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MANDATORY ELEMENTS OF THE CRIME OF HUMAN TRAFFICKING ACCORDING TO THE CRIMINAL CODE OF GEORGIA

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Purpose: the aim of this paper is to analyze mandatory elements of the crime of human trafficking according to the criminal code of Georgia. **Methods:** mandatory elements of human trafficking shall be analyzed in accordance with the structure of *corpus delicti*. According to dominating legal theory in Georgia the *corpus delicti* (first element of the crime) is composed of objective and subjective elements: while the conduct, result and means of the commission of the crime are included in objective elements, the purpose and intent of the crime are part of the subjective elements. **Results:** it appears that the crime of human trafficking is made of 5 basic elements: Sale and purchase (or other illegal transaction); Recruitment; Coercion (or deception); Limitation of freedom/control of the victim; Exploitation. However, none of these elements are mandatory for the crime of human trafficking. They are optional in nature. Also, it appears that the Georgian law on human trafficking is too wide and requires modification, because on the one hand it may not entirely fit with international legal definition of human trafficking and on the other hand may overlap with other crimes already covered by Georgian criminal code. **Discussion:** the Georgian criminal code adopted in 1999 did not contain the crime of human trafficking. In 2003, the crime of human trafficking was included in the chapter of crimes directed against human rights and freedoms (Chapter 23). This chapter contains three articles related to the crime of human trafficking: Article 143¹ (Human Trafficking) Article 143² (trafficking of minors) and Article 143¹ (benefiting from the services of the victims of human trafficking); For proposer qualification of the crime of human trafficking, it is important to identify its elements and find out whether these elements are mandatory or optional. While the crime of human trafficking has a complex composition, many terms applied by the law cause divergent interpretations in legal theory. However, its important that the terms are interpreted in accordance with the international agreements on human trafficking to which Georgia is a party.

Key words: legislation of the Republic of Georgia; trafficking in human beings; criminal liability; *corpus delicti*; punishment.

Introduction. The crime of human trafficking, often described as modern form of slavery is proscribed in various universal and regional instruments [1] and national legislations of most democratic countries.

In 2006, Georgia has adopted a special law on human trafficking “Law of Georgia on the fight against human trafficking”. It defines measures directed towards the prevention of human trafficking, bodies in charge of human trafficking and legal status of the victim.

The Georgian criminal code adopted in 1999 did not contain the crime of human trafficking. In 2003, the crime of human trafficking was included in the chapter of crimes directed against human rights and freedoms (Chapter 23). This chapter contains three articles related to the crime of human trafficking: Article 143¹ (Human Trafficking) Article 143² (trafficking of minors) and Article 143¹ (benefiting from the services of the victims of human trafficking).

The core legal values protected by the incrimination of human trafficking are believed to be the right to private life, sexual freedom and physical integrity, freedom and right to free movement, right to free choice of domicile, labor rights, physical integrity, honor and dignity [2].

The crime of human trafficking is bordering many other traditional crimes directed against freedom, honor and physical integrity already stipulated by criminal code of Georgia. Such as kidnapping (art. 144 of the criminal code), illegal deprivation of freedom (art. 143 of the criminal code), coercion (art. 151 of the criminal code). Thus, for the proper qualification of the crime in practice, it is important to identify what are the core elements of the crime of human trafficking.

The goal of this article is to understand what are the key elements constituting the crime of human trafficking according to the criminal code of Georgia and which of those elements are mandatory.

Definition of human trafficking in criminal code of Georgia. In Georgian criminal code, the crime of human trafficking is envisaged in the chapter of crimes directed against human rights and freedoms (Chapter 23). Article 143¹ (par. 1) of the criminal code, provides following definition of human trafficking:

“Purchase or sale of human beings, or any unlawful transactions in relation to them, by means of threat, use of force or other forms of coercion, of abduction, blackmail, fraud, deception, by abuse of a position of vulnerability or power or by means of giving or receiving of payment or benefits to achieve the consent of a person having control over another person, as well as recruitment, carriage, concealing, hiring, transporting, providing, harboring or receiving of a human being for exploitation”

The same article provides a definition of the purpose of exploitation:

1. For the purposes of this article and Article 143² of this Code, the following shall constitute exploitation for the purpose of gaining material or other benefit:

- a) coercing a person to perform labor or other services;
- b) coercing a person to provide sexual services;
- c) engaging a person in criminal activities, prostitution, pornographic or other anti-social activities;

d) removing, transplanting or otherwise using an organ, part of an organ or tissue of the human body by force or deception;

e) subjecting a human being to practices similar to slavery or to modern-day slavery. Subjecting a human being to modern-day slavery shall mean creation of such conditions when the person performs certain work or renders services in favour of another person in return for payment, inadequate payment or without payment, and he/she is not able to change these circumstances because of his/her dependence on that person. Dependence on a person may be caused by, among other things:

e.a) confiscation, control or intentional unlawful handling of personal identification documents;

e.b) restriction of the right to free movement or control of free movement;

e.c) restriction or control of communication (including correspondence and phone calls) with family members or other persons;

e.d) creation of coercive or threatening environment.

For comparison, Council of Europe Convention on Action against Trafficking in Human Beings describes following three elements of human trafficking.

a. Action: “recruitment, transportation, transfer, harbouring or receipt of persons”;

b. Means: “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”;

c. Purpose of exploitation: at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

As clarified by explanatory memorandum of the Convention, “For there to be trafficking in human beings ingredients from each of the three categories (action, means, purpose) must be present together. There is, however, an exception regarding children: under Article 4(c) recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is to be regarded as trafficking in human beings even if it does not involve any of the means listed in Article 4(a). Under Article 4(d) the

word “child” means any person under 18 years of age” [3].

Thus, in international law, human trafficking is composed in three basic elements listed above: action, means and purpose.

Elements of human trafficking in Georgian criminal law.

From the legal definition of the crime of human trafficking stipulated in criminal code of Georgia, five basic elements can be identified:

- a. Sale and purchase (or other illegal transaction)
- b. Recruitment
- c. Coercion (or deception)
- d. Limitation of freedom/control of the victim.
- e. Exploitation

We can consider each of these elements separately from three angles: in what forms they are described by the law, whether they are mandatory or optional and what are the most disputed issues related to the interpretation of these elements.

a. Sale and purchase, or any other unlawful transaction.

This element of the crime consists of purchase or sale, or any unlawful transactions related to human beings. According to various authors, the sale or purchase can happen through payment of money, or exchange of items, or discount of a debt. Example of illegal transaction can be the case when the buyer promises to the seller some non-pecuniary benefit, such as the assistance in a commercial activity or travel abroad, etc [4].

A disputed issue in Georgian literature is whether the transaction can take place between the offender and the victim. The doctrinal interpretations are different: Some authors believe that the transaction can take place only between the offender and the third person, while others believe that the transaction can also take place between the offender and the victim [5]. We think that the transaction can take place only between the offender and the third person, as the essence of the crime of human trafficking is to treat a human being as an object of transaction.

From the text of art. 143¹ of the criminal code of Georgia, it is clear that the sale or purchase (or any other unlawful transaction) is not a mandatory but optional element of human trafficking. Thus, the human trafficking can take place without sale/purchase or any other illegal transaction.

b. Recruitment

According to Georgian criminal code, this element can be expressed in recruitment, concealing, hiring, transporting, transferring, harboring or receiving of a human beings (using methods listing in the law coercion, threat, blackmail, etc). These actions are exhaustively listed in the law.

A question is whether the crime of human trafficking can be committed directly by exploitation of the person without a conduct element listed above. For example, if A-has encountered B in the forest and by threatening with his gun, forced him to collect wood for days. It can be argued that a forced labor can be classified under the term “recruitment”, however, the word “recruitment” is not a precise translation of the Georgian term used by Georgian criminal code - “გადადბორება” which more precisely can be translated as “seducing a person to do something”. Thus it would be very difficult to qualify a forced labor under a term “გადადბორება” [6].

While these actions constitute the conduct element of the crime of human trafficking (alternative to sale and purchase), they should be accompanied by methods listed below. However, it has been argued that the receiving of human being for the purpose of exploitation does not require any of the listed means. This interpretation is disputable, because the law exhaustively lists the conduct element of the crime and the methods for the commission of the crime, thus, is clear that the conduct element of the crime cannot be committed without those methods (unless we are speaking about sale/purchase).

Usually, the crime of human trafficking is committed by action. However, it has been argued that some form of human trafficking can also be committed by omission. For example, if an owner of the house came to know that his house is being used for harboring victims of human trafficking and failed to impede the crime, this can be classified under the term “harboring” [7].

c. Coercion/deception.

This element of the crime may unite the methods listed by the law in order to influence the will of the victim of the human trafficking. The list of means is exhaustive.

According to art. 143¹ of the criminal code these means are: threat, use of force or other forms of coercion, of abduction, blackmail, fraud, deception, by abuse of a position of vulnerability or power or

by means of giving or receiving of payment or benefits to achieve the consent of a person having control over another person.

It is clear from the wording of the law that these methods are not mandatory when it comes to sale/purchase or other illegal transaction. Also, the element of coercion/deception is not necessary when it comes to the trafficking of juveniles (art. 143² of the criminal code).

One of the disputed concepts used by the law is abuse of a position of vulnerability. Some authors believe that the term vulnerability does not refer to the victim but to the offender. Thus, the offender is using his/her vulnerable position to influence the victim [8]. We believe that this interpretation is erroneous. Various commentaries of international law on human trafficking clarify that the term vulnerability refers not to the offender, but to the victim [9].

In most academic commentaries of criminal code of Georgia, the term “fraud” is understood within the meaning of the crime of fraud stipulated in art. 180 of the criminal code of Georgia which defines fraud as “appropriation of property by deceit”. Thus, as an example the authors often cite a case, when the defendant appropriates the victim’s property by fraud and then forces the victim to engage into prostitution under the promise of the return of property [10]. We believe that this is an erroneous interpretation and the example cited in the literature is very artificial. The term “fraud” should have autonomous interpretation and should be interpreted as any act of deception carried out for the purpose of unfair, undeserved and/or unlawful gain. This conclusion can also be drawn from explanatory memorandum of COE Convention against Human Trafficking, par. 82 [11].

When it comes to the “abuse of power” it is believed that this means does not cover the abuse of official power or even the abuse of parental power, as these means would be covered by aggravating circumstances listed in art. art. 143¹ of the criminal code (abuse of official power or abuse of material or other dependence of the victim). However, this method can include the abuse of power from a boss of criminal gang.

Element of coercion is also included in the exploitation purpose defined by art. 143¹ of the criminal code. Namely, the exploitation may be ex-

pressed in forced labor or coercion of sexual services.

d. Limitation of freedom/control of the victim.

This element is included in the exploitation purpose defined by article 143¹ of the criminal code of Georgia. Namely, this element includes:

e.a) confiscation, control or intentional unlawful handling of personal identification documents;

e.b) restriction of the right to free movement or control of free movement;

e.c) restriction or control of communication (including correspondence and phone calls) with family members or other persons;

e.d) creation of coercive or threatening environment.

As the wording of the art. 143¹ reveals, this list is not exhaustive. Thus, there may be other forms of limitation of freedom which can accompany the exploitation of the person.

However, the element of the limitation of freedom is not mandatory, but optional. According to the wording of art. 143¹ of the criminal code, the involvement of the victim into prostitution, pornography or other anti-social behavior does not require neither coercion or any form of limitation of freedom. In this respect, the given norm is problematic, because without the element of coercion or limitation of freedom, the crime of human trafficking fully coincides with other crimes such as incitement to prostitution or pimping (article 254 of the criminal code of Georgia).

c. Exploitation.

This element is defined by the clarification note at the end of art. 143¹ of the criminal code. Four different types of exploitation can be identified:

a. Labor exploitation (coercing a person to perform labor or other services)

b. Sexual exploitation (coercing a person to provide sexual services)

c. Criminal exploitation (engaging a person in criminal activities, prostitution, pornographic or other anti-social activities)

d. Medical (biological) exploitation (removing, transplanting or otherwise using an organ, part of an organ or tissue of the human body by force or deception)

Some of the authors believe that the purpose of exploitation may also imply the illegal adoption or forced marriage [12]. However, this view is not

grounded in the legislation because all types of exploitation are exhaustively listed by art. 1431.

According to the note of art. 1431, final goal of exploitation is to obtain material or other type of gain.

According to some authors, the purpose of exploitation is not required when it comes to purchase/sale or any other illegal transaction [13]. We believe that this view is erroneous due to the wording of art. 1431 of the criminal code of Georgia, as well as the explanatory memorandum of the COE Convention on Action against Trafficking of Human Beings [14], which defines the purpose of exploitation as one of the basic components of the human trafficking.

Conclusion. The article overviewed mandatory elements of human trafficking according to the Georgian law. It appears that the crime of human trafficking is made of 5 basic elements:

- a. Sale and purchase (or other illegal transaction)
- b. Recruitment
- c. Coercion (or deception)
- d. Limitation of freedom/control of the victim.
- e. Exploitation

However, (based on dominant view in legal literature) it appears that none of these elements are mandatory, namely

a. If the crime is committed via any form of recruitment, the sale and purchase element is not necessary.

b. If the crime is committed via sale/purchase, the recruitment element is not necessary. A disputable question is whether the exploitation can be committed directly without recruitment.

c. If the crime is committed via sale/purchase, the coercion/deceit element is not necessary. The coercion is also not necessary when it comes to involvement into prostitution or other anti-social behavior. Coercion and deceit are not necessary when it comes to juvenile victims.

d. Limitation of freedom or control of the victim are not mandatory elements of human trafficking when it comes to involvement into prostitution or other anti-social behavior.

e. Purpose of exploitation is not necessary when it comes to sale and purchase of the victim (majority view).

From this overview, it appears that the Georgian law on human trafficking is too wide and requires

modification, because on the one hand it may not entirely fit with international legal definition of human trafficking and on the other hand may overlap with other crimes already covered by Georgian criminal code.

References

1. Such as United Nations Convention against Transnational Organized crime and its protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000-2003), Council of Europe Convention on Action against Trafficking in Human Beings (2005).

2. Dvalidze I., Kharanauli L., Tumanishvili G., Tsikarishvili K. Crimes directed against human rights and freedoms according to the criminal code of Georgia, Tbilisi, 2019, 87. Lekveishvili M., Todua N., Mamulashvili G. Special part of the criminal law, 2019, book 1, Meridiani, 287.

3. See: Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, par. 76.

4. See e.g. Lekveishvili M., Todua N., Mamulashvili G. Special part of the criminal law, 2019, book 1, Meridiani, 288.

5. Lekveishvili M., Todua N., Mamulashvili G. Special part of the criminal law, 2019, book 1, Meridiani, 289.

6. However, some authors believe that recruitment can be committed by coercion and without coercion, Dvalidze I., Kharanauli L., Tumanishvili G., Tsikarishvili K. Crimes directed against human rights and freedoms according to the criminal code of Georgia, Tbilisi, 2019, 92.

7. Lekveishvili M., Todua N., Mamulashvili G. Special part of the criminal law, 2019, book 1, Meridiani, 288.

8. Lekveishvili M., Todua N., Mamulashvili G. Special part of the criminal law, 2019, book 1, Meridiani, 291.

9. By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe

human rights and violate human dignity and integrity, which no one can validly renounce. See Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings * par. 83 <https://rm.coe.int/16800d3812> (last seen: 31.05.2022).

10. Lekveishvili M., Todua N., Mamulashvili G. Special part of the criminal law, 2019, book 1, Meridiani, 291.

11. Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings. Warsaw, 16.05.2005. URL: <https://rm.coe.int/16800d3812> (last seen: 31.05.2022).

12. Dvalidze I., Kharanauli L., Tumanishvili G., Tsikarishvili K. Crimes directed against human rights and freedoms according to the criminal code of Georgia, Tbilisi, 2019, 102.

13. Lekveishvili M., Todua N., Mamulashvili G. Special part of the criminal law, 2019, book 1, Meridiani, 296 Meskhi M. Legal aspects of trafficking, methods of prevention, experience and perspectives, Tbilisi, 2014, 70.

14. Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings. Warsaw, 16.05.2005. Par. 74. URL: <https://rm.coe.int/16800d3812> (last seen: 31.05.2022).

Каха Цікарішвілі

ОБОВ'ЯЗКОВІ ОЗНАКИ ЗЛОЧИНУ ТОРГІВЛІ ЛЮДЬМИ ЗА КРИМІНАЛЬНИМ КОДЕКСОМ ГРУЗІЇ

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Метою даної роботи є аналіз обов'язкових ознак злочину торгівлі людьми згідно з Кримінальним кодексом Грузії. **Методи:** обов'язкові елементи торгівлі людьми аналізуються відповідно до структури складу злочину. Відповідно до домінуючої правової теорії в Грузії склад злочину складається з об'єктивних і суб'єктивних елементів: тоді як поведінка, наслідок і засоби вчинення злочину входять до об'єктивних ознак, мета, умисел та вина, є частиною суб'єктивних елементів у складі злочину. **Результати:** таким чином злочин «Торгівля людьми» складається з п'яти основних елементів: купівля-продаж (або інша незаконна операція); рекрутинг; примус (або обман); обмеження свободи/контролю потерпілого; експлуатація. Однак жоден із цих елементів не є обов'язковим для злочину торгівлі людьми. Вони носять необов'язковий характер. Крім того, видається, що грузинський закон про торгівлю людьми є занадто широким і потребує змін, оскільки, з одного боку, він може не повністю відповідати міжнародно-правовому визначенню торгівлі людьми, а з іншого боку, може збігатися з іншими злочинами, які вже охоплюються іншими складами злочинів за КК Грузії. **Обговорення:** Кримінальний кодекс Грузії, прийнятий у 1999 році, не містив складу злочину «Торгівля людьми». У 2003 році злочин «Торгівля людьми» був включений до глави щодо злочинів, спрямованих проти прав і свобод людини (глава 23). Ця глава містить три статті, що стосуються злочину торгівлі людьми: стаття 143¹ (торгівля людьми), стаття 143² (торгівля неповнолітніми) та стаття 143¹ (користування послугами потерпілих від торгівлі людьми). Для запропонованої кваліфікації злочину «Торгівля людьми» важливо визначити його елементи та з'ясувати, чи є ці ознаки обов'язковими чи факультативними. У той час як злочин «Торгівля людьми» має складний склад, багато термінів, що використовуються в законі, викликають різне тлумачення в теорії права. Однак важливо, щоб терміни тлумачилися відповідно до міжнародних угод про торгівлю людьми, учасником яких є Грузія.

Ключові слова: законодавство Республіки Грузія; торгівля людьми; кримінальна відповідальність; склад злочину; покарання.

Стаття надійшла до редакції 31.05.2022