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HELSINKI FOUNDATION for HUMAN RIGHTS**

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Warsaw, 16<sup>th</sup> April 2018

617/2018/47726/PSP/AK/KW

**Mr Linos-Alexandre Sicilianos**  
**The European Court of Human Rights**  
**President of the First Section**  
Section I  
Council of Europe  
67075 Strasbourg-Cedex  
France

**Ref. Robert Kuchta and Sebastian Mętel against Poland**  
**Application No. 76813/16**

Pursuant to the letter of Mr Abel Campos, the Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 26<sup>th</sup> March 2018, granting leave to make written submission to the High Court by the 16<sup>th</sup> April 2018, the Helsinki Foundation for Human Rights (hereinafter also referred to as "HFHR") with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Robert Kuchta and Sebastian Mętel against Poland (application no. 76813/16) with attachments.

On behalf of the Helsinki Foundation for Human Rights,



*Dr Piotr Kładoczny*

Secretary of the Board

Helsinki Foundation for Human Rights

*Maciej Nowicki*

Vice-President of the Board

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*Robert Kuchta and Sebastian Meřel*  
*v. Poland*  
(no. 76813/16)

Amicus curiae brief  
drafted by the  
Helsinki Foundation for Human Rights

**I. The Helsinki Foundation for Human Rights – activities in the context of police violence**

The problem of police violence is an area of particular interest to the HFHR since the beginning of its activity. We assist victims thereof through various kinds of interventions and organizing pro bono professional legal assistance, we observe court proceedings in cases that may involve police violence, monitor places of the deprivation of liberty, as well as conducting observations of public assemblies. HFHR further conducts trainings for police officers in the area of the prohibition of torture and inhuman or degrading treatment and ECtHR jurisprudence. These circumstances form the foundation for HFHR's decision to present its opinion to the Court also in this case.

**II. Introduction**

HFHR would like to reiterate that this brief, in light of the scope of leave granted by the court, does not reference the reality of facts in the subject matter.

Nevertheless, the proceedings before the Court are important from the perspective of the HFHR's hitherto practice and mission as well as the currently ongoing discourse concerning police brutality in Poland. NGOs, the Ombudsman and the National Mechanism for the Prevention of Torture, as well as advocates and legal advisors' associations have been particularly vocal in this public discourse. In the course of analysis, many postulates are being submitted that may lead to decreasing the number of cases of police ill-treatment. Suggestions range from the practical to the legislative (concerning substantive as well as procedural laws).

At the same time, HFHR is aware that ECtHR has already ruled in numerous similar cases, including those against Poland (e.g. *Dzwonkowski v. Poland*, no. 46702/99, 12 April 2007; *Lewandowski and Lewandowska v. Poland*, no. 15562/02, 13 January 2009; *Mrozowski v. Poland*, no. 9258/04, 12 May 2009), thereby establishing a certain standard. Nonetheless, new cases continue to occur in Poland, which may suggest that Court guidelines are not being applied in practice by police officers, investigative bodies and the courts. In the HFHR's opinion, ECtHR's position in new cases, including this case, may contribute to material changes in the legal system as well as the mentality of police officers and their superiors.

**III. Prohibition against torture and inhuman or degrading treatment in Poland – international perspective**

International organizations such as the UN or the Council of Europe have noted the problem of police violence in Poland. A 2013 Committee against Torture (CAT) report claims the Polish State should ensure that all reports of torture or ill-treatment are investigated promptly, effectively and impartially and promptly undertake an effective and impartial investigation on its own initiative whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed<sup>1</sup>. In the same report, CAT notes that Poland should introduce the crime of torture into its legal system so that its definition comports with the definition found in art. 1 Convention against torture and other cruel, inhuman, or degrading treatment or punishment (Convention against Torture, UNCAT)<sup>2</sup>.

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<sup>1</sup> Conclusions and recommendations of the Committee against Torture, 23 December 2013, CAT/C/POL/CO/5-6, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr0yVMLY8ltqp7eIpaWy9%2fzhpqAgxlv0wYIHQRBCyv6Z5WSAJ4meQ2Ica4vsJ8k3h%2fQY3d6Rp6d2fr%2fQBcD8Iel5hagJXI9LdkxR6L9Oq8QZ> (accessed: 16-04-2018).

<sup>2</sup> Dz. U. [*Journal of Laws*] from 1989, No. 63, pos. 378.

In its 2013 visit report, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), recommends police officers throughout Poland be reminded that any form of ill-treatment (including verbal) of individuals deprived of liberty is prohibited. In addition, the report indicates that when prosecutors require operational support from another service for the investigation of cases of possible ill-treatment by the police, support is to be sought from a completely independent source rather than from the regional police commands associated with a given case<sup>3</sup>.

In November 2016, the UN Human Rights Committee noted that not all elements of the crime of torture are penalized by the Polish Penal Code, nor does the code fully reflect what the actual crime is. In connection with that, it recommended amendment of the Polish Criminal Code so that it would comply with UNCAT provisions. Further, the Human Rights Committee is alarmed in cases of abuse of force by police officers and the fact that proceedings in such cases are rarely instituted. That is why it recommended the State actor “ensure that all reported allegations of and complaints about acts of torture and ill-treatment are promptly and properly investigated, that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that victims have access to redress, including adequate compensation.”<sup>4</sup>

It should be noted here that Poland was subject to supervision by the Council of Ministers of the Council of Europe with respect to implementing judgments from the group of *Dzwonkowski v. Poland* cases. In its report dated 29 April 2016 on the measures aiming to comply with these judgments,<sup>5</sup> the Polish Ministry of Foreign Affairs indicated the adoption of the Act dated 24 May 2013 on the Measures of Direct Coercion and Firearms<sup>6</sup>, which accounts for ECtHR jurisprudence. Furthermore, the government pointed to the issuance of the Guidelines of the General Prosecutor dated 27 June 2014 concerning procedures for prosecutorial conduct in cases related to deprivation of life or inhuman or degrading treatment or punishment by police officers or other public officials.<sup>7</sup> The action report also states that human rights trainings are being held for police officers while also noting the directive of the Minister of Interior dated 18 April 2012 on qualification procedures for police candidates.<sup>8</sup> In connection

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<sup>3</sup> Appendix I: List of the CPT’S recommendations, comments and requests for information, CPT/Inf (2014) 21, Section: 32/33, 27 November 2013, <http://hudoc.cpt.coe.int/eng?i=p-pol-20130605-en-32> (accessed: 16-04-2018). It should also be noted that in the visit report from 2009, CPT also recommended that police officers throughout Poland be reminded that any form of improper treatment (including verbal) of individuals deprived of liberty is prohibited, and that police officers should also be reminded that use of excessive force (more force than is required) is prohibited, especially with respect to detained individuals, when control over them is being assumed, and such use of force may not be justified, Appendix I: List of the CPT’S recommendations, comments and requests for information, CPT/Inf (2011) 20, Section: 42/43, 30 July 2010, <http://hudoc.cpt.coe.int/eng?i=p-pol-20091126-en-42> (accessed: 16-04-2018). CPT’s latest visit of Poland took place in May 2017. Poland is still awaiting publication of the report.

<sup>4</sup> *Concluding observations on the seventh periodic report of Poland*, 23 November 2016, CCPR/C/POL/CO/7, points 25-26, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqEnKe%2bgR3Hi9diNTN1CrMSzSrhezGOiSGtJKSvy8EGXyYBfE5lx500qrhNSRf5J%2b60Y5lx3TIN4JeQpWZ%2fKV0NvWwVotRjK20CLics7xzpK> (accessed: 16-04-2018).

<sup>5</sup> Poland, Ministry of Foreign Affairs, Action Report. Information on the measures aiming to comply with the judgments in cases of *Dzwonkowski v. Poland*, *Lewandowski and Lewandowska v. Poland*, *Pieniak v. Poland*, *Mrozowski v. Poland*, *Polanowski v. Poland*, *Wasilewska and Kalucka v. Poland* and *Karbowniczek v. Poland*, *Przemysk v. Poland*, <https://rm.coe.int/168064a9db>, (accessed: 16-04-2018).

<sup>6</sup> Final version: Dz. U. [*Journal of Laws*] from 2017, pos. 1120 as amended.

<sup>7</sup> Guidelines of the General Prosecutor dated 27 June 2014 (Guidelines), Ref. PG VII G 021/4/14, <https://pk.gov.pl/wp-content/uploads/2014/07/022c10a03902e8d39fd95788590691da.pdf> (accessed: 16-04-2018). The Guidelines indicate that prosecutors should personally receive notice of the crime and question the notifying party as a witness. If there is a suspicion of the commission of a crime by a police officer, in order to establish the facts, it is necessary to conduct evidentiary activities in the investigation, which the police may be allowed to perform only in exceptional cases and only to a limited degree. Furthermore, point 6 of the Guidelines indicates that “in the event of disclosure of facts that could engender doubt as to the impartiality of all prosecutors of an organizational unit in which the proceedings are being conducted or the director of that unit, upon his request or ex officio, the director of the supervisory organizational unit shall convey the matter for further review to another unit subject thereto, obviating the principles of territorial jurisdiction.” If the subject of the investigation is police officer’s use of direct force, the prosecutor shall forthwith obtain documentation concerning these activities or use of said means, and should then thoroughly analyze such with respect to propriety of the acts or use of means, and should also evaluate the compliance of documentation with the established factual circumstances. In the event of harm to the health of the victim, complete medical documentation related to the circumstances of such arising along with that of medical assistance provided shall be collected. In such event, an expert shall be appointed to draft an opinion, which shall reference said harm, and it should be particularly evaluated whether such opinion convincingly explains the mechanism that caused such harm.

<sup>8</sup> Dz. U. [*Journal of Laws*] of 2012, pos. 432, as amended.

with those and many other changes, the Committee of Ministers of the Council of Europe adopted final resolution CM/ResDH(2016)148<sup>9</sup> dated June 2016, thereby ending its supervision of this group of cases.

#### IV. State of the law with respect to the provision against torture and inhuman or degrading treatment in Poland

Art. 40 of the Constitution of the Republic of Poland<sup>10</sup> provides: “[n]o one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.” The Polish legal system does not contain a single definition of the crime of torture, which is why the definition contained in CAT art. 1 par. 1 may be used.

Police officers in Poland who commit torture or inhuman or demeaning treatment are subject to criminal liability pursuant to provisions of the Criminal Code (CC);<sup>11</sup> those provisions have not been amended since implementation in 1 September 1998. Art. 246 CC provides: “[a] public official or anyone acting under his orders for the purpose of obtaining specific testimony, explanations, information or a statement, uses force, unlawful threat, or otherwise torments another person either physically or psychologically shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.” The prohibited act defined in art. 246 CC is a mens rea crime that may only be committed with direct intent. This crime may be committed by a public official or an individual acting under the orders thereof. Further, this crime: “(...) is of a formal nature, as the acts defined therein need not result in the actual obtainment of testimony, explanations, information or a statement,”<sup>12</sup> and the: “(...) element of the crime defined in art. 246 may involve an act (force, unlawful threat, or otherwise torments another person either physically or psychologically) or an act or omission (solely the physical or psychological torment).”<sup>13</sup>

This is followed by art. 247 § 3 CC, while the full text of art. 247 CC is as follows: “§ 1. Whoever torments either physically or psychologically a person deprived of liberty shall be subject to the penalty of deprivation of liberty for a term of between 3 months to 5 years.; § 2. If the perpetrator acts with particular cruelty, he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.; § 3. A public official who, despite his duties, allows the act specified in § 1 or 2 to be committed, shall be subject to the penalty specified in these provisions.” The crime described in art. 247 § 3 CC is a misdemeanour that may be committed intentionally, with *dolus directus* or *dolus eventualis*, where *dolus eventualis* occurs: “(...) when a public official, aware of the high probability of commission, upon the individual he or she was obligated to supervise, of crimes described in § 1 or 2, has not properly performed the duty of supervision and failed to undertake any effective means to prevent such.”<sup>14</sup> The crime described in art. 247 § 3 CC and committed by a public official: “(...) is a substantive crime, the effect of which is the commission of an act described in art. 247 § 1 or 2 upon a person deprived of liberty. It may be committed solely by omission, i.e. by allowing the occurrence of the situation described above. If, however, the public official conspires with other individuals in performing the elements of art. 247 § 1 or 2 by acting, he or she shall be liable for committing those crimes.”<sup>15</sup>

Furthermore, for abuse of authority, a police officer may be liable pursuant to art. 231 CC, which provides that: “§ 1. 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 deprivation of liberty for up to 3 years.; § 2. If the perpetrator commits the act specified in § 1 with the purpose of obtaining a material or personal benefit, he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.; § 3. If the perpetrator of the act specified in § 1 acts unintentionally and causes an essential damage shall be subject to a fine, the penalty of restriction of liberty, or deprivation of

<sup>9</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=090000168065c7b5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168065c7b5) (accessed: 16-04-2018).

<sup>10</sup> Dz. U. [Journal of Laws] of 1997, No 78, pos. 483 as amended.

<sup>11</sup> Final version: Dz. U. [Journal of Laws] of 2017, pos. 2204 as amended.

<sup>12</sup> M. Szewczyk, A. Wojtaszczyk, W. Zontek, *Komentarz do art. 246*, [in]: *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212-277d* [Commentary to art. 246, [in] *Criminal Code. Particular Parts. Tome II. Part II. Commentary to art. 212-277d*], W. Wróbel, A. Zoll, eds., Wolters Kluwer Polska 2017, publ. LEX.

<sup>13</sup> *Ibid.*

<sup>14</sup> M. Szewczyk, A. Wojtaszczyk, W. Zontek, *Komentarz do art. 247*, [in]: *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212-277d* [Commentary to art. 246, [in] *Criminal Code. Particular Part. Tome II. Part II. Commentary to art. 212-277d*], W. Wróbel, A. Zoll, eds., Wolters Kluwer Polska 2017, publ. LEX.

<sup>15</sup> *Ibid.*

liberty for up to 2 years.; § 4. The provision of § 2 shall not be applied when the act has the features of the prohibited act specified in Article 228.”

In connection with the above, it should be noted that in the Polish legal system there is not a single criminal provision pursuant to which a police officer might incur criminal liability after committing torture and inhuman or degrading treatment.

Furthermore, it should be highlighted here that police officers may be subject to disciplinary liability pursuant to art. 132 of the Act dated 6 April 1990 on the Police<sup>16</sup> (Act on Police). Ways to initiate such a proceeding include pursuant to art. 134 par. 1 pt. 2 of the Act on Police, i.e. following a victim’s report submitted as a complaint pursuant to provisions of the Administrative Code of Procedure.<sup>17</sup> For the police officer to be subject to disciplinary liability, pursuant to art. 132 par. 1 of the Act on Police, he or she must violate official discipline or fail to observe professional ethics principles. Pursuant to art. 132 par. 2 of the Act on Police: “[v]iolation of professional discipline is an act by a police officer that involves an at fault abuse of authority or failure to fulfil a duty arising under provisions of the law or orders or commands issued by superiors authorized to do so pursuant to these provisions.”

## **V. Practice and problems in Polish proceedings concerning torture and inhuman or degrading treatment**

### *1. Examples of cases monitored by HFHR*

In its hitherto practice HFHR is encountered numerous cases involving accusations of inhuman or degrading treatment by police officers.

The most important case in this realm was the matter of K.J. and K.W., who were beaten in the course of an interrogation at the police station. The police officers told interrogated parties to kneel on chairs with their faces toward the wall and beat their bare feet with truncheons. The prosecutorial office had no doubt that the beating had taken place but was unable to find the responsible person. As a result, it ultimately dropped investigation. Therefore, HFHR drafted a complaint and represented the victims before ECtHR. The court accepted the Government’s unilateral declaration admitting that the plaintiffs were subjected to torture as defined by art. 3 ECHR.<sup>18</sup> This case may evidence the problem of a so-called “code of silence” among police officers, because although there was no doubt the beating had occurred, the prosecutor’s office could not find the individuals responsible for the crime.

Another case concerns a situation occurring at the police station on Chodecka Street in Warsaw. K.S. accused a police officer of unjustified use of force in the form of at least two knee kicks to the lower back. Use of physical force by the police officer caused K.S. to incur physical injuries, including trauma to the temple area, ribs and a torsional spinal injury in the neck area. The prosecutor twice dismissed proceedings against the police officers in this matter pursuant to art. 17 § 1 pt. 1 Code of Criminal Procedure, which provides that either the act was not committed or there is insufficient information to justify suspicion of its commission. In light of the above, on 2 November 2012, K.S. filed a subsidiary complaint and waited two years for the first hearing date to be set by the Warsaw Praga-Północ District Court.<sup>19</sup> To this day, the matter has not been completed by the court of first instance.

On 26 July 2008, in Tczew, in the course of detaining Z.C., police officers abused their authority. Despite placing Z.C. in handcuffs with hands behind his back and laying prone on the ground, they took part in beating him during which the victim was pressed down to the ground and dragged across the sidewalk, kicked in the torso and hit several times in the head. As a result of these acts, the victim suffered injuries to the body such as numerous bloodied bruises to the upper and lower extremities as well as on his back, two black eyes, subconjunctival haemorrhage in the left eye, perforation of the right eardrum limiting his hearing for a duration in excess of seven days. The first hearing took place in February 2011 and only on 29 September 2014 did the Gdańsk-Południe District Court in Gdańsk judge both police officers guilty. The reasoning for the decision indicated that the necessity and justifiability

<sup>16</sup> Final version: Dz. U. [Journal of Laws] of 2017, pos. 2067 as amended.

<sup>17</sup> Act of 14 June 1960 – Code of Administrative Procedure (final version: Dz. U. [Journal of Laws] of 2017, pos. 1257 as amended).

<sup>18</sup> ECtHR decision of 14 September 2015 in *Kazimierz Wołkowski and Krystian Jacyna v. Poland*, complaint no. 2037/14.

<sup>19</sup> Case described pursuant to documents possessed by HFHR. The case is ongoing before the Warsaw Praga-Północ District Court in Warsaw.

of physical force used against the victim and that upon his being effectively restrained through the use of gas, handcuffs behind the back and laying him face-down on the ground with his hands behind him. The further acts committed by the accused exceeded their authority. The court sentenced the perpetrators to a year deprivation of liberty suspended for two years. However, the attorney of one of the defendants appealed, resulting in the judgment being overturned by the Regional Court in Gdańsk. Currently, the case is in progress before a court of first instance and successive hearings are being stayed due to doctor's releases being presented by the defendants. Furthermore, a disciplinary proceeding against the police officers was conducted in 2008, which found him guilty of committing a disciplinary violation. However, only one of them was disciplined – in the form of a reprimand; the other police officer was not disciplined because official subordination.<sup>20</sup>

The most egregious case involving abuse of authority by a police officer involved an intervention by HFHR in connection with the death of Igor S. at the Wrocław-Stare Miasto Police Station in Wrocław. Igor S. was taken to the police station on 15 May 2016 after being restrained by police officers with a taser gun. After being transported to the police station, Igor S. lost consciousness and, despite attempts to resuscitate him, died. HFHR wrote to the Voivodeship Police Command in Wrocław and District Prosecutor in Legnica, i.e. the office that was handling the abuse of authority by officers and manslaughter proceedings. The Voivodeship Police Commander in Wrocław described in written detail the police officers' actions. His letter indicates what actions were taken in connection with the death of Igor S. at the police station. The writing admitted that the taser gun was used twice, including once at the police station when the detained party was already restrained in handcuffs. When Igor S. began to lose consciousness, the police officers administered first aid and called an ambulance, but none of this prevented his death. The medical report lists "*other specific effects of external factors - severe respiratory and respiratory-circulatory failure.*". Furthermore, the investigation of manslaughter and abuse of authority by police officers from the Wrocław-Stare Miasto Police Station was transferred to the National Public Prosecutor's Office, as requested by response from the District Prosecutor in Poznań (to which the investigation was previously transferred). The medical forensic opinion noted that the causal relationship between use of the taser gun and death of the detained party were investigated. The court-doctor's opinion issued after an additional post-mortem examination was performed indicated the probable cause of death was the joint existence of several factors: consumption of high amounts of amphetamine and tramadol, being tasered several times as well as the potential repeated pressure on the detained party's neck in the course of restraining him<sup>21</sup>. Information from the District Prosecutor's Office in Poznań indicates that: "*[o]n 20 March 2018 the Wrocław-Śródmieście District Court in Wrocław received a criminal complaint against Łukasz Rz., Adam W., Paweł P. and Paweł G., who on 15 May 2016 were officers of the Wrocław-Stare Miasto Police Station. The aforementioned individuals were charged with acting jointly and in concert and abusing their authority by conducting a search of Igor S. in violation of principles for using means of direct coercion. Łukasz Rz. used against Igor S. more than one means of direct coercion, including the Taser X2, disproportionately to the threat posed by the detained party's behaviour, while the behaviour of the remaining officers enabled the unreasonable use of the Taser X2, while additionally verbally abusing the victim with vulgarities, commonly considered insulting. The aforementioned behaviour caused the physical suffering of the victim, violated his decency, physical inviolability and right to humane treatment. The behaviour of defendants constituted crimes described by art. 231 § 1 CC and art. 247 § 1 CC i.e. abuse of authority by public officials and abuse of an individual deprived of liberty.*"<sup>22</sup>. HFHR continues to monitor proceedings against these officers.

## 2. *The latest judgments involving torture or inhuman or degrading treatment*

It is worth noting two of the latest judgments, which have not yet become final. One of them is from the Lublin-Zachód District Court in Lublin, in which the court convicted police officers to terms of deprivation of liberty without the possibility of parole. One of the police officers was found to abuse

<sup>20</sup> Case described pursuant to documents possessed by HFHR. The case is ongoing before the Gdańsk-Południe District Court in Gdańsk.

<sup>21</sup> Described pursuant to *Report on the Human Rights of Persons Deprived of Liberty*, Warsaw, Poland 2017, p. 8, <http://www.hfhr.pl/wp-content/uploads/2017/05/Report-CPT-FIN.pdf>, (accessed: 16-04-2018).

<sup>22</sup> Information concerning the ending of proceedings by the District Prosecutor in Poznań on 21 March 2018, <http://www.poznan.po.gov.pl/index.php?id=1631>, (accessed: 16-04-2018).

his authority in applying direct coercion against I.C. by using his own private Taser in the course of a detention as well as during I.C.'s presence in the sobering-up chamber. The officer was also found to act with severe cruelty in physically and mentally abusing I.C. by handcuffing him in the police vehicle, cursing at him, taking away his clothing, hitting him in the face with his fist, which resulted in trauma on the inside of the left cheek in the form of an irregular ulcer in the mucous membrane covered with a fibroma, use of a private Taser and electrocuting the victim in the chest, genitals and the right thigh causing second-degree burns to the skin on the right side of the chest, and the lower portion and the right thigh as well as on the right side of the scrotum and on the underside of the penis. The same officer was found to have twice used his private Taser against R.K., was present in the same sobering-up chamber as I.C. R.K. was restrained with handcuffs when he was tasered and the electrocution was directed to areas of the scrotum. The other two police officers were found to have mentally and physically abused I.C. In the reasoning for its decision, the court indicated that: “[w]hich should be considered in reviewing the importance of the violated duties and the consequences thereof for public awareness; the foundation for the effectiveness of the police is respect and esteem granted by citizens, and not fear against police officer brutality and unpredictability. Through the prism of such cases, there is a danger that police will begin to be viewed as a formation that is undisciplined and unprofessional, prone to use violence without reason and for its capriciousness, and therefore unworthy of trust – which directly influences public safety.”<sup>23</sup>.

The second example is a decision of the Ostrów Wielkopolski District Court in which it convicted four officers of the Criminal Department of the Municipal Police Station in Siedlce for torture, and the Commanding Officer of the Criminal Department for lack of a proper reaction to the violence, which he witnessed. The events occurred in August 2012, when police officers stopped three young men, aged 19 to 29, suspected of robbing a jewellery store. The young men were transferred to the Municipal Police Station in Siedlce where officers of the Criminal Department informally questioned and tortured them. The torture included beatings on the feet with police batons, pouring water on them, being tasered in the genital areas, and pressed to the floor with boots. Their lips were taped shut and they were threatened with having their testicles crushed, being taken to the forest for a game of rabbit (handcuffing the hands to the legs followed by a chase), with beating of their siblings or disseminating false information about their collaboration with police authorities. The men were tortured in separate rooms, though they could hear their friends screaming and begging from the other rooms. During this time, the Commanding Officer of the Criminal Department walked between the rooms to check if the individuals being tortured were providing any valuable information. The court found that the perpetrators acted jointly and in concert while the victims remained handcuffed and offered no resistance. The court sentenced the defendants to deprivation of liberty ranging from a year to two years and one month and, in the case of one of the defendants, it suspended execution of the sentence for a term of three years<sup>24</sup>.

### 3. HFHR Survey Research

Recently, HFHR conducted survey research among lawyers concerning ill-treatment of suspects and other individuals detained by police officers<sup>25</sup>. The 47 lawyers surveyed included individuals with various levels of experience<sup>26</sup> and practicing in various parts of the country. More than half of the surveyed lawyers handle only criminal cases<sup>27</sup>. All respondents claimed that in cases they handle they had encountered clients reporting the problem of ill-treatment by police officers.

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<sup>23</sup> Judgment of the Lublin-Zachód District Court in Lublin dated 30 January 2018, Ref. No. IV K 717/17.

<sup>24</sup> Judgment of the Ostrów Wielkopolski District Court dated 9 February 2018, Ref. No. II K 907/15, prepared pursuant to a press release from the Commissioner of Human Rights dated 12 February 2018, <https://www.rpo.gov.pl/pl/content/tortury-na-komendzie-w-siedlcech-policjanci-skazani-na-kary-bezwzględnego-wiezienia> (accessed: 16-04-2018).

<sup>25</sup> The inspiration to survey lawyers came from the Raport Sekcji Praw Człowieka przy Okręgowej Radzie Adwokackiej w Warszawie [Report of the Human Rights Section of the District Attorney Council in Warsaw] dated 26 June 2017 regarding the treatment of individuals deprived of liberty by police officers and other public officials, as well as the conclusions it presents.

<sup>26</sup> Among the surveyed lawyers, including their time interning, sixteen have practiced up to five years, thirteen have practiced 5-10 years, eleven have practiced 10-15 years, and seven have practiced more than 15 years.

<sup>27</sup> Five lawyers indicated that only 20% of their cases involve criminal matters, nine lawyers indicated that criminal cases constitute 20-40% of their caseload, ten lawyers indicated that criminal cases constitute 40 to 60% of their cases, ten lawyers indicated that 60 to 80% of their cases involve criminal matters, while 13 lawyers reported this range to be 80 to 100%.

The surveyed lawyers also indicated groups particularly subjected to ill-treatment by police officers. Distinguishing characteristics of potential victims included age, gender, ethnic origin, race, nationality, sexual orientation, religion and disability (Chart 1). The lawyers added that such characteristics may also include previous convictions, social status or addictions.

In matters concerning ill-treatment by police officers, the surveyed lawyers indicated that usually in such cases they encounter evidentiary problems. Their complaints concerning ill-treatment are ignored, demeaning treatment by police officers, lack of police reaction to the claims of ill or degrading treatment, as well as an improper approach by judges (Chart 2).

## VI. The scale of police violence

### 1. *The scale of police violence – statistical data*

Data made available by the Polish National Police<sup>28</sup> in matters categorized as: “*Violations of the right to freedom*,” which includes complaints of unreasonable, illegal, improper and unduly lengthy detentions, indicates the number of complaints has decreased year-over-year. Interestingly, the number of complaints submitted to the prosecutorial service in 2013-2015 decreased and then rose in 2016, where nearly 50% of the cases had been submitted to the prosecutorial office. Detailed data in this regard is appended to this brief in Chart 3. For the “*Inhuman or degrading treatment*”<sup>29</sup> category, the number of complaints filed stayed at the same level. This data, provided by the Polish National Police, includes allegations of improper physical methods/physical violence, direct coercion, psychological violence/threats, forced testimony, explanations, information, declarations, sexual harassment/rape, conditions in facilities for the detained, children’s facilities, in the course of transport, other inhuman or degrading treatment. While the number of filed complaints remained the same, the number of complaints submitted to the prosecutorial office in 2013-2015 grew year-over-year where, in 2015 92% of the submitted complaints were conveyed to investigative authorities. In 2016 the growth tendency significantly slowed. Detailed data are appended to this opinion in the form of Chart 4.

In data obtained in 2016 by the Warsaw Bar Association it follows that: “*(...) slightly over 2% of cases in which proceedings were initiated (in 2014 this was about 2.45%, in 2015 – about 2.06% and in the first two quarters of 2016 – 2.23%). Therefore, only slightly above 2% of the cases in which criminal proceedings are initiated are reviewed by an independent court in a judicial proceeding. The others are dropped at the stage of preparatory proceedings (while in over 50% of the cases no criminal proceedings are initiated at all).*”<sup>30</sup> (table 1)<sup>31</sup>.

### 2. *Report of the Ministry of Internal Affairs and Administration*

In December 2015, the Ministry of Internal Affairs and Administration prepared a report summarizing: “*Research concerning the occurrence in the police force of aggression directed against individuals outside the police force with whom police officers have contact in connection with performance of official duties*”<sup>32</sup> (MIAA Report). The MIAA Report indicates that its fundamental goal was to: “*(...) identify the sources of police officer aggression for the purpose of introducing activities aimed at diminishing or eliminating such. This approach required the level of aggression in the police force be established along with cause and effect relationships between undesired behaviour by police officers and other phenomena so that it would be possible to impact police officer behaviour by*

<sup>28</sup> HFHR obtained access to the reference data as part of a public information request submitted pursuant to the Act dated 6 September 2001 on Access to Public Information (final version: Dz. U. [Journal of Laws] of 2016, pos. 1764 as amended), hereinafter: Act on Access. The information was made available in a writing dated 20 February 2018, Ref. No. GIP-1004/824/18/KR.

<sup>29</sup> HFHR obtained access to the reference data as part of a public information request submitted pursuant to the Act on Access. The data was made available via email on 9 March 2018, entitled GIP-1172/18.

<sup>30</sup> Report of the Human Rights Section of the District Lawyers Council in Warsaw dated 26 June 2017 about the problem of treatment of individuals deprived of liberty by police officers and other officials, p. 4.

<sup>31</sup> Table taken from the Report of the Human Rights Section of the District Lawyers Council in Warsaw dated 26 June 2017 about the problem of treatment of individuals deprived of liberty by police officers and other officials, p. 3-4.

<sup>32</sup> The research is part of the report which was prepared by Synergion Michał Kochanowski spółka komandytowa. HFHR obtained access to the report as part of a request for access to information public information submitted pursuant to provisions of the Act on Access.



eliminating or attenuating causes thereof.”<sup>33</sup> The MIAA Report indicates that 45% of police officers admitted to: “(...) *having been participants in situations in the course of police service during which acts by police officers occurred, which in the eyes of individuals from outside the police, could be deemed to be expressions of unreasonable aggression. (...) 12.95% claim that interventions that involve such situations constituted at least 1/5 of their recent 100 interventions, while for 3.58% this was more than half of their recent 100 interventions.*”<sup>34</sup> The most frequent aggressive forms of behaviour witnessed personally by police officers included various disabling holds (73%), general use of physical force (69%), forcing an uncomfortable position of the body (43%), and insults (42%). Less egregious, though not exiguous, forms of violation that are difficult to deem accidental, include demeaning statements (29%), a blow with the hand or a kick (25%), a strike using an object other than a police baton (17%), use of handcuffs in contravention of regulations (16%), excessive use of the police baton (16%).<sup>35</sup> As indicated in the MIAA Report: “[*t*]he fundamental source of police officers’ frustration is the deep divergence between their own understanding of the sense, role and value of being a police officer and their perception of the social understanding and appreciation of that role on the part of society. Police officers consider themselves guardians of the law, obligated to act effectively on behalf of society. However, they feel they are not perceived this way. 71% of those surveyed feel they experience the problem of the low social authority of the police profession, 66% note the lack of appreciation by society, of which 38% feel this applies to them to a high or very high degree. 59% declare they experience the problem of the need to protect the respectability of the “police uniform” against the insulting behaviour of individuals with respect to whom they conduct their activities.”<sup>36</sup> The MIAA Report also states that: “(...) 87% of police officers claim that an officer should use all available means when it appears that a situation may slip out of control during an intervention. (...) 84% feel that use of all physically available means is indicated when there is a threat that in a direct confrontation with a criminal, the police officer will not have sufficient physical or equipment means to put up effective resistance. 63% of police officers directly admit they are likely or very likely to use direct means of force in a manner that may be deemed excessive by individuals from outside the police, if a situation appeared to be getting out of control.”<sup>37</sup> Police officers described threats that may allow a situation to get out of control to include allowing the person with respect to whom an intervention had been taken to take control of the situation (58%), involvement of third parties in the course of the intervention (55%), being unsure of one’s abilities (45%), lack of a physical advantage (42%), and lack of an intellectual advantage (39%).<sup>38</sup> Police officers’ ability to obtain an advantage is constantly put to the test; for 10% of them this occurs several times a day, 46% of them encounter a verbal provocation once every few days, 45% of those surveyed are subjected to criticism and social pressure once every few days, and 42% at least once every few days experience an impression concerning the impunity of individuals with respect to whom they’re conducting an intervention.<sup>39</sup> The MIAA Report indicates that only 11% of police officers exhibit a high propensity toward violent behaviour, though as many as 74% exhibit a medium level, with 15% exhibiting a low level thereof.<sup>40</sup>

## VII. Current ideas for solving the problem of torture and inhumane or degrading treatment in Poland

### 1. Adding the crime of torture to the Criminal Code

One of the ideas that could have a preventive effect is adding the crime of torture to the Criminal Code, by changing e.g. art. 246. In his letter to the Ministry of Justice, the Ombudsman pointed out that Polish law does not penalise all elements of torture described in art. 1 of the Convention against Torture.<sup>41</sup> Additionally, the Ombudsman pointed out that: “(...) *the provisions of the Criminal Code do*

<sup>33</sup> MIAA Report, pp. 34-35.

<sup>34</sup> MIAA Report, p. 5.

<sup>35</sup> MIAA Report, p. 6.

<sup>36</sup> MIAA Report, p. 7.

<sup>37</sup> MIAA Report, p. 7.

<sup>38</sup> MIAA Report, p. 7.

<sup>39</sup> MIAA Report, p. 8.

<sup>40</sup> MIAA Report, p. 8.

<sup>41</sup> Ombudsman’s letter to the Ministry of Justice dated 27 October 2015, Ref. No. II.071.4.2015.ED, p. 3, [https://www.rpo.gov.pl/sites/default/files/Do\\_MS\\_ws\\_tortur\\_0.pdf](https://www.rpo.gov.pl/sites/default/files/Do_MS_ws_tortur_0.pdf) (accessed: 16-04-2018).

not take into account situations of the application of torture 'for the purpose of punishing individuals for acts committed by them or by a third party, or which they are suspected of committing, or for the purpose of intimidation or exerting pressure on them or on a third party, or for any other purpose arising from any form of discrimination.' In practice, this may make it impossible to prosecute and punish the perpetrators of torture who apply it for these reasons and purposes. This also violates the victims' rights to trial and fair compensation."<sup>42</sup> A similar proposal, as has already been indicated in this opinion, has been presented by the CAT and the UN Human Rights Committee, pointing out that Polish criminal law does not implement the provisions of the Convention against Torture.<sup>43</sup>

In 2017 a group of MPs presented to the Sejm a draft amendment to the Criminal Code<sup>44</sup> that would have changed art. 246 by introducing what they considered full penalisation of torture and an increase in penalties for this type of crime. The amendment was to include the comments of the Ombudsman mentioned above. But the bill was rejected on the first reading on 29 September 2017.

Furthermore, in a survey a clear majority (66%) of advocates believe that introducing the crime of torture to the Criminal Code would ensure better qualifications and would contribute to more effective imposition of legal consequences on Police functionaries (Chart 5).

It must also be stressed that the ECtHR, in the case of *Cestaro v. Italy*, ruled that for the purpose of ensuring more effective defence, as described in art. 3 of the ECHR, States should undertake the appropriate legislative actions, presenting effective criminal provisions penalising torture. Additionally, the Court noted that the penalisation of torture also arises from art. 4 of the Convention against Torture. The ECtHR stressed that its jurisdiction is limited to ensuring fulfilment of the obligations arising from art. 3 of the Convention, and in particular to assisting the defendant state in finding appropriate solutions for the identified structural problem, meaning shortcomings, as in the aforementioned case, in Italian legislation. Each state, first of all, has the choice of means to be used in its internal legal order for the purpose of fulfilling its obligations arising from art. 46 of the Convention. This is why the Court, in the context of this matter, pointed out that it is essential to introduce to the Italian legal system mechanisms imposing appropriate penalties on individuals responsible for torture and other forms of abuse on the basis of art. 3 of the ECHR and making it impossible for them to use illegal means (*Cestaro v. Italy*, No. 6884/11, 7 April 2015, § 243-§ 246).

In the context of the findings in Italian case, the recommendations of international bodies and the position of the Ombudsman, the question arises whether the Court should also consider calling the Polish authorities' attention to the necessity of introducing a new type of prohibited act to the Criminal Code.

## 2. Access to lawyer

Another idea whose implementation could prevent torture and inhumane or degrading treatment is to guarantee detained individuals an advocate or legal advisor from the first moments after their detention. Under current law, in accordance with art. 245 § 1 of the Code of Criminal Procedure<sup>45</sup> (CCP): "[d]etained persons, upon their request, shall immediately be given the opportunity to contact a lawyer or legal advisor by any means available, and also to talk directly with the latter; (...)".

From studies recently carried out by the HFHR<sup>46</sup> follows that even though art. 245 of the CCP guarantees the detained person the right to immediate contact with a lawyer and to speak directly with

<sup>42</sup> *Ibid*, p. 3.

<sup>43</sup> However, doctrine indicates that art. 246 and 247 of the Penal Code do implement the obligations arising from the Convention on the Prevention of Torture cf. W. Zalewski, "Komentarz do art. 247" [Commentary on art. 247], in: *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz – art. 212-316* (The Penal Code, detailed section: Volume II, Part II, commentary on arts. 212-316), eds M. Królikowski, R. Zawłocki, CH Beck 2013, p. 243; I. Zgoliński, "Komentarz do art. 246" [Commentary on art. 246], in *Kodeks karny. Komentarz* [The Penal Code: Commentary], ed. V. Konarska-Wrzošek, Wolters Kluwer 2016, publ. LEX.

<sup>44</sup> MPs' bill amending the Penal Code, Sejm file No. 1702, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/B8DA1A0E853A409CC1258154002DBF58/%24File/1702.pdf> (accessed: 16-04-2018).

<sup>45</sup> Unified text: Dz. U. [Journal of Laws] 2017, pos. 1704 as amended.

<sup>46</sup> A. Klepczyński, P. Kładoczny, K. Wiśniewska, *On the (in)accessible access to an attorney*, Warsaw 2017, [http://www.hfhr.pl/wp-content/uploads/2018/01/HFHR\\_JUSTICIA2017\\_National-Report\\_PL.pdf](http://www.hfhr.pl/wp-content/uploads/2018/01/HFHR_JUSTICIA2017_National-Report_PL.pdf) (accessed: 16-04-2018), hereinafter: Report on access to lawyers, B. Grabowska-Moroz, in consultation with P. Kładoczny, P. Kubaszewski, *Strengthening procedural rights in criminal proceedings: effective implementation of the right lawyer/ legal aid under the Stockholm Programme*, Warsaw 2018.

them, lawyers indicated that such contact does not happen. One of the lawyers said that contact is often delayed: “(...) because ‘they want to get as much as they can out of the detainee.’ Another defender stressed that a certain kind of delay in this area is a type of ‘procedural gambit’, whose purpose is to prevent the establishment of a line of defence, because this could ‘disrupt the police and prosecutors’ investigation’, and the presence of a lawyer from the very beginning of the proceedings may be inconvenient and hinder the actions taken.”<sup>47</sup>. This is why the HFHR proposed that the investigative bodies, in accordance with art. 245 § 1 of the CCP ensure detainees the ability to immediately contact a lawyer or legal advisor. Additionally, police stations should have lists of lawyers or legal advisors, and also, Regional Bar Associations and the Regional Councils of Legal Advisors should create a list of on-call advocates and legal advisors for detainees<sup>48</sup>. A similar idea was presented in 2015 by the Cracow Bar Association<sup>49</sup>. The similar resolution was adopted by Warsaw Bar Association<sup>50</sup>.

It must also be stated that the majority (94%) of advocates surveyed are of the opinion that increasing access to lawyers from the first moment after detention could prevent situations in which police functionaries use violence (Chart 6).

### 3. Recording interventions and actions taken with respect to detainees

The idea of recording interventions and actions undertaken by Police functionaries arose in Poland in 2014, when the Office of the Chief Police Commandant prepared a draft outline for a bill amending the act on the Police. In 2015 the ideas of the Office of the Chief Police Commandant were transformed into the *Strategy for actions aimed at counteracting violations of human rights by Police functionaries*<sup>51</sup> of the Ministry of Internal Affairs (Strategy). Point 2 of the Strategy proposed the introduction of new evidentiary solutions, for the purpose of: “ (...) developing mechanisms ensuring the collection of evidence documenting the actual course of events during which improper behaviour by functionaries could occur.”<sup>52</sup>. The implementation of this idea was to be: “ (...) the development of legal and technical solutions concerning the recording of the course of police administrative/law enforcement activities in certain non-public locations, including in interrogation rooms.”<sup>53</sup> Nevertheless, work on the implementation of the Strategy was discontinued by the previous parliament.

In 2017, after the details of the death of Igor S. were revealed, discussion intensified about the introduction of a system that would record the actions taken by police officers. It must be pointed out that such a system already operates in Great Britain<sup>54</sup>, where police officers are equipped with body cameras. A similar solution is now being tested in Poland. A press release from the Central Police Command indicates that this system is being tested by police officers in Warsaw, and in Podlaskie and Lower Silesia provinces. The body cameras are supposed to record both sound and video<sup>55</sup>.

It must also be pointed out that majority (98%) surveyed advocates were of the opinion that recording actions in which police officers are involved could prevent situations of the use of violence by police officers (Chart 7). It is also indicated that “ (...) interrogation without the presence of defence counsel should absolutely be recorded.”<sup>56</sup>.

<sup>47</sup> Report on access to lawyers, p. 26.

<sup>48</sup> Report on access to lawyers, p. 61.

<sup>49</sup> Position of the Cracow Bar Association on access to lawyers for detainees during the first 48 hours of detention, dated 10 April 2015, [http://www.adwokatura.pl/admin/wgrane\\_pliki/file-stanowisko-10-04-2015-11386.pdf](http://www.adwokatura.pl/admin/wgrane_pliki/file-stanowisko-10-04-2015-11386.pdf) (accessed: 16-04-2018).

<sup>50</sup> Resolution of 24 May 2017 of the Warsaw Bar Association on the prohibition of #torture and on access to the assistance of a #lawyer in the case of detention of a criminal suspect, <http://ora-warszawa.com.pl/pl/9388327-uchwala-ora-w-warszawie-z-dnia-24-maja-2017-r-w-przedmiocie-zakazu-stosowania-tortur-i-dostepu-do-pomocy-adwokata-w-razie-zatrzymania-osoby-podejrzewanej-o-popelnienie-czynu-zabronionego> (accessed: 16-04-2018).

<sup>51</sup> Hereinafter: the Strategy

<sup>52</sup> Strategy, p. 13

<sup>53</sup> Strategy, p. 13

<sup>54</sup> *The Independent*, “How the police's body-worn camera technology is changing the justice system”, 1 March 2016, <http://www.independent.co.uk/news/uk/crime/how-the-polices-body-worn-camera-technology-is-changing-the-justice-system-a6905691.html> (accessed: 16-04-2018).

<sup>55</sup> Central Police Command, “Na ulicach Warszawy pierwsze patroly wyposażone w kamery” [First camera-equipped patrols on the streets of Warsaw], 18 December 2017, <http://www.policja.pl/pol/aktualnosci/152720,Na-ulicach-Warszawy-pierwsze-patrole-wyposazone-w-kamery.html?search=250> (accessed: 16-04-2018).

<sup>56</sup> B. Grabowska-Moroz, in consultation with P. Kładoczny, P. Kubaszewski, *Strengthening procedural rights in criminal proceedings: effective implementation of the right lawyer/ legal aid under the Stockholm Programme*, Warsaw 2018, p. 34.

## VIII. Conclusions:

- a) International and domestic human rights bodies are pointing out the problem of torture and inhumane or degrading treatment;
- b) But it is not only external entities that are calling attention to examples of abuse of force by police officers. Also in the Report prepared for the Ministry of Internal Affairs and Administration it has been underlined the huge scale of Polish functionaries' inclination toward violence;
- c) In Poland particular attention must be paid to doubts in the area of fulfilment of the procedural obligations arising from art. 3 of the ECHR, because many cases are dismissed by the prosecutors, as a result of which they never reach the courts;
- d) In surveys, advocates stress that the greatest problem in this type of case is evidentiary difficulties. Their concerns are also raised by the approach of judges in cases of improper treatment;
- e) Access to a lawyer from the first moments after detention may be the first safeguard to counteract violence from police officers;
- f) It was only after the latest events that cameras registering police officers' actions began to be tested and psychological testing for police officers was intensified. That is why we do not know how these changes will work in the future;
- g) As a result of the current wording of Polish law the question arises whether current regulations ensure an effective model of punishment that performs the defensive, repressive and preventive function.

*These written comments have been prepared by Adam Klepczyński, lawyer from the Strategic Litigation Programme of the Helsinki Foundation for Human Rights, under scientific supervision of advocate Katarzyna Wiśniewska and Ph.D. Piotr Kładoczny.*

Chart 1.

### Ill-treatment by police officers due to a membership in a given group

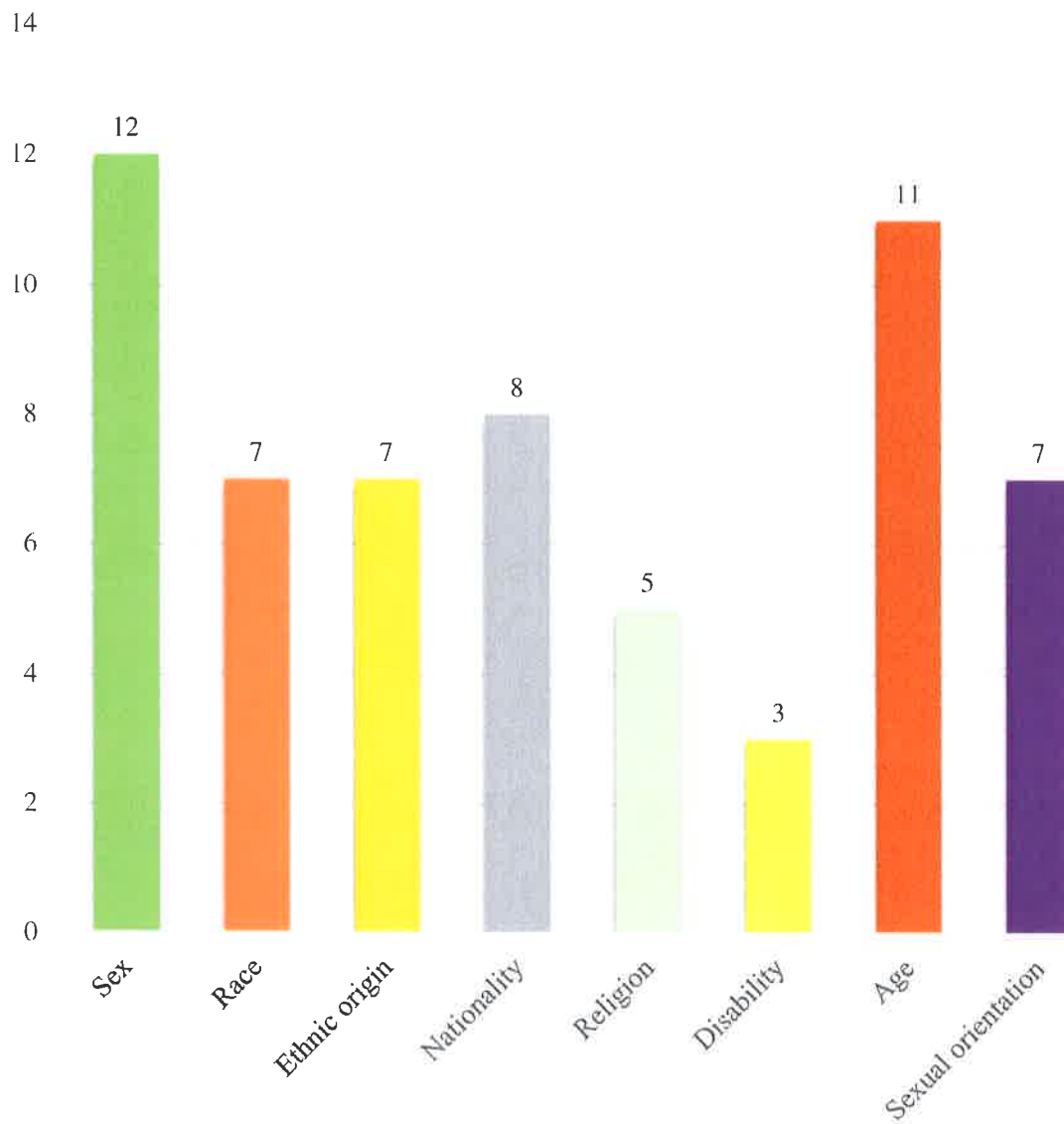


Chart 2.

### Difficulties advocates encounter when dealing with ill-treatment by police officers

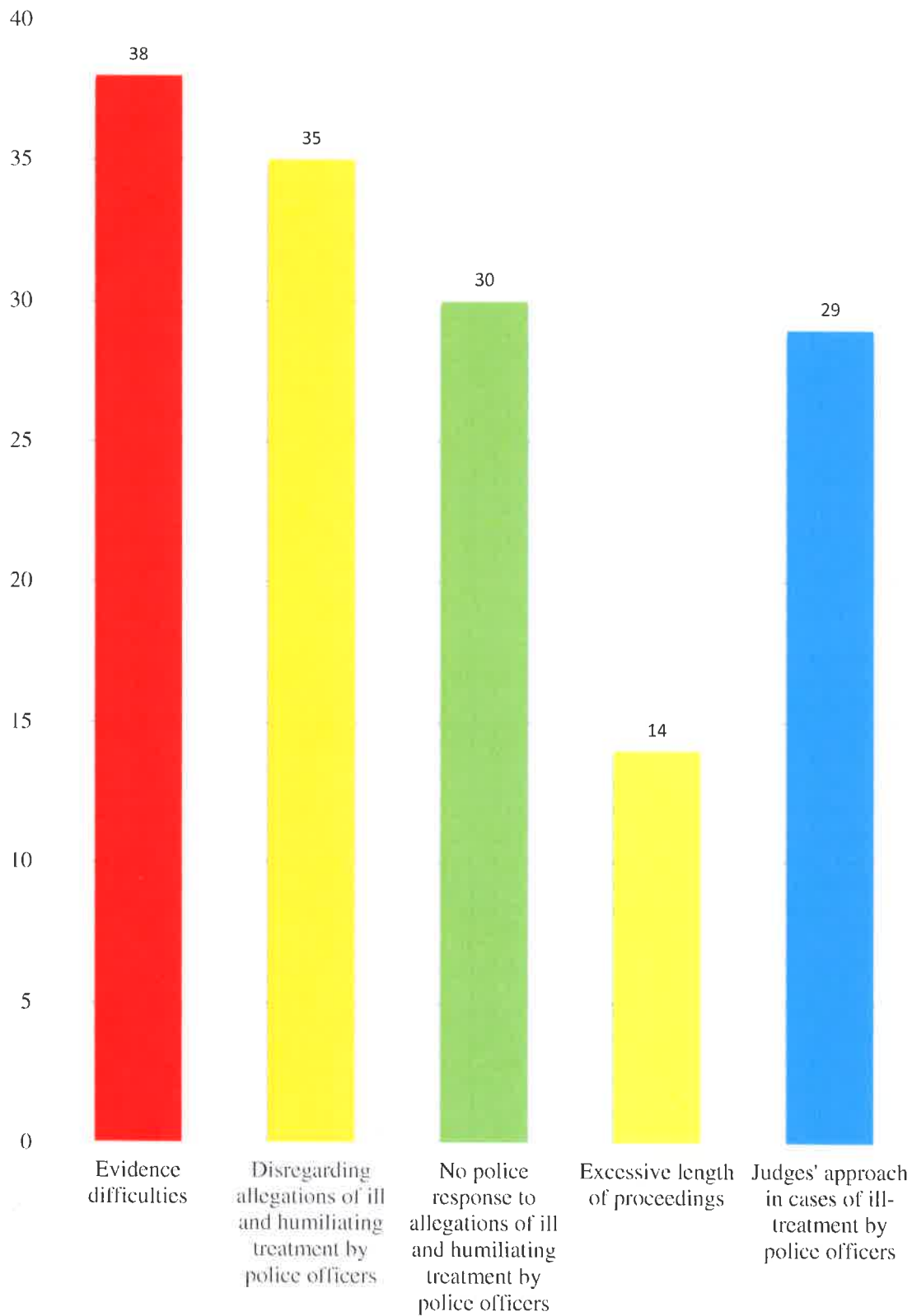


Chart 3.

### Violation of the right to freedom - number of complaints



Chart 4.

### Inhuman or degrading treatment - number of compliance

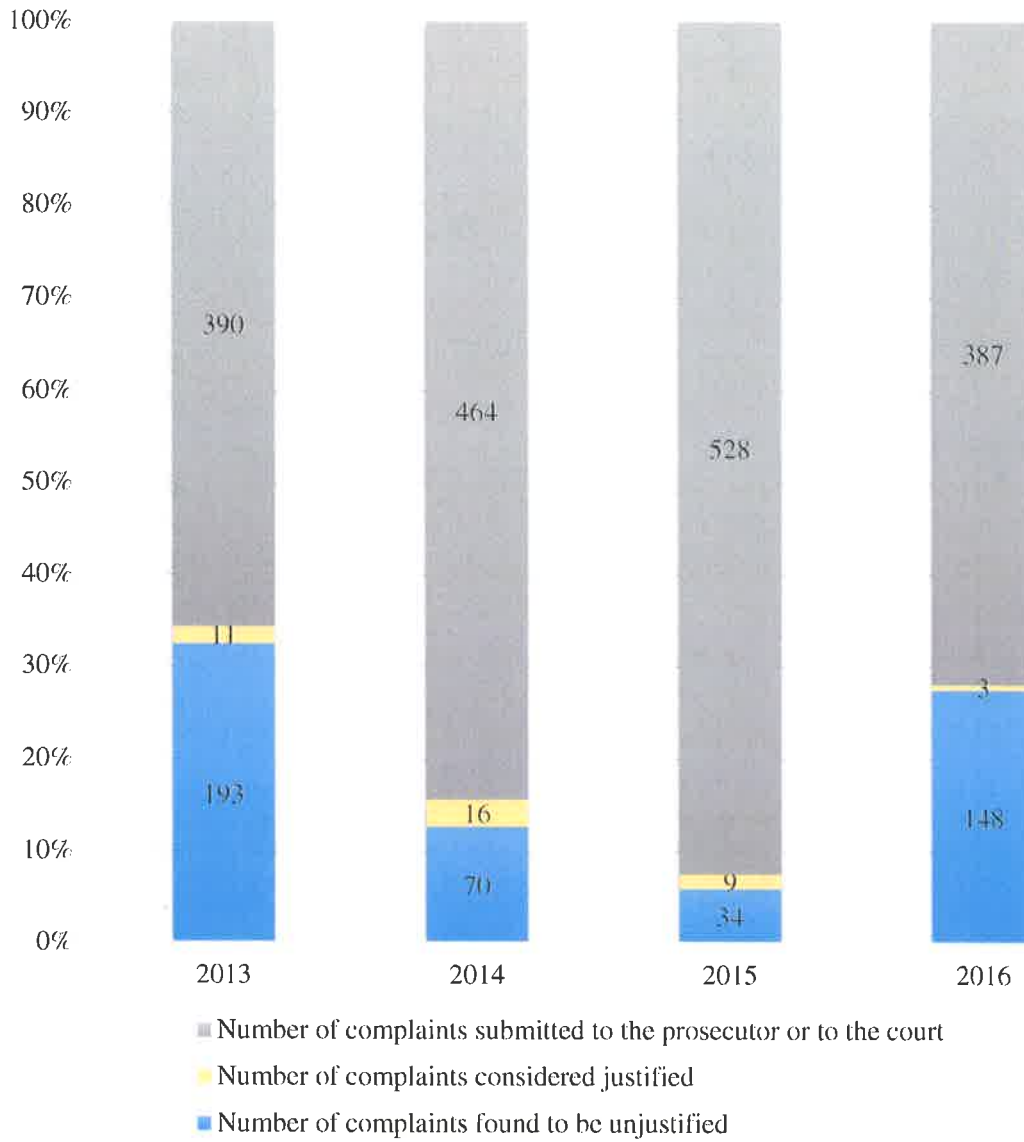




Table 1. Data gained from the National Prosecutor's Office by the Warsaw Bar Association

Offenses related to torture and inhuman or degrading treatment, use of physical or verbal violence by police officers against persons deprived of their liberty	2014	2015	2016 (the first two quarters)
Number of notifications about crime	1386	1354	680
Number of initiated proceedings	732	727	358
Number of acts of indictment	18	15	8
Number of discontinued proceedings	670	701	286
Number of convictions/conditionally discontinued proceedings	11	9	4
Number of acquittals	5	0	4

Chart 5.

**Question: Do you think that the introduction of the crime of torture into the Criminal Code would provide a better qualification and would increase the effectiveness of proceedings in the case of ill-treatment by police officers?**

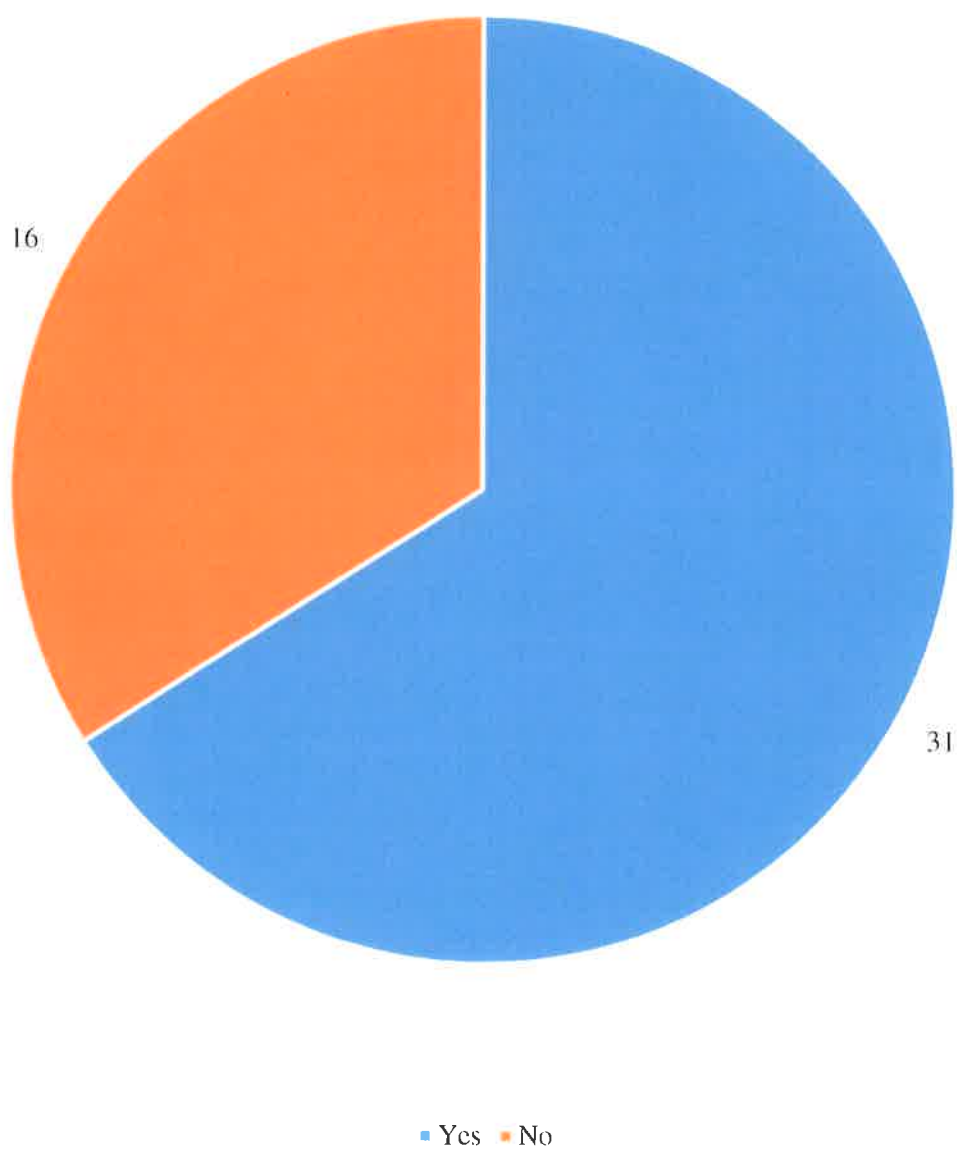


Chart 6.

**Question: Whether, in your assessment, access to a lawyer would prevent ill-treatment by police officers?**

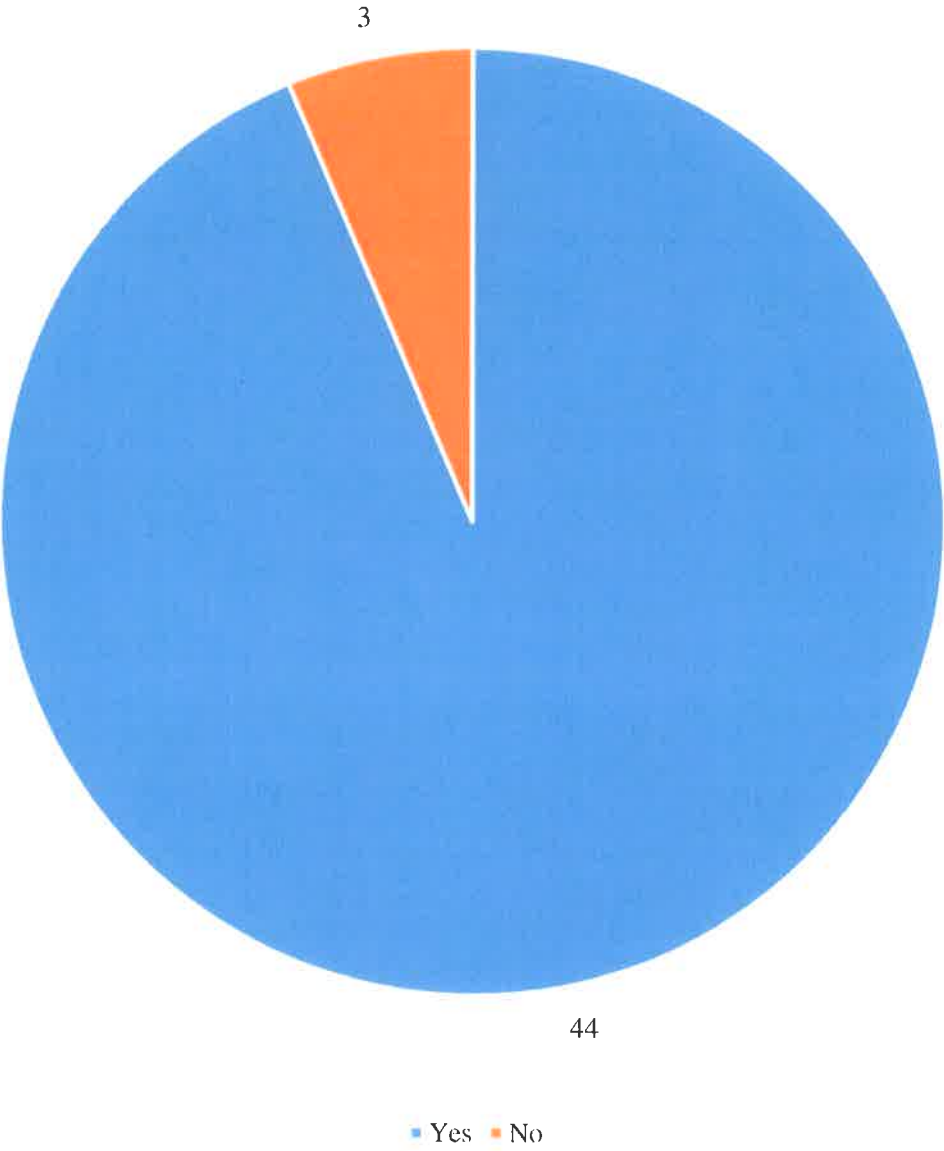


Chart 7.

**Question: In your opinion, would the introduction of video recording of the police officers activities prevent such situations?**

