# The Role of Covert Policing and the Use of Its Results in Criminal Proceedings Involving Unlawful Restraint for Ransom[1]

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***Abstract.*** *The article is concerned with the subject matter of covert policing involving cases where a hostage is unlawfully taken and detained with the purpose of forcing other persons to act in a specific manner. Such activities, being among the most difficult procedures relevant to the work of law enforcement agencies, are usually conducted in conditions determined by a rapidly changing factual situation, high level of criminal conspiracy and the state of permanent risk to the hostage's life, the saving of which is the ultimate objective of public officers. Due to these factors, covert policing related to this kind of cases — given its nature and its investigative potential — becomes extremely important. The author's aim is to determine the essence and functions of covert policing, and in particular to present conditions which must be met to adequately process covertly obtained intelligence for the needs of criminal proceedings.*

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Taking a hostage with the purpose of forcing a government authority, an institution, a person or a group of persons to act in a specified manner is inasmuch specific a crime as investigators must not only face the occurrences which have already taken place, as is the case in the overwhelming majority of criminal offences, but also with occurrences taking place in the present and with developments which are yet to come[2]. For the very abduction is just the first link in the chain of criminal acts, which is followed by abductors' demands, and further still by potential fulfillment of those demands by victims. The crime in question is inherently an emergency involving threat to human life when state authorities are obliged to take effective action in an effort to secure the release of a hostage[3].

The crime defined in Article 252 of the Polish criminal code does not necessarily have to involve exclusively forcing others to meet financial demands

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[2] The annual figure for investigations conducted in the years 2000–2010 in cases under Article 252 of the criminal code ranges from 8 (2006) to 29 (2002). *Source*: statistics of the National Police Headquarters (www.kgp.gov.pl).

[3] Far-reaching social implications of kidnappings can be shown using examples both from the Polish police science (the 1957 kidnapping of Bohdan Piasecki — the son of prominent Polish politician Bolesław Piasecki, abduction of Krzysztof Olewnik in 2001) and the world forensics (1983 kidnapping of Emanuela Orlandi — a Vatican official's daughter, 2004 kidnapping of Cecilia Cubas — the daughter of former Paraguayan President Raúl Cubas).

as the legislator has meant it to penalise behaviour which involves unlawful taking or detention of a hostage with the purpose of forcing named entities to act in a specific manner. In the relevant literature one can find examples of cases which happened in Poland over the last 15 years and which involved taking a hostage, among others, form a police convoy, while attempting to escape from court during a court trial, forcing bodies of public administration to issue or change an administrative decision, or forcing responding police officers to refrain from performing their official duties[4].

In practice it is kidnappings for ransom that prevail and are most often carried out in Poland by the organised crime groups, which is mostly determined by the fact that these crimes require proper organisation: professional preparation, group configuration, precise role-sharing and considerable financial outlays. It is also worth emphasising that the development of new technologies, which are used by the police as a weapon, are also used by kidnappers in order to conceal their activity. Therefore, the investigation and covert policing carried out at the same time and concerning the crime pursuant to Article 252 of the Polish criminal code are a type of intellectual competition between law enforcers and perpetrators in which both sides use the latest technological developments[5]. Such cases are distinguished by rapid changes of a situation, the advantage, which is initially created by perpetrators, who carefully get prepared to commit the crime, the high level of the perpetrators' conspiracy, and the permanent risk of losing the kidnapped person, whose rescuing is the primary aim for law enforcers. Therefore, the time factor plays a very important role in such cases. Briefly describing the activities taken by law enforcers in cases of kidnapping for ransom, it is also worth noting that the activities taken should be highly discreet especially at the time prior to releasing the kidnapped person. It should be assumed that perpetrators, who demand from the kidnapped person's family not to notify the police, may monitor the area in many different ways: by observing the place of residence (whether police officers visit the place), observing the place where the kidnapping happened (whether any actions in connection with legal proceedings are taken), or observing the police stations dealing with kidnappings (whether law enforcers are more active, especially

[4] Staszak A, Porwania w celu wymuszenia okupu. Zdzieszowice: Prometeusz, 2010, p. 54.

[5] Establishing the Team for preparing methods of preventing and taking actions in cases of kidnapping was an attempt to reduce the difficulties related to conducting preparatory proceedings concerning the cases of taking and detaining a hostage in order to force other people to act in a specific manner. The Team was set up based on the agreement between the Attorney General, National Police Chief and the Chief of the Internal Security Agency. The result of the mutual cooperation was preparing the *Methods for law enforcement to deal with kidnappings for ransom or kidnappings to force somebody to act in a specific manner in exchange for releasing the hostage, whose whereabouts is unknown* and preparing the concept of training for both police officers and prosecutors. A letter of 22 May 2012, ref. No. PG VII G 021/10/12, which contained the *Methods for law enforcement*… was sent to appeals prosecutors by the Attorney General to be applied in cases of kidnapping. Moreover, since 2012 the Police Academy in Szczytno together with the National School of Judiciary and Public Prosecution have regularly conducted training courses for police officers and prosecutors on how to deal with cases of kidnapping for ransom.

working overtime). Similarly, when gathering specific evidence and information one has to take into consideration the need to keep the fact that law enforcement conduct activities related to kidnapping in secrecy. The proper cooperation between the prosecutors and police officers is of significant importance. The cooperation should consider coordination of actions taken in connection with legal proceedings along with highly significant covert policing. The author expresses his opinion that the level of difficulty related to kidnapping cases and their specific nature should require experts specialised in fighting this type of crime, that is a particular group of prosecutors from investigation sections at district public prosecutor's offices and branch divisions of the Department for Organised Crime and Corruption of the State Public Prosecutor's Office, as well as police officers from regional police headquarters and branch divisions of the Police Central Bureau of Investigation. It is also necessary to establish, if a crime of Article 252 of the criminal code has been committed, special investigative groups, headed by relevant deputy chiefs of police regional headquarters, involving regional police headquarters covert operations officers and overt officers, Police Central Bureau of Investigation officers, technical surveillance teams' representatives, criminal analysts and police psychologists. The command structure organised at the level of regional police headquarters offers great logistic opportunities and fast courses of action for institutions provided for in the Police Act, covert surveillance included. When characterising action undertaken in this type of joint investigations, it needs to be emphasised that it is necessary to provide adequate technical and organisational resources, involving adequate material resources, a fast flow of information among group members or effective cooperation with various expert witnesses. At the same time, it has to be assumed that in case of kidnapping for ransom, covert policing is of a crucial importance. The necessity of discretion of police activities resulting from a threat to a hostage's life, the need to take immediate action and, consequently, the need to reduce formalism to the required minimum as well as the implementation of tactical assumptions targeted at the protection of a hostage's life, the subsequent preservation of evidence and identification of perpetrators, the nature of operations being de facto a kind of a specific game played with kidnappers, including the use of specialist equipment and modern technologies are only some factors which need to be considered if covert activities have to be undertaken. However, it needs to be emphasised that in order to prosecute kidnappers it is necessary to correctly carry out covert policing activities, taking into consideration not only tactical but also procedural aspects, and then to introduce them into a criminal trial.

**Covert policing** has no legal definition, but it is present in many applicable legal acts[6]. Therefore, it is worth referring to the doctrine which advocates that covert policing mainly includes covert and non-procedural operation of relevant law enforcement agencies, oriented at the performance of tasks related to the maintenance of public order and safety[7].

[6] Such a definition is included in the draft act on covert policing of 7 February 2008 (Seym paper No. 353), but the act-related works have been stopped.

[7] *C.f.* Widacki J (Ed.), Kryminalistyka. Warsaw, 1999, p. 110; Hołyst B, Kryminalistyka. Warsaw, 2004, p. 47; Czeczot Z, Tomaszewski T, Kryminalistyka ogólna. Toruń, 1996, p. 67.

In the Polish relevant literature there are other definitions of this form of law enforcement activity, in particular, 'covert work', 'covert operations' or 'covert activities'[8].

Secrecy of covert policing, also as regards the person against whom they are carried out, results from the necessity to provide maximum effectiveness for them. The aims of these activities are very serious, they are connected with protection of essential legal interests. Carrying them out in an open way would be in contrast to so understood attitude towards the essence of the problem discussed. It ought to be noticed, however, that secrecy, as an area prone to abuse, must implicate the need for creating an appropriate control system over the activities of this type.

On the other hand, the non-procedural nature of activities means that these are acts performed outside criminal proceedings, under acts different from the code of penal proceedings despite the fact that their results may be used in the penal proceedings in the future. The above mentioned effects do not merely consist in gaining information, but also in its collecting, verifying, analysing or processing. While accomplishing their statutory tasks law enforcement agencies may be legally interested in persons, places, objects or threats. Activities undertaken by law enforcement agencies which are engaged in covert policing may be of very different functions. Amongst others, the following are mentioned:

- reconnaissance function (identifying factors, criminogenic and criminal environments),
- detection function (detecting crimes and perpetrators),
- evidence function (proving offenders guilty),
- and prevention function (preventing committing crimes or reducing certain threats)[9].

Some of the operational intelligence activities, for example controlling telephone calls or observing, highly interfere in private lives of citizens. The problem is of a significant importance, especially when considering the Article 51 (2) of the Constitution, according to which state institutions are not allowed to obtain, collect or reveal information on citizens other than indispensable in a democratic country based on the law system. However, civil rights and liberties, which result from the judicature of the Constitutional Tribunal or of the European Court of Human Rights, are not of an absolute nature and may be limited in certain cases. According to the Constitutional Tribunal's sentence as of 13 February 2001[10], one of the important functions of a democratic country is to effectively fight negative phenomena which may be an extreme threat to the existence of the country. Then, the legislator has not only the right, but the responsibility to combat negative phenomena by means of granting law enforcement with such entitlements which, being in accordance with the principles of the Constitution of the Republic of Poland, will have a direct influence on improving the effectiveness of fighting crime. Interference in privacy may take place only in strictly defined cases, based on rules determined in acts. Here, a test of constitutional limitations of rights or

[8] *C.f.* Taracha A, Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawnodowodowe. Lublin, 2006, p. 17.

[9] *Ibidem*, p. 25.

[10] Constitutional Tribunal's judgement as of 13 February 2001, K 19/99, OTK 2001/2/30.

liberties defined in Article 31 (2) of the Constitution is worth mentioning. It is necessary to answer three questions relating to the introduced legal regulation, that is: can it result in the intended effects (the requirement of usefulness), is it necessary for the protection of public interest, with which it is connected (the requirement of indispensability), and, finally, are its effects proportional to the responsibility imposed by citizens (the requirement of proportion). As the Constitutional Tribunal states, secret obtaining information in the process of operational intelligence activities must be a subsidiary instrument, that is used when other solutions are useless or ineffective. It means that secret interference in rights and liberties is to be applied as ultima ratio. It relates to a covert policing control, as well as to providing telecommunications data or other forms of covert policing work with a similar effect for units.[11]

In the law of criminal procedure doctrine there is an opinion that if the code of penal proceedings with a certain procedural decision (in a preparatory proceedings especially) does not clearly require applying evidence, thus evidential material or legal proceedings actions are recorded in forms determined by the criminal procedure act. For creating legally formed basis of the decision, it is possible to use the results or information gathered from operational intelligence actions recorded in non-proceedings forms, which then are used as 'free' evidence[12].

An example of such a lawsuit situation may be verifying actions from Article 307 of the code of penal proceedings, where completing data included in the crime report form, or the institution of bringing charges defined in the article 313 of the code of penal proceedings in which the legislator uses the term of 'data', not of the 'evidence' while creating the condition of sufficient justification of the suspicion of crime commitment.

The next circumstance which ought to be considered is that the so called competence acts, the Act on the Police included, refer directly to apply Article 383 (1) of the code of the criminal procedure, for example the article 19 (15). According to the principle stated in this regulation, during trial it is allowed to read all official documents having been submitted in the preparatory proceedings or in any other proceedings determined in the act. However, it is not allowed to present any notes relating to the actions which are defined in Article 311 (5) (recording statements of witnesses in an investigation).

The issues of transforming covert policing materials into evidence in a criminal law proceedings are relatively complicated ones in the law of criminal procedure. It undoubtedly results from the essence of covert policing actions, which was discussed in the introduction, as well as from other rules which are in force when operational intelligence materials or evidence are gathered in a criminal proceedings. High importance of operational intelligence outcomes will play its role in the proceedings and may be then used only in case of applying an appropriate procedure. Therefore, the discussion on the particular covert policing activities demands firstly considering the nature of documentation produced in connection

[11] Constitutional Tribunal's judgement as of 30 July 2014, K 23/11.

[12] Grzegorczyk T, Wykorzystanie i przekształcanie materiałów operacyjnych w materiał dowodowy w postępowaniu karnym, [in:] Pływaczewski E.W (Ed.), Przestępczość zorganizowana. Świadek koronny. Terroryzm. Krakow, 2005.

with conducting the activities, as well as acquiring certain objects. Notes, official papers, records of sound, or records of sound and image are included in the above mentioned categories.

The fundamental form of documenting such activities is a **note** made by an officer carrying out a covert policing case[13]. Depending on the type of activities relating to the case, its submitting requires the decision of the Polish Police Chief, the Chief of the Police Central Bureau of Investigation or a competent regional police chief (for example in case of submitting materials from an operational intelligence control) or it may be done without such a decision (for example in a situation when the collected information is presented as an interview. Notes made on the basis of competence acts are read out during a trial according to Article 393 (1) of the code of criminal procedure, with the reservation that limitations resulting from the code of criminal procedure are applied in this area. These may be: ban on replacing papers, notes or official notes of suspects' explanations and of witnesses' statements with a content. (Article 174 of the code of criminal procedure). Moreover, it should be mentioned that a note proves only the fact that it has been made by a certain officer by means of giving certain information in it. It does not prove, however, that the described events have really taken place, and that is why, it cannot be used for establishing facts connected with the action in question. It can only serve as an indicator that a certain evidential material exists. That, in turn, gives a possibility to interview the author of the note or the person indicated in it as a witness and to undertake lawsuit actions which would verify the circumstances described in the note.[14] It must be stated however, that a note will not always be a document of information collected from human intelligence sources, but it may also refer to non-human intelligence sources (for example, it may be made in connection with applying an operational intelligence control).

In case of kidnapping for ransom, actions carried out in the initial phase of the proceedings should be performed immediately. Next, documenting arrangements in an appropriate way may be, on one hand, a contribution to identifying evidential sources being then verified in a criminal lawsuit; on the other hand, it may illustrate versatility and multidirectional character of police actions, which is of a great importance in cases where human life is in danger. In practice, in case of failing to bring an investigation into success, and particularly when a hostage dies, the case is likely to be consequently examined paying special attention to proper performance of their tasks by law enforcers. Materials which document proper activities of the Police are essential evidence in such a situation. It allows for their

[13] *See:* e.g. Article 4 (1) (8) of the order of the Minister of Interior and Administration of 7 June 2011 on methods of conducting and documenting police operational intelligence activities which consist in secret acquiring, selling off or taking over objects coming from crime, the objects being subject to confiscation, or the objects which are banned to be produced, possessed, transported or traded; in accepting or offering a bribe, as well as methods of handing over, processing and destroying materials produced as a result of the above mentioned activities.

[14] Certain legislations, e.g. German or Swiss of the St. Galen's canton, contain the regulation of questioning an officer as a 'hearsay evidence' witness. It relates to the knowledge gained from the informant with keeping secrecy of the source of information.

thorough assessment.[15] They can be compared to an insurance policy which may be referred to in case of risk. The more accurate and extensive way of documenting all objectively possible covert policing activities, the more effective the materials are.

The following category of operational intelligence materials are **official documents**, including for example data which are referred to in Article 180c and 180d of the 16 July 20014 Act on telecommunications law, or information relating to insurance contracts or to bank actions. The police have rights to obtain this type of information in the form of covert policing activities (Article 20 (3), Article 20c of the Police Act) and it is possible to subsequently submit the data during the criminal trial. In cases of kidnapping for ransom, telecommunications or financial data are usually of a significant importance. Kidnappers very often use mobile phones to contact persons from whom they demand ransom. Therefore, telephone calls from or to an injured person may be essential. Information which a telecommunications network operator provides law enforcers with (time and place of logging particular telephone numbers) is of vital importance, too. Similarly, data relating to bank operations may contribute to obtaining the information on ransom (did perpetrators know what financial resources the injured party had? Who could get this information? What are contacts of these people like?)

Undoubtedly, fast collection of the data in a dynamically developing cases where human lives are in danger, is of great significance. The conclusions drawn ought to be immediately analysed and should have an impact on directions of further detection activities. It should be noted, however, that according to some authors, direct transfer of this type data into the process is unacceptable. Yet, this attitude is not a dominant one in the doctrine[16]. The later presentation of these materials in court takes place based on Article 393 (1) of the code of criminal procedure, which indicates, apart from the formerly discussed notes, the category of all official documents presented in a proceedings different from the criminal one, but listed in the act.

Recordings of sound or recordings of sound and image gained in the process of covert policing activities may become vital for criminal proceedings connected with crimes defined in Article 252 of the criminal code. This kind of recordings may be made particularly when an operational intelligence control is applied. The issue will be discussed separately. It is only worth mentioning here that the fundamental conditions which should be fulfilled (so that the recordings are allowed to be used during the trial) are as follows:

- gaining decisions and permissions of competent public institutions in the area of making recordings,
- issuing a decision by a competent body about handing over operational intelligence materials to be used in a penal proceeding,

[15] Mistakes made in the famous case of kidnapping and murdering of Krzysztof Olewnik, a son of a businessman in the meat industry near Płock, were analysed by the prosecutor's office in the process of the ongoing investigation into a crime under Article 231 of the criminal code, as well as by the Seym commission of inquiry. It was the decision of the Minister of Interior that covert policing materials collected by the police while conducting an investigation into the crimes committed, were then made available for both units.

[16] For more information see: Taracha A, *op. cit.,* p. 225.

- formal playing and making stenographic records of annexes to the protocol (the article 143 section 1 point 7 and the article 393a of the code of criminal procedure),
- potential familiarising persons, whose images and voices have been recorded, with the recordings (with the aim to take a position on the recordings),
- finally — potential obtaining necessary opinions, for example in the field of audio forensics, audio-visual techniques or anthropology.

This article is only to indicate the essence of the discussed phenomenon in the context of applying covert policing materials into penal proceedings relating to the crime defined in Article 252 of the criminal code. Therefore, only the most essential (from the point of view of their lawsuit usefulness) forms of operational intelligence, together with their division into the simple and complex ones will be listed in it. In the category of simple forms of operational intelligence activity, an interview and observation are considered as the most typical and essential ones. Examples of complex operational intelligence activity may be controlled delivery, controlled bribery or controlled purchase, as well as an operational intelligence analysis or control which are both of vital importance in cases of kidnapping for ransom.

An operational intelligence interview, which is one of the complex forms of covert policing activities, depends on getting information by an officer when he or she is having a casual conversation with another person[17]. These actions are usually registered by means of notes or operational reports. Very often the information collected in this way may be of significant importance for the penal proceedings after transforming it into explanations or statements of a person providing the information. The opinion of the Supreme Court is worth mentioning here. It says that it is acceptable to covertly question a witness before an interview, which is to 'check if and to what extent the witness is able to provide information essential for the proceedings, and this ought to be used during their interview'[18]. It must be noted, however, as it has already been mentioned, that the code of criminal procedure in Article 174 bans substitution of the evidence from witness's testimony or suspect's statement with the content of the writings, notations or official memos, thus it will always be necessary to take protocol account from the interviewed person with the application of rigours and limitations of the criminal procedure act. Repeatedly the mode of procedural valorising of information requires reaching for special procedural instruments, which entail complicated procedural consequences (a suspect taking advantage of extraordinary mitigation of punishment, an anonymous witness, a crown witness). In spite of 'a long way' between operational intelligence and a procedural hearing, it needs to be emphasized that for a judicial body just the knowledge about a personal source of evidence possessing crucial knowledge for the case may turn out to be invaluable. Finally, two very important issues must be added. First of all, acquiring information from persons in kidnapping for ransom cases must be conducted with extreme caution, especially at the stage before releasing the hostage. It is related to the necessity of providing the possible discretion of Police activities and implementation of the primary objective, which

[17] Hołyst B, *op. cit.*, p. 47; Czeczot Z, Tomaszewski T, *op. cit.*, p. 135.

[18] Supreme Court's decision of 28 February 2002, IV KKN 13/02, Lex No. 53058.

is causing the safe return of the hostage to their home. Secondly, it must be taken into account that transposing the relation from the intelligence to the trial will not be possible due to the fact that a particular person is an informant and their exposing not only might be associated with a wide range of threats, but also have their own legal limitations (compare with Article 22 of the Police Act).

Covert policing in the form of **surveillance** is based on relevantly constant focus of attention in visual recognition of a particular person, place, object in order to provide security, or in order to get to know the changes in their location in time and space[19]. Despite counting these kinds of activities as simple forms of covert policing[20], one must be aware of the fact that such an activity can be a very complex undertaking on the logistic level, with the use of a lot of technical measures and officers conducting surveillance. In the relevant literature it has been indicated that it can be of static (when the person conducting surveillance does not move) or dynamic character (when the person conducting surveillance is constantly or temporarily on the move). It is basically conducted in hiding, as the person conducting surveillance remains invisible for the subject of the surveillance, however, depending on the situation and the adopted strategy it is possible that the activity is the opposite one — overt surveillance. A combined model of surveillance is also known and it connects the elements of covert and overt activities. The doctrine indicates the objectives of surveillance as:

- acquiring particular information or confirming the previously acquired from other sources information about persons, objects or places,
- establishing or confirming the presence of particular persons at a specific place,
- establishing personal composition of criminal groups,
- establishing sources of evidence and
- establishing and apprehending perpetrators in the act[21].

The practice of law enforcement knows examples of direct transfer of information acquired as a result of surveillance to the criminal procedure. It might take the form of transferring, so called reports from surveillance to the records of a criminal case, however, this procedure is very rarely implemented in practice and it requires following the procedure described in the competence acts or the Act of 21 June 1996 on some of the powers of employees of the office attending to the minister competent for internal affairs and officials and employees supervised by this minister (OJ No. 106, item 491, as amended). Another means of procedural valorisation of the discussed findings might be interviewing as witnesses officers conducting the surveillance after releasing them from confidentiality obligation regarding classified data. However, this activity also requires a lot of consideration and sometimes even reaching for special procedural solutions. It must be always kept in mind that

[19] Hanausek T, Kryminalistyka. Zarys Wykładu. Zakamycze, 2005, p. 136.

[20] *Ibidem*, p. 135; Olejnik K, Zakres stosowania czynności operacyjnych — stan faktyczny, oczekiwania, potrzeby i możliwości wykorzystania ustaleń operacyjnych w procesie karnym oraz dopuszczalny udział prokuratora i sędziego w działaniach operacyjnych, [in:] Paprzycki L, Rau Z (Ed.), Praktyczne elementy zwalczania przestępczości zorganizowanej i terroryzmu. Nowoczesne technologie i praca operacyjna. Warsaw, 2009, p. 637.

[21] Gołębiewski J, Praca operacyjna w zwalczaniu przestępczości zorganizowanej. Warsaw, 2008, pp. 40–41.

exposing officers conducting the surveillance in the course of the procedure, especially those carrying their duties in divisions of technical surveillance, might result in far-reaching consequences contributing to serious limitations in their further work. Thus, in the investigative practice reaching for this kind of procedural act should only occur in case of absolute necessity of acquiring evidence from observations of the person conducting surveillance and should be evaluated in the context of possible grounds to apply the institutions of an anonymous witness. It is also worth mentioning that findings resulting from surveillance, together with appropriate attitude of law enforcement agencies might be transferred to the proceedings in an indirect way. As an example one may point out a situation related to the observation at the ransom exchange point particular persons or vehicles which might have also been recorded by CCTV cameras operating in the area. Its appropriate securing in accordance with Article 217 of the code of criminal procedure and then its protocol reconstruction based on Article 143 (1)(7) of the code of criminal procedure and connecting it with the rest of the evidence material (including e.g. testimony of the person transferring the ransom as for the time and place of the action), and conducting the activities unrelated with the direct transfer of the information from surveillance, might constitute the foundation to make crucial factual determinations in criminal proceedings. It should also be noted here that surveillance conducted at the time and at the location of ransom handover should be correlated with other activities of the Police and decisions taken in a way that includes priorities in procedures in abduction cases. One must especially take into account the fundamental rule of protecting hostage's life and health and not jeopardising them in the situation when their whereabouts is unknown. In the relevant literature a case has been described in which in the course of apprehending one of the perpetrators while picking up the ransom placed in a package and dropped in a rubbish bin at the bus stop. In spite of this activity and apprehension of two other persons, the hostage was not freed. The victim's body has not been found until today and this is one of the reasons why murder charges have not been pressed[22]. However, the adequate tactics regarding decision making in crucial moments of police activities, including the moment of ransom handover, must, together with aforementioned rule of not jeopardizing the life of a hostage, fully allow for the directive of protecting the life of a person handing over the ransom.

The complex form of covert policing, which is **operational analysis**, is based on searching and identifying connections between information related to a prohibited act or its perpetrator and other data, including the data gathered in existing data bases. Services authorized to conduct operational intelligence activities possess special powers to gather, verify or process information (see: Article 20 of the Police Act). A lot of this data, including — as in the case of the Police — personal data, fingerprints, photos, sketches, descriptions of appearance, pseudonyms, information on perpetrator's modus operandi, their environment and contacts, but also telecommunication data or related to financial flow, in analytical comparison with information regarding a particular crime or threat might lead to interesting conclusions. Undoubtedly a specific role in cases related to kidnappings for ransom is played by the analysis of telecommunication data due to the fact of frequent use

[22] Staszak A, *op. cit*., p. 156.

of mobile phones by perpetrators. On the basis of Article 20c (1) of the Police Act it is possible to acquire three types of data: about a subscriber, about movement (so called billing data), and about location. There is no legal capability to acquire this way the contents of information transferred with the use of telecommunication networks. Only applying the procedure of covert surveillance gives such powers.

Oft-times such analysis takes place with the use of special computer programmes which process hundreds thousands of information. One might indicate the following programmes: Analyst's Notebook (for visualization and analysis of data), iBase (analytical data base) Maltego (for searching data in the internet resources), or AreGIS (for processing geospatial information). Constatations resulting from the analysis may be a foundation for accomplishing definite settlings or building hypotheses directing further operational activities. Operational analysis may often be the factor contributing to undertake particular procedural steps, nonetheless, in such case it is necessary to acquire properly the data for the criminal proceedings. One must bear in mind, however, that, for example, acquiring information representing bank or telecommunication secret for the use of operational analysis occurs in the form of competence acts, whereas using it in criminal proceedings requires from the judicial body either transferring, together with the analysis, the applied source material in accordance with the required form, or applying appropriate procedures described in the code of criminal procedure or the banking law and 'repeated' acquisition of the appropriate documents. Being satisfied only with conclusions from operational analysis, without the accurate transferring to the proceedings the source materials on which the analysis had been implemented, makes it *de facto* impossible to use them. The practice of law enforcement authorities indicates very significant role of operational analysis in cases concerning kidnapping for ransom. It results from the enormity of different information collected by law enforcement agencies during its course. It is vitally important to input to the data bases all the information acquired during the proceedings, all the more so because there are frequent serious interpretative difficulties when it comes to assessing the importance of particular data, especially at the preliminary stage. At the later stages of the case, the accurate documenting and cataloging of seemingly irrelevant data might appear very significant.

Whereas the indicated methods of covert policing, such as intelligence, surveillance, operational analysis, have only general support in regulations in force (by regulating in them powers of services authorised to conduct widely understood covert policing[23]), the presented below complex form of activity which is covert surveillance is strictly formalised in the Police Act, and its effective execution requires implementation of procedures related to obtaining consent of appropriate organs not dependent on the services conducting the activities and meet the specified deadlines. It must be stressed here that the practice of law enforcement authorities

[23] Although in this scope there are some interesting exceptions, such as regulations in Article 75b on Customs Service in accordance which the officers of this formation are authorised to conduct surveillance and record with the use of technical means the images of the events in public places with the sound accompanying the events — strictly during the activities conducted in order to identify the perpetrator and acquiring evidence of crimes or fiscal crimes — only in the case of the Director's of Customs Chamber Directive for a specific period of time not longer than 3 months.

indicates that demanding ransom in vast majority of cases takes place over the telephone, which is the reason why covert surveillance plays primary role in crime cases described in Article 252 of the code of criminal procedure[24].

Covert surveillance is conducted undercover and — in accordance with the Article 19 (6) of the Police Act — consists in:

1) acquiring and recording the contents of phone conversations with the use of technical means, including telecommunications networks;
2) acquiring and recording images or sound of people in rooms, means of transport or places other than public places;
3) acquiring and recording contents of correspondence, including correspondence conducted with the use of electronic communication means;
4) acquiring and recording data form computer data carriers, telecommunication user's devices, ICT systems;
5) acquiring access and control of the packages' contents.

Thus, in the course of covert surveillance one may acquire both, information coming from controlling the contents of correspondence or packages without using technical means (letters, postcards, packages, parcels) and information acquired owing to the technical means understood as devices used for controlling conversations in different circumstances and recording them, but also surveillance and recording events taking place in rooms (phone conversations, text messages, fax messages, videos sent via electronic mail, data on carriers, etc.)[25]

Regulations precisely determine the objectives in relation to which covert surveillance might be applied. They include the following: preventing the commission of a crime, its detection, determining a perpetrator, acquiring and recording evidence. Furthermore, the article 19 (1) of the Police Act determines the catalogue of crimes in relation to which covert surveillance might be applied. The legislator assumes that such big interference into the right to communicate might only be executed in case of a suspicion of committing the most serious intentional crimes. Furthermore, it might be ordered when other means appeared to be ineffective or will be unusable. The decision regarding covert surveillance is issued by the district court with territorial jurisdiction on account of the headquarters of applying Police organ or the District Court in Warsaw in case of motions filed by, inter alia, the Police Commander in Chief or the Commander of the Police Central Bureau of Investigation. Filing a motion by an authorised organ depends on the written consent of the prosecutor (Attorney General or district prosecutor with territorial jurisdiction). The motion is examined by one judge and all actions related with it are implemented with exclusion of openness and under conditions described in the Act of 5th August 2010 on protection of classified information (OJ No. 182, item 128). The basic period of application of covert surveillance is 3 months, but it is possible to extend it justified cases. The abovementioned motion must include: a case number, its codename, the description of a crime including, if possible, its legal qualification, circumstances justifying the need for application of covert

[24] According to A. Staszak's research a phone is the most common means used by perpetrators to contact the persons who will have to pay the ransom and appeared in 83% of cases analysed by the author, *op. cit*., p. 166.

[25] Pikulski S, Podstawowe zagadnienia taktyki kryminalistycznej. Białystok, 1997.

surveillance, including confirmed ineffectuality or uselessness of other means, personal or other data which allows to unambiguously determine the subject or object towards which covert surveillance will be applied, including indicating its place or way of implementation, but also its objective and the kind of conducted covert surveillance [see: Article 19 (7) of the Police Act]. In addition, the organ filing a motion for ordering covert surveillance is obliged to present the district court with materials justifying the need for its application in the particular case and in relation to persons indicated in the motion. [Article 19 (1a) of the Police Act].

The Constitutional Tribunal emphasises the fact that legal acts related to surveillance impose a significant condition to be fulfilled before a request for surveillance can be submitted for consideration. The condition requires that the agency which submits the request has to define 'the methods of implementing surveillance' and 'the type of surveillance.' According to the Constitutional Tribunal, statutory provisions and executive acts which have been made under them imply that the agency which requests surveillance is obliged not only to indicate which of the three statutory forms of surveillance they want to proceed with but also what the surveillance will in fact include and what resources and personnel will be used. Defining 'the method of surveillance' also makes it possible to determine what type of information will most likely be collected in the course of surveillance (e.g. recorded telephone calls, text messages or multimedia messages, movement tracking).[26]

When attempting to relate the above mentioned reasoning to the actual process of preparing request for surveillance in cases involving kidnapping for ransom, we should note that Article 19 (1) (2) of the Police Act provides a list of legal qualifications which are significant from the viewpoint of investigating kidnapping cases. These include Article 189 (false imprisonment), Article 252 (1–3) (taking or detaining a hostage in order to fore other persons to act in a specific way), Article 258 (participation in an organised criminal group or leading an organised criminal group) or finally Article 282 of the criminal code (extortion by force). Another condition which has to be fulfilled to approve surveillance is to prove that other investigative tools and methods have been ineffective or useless. The first condition occurs when other methods (such as the already mentioned intelligence or covert observation), despite their implementation, failed to bring the desired results, and the other one assumes that we know in advance that using these methods, given the specific nature of a case, will be ineffective. Another example in that respect is a condition which frequently occurs in kidnappings for ransom where unknown offenders specify their demands by phone and the place where they keep the hostage is unknown to law enforcement. Taking into consideration that in such cases working with covert human intelligence sources should be conducted with great care, especially with regard to the hostage's life which may be in jeopardy and the need to conceal the actions of law enforcement agencies, we are unlikely to assume that methods other than wire-tapping will give quick and solid results.

Article 19 (3) of the Police Act provides law enforcement with a type of procedure which may have great significance in cases involving crimes described in Article 252 of the criminal code. In urgent cases, where any delay could cause loss of information

[26] The Constitutional Tribunal's sentence from 30 July 2014, K 23/11.

and either distortion or destruction of evidence of a crime, the National Chief of Police, the Chief of the Central Investigation Bureau or a regional police chief can issue an order to initiate surveillance upon receiving a written approval from an appropriate prosecutor. At the same time the prosecutor files a request at the regional court of proper territorial jurisdiction in order to obtain a decision on this matter. The dynamics of kidnapping cases, including how quick the offenders ask for the ransom to be paid, how long they detain the kidnapped person or the fact that the kidnapped person's life is in jeopardy, are undoubtedly factors which should be considered whenever we try to find out if a particular case is urgent as defined in the cited regulations.[27] However, should the court fail to endorse the request within 5 days since the surveillance was initiated, the executive office puts the surveillance on hold and authorizes the destruction of all collected materials in the presence of a supervisory commission and documented in a protocol.

Due to the fact that kidnappings for ransom often involve both covert policing and an official investigation, it should be noted that it is possible to use surveillance parallel to and for the benefit of the criminal proceedings being conducted. This is unequivocally determined by the specific editing of the provisions of law in Article 19 (3) of the Police Act which state that if there is a necessity to place a suspect or an indicted criminal under surveillance, the police have to include information about any ongoing investigations against that person in their request during application phase. Obviously, surveillance in such circumstances would only be possible if proof were shown that other methods had turned out to be ineffective or useless.

The provisions of law included in the Police Act clearly state that whenever the police gathers enough evidence to launch a criminal investigation or if new evidence may alter an ongoing investigation, the proper body (including the National Police Chief, the Chief of the Central Investigation Bureau or a regional police chief) hands over the files and all evidence collected during the surveillance. Particular attention should be paid to the legislator's requirement which states that "all" materials should be handed over, which prevents a particular agency from filtering out the files they do not want to send, at the same time the requirement ensures that judicial bodies can prepare a more accurate evaluation of the files since they receive complete materials. Therefore the procedure of incorporating evidence gathered through surveillance into the judicial process has been clearly defined in legal provisions. Article 321 of the Code of Criminal Procedure can be applied in the same situation where a subject of surveillance has the right to look through the case files. If no decision has been made to convert these materials to case evidence then the individual who has been placed under surveillance is deprived of this right, which often becomes an object of contestation in doctrine and in sentencing.[28]

[27] A. Staszak's research shows that in 64% of the analysed cases the kidnappers asked for the ransom within 24 hours after the kidnapping had been committed, on the other hand, the number of contacts per day remained relatively big (in 22,6% between one to eight hours, in another 30,2% of the analysed cases — 2–3 times a day). In 38,3% cases the kidnapped person had been held hostage for up to 2 days, and in 23,3% for a period of 2 to 7 days — *op. cit.*, pp. 152, 164, 168.

[28] *Cf.* Kozielewicz W, Postępowanie w przedmiocie zarządzenia kontroli operacyjnej, [in:] Praktyczne elementy…, *op. cit.*

The Supreme Court[29] has ruled that all materials collected by the police as a result of lawful surveillance, including recorded phone calls, which serve as evidence in a court of law under Article 19 (15) of the Police Act must be presented (played) during the main court session (according to the first sentence of Article 393 (1) of the code of criminal procedure) or, should neither of the parties present at the hearing file an objection, be presented in court but not played aloud (Article 394 (2) of the code of criminal procedure), which has to be noted in the session minutes. Transcripts of the recorded phone calls are enclosed in the session minutes (analogically to Article 147 (3) of the code of criminal procedure). However, if the wiretapping has been considered unlawful, it cannot serve as evidence and must not be used in any shape or form in criminal proceedings, i.e. taken into consideration prior to sentencing even if the phone call recordings were played during the session. At this point it should be pointed out that the objective-subjective limitations imposed by the legislator to define the conditions which have to be met in order to allow wiretapping also grant them a guaranteed status, eliminating any possible deviation from this rule of law.[30]

Considering that the code of criminal procedure has been revised since 15 March 2016 there should only be a slight mention that changes were applied to the conditions of the so-called subsequent permission concerning situations where surveillance either provided evidence incriminating persons not listed in the decision to initiate surveillance or evidence of crimes not listed in this decision. Whether to use such evidence is up to the prosecutor in accordance with Article 168b of the code of criminal procedure, unlike the previous legislation which only allowed the court to decide. Furthermore, the range of crimes for which subsequent permission is required has been expanded and as a result does not only include offences from a closed catalogue; a deadline for the decision has not been clearly specified in the legal act either.

When considering the potential consequences of implementing the incorrect procedure in the process of using evidence gathered through surveillance in criminal proceedings, we should keep in mind Article 168a of the code of criminal procedure which has been in force since 15 March 2016. According to this legal norm evidence must not be rejected solely because it has been obtained either in violation of criminal procedure rules or by committing an offense defined in Article 1 (1) of the criminal code, unless the evidence has been gathered by a public officer performing his duties, as a result of: murder, intentional grievous bodily harm or false imprisonment. However, the range and extent to which the procedure of subsequent permission may be violated varies: starting with the incorrect form of the decision and ending up with an unlawful decision to admit evidence gathered through illegal surveillance. Although in the first case credit should be given to M. Kurowski who indicates that violating the form of decision pursuant to Article 168b of the code of criminal procedure is insignificant when it comes to the ways in which those materials may be utilized since we can conclude from Article 168a of the code of criminal procedure that violation of the procedure

[29] The Constitutional Tribunal's sentence of 10 June 2008, III KK 30/08, OSNKW 2008/8/65.

[30] The sentence of the Court of Appeal in Lublin of 18 May 2009, II AKa 122/08, Lex No 513128.

cannot cause the evidence to become invalid[31], the issue of using illegally gathered evidence raises significantly more questions. It is entrenched in the Polish Constitution as much as it is in Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms about the right to a fair trial. The introduction of Article 168a of the code of criminal procedure forces us to reconsider the validity of the current jurisprudence of the Supreme Court, the example of which may be its decision from 30 November 2010 (III KK 152/10, OSNKW 2011, No. 1, item 8). In this ruling the Supreme Court indicates that 'failing to adhere to the provisions of Article 19a of the Police Act from 6 April 1990 which defines statutory conditions for use of covert policing renders all evidence gathered in this manner invalid and unusable in the criminal procedure', and additionally that 'it is impossible to accept a situation in which officers of the state, therefore of the public authority, would be able to gather evidence showing disregard for applicable law, and then in accordance with the same law the citizens would be liable to prosecution.' In its rulings, the Supreme Court would cite the provisions defined in the Polish Constitution, specifically in Article 2 (the rule of a democratic state ruled by law), Article 7 (the rule of law) and Article 45 (1) (the rule of the right to a fair and public hearing of one's case and the rule of the right to a competent, impartial and independent court). Undeniably, the above mentioned legal rules of the basic law are still in effect, and the current form of Article 168a of the Code of Criminal Procedure raises doubts about its accordance with constitutional rules. However, according to the rule of the presumption of the constitutionality of legal acts, they are in perfect accordance with the Polish Constitution, as long as it is not challenged in an official inquiry in the Constitutional Tribunal to be otherwise.

It is also worth adding that the documents submitted directly to a legal proceeding, often being the product of surveillance, are by default classified, as specified in the Act on Protection of Classified Information. Such circumstances on its own do not prevent this information from being used in criminal procedure; however, they seriously obstruct it.

Processing such documents in that situation can only be allowed in classified information archives, which may become an organizational problem for a judicial body not only in the sphere of information processing (as specially certified CPUs are required) but also when it comes to preparing experts' reports of various sound and image storing media (possible opinions include audio forensics, anthropology or foreign language translations). Most importantly, however, upholding confidentiality clauses may seriously restrict the rights of defense. The accused and counsels for the defense are not allowed to copy classified files for their own use and making certified copies of the files, although the current legislation in force allows it, does not entail taking the files out from either the prosecutor's office or the court.[32] The absence of such materials creates restrictions when preparing defense strategy, both with the analysis of the files in order to bring motion to adduce new evidence and with preparing means of appeal. The significance of the rights of defense

[31] Kurowski M, *op. cit*.

[32] *Cf.* The Regulation of the Minister of Justice of 20 February 2012 on methods of processing interrogation forms and other documents or objects which fall under the obligation of confidentiality to keep secret all classified information or information related to practicing a profession or function (OJ, item 219).

is reflected in Article 6 (3b, 3c) of the Convention for the Protection of Human Rights and Fundamental Freedoms which state that the above mentioned right should be exercised in such a manner that the defendant has the time and resources to thoroughly prepare the line of defense. Similarly the Supreme Court's sentencing shows a very uncompromising approach to the issue and seeks to prevent that right from being restricted in any manner.[33] Therefore the prosecutor may request the relevant bodies (the National Chief of Police, the Chief of the Central Investigation Bureau or a regional police chief) to de-classify the case files, which seems to be a reasonable postulate, and consequently lift the confidentiality clauses placed on the files. Despite the fact that the prosecutor and the court both serve merely as the applying bodies in this regard, initiating this type of procedure alone proves that judicial bodies acknowledge the rights of defense and utilize the existing legal possibilities.

Altogether — it should be stressed again that the usability of covert policing in criminal proceedings, including kidnapping for ransom cases, could be fairly extensive. However, putting its results to good use in legal proceedings calls for compliance with the procedures defined in the Police Act at the stage of gathering and transferring materials obtained from surveillance, as well as the application of proper rules from the code of criminal procedure when transforming surveillance material into formal evidence. On one hand, it is crucial to establish that surveillance material has been acquired and recorded in compliance with statutory rigors, designated for various categories of threats to the legal order against which these proceedings are initiated[34] and on the other hand classified surveillance files can be disclosed in the course of a criminal proceeding only if it does not cause any of the evidence to fall within the scope of the exclusionary rule and no other criminal procedure rigors described in the code of criminal procedure are violated.

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[33] *Cf.* The Supreme Court's sentence of 14 February 2001, V KKN 395/98, Lex No 52027.

[34] *Cf.* The Supreme Court's decision of 22 September 2009, III KK 58/09, OSNKW 2010/3/28.

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***Streszczenie.*** *Przedmiotem artykułu jest problematyka czynności operacyjno-rozpoznawczych prowadzonych sprawach, których przedmiotem wzięcie i przetrzymywania zakładnika w celu zmuszenia innych osób do określonego zachowania. Czynności takie, należące do najtrudniejszych z jakimi można spotkać się w praktyce organów ścigania, realizowane są najczęściej w warunkach zdeterminowanych przez błyskawicznie zmieniającą się sytuację faktyczną, wysoki stopień konspiracji sprawców oraz stan permanentnego ryzyka utraty życia przez zakładnika, którego uratowanie jest celem nadrzędnym dla funkcjonariuszy publicznych. Elementy te powodują, że podejmowana w tego rodzaju sprawach praca operacyjna — z uwagi na swój charakter oraz możliwości wykrywcze jakie daje — ma niezwykle doniosłe znaczenie. Autor skupia się w swojej publikacji na nakreśleniu istoty czynności operacyjno-rozpoznawczych, ich funkcji a przede wszystkim na przedstawieniu warunków związanych z właściwym przetransponowaniem materiałów uzyskanych w ich wyniku do postępowania karnego.*

***Резюме.*** *В статье рассматривается вопрос оперативно-следственных действий, используемых в расследовании дел, которых предметом является захват заложника и его удерживание, чтобы заставить других выполнять определенные действия. Такие действия, которые являются самыми трудными, и будучи частью практики органов преследования, чаще всего осуществляются в условиях, когда резко меняется действительное положение дел, существует высокая степень конспирации и постоянный риск, что заложник может потерять жизнь, спасение которого является высшей целью для государственных должностных лиц. Эти элементы приводят к тому, что оперативно-следственная деятельность, предпринимаемая в таких делах, с точки зрения характера и возможности раскрываемости, которые она дает, имеет чрезвычайно важное значение. Автор в своей публикации сосредоточивается на сущности этих мероприятий, их функции, но прежде всего, старается представить соотвествующие условия перевозки материалов, полученных в результате оперативных действий в рамках уголовного дела.*

***Translation:*** *Mariola Bil, Anna Jurczenko, Tomasz Różycki, Tomasz Mazur, Olimpia Bogdalska (article, abstract), Mirona Urbanik-Gołota (резюме)*