XXXVII POLISH YEARBOOK OF INTERNATIONAL LAW
2017
DOI 10.7420/pyil2017n
PL ISSN 0554-498X

*Karolina Wierczyńska**

ACT OF 18 DECEMBER 1998 ON THE INSTITUTE OF NATIONAL REMEMBRANCE – COMMISSION FOR THE PROSECUTION OF CRIMES AGAINST THE POLISH NATION AS A GROUND FOR PROSECUTION OF CRIMES AGAINST HUMANITY, WAR CRIMES AND CRIMES AGAINST PEACE

Abstract:
This article discusses definitions of crimes included into the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, and their usefulness in prosecuting individuals who committed international crimes. It is argued that the provisions of the Act cannot constitute a ground for criminal responsibility of individuals, as they violate the principle of nullum crimen sine lege certa.

Keywords: crimes against humanity, crimes against peace, genocide, ICC, ICTR, Institute of National Remembrance, war crimes

INTRODUCTION

The current discussion on the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (the Act) should have been started many years before adoption of the controversial amendment which has unleashed an international furore, with Poland at the centre.[1]

* Dr. habil., Associate professor, Institute of Law Studies of the Polish Academy of Sciences, Warsaw (Poland), email: wierka2000@wp.pl.

[1] The amendment, which was accepted on 26 January 2018 and entered into force on 1 March 2018 (*see* Dz. U. (Journal of Laws): http://www.dziennikustaw.gov.pl/du/2018/369), was intended to prevent using the misnomer "Polish death camps", but has led to precisely the opposite result. The amendment made said phrase more popular and brought more attention to it, making this phrase a headline in newspapers (*see* https://wapo.st/2H7Ogcl). It flooded the internet (*see* https://bit.ly/2HEROUu and https://cnn.it/2r7fyX3), being the most searched phrase there and on TV news (as is visible if, for example, we compare

The reason is that from the very beginning the Act has been ambiguous, as it consists of regulations which do not have their point of departure in international law, while at the same time the Act refers to and partially relies on already accepted definitions of international crimes. After a closer look however, an addressee looking for a reliable definition of international crimes will rather be disappointed and be left with a number of doubts and unanswered questions. Additionally, the case law of Polish courts referring to the Act does not provide answers, especially to those who are familiar with international regulations concerning international crimes and the practice of international criminal tribunals (ICTs).

It should be stressed at the beginning that the present analysis is focused on the Act itself, and not on its recent controversial amendments. The objectives of this article are twofold. Firstly, it aims at examining the relevant normative content of the Act and the definitions of international crimes used in acts of international law, as for example in the Statute of the International Criminal Court[2] (Rome Statute), which is the main point of reference (especially in the practice of Polish courts, as it is the code of the only international permanent criminal court of which Poland is a member state). In this context, this article focuses on those definitions contained in the Act which are inconsistent with definitions used in international law, in particular the notion of "crimes against humanity." Secondly, the contribution analyses the practice of Polish courts which have used and applied definitions from the Act to charge and convict individuals for crimes against humanity and argues that this practice is inconsistent with the *nullum crimen sine lege certa* principle. The inconsistencies in the Polish regulations are highlighted to conclude that the Polish system based on the Act does not follow any universal standard concerning the definitions and the content of international crimes.

1. CRITICAL OVERVIEW OF THE ACT IN THE CONTEXT OF THE CRIMES IT DEEMS TO PROSECUTE

The Act came into force on 19 January 1999, aimed at "the remembrance of the enormity of the number of victims and the losses and damages suffered by the Polish people during World War II and after it ended." It also recalls "the obligation to prosecute crimes against peace and humanity and war crimes", as clearly stated in its Preamble.

Further Article 1(2) states that it regulates the procedure for the prosecution of the following crimes (specified in Article 1(1)(a)):

- Nazi crimes;
- communist crimes;

---

the phrases "German death camps" and "Polish death camps" in the application of google trends) (all accessed 30 June 2018). The amendments to the Act are addressed by Patrycja Grzebyk in the subsequent article. The amendments were partly withdrawn in June 2018.

[2] Rome Statute of the International Criminal Court, signed 17 July 1998, 2187 UNTS 3.

- crimes of the Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich;[3]
- other offences constituting crimes against peace, crimes against humanity or war crimes.

The notion of Nazi crimes is not defined in the Act, nor are its elements or prerequisites mentioned. This general category is supposed to cover all crimes committed by the Nazis. Some light into its hypothetical content could be found in Article 55a (which was introduced by the 2018 amendment in January), which referred to the responsibility of individuals who publicly, and contrary to the facts, declare the responsibility of the Polish nation for Nazi crimes regulated in Article 6 of the Charter of the International Military Tribunal (the Nuremberg Charter). Thus, while Article 55a at least gave the reader a slight idea of what the point of reference of the drafters of the Act was (i.e. the Nuremberg Charter[4]), it must be underscored that this new provision, which did not exist before January 2018 was withdrawn in June.

According to Article 2 of the Act, communist crimes are defined as

> the actions performed by the officers of the communist state between 8.11.1917 and 31.07.1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people, which as such constituted crimes according to the Polish penal act in force at the time of their perpetration.[5]

According to Article 2a of the Act crimes committed by the Ukrainian nationalists and members of Ukrainian formations collaborating with the Third Reich consist of:

> acts committed by Ukrainian nationalists between the years 1925-1950 consisting of the use of violence, terror, or other violations of human rights against individuals or groups of the population. The crimes committed by Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich also include participation in the extermination of the Jewish population or genocide of the citizens of the 2nd Republic of Poland on the territory of Volhynia and Eastern Lesser Poland.

The Act provides only fragmented definitions of international crimes, as it neither offers definitions of all the mentioned crimes nor describes the elements or content of those mentioned above. Among the crimes defined in international law, the Act includes solely the definition of 'crimes against humanity', which however can hardly be recognized as a definition that currently exists under public international law. Article 3 of the Act states as follows:

> Crimes against humanity are especially considered as the crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide,

[3] Note that the passage mentioning these crimes was added by the amendment in January, Dz. U. 2018, item 369, part of January amendments was however withdrawn in June 2018, Dz. U. 2018, item 1277 including Article 55a. The text of the Act before amendment can be found in Dz. U. 2016, item 1575.

[4] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, containing the Charter of the International Military Tribunal, signed 8 August 1945, 82 UNTS 280.

[5] Translation taken from the official website of the Institute of National Remembrance (available at: https://bit.ly/2E5YyIl); amendments available at: https://bit.ly/2F5pWry (both accessed 30 June 2018).

> adopted on 9 December 1948 (Journal of Laws of 1952 No. 2, item 9 as amended), as well as other serious persecutions based on the ethnicity of the people persecuted and their political, social, racial or religious affiliations, if they were either performed by public functionaries or inspired or tolerated by them.

At the same time, the Act does not offer any definition of war crimes or crimes against peace, although it refers to them directly in Articles 1, 3, 4 and withdrawn in June article 55a. It also refers to the crime of genocide, which must be understood in its conventional meaning, because the Convention on the Prevention and Punishment of the Crime of Genocide (Convention on Genocide) are, together with the Nuremberg Charter, the only regulations which are referred to in the Act and which refer to the international crimes as defined and understood in international law.

2. GENERAL DISCUSSION ON THE DEFINITION OF CRIMES INCLUDED IN THE ACT

Insofar as concerns the eventual prosecution of the crimes specified above, as provided for in Article 1(2), the situation becomes very complex and problematic. The problems are connected with the definition of crimes against humanity given in the Act, which is not a definition accepted in international law, and the lack of definitions of "war crimes" and "crimes against peace."

It could probably be argued that the drafters wanted the Act to reproduce the definition of crimes against peace and war crimes by taking into account the Nuremberg Charter. Some arguments could be presented to support such a thesis, as for example the reference to the Nuremberg Charter in Article 55a (which was however included in the text only in the amendment and was later withdrawn) and the fact that Poland is a State-party of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and subsequently the Nuremberg Charter of the International Military Tribunal,[6] which is annexed to the said agreement. One could also take into account the fact that the notion of 'international crime' is used, while the Polish Penal Code does not use the notion "crime" (*zbrodnia*) but "offence" (*przestępstwo*).[7] The Nuremberg Charter is also the only treaty instrument binding Poland where the definition of "crimes against peace" appears.[8] None of the other documents which are aimed at prosecuting individuals regulate this issue. However, in international law the notion of a crime against peace was replaced by the crime of aggression, as visible in Article 8 *bis* of the Rome Statute. Although Poland is bound by several treaties

[6] *Supra* note 4.

[7] *See* chapter XVI of the Polish Penal Code, available at: https://bit.ly/2KlcmiI (accessed 30 June 2018).

[8] Article 6a of the Nuremberg Charter states: "[c]rimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

concerning war crimes – such notion was used solely in the Nuremberg Charter (and later in the Rome Statute, and Additional protocol I to the Geneva Conventions of 1949), while in the other documents a different nomenclature was applied, such as "grave breaches of humanitarian law", or "violation of the laws or customs of war" (as in the Hague Conventions of 1907 or Geneva Conventions of 1949[9]). This all leads to the conclusion that the Nuremberg Charter was probably the model for the provisions included in the Act.

The lack of a legal definition of a war crime and a crime against peace in the Act, which simultaneously provides for regulation of the procedure for the prosecution of those crimes, means that the document violates the *nullum crimen sine lege certa* principle, as penal law requires a crime to be precisely defined so that the foreseeability of the punishment and accessibility to the concrete penal norms can be established for individuals.[10]

In contrast to war crimes and crimes against peace, the notion of "crimes against humanity" is defined in the Act. However the definition, which includes genocide within its scope ("the crimes against humanity are especially considered the crimes of genocide (…), as well as other serious persecutions based on…") is not compatible with the definitions of crimes against humanity known in international law. The definition used in Article 6c of the Nuremberg Charter enumerated: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." This definition is completely different from the definition used in the Act, although since World War II this crime has been widely recognized in international regulations. The definition of crimes against humanity has been subjected to many modifications, as the drafters of the various definitions have taken different approaches as to whether crimes against humanity can be committed only during an armed conflict, or include actions outside a war, or whether they need to be committed on discriminatory grounds, etc. Interestingly, according to the definition included into the Statute of International Criminal Tribunal for Rwanda, the court had a competence to prosecute "crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[11], while the Rome Statute states that a "'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any

[9] Geneva Conventions of 1949, 75 UNTS 31, 75 UNTS 85, 75 UNTS 135, 75 UNTS 287; 1907 Hague Convention (iv) available at: https://bit.ly/2gZ093I (accessed 30 June 2018); Additional protocol I to Geneva Conventions of 1949, 1125 UNTS 3.

[10] P. Karlik, T. Sroka, P. Wiliński, *Artykuł 42* [Article 42], in: M. Safjan, L. Bosek (eds.), *Konstytucja RP.* Vol. I: *Komentarz do art. 1-86*, CH Beck, Warszawa: 2016, pp. 1033-1040, para. 118.

[11] The Statute of the ICTR is available at: http://legal.un.org/avl/pdf/ha/ictr_EF.pdf (accessed 30 June 2018).

civilian population, with knowledge of the attack." Although different in many respects – these definitions have one common denominator, i.e. a civilian population.[12] But this element was eventually omitted in the definition included in the Act. To the contrary, the definition in the Act was construed using the notion of genocide. This definition does not have any connection with any existing definition of "crimes against humanity" in the statutes of the ICTs, but it shows certain similarities to the provisions used in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[13], which states in Article 1 that:

> No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:
> a) (…)
> b) crimes against humanity, whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal (…), eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, *and the crime of genocide* as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed (emphasis added).

In the above wording it is not clear whether genocide is a part of a definition, making genocide a crime against humanity, or whether it is a distinct crime. Note that the name of the Convention refers solely to war crimes and crimes against humanity, which would support the thesis that in 1968, when the Convention was adopted, genocide was treated as a crime against humanity. It is not clear however whether this definition was the source for the Polish legislator, especially that the Convention is not a penal act which allows for the prosecution of international crimes. It was only designed to avoid the impunity of the criminals and ensure the effective punishment of war crimes and crimes against humanity by confirming the "principle that there is no period of limitation for war crimes and crimes against humanity."[14] But it might be argued that the Convention was a model for Polish legislators, as the formulations of the relevant provisions are similar to those applied in the Act. Additionally, Article 4 of the Act refers to the limitation period by stating: "[t]he crimes mentioned in Article 1(1)(a), which according to international law constitute crimes against peace, humanity or war crimes, shall not be subject to a limitation period." This provision, however, differs from the provisions of the Convention on the Non-Applicability of Statutory Limitations, as it also mentions crimes against peace, while the Convention does not. Thus the Act provides for a better protection of the prosecution of international crimes, but it does not provide the legal definitions of such crimes.

[12] The definition included in the Polish Penal Code in Article 118a also mentions the population as one of its elements.

[13] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, signed 26 November 1968, 754 UNTS 73.

[14] *Ibidem* (Preamble).

3. CRIMES AGAINST HUMANITY AND GENOCIDE TODAY

A few decades ago genocide was perceived as "constituting a crime against humanity",[15] or as an aggravated form of a crime against humanity or, as noted by Stefan Glaser, as a qualified form of a crime against humanity ("génocide n'est par sa nature qu'un crime contre l'humanité, voire un crime qualifié contre l'humanité").[16] Today however, after the recognized definitions of both crimes have evolved,[17] they are perceived as separate crimes, the elements of which can be easily distinguished from one another.

The current definition of genocide, as accepted in the Convention on Genocide and then subsequently reproduced without modifications in the statutes of ICTs (including the ICC), states that: "genocide means any of the following acts (the acts are here omitted – KW) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Thus intent, i.e. the mental element (*mens rea*), is the most important factor distinguishing genocide from all other crimes. Additionally, it must be committed against certain protected groups, as the intent of the criminal must be aimed at destroying a protected group, in whole or in part. Such a definition markedly differs from definition of a crime against humanity accepted in the Rome Statute, which underscores the fact that act be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", where the attack against a civilian population and its systematic or widespread nature are the main features of the definition. In the light of the cited definitions, the thesis that genocide constitutes a crime against humanity can no longer be sustained, which is why the definition included in the Act stating that "crimes against humanity are especially considered the crimes of genocide (…) as well as other serious persecutions based on …" must be regarded as erroneous, as it actually is not a definition which could be recognized as having anything in common with the international definitions of crimes. Additionally, it cannot be the ground for individual responsibility as it is not clear enough to be a basis for prosecution, inasmuch as it does not regulate the scope of criminalization and the elements of the crime. An addressee may not discern from the wording of the definition of the criminal conduct which acts or omissions are prohibited.[18] Furthermore, the definition refers only to the conventional definition of

[15] Fourth report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398 and Corr. 1-3, Yearbook of the International Law Commission: 1986, vol. II(1), p. 58, para. 29.

[16] S. Glaser, *Droit international pénal conventionell*, vol. 1, Bruylant, Bruxelles: 1970, p. 109.

[17] In the context of genocide, we refer to the definition in the Convention on Genocide. With respect to crimes against humanity, the situation is more complex as there is no any separate convention regulating only this crime. It must be however noted that its definition in the Rome Statute is recognized universally as there are 123 member-parties of that statute, and this universal recognition of the definition impacted the work on the convention on crimes against humanity, where such a definition was reproduced, *see* Crimes against humanity, Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, 5 June 2015, ILC, 67th session, pp. 5-6.

[18] Karlik et al., *supra* note 10.

genocide, although the provisions of the Convention on Genocide cannot be directly applied.

Finally, the definition included in the Act, which is inconsistent with any existing definition in current international law, is also inconsistent with the Polish Penal Code, which in its Article 118 regulates the responsibility for genocide, and separately in Article 118a regulates responsibility for crimes against humanity. To sum up – the acts defined as crimes against humanity in the Act, despite having the same label must be regarded as separate forms, different from the notion of crimes against humanity contained in the Penal Code. And insofar as concerns its application in practice, it must be noted that such a definition is not only inconsistent with any known definition of a crime against humanity, but also violates the fundamental principle of law – legal certainty (*nullum crimen sine lege certa*)[19] – if it is applied for the prosecution of individuals. The legislator does not have to regulate normative provisions precisely, but the regulations in the Act must fulfil the principle of sufficient specificity of a prohibited act, and its provisions under criminal law should satisfy the test of foreseeability and predictability, specifically the predictability of the legal effects of the addressee's actions.[20] Thus the provisions concerning the definitions of crimes in the Act cannot be applied to prosecute anyone for either war crimes or crimes against humanity, because they are not precise enough to be the grounds for a criminal prosecution. They cannot be applied according to legal theory... but the practice in Polish courts has been different.

4. COURTS APPLYING THE ACT

The practice of the courts applying the Act requires a critical reassessment.[21] In recent decades, the Act was applied in order to prosecute members of the Citizens' Militia (the communist police force) for their internment of members of the political opposition. The alleged illegal internment, which refers to the events surrounding the introduction of martial law on 12 December 1981, lasted only a few days or a week at most, as after 19 December – when the act went into effect – the "illegal internment" became legal, and usually lasted several weeks or months.[22] Several regional courts (for

[19] C. Kress, *Nulla poena nullum crimen sine lege*, Max Planck Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, Oxford: 2010.

[20] *See* Karlik et al., *supra* note 10.

[21] The Polish Yearbook of International Law already presented a discussion on the issue. *See* A. Kleczkowska, *Decision of the Supreme Court-Criminal Chamber, dated October 14, 2015 (ref. no. I KZP 7/15)*, XXXV Polish Yearbook of International Law 327 (2015) where the author, in analyzing whether internment could be qualified as a crime against humanity, noted that international courts demand longer periods for a crime to be qualified as a deprivation of liberty (*see* particularly pp. 334-335).

[22] In this instance, "illegal internment" covers those situations when such internment was not yet grounded on legal provisions deriving from the Decree of 12 December 1981, which was the normative

example in Skierniewice and Gorzów Wielkopolski) found that such illegal application of the practice of internment was an unlawful deprivation of liberty and a serious political repression of the political opposition, and consequently constituted a crime against humanity, being simultaneously a communist crime according to Articles 2 and 3 of the Act.[23] A few of the accused were sentenced to two years of imprisonment, although these sentences were in each case suspended and replaced by probation for a period between 2-5 years. The courts did not apply any international definition of crimes against humanity (only the one included in Article 3 of the Act), and one Court (the Skierniewice court) addressed the definition of crimes against humanity by taking into account (following the decision of the Supreme Court[24]) the criteria mentioned in Article 7 of the Rome Statute (which came into force in 2002!), and applied them to the situation of the accused, pointing out that the decision on the internment of 36 persons was a massive persecution of a social group because of its political views. Every deprivation of liberty which is the result of such persecution of certain groups by state organs, applied on mass scale and connected with a clear violation of citizens' rights and causes physical and mental suffering might be, in the opinion of the court, qualified as a crime against humanity.

A few circuit courts also confirmed this line of reasoning by addressing, once again following the decision of the Supreme Court, the provisions of the Rome Statute to analyse and interpret the provisions of the Act, specifically the definition of crimes against humanity.[25]

The above-mentioned decision of the Supreme Court focused its considerations specifically on the status of crimes against humanity with respect to domestic acts in the context of internment. It confirmed that even a short-term deprivation of liberty (for less than 7 days) could be exceptionally considered as a crime against humanity, but only when other elements of crimes against humanity recognized in international documents are fulfilled. The Supreme Court stated that an intentional deprivation of liberty might be considered as a crime against humanity even if the prerequisites of this crime as contained in the Polish Penal Code (Article 118a para. 2) are not met.[26] The Court also underlined that the notion of "crimes against humanity" is not identical

---

ground for the application of internment. After the Decree was officially promulgated, the internments which continued were not illegal. *See* Judgement of the Supreme Court No. V KK 402/14, 2 February 2016, p. 7 and G. Wierczyński, *Urzędowe ogłoszenie aktu normatywnego* [Official promulgation of a normative act], Wolters Kluwer, Warszawa: 2008, pp. 121-122.

[23] *See e.g.* the judgement of the Regional Court in Skierniewice No. II K 504/15, 1 February 2017. *See also* the judgement of the Regional Court in Gorzów Wielkopolski no. II K 62/11, 15 October 2012, both available at: https://www.legal-tools.org/en/browse/record/a98935// (accessed 30 June 2018); *see also* Kleczkowska, *supra* note 21, pp. 327-328.

[24] Decision of the Supreme Court, Criminal Chamber, No. I KZP 7/15, 14 October 2015, available at: www.sn.pl (accessed 30 June 2018).

[25] *See e.g.* the judgement of the circuit court in Białystok, No. VIII Ka 414/16, dated 18 October 2016, available at: https://orzeczenia.ms.gov.pl/ (accessed 30 June 2018).

[26] Decision of the Supreme Court, p. 23.

with the notion of crime as provided in Article 7 of Polish Penal Code,[27] thus the Court decided that lesser offence (*występek*) could be also recognized as crime against humanity.[28]

Taking this decision into account, the Supreme Court issued a judgement in the case of J.W. who was accused of both a communist crime and a crime against humanity for illegally interning certain individuals. The Supreme Court criticized the direct application of Article 3 of the Act, pointing out that the provisions of Article 3 do not have a penal character – they cannot constitute grounds for criminal responsibility of an individual, and that such definition of crimes against humanity is specifically established only for the Act on the Institute of National Remembrance. Contrary to the actions of the other courts, the Supreme Court decided to take into account the different notions of crimes against humanity appearing in international documents, suggesting at the same time that courts in the case of J.W. should have taken into account the definition of the crime existing at the moment when it was possible to proceed in the case of the accused on normal terms, bearing in mind the prescription periods set out in the penal code.[29] The Supreme Court decided that in the case of J.W it was necessary for the circuit court to precisely reconstruct and determine the notion of crimes against humanity which refer to the situation of the accused (especially in that there are other definitions of crimes beside those included in the Nuremberg Charter and the Rome Statute) and decide whether the acts of accused fulfilled the elements of such definition of crimes against humanity and whether they still do. In the judgement however, the Court did not refer to the question whether lesser offences could be qualified as crimes against humanity, and this question is touched upon below.

CONCLUSIONS

The judgement of Supreme Court revealed flaws of the regional and circuit courts not only in the context of the case of J.W., to which it referred directly, but also in a few other cases where the qualification of the crime for which internment was applied was based on Article 3 of the Act, i.e. qualified as a crime against humanity. The Supreme Court was clear that this definition cannot be the grounds for finding criminal responsibility on the part of an individual, as it does not have a penal character. The Supreme Court did not however refer to the *nullum crimen sine lege certa* principle, or the legality principle in general, which could have strengthened its arguments.

[27] Article 7 of Polish Penal Code makes a difference between types of offences: crimes and vices. The former, being a more grave form of an offence, is punishable by a penalty not less than 3 years of imprisonment.

[28] Decision of the Supreme Court, p. 17.

[29] Judgement of the Supreme Court No. V KK 402/14, 2 February 2016, p. 12.

Furthermore, it is worth noting that the Court obliged the Circuit Court to consider which definition of crimes against humanity should be applied with respect to J.W., and whether, under whatever definition is applied, the court considers that his acts fulfilled the elements of the definition which existed at that time.

The Supreme Court did not directly declare that the Rome Statute came into force only in 2002 and thus cannot be directly applied to acts which had taken place before that date (*lex retro non agit*), although it seems that it can be inferred as a natural consequence of the obligation imposed on the circuit court demanding the establishment of the proper definition of the crime (if any) to be applied.

It is however disappointing that the Supreme Court did not take re-examine the question whether a lesser offence could actually be qualified as a crime against humanity, a question which was answered in the affirmative in an earlier Supreme Court decision (which in the opinion of this author was an erroneous interpretation). It must be noted that all the definitions of crimes against humanity existing in international law concern only grave crimes, the "most serious crimes of concern to the international community", or grave crimes that "threaten the peace, security and well-being of the world" (from the preamble of the Rome Statute). A short-term internment would probably never fulfil such a notion of a grave crime, and the practice of the International Criminal Court seems to confirm it could never be recognized as a crime before that court, as it would be assessed as not being sufficiently grave. It seems that the Supreme Court's decision was wrong in allowing for qualifying a lesser offence as a crime against humanity. It was never the idea of the international community to include lesser offences within the notion of crimes against humanity. Quite the contrary, Article 5 of the Rome Statute states that the ICC "has jurisdiction over the most serious crimes of concern to the international community as a whole." The ICC understands this in the following way: "[A]ll crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases."[30] This means that a short-term internment would probably never be qualified as crime against humanity, as it is not deemed to be a sufficiently grave crime to justify further actions by the Court. As expressed by Judge Kovács: "[t]he concept of gravity in the Statute (…) should function in such a manner as to achieve the ultimate goal for its inclusion, namely to focus on those situations/cases which are indisputably grave and deserve the attention of the international community."[31] This does not mean that the domestic courts cannot prosecute lesser offences. States have primary responsibility for prosecuting crimes, but it cannot be derived from this that they are allowed to freely qualify a few days' internment as a crime against humanity.

---

[30] ICC, Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC -01/09-19-Corr, p. 25, para. 56.

[31] Partly Dissenting Opinion of Judge Péter Kovács, ICC-01/13-34-Anx 16-07-2015 1/21 EC PT, para. 18.

Interestingly, the Polish regional and circuit courts have, in a few cases, used the concept of crimes against humanity to justify the very proceedings against perpetrators of communist crimes, qualifying them as crimes against humanity so that the limitation periods do not apply to such crimes (which is probably why the prosecutors and courts insisted on such a qualification), as presumably in 2020 they would be subject to the statute of limitations as communist crimes. Apart from that, the rationale underlying the policy of qualifying lesser offences as a crime against humanity is not the proper way to fulfil the aims of criminal justice.