonic form, in such a way that the latent danger, which these manifestations contain, is prevented from evolving into an actual evil (…)." (Dongoroz, 1939, p. 480).

In the Criminal Code of 1969, a crime with this marginal name was not provided for, instead it was provided for in art. 323 the crime "Association for the commission of crimes".

A brief comparative analysis of the two crimes allows us to observe some elements of similarity, as well as some differences.

As elements of similarity, we highlight the identity of the actions by which the material element of the objective side is achieved, respectively, the initiation, establishment, joining or support of a criminal group, as well as the retention of the criminal contest when the incriminated facts were followed by the commission of a crime.

We also observe the maintenance of the cause of non-punishment if, after committing the incriminated acts, one of the participants denounces the group (association) to the authorities before the commission of the crime for which the group was formed and anyway, before the discovery of the group by the competent bodies of the state.

As elements of differentiation, we highlight the marginal title, as well as the existence of the cause of aggravation, as well as the one of mitigation, which did not exist in the previous law.

Unlike the old law, we note that the definition of the phrase *organized criminal group also appears in the new law*.

This phrase (*organized criminal group)* was provided for and interpreted for the first time in Romanian law in the provisions of Law no. 39/2003 on preventing and combating organized crime[1].

Thus, according to the provisions of art. 2 letter a) from the mentioned normative act, by organized criminal group is meant "the structured group, consisting of three or more persons, which exists for a period and acts in a coordinated manner with the aim of committing one or more serious crimes, in order to obtain directly or indirectly a financial or other material benefit."

At the same time, "the group formed occasionally for the immediate purpose of committing one or more crimes and which does not have continuity or a determined structure or predetermined roles for its members within the group does not constitute an organized criminal group".

Regarding the phrase "serious crimes" provided in the content of the notion of organized criminal group, it was defined by referring to several crimes, considered by the legislator to be serious, all provided in the provisions of art. 2 letter b) from the mentioned special law.

We specify that compared to the initial wording, the minimum and maximum limits of the penalties provided for in the incriminating text have been increased.

2. Forms, Ways, Sanctions

2.1. Forms

Although possible, *acts of preparation,* and *the attempt,* are not sanctioned by law.

The consummation of the offense takes place when one of the actions by which the material element of the offense is carried out has been completed in its entirety.

We specify, however, that the crime examined can also know a moment of *exhaustion.*

We note that in terms of consummation or exhaustion of the crime, these moments are not conditioned by the achievement of the purpose for which the group was initiated, constituted, or joined or supported in any way.

In this sense, in judicial practice it was noted that "(...) The crime provided by art. 367 of the Criminal Code, is consumed at the time of the performance of any of the actions that may constitute its material element, at which time the state of danger appears representing the immediate consequence. Being linked to the performance of the action that constitutes the material element, the moment of consummation of

[1] Published in Official Monitor. no. 50 of January 29, 2003.

this offense varies, for the different perpetrators, depending on the action that each one performed. Thus, for the person who committed the action of initiation of the group, the crime is consummated when the action of initiation was carried out. For those of the perpetrators who took part in the formation of the group, the offense is consummated when that group was formed. Finally, in the case of the other ways of committing the crime, the moment of consummation is when the perpetrator joined the group or committed an act of support for it.

Consummation of the offense provided for by art. 367 of the Criminal Code, it is therefore not conditioned by the achievement of the purpose for which the group was established, i.e. by the commission of the crime or crimes included in its program. The commission of such crimes, although it appears as a consequence of the establishment of the association, has no other connection with provisions of art. 367 of the Criminal Code, so that between this crime and the crime or crimes committed there is only a contest of related facts.

Although the crime of constituting an organized criminal group is a momentary crime, nevertheless after consummation the deed is susceptible, in relation to the group's program, to a prolongation of the criminal activity in time. This extension is possible either by the will of the perpetrator, in the case of some of the ways of the crime, or by the very nature of the action, in the case of other ways. Thus, in the case of the initiation of the formation of the group, although the moment of consummation of the crime is that of committing an act of initiation, if the perpetrator is not prevented, he will continue, based on the same resolution, to commit other such acts to effectively establish the group. In the same way, in the case of supporting a group in any form to commit crimes, although the consummation of the crime, in this way, takes place at the time of committing an act of support, the perpetrator can continue to commit other such acts, based on the same criminal resolution. In both cases, the plurality of acts does not change the form and unity of the crime, but for the exact establishment of the act and therefore for the individualization of the punishment, all the acts of execution will have to be considered, the dangerous social result being exhausted with the last act.

In the case of the establishment of a criminal group, the moment of consummation is the one in which the association or grouping was achieved or constituted. But once this moment is reached, the criminal state is naturally prolonged until a contrary action takes place which puts an end to the group. Likewise, in the case of joining the group, although it is consumed currently of the act of joining, the illegal activity is extended in time until the dissolution of the group or until the perpetrator leaves it.

Therefore, in the case of these latest changes, the crime prev. of art. 367 Criminal Code, the criminal activity naturally extends beyond the moment of consummation, acquiring the criminal form of a continuous act and causing, as with any continuous crime, a moment of exhaustion[1] related to the crime of association with a view to

[1] See in this sense C. Bulai in (Dongoroz, 2003, pp. 618-619).

committing crimes, considerations applicable *mutatis mutandis* also regarding the crime of constituting an organized criminal group).

The continuous nature of the offense provided for by art. 367 Of the Criminal Code in the variants of incorporation or accession is also emphasized by the recent jurisprudence of the High Court of Cassation and Justice. "Even if the moment of consummation of the crime was that of the first act of incorporation, he continued, based on the same resolution, to commit other such acts to achieve the purpose of the association. As such, the criminal activity was prolonged, naturally, beyond the moment of consummation, it acquired the criminal form of the continuous act, which was exhausted in 2005. (…) In the hypothesis in which the moment of exhaustion of the crime of constituting an organized criminal group is located after the entry into force of Law no. 39/2003, the act falls within the provisions of art. 7 of Law no. 39/2003 (or the provisions of art. 367 of the Criminal Code, if the new criminal law represents the more favorable criminal law), even if the moment of consummation was reached before the entry into force of Law no. 39/2003, since, in this hypothesis, the applicable criminal law is established in relation to the time of exhaustion, and not in relation to the time of consummation of the crime"[1].

2.2. Ways

The examined crime has a standard (simple) normative modality and an aggravated normative modality.

The standard (simple) normative way is provided in the provisions of art. 367 para. (1) and consists in initiating or constituting an organized criminal group, joining, or supporting, in any form, such a group.

Provided in para. (2) of art. 367 of the Criminal Code, *the aggravated normative modality* will be retained when the crime that falls within the scope of the organized criminal group is sanctioned by law with the penalty of life imprisonment or imprisonment of more than 10 years.

2.3. Sanctions

In the case of the standard normative procedure, the sanction provided by the law is imprisonment from one to 5 years and the prohibition of the exercise of certain rights, and in the case of the aggravated normative procedure, the sanction is imprisonment from 3 to 10 years and the prohibition of the exercise of some rights.

For the mitigated method, the punishment limits provided by law are reduced by half.

[1] ICCJ, Criminal Sanction dec. no. 71/RC of March 4, 2016, available on www.scj.ro, Trib. Bucharest, Criminal Division no. 221/13.02.2019, unpublished, *apud* (Iugan, 2020, pp. 534-535).

3. The Reason for Non-Punishment

In the situation where a person who has committed the mentioned crimes, denounces the organized criminal group to the authorities, before it has been discovered and the commission of any of the crimes included in the purpose of the group has begun, he will not be punished.

4. The Reason for Reducing the Sentence

If the person who committed one of the examined crimes facilitates, during the criminal investigation, the finding out of the truth and bringing to criminal responsibility one or more members of an organized criminal group, the special limits of punishment are reduced by half.

5. Some Procedural Aspects

The competence to carry out the criminal investigation belongs to DIICOT, and the competence to judge in the first instance belongs to the court in the district in which the act was committed or to the court referred to.

If the organized criminal group includes certain persons who, by virtue of their capacity, can determine the competence of other courts, the jurisdiction of the first instance may also belong to the higher courts at the level of the court.

The jurisdiction of a higher court may also be invoked depending on the nature of the crime committed.

6. The Legislative Precedents and Transitional Situations

6.1. Legislative Precedents

The offense examined was also provided for in the Criminal Code of 1969, under another marginal name.

At the international level, the phrase *organized criminal group* is defined in art. 2, letter a) from the United Nations Convention against Transnational Organized Crime[1] where it is stated that it is (…) a structured group made up of three or more persons, which exists for a certain period and acts in agreement, with the aim of committing

[1] The United Nations Convention against Transnational Organized Crime, ratified by Romania through Law no. 565 of October 16, 2002 for the ratification of the United Nations Convention against Transnational Organized Crime, the Protocol on the Prevention, Suppression and Punishment of Trafficking in Persons, especially Women and Children, additional to the United Nations Convention against Transnational Organized Crime, as well as the Protocol against Trafficking illegal migrants by land, air and sea, additional to the United Nations Convention against Transnational Organized Crime, adopted in New York on November 15, 2000, published in Official Monitor. no. 813 of November 8, 2002.

one or more serious crimes or offenses provided for by this convention, in order to obtain, directly or indirectly, a financial advantage or another financial advantage".

Regarding the notion of an organized criminal group, in our doctrine from the first half of the last century it is argued that "What gives these groups a particularly serious feature is precisely their characteristic organization through: *the hierarchical structure* (leaders and subordinates), the *division of work* (everyone is given a suitable attribution), *activity schedule* (establishing, down to the detail, how the work will be done), *information service* (for gathering the necessary data and indications), *preparing the rescue action* (prior agreements with those what will serve as concealers or the favoritism) etc." (Dongoroz, 1939, p. 480).

6.2. Transitional Situations

Considering the incrimination from the previous law, the High Court of Cassation and Justice, the Panel for solving some legal issues in criminal matters established that "The facts provided by art. 323 of the previous Criminal Code and art. 8 of Law no. 39/2003, in the regulation prior to the changes made by Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code, are found in the incriminations of art. 367 of the Criminal Code, not being decriminalized."[1]

In an extensive analysis carried out in relation to a decision issued by the supreme court, which due to its complexity we reproduce in its entirety, it was assessed that the offense provided for by art. 367 of the Criminal Code, retained in the indictment, "(...) consists in the acts of the defendants A., C. and B., who, following the commission of the crime of using information not intended for publicity, followed, in the period March-July 2012, an action plan, previously agreed upon, in which each of the participants had well-defined tasks, with the observance of certain measures, likely to eliminate the possibility of preserving or administering any possible means of evidence regarding the criminal activity that they were going to unfold.

Thus, the defendants C. and B. had the task of ensuring, through the positions they occupied in the structure of the CSM, as well as through the connections at the political level, both the protection of the defendant A., in the sense of maintaining him as head of the Investigation Service and Ilfov Internal Protection, in the common interest of the association, as well as the transmission to it of requests regarding obtaining information not intended for publicity, for its own benefit or that of other persons, especially to ensure defense in the event of criminal investigations; C. had the task of ensuring, on the occasion of the group's meetings, the conspiracy and ambient security of the dialogues, by relating with reliable persons from the administrative structure of the meeting place; A. had within the association the main task of accessing, by the virtue of the position, the information not intended for publicity and providing it to the other members of the association, in order to obtain undue benefits for the interested persons.

[1] Decision no. 12/2014, published in Official Monitor. no. 507 of July 8, 2014.

Considering the considerations presented previously in the chapter related to the application of the more favorable criminal law, the first court analyzed to what extent the facts held against the three defendants by the indictment meet the constitutive elements of the offense provided for. of art. 367 of the Criminal Code in force.

According to the new criminal regulations contained in art. 367, para. (1), it is incriminated as a crime that initiating or forming an organized criminal group, joining or supporting, in any form. In para. (6) of the same article, the legislator defines the organized criminal group as the structured group, consisting of three or more persons, established for a certain period and to act in a coordinated manner for the purpose of committing one or more crimes.

It follows from the mentioned legal provisions that, to be in the presence of an organized criminal group, it is necessary to fulfill, cumulatively, several conditions.

First, the group must consist of three or more people and operate over a period and in a coordinated manner. Regarding the coordinated mode of operation, there is a need for a pre-established hierarchical subordination within the group, in the sense that the role of each individual member in committing the crime must be foreseen. Also, the coordinated character implies planning, organization, control as well as the procurement of tools, specific means, the use of combinations, etc.

Another essential condition for the existence of the organized criminal group is that it does not have an occasional character but is constituted based on a prior study that considers certain qualities, attributes, and specializations of its members.

In fact, the group must have a determined structure, i.e. have certain components with complementary tasks in carrying out the criminal activity, a so-called division of labor, within a hierarchy with predetermined roles and rules of behavior specific to a structured unit.

From the aspect of the objective side of the crime, it consists in the action of initiating or forming a criminal group, or of joining or supporting it.

Consisting involves the association and understanding of several persons for the purpose of being in time and preparing and organizing crimes provided by law.

Initiation involves not only conception, but also activities to materialize the idea, namely clarification, meetings, consultations, plans, etc.

Joining the group is achieved by expressing a person's express consent to be part of the criminal structure, while supporting the group involves providing assistance, help or advice in order to commit crimes.

From the subjective aspect, the act is committed with direct intent, qualified by purpose, in the sense that the person must know and agree to the establishment, membership and support of the group, knowing that serious crimes are to be committed and must aim at committing one or more crimes.

Applying the previously stated theoretical considerations to the case, the trial court found that the constitutive elements of the crime of forming an organized criminal

group are not met from the objective point of view. None of the activities attributed to each of the defendants A., C. and B. fall within the material object of the objective side, not showing who initiated or established the group, who joined or supported the group already established.

The indictment does not show the hierarchical structure of the group, given that the relations between the defendants were friendship, respectively affinity, it does not indicate, in concrete terms, the moment when the criminal agreement took place and the date of adoption of the criminal plan, it does not describe the existence of an organized structure, which act in a coordinated manner and according to well-established rules.

Considering that in the factual situation described in the indictment, the conditions of structured and coordinated action and for a certain period, the defining elements for the existence of the organized criminal group, are not found either, the High Court considers that the facts of the defendants A., C. and B. are not provided by the criminal law in force.

In this case, the evidence administered in the case proves that the defendants A., C. and B., between whom there were friendship or family relations, participated in the period March-July 2012 in several meetings that took place in the M restaurant from Bucharest, under the conditions of discretion (as a rule, in a separate room provided by its owner, the witness P.) and of environmental security for the discussions (leaving mobile phones in the wardrobe).

From other discussions, in which politicians (E. and O.) occasionally participated, it is clear the interest of the defendants C. and B. to be nominated for the highest positions in the Public Ministry that became vacant or that were to become vacant during the immediately following, benefiting for this purpose from political support either from the participants in these meetings (or from their chain), or from other persons with high positions in the Romanian state, with which part of the defendants were at least in professional relations (see the case of defendant B.).

Equally, in these discussions, the issue of maintaining the position of head of the Ilfov Investigation and Internal Protection Service of the defendant A., by appealing to the same political support, in the context of the existing animosities between the latter and his hierarchical boss, the witness BB.

The same evidentiary material starts taking shape, as we will show below, either indications or certainties in the sense of the transmission by the defendant A. to those present of some information not intended for publicity or even of a classified nature, on his own initiative or following previous requests of co-defendants C., facts that may or may not meet the constitutive elements of some crimes.

The dominant element of these meetings is the influence of the political factor in the appointment and retention of persons in important public positions in secret services (see the case of defendant A.) or in the judicial authority (see the case of defendants B. and C.), as well as the common interest of politicians and defendants in granting/obtaining political support for the occupation of such positions, with

the foreseeable consequence and accepted by all those involved, of the future subservience of the respective institutions to the political decision-makers.

Insinuating or negotiating, more or less explicitly, a political support for the occupation of the respective positions, is undoubtedly a serious act and incompatible with the status of a magistrate or an intelligence officer, but no connection can be established between this and the provision by the defendant A. during the same meetings of information not intended for publicity, which took place spontaneously or following requests previously made by those present at the meetings.

The concern of the defendants C. and B. to keep the defendant A. in office is part of the wider context of the underground actions he made for the same purpose, without being able to ignore the pre-existing close, friendly relations between the defendants (according to the referral document, the defendant A. had worked as a judicial police officer with the defendant B. since 2000, being also the son of the defendant C.), so it cannot be held that such a preoccupation of the defendants was in fact a assignment that they had assumed within an illegal group, which aimed at providing/obtaining the information not intended for publicity.

Finally, regarding the conditions in which these meetings took place, it is more about discretion than clandestineness, but this circumstance does not prove the involvement of the defendants in an illicit association, but their concern of not appearing in public with political people (a fact that would undoubtedly have created a vulnerability for them, considering the positions held) and of not disclosing the held discussions, between them or with them, considering their subject.

In the same way, the conduct adopted by the defendants after they found out, through the defendant F., about the existence of a criminal file in connection with these meetings and the imminence of searches, does not represent an implicit assumption of their association in a criminal group, but an attempt to synchronize their defenses and, possibly, to get rid of possible incriminating evidence that could have been found in the searches, which would have attested their involvement in the circulation of information not intended for publicity."[1]

At the same time, by decision no. 10/2015 pronounced by the High Court of Cassation and Justice, the Panel for solving some legal issues in criminal matters, established that "In the hypothesis in which, with the entry into force of the new Criminal Code, the crime that falls within the scope of the organized group was decriminalized, only one of the essential features of the crime, namely the condition of typicality, is fulfilled"[2].

[1] ICCJ, Criminal Division C. 5 judges, dec. no. 81/22.06.2015, available on www.scj.ro, *apud* (Iugan, 2020, pp. 528-530).
[2] Published in Official Monitor. no. 389 of June 4, 2015.

7. Conclusions

The unprecedented evolution of crime in recent years, especially in terms of organized crime, the urgent need to prevent and fight more firmly, has determined the adoption of appropriate legislation by all states of the world with recognized democratic regimes.

At the national level, there was a similar incrimination in the previous law, incrimination that proved to no longer correspond to current requirements.

On this basis, the action of initiating or setting up an organized criminal group was incriminated, an act that has the subsequent effect of committing serious crimes.

The current incrimination allows Romanian judicial bodies empowered to carry out specific activities to identify and document the activities of initiation, establishment, joining or supporting in any form an organized criminal group.

To prevent the formation of organized criminal groups that intend to commit serious crimes, an aggravated normative method has been provided that will be sanctioned as such.

It is important to note that to prevent the discretionary interpretation of the notion of an organized criminal group, the legislator defined that phrase in the incrimination text itself, an aspect that contributes to the achievement of a unified action by all bodies and institutions involved in the judicial process of prevention and combating such crime.

We appreciate that the incrimination of such acts represents a progress in the complex activity of crime prevention generated especially by organized crime groups at the national or European level.

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