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DECISION OF THE SUPREME COURT – CRIMINAL CHAMBER, DATED OCTOBER 14, 2015

(Ref. no. I KZP 7/15)

THE RULING

The deliberate deprivation of a person of his or her liberty may – upon the fulfilment of specific requirements – be recognized as a crime against humanity, the punishability of which is not subject to statutory limitations, even if it does not violate all of the elements of the prohibited conduct as stipulated in Art. 118a § 2 point 2 of the Polish Penal Code.[1]

1. FACTUAL BACKGROUND

The Regional Court in S., in its judgment dated 8 April 2013, decided that an individual – J.W. – was guilty of violation of Art. 231 § 1[2] in conjunction with Arts. 189 § 2[3] and 11 § 2[4] of the Polish Penal Code, in conjunction with Art. 2 paragraph 1[5] and

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[1] Journal of Laws 1997, No. 88, item 553 as subsequently amended.

[2] Art. 231 § 1 provides: "[a] public official who, exceeding his authority, or not performing his duty, acts to the detriment of a public or individual interest shall be subject to the penalty of imprisonment for up to 3 years." (Translated with the aid of English version of the Penal Code, available at: https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf (this translation note also refers to further parts of this comment).

[3] Art. 189 § 1 provides: "[w]hoever deprives a human being of their liberty shall be subject to the penalty of imprisonment for a term of between 3 months and 5 years. § 2. If the deprivation of liberty lasted longer than seven days, the perpetrator shall be subject to the penalty of imprisonment for a term of between 1 and 10 years."

[4] Art. 11 § 2 provides: "[i]f an act or conduct has elements specified in two or more provisions of penal law, the court shall sentence the perpetrator for one offence on the basis of all concurrent provisions."

[5] Art. 2 § 1 provides: "[a]s conceived of by the Act, communist crimes are actions performed by the officers of the communist state between 17 September 1939 and 31 July 1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people or which as such constituted crimes according to the Polish penal act in force at the time of their perpetration." (Full translation of the Act is available at: http://ipn.gov.pl/en/about-the-institute/documents/institute-documents/the-act-on-the-institute-of-national-remembrance).

Art. 3[6] of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.[7] As the Commander of the Citizens' Militia, J.W. issued decisions, between 12 and 16 December 1981, on the internment of several people, grounding his decision in the Decree of 12 December 1981 on the protection of the state's security and public order, at a time when this act was not yet officially promulgated.[8] These decisions resulted in the unlawful deprivation of liberty of the interned persons for a period of time exceeding seven days and amounted to serious political repression, which is a form of a crime against humanity. Moreover, the Court found J.W. guilty of issuance of a decision on the internment of B.B. on 12 December 1981, qualified as an offence of certifying an untruth in an official document, also recognized as a crime against humanity on the grounds of Art. 3 of the Act on the Institute of National Remembrance. The legal grounds for this ruling were also based on the above-mentioned Decree of 12 December 1981.

Since the Regional Court decided that J.W. committed crimes against humanity, consequently the Court also found that these crimes were not subject to any statutory limitation and sentenced him to 2 years of imprisonment, which ruling was suspended for the period of three years' probation.

In examining the appeal, on 21 May 2014 the Circuit Court in S. changed the judgment of the Regional Court and ruled that the last offence did not constitute a crime against humanity, as well as modified the ruling on the penalty, sentencing J.W. to 2 years of imprisonment, without placing him under a probation period.

The counsel for the defendant brought a cassation appeal against this decision, pointing out, inter alia, that J.W., as the commander of the Citizens' Militia, was obliged to comply with the regulations of the Decree of 12 December 1981; that the unlawfulness of the deprivation of liberty could not be assessed from the standpoint of the proper official promulgation of the legal act which constituted the grounds for defendant's actions; and that the decisions on internment did not lead to a deprivation of liberty, but were only preventive forms of isolation, applied and tolerated by Polish and international legal acts.

In considering the cassation appeal, the Supreme Court, in a ruling by a bench panel of three judges, decided that the case required a thorough examination of the definition of a crime against humanity. Thus, the Supreme Court came to the conclusion that the application of Art. 105 § 1 of the Penal Code (the stipulation that a crime against humanity is not subject to statutory limitations) was limited only to acts of deprivation

[6] Art. 3 provides: "[a]s crimes against humanity are especially considered the crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 (Journal of Laws of 1952, No. 2, item 9 and 10 and No. 31, item 213 and of 1998 No. 33, item 177), as well as other serious persecutions based on the ethnicity of the people and their political, social, racial or religious affiliations, if they were performed by public functionaries or either inspired or tolerated by them."

[7] Journal of Laws of 2014, item 1075 (Act on the Institute of National Remembrance).

[8] The Decree was officially promulgated on 17 December 1981.

of liberty, which, if not connected with severe distress, lasted longer than seven days and included other elements enumerated in Art. 118a § 2 point 2[9] of the Penal Code. The Supreme Court's doubts arose from the assumption that, if the Decree of 12 December 1981 was properly promulgated on 17 December 1981, this promulgation validated this act, which therefore made the deprivation of liberty, ordered by the decisions issued on the internment, lawful commencing from 17 December. Consequently, the unlawful deprivation of liberty lasted for a maximum of five days (counting from the first decisions issued by J.W. on 12 December to the moment of official promulgation of the Decree on 17 December). These uncertainties on the part of the panel resulted in submission of a legal question to the bench of seven judges of the Supreme Court, which was stated as followed: "Can the deliberate deprivation of liberty of another person be acknowledged as a crime against humanity, the punishability of which is not subject to statutory limitations, even if it does not include elements of the prohibited conduct stipulated in Art. 118a § 2 point 2 of the Penal Code?"

2. THE SUPREME COURT'S REASONING

The Supreme Court started its considerations from an overview of the legal status of a crime against humanity in the respective international and domestic legal acts, as well as the case law. Thus, among international treaties the Court mentioned Art. VI of the Charter of the International Military Tribunal, Art. I of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, and Art. 7(1) of the Rome Statute of the International Criminal Court.[10] In referring to the Polish legal order, the Court enumerated Arts. 3 and 4[11] of the Act on the Institute of National Remembrance. As the Supreme Court noted, none of these acts mentioned how long the deprivation of liberty should last in order for a conduct to be recognized as a crime against humanity.

Inasmuch as the Supreme Court wanted to determine why the legislator decided to include in Art. 118a of the Penal Code the element of "deprivation of liberty for a time exceeding seven days", even though the definition of a crime against humanity stipulated in the Rome Statute does not contain such a limitation, it referred to

[9] Art. 118a § 2 point 2 provides that: "[a]ny person who taking part in a massive attack or at least in one of a series of the attacks against a group of people carried out in order to execute or support the policy of the state or organization (…) deprives a person of liberty for a time exceeding seven days or in connection with severe distress shall be punished with imprisonment for a time not shorter than five years or with imprisonment for twenty-five years."

[10] Art. 7 paragraph 1(e) stipulates that: "[f]or the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (…) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law."

[11] Art. 4 provides that: "[t]he crimes mentioned in Art. 1, point 1 (a) which, according to international law, constitute crimes against peace, humanity or war crimes shall not be subject to a limitation period."

the explanatory memorandum to the law introducing Art. 118a into the Penal Code. This document stated that it was important, because of the principle of complementarity, to introduce into the Polish Penal Code types of crimes referring to the crimes prohibited by the Rome Statute, i.e. a crime against humanity and a war crime, since this would enable the Polish courts to have jurisdiction of these crimes. It was decided that in order for the principle of complementarity to work effectively, it was important to precisely indicate in the Polish legislation the scope of the penalization, so that the International Criminal Court (ICC) could unambiguously assess to what extent the crime was adjudicated before Polish courts. The conducts prohibited by the Penal Code reflect *ratio legis* of the crimes prohibited by the Statute. However, they differ in their description from the Rome Statute, as the elements included in the Polish Penal Code were referred to notions used previously in the Code so that their interpretation would be clear, and additionally because there is extensive case law explaining their meaning. As an example, the explanatory memorandum mentions the element of "deprivation of liberty for a time exceeding seven days", which in general reflects the content of Art. 7(1)(e) of the Rome Statute.[12] The Supreme Court commented on these passages of the explanatory memorandum, stating that the document does not clarify why the legislator decided to introduce the required time period to the "deprivation of liberty."

Next the Supreme Court presented an overview of the Polish case law concerning a crime against humanity, quoting from some decisions adopted by the Supreme Court. Among them, the decision of the Supreme Court dated 28 November 2012 (ref. no. V KK 168/12) was mentioned. In that case the Court, after interpreting the norms of international criminal law, found that in order to determine whether an act or conduct was a crime against humanity under Art. 3 of the Act on the Institute of National Remembrance, it was sufficient that only one person be harmed as the result of a perpetrator's actions (i.e. there is no requirement that the perpetrator should harm many people in order to find his act or conduct as a crime against humanity). Thus, the Supreme Court deduced from these findings that the same conclusion may be referred to the duration of the deprivation of liberty, i.e. that the introduction of the time element was unjustified.

The Supreme Court also cited its decision dated 21 August 2013 (ref. no. III KK 74/13), wherein it stated that Art. 118a § 3 point 2 of the Penal Code does not have application in order to interpret Art. 3 of the Act on the Institute of National Remembrance, since the definition of a crime against humanity included in this latter article was formulated only for the purposes of this specific Act and refers to international criminal law regulations, while Art. 118a of the Penal Code was introduced in order to harmonize the Penal Code with Art. 7 of the Rome Statute. However, this latter regulation is also used to interpret Art. 3 of the Act on the Institute of National Remembrance.

The Supreme Court also referred to the decision of the Appeal Court in Lublin of 13 September 2011 (ref. no. II AKZ 393/11). The Appeal Court underlined in that case

[12] Since this element is included also in the above mentioned Art. 189 § 2 of the Penal Code.

that, inasmuch as the legislator used the phrase "are especially considered", Art. 3 of the Act on the Institute of National Remembrance cannot be deemed to define all actions which can constitute a crime against humanity. Consequently, in order to determine the full range of actions which may constitute a crime against humanity, one needs to interpret this article using sources of international law (none of which stipulates a minimum duration of the deprivation of liberty).

Summing up these considerations, the Supreme Court found that there are no findings in the case law which could directly aid the Court in determining whether the deprivation of liberty for a time period not exceeding seven days could also constitute an element of the crime against humanity.

Having so concluded, the Court proceeded to present an overview of the viewpoints set forth in the Polish scholarly jurisprudence in this respect. From among the publications quoted by the Supreme Court, it is worth noting that none of the commentators referred directly to the time period of a deprivation of liberty with respect to definitions of crimes against humanity in international law, nor commented on the reasons for the introduction of this element into the Polish legal system. Thus, the Supreme Court referred to the following views presented in the Polish jurisprudence: first of all, Art. 118a § 2 is *lex specialis* with respect to Art. 189 § 1 and 2 of the Penal Code (M. Szewczyk); secondly, the crime against humanity defined in Art. 118a of the Penal Code must be committed by at least two perpetrators, which is an unjustified constraint in relation to the content of Art. 7 of the Rome Statute; thirdly, the "deprivation of liberty exceeding 7 days" from Art. 118a is the same element which was included in Art. 189 § 2 and 3 of the Penal Code, fourthly, Art. 7 of the Rome Statute may be useful in the interpretation of Art. 118a of the Penal Code (L. Gardocki); finally, Art. 118a of the Penal Code and Art. 8 of the Rome Statute are convergent because of the requirement of implementation of the complementarity principle (D. Dróżdż). However, the Supreme Court did not point the relevance of these views in the context of the examined problem.

Subsequently, the Supreme Court found that if Art. 7(1)(e) of the Rome Statute and the element of "deprivation of physical liberty" included in this article were to be construed through the lens of Art. 118a of the Penal Code, this would be contrary to the rules of interpretation of treaties included in the Vienna Convention on the Law of Treaties, since an act of international law cannot be interpreted by reference to the content of a domestic law. Thus, it is impossible to determine, based on Art. 7(1)(e) of the Rome Statute, how long "[i]mprisonment or other severe deprivation of physical liberty" should last. Nor does the Elements of Crimes published by the ICC stipulate the duration of a deprivation of liberty; rather this document focuses on the number of persons deprived of liberty and the gravity of their rights violated by this deprivation. Consequently, the Court came to the conclusion that charges pressed against J.W. may have been considered as a crime against humanity only with reference to the number of interned persons and the gravity of rights violated by the "deprivation of liberty", and not with respect to the duration of the deprivation.

Moreover, as stated in Art. 91(1) of the Constitution of the Republic of Poland: "[a]fter promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute." And pursuant to paragraph 2: "[a]n international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes." These provisions of the Polish Constitution also describe the rules applicable to the Rome Statute, since it is a ratified international agreement promulgated in the Journal of Laws.

Taking all the above into account, the Supreme Court found that even if the act or conduct does not fulfil the elements of Art. 118a of the Penal Code, this does not mean that it cannot be recognized as a crime against humanity on the grounds of Art. 3 of the Act on the Institute of National Remembrance. In order to interpret Arts. 3 and 4(1) of the Act, one should apply the international legal regulations, and not Art. 118a of the Penal Code. Consequently, the deliberate deprivation of liberty of another person may, upon fulfilling certain requirements determined in international legal acts, constitute a crime against humanity, which is not subjected to statutory limitations – even if it does not include elements of a prohibited act stipulated in Art. 118a § 2 point 2 of the Penal Code.

However, the Court also determined that it was necessary to consider whether the Rome Statute could be applied in order to interpret Polish regulations in the case in question, since the principle prohibiting retroactivity could lead to an interpretation that a "crime against humanity", as defined in the Rome Statute, may be applied only to acts of conduct committed after the Rome Statute came into force. Ultimately however the Court limited itself only to this general remark.

3. DISCUSSION OF THE COURT'S REASONING

Above all attention must be drawn to several contradictions in the Supreme Court's reasoning in the discussed Decision. Firstly, with respect to the arguments raised by the Court it does not seem to have been necessary to determine why the legislator decided to include the element "deprivation of liberty exceeding seven days" in Art. 118a § 2 point 2 of the Penal Code in order to support the ruling of the present case. Courts refer to the explanatory memoranda of legal acts in order to interpret elements included in legal norms. However, such authentic interpretation is applied only when the interpretation of the regulation is needed at all, i.e. when it is necessary to determine the meaning of the regulation.[13] In the present case, the core of Art. 118a § 2 point 2, which allows to attribute a crime against humanity to a perpetrator only when the victim was deprived of liberty for a period of time exceeding seven days is explicit, and the Court

[13] L. Morawski, *Zasady wykładni prawa* [Principles of interpretation], ODiDK, Toruń: 2010, pp. 15, 34.

should have confined itself to applying such a clear legal norm. Instead, in the present case the Supreme Court apparently sought an explanation for the legislator's decision with respect to this particular time period, which is meaningless. Even if the Court found that the legislator introduced this element for some frivolous reason, but the meaning of the regulation as a whole was clear and coherent, the Court would have had to apply it. Thus, it is hard to stipulate what kind of consequences might follow from the Supreme Court's findings that there was an illogical reason underlying the insertion of the provision in question contained in Art. 118a § 2 point 2 of the Penal Code. Nevertheless, the Court, even though it neglected these grounds, determined the legislator's motives, quoting the part of the explanatory memorandum which stated that through Art. 118a § 2 point 2 the regulations of the Rome Statute were introduced to the Polish Code, and that the legislator decided to specify the elements of the crimes because of the principle of complementarity. The regulation of the Penal Code is valid regardless of the Supreme Court's doubts and should be fully applied in cases adjudicated before Polish courts, without further reference to sources of international law.

Secondly, it is virtually impossible, if not inexplicable, to find any link between the finding that, through the interpretation of norms of international criminal law, even harming one person may amount to a crime against humanity (as stated in the case ref. no. V KK 168/12, quoted by the Court), and the introduction into the Polish domestic law of a time period as to how long the deprivation of liberty should last. What's more, it is also hard to figure out how the conclusion that the former is unjustified would influence the validity of the latter.

Finally, it is important to observe the outcome of the Court's findings. In the light of the Court's resolution of the case, there are two completely different norms defining a crime against humanity in the Polish legal order. The first one is included in Art. 3 of the Act on the Institute of National Remembrance. To commit this crime, a perpetrator must contribute, as J.W. did, to the deprivation of liberty of a person for any time period, including one shorter than seven days, and, consequently, he may be guilty of a crime against humanity with all its consequences, in particular the lack of statutory limitations. What's more, this norm may be applied only in reference to the prosecution of crimes perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 1 September 1939 until 31 July 1990, such as the Nazi crimes, communist crimes, and other crimes against peace, humanity or war crimes (Art. 1 of the Act).

The second norm prohibiting a crime against humanity in the Polish legal order is included in Art. 118a § 2 point 2 of the Penal Code. The Supreme Court, even if it apparently could not find reasonable grounds for its introduction, could not undermine the content of this regulation, i.e. that the crime against humanity prohibited by the Code requires that the perpetrator took part "in a massive attack or at least in one of a series of attacks against a group of people carried out in order to execute or support the policy of the state or organization" and deprived "a person of liberty for a time period exceeding seven days", with no limitations in terms of the time when the crime took place and the nationality or citizenship of the victims.

Taking all the above into account, a more severe criterion is applied to a perpetrator, such as J.W., who was acting as a public officer performing his duties by issuing decisions pursuant to the legal regulations of the time (without prejudice to their moral assessment), than to a person who conducts a massive attack and, as a result, deprives people of their liberty. The inequity in this finding is especially striking in reference to the J.W. case: a person who only contributed to the deprivation of liberty for less than seven days by his decisions, not using violence but performing his official function, may face the charge of a crime against humanity and find himself in a worse situation than a brutal terrorist who, carrying out a massive attack, deprives people of liberty, but for a time not exceeding seven days. Even if the perpetrator of the communist crime is no less guilty of his crime than such terrorist, bearing in mind the circumstances and means of conduct, the Court's resolution, allowing for the application of these two different norms to such grossly different situations, does not seem reasonable in any of its point.

Moving on to the Court's arguments related to the duration of the deprivation of liberty in relation to the content of international legal acts and in light of the views presented in the scholarly jurisprudence, the Supreme Court neglected to enter into a more detailed examination of the problem. In this regard it would seem essential to refer to the opinion presented by the International Law Commission (ILC) in the commentary to the Draft Code of Crimes against the Peace and Security of Mankind.[14] Article 18 of the Draft Code stipulates the elements of a crime against humanity, including also "arbitrary imprisonment". Pursuant to the commentary to this regulation, "imprisonment" is defined as "deprivation of liberty of the individual", so it reflects the content of Art. 7 of the Rome Statute. However, the commentary states that this element "would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps and detention camps or other forms of long-term detention."[15] As a result, the ILC indicated that only a deprivation of liberty lasting for a long time, such as in cases of detention in a concentration camp, may be considered as a crime against humanity. This view is broadly shared by the doctrine,[16] also in relation to interpretation of Art. 7(1)(e) of the Rome Statute. Furthermore, it is pointed out that the element of the "severe" deprivation of liberty (as the Rome Statute relates to "[i]mprisonment or other severe deprivation of physical liberty") indeed refers to the duration of the deprivation of liberty.[17] What's more, the Elements of Crimes, which was also mentioned by

[14] *Draft Code of Crimes against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1996, vol. II, Part Two.

[15] *Ibidem*, p. 49.

[16] *E.g.* A. Klip, G. Sluiter, *The International Criminal Tribunal for the Former Yugoslavia*, Cambridge University Press, Cambridge: 2005, p. 312; C. Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Oxford University Press, Oxford: 2009, p. 222; M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge: 2002, p. 507.

[17] C.K. Hall, *Commentary to Art. 7 (1)(e)*, in: K. Ambos, O.R. Triffterer (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article*, CH Beck, München: 2008, p. 203.

the Supreme Court, stipulates that the crime against humanity comprises, *inter alia*, the following elements: "[t]he gravity of the conduct was such that it was in violation of fundamental rules of international law" and the fact that "[t]he perpetrator was aware of the factual circumstances that established the gravity of the conduct." Once again the term "gravity" is said to relate to both the duration and conditions of deprivation of liberty.[18]

These findings, which link "deprivation of liberty" only with long-term periods of deprivation, seem to find justification in international case law. The International Criminal Tribunal for Rwanda found that "imprisonment" and "deprivation of liberty" do not refer to "every minor infringement of liberty that forms the material element of imprisonment as a crime against humanity."[19] Likewise, the Special Panels for Serious Crimes (District Court of Dili) in East Timor decided that "[d]eprivation of physical liberty would be severe if the length of such deprivation is great or if the conditions of such deprivation are unduly harsh. It follows that deprivation of physical liberty for no more than a couple of days in generally good conditions of detention would not be severe."[20] What's more, the International Criminal Tribunal for the Former Yugoslavia (ICTY) also found defendants guilty of crimes against humanity only when the deprivation of liberty of victims lasted for a considerable period of time (for example, in the *Krnojelac* Trial Judgment, the ICTY found that defendant deprived his victims of liberty for the period of time from four months to two and a half years).[21] The ICTY also referred directly to the ILC findings, for instance in the *Kordić and Čerkez* case.[22]

Taking all the above into consideration, it is difficult to agree with the Supreme Court's reasoning. On one hand, the legislator was allowed to specify the elements of the crime against humanity in the Polish Penal Code, and this was done deliberately, to facilitate the work of both Polish courts and the ICC. On the other hand, the wording of Art. 3 of the Act on the Institute of National Remembrance does not exclude a reference to Art. 118a § 2 point 2 of the Penal Code in order to construe the elements of a crime against humanity. Undoubtedly Art. 3 of the Act relates to sources of international law to expand the possible range of acts of conduct which could be recognized as elements of a crime against humanity. However, it seems that the purpose of such a formulation was rather to enable the prosecution of a perpetrator in a case when his conduct did not contain any element of a crime against humanity as recognized under Polish Penal law, and definitely not aimed at excluding any references to Art. 118a § 2 point 2 of the Penal Code. Consequently, if the elements of the committed crime against humanity, adjudicated under the Act on the Institute of National Remembrance, also include the

[18] M. Boot, *supra* note 16, p. 507.

[19] *The Prosecutor v. André Ntagerura Emmanuel Bagambiki Samuel Imanishimwe*, Trial Judgement and Sentence, ICTR-99-46-T, 25 February 2004, para. 702.

[20] *The Prosecutor v. Jose Cardoso*, Judgement, 04c/2001, 5 April 2003, para. 359.

[21] *The Prosecutor v. Milorad Krnojelac*, Trial Judgement, IT-97-25-T, 15 March 2002, paras. 119-121.

[22] *The Prosecutor v. Dario Kordić & Mario Čerkez*, Trial Judgement, IT-95-14/2-T, 26 February 2001, para. 299.

elements stipulated in Art. 118a § 2 point 2, the relevance of these elements should be construed through the prism of the Penal Code regulations. Only if the Penal Code did not refer at all to some elements of this crime should the interpretation should be adopted using sources of international law.

Nevertheless, even though the Supreme Court took a different position in this case, i.e. that Art. 118a § 2 point 2 does not have application to the construction of Art. 3 of the Act on the Institute of National Remembrance, it still should have arrived at substantially different conclusions for two reasons. In the first place, if Art. 7 of the Rome Statute was considered as the grounds for the interpretation of Art. 3 of the Act on the Institute of National Remembrance, the Court should not have decided that a deprivation of liberty which lasted five days amounted to a crime against humanity since, as was stated above, the respective provisions of the Rome Statute refer to a long-term deprivation of liberty. Secondly, as the Court correctly noted at the end of its reasoning, it is doubtful whether the Rome Statute can be applied to the interpretation of elements of crimes committed before the Statute came into force. In this situation, the Court should have made use of the domestic, explicit and coherent regulations of the Penal Code, based on the rules of systematic interpretation of law.

In addition, it is worthwhile here to add a few comments on the shape of the regulation contained in Art. 3 of the Act on the Institute of National Remembrance. As was mentioned above, pursuant to its provisions the crime against humanity embraces particularly "crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide" and "other serious persecutions based on the ethnicity of the people and their political, social, racial or religious affiliations, if they were performed by public functionaries or either inspired or tolerated by them." The Supreme Court chose the Rome Statute as the benchmark, but apparently only in terms of construction of the "deprivation of liberty" as the element of the crime against humanity in the statutory regulations, failing to mention the much broader context of the Statute.

Thus it is indispensable to observe that on the grounds of the Rome Statute, the crime against humanity and genocide are established as two separate crimes, with no mutual references to each other in their definitions. Art. 6 of the Rome Statute regulates the crime of genocide, stating that genocide includes "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as killings, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group." This definition is the exact replication of the content of Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide.

On the other hand, Art. 7 of the Rome Statute, referring to a crime against humanity, stipulates that this notion refers to one of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with the requisite knowledge of the attack:

> [m]urder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, enforced disappearance of persons, the crime of apartheid, or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

This extensive enumeration was necessary to compare these two crimes and clearly depict their differences. The distinction between them is rather obvious: the crime of genocide includes acts aimed at destroying a national, ethnic, racial or religious group, whilst the crime against humanity concerns widespread or systematic attacks directed against any civilian population. Thus, the intent of the perpetrator is substantially different in both cases. The *mens rea* required for the crime of genocide – the intent to destroy a particular group – is said to be the most characteristic element of this crime, distinguishing it not only from a crime against humanity, but from all other crimes of international criminal law.[23] It was the especially cruel and inhumane character of this crime which led to it being called the "crime of crimes" and granting it the status of a peremptory norm of international law.[24] On the other hand, the core of a crime against humanity focuses more on the scale of the attacks and not so much on the specific intent of the perpetrator. What's more, the crime of genocide refers to the protection of a limited group of persons – only "national, ethnic, racial or religious groups" (so it does not cover the situation of, for example, political and social groups). On the other hand, the "crime against humanity" provides protection to the entire "civilian population".[25] Another difference is connected with the means of conduct - genocide refers to physical means of extermination,[26] while the crime against humanity envisages also persecutions. Thus, in the case of a crime against humanity it is more a question of "discrimination rather than elimination."[27]

Obviously there are some overlaps in the definitions of these crimes, but it is impossible to assume that they have exactly the same meaning and consequently equate them. Nevertheless, that is the outcome of the Polish legislator concept: the crime against humanity was defined as embracing the entire definition of genocide from the Convention on the Prevention and Punishment of the Crime of Genocide, suggesting that a crime against humanity embraces all actions defined under the notion of genocide, and even more.

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[23] E. Wilmshurst, *Genocide*, in: R. Cryer, H. Friman, D. Robinson, E. Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge: 2010, p. 203.

[24] *Ibidem*, pp. 203-204.

[25] A. Murray, *Does International Law Still Require a 'Crime of Crimes?'*, 3 Goettingen Journal of International Law 595 (2011).

[26] S.R. Ratner, *Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity*, 6 Washington University Global Studies Law Review 583 (2007).

[27] Wilmshurst, *supra* note 23, p. 206.

Such an approach constitutes regress with respect to the efforts undertaken in the doctrine of international law since the Nuremberg Trials, aimed at clearly distinguishing these two types of crimes. During the Nuremberg proceedings, on the grounds of the Charter of the International Military Tribunal (IMT) the defendants could be prosecuted only for crimes committed during the time of war, and consequently the Charter of the IMT did not refer to the crime of genocide.[28] Thus, the Tribunal could not find any defendant guilty of the crime of genocide, while it could adjudicate, for example, a crime against humanity committed during armed conflict.[29] Nevertheless, after the Second World War, mainly owing to the efforts of Rafał Lemkin, genocide was regulated and prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide.[30] In comparison to the crime against humanity, the crime of genocide offered more complex protection, as it could be prosecuted also as a crime committed during a period of peace.[31] This became even more important when the ICTY Statute included "armed conflict" as one of the elements of the crime against humanity.[32] However, the case law of the ICTY indicated clearly that such a limitation is contrary to customary law.[33] For this reason neither the Statute of the International Criminal Tribunal of Rwanda nor the Rome Statute mentioned the requirement of a lasting armed conflict in order to prosecute a crime against humanity.

If the Rome Statute and other statutory regulations of international criminal courts explicitly distinguish these two crimes and provide detailed definitions of them, it is of the utmost importance to keep all further regulations, including domestic legal acts, as close as possible to the elements introduced by them. One needs to bear in mind that these provisions were enacted on the grounds of criminal law, i.e. in the context of the most repressive legal branch. Owing to this, two of the chief principles of criminal law, including both domestic and international, are "*nullum crimen sine lege*" and "*nulla poena sine lege*" (Arts. 22 and 23 of the Rome Statute). As a result, if the Rome Statute sets forth detailed descriptions of the crime against humanity and genocide, and makes the charges faced by defendants dependent on them, these elements should not be infringed upon lightly by the domestic legislator, as criminal law norms should be reliable and predictable.[34] However, an examination of Art. 3 of the Act on the Institute of National Remembrance demonstrates that the qualification of the conduct of which

[28] Pursuant to Art. 6 of the Charter, crimes coming within the jurisdiction of the Tribunal included: crimes against peace, war crimes, and crimes against humanity; D. Schindler, J. Toman, *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher, Leiden-Boston: 1988, pp. 912-919.

[29] Murray, *supra* note 25, p. 593.

[30] P. M. Wald, *Genocide and Crimes Against Humanity*, 6 Washington University Global Studies Law Review 623 (2007).

[31] Murray, *supra* note 25, p. 594.

[32] Pursuant to Art. 6 of the ICTY Statute, establishing the crime against humanity: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict", available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[33] Murray, *supra* note 25, p. 594.

[34] *Ibidem*, p. 595.

potential defendants are criminally liable is not that certain. Moreover, it may be possible that by the same conduct the same person commits a crime against humanity and genocide, but is charged with only one offence. Nevertheless, Art. 3 is above all a criminal law regulation and it should be interpreted through the prism of the whole system of domestic criminal law. Meanwhile, under the Polish Penal Code, a crime against humanity and genocide are two separate crimes, and under the general rules provided by the Code, a person may, by the same conduct, commit only one crime (Art. 11 § 1 of the Penal Code). Thus these legal regulations, included in both the Polish Penal Code and in Act on the Institute of National Remembrance, are impossible to reconcile.

To sum up, it is hard to relate the "definition" of the crime against humanity included in Art. 3 of the Act on the Institute of National Remembrance to any other legal norm defining this crime, including norms of international criminal law. If the Supreme Court grounded its considerations mostly on the interpretation of the Rome Statute, it seems that first and foremost it should have observed the incompatibility between Art. 3 of the Act and Art. 7 of the Rome Statute. Probably in the future some competent body will launch a proceeding before the Polish Constitutional Tribunal in order to enable, pursuant to Art. 188(2) of the Constitution, to rule on the inconsistency of Art. 3 of the Act on the Institute of National Remembrance with Art. 7 of the Rome Statute.