

10. B. Namysłowska-Gabrysiak, Handel ludźmi w celu wykorzystania seksualnego. Zagadnienia karnoprawne i kryminologiczne, Warszawa 2018, p. 167.

11. <https://statystyka.policja.pl/st/wybrane-statystyki/handel-ludzmi-i-przest/50848>, Handel-ludzmi-i-przestepstwa-okoloprostyuczne.html (accessed: 20.01.2023)

12. <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> (accessed: 20.01.2023)

13. <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> (accessed: 20.01.2023)

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MEMBERSHIP OFFENCES IN CRIMINAL CODE OF GEORGIA - DO THEY FIT WITH TRADITIONAL CONCEPT OF CRIMINAL CONDUCT?

Since 1999, criminal code of Georgia has introduced tripartite division of elements of the crime. Namely, according to art. 7, par. 1 of the criminal code of Georgia, the basis for the imposition of criminal liability is the commission of unlawful and guilty conduct envisaged by criminal code. Thus, three basic elements of the crime can be identified from this requirement: the corpus delicti (composition of the crime), the unlawfulness (absence of justification) and the guilt (absence of excuse).

According to traditional criminal law doctrine, the conduct element is a necessary prerequisite of the corpus delicti. In other words, there is no crime without conduct (actus reus). This element can be expressed in either act or omission.

Act is considered to be the voluntary bodily movement, which bring change in the physical world, while the omission is the failure to act, the performance of which is mandatory by the law. Criminal legal doctrine differentiates between two types of omissions: the pure omission and the impure omission. The pure omission is the mere failure to act (for example failure to testify, failure to pay taxes, etc), while so called impure omission is the omission which has caused a particular result envisaged by criminal law (for example failure of mother to feed child, which has caused death of the infant).

In the light of traditional definition of the criminal conduct, the question arises where do we place the so called “membership offences” which now appear in criminal code of Georgia. Lets bring some examples:

– Article 223 of the criminal code of Georgia criminalizes the affiliation into an illicit gang. However, the annex to this article defines that criminal gangs are those groups which are armed and have criminal purpose.

– Article 223¹ criminalizes membership of the “thieves world”.

– Article 327 criminalizes the membership of terrorist organization.

The current criminal code of Georgia was adopted in 1999 and when it was adopted it did not criminalize mere membership of criminal organisations. It only contained provisions about “participation” in criminal organisations. However, the membership offences were introduced by subsequent legislative amendments (2014, 2015).

The reason for introducing membership offences in the criminal code is the new challenges of organized crime, where traditional forms of criminal participation (complicity, conspiracy, group criminality, participation of criminal organization) are no longer sufficient.

Criminalization of membership offences means that the existence of criminal organization poses danger to the security of society and the State without any additional actions.

The article 223 criminalizes the “affiliation” in the criminal organization. This legislative formula explicitly focuses on the act of “affiliation”, which is a concrete act. Thus it does not criminalize membership as such but as the “act of affiliation”

The offence defined by article 223¹ is not a “pure membership offence” either, because the membership of “thieves world” is defined as (by Law of Georgia against Recketeering and Organized Crime) as “person who recognizes the world of thieves, keeps connections and there are clear signs that the person, by its conduct is willing to participate in the activities of the world of thieves”. Thus, this law requires some kind of active participation in the criminal organization or an active connection with its members.

However, the pure membership offence is the offence defined by art. 327, which is the “membership of terrorist organization”.

The first part of the article criminalizes the membership per se and it does not require participation in the activities of the organization (the participation is criminalized in par. 2 of the same article). Thus being a member of terrorist organization is a crime per se without any further conduct.

The terrorist organization is defined by art. 1.g. of the law of Georgia on the Fight Against Terrorism, which states that terrorist organization is any organization created for the purpose of conducting terrorist activity.

Once we identified a pure membership offence in the criminal code of Georgia, now a question remains what kind of crime are we specifically talking about: is this an act or omission?

It is clear that membership of an organization needs to be started by an act of affiliation. It is difficult to imagine affiliation by omission. However, we can

imagine situations where the person was affiliated to a non-terrorist organization which later became terrorist (of which the defendant was fully aware). In such case, his/her omission to leave the organization will amount to affiliation. However, once the affiliation is completed, then starts the membership. Thus, the membership is the continuous offence. Continuous offence is defined by art. 13 par. 1 of the criminal code of Georgia as an offence, which starts by act or omission and thereafter is committed continuously without interruption. Other examples of continuous offences are unlawful deprivation of liberty (art. 143 of the criminal law of Georgia) and unlawful possession of firearms (art. 236 of the criminal law of Georgia).

Two questions related to the commission of membership offences concern the time of the and the place of the commission.

The question of the time of the commission of membership offences should be resolved similarly with the other continuous offences. Namely, the membership offence starts by affiliation and continues uninterrupted, until the membership is terminated.

More difficult question is what should be considered as the place of commission of membership. Is it the place of affiliation, the place of location of headquarters of terrorist organization, the place of location of the member?

According to par. 1 of art. 4 of criminal code of Georgia, the crime is committed on the territory of Georgia if it was commenced, continued, suspended or completed on the territory of Georgia. Thus, from this definition we can conclude that the place of the commission of membership should be the place of affiliation of the member, or the place of the location of the headquarters of the organization or the place of location of the member.

From this overview, it becomes clear that membership offences are a particular form of criminal conduct. They continue uninterrupted until the membership ends. Thus, they are continuous offences which can be started by act or by omission.

Literature

1. Levanon L, Criminal Prohibition of Membership in Criminal Organization, *New Criminal Law Review*, 2012.
2. Mamulashvili G. Lekveishvili M., criminal law, special part, 2019.
3. Anna Sergi, Organised Crime in Criminal Law: Conspiracy and Membership Offences in Italian, English and International Frameworks, (2014) 25 *KLJ* 1–17.