



## The Non-compliance of the Nuclear Materials or other Radioactive Matters Regime. The Constitutive Content of the Crime

Ion RUSU<sup>1</sup>

**Abstract:** In this paper we have examined the constitutive content of the crime content provided in article 345 of the Criminal Code, and the differences between the current regulation and the one existing in the old law. This comparative examination presents the importance in identifying and applying a more favorable criminal law. The work is useful to judicial authorities specialized in preventing and combating crime of this kind, for Romanian or foreign physical and legal entities, as well as for academics. The innovations consist in examining the objective and subjective side of the offense, with reference to the existing doctrine and practice, with the new changes introduced by the new law and the comparative examination with the old law.

**Keywords:** the objective side; the subjective side; comparative analysis; more favorable criminal law

### 1. Introduction

The incrimination of the non-compliance act of the regime of nuclear material and other radioactive matters in the Romanian law<sup>2</sup> was determined on the one hand by the developments of international crime in the area, with direct effects on the Romanian territory, and on the other hand the need to respect the obligations imposed by ratifying the Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980, and the Convention on Nuclear Safety, adopted at Vienna on 17 July 1994.<sup>3</sup>

<sup>1</sup> Associate Professor, PhD, “George Bacovia” University of Bacău, Romania, Address: 157 Calea Marasesti, 600164 Bacău, Romania, Tel.: +4034116448, Fax: +4034116448. Corresponding author: av.ionrusu@yahoo.com.

<sup>2</sup> The offense is examined in detail in the paper “Explicații preliminare ale noului Cod penal/Preliminary Explanations of the new Criminal Code” which will be released by Universul Juridic Publishing, in 2015, signed by the same author.

<sup>3</sup> The convention on the Physical Protection of Nuclear materials was ratified by Romania by Law no. 78 of 8 November 1993, published in the Official Monitor of Romania, Part I, no. 265 of 15 November 1993 and the Convention on Nuclear Safety was ratified by Romania by Law no. 43/1995, published in the Official Monitor of Romania, Part I, no. 104 of 29 May 1995.

At the same time, the additions and changes, including the option provided for in article 345 of the Criminal Code (its constitutive content will be further examined) were determined also by the need to respect and implement the Council Decision of 10<sup>th</sup> July 2007 of approving the accession of the European Atomic Energy Community to the Convention on physical protection of nuclear materials and facilities, as amended (2007/513 / Euratom).<sup>1</sup>

The two regulations of the Council of Europe and the European Union Council Decision establish the obligation of Member States or signatory members to take firm action in accordance with their national law, to adopt general provisions regarding conducting safely of such activities, and other provisions of criminal sanction for those who violate them.

Under these internal and international conditions it was imposed the incrimination of such acts in article 345, Chapter III, Title VII, Chapter called marginal “the Non-compliance regime of arms, munitions, nuclear and explosive materials” of the Criminal Code in force.

The offense provided for in article 345 paragraph (1) is the action of receipt, possession, use, transfer, alteration, transfer, dispersion, exposure, production, processing, handling, intermediary or final storage, import, export, transport or diversion of nuclear material or other radioactive matters, and any other operations on their movement, without right.

The execution of these incriminated actions, without right, means their performance in breach of Law no. 111/1996, republished, on the safe deployment, regulation, authorization and control of nuclear activities.<sup>2</sup>

At paragraph (2), article 345 of the Criminal Code it is provided the offense of removal of nuclear materials or other radioactive matters.

Paragraph (3) of article 345 provides the first aggravated way, which is to be incident given that one of the acts incriminated in paragraph (1) or (2) resulted in endangering other persons or property or have caused injury to one or more persons.

In the case where one of the acts referred to in paragraph (1) or (2) resulted in the death of one or more persons (the second aggravated way), the penalty prescribed by law is higher.

---

<sup>1</sup> Published in the Official Journal of the European Union no. L 190/12 of 21.07.2007.

<sup>2</sup> Republished in the Official Monitor of Romania, Part I, no. 552 of 27.06.2006.

In paragraph (5) it is provided for the punishment of acts referred to in paragraph (1), (3) and (4) of the article 345, committed at fault.

Therefore, in the article 345 of the new Criminal Code there are incriminated two offenses, two aggravated ways and an attenuated way.

Please note that beside this crime, the Romanian legislator has incriminated also other facts in the content of articles 44-46 of Law no. 111/1996, republished.

In this paper we will undertake a comparative examination of the provisions of the old law with the new rules, given the need to identify and apply the more favorable criminal law, under the transitional situation in which we find ourselves.

We also take into account some elements of differentiation between the two regulations, being examined also the constitutive content of the offense.

## **2. The Law in Force in Relation to the Old Law**

The offense of violation of the regime of nuclear materials and other radioactive matters was provided in the Criminal Code of the article 279<sup>1</sup>.

Comparing the two texts, we find elements of similarity and distinction, resulted of course from the new vision of the legislator.

Thus, unlike the old law, in the legal content of the offense provided for in article 345 paragraph (1) of the new Criminal Code there are incriminated other actions by which it is achieved the material element of the objective side, namely: production, processing, handling, intermediary or final storage, import, export, however referring to nuclear materials or other radioactive matters.

The offense of nuclear materials removal or other radioactive matters referred to in article 345 paragraph (2) of the new Criminal Code is mentioned in the old law in article 279<sup>1</sup> paragraph (3), the only difference between the two consists of the limits of punishment which are lower in the new law, namely imprisonment from 5 to 12 years and prohibition of certain rights, compared to imprisonment from 5 to 15 years and prohibition of certain rights.

Under paragraph (3) of article 345 of the new Criminal Code it is provided for the sanctioning of the acts committed at fault, being mentioned in paragraph (2) and (4) of the article 279<sup>1</sup> of the Criminal Code of 1969, and in paragraph (4) it is incriminated the second aggravated way, which is mentioned also in article 279<sup>1</sup>

paragraph (5) of the Criminal Code of 1969. There are also differences in these texts within the minimum and maximum limits of penalties set out in the Criminal Code, which are lower.

In paragraph (5), article 345 of the new Criminal Code it is provided for the punishment of offenses committed by negligence, referred to in paragraph (1), (3) and (4), such incrimination does not exist in the Criminal Code of 1969.

Also, another element of differentiation regards the renunciation of the legislator of the new Criminal Code to incriminating the act of threat, addressed to a foreign state, an international organization or a physical or legal entity, with the use of nuclear material or other radioactive matters, in order to cause injury or death to persons or damage to property and to the aggravated way of this offense, both incriminated in contents of paragraph (6) and (7) of article 279<sup>1</sup> of the Criminal Code of 1969.

As elements of similarity between the two incriminations, we note the identical marginal title and punishment of the attempt.

### 3. The Constitutive Content of the Offense

**The Material element** of the objective side in the case of the offense referred to in paragraph (1) article 345 consists of several alternative actions, namely: receipt, possession, use, transfer, alteration, alienation, dispersion, exposure, production, processing, handling, intermediary storage, import, export, final storage, transport or diversion of nuclear materials or other radioactive matters and any other operation on their movement. (Pascu & Gorunescu, 2009, p. 509)

Given the diversity of the actions incriminated by the legislator, we will explain their meaning in the view of the legislator's will, relating directly to the current doctrine and jurisprudence.

Thus by the action of **receiving** we understand the act of a physical or legal entity accepting to take over from another person nuclear or other radioactive matters, and by **holding** means taking into custody or possession such materials, having no legal relevance the conditions or duration time for their detention.

The **use** of nuclear or other radioactive matters presumes giving them a specific use, regardless of the intended way and purpose, either in their intended design or in another sense. (Diaconescu & Duvac, 2009, p. 666)

**Transfer** means making available to other physical or legal entity of nuclear materials or other radioactive matters, in any way.

**Changing** requires an operation by which the nuclear material or radioactive matter is transformed or changed its content, an action affecting directly their substance.

**Alienation** involves the operation by which the nuclear materials or other radioactive matters are taken from another owner; they pass from one legal or physical entity to another.

**Dispersing** means an act of scattering, dissipating, spreading these nuclear materials and radioactive matters.

**Exposure** requires the action of presenting, providing, make it noticeable for the public such materials or matters.

By means of **production** we understand manufacturing such materials or matters.

**Processing** means a sequence of operations, states or phenomena by which work it is performed an activity, there is a transformation of the nuclear materials or radioactive matters.

**Handling** nuclear materials or radioactive materials requires an action by which such materials or matters are handled.

The **intermediary storage** requires an action of receiving such materials or matters and storing them, keep them for a certain period of time, while the **final storage** means to receive, store, keep, such materials or matters indefinitely.

**Import** and **export** of such materials or matters require all commercial operations by which they are inserted or removed from the country.

The action of **transporting** such materials or matters presumes moving them, taking them from one place to another, for whatever reason.

**Diversion** means changing the destination of the nuclear materials and other radioactive matters.

**Any operation on the movement of nuclear materials and other radioactive matters involves** performing other operations than those expressly mentioned in the text by the legislator, such as destruction, sale, purchase, donation, loan, etc.

Because the law requires to be sanctioned also any operation on the movement of nuclear material or other radioactive matters, it results that the mentioned actions are only illustrative.

Also, we should note that the offense will exist in all situations where there is established the execution of one of the action incriminated by the law which is the material element of the objective side. The establishment of conducting several such actions will lead to the existence of a single offense.

For the offense referred to in paragraph (2) the material element of the objective side consist of the action of removal of nuclear material or other radioactive matters.

**Removal** means the action of the active subject of taking, of being into the possession of nuclear material or other radioactive matter without the consent of their rightful owner (including theft).

In paragraph (3) it is provided the first aggravated way of the offense and in paragraph (4) the second aggravated way, the differences between them consisting of the socially dangerous consequence that occurs.

At paragraph (5) it is provided sanctioning at fault the facts referred to in paragraph (1), (3) and (4).

In order to complete the material element of the objective side of the offense referred to in paragraph (1) it is necessary to be fulfilled the **essential requirement**. This requirement implies that the incriminated actions would be committed **without right**, i.e. under the conditions by which there are violated the provisions of Law no. 111/1996, republished.

This requirement must be met at the time of the incriminated action, having no legal relevance if the person who executed the action incriminated by law had previously such a right. There will be such a situation when the person has held a legal license or permit, which at the date of the offense was no longer valid.

According to the special law, the national competent authority in the nuclear field, which exercises regulatory, licensing and control attribution, is the National Commission for Nuclear Activities Control, an institution of national public interest, with legal personality.

The Commission is empowered to issue regulations detailing the general requirements for nuclear safety, for protection against ionizing radiation, of quality

assurance, of the control of nuclear weapons non-proliferation, of physical protection, transportation of radioactive materials, of radioactive waste management and spent nuclear fuel, of intervention in case of nuclear accident, including procedures for the authorization and control, manufacturing products and services for nuclear facilities and any other regulations necessary for the authorization and control in the nuclear field.

The Commission also develops the strategy and policy of regulation, authorization and control in the security domain, protection against nuclear radiation, control of nuclear non-proliferation, physical protection of nuclear materials and facilities, transport of radioactive materials and nuclear security of and radioactive waste management and spent nuclear fuel as part of the National Strategy for the Development of the Nuclear Field and it is approved by Government decision.

All activities provided by law in article 2 except transport activities of devices generating ionizing radiation, the use of equipment for dosimetric control and the detection system for ionizing radiation, as well as those referred to in point h) thereof, it requires a permit issued by the Commission, in compliance with the authorization procedure specific to each kind of activity or source.

The authorization shall be issued to the legal entities, upon request. The authorization may be issued to units without legal personality, established under the law, listed in Annex 4 of the law.

The authorization may be used only for the purposes for which it was issued, within the limits and conditions set out therein.

For activities referred to in article 2 letters a) - c), the authorization holder shall use only personnel with a practice permit, valid for these activities. Authorization and permit shall be issued for a specified period.

Both permits and licenses are suspended or withdrawn, in part or entirely under the terms of article 11 and 12 of the special law.

The extension of validity of the authorization or practice permit, license renewal or issuance of a new permit shall be made under the law.

The examination of the provisions of the special law regulating the issuance, suspension and withdrawal of licenses or permits clarifies the conditions for fulfilling the essential requirement required by the law, i.e. for the activities provided by law to be executed without right.

Thus the essential requirement will be met when to an initially authorized legal entity, it is suspended or withdrawn the authorization, and it continues to execute those activities or when although possessing a valid authorization, it uses the personnel without the practice permit for the activities referred to in article 2 letter a) - c).

Also, the essential requirement will be met if, after the expiry of the validity period, the legal entity continues to execute activities for which it was authorized, without presenting and seeking to extend the validity of the authorization or permits, license renewal or the issuance of a new license.

The essential requirement will be fulfilled when the legal entity is the owner of a permit issued by the Commission, but it performs other activities for which it requires authorization from another institution, such as transportation of devices generating ionizing radiation.

In the last case, we consider that the essential requirement will be fulfilled when the legal entity, although possessing an authorization issued by the Commission, conducts activities other than those for which it was authorized. Such a situation will be incident when a legal entity authorized to receive such nuclear materials, proceeds to export them as well.

**The immediate result** for the offense referred to in paragraph (1) is to create a state of danger to the social values protected by the incrimination rule, namely life, physical integrity and health of individuals, the patrimony of legal o physical entities.

For the offense of paragraph (2) in addition to the existing immediate result at paragraph (1) it can be identified further another result which could be regarded as secondary; it consists of changing the physical position of nuclear materials or radioactive matters by removing them from the property of the owner or holder, and their illegal passing into possession of the removal perpetrator. (Pascu & Dobrinouiu, 2014, p. 830)

Within the aggravated way in paragraph (3) the immediate result is endangering other persons or property or injury to one or more persons.

The immediate result of aggravated way provided in paragraph (4) lies in the death of one or more persons.



**The causal connection** between the incriminated offense charged and the produced result should not be demonstrated, as it results from the materiality of the act. (Pascu & Gorunescu, 2009, p. 510)

The form of guilt, with which the offense referred to in paragraph (1) may be committed, is the direct or indirect intention.

There will be a direct intent when the perpetrator provides the result of his act, and he executes the offense incriminated by law pursuing this result.

There will be indirect intent when the perpetrator provides the result of his act, and although he does not pursue it, he accepts the possibility of its occurrence.

In the doctrine it has been stated that in order “to consider fulfilled the subjective element specific for this offense, it must be noted that both factors of guilt are not affected. Thus, if from the intellectual point of view it appears that the person does not have the representation of the fact that the substance in his possession, use, received, etc. is a substance that falls into the category of nuclear material and other radioactive matters, we believe that it can retain as charge the commission of the offense. This is due to the fact that the definitions given in the legislation are quite technical and the field itself requires some technical skills regarding this type of materials, so that the error can manifest in many cases and may therefore be invoked under article 30 of the Criminal Code. The results on the intellectual factor must be done with great care, according to each case. This is because, if the person has a level of knowledge or information enabling him to know what the specifics of those materials, the act will result in being an actual offense. For example, if the person is the owner of a permit of conducting activities in the nuclear field and he was the owner of such a license, invoking the error of fact is very difficult to pass”. (Pascal & Dobrinouiu, 2014, pp. 830-831)

No doubt that the views expressed by the quoted author are current, but with some additions.

In our opinion, it can be invoked the error only on certain actions provided in article 345, paragraph (1), namely: receipt, possession, intermediary or final storage, and transport. For the other actions punishable by law such as the use, transfer, alteration, alienation, dispersion, exposure, production, processing, handling, import, export and diversion of nuclear material or other radioactive matters usually the error cannot be invoked.

Also, the error can be invoked when a legal or physical entity owning a material warehouse receives, holds or stores such materials, but which are packed in boxes that are labeled other materials than the existing ones (those that had been submitted to the regime of nuclear materials or radioactive matters), supported by justifiable documents.

At the same time, it cannot, under any circumstances, be invoked the error in the case where a legal entity (sometimes physical) uses, modifies, produces etc. such nuclear materials or radioactive matters, as these activities require authorization, which is issued only under the conditions expressly provided by law, which inter alia it involves knowledge of the technological process, the existence of a personnel holding an appropriate license, etc.

In the case of the offense referred to in paragraph (2), it can only be direct intention.

However, there may be situations where the offender who removes such materials or matters does not realize that they are subject to nuclear materials or other radioactive substances regime, in which case he will not be criminally liable for this offense, but he will be liable for theft offense, provided in article 228 or 229 of the Criminal Code.

In the cases of the aggravated ways set out in paragraph (3) and (4), the form of guilt is the exceeded intention (*praeter intentionem*).

The *Praeter intentionem* (where the consequence exceeded the intention) will exist when the perpetrator foresees, seeks or accepts the production of the immediate consequence, provided in paragraph (1) or (2), but due to the specific circumstances of the offense, at its fault, the result is worse, consisting in the death of one or more persons, bodily injury to one or more persons or to endanger the other persons or property.

The last form of guilt where it might commit any of the offenses referred to in paragraph (1), (3) and (4) it is at fault with both variants.

The motive and purpose does not comprise the requirements of the subjective side, but their knowledge is helpful to the court in the process of individualization of punishment.

## 5. Conclusions

The examination of the constitutive content of the offense of non-compliance of nuclear materials or other radioactive matters provided for in article 345 of the Criminal Code, and the elements of differentiation related to the same offense in the Criminal Code of the 1969, allows the identification and application of a more favorable criminal law.

At the same time, the examination of the constitutive content of the offense presents interest in terms of identifying the novelties emerging in the new law.

The conclusion that emerges is that, currently, this indictment was required, due to the need of harmonizing the existing national legislation with the European Union one.

## 6. Bibliography

Pascu, I. & Gorunescu, M. (2009). *Drept penal, Partea specială/Criminal Law. The Special Part*. Bucharest: Hamangiu.

Diaconescu, Gh. & Duvac, C. (2009). *Tratat de drept penal, Partea specială/Treaty of criminal law. The Special Part*. Bucharest: C. H. Beck.

Dobrinioiu, V.; Pascu, I., Hotca, M.A., Chiș, I., Gorunescu, M., Păun, C., Neagu, N., Dobrinioiu, M. & Sinescu, M.C. (2014). *Noul Cod penal, comentat, Partea specială/The new Criminal Code, commented, The Special Part*. 2nd Edition revised and enlarged. Bucharest: Universul Juridic.

\*\*\* The Convention on the Physical Protection of Nuclear Material was ratified by Romania by Law no. 78 of 8 November 1993 published in the Official Monitor of Romania, Part I, no. 265 of 15 November 1993 and the Convention on Nuclear Safety was ratified by Romania by Law no. 43/1995, published in the Official Monitor of Romania, Part I, no. 104 of 29 May 1995.

\*\*\* Council Decision of 10 July 2007 approving the accession of the European Atomic Energy Community to the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities as amended (2007/513 / Euratom).