

General Aspects Regarding the Crime of Human Trafficking

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Abstract

Wishing to emphasise the importance of the fundamental social values defended by the criminalization of the human trafficking crime, the Romanian legislator, with the change of the penal code, by the entering into force on February 1, 2014 the new code, incriminated human trafficking in the article 210 of this complex criminal law.

Thus, according to article 210 of the Penal Code, the crime of human trafficking involves „recruiting, transportation, sheltering or receiving of a person with the purpose of exploiting. For the offense of human trafficking there may exist preparatory acts, but the law does not incriminate these acts as crimes and does not punish them. The attempt is punished according to article 217 of the Penal Code, stating that the attempt to the offenses stipulated at articles 209- 211 and article 213 paragraph 2 of the Penal Code shall be punished.

Key words: human trafficking, social values, person's freedom

J.E.L. classification: K14, K10

1. Introduction

On December 2, 1945 through the UN General Assembly Resolution was adopted “The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others”, convention that came into effect on July 25, 1951. Previously, in 1921, in Geneva had been adopted the “International Convention for the Suppression of the Traffic in Women and Children” and in 1996 again in Geneva, “The Convention of the Suppression of Slavery”.

The concerns of the international organizations on this matter have intensified, thus on November 15, 2000 in Palermo, Italy, was adopted the Protocol regarding the prevention, suppression and punishment of the traffic in persons, especially in women and children, additionally to the UN convention against the transnational organized crime and subsequently, on May 16, 2005 in Warsaw was adopted the Convention of the European Council regarding the fight against the traffic in human beings, which for the first time since the Palermo Protocol, succeeded to put forth the structured definition of the traffic in human beings, definition which was subsequently included in article 4 of the Convention of the European Council mentioned above.

2. Introductory aspects

Thus, it was considered that “the traffic in human beings means the recruitment, transportation, transfer, sheltering or reception of persons by means of threat, use of force or other forms of coercion by abduction, fraud, deception, abuse of authority or of a situation of vulnerability or by the acceptance or receipt of money or other benefits in order to obtain the consent of a person having authority over another one with the purpose of exploitation. The exploitation involves at least the exploitation through prostitution of another person or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, organ usage or procurement” (the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime of 15.11.2000, ratified by Law no. 565/2002).

Consistent with the conventions it is part of or the agreements which it has concluded on this subject, Romania proceeded to criminalizing human trafficking, appropriating most of the provisions of international documents in this matter.

Initially, the crime was criminalized by article 12 of Law no. 678/2001 on preventing and combating human trafficking and consist of the "recruitment, transportation, transfer, accommodation or reception of a person trough threats, violence or other forms of coercion, through abduction, fraud, deception, abuse of authority or taking advantage of the person's inability to defend themselves or to express their will or trough offering, giving, accepting or receiving money or other benefits in order to obtain the consent of the person having authority over another person for the purpose of exploitation of that person" and was punishable by imprisonment from 3 to 10 years and the prohibition of certain rights.

Paragraph 2 of article 12 of the same law refers to committing human trafficking in the following circumstances, namely: committed by 2 or more persons jointly, through the infliction of serious harm to the victim's health or bodily integrity, by a public official in the performance of his/her duties, and in paragraph 3, by causing the death or suicide of the victim, and so the original deed was qualified as a more serious one, the special maximum penalty reaching 25 years.

Wishing to emphasise the importance of the fundamental social values defended by the criminalization of the human trafficking crime, the Romanian legislator, with the change of the penal code, by the entering into force on February 1, 2014 the new code, incriminated human trafficking in the article 210 of this complex criminal law.

Thus, according to article 210 of the Penal Code, the crime of human trafficking involves „recruiting, transportation, sheltering or receiving of a person with the purpose of exploiting this one committed trough:

- a. coercion, abduction, misleading or abuse of authority;
- b. taking advantage of the inability to defend or to express their own will or of the particularly vulnerable status of that person;
- c. offering, giving, accepting or receiving money or other benefits in exchange of the consent of the person who has the authority over another person, the punishment being imprisonment from 3 to 10 years and the prohibition of certain rights.”

In paragraph 2 of the same article 210, human trafficking committed by a public official becomes the aggravated variant of the crime, punished with imprisonment from 5 to 12 years (Noul Cod Penal , Noul Cod de procedură Penală , Ed. Hamangiu, Bucharest, 2014).

Lastly, in paragraph 3 of article 210 the legislator points out that the consent of the trafficking victim is not an explanatory cause.

It appears that a good part of the provisions of article. 12 of Law no. 678/2001 have been taken over in article no. 210 in the new Penal Code, maintaining the structure of the definition envisaged by the Palermo Protocol of 2000.

3. Pre-existent factors

1. The object of the offense

a. The special legal object of the offense consists of social relations which arise, are carried out and develop around the preservation of individual freedom against human trafficking acts. In this regard, the crime of human trafficking does not have the same object as the offenses of unlawful deprivation of liberty, since it is a medium offense aiming to achieve a result from exploiting the victim.

From this point of view, the aim is not protecting the person's freedom from certain points of view, namely moral freedom, the freedom of movement, but the person's freedom in a broad sense, understanding by this all the rights of an individual (Alexandru Boroi, Drept Penal – Partea Specială, 2nd edition , Ed. CH Beck , Bucharest, 2014, page 131).

b. The material object

The offense has a material object, whereas the actions or inactions which constitute the material element are committed upon a person par excellence, so the material object of the offense is the body of the person trafficked in any way.

c. The subjects

The active subject of the offence may be any natural person who fulfils the conditions to be held criminally accountable.

If we consider the aggravated variant regulated by article 210, paragraph 2, it is observed that the active subject is qualified, namely it is a public official in the exercise of his/her duties.

The passive subject of the crime is a natural person, regardless of sex, an adult, of over 18 years of age.

If the person has less than 18 years of age, the act qualifies as a child trafficking offense, referred to in article 211 of the Penal Code.

4. Constituent content

In order for the offense to be committed, there must be a prerequisite situation which refers to the existence of a person likely to be trafficked.

1. The objective side

a. The material element

The material element has an alternative normative structure, the legislator envisaging in the text of article 210, paragraph 1 of the Penal Code several alternative actions by which the offense may be committed, namely the recruitment, transportation, transfer, sheltering, reception.

The recruitment of the victim for the purpose of the exploitation means the identification, the discovery of a vulnerable person and the determination of this person to become a victim of exploitation.

Transportation refers to the action of a participant in committing the offense of moving from one location to another by the use of means of transport, the victim who is or will be exploited.

Transfer refers to the activity of a participant in committing the offense by which he/she arranges and carries out the change of the exploited victim's accommodation location.

Sheltering refers accommodating and hosting to a person for in view of exploitation.

Reception refers to the action of taking over, taking a person with the purpose of exploitation (Ion Ristea, Drept Penal – Partea Specială, Ed. Universul Juridic, Bucharest, 2014, page 132).

In order for the act to be considered a crime it is necessary, however, that the offending actions previously shown to be perpetrated by coercion, abduction, misleading or abuse of authority, or by taking advantage of the inability to defend oneself or to express their will or of the manifested state of vulnerability of the victim or by offering, giving or accepting money or other benefits in exchange of the consent of the person who has authority over the victim (Ilie Pascu et al. – Noul Cod Penal Comentat – Partea Specială, 2nd Edition, Ed. Universul Juridic, Bucharest, 2014, page 126).

These expressions used by the legislator in the definition of the essential requests linked to the material element are clearly defined in the Romanian legal literature and do not require further explanations.

b. The immediate consequence consists in jeopardising the trafficked person, respectively in creating a strong fear, a state incompatible with the rights of an individual, in a broad sense, with a person's freedom.

c. The causality link

In the case of the human trafficking offense, it needs to be demonstrated that at least one of the alternative actions of the material element of the offense is in direct causal connection with the state of jeopardy inflicted on the trafficked victim.

2. The subjective side

For the offense of human trafficking, the acts that form the material element are committed with direct aggravated intent, the aggravation resulting from the purpose of the infringer, purpose that is related to the exploitation of the trafficked person.

Clearly, the notion of a person's exploitation is to be found in article 182 of the Penal Code, which shows that exploitation involves:

- The obligation to perform work or to offer services forcefully;
- Keeping in slavery or other similar processes of deprivation of freedom or servitude;
- the obligation to engage in prostitution, pornography, for the production and dissemination of pornographic materials or other forms of sexual exploitation

- forcing someone to beg;
- the illegal removal of organs, tissues or other human cells (Noul Cod Penal, Noul Cod de procedură Penală, Ed. Hamangiu, Bucharest, 2014 and Alexandru Boroii, op. cit. page 132)

In the specialized literature it was shown that if the purpose of exploitation is achieved, we can have a competition between the offense of human trafficking and other crimes, of the type based on the purpose of exploitation, pimping or subjecting someone to forced or compulsory labour.

Furthermore, it was also shown that this object of exploitation distinguishes between human trafficking and the smuggling of migrants, which it is done to aid the illegal border crossing in exchange for money (Ion Ristea, op. cit, page 134).

5. Types

For the offense of human trafficking there may exist preparatory acts, but the law does not incriminate these acts as crimes and does not punish them. The attempt is punished according to article 217 of the Penal Code, stating that the attempt to the offenses stipulated at articles 209- 211 and article 213 paragraph 2 of the Penal Code shall be punished.

6. Partaking in an offense

Partaking in an offense occurs when the trafficked person is put in a state of danger, state which is achieved by committing one of the offenses that constitute the material element, namely: recruitment, transportation, transfer, sheltering or reception of persons in view of exploitation.

It is enough that one of these actions be committed for the offence to exist, but in the case of committing several of the actions referred to above, the offence will constitute a natural unit.

However, if these actions target the trafficking of different victims, regardless of the circumstances of place and time and whether or not there is a single criminal resolution, the actions will constitute distinct offences, in function of the number of victims trafficked.

The deed is susceptible to have an aggravated form, the legislator incriminating in article 210 paragraph 2 of the Penal Code the offense of human trafficking committed by a public officer during the performance of his duties.

Note that in this context the legislator has qualified both the subject of the crime – the public officer, and the circumstance as the action to be performed during the exercise of his/her duties, when committing the offence of human trafficking.

Regarding the notion of public officer, it is necessary to interpret this concept within the meaning of article 175 of the Penal Code, where is stipulated as the person with permanent or temporary title, with or without remuneration who exercises, carries out certain activities which makes him/her a public officer.

On the other hand, it is not mandatory that the deed committed by a public officer in the performance of his/her duties be linked to those duties, being enough for it to be committed during the performance of the duties.

It appears that this circumstance of aggravation is the only one that was taken from the old regulations, article 12 paragraph 2 of Law No. 678/2001.

At the same time, according to article 210, paragraph 2 of the Penal Code, the consent of the trafficking victim is not an explanatory cause. This provision has also been taken from Law no. 678/2001 in which was stipulated at article 16 that the criminal liability of the perpetrator is not removed even if there is a consent of the victim of human trafficking.

7. Penalties

According to the provisions of Article 210 paragraph 1 of the Penal Code, the standard offense is punishable by imprisonment from 3 to 10 years and the prohibition of certain rights, and the aggravated form referred to in paragraph 2 shall be punished with imprisonment from 5 to 12 years.

8. Conclusions

The link between the human trafficking crime and other crimes. First, the offense of human trafficking is closely related to the crime of illegal deprivation of liberty under article 205 of the Penal Code, whereas human trafficking is a complex crime, absorbing in its constitutive content the standard form of the crime of illegal deprivation of liberty (Decision no. 1834 / 22.11.2006 of the High Court of Cassation and Justice - Criminal Division).

Then, the offense of human trafficking is similar to slavery offenses, article 209 of the Penal Code, submission to forced or compulsory labour, article 212 of the Penal Code and pimping, incriminated in article 213 of the Penal Code.

Examining these texts, it may be observed that there is no overlap in terms of incrimination modalities and purpose, so that they can be retained in competition, sometimes being an etiological connection between the above mentioned crimes, a deed being committed with the purpose of committing another (Florin Streteanu – Concursul de infracțiuni, Ed. Lumina Lex, Bucharest, 1999, page 97).

9. References

1. See the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime of 15.11.2000, ratified by Law no. 565/2002.
2. See Noul Cod Penal , Noul Cod de procedură Penală , Ed. Hamangiu, Bucharest, 2014
3. See Alexandru Boroi, Drept Penal – Partea Specială, 2nd edition , Ed. CH Beck , Bucharest, 2014, page 131
4. See Ion Ristea, Drept Penal – Partea Specială, Ed. Universul Juridic, Bucharest, 2014, page 132
5. See Ilie Pascu et al. – Noul Cod Penal Comentat – Partea Specială, 2nd Edition, Ed. Universul Juridic, Bucharest, 2014, page 126
6. See Noul Cod Penal, Noul Cod de procedură Penală, Ed. Hamangiu, Bucharest, 2014 and Alexandru Boroi, op. cit. page 132
7. See Ion Ristea, op. cit, page 134
8. See decision no. 1834 / 22.11.2006 of the High Court of Cassation and Justice - Criminal Division
9. See Florin Streteanu – Concursul de infracțiuni, Ed. Lumina Lex, Bucharest, 1999, page 97