

## **CRIME OF TAKING OR DETAINING A HOSTAGE IN THE POLISH CRIMINAL LAW (ARTICLE 252 OF THE PENAL CODE)**

Article 252 of the current Polish Penal Code specifies a crime that was not governed by the previously applicable Penal Codes (of 1932 and 1969). It is penalized (by imprisonment for a period of not less than 3 years – Article 252 § 1 of the Penal Code) to take or detain a hostage in order to force a central government body or a local government body, institution, organization, natural or legal person or a group of people to behave in a certain way. An aggravated type of this crime is when the act referred to in Article 252 § 1 is committed with particular torment (then the perpetrator is subject to imprisonment for a period not shorter than 5 years or the penalty of imprisonment for 25 years – Article 252 § 2 of the Penal Code). Due to the high degree of social harmfulness of the offence of taking or detaining a hostage, the punishment for preparation for the crime specified in Article 252 § 1 of the Penal Code was introduced (Art. 252 § 3 of the Penal Code).

2. As the Supreme Court rightly pointed out in the judgment of 11 December 2006, II KK 192/06 (OSNwSK 2006/1/2399) "The crime under Article 252 § 1 of the Penal Code has a complex object of protection: it is both the freedom of action (freedom from being forced to do something) of central and local authorities, institutions, organizations and legal and natural persons, i.e. the legal order, and the freedom and inviolability of the person attacked". This position also seems to prevail in the scholarly opinion [1].

3. The object of the crime is a hostage, i.e. a person unlawfully deprived of freedom. As K. Wiak rightly notes, "The situation of the person concerned is intended to generate pressure on a central government body or local government body, institution, organisation, natural or legal person or a group of persons in order to bring about a behaviour of at least one of the listed entities as desired by the perpetrator. The combination of verb-defined criteria of the offence with the offender's objective suggests that the addressee of the coercion is threatened that the hostage will be harmed by causing distress of various degree" [2]. Taking a hostage means depriving a person of freedom against their will, while holding a hostage means keeping an already taken hostage under unlawful detention (Supreme Court decision of 28 March 2002, I KZP 3/02, OSNKW 2002/5-6/41). The perpetrator of the offence under Article 252 § 1 of the Penal Code may be both the one who deprives the hostage of liberty and another one of the accomplices who detains the hostage, whereas taking and holding a hostage by the same perpetrator constitutes one offence as an unified act (the verdict of the Court of Appeal in Katowice of 22 August 2012,

II AKa 245/12, LEX no. 1258292).

4. The act defined in Article 252 § 1 of the Penal Code, similarly to the offence specified in Article 189 of the of the Penal Code (unlawful deprivation of liberty) covers deprivation of a person of liberty. For both offences, deprivation of human liberty is the causative action. The difference between these two provisions comes down to the definition of the objective pursued by the perpetrator; the objective of the perpetrator of the offence defined in Article 252 of the Penal Code is to "force" the entities listed in this provision to behave in a specific manner, while this objective is irrelevant for the existence of the offence defined in Article 189 of the Penal Code. Therefore, unlawful deprivation of liberty to achieve an objective other than that indicated in the provision of Article 252 § 1 of the Penal Code constitutes a crime specified in Article 189 of the Penal Code (Supreme Court decision of 28 March 2002, I KZP 3/02, OSNKW 2002/5-6/41). Scholars in the field point out that the offence defined in Article 252 § 1 of the Penal Code constitutes (due to the specific intent of the perpetrator) an aggravated type of the offence defined in Article 189 of the Penal Code [3].

5. The statutory criteria of the offence are met by both the factual situation in which coercion concerns both a third person and the hostage himself/herself who is forced e.g. to dispose of his/her property [4]. As the Supreme Court rightly observed in its decision of 16 November 2005 (II KK 165/05, OSNwSK 2005/1/2079), "although the forced person may be and usually is a third party (...) there are no obstacles to assuming that taking (or detaining) a hostage may aim at extorting a "ransom" from this person (deprived of liberty) e.g. in exchange for his/her release". The provision of Article 252 § 1 uses the concept of forcing, which also appears in Article 191 of the Penal Code (and has the same meaning). Forcing is understood as "suppressing the will of another person, subjecting that person to one's will, to one's command" [5]. As stated by the Supreme Court in the above-cited decision of 28 March 2002 (I KZP 3/02) "forcing a specific behaviour should be understood as inducing a specific action or omission against the will of the forced person".

6. The nature of the crime is subject to doubt among scholars in the field. Some of them consider it as an offence not characterized by its result (e.g. Z. Cwiąkański [6], K. Wiak [7]), and some that it is characterized by its result (e.g. A. Marek [8], M. Mozgawa [9], P. Janas, Ł. Kazarek [10], A. Herzog [11]). Holding the latter position, it should be noted that M. Mozgawa is right, arguing that, since the act prohibited by Article 252 PC actually consists in deprivation of liberty (which is undoubtedly an act characterised by its result), it is not known why the act under Article 252 § 1 PC would not be characterised by its result [12]. Of course, for the offence in question to happen, it is not necessary to achieve the intended objective by the perpetrator (i.e. to force a particular person, authority, etc. to behave as desired) [13]. The offence under Article 252 § 1 is a general-perpetrator crime and can only be committed

intentionally with direct intent (*cum dolo directo colorato*).

7. Under the Act of 17 December 2009 amending the Penal Code Act and the Code of Criminal Procedure (Journal of Laws 2010, No. 7, item 46) a new aggravated type was added to the Penal Code in the form of taking or detaining a hostage with particular torment. The element of particular torment is contained also in other provisions of the Penal Code (Article 105 § 2, Article 118a § 2, Article 189 § 3). As is pointed out by scholars in the field, the element of particular torment reflects the intense violence, brutality and drastic ways of acting employed by the perpetrator [14]. This particular torment must be caused by the conduct of the perpetrator beyond what is necessary to deprive the victim of their liberty and ensure that this liberty can be regained. Undoubtedly, a number of abusive practices (described in Article 207 of the Penal Code) will also constitute a particular torment. This may include e.g. starving the victim, subject the victim to severe noise, moisture, death threats [15]. As the Appellate Court of Krakow pointed out in its judgment of 22 September 2014 (II AKa 88/14, LEX nr 2242301), "particular torment may result from any steps taken by the perpetrator (physical or psychological abuse of the victim) and circumstances relating to the place or conditions of detention, and may also be related to the characteristics of the victim, if these involve causing pain, suffering, harassment or distress to the victim to a degree exceeding the 'ordinary' deprivation of liberty. (...) particular torment takes place when the deprivation of liberty is accompanied by other circumstances, for example: starving the victim, keeping in a dark cellar, painful bonding, leaving by the victim a little child unattended, separating the mother from her minor children."

8. According to the explanatory memorandum to the Penal Code of 1997, in order to secure hostage's life, the new code provides for impunity for the perpetrator of a crime under Article 252 § 1 of the Penal Code, if the perpetrator abandons the intention to enforce a certain behaviour and releases the hostage (Article 252 § 4) [16]. M. Flemming's remark that this solution resulted in a rather specific situation in which "the perpetrator of the deprivation of liberty of a person taken or held hostage is not held criminally liable, but the perpetrator of an "ordinary" deprivation of liberty under Article 189 § 1, punishable by a much more lenient penalty, even if he/she met the condition of Article 252 § 4 and voluntarily released the person deprived of liberty cannot exercise this privilege [17]. It should be noted that the perpetrator's motives are irrelevant. The Act also does not require this renouncement to be voluntary – the decision to abandon the intention can be forced or can result from realising the effectiveness of action of the police [18]. In the case of an aggravated type (described in Article 252 §2), voluntary disclosure does not lead to impunity for the offender, but may cause (or causes) extraordinary leniency. Thus, the court may apply extremely leniency to the perpetrator of an act referred to in Article 252 § 2 if the perpetrator has abandoned the intention of extortion and has released the hostage and shall apply (compulsorily) such leniency if the

intention to extort and the release of the hostage has been voluntary (Article 252 § 4 PC).

9. The number of offences found, identified under Article 252 of the Penal Code, is small. In the period 2010 to 2020, a total of 203 such offences were recorded throughout Poland (28 in 2010, 14 in 2011, 29 in 2012, 13 in 2013, 21 in 2014, 11 in 2015, 22 in 2016, 23 in 2017, 16 in 2018, 15 in 2019, and 11 in 2020) [19]. In 2018, a total of 27 people were sentenced in Poland under Article 252 of the Penal Code (including nineteen under § 1, seven under § 2 and one under § 3). In each case, a custodial sentence was imposed (for § 1 – in 18 cases in absolute form and one suspended custodial sentence; for § 2 - seven cases, all with suspended sentence; for § 3 - one suspended sentence) [20].

#### *Literature*

1. Cf. e.g. K. Wiak in: Kodeks karny. Komentarz, eds. A. Grześkowiak, K. Wiak, Warszawa 2019, p. 1268; A. Marek, Kodeks karny. Komentarz, Warszawa 2010, p. 544; M. Flemming in: M. Flemming, W. Kutzman, Przestępstwa przeciwko porządkowi publicznemu. Rozdział XXXII Kodeksu karnego. Komentarz, Warszawa 1999, p. 30.

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3. Flemming M. in: M.Flemming, W.Kutzman, Przestępstwa, p. 30.

4. Wiak K. in: Kodeks, p. 1269.

5. Peiper L. Komentarz do kodeksu karnego, Kraków 1936, p. 510.

6. Ćwiakalski Z. in: Kodeks karny. Część szczególna. Komentarz do art. 21 - 277d k.k., eds. A. Wróbel, A. Zoll, Warszawa, 2017, p. 488.

7. Wiak K. in: Kodeks, p. 1269.

8. Marek A. Kodeks, p. 546.

9. Mozgawa M. in: Kodeks, p. 875.

10. Janas P., Kazarek Ł. Porwanie dla okupu (art. 252) – zagadnienia wybrane, ze szczególnym uwzględnieniem problematyki zbiegu przepisów, Prokurator 2-34/2008, p. 77.

11. Herzog A. in: Kodeks karny. Komentarz, ed. R.A. Stefański, Warszawa, 2018, p. 1632.

12. Mozgawa M. in: Kodeks, p. 875.

13. Marek A. Komentarz, p. 546.

14. Wiak K. in: Kodeks, p. 1270.

15. Mozgawa M. Znamień szczególnego udržczenia z art. 165 § 2 k.k.w świetle badań empirycznych, Annales UMCS 1995, sectio G (Ius), vol. XLII, p. 131 et seq.

16. Nowe kodeksy karne z 1997 r. z uzasadnieniami, Warszawa, 1997, p. 203.

17. Flemming M. in: M. Flemming, W. Kutzman, Przestępstwa, p. 36.

18. Herzog A. in: Kodeks, p. 1632.

19. URL: <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-13/63606,Branie-zakladnika-art-252.html>

20. URL: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>