

CRIMES AGAINST PEACE, HUMANITY AND WAR CRIMES AS OFFENCES OF TERRORIST CHARACTER UNDER ARTICLE 115(20) OF POLISH CRIMINAL CODE

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Abstract. The article analyses crimes against peace, crimes against humanity and war crimes from the perspective of the construction of a terrorist offence under Article 115(20) of the Polish Penal Code. The author discusses the concept of state terrorism in social sciences, such as criminology and political science, and points out the controversies surrounding this concept. This is followed by an analysis of the terrorist offence in the Criminal Code and the arguments supporting the view that the offences in Chapter XVI of the Criminal Code can be regarded as fulfilling the conditions of a terrorist offence. Such a solution implies the application to the perpetrators of such offences of stricter rules for the imposition of punishment and probation measures in accordance with the provisions of Article 65(1) of the Criminal Code.

Keywords: terrorism; state terrorism; terrorist offences

INTRODUCTION

During almost 25 years that the 1997 Criminal Code was in force, Chapter XVI of this legal act, grouping offences against peace, humanity and war crimes, may have appeared as that part of the penal act which was introduced in order to fulfil Poland's international obligations in this area, however, in practice, the significance of these regulations was (fortunately) insignificant, and the few rulings of Polish courts concerning the provisions of this chapter referred either to violations of the law by Polish soldiers participating in foreign military operations¹ or to quite minor offences (in comparison with other crimes) such as praising the commission of an offence described in Article 126a of the Criminal Code,² or use

¹ See judgment of the Supreme Court of 14 March 2012, ref. no. WA 39/11, Legalis.

² As an example of a conviction for an action under Article 126a, one can point to the verdict of the Court of Appeal in Wrocław of 21 August 2019, ref. no. II AKa 196/19, KZS 2019 No. 12, item 80. In turn, the verdict issued by the same court on 12 June 2014, ref. no. II AKa 149/14 (Legalis) refers to a factual situation in which the perpetrator was accused

of violence or unlawful threats against a group of persons or an individual because of his/her national, ethnic, racial, political or religious affiliation or because of his/her irreligiousness (Article 119(1) CC).³

The aggression of the Russian Federation against Ukraine and the war taking place just across our border, affecting Poland in various ways, has made everyone realise how unjustified the sense of security in which we have lived until recently can be. Certainly, the events of the war also make one realise how important the regulations relating to crimes against peace, humanity and war crimes grouped in Chapter XVI of the Criminal Code are. Of course, it is difficult to hope that these legal solutions can play a greater role in deterring acts of violence and aggression, especially when a state is behind such attacks and, moreover, acting with a sense of impunity resulting from its *de facto* international position. The regulations in question are therefore of little practical deterrent value, especially for the most serious crimes, but they are of great importance in terms of their potential for a criminal response to the crimes they describe, should such a response become possible.

The following considerations are aimed at juxtaposing the regulations of Chapter XVI of the Criminal Code and the construction of an offence of terrorist character (Article 115(20) of the Criminal Code), and the aim of the analysis is to answer the question to what extent the individual crimes against peace, humanity and war crimes may constitute terrorist offences at the same time, and what conditions must be met for such a charge to be brought against their perpetrators.

1. STATE TERRORISM IN SOCIAL SCIENCES

Referring to this problem, it is worth noting that, for example, in the resolution of the Sejm of the Republic of Poland of 14 December 2022

of committing an offence under article 126a, and the court found that his conduct fulfilled the statutory features of an offence under Article 255(3) of the Criminal Code.

³ As examples of judgments in which the perpetrator has been convicted of committing a misdemeanour under Article 119 of the Criminal Code, the following may be indicated: the judgment of the Court of Appeal in Poznań of 18 June 2020, ref. no. II AKa 14/20 (Legalis), upholding the judgment of the District Court in Poznań of 7 November 2019, ref. no. III K 294/19; judgment of the Court of Appeal in Lublin of 29 October 2019, ref. no. II AKa 198/19, KZS 2019 no. 12, item 53 or judgment of the Court of Appeal in Szczecin of 22 August 2019, ref. no. II AKa 132/19 (Legalis), judgment of the Court of Appeal in Wrocław of 11 July 2019, ref. no. II AKa 223/19 (Legalis). In turn, the judgment of the Court of Appeal in Wrocław of 7 November 2019, ref. no. II AKa 317/19 (Legalis), for example, may be indicated as an example of a factual situation in which the charge of committing an offence under Article 119 of the Criminal Code was not ultimately upheld.

on the recognition of the Russian Federation as a state supporting terrorism,⁴ the Polish Parliament did not decide to call Russia's activities against Ukrainian citizens explicitly terrorist activities, but accepted that "forms of terror used by Russia against Ukrainian citizens are a crime against humanity and genocide", and at the same time there was a recognition of the Russian Federation "as a state supporting terrorism and using terrorist means". On the other hand, more far-reaching formulations were used in the somewhat earlier Resolution of the Senate of the Republic of Poland of 26 October 2022 on the recognition of the authorities of the Russian Federation as a terrorist regime,⁵ the content of which drew attention to the fact that Russia was committing state terrorism. In turn, in the European Parliament resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism⁶ the following terms are used: "a state sponsor of terrorism", "acts of terror", "to terrorise the population", "state terrorism" (this term, interestingly enough, was used explicitly with regard to Belarus, while with regard to Russia it was cited as a quotation from a statement by Minister Zbigniew Rau in his capacity as President of the Organisation for Security and Cooperation in Europe), and in the conclusions of the resolution Russia has been recognised "as a state sponsor of terrorism and as a state which uses means of terrorism."⁷

The terminological mosaic indicated above makes it worthwhile to attempt some ordering of the terms that should be applied to the war taking place in Ukraine, as well as to look at them from the perspective of the binding Polish criminal law. At the outset, it should be noted that in other social sciences, such as political science or criminology, crimes against humanity, peace and war crimes committed by a specific state are rather rarely described as manifestations of terrorism. While there is a concept of state terrorism in these sciences, it raises some questions and controversies. In the older literature on the subject, state terrorism is sometimes equated with state-supported/sponsored terrorism (this is how "state terrorism" is perceived by the acknowledged authority on the phenomenon, Walter Laqueur [Laqueur 1999, 156-83]), and in those studies that distinguish between the two concepts, various types of totalitarian or authoritarian regimes that intimidate their own citizens are most often cited as examples of state terrorism. As noted by B. Hoffman, who defines terrorism in a way

⁴ "Monitor Polski" 2022, item 1253.

⁵ "Monitor Polski" 2022, item 1043.

⁶ 2022/2896 (RSP).

⁷ However, this rather cautious use of the term 'terrorism' in the context under discussion may be justified by the disputes surrounding this concept and the reluctance to regulate it directly at the international level (where legal acts on selected aspects of terrorism prevail). For more on terrorism in terms of international law, see: Wiak 2009, 89-161.

that essentially excludes state terrorism from the term, a more appropriate term for state action is “terror”. The author points to Nazi or Stalinist terror as examples of this phenomenon, clearly indicating that in the case of regular warfare, one should not speak of terrorism [Hoffman 2006, 20-42]. In turn, e.g. K. Wiak, as examples of state terrorism, points to cases of intrinsically terrorist actions undertaken by state secret services [Wiak 2009, 64].

However, the term “state terrorism” itself now also has quite a number of adherents,⁸ but, as with terrorism as such, it is difficult to find a universal definition of the phenomenon. As an example one can point to the proposal formulated by Ruth Blakeley, who identifies the following four characteristics of state terrorism: “(a) there must be a deliberate act of violence against individuals that the state has a duty to protect, or a threat of such an act if a climate of fear has already been established through preceding acts of state violence; (b) the act must be perpetrated by actors on behalf of or in conjunction with the state, including paramilitaries and private security agents; (c) the act or threat of violence is intended to induce extreme fear in some target observers who identify with that victim; and (d) the target audience is forced to consider changing their behaviour in some way” [Blakeley 2009, 15]. It is worth emphasising the constitutive element of state terrorism, as indicated by this author, in the form of attacks on persons that the state is obliged to protect, and, importantly, in accordance with international law, such persons should also be considered to be those in respect of whom the state’s obligations also arise from its international obligations, such as prisoners of war or civilians in an already occupied area, or even just an area under attack. Therefore, the above-mentioned understanding of state terrorism may also include warfare carried out in the course of an ongoing armed conflict, although the question remains open, for example asked by the above-mentioned W. Laqueur, as to whether it is appropriate to analyse state terrorism together with ‘traditional’ terrorism, which is characterised by the activity of other actors. As this author notes: “There are basic differences in motives, function and effect between oppression by the state (or society or religion) and political terrorism. To equate them, to obliterate them is to spread confusion” [Laqueur 1986, 89].

⁸ The literature even indicates that state terrorism can be seen as a primary term and synonymous with terrorism [Aliozi 2012-2013, 54-69]. There is now quite a substantial literature on the concept of state terrorism [Wilkinson 1981; Mitchell, Stohl, Carleton, et al. 1986, 1-26; Stohl 1988, 155-205; Idem 2008, 4-10; Idem 2006, 1-26; Westra 2012, 1-243; Wilson 2019].

2. THE CONSTRUCTION OF AN OFFENCE OF TERRORIST CHARACTER IN THE CRIMINAL CODE

While this issue remains unresolved in political science, an analysis of the Criminal Code regulations leads to the conclusion that, at least *prima facie*, there is no reason to exclude the assumption of a terrorist character by individual crimes of war, against peace and humanity, with all the legal consequences that this entails. Such a conclusion follows from the very manner in which the offence of terrorist character is framed in Polish criminal law.

This construction was introduced into Polish criminal law in 2004⁹ in connection with the accession of the Republic of Poland to the European Union. The Polish legislator, implementing the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA),¹⁰ adopted its own concept of regulating responsibility for the most serious terrorist acts. It was done by introducing into Article 115 of the Criminal Code (as a new § 20) a definition of an offence of terrorist character with the simultaneous linking of responsibility for the commission of such an offence with the principles of punishment and probationary measures provided for multi-recidivists (Article 65(1) CC in connection with Article 64(2) CC). It follows from this definition that a common offence may become a terrorist offence if the formal and material criteria described in Article 115(20) CC are met.

The formal criterion concerns the severity of the statutory punishment. According to this provision, in order for an offence to assume a terrorist character it must be punishable by imprisonment of at least 5 years. The analysis of the criminal sanctions provided for offences from Chapter XVI of the Criminal Code clearly demonstrates that this condition is fulfilled by almost all offences grouped in this chapter (only offences specified in Article 126(1) and (2) CC¹¹ and – as it results from Article 126c(3)

⁹ This was the Act of 16 April 2004 amending the Act, the Criminal Code and certain other acts (Journal of Laws No. 03, item 889).

¹⁰ OJ L 164, 22.6.2002, p. 3-7 (no longer valid, in 2017 it was repealed and replaced by Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA).

¹¹ These are the offences of using the mark of the Red Cross or Red Crescent (§ 1) during hostilities in violation of international law, or of using the mark of protection for cultural property or another mark protected by international law during hostilities in violation of international law, or of using the state flag or military badge of the enemy, a neutral state or an international organisation or commission.

CC¹² – preparatory acts to the offences specified in Article 124(1)¹³ or Article 125 CC¹⁴ cannot have a terrorist character due to insufficient sanctions for them).

As regards the material criterion for recognising an offence as an act of a terrorist character, the decisive factor is the intention of the perpetrator, who must commit the offence for one of the three alternatively indicated purposes, i.e. to seriously intimidate a large number of people, to force a public authority of the Republic of Poland or another state or an authority of an international organisation to take or to refrain from taking certain actions or to cause serious disturbances to the political system or economy of the Republic of Poland, another state or an international organisation. A threat to commit such an act is also considered an offence of terrorist character, though the construction of the “terrorist threat” may raise some interpretation doubts [Michalska-Warias 2019, 41-50]. Thus, any offence that meets the requirement of a sufficiently severe penalty may assume a terrorist character if the perpetrator is motivated by an purpose described in Article 115(20), which may be briefly referred to as a ‘terrorist purpose’.

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A juxtaposition of this definition with the offences in Chapter XVI of the Criminal Code (punishable by sufficiently severe punishment) leads to the conclusion that many of these offences may be committed for terrorist purposes within the meaning of the code. In the case of many of them, the occurrence of such a motivation even seems quite natural and therefore highly probable. By their very nature, as it were, the most serious offences described in the chapter under review may be aimed at simultaneously intimidating persons who are not their direct victims, but who are the intended addressees of the offence in question.

As an example, the felony of Article 118a(3) of the Criminal Code may be quoted. The offence is committed when the perpetrator – who is taking part in a mass attack or at least in one of the repeated attacks against a group of people undertaken in order to implement or support the policy of a state or organisation – in violation of international law, forces persons

¹² This provision provides for the punishment of making preparations for an offence specified in Article 124(1) or Article 125 CC.

¹³ Article 124 §(1) CC defines the offence of, inter alia, forcing certain categories of persons protected by international law to serve in an enemy army.

¹⁴ Article 125 CC refers to behaviour against cultural property undertaken in an occupied, seized or armed area.

to change their lawful place of residence or commits serious persecution of a group of people for reasons deemed unacceptable under international law, in particular political, racial, national, ethnic, cultural, religious or because of irreligiosity, philosophical belief or gender, thus causing deprivation of fundamental rights.

It is not difficult to imagine that, for example, forcing people to change their lawful place of residence can be done in such a way as to simultaneously cause serious intimidation to a number of other persons belonging to the same group and thus make them 'voluntarily' leave the territory. In such a case, all the criteria for considering such behaviour as an offence of terrorist character will be met.

It appears that of the offences specified in the chapter under discussion, the terrorist purpose within the meaning of Article 115(20) will not, for example, be attributable to offences under Article 121 CC¹⁵, Article 125 CC¹⁶ or Article 126.¹⁷ For obvious reasons, the terrorist purpose will also not yet be attributable to perpetrators who only undertake criminal preparatory actions for individual crimes (Article 126c(1) and (2) CC).

Whether or not a given offence from the group of crimes against peace, humanity and war crimes at the same time fulfils the conditions for recognition as an offence of terrorist character seems to be important in view of the legal consequences connected with the latter construction. As it follows from Article 65(1) CC, the provisions on the imposition of punishment, penal measures and measures related to putting the perpetrator on probation provided for the perpetrator defined in Article 64(2) CC (i.e. the multi-recidivist) shall apply to the perpetrator of an offence of terrorist character. With regard to the imposition of the punishment relating to multi-recidivists, for the time being this regulation does not appear to be particularly severe, due to the fact that the provisions of Article 64(2) CC only provide for the necessity of imposing a custodial sentence provided for a given offence above the minimum statutory punishment (thus, the minimum punishment is increased by only one month in each case) and the possibility of imposing a sentence above the maximum punishment increased by half, which, however, does not apply to felonies.

Thus, in the case of all the offences set out in Chapter XVI of the Criminal Code, the determination of their terrorist character leads only to the above-mentioned symbolic increase in the minimum

¹⁵ This provision makes it an offence for an individual to manufacture, collect, acquire, dispose of, store, transport or transmit means of mass destruction or means of warfare or to conduct research with a view to the manufacture or use of such means, contrary to the prohibitions of international law or the provisions of the law.

¹⁶ See reference no. 14.

¹⁷ See reference no. 11.

punishment. However, it is worth noting that in accordance with the already enacted amendment to Article 64(2) CC, which is to enter into force as of 1 October 2023,¹⁸ the principles of punishment for multirecidivists, and thus also for perpetrators of terrorist crimes shall become more severe. Pursuant to the adopted new wording of Article 64(2) CC, such perpetrators are to be given a custodial sentence for the offence ascribed to them ranging from the minimum punishment increased by half to the maximum one also increased by half (still, however, the increase of the upper limit is not to apply to felonies). This change implies a clear increase in the possible minimum sentence to be imposed, especially for already severely punishable Chapter XVI felonies insofar as they are of a terrorist character. For example, the felony described in Article 118(1) CC (genocide) committed for terrorist purposes as of 1 October 2023 will be punishable by a minimum sentence of 18 years' imprisonment,¹⁹ and e.g. an offence under Article 118(2) CC, the perpetrator of which was motivated by a terrorist purpose will be punishable by seven years and six months' imprisonment.²⁰

However, when considering the possibility of the terrorist character of crimes against peace, humanity and war crimes, it should be borne in mind that the terrorist purpose within the meaning of Article 115(20) CC guiding the perpetrator is in fact an additional statutory feature of the mens res and therefore, like all statutory features, requires proof (this possible difficulty in proving the terrorist purpose is noticed in the literature [e.g. Michalska-Warias 2016, 323; Zawłocki 2021, thesis no. 9]). This, in turn, means that it will not always be possible to convict a perpetrator committing an offence under Chapter XVI of the Criminal Code for an act which simultaneously displays a terrorist character. In the case of direct perpetrators of the felonies and misdemeanours in question, the required terrorist motivation may in fact not be present at all – a soldier carrying out orders or “only” an incentive to loot a given area, drive civilians from their homes, commit acts of sexual violence or kill or torture need not be aware of the fact that those issuing the relevant orders or only allowing behaviour contrary to international law may in fact be motivated by the purpose of influencing individuals other than those directly affected by violence and threats from the armed forces.

Moreover, even if it is established that the soldier directly committing this type of offence was aware that his behaviour could cause, for example, serious intimidation of a large number of people, it does not yet mean that he himself was certainly motivated by such an aim. Thus, proving the terrorist

¹⁸ Act of 7 July 2022 amending the Act, the Criminal Code and certain other acts (Journal of Laws item 2600).

¹⁹ The new sanction is to be imprisonment from 12 to 30 years or life imprisonment.

²⁰ The new sanction is to be imprisonment from 5 to 25 years.

character of offences committed by soldiers or mercenaries may be difficult, and often impossible, in practice. While in the case of “regular terrorists” it is not uncommon for them to declare what their objectives are, in the reality of an open armed conflict such declarations are unlikely to be made explicitly and the perpetrators of war crimes generally deny their responsibility for them. This, in turn, makes the elements of the *mens rea* necessary to attribute the terrorist character to an offence difficult to prove.

Thus, it seems more likely to attribute a terrorist character to offences committed by those giving orders and directing armed actions (since such persons have a broader view of reality and, in general, the desire to break the morale of the enemy and thus seriously intimidate many people is an almost self-evident element of much warfare), although, in these cases too, establishing the required elements of the *mens rea* may, depending on the specific facts, may pose greater or lesser difficulties.

At the end of these considerations, it is also worth asking whether it would not be reasonable to assume that the offences grouped in Chapter XVI of the Criminal Code are, by their very nature, committed for the terrorist purposes listed in Article 115(20) of the Criminal Code. In the case of the conducting of hostilities against the military and civilian population of another state, it is, after all, inherent in the very nature of most of these actions to both seriously intimidate the entire attacked community and to cause serious disruptions in the political system and economy of such a state, as well as to force public authorities to behave in accordance with the will of the aggressor. The adoption of such an interpretation could lead to the exclusion of a formal determination of the terrorist character of these offences, in accordance with the generally accepted principle that the same circumstance cannot work twice to the disadvantage of the perpetrator.²¹ However, such an interpretation would not seem to be correct. The felonies and misdemeanours grouped in Chapter XVI are often offences characterised from the point of view of *mens rea* by a clearly specified purpose of the offender, but these features never explicitly include terrorist purposes as described in Article 115(20) of the Criminal Code. Furthermore, as indicated above, while it can be said that such offences seen as a certain

²¹ It is assumed, for example, that if the professional commission of certain offences constitutes an aggravating feature then the aggravation of punishment provided for in Article 65(1) of the Criminal Code in conjunction with Article 64(2) of the Criminal Code should no longer apply to the professional offender. An example can be the regulation of Article 116(3) of the Copyright Act (Journal of Laws of 2022, item 2509), in which making a regular source of income is indicated as an aggravating feature of the offence of distributing, without authorisation or in violation of the terms and conditions of the authorisation, somebody else’s work in the original version or in the form of a compilation, artistic performance, phonogram, videogram or broadcast [Sakowicz 2021, thesis no. 7; Raglewski 2017, thesis no. 97; Łabuda 2021, thesis no. 9].

whole do indeed always serve to achieve terrorist aims, their perpetrators need not always be guided by such a motivation. And this supports the view that there is no reason whatsoever to exclude from the group of offences whose terrorist character can be established in specific factual situations any offences grouped under Chapter XVI of the Criminal Code. Possibly some doubts as to the correctness of such an interpretation could be considered valid in the case of the offence of initiating and waging an attacking war under Article 117(1) CC – this felony can, according to the accepted interpretation, only be committed by persons occupying the relevant positions in the state structure (such a view is unanimously accepted in the literature, regardless of whether the offence is considered to be individual as to the subject [Wiak 2021, thesis no. 3] or a common one [Giezek 2021, thesis no. 5; Rams and Szewczyk 2017, thesis no. 7; Budyn-Kulik 2023, thesis no. 6]) and thus, in these cases, the terrorist purpose – if only in the form of forcing the authorities of a foreign state to behave in a desired manner – seems indeed to be inscribed in the very structure of this offence, albeit in an implicit manner.

CONCLUSION

In conclusion, it should be stated that in the light of the current regulations of the Criminal Code, crimes against peace, humanity and war crimes may – if the conditions set out in Article 115(20) of the Criminal Code are fulfilled – be recognised as offences of terrorist character, and thus their perpetrators should then be treated more severely with regard to their punishment and the application of probation measures, in accordance with the solutions of Article 65(1) of the Criminal Code.

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