

**SUBMISSION TO THE 51st SESSION OF THE COMMITTEE AGAINST TORTURE
REVIEW ON POLAND**

Comments of the Helsinki Foundation for Human Rights on the replies provided by the Government of Poland to the list of issues (CAT/C/POL/Q/5-6) raised by the Committee against Torture to be taken up in connection with the consideration of the fifth and sixth periodic report on Poland (CAT/C/POL/5-6) regarding implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

INTRODUCTION

The Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989 based in Warsaw, Poland. Its creation was preceded by the Helsinki Committee in Poland, which was an active underground movement for seven years starting in 1982. Following the transformation in Poland, the Committee's members decided to come out into the open and establish an independent organization with the mission to promote human rights and the rule of law, as well as to contribute to the development of an open society in the country. Nowadays, the HFHR is one of the most experienced, professional and influential non-governmental organizations operating in the field of human rights in Poland and Eastern and Central Europe.

HFHR's objective is the promotion of human rights in Poland and countries of the post-Soviet region. Its main activity areas include:

- domestic education in the field of human rights;
- international activities: programs promoting democracy, constitutionalism, rule of law and human rights in the countries of the Commonwealth of Independent States;
- public interest activities aimed at increasing the standards of human rights protection in Poland, implemented through monitoring, intervention and strategic litigation before domestic and regional courts. Since 2007, the Foundation has held consultancy status at the United Nations Economic and Social Council (ECOSOC).

The HFHR is also a member of FRA networks within the European Union Agency for Fundamental Rights;

The Helsinki Foundation for Human Rights is a member of the following networks:

- The Human Rights House Network - an international coalition consisting of NGOs from Norway, the United Kingdom, Belarus, Azerbaijan, Kenya and Uganda, among other countries. The HFHR experts publish bi-weekly news updates on human rights in Poland;
- The Zagranica Group, an association of Polish NGOs cooperating to provide international development assistance and humanitarian aid, and to promote democratic institutions;
- The European Council on Refugees and Exiles;
- FRANET - a multidisciplinary research network of the European Union Agency for Fundamental Rights.

The HFHR is submitting written comments to the UN Committee against Torture in view of its forthcoming examination on the 51th Session during the period from October 28 - November 22, 2013 of the replies of the Government of Poland to the list of issues. It was raised by the Committee in connection with the fifth and sixth periodic reports on Poland regarding implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In order to provide information on the most recent developments in Poland, the HFHR presents the following comments relating to the content of respective answers provided by the Government of Poland.

The hereby-presented comments constitute an abridged and updated edition of the report of the HFHR from October 10, 2011 submitted to the Government of Poland in relation to the replies to the list of issues of the UN Committee against Torture.

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COMMENTS TO THE REPLIES OF THE GOVERNMENT OF POLAND

Comments to the reply to question 3

Overview

The Government of Poland noted that within the reporting period a downward trend had been observed in the number of ECtHR judgments relating to pre-trial detention. However, a caveat must be made that in some instances the time the ECtHR needed to hear and rule in a given case extended beyond the reporting period. In consequence, an ECtHR judgment entered in the reporting period might concern a matter commenced in the previous period, which is a result of the procedure of hearing cases before the Strasbourg Court. Accordingly, it seems unreasonable to present a clear-cut conclusion that the number of cases concerning abuses of pre-trial detention dropped within the reporting period. Such a conclusion could be made only after a thorough review of the cases that have already been decided or have led to a settlement, as well as the complaints, either pending or communicated to the Government of Poland, which would relate to particular years covered by the reporting period.

Introduction – principles governing the application of pre-trial detention

- Duration

In its response, the Government of Poland observed that owing to the severity of pre-trial detention as a preventive measure, it might be used in strictly defined circumstances and only for a legally imposed duration. Notably, article 263(3) of the Polish Code of Criminal Procedure (CCP) (*Kodeks postępowania karnego*) provides that the aggregate duration of pre-trial detention applied from the date of a judgment made by the court of first instance, cannot be longer than two years. Still, this rule is not an absolute one and needs to be interpreted in conjunction with subsection 4 of the article which reads that a court of appeal may extend the period of pre-trial detention beyond two years, designating a specified duration of the extension. An extension of the principal legal duration of pre-trial detention can be justified by a need arising in connection with the suspension of criminal proceedings, actions taken to establish or confirm the identity of the accused, a necessity to take evidence in an especially complex case or abroad, or the intentional stalling of the proceedings by the accused. However, the practice of criminal process observed by the HFHR is that courts often use the above rule to extend the duration of the most severe preventive measure for a period much longer than two years.

- Safeguards applicable to pre-trial detention

The Government of Poland indicated the legal safeguards of the application of pre-trial detention. Undoubtedly, the requirement of proper justification of a court's detention order serves as a safeguard against unreasonable application of the measure. Article 251(3) of the

CCP provides that a justification of a detention order should present prima-facie evidence that the accused has committed an offence as well as describe facts which indicate that there is a basis and a necessity for applying a preventive measure. In the case of pre-trial detention, the court needs also explain why other preventive measure has been considered insufficient. Yet the practice suggests that the above requirement is not always properly adhered to. Often, criminal justice authorities only identify requirements from the Code of Criminal Procedure without actually applying them to the facts of the case. This practice has been many times commented in the jurisprudence of the European Court of Human Rights. The ECtHR has also repeatedly pointed to the fact that instead of repeating statutory language, a proper justification of a pre-trial detention order must provide arguments that grounds for pre-trial detention exist. (*D.P. v. Poland*, Application no. 34221/96; *Oleksy v. Poland*, Application no. 64284/01; *Pyrak v. Poland* Application no. 54476/00). Even if the need to apply the most severe measure clearly appears from the circumstances of a case, a failure to present such circumstances in a detailed and concrete manner in the justification of a detention order leads to a conclusion that the detention safeguards have not been observed.

Unfortunately, the courts do not always follow the above guidelines. In practice, in cases involving multiple defendants the reasoning given as part of the justification of an order extending the duration of pre-trial detention is very often limited and poorly drafted. Orders to apply or extend pre-trial detention rarely include a justification which unambiguously states that other measures have actually been considered but an informed and reasoned decision has been made that they were unsuitable in a given case and for a particular individual. Such a requirement has been identified by the ECtHR, for instance in *Kauczor v. Poland* (Application no. 45219/06).

- Other safeguards

In para. 29 of the Periodic Report, the Government of Poland mentioned that an obligation to notify pre-trial detention was set forth in article 261 of the CCP, the provision which reads: *“The court shall immediately notify a person closest to the accused that the pre-trial detention has been applied; the notified person may be a person designated by the accused”*. It must be though emphasized that the Code does not create an obligation to inform the accused about the court’s notification under article 261 of the CCP. The relevant amendment of legislation is advisable to rectify this legal loophole as the imposition of such an obligation on the court is a condition required to attain the practical purpose of article 261 of the CCP.

Further, in para. 30, the Government presents an imprecise picture of the legal framework of complaints and motions to change the applied preventive measure. Article 254(1) of the CCP states that the accused may at any time submit a motion to revoke or change the preventive measure. The motion is decided, within three days, by a prosecutor or, after the indictment is filed with the court, the court that hears the case. Still, article 254(2) of the CCP provides that the accused may complain against the decision only if the motion is submitted after at least three months from the date of a pre-trial detention order naming the same accused.

It must be emphasized that an effective and efficient system of the judicial review of preventive measures should be put in place. It is evident from cases reported to the HFHR that there are still proceedings in Poland in which the application of pre-trial detention is subject to only a limited review.

Access to case files with the justification of pre-trial detention

In para. 33 of the Report the Government of Poland listed current legal regulations concerning access to files of pre-trial proceedings. However, it failed to make note of the need to amend article 156a of the CCP which was brought forward by the Criminal Law Codification Commission.

The currently applicable article 156a is argued to be non-compliant with international standards. The ECtHR has been consistent in noting that judicial proceedings must be adversarial and ensure the equality of arms between parties. Such an equality cannot be ensured if a defense lawyer is deprived of access to case files which may be a basis for challenging the legality and reasonableness of pre-trial detention of their client (*Łaskiewicz v. Poland*, Application no. 28481/03; *Chruściński v. Poland*, Application no. 22755/04). The objective of protecting the course of justice cannot be attained at the expense of significant restrictions put on the right to defense. In consequence, accused's defense lawyer should have appropriate access to material facts of the case (Cf. judgments in *Migoń v. Poland*, Application no. 24244/94, § 80; *Chruściński v. Poland*, Application no. 22755/04, § 56; *Łaskiewicz v. Poland*, Application no. 28481/03, § 84).

In light of the above, the second sentence of article 156(5a) seems to fail short of the Strasbourg standard as it reads that the prosecutor may refuse to provide access to the case files which discuss pre-trial detention only where “*there is a justified concern that this would pose a threat to the life and/or health of the injured party [i.e. victim of the crime] or other participant in the proceedings, a risk of destruction and/or concealment of evidence or creation of false evidence, or might prevent identification and apprehension of a co-perpetrator of an offence imputed to the accused and/or perpetrators of other offences discovered in the course of the proceedings, or would result in the disclosure of the conducted operational and investigative activities [i.e. actions performed by the police or other law enforcement agencies] or would otherwise unlawfully obstruct the course of pre-trial proceedings*”.

The act of September 27, 2013 amending the Code of Criminal Procedure introduces a two-tier procedure for providing access for the accused and their defense lawyer to those case files in pre-trial proceedings which include information that may constitute grounds for a pre-trial detention order. The proposed article 156(5a) of the Code creates the prosecutorial obligation to provide access to the part of the case files which contains description of evidence put forward in the motion for a pre-trial detention order or its extension. Moreover, the newly drafted article 249a of the CCP obliged the courts to rule on the application of a custodial preventive measure solely on the basis of evidence fully disclosed to the accused and their

defense lawyer. Accordingly, the court – obliged by law to consider also any circumstances favorable for the accused which have not been disclosed by the prosecution – must first make them known at a hearing. The two above-mentioned articles create a legal framework for the judicial decision-making on pre-trial detention which is compatible with Article 5(4) of the European Convention on Human Rights by providing the accused with an opportunity to successfully challenge the reasonableness of the application or extension of pre-trial detention.

Compensation for moral and financial losses sustained as a result of undoubtedly unfair pre-trial detention

Article 552(4) of the CCP governs the right of a person placed in pre-trial detention to compensation for moral and financial losses. The HFHR would like to point to the issue of the time-limit set for persons entitled to assert the discussed claims for compensation. Under article 555 of the CCP, claims become statute-barred upon the expiry of one year after the day the final judicial decision in the case is issued. Based on the HFHR's experience, this time-limit is decidedly too short. In comparison to other time-limits for filing claims existing under the laws of Poland, the term set out in article 555 of the CCP is evidently shorter: its length is only one third of that of the limitation period for similar claims established in the Civil Code (CC) (*Kodeks cywilny*). In consequence, the persons claiming compensation for moral and financial losses sustained as a result of undoubtedly unfair pre-trial detention are less likely to succeed in court. Furthermore, bodies involved in the criminal proceedings are not obliged to inform potential claimants about their right to assert the claim.

In October 2012 the Constitutional Tribunal declared that the one-year limitation period introduced by article 555 of the CCP is constitutional (case no. SK 18/10). According to the Tribunal, the right to compensation for unfair detention is not absolute and may become subject to a legislative regulation and limitations of its exercisability. The Constitutional Tribunal held that by introducing a statutory time-limit of limitation the legislator met the formal requirement established by the principle of proportionality. The Tribunal further decided that the time-limit was not unreasonably burdensome.

This judgment has been universally criticized. For instance, on July 16, 2013 the Human Rights Defender (*Rzecznik Praw Obywatelskich*, national Ombudsman) challenged the constitutionality of article 555 of the CCP, a provision that introduced a one-year limitation period for compensatory claims related to not only unfair pre-trial detention but also unfair conviction, unfair application of a protective measure and undoubtedly unfair arrest. The Defender argued that unlike the remedies available under the Civil Code, article 555 failed to guarantee the equal protection of an individual's right to be compensated for illegal actions of a public authority.

Notably, the Act of September 27, 2013 amending the Code of Criminal Procedure extended the period of limitation to three years.

The above information shows that despite the improvement in the situation of persons placed in pre-trial detention as compared to previous years, there are still areas which require certain reforms. The Polish Government should, in particular, focus on the duration of application of the preventive measure in question.

Comments to the reply to question 4

Complaint procedure

In terms of the Polish Government's answer to question no. 4, the HFHR would like to provide information regarding the effectiveness of the complaint procedure. In our opinion it is essential to assess this issue from the perspective of prisoners' rights.

International standards emphasize that a state is obliged to provide independent and impartial complaint procedures for processing alleged violations of rights and adequate remedies. According to Art. 63 of the Polish Constitution, everyone shall have the right to submit petitions, proposals and complaints in the public interest, in their own interest or in the interests of another person - with their consent - to bodies of public authority, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering petitions, proposals and complaints shall be specified by statute.

However, the difference between prisoner complaints that are defined as justified within the complaint procedure and those that are found groundless evokes doubts about the effectiveness of the complaint procedure in Poland. Statistics published by the Ministry of Justice website show that the complaint procedure cannot be regarded as a sufficient way to protect prisoners' rights. Without a doubt, many of these complaints are properly found groundless since they are not fully justified. However, it is highly doubtful that most prisoner complaints (as it seems from the statistics) are not worth consideration.

The Act amending the Criminal Enforcement Code (*Kodeks karny wykonawczy*) came into force on January 7, 2012. Under the amended law, a prisoner, when filing requests or complaints, is obliged to properly substantiate claims contained therein, in particular by attaching relevant documents. Also when the additional complaints are based on the same factual basis, contain words or phrases commonly regarded as vulgar, offensive, or prison slang, or those which do not contain proper substantiation of claims contained within them, the competent authority may reject the motion, complaint or request without consideration.

In the opinion of the HFHR, these new changes should be evaluated negatively, since they limit the ability to file a complaint as a result of different aspects of detention, which is a crucial element for the protection of rights of prisoners. In our opinion, the amendments to the Criminal Enforcement Code violate the principles of the Polish

Constitution. The HFHR submitted its formal motion to the Human Rights Defender with the request to initiate the procedure before the Constitutional Tribunal.

Comments to the reply to question 5

The HFHR would like to emphasize the main problems concerning binding law on access to legal aid and its practice.

Law

In reply to question 5, the Polish government indicated in detail current provisions of the Code of Criminal Procedure and the Code of Civil Procedure relating to the issue of free legal aid. The Government also presented information about work on drafts dealing with access to free legal aid. It was stated that the last draft prepared by the government was presented to the Parliament during the 5th term of office of Sejm (2005-2007). Since 2007 no government draft on legal aid has been sent to Parliament. Furthermore, the Government mentioned that in 2010 the Council of Ministers decided that the Minister of Justice would prepare and conduct a pilot program of free-of-charge legal aid, intended to contribute to a reliable and thorough assessment of the financial implications of future law of out-of-court free legal aid for natural persons. **However, until now the Government has not presented results of this program nor provided information as to whether it was even organized at all.**

In July 2013 the media reported that Ministry of Justice had prepared a new draft of the law on access to free legal aid, but still it has not been made public nor has been sent for public consultations. In parallel, the President of Poland and its administration organized a set of debates called the Forum of Public Debate (*Forum Debaty Publicznej*) concerning the issue of a system of free legal aid in Poland. The results of these debates have also not yet been presented.

Moreover, Parliament adopted a set of amendments to the Code of Criminal Procedure, which introduce a more adversarial model of judicial criminal proceedings. To ensure the equality of issues before the court, it is planned to extend appointed legal aid to each situation when an accused does not have a chosen defence counsel during court proceedings, regardless of whether or not they can afford to pay for their legal aid. Furthermore, this reform gives legal counsellors (*radcowie prawni*) the competence to defend accused people in criminal cases. Up until now, attorneys (*adwokaci*) have been the only legal professionals allowed to defend. Thus, the issue arises as to whether or not these legal counsellors are properly prepared to conduct such cases in practice.

Practice

Apart from the legal provisions on access to legal aid in Poland, some important issues about its practice should be made. The HFHR receives many complaints concerning access to free legal aid, as well as the quality of aid provided. Our clients underline that appointed counsels

are less active than privately funded counsels. The main reason seems to be that remuneration for free of charge legal aid cases is evidently lower than remuneration for privately funded legal aid.

The issue of free legal aid is also subject to public debate. For instance in September 2012 the National Bar Association organized the conference, “Free-of-charge legal aid v. right to a fair trial”, where one of the conclusion was that the court should not be the authority deciding on the granting of free legal aid (and appointing the counsel), since it challenges the impartiality of the court.

When analysing criminal proceedings, it is necessary to point out that in many cases the arrested are not assisted by a lawyer at the beginning of proceedings. Authorities conducting proceedings often do not even inform a privately funded defense lawyer about an arrest during the first hours. As a result, a person often only has the possibility to consult a lawyer after the court's decision for a pre-trial arrest had been already made. Furthermore, in Polish criminal procedures there is no regulation guaranteeing that free legal aid will be appointed immediately after an arrest (the so-called “lawyer for the first hour”). **Thus, the HFHR would like to emphasize that the European Court of Human Rights’ judgment in the case Płonka v. Poland (judgment of March 31, 2009; application no 20310/02) has still not been executed by Polish authorities.**

Moreover, in answering the question concerning voluntary acceptance of a penalty (Art. 387 of the Code of Criminal Procedure), the court should instruct the accused about the possibility to request that a defense counsel be appointed, nevertheless this activity is not expressly regulated in the CCP. This presumption can be formulated on the basis of the general rule of Art. 16 of the CCP according to which, the authority conducting proceedings shall, if necessary, inform the parties to the proceedings of their rights and duties, even if this is not explicitly stipulated by law. The HFHR is of the opinion that the duty to instruct the accused in this matter should be clearly regulated in the CCP. Without this, there is considerable worry that a court or prosecutor may try to convince a defendant without the assistance of a defense counsel to resolve the case through the voluntary acceptance of a penalty¹.

In the light of the forthcoming amendments to the Code of Criminal Procedure based on the more adversarial judicial part of the proceedings, it is necessary to underline that equality of arms may be violated if the abovementioned problems concerning the activity of appointed counsels apply. Unfortunately, CCP reform does not deal with the lack of a general system of legal aid.

¹ According to the experience of the Helsinki Foundation for Human Rights, there are cases in which persons are criminally sentenced despite the fact that they were refused a free legal counsel by the court. For instance, Andrzej Sobieraj was accused of defamation for writing in his book that a lawyer who formerly represented him in another case collaborated with the communist regime. Thus, A. Sobieraj, a social activist without higher education, was accused in criminal case. On the other side there was a professional lawyer. Despite this fact the court did not grant him legal aid. As a result, his right to defense was significantly limited.

In civil proceedings, the main problem is related to the fact that the court has the right to refuse to appoint a counsel if it concludes that their participation is dispensable. The HFHR has received complaints concerning this kind of refusal. In some cases the reasons for refusals were questionable.

Comments to the reply to question 6

In the report, the Polish Government describes the program “Stop Sexual Violence in Poland” (*Stop przemocy seksualnej w Polsce*). It is very positive that the Platform was created, serving as the first Polish transversal coalition aimed at eliminating sexual violence in Poland. **However, the Procedures for the Police and medical facilities dealing with victims of sexual violence (*Procedura postępowania Policji i Placówki medycznej z Ofiarą przemocy seksualnej*), which is mentioned in the report as the achievement of the Platform, has not been approved by relevant authorities and remains unimplemented.** It is perhaps interesting to note that the Procedure was first presented in 2010 and is still inoperative. **Similarly, the Guidelines for the Prosecutor General concerning Adult Victims of Rape and other Sexual Crimes of May 9, 2011 (*Wytyczne Prokuratora Generalnego z dnia 9 maja 2011 r. dotyczące postępowania z pełnoletnimi ofiarami zgwałceń i innych przestępstw seksualnych*) were created within the Platform activities; they received high praise from many experts for their quality but were not approved by the Prosecutor General and have not been implemented.** In 2012, a group of non-governmental organizations and experts petitioned the Prosecutor General to sign and implement the Guidelines. Another document prepared within the Platform’s activities was the Guide for Victims of Rape (*Informator dla ofiar zgwałcenia*) in the form of a flyer. This leaflet was never widely distributed and only 1,000 copies were printed.

There is no mention in the report of the problems concerning emergency contraception or legal abortion that female victims of sexual violence encounter. It is telling that neither the Guide for Victims of Rape nor the Procedure of operation for the Police give proper consideration to matters related to emergency contraception or legal abortion available to rape victims. **This failure illustrates an overall and systematic problem of access to emergency contraception and legal abortion in Poland.** In the recent case *P. and S. v. Poland* (application no. 57375/08), the European Court of Human Rights found an infringement of Article 3 ECHR (as well as Articles 5(1) and 8 ECHR) in the context of the rights of female victims of sexual violence. In the context of Art. 3, the ECtHR stated that in regard to the circumstances of the case seen as a whole, P. was treated by the authorities in a deplorable manner and that her suffering reached a minimum threshold of severity under Art. 3 of the Convention. According to the Court, the government’s approach did not meet the requirements inherent in the State’s obligations to effectively establish and apply a criminal-law system punishing all forms of sexual abuse. The facts of the case need be adduced to portray the magnitude and caliber of the problems to be addressed by Polish authorities.

The applicants were P. and S. (daughter and mother, respectively). In 2008, P. became pregnant at the age of 14 as a result of rape. In order to have an abortion, she duly obtained a certificate from the public prosecutor – as required by law – stating that her pregnancy had resulted from unlawful sexual intercourse. In several hospitals, they received contradictory information as to the conditions under which abortion could be performed. In one of hospitals in Lublin (Eastern Poland), the head of the gynecological ward asked the mother to sign a consent-form, which stated that the abortion could lead to her daughter's death. In the same hospital, the doctor took the girl to see a Catholic priest. He tried to convince P. to carry the pregnancy to term and recorded her mobile phone number; anti-abortion activists then received the number. At a point when the mother was not present, the doctor also presented the girl with a statement that she wanted to continue with the pregnancy, which at the doctor's request she ended up signing. Finally, the head of the gynecological ward refused to perform the abortion in her ward due to her religious views. The Lublin hospital issued a press release informing that it would not perform the abortion in P.'s case. The case was widely covered by the media.

In the meantime, the Lublin district court instituted proceedings against P. on the suspicion that she had committed a criminal offence – sexual intercourse with a minor under 15 years of age. Failing to perform the abortion in Lublin, the P. and S. travelled to the hospital in Warsaw. P. received text messages and visits from people trying to convince her to change her mind about the abortion. P. and S. fled the hospital under pressure as they felt manipulated and helpless. They were harassed by anti-abortion activists on their way out of the hospital and taken to the police station. On the same day, the police placed P. in a juvenile center in execution of a Lublin Family Court order. It was an interim measure in proceedings to divest S. of her parental rights. P. and S. complained to the Office for Patients' Rights of the Ministry of Health, which ultimately helped them to receive the abortion in the city of Gdańsk. The ministry sent a car for P. and S.; they were driven from Warsaw to Gdańsk, which amounts to a journey of c.a. 500 km and 6 hours on Polish roads. This service was operated by the Ministry in a clandestine manner.

In points 89-92 of the Report, the Government underlines the information and intervention telephone line (the National Emergency Service for Victims of Domestic Violence “Blue Line”), which was launched in January 2011. From the information available on the website “www.niebieskalinia.info”, it follows that help from counsellors is available from Monday to Saturday from 8am to 22pm and on Sundays and holidays from 8am to 4pm. The duty hours of lawyers take place on Monday and Tuesday (5pm-9pm), Wednesday (6pm-10pm). **Taking into consideration the specificity of the cases concerning domestic violence, such helplines should work 24h.**

In the opinion of the HFHR, there is a problem with the data presented in the Government's report. In points 96-97, the Government presented activities undertaken in order to make a diagnosis of the situation in the years from 2007 to 2010. The research was conducted by TNS OBOP Public Opinion Center and the Polish Academy of Science. **It is problematic**

that every year the study concerns a different group, because there is very little such sharp focus can teach us about developments. In 2008 the research concerned children, in 2009 – seniors and people with disabilities, in 2010 the focus was on gender.

Moreover, the data concerning court rulings presented by the Government in the report relates to the offence of abuse of close family members (Article 207 of the Criminal Code) and is restricted to §1 of this Article and not §2 (mistreatment compounded with a particular cruelty), §3 (mistreatment where the consequence is a suicide attempt by the injured person) and is restricted in most cases to the year 2010. Similarly the data concerning the application of Article 197 of the Criminal Code (*Kodeks karny*) concerns in most cases the provision's section (§) 1 (rape) and not §2 (subjection to other sexual acts) or §3 (gang rape).

The lack of adequately collected data is a serious problem. Systematic and adequate data collection has long been recognized as an essential component of effective policy-making in the field of preventing and combating all forms of domestic violence, including violence against women. In order to design and implement evidence-based policies and assess whether they meet the needs of those exposed to violence, it is necessary for the Government to collect gender-disaggregated relevant statistical data at regular intervals on cases of all forms of violence.

On December 18, 2012, Poland signed the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. In view of its ratification, the Criminal Code and the Code of Criminal Procedure were amended in order to make rape an offence prosecuted *ex officio*. This is a positive step. Other changes in the legal system, however, should follow. For example, the statistical data is not collected in a proper way, as it is visible from the government report. The Convention draws special importance to the collection of statistical data (Article 11 – data collection and research). **Moreover, parties should take the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence referral centers for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counselling. Such special centers for female victims of sexual violence are non-existent at the moment.**

Comments to the reply to question 7

In terms of the Government's answer to the question 7, the HFHR would like to provide additional and up-to-date information regarding the scale of the actions undertaken to combat human trafficking in Poland.

General information

In general, an increase in human trafficking has been observed in Poland since the early 1990s. Currently, Poland is not only the country of origin of the victims, but also a transit

country through which victims are transferred from Eastern Europe to Western Europe. **It is also a destination for victims mainly used in prostitution and forced labor.**

It is stressed that forced labor and human trafficking are crimes, which are very difficult to detect. Additionally, both offences have been not well recognized in Poland yet, forced labor in particular. It is underlined that victims of labor exploitation are usually professionally active persons between the ages of 20-50. It is reported that mostly men are among these victims, as this is the most desirable group of workers in the labor market. This varies significantly from human trafficking, as that concerns mainly woman. Furthermore, it also results from the fact that economic sectors of agriculture and construction are at the greatest risk of the labor exploitation.

It is commonly accepted that the phenomenon of forced labor refers to a large extent to migrant workers. Most often, it regards the following economic sectors: manufacturing (e.g. food processing), agriculture and construction. Within this group of workers, seasonal workers are the most vulnerable for exploitation.

A new National Action Plan against Trafficking in Human Beings was adopted for the years of 2013-2015.

Pursuant to the Prime Minister's Order no. 36 of June 9, 2011, **the Team for Combating and Preventing Trafficking in Human Beings** (*Zespół do Spraw Zwalczenia i Zapobiegania Handlowi Ludźmi*)² was established. The Team is responsible for the evaluation of the National Action Plan against Trafficking of Human Beings, as well as for the preparation of activities against human trafficking. The team's staff consists of representatives of the Ministry of National Education, the Ministry of Justice, the Ministry of the Interior, the Ministry of Labor and Social Policy, the Ministry of Foreign Affairs, the Ministry of Health, the Chief of the Police, the Commander of the Border Guard, the Government Plenipotentiary for Equal Treatment, the Head of the Office for Foreigners.

Also, the National Consulting and Intervention Center for Victims of Trafficking (*Krajowe Centrum Interwencyjno-Konsultacyjne dla Ofiar Handlu Ludźmi*) was established.³ The Center provides a 24h helpline for victims or witnesses of trafficking; organizes assistance both to Polish nationals, who for example have been forced to work abroad and foreigners staying in Poland, as well as medical, psychological, and legal care. Additionally, the Center also guarantees support for foreign victims to legalize their stay and organize their return to their home countries, and assistance for victims during meetings with the police and prosecutors. Currently, the Center is managed by La Strada Foundation.

Since its establishment in April 2009 and until March 31, 2010 the Center provided support to a total of 287 victims of trafficking by rendering interpretation services, legal consultations,

² More information about the Team is available here:

http://www.msw.gov.pl/portal/pl/386/1999/Zespol_ds_Zwalczenia_i_Zapobiegania_Handlowi_Ludzmi.html

³ More information about the National Consulting and Intervention Center for the Victims of Trafficking:
<http://www.kcik.pl>

psychological care and accompanying them during meeting with police officers and prosecutors. In 2009 a total of 77 Polish citizens and 116 foreigners received assistance at the Center. In 2009 the Center advised victims and their families through phone and e-mail in 322 cases. In 2010 a total of 71 Polish citizens and 52 foreigners received assistance at the Center, in 2011 a total of 112. In 2013 the Center gave assistance to 198 people⁴.

As the Government mentioned in the 5th and 6th Periodic Review, the Border Guard (*Straż Graniczna*, the Polish border protection agency) is involved in the implementation of the National Action Plan against Trafficking in Human Beings. Under decision no. 139 from 18 June 2008 r. of the Commander of the Border Guard, **the Group on the Constant Monitoring and Coordination of Border Guard's actions related to the Prevention and Combating the Human Trade was created**. The Group consists of 9 officers and is managed by the Director of the Operational and Investigative Board of the Border Guard Headquarters. The Group's tasks are as follows: coordination of Borders Guard's undertakings from the National Agenda of Actions against human trade; monitoring and analysis of the cases of human trade disclosed by Border Guard, participation in the activities embarked by the Working Group constituted within the framework of the group appointed by order number 24 of the Prime Minister dated March 5, 2004 with regard to the creation of a group for the prevention and combating of human trade in Ministry of Internal Affairs; initiating and coordinating the actions of Border Guard's in the ambit of combating human trade other than those from National Agenda of Actions against the Human Trade with due regard to educational undertakings; collaboration with Ministry of Internal Affairs, the Police and other organs of domestic administration and non-governmental organizations.

Furthermore, amongst the Operational and Investigative Managing Board of the Headquarters of Border Guard, there is a functioning Section on Illegal Migration and Human Trade and a central coordinator on human trade. In every branch of the Border Guard (currently 10 organizational units), within the framework of Operational and Investigative structures there are coordinators and their deputies dealing with matters of combating human trade (approximately 30 officers of the Border Guard, depending on the territorial scope of the organizational unit). As regards the educational scope, the tasks concerning human trade are implemented in particular by the Center for Educating Border Guard in Koszalin.

Recently, there has been political debate regarding human trafficking in Poland. **The Polish Senate has prepared a draft regulation empowering the Border Guard's officers to investigate persons who have committed an offence of human trafficking. The draft regulation introduces significant changes, since currently Border Guard officers must refer the case to the Police.**

4

http://www.mpips.gov.pl/gfx/mpips/userfiles/_public/1_NOWA%20STRONA/Pomoc%20spoleczna/cudzoziemcy/Raport_HL_2011_2012.pdf

Furthermore, the UEFA football championships EURO 2012 in Poland in the summer of 2012 also raised the number of debates regarding the issue of human trafficking. There were many media reports before the Euro 2012 regarding the question whether this event would improve number of cases regarding human trafficking. **A member of the Polish Parliament turned to the Ministry of Interior with an oral question (number 4009) prior to the Euro 2012 UEFA championships. It focused on the question of measures undertaken to prevent sexual exploitation during this event. In his reply, the Ministry of Interior summarized all the measures undertaken to prevent human trafficking such as: social campaigns, preventive mechanisms, and assistance programs for victims.⁵ However, after the championship, the media reported that the number of cases of human trafficking did not rise during Euro 2012.**

Comments to the reply to question 8

The answer of the Polish authorities on the outcome of the review of the refugee status determination system initiated by the UNHCR does not show the full picture of the procedure on granting refugee status in Poland. **It mentions the UNHCR's recommendations, but does not provide information on whether they are implemented in practice. In the HFHR's opinion, the quality of this procedure has not improved significantly in recent years.**

With reference to the UNHCR's recommendations it has to be noted that in light of the HFHR's experience accurate information about the nature and content of the internal materials of the authorities is not mentioned in practice in the decisions. Assessment of the credibility of applicant documents is often not made individually (e.g. documents from Nigeria are considered not credible because of the high rate of the forgeries in this country). The fact that an applicant has asked for a refugee status in Poland a long time after leaving their country of origin very often negatively affects the procedure for granting refugee status in Poland. Justifications of the decisions are written in Polish, and they are often long and complicated, which makes them not understandable for asylum seekers. It happens that in the justifications of the decisions there are mentioned personal data of another foreigner or the justification is clearly copied from another foreigner's decision only with a change of the personal data.

Although the UNHCR did not make any recommendations regarding the second instance authority (the Refugee Board), **the HFHR would like to emphasize that it also considers unsatisfactory the quality of the decisions of the second instance authorities. In the HFHR's opinion most of the UNHCR's recommendations concerning the Office For Foreigners also apply to the Refugee Board.**

⁵ <http://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=552B6E93>

The HFHR also observes problems concerning the examination of LGBTI asylum claims. We handled a case where the Head of the Office for Foreigners requested that an applicant from Uganda provide a medical certification from a psychologist or sexologist confirming his sexual orientation. The Refugee Board, as the second instance authority, admitted that it is indeed a bad practice. However, following this request, the Board challenged the medical certification and claimed that the applicant was generally not credible and cannot be trusted in terms of his declaration about sexual orientation.

In the HFHR's opinion, in every decision there should be instruction in Polish as well as a foreign language understandable for a foreigner explaining how to appeal from the decision. However, it happens that even if a foreign language is provided, it is still not understandable for a foreigner, since, for instance, it is written in Dari when a foreigner knows only Persian.

As regards access to an interpreter, this right is respected, though not entirely. Interpretation during the procedure for granting refugee status is ensured respectively by the Head of the Office for Foreigners and the Refugee Board. The interview should, according to law, be conducted in a language understandable for the applicant. Interpretation is available in most of the languages spoken by the asylum seekers in Poland, except some rare African languages. Importantly, in practice there are problems with the quality of interpretation, and it happens that the dialect of a particular language is not duly taken into account.

Audio or video recording is possible under national legislation, but it is not used in practice. Instead, a report of the interview is prepared. It is in Polish and is not a verbatim transcript. The report is handwritten, which sometimes makes it unreadable. In practice, it has also happened, that the interview was conducted although the applicant was not fit for interview due to serious psychological and psychiatric problems.

Polish authorities point out that the UNHCR recommends that Poland guarantee the state legal aid for persons applying for refugee status. **Currently, there is no state legal aid system and legislation does not guarantee access to legal assistance for asylum seekers.** Free legal assistance for asylum seekers and people granted international protection is only provided through projects run by NGOs, e.g. the HFHR, funded by the European Refugee Fund (75% of the projects budget is covered by EU funds, and there is a possibility for NGOs to request additional 10% from the state budget. 15 % has to be provided by the organization itself). There are also some projects that involve the provision of legal assistance during visits to accommodation and detention centers, but generally asylum seekers face practical obstacles in accessing legal assistance, as most of these centers are located in remote areas, while NGOs have their offices in the main cities of the four provinces (Mazowieckie, Małopolskie, Podlaskie and Lubelskie).

There is a general possibility to apply for cost-free professional legal representation before courts concerning complaints on administrative decisions made in the procedure for granting refugee status under the same rules that apply to Polish citizens (i.e. insufficient financial

resources). **In practice, many foreigners do not know about such a possibility. However, when they do apply, the legal representation is very often granted.**

Access to health care for asylum seekers is guaranteed in the national legislation to the same extent as for Polish nationals who have health insurance. However, asylum seekers may not easily access doctors, since they can choose only from the list of doctors available in the clinics and hospitals contracted by the Office for Foreigners. **The biggest obstacle in accessing health care by asylum seekers is the lack of knowledge of foreign languages among medical personnel. Polish authorities do not provide free interpreting services and most asylum seekers are not able to pay for such assistance on their own.** Also, some of the clinics and hospitals that have signed an agreement with the Office for Foreigners, are situated far away from the refugee accommodation centers. Another problem identified by the experts is lack of intercultural competences among medical personnel.

It is worth mentioning – although it is not highlighted in the Government’s report - that according to the UNHCR the main challenge regarding the procedure for granting refugee status in Poland presently concerns the identification of vulnerable persons and procedural guarantees for them.⁶ **Although the relevant legal provisions are in place, the current identification methods are not sufficient**⁷. Another issue is that the rules set in law are very general and do not concern all vulnerabilities⁸. Rape victims, trafficking victims, and sexual violence victims are not mentioned by law.

Comments to the reply to question 9

In the reporting period, Polish courts claimed that refugee status given by the EU member state authorities is not an obstacle to extradition (i.e. decision of the Regional Court in Warsaw dated February 21, 2011 case No. VIII Kop 39/11).

In the decision of October 26, 2010 (case no. AKz 791/10), the Court of Appeals in Warsaw stated that even refugee status obtained from the Polish authorities is not an obstacle to extradition.

Usually in such cases the courts claim that extradition is not permissible because of possible human rights violations in the demanding country (courts say that extradition would violate Article 3 or 6 of the ECHR). **However, the right of refugees not to be expelled or returned**

⁶ K.Rusiłowicz, E.Ostaszewska, M. Tobiasz, Asylum Information Database National Country Report: Poland, 2013, available at http://www.asylumineurope.org/files/report-download/aida_poland_nationreport_final.pdf, p. 26.

⁷ A. Chrzanowska, W. Klaus, Rekomendacje dla polityki lokowania ośrodków dla uchodźców (Recommendations for policy on placement of the centers for refugees), in A. Chrzanowska, W. Klaus, A. Kosowicz, ed., Polityka wyboru i lokalizacji ośrodków dla uchodźców. Analiza i rekomendacje (The policy on selection and location of the centers for refugees. Analysis and recommendations), Stowarzyszenie Interwencji Prawnej, Fundacja Polskie Forum Migracyjne, 2011, p. 17, available at <http://interwencjaprawna.pl/docs/polityka-wyboru-i-lokalizacji-osrodkow.pdf>.

⁸ P. Cebała, M. Pajura, Raport o sytuacji osób szczególnej troski w procedurze o nadanie statusu uchodźcy (Report on the situation of persons with special needs in the procedure for granting refugee status), Centrum Pomocy Prawnej im. Haliny Nieć, Kraków 2009, available at http://www.pomocprawna.org/images/stories/pomoc_uchodcom/Raportszczegolnejtroski.pdf

to the frontiers of territories where their life or freedom would be threatened (non-refoulement) have not been observed by the Polish authorities as they do not recognize refugee status as a sole reason to refuse extradition.

In at least one case, according to the knowledge of the HFHR, Polish authorities decided on extradition to the Russian Federation, despite the fact that an expert opinion was provided to the court in the course of proceedings. The opinion indicated common human rights violations in this country, such as the lack of an independent judiciary, numerous violations of the right to the fair trial and harsh detention conditions leading to inhuman or degrading treatment. In the decision of June 3, 2009 the Court of Appeals in Lublin (case no. II AKz 305/09) stated that information provided in the expert opinion did not refer directly to the person being subjected to extradition proceedings, so there was no proof that this person's rights would be violated in Russia.

- Expulsion procedures

As a result of a gap in the system of legal protection of foreigners, they can be expelled from the territory of Poland without having their expulsion decision reviewed by an independent and impartial court or tribunal.

This problem concerns asylum seekers, who are given a return order when their asylum application is denied and other returnees expelled from the territory on the basis of an administrative decision.

There is a possibility to lodge a complaint against the decision of the Refugee Board (which is a second instance administrative authority in asylum cases) or the Head of the Office for Foreigners (which is a second instance administrative authority in return cases) to the Provincial Administrative Court in Warsaw. However, this onward appeal does not have a suspended effect. Upon request of the applicant, the court may suspend the execution of the decision for the duration of the court proceedings if there is a threat of causing substantial damage or the execution of the decision would have irreversible effects.

In practice, interim measure in such cases (especially in the case of failed asylum seekers) is usually granted. The court justifies that expulsion would make it impossible for a foreigner to access a court and this would make judicial protection illusory.

However, examining applications for interim measure takes some months. First of all, it should be noted, that the complaint is submitted through the second instance administrative authority, which by law has 30 days to pass the complaint to the court. Then the court is obliged to undertake other procedural steps before examining the request for an interim measure. There is a fee applicable for the procedure, but if a party is unable to cover the costs, they can lodge a request for assistance. In such a request, foreigners often apply also for a professional legal representation (advocate or legal counsellor). The court appoints a lawyer through the Regional Bar Council in Warsaw or Regional Chamber of Legal Counsellors in Warsaw.

The above-mentioned loophole constituted a reason for the Dutch court in the Hague to withhold a transfer of an asylum seeker to Poland under the Dublin Regulation⁹ for the time of the appeal procedure against the transfer (ruling no. AWB 13/11314 from June 18, 2013¹⁰). The Court stated that the practice of deporting asylum seekers before the court examines their case is inconsistent with Article 47 of the Charter of Fundamental Rights of the European Union and can lead to violation of the principle of non-refoulement. Therefore the court found that the principle of trust could no longer be applied towards Poland.

The HFHR has reported cases where foreigners were deported before accessing the court. On January 9, 2012, three NGOs dealing with asylum issues (Halina Niec Legal Aid Center – *Centrum Pomocy Prawnej im. Haliny Nieć*, Legal Intervention Association – *Stowarzyszenie Interwencji Prawnej* and the HFHR) sent a letter to the Secretary of State in the Ministry of the Interior and the Human Rights Defender describing the case of a traumatized asylum seeking woman from the Democratic Republic of Congo, who was deported on the same day she received a negative decision from the Refugee Board on her asylum claim. The Ministry of the Interior in a letter from February 27, 2012 (no DPM-WPM-051-1/12/LBK) admitted that although the deportation by the Border Guard did not infringe upon legal provisions in place and that the woman had the possibility to lodge a complaint to the court, such a possibility was indeed limited in practice.

On February 22, 2012 the HFHR sent a letter to the Ministry of Interior and the Human Rights Defender's Office about the deportation of an Afghan family four days after they received a final negative decision, giving them no time to lodge an appeal to the Provincial Administrative Court. In letter no DPM-WPM-051-5/12/EBK from April 19, 2012 the Ministry of the Interior again confirmed that the applicant had limited possibilities of lodging a complaint, but that the deportation did not infringe on the law.

On June 27, 2012 the HFHR intervened in the case of a Georgian citizen, who managed to lodge a complaint to the court, but was deported before the application for an interim measure was examined. The complaint was lodged on April 3, 2012 and the deportation was scheduled for June 24, 2012 (Sunday). The asylum seeker was informed about it two days beforehand (on Friday), which gave her no possibility to contact her lawyer. In their letter no. KG-CU/1201/IV/AF/12 from July 20, 2012, the Border Guard pointed out that lodging a complaint and a request for an interim measure to the court does not have a suspended effect, so the decision was enforceable. It was also mentioned that the foreigner concerned was informed about the deportation no less than 24 hours before the operation.

On November 30, 2012, the HFHR and the Legal Intervention Association submitted a letter to the Border Guard Commander in Chief (*Komendant Główny Straży Granicznej*) pointing to

⁹ Council Regulation (EC) No [343/2003](#) of February 18, 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹⁰ Available at (in original language version): <http://www.hfhr.pl/wp-content/uploads/2013/09/2013-06-18-Rb-Haarlem-13-11314-Rusland.pdf>

the risk of further infringements of asylum seekers' right to judicial control if the practice of immediate deportations is maintained. The Commander of the Border Guard, in his letter no. KG-CU-212/IV/KF/12 from January 9, 2013 stated that the Refugee Board's decisions were final and return orders could be enforced.

On April 15, 2013 HFHR sent a letter to the President of the Provincial Administrative Court in Warsaw highlighting two cases: one of a Belarusian citizen, who was deported before the court examined his application for an interim measure and the case of a Ugandan citizen, who waited 4 months for examination of his application for an interim measure. The HFHR asked the President to organize the division responsible for asylum cases in a way that would allow examination of applications for interim measure as soon as possible.

The President of the Provincial Administrative Court in Warsaw in his response stressed that applications for interim measures are examined without delay, and that the courts responsibilities are limited because of the legal regulations in place. After receiving the complaint from the Refugee Board, the court still needs to examine a request for assistance, appoint an interpreter and/or a guardian ad-litem for the person whose place of residence remains unknown. The President of the Provincial Administrative Court in Warsaw confirmed that in one of the reported cases, it indeed took 4 months to grant an interim measure and that generally because of the legal framework there is a risk of deportation before the court decides to withhold the execution of the decision.

The HFHR and Legal Intervention Association, as NGOs participating in the consultation process of the new draft foreigners act, also called on the Ministry of the Interior to change the legal regulations and introduce an exception ensuring that the complaint to the court has a suspended effect on negative asylum decisions containing return orders, just as it is in the case of return orders issued towards EU citizens and their family members. Currently these legal provisions are being discussed in the Parliament.

Comments to the reply to question 10 and 25

In the opinion of the HFHR, the explanations given by the Polish Government with regard to the Committee's questions 10 and 25 do not provide exhaustive information regarding the actions undertaken to investigate the case of the alleged existence of secret CIA facilities in Poland and to assure that all persons liable for human rights infringements are held accountable.

It must be noted that in the wake of US press reports and the report by the Human Rights Watch, the issue became the subject of two reports by Senator Dick Marty, published as a part of an investigation undertaken by the Council of Europe, the Report of the Temporary Committee of the European Parliament and the Report by UN Special Rapporteurs, Manfred Nowak and Martin Scheinin. International bodies found that there was a network of prisons

and flights enabling the CIA to illegally transfer detained persons, and that one of such locations was the Polish intelligence facility in Stare Kiejkuty.

According to the HFHR, the State response to the above-mentioned question is of a general character. First of all, the Government did not explain that after information on secret facilities hosted by European countries was first published by the Washington Post, the case was examined by the Intelligence Services Committee of the Polish Sejm (lower chamber of the Parliament). The minutes of the closed meeting of the Committee held on 21 December 2005 have not yet been disclosed. The public was only informed that there had been no CIA prisons in Poland and that the matter was considered dealt with.

On 11 March 2008 the Attorney General initiated an investigation conducted at the 5th Department (Organized Crime and Corruption) of the Appellate Prosecutor's Office in Warsaw. The inquiry concerned the alleged abuse of power by state officials, which was an offence under article 231 (1) of the Criminal Code. Since the investigation was classified as 'top secret', state authorities have consequently refused to divulge information on the scope of the proceedings or its findings. As a consequence, for approximately two years from 2008 until 2010, the public was deprived of nearly all information concerning the case. During that time, the Prosecutor's Office made only one disclosure, confirming that on February 4, 2009 CIA planes flew into and out of Polish territory through Szymany airport.

Additionally, due to the secret character of the proceedings, the public knows nothing about the approximate date of their conclusion. The investigation is still pending. Recently, it was again prolonged until mid-October 2013.

In 2011 newspapers, quoting an unofficial source within the Prosecution Service, reported that the investigating prosecutors had collected evidence sufficient to prosecute, before the Court of State, top state officials who had been in office when CIA prisons had allegedly operated in Poland on charges of committing war crimes (an offence under article 123 (2) of the Criminal Code). On May 20, 2011, Prosecutor Jerzy Mierzewski was removed from the criminal investigation into secret CIA prisons and replaced by Waldemar Tyl, the Deputy of the Appellate Prosecutor in Warsaw. Subsequently, in November 2011 Waldemar Tyl, provided information that he expected the proceedings to be closed in 2012, possibly in August. However, in February 2012, the Prosecutor's Office shifted the investigation from the Prosecution Office in Warsaw to the Prosecution Office in Cracow. The decision was very confusing, especially taking into consideration that on February 2, 2012 Attorney General Andrzej Seremet stated in the Polish Parliament's forum that he felt great responsibility for this particular investigation.

Al-Nashiri, Abu Zubayda and Walid bin Attach, three Guantanamo detainees who claim they were illegally detained and tortured by the CIA in Poland, currently intend to seek justice before the Polish courts. Al-Nashiri and Abu Zubayda were granted victim status in the Polish investigation after their lawyers filed motions including notification of the commission of a crime with the prosecutor's office which were based exclusively on the case files open to the

public and that are not classified as state secrets. In 2013 such a motion was also submitted by Walid bin Attash.

Additionally, in July 2012 the European Court of Human Rights communicated to the Polish Government the case of *Al-Nashiri v. Poland*. Also, in 2013 the case *Abu Zubayda v. Poland* was communicated to the Polish Government. The case *Al-Nashiri v. Poland* showed that the Polish Government was not eager to cooperate with the ECtHR in respect of this case. After the ECtHR limited public access to case files, at Poland's request the Polish Government did not provide information demanded by the ECtHR. Instead, Poland submitted to the ECtHR a short memo in which it presented solely information that has already been present in the public domain. As a result, the ECtHR lifted the confidentiality clause. Currently, access to case files is open to the public.

The HFHR wishes to emphasize that the majority of the information about secret CIA prisons in Poland already disclosed to the public was obtained thanks to actions taken by the HFHR or from media reports. For several years now the HFHR has been applying to state authorities for the disclosure of public information. In this way the Foundation has been able to obtain from the Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*) the flight logs which showed that CIA planes landed many times in Poland and both Polish and US authorities covered up their flight plans. It was the first time when a Polish government agency officially confirmed this. In addition, the Border Guard disclosed that the planes were carrying passengers. From December 5, 2002 to September 22, 2003, five out of seven planes that landed at Szymany airport brought passengers. However, all aircrafts departed with only crew on board. The last plane arrived at Szymany with no passengers and departed carrying five people. It is worth mentioning that in 2006 the Polish authorities refused to present any information on the discussed flights and passengers for the purposes of the investigation conducted by the Council of Europe and the European Parliament.

Additionally, in its December 15, 2010 letter sent to the HFHR, the Appellate Prosecutor's Office in Warsaw provided, for the first time, comprehensive and complete information about the current stage of the proceedings, which marked a shift from the previous attitude of the Polish Prosecutor Service. The Prosecutor informed that on March 18, 2009, the Appellate Prosecutor's Office in Warsaw submitted a legal assistance request to American judicial authorities regarding the investigation, which was refused on October 7, 2009 by the American Department of Justice. A second request was then submitted on March 22, 2011.

Also, upon the HFHR's request, the Appellate Prosecutor's Office in a letter of February 4, 2011 reiterated that the investigation concerned Art. 231(1) of the Polish Criminal Code. Moreover, the Prosecutor's Office revealed what procedural actions had been undertaken until that time in order to verify the landings of planes associated to CIA without border clearance at Szymany airport in 2002-2003. Additionally, in the course of the proceedings, prosecutors conducting the investigation interrogated border guard officers, custom service officers, employees of Szymany airport, flight controllers, and a member of the European Parliament's Temporary Commission, who had previously dealt with extraordinary rendition issues. In the

investigation files, prosecutors had gathered a document concerning planes landing at Szymany airport, reports of international organizations and press releases.

In the response to the HFHR's motion, on April 4, 2012, the Appellate Prosecutor Office in Cracow informed the HFHR that at that point, 62 persons had been interrogated and that there were 20 volumes of case files. In March 2011 a second legal assistance request was submitted to the US Department of State.

In a letter of September 11, 2013 the Appellate Prosecutor Office in Cracow informed that after the investigation was shifted to Cracow, two persons were investigated; the files of the case were supplemented with the analysis of a variety of documents, information provided by other state authorities and international bodies; documents were sent for translation; there are 30 main case files in total; the prosecutors are preparing another request to US authorities for mutual assistance; there have been no charges filed by the Appellate Prosecutor Office in Cracow. Importantly, in March 2012 press reports that charges were filed by the Appellate Prosecutor Office in Warsaw against the former head of the Intelligence Agency Zbigniew Siemiątkowski.

It should be noted that on September 11, 2013 Nils Muiznieks, the Commissioner for Human Rights published a statement in which he condemned the Council of Europe states' indolence in their explanation of participation in the extraordinary rendition program in 2002-2006. According to the Commissioner, states that took part in this program evaded proper explanation of the case and have not yet held persons accountable for human right violations. Additionally, the Commissioner stated that secrecy may not prevent the exhaustive explanation of this case.

So far a good deal of information has been gathered to support allegations regarding multiple cases of torture, illegal detention of persons and other major violations of human rights that took place during the war on terror waged after September 11, 2001. These allegations should be diligently and carefully investigated in Poland. Poland is obliged to do so under the International Covenant on Civil and Political Rights and the European Convention on Human Rights. However, it was underlined that the preparatory proceedings [the investigation] conducted by the Appellate Prosecutor's Office in Warsaw fail to meet such requirements.

Considering the above, the reply given by the Polish Government should be assessed negatively. First, Polish authorities disclosed only the pieces of information already known to the public, such as the Prosecutor's Office conducting the investigation, the scope of the investigation and circumstances of its commencement, indicating that the majority of evidence-taking activities are classified. Second, it was underscored that the fact that the proceedings are being conducted by a specialized unit of the Polish Prosecution Service proves how seriously Poland treats the issue of observing human rights and the need to clarify all the suspicions regarding possible violations of international human rights protection standards. However, since the investigation has not yet brought any results, one doubts whether the case of the alleged existence of CIA

prisons in Poland and resulting human rights violations is being treated with appropriate solemnity and diligence.

Comments to the reply to question 11

In terms of question no. 11, one must pay attention specifically to the regulations of the Foreigners Act (*Ustawa o cudzoziemcach*) of June 13, 2010. The Act gives the authorities the power to refuse to grant a foreigner a fixed-term residence permit on grounds concerning state defense or security or the protection of security and public order or the interests of the Republic of Poland. In consequence, it is possible that the negative opinion was based on suspicion of the foreigner's links with terrorist activities. The decision to refuse a fixed-term residence permit is issued by an administrative body on the basis of a classified opinion drafted by the Border Guard, the Police or Internal Security Agency (ISA) (*Agencja Bezpieczeństwa Wewnętrznego, ABW*). However, the body is unable to verify the accuracy of the opinion. Since the information on which the decision is based is classified, in practice the reasons given in a negative decision comprise only an indication that refusal was based on security considerations. Although the addressee of the decision may apply for judicial review, he or she is deprived of the ability to effectively challenge the decision because both the appellant and his or her attorney have no appropriate security clearance.

This problem is visible in the case of a Moroccan national accused of engaging in terrorist activity in Poland. He was deported from Poland pursuant to an administrative decision, based on a secret opinion by the ISA, subsequently upheld twice by the judgment of the Provincial Administrative Court in Warsaw. Currently, the case is pending before the Supreme Administrative Court. In the course of the proceedings, neither the appellant nor his attorney were granted access to the content of the classified opinion that constituted the basis of the deportation. This case shows that there are no procedural guarantees such as an accused person's right to see classified documents used in the course of the legal proceedings.

Another example of the problem is a case of a Belarusian student who initiated proceedings in order to be recognized as a Polish citizen. His application was rejected on the basis of a classified document prepared by the ISA. Subsequently, he was issued a decision that he should leave Polish territory. Importantly, in the course of the administrative proceedings, he was denied access to classified documents. The proceedings are still pending. However, he faces expulsion from Poland not knowing why he is perceived as danger to Poland.

This situation should be changed by introducing, for example, the solution applied in Canada, which establishes a "corps" of special representatives with security clearance. Such a "special representative" is authorized to review all the case records and would act for the party ensuring that the proceedings are appropriately conducted.

Comments to the reply to question 18

In general, referring to question 18, it must be noted that the current legal regulations creating a prison-like regime prevail in the guarded centers for foreigners. Foreigners are placed in guarded centers due to administrative infringements and not due to criminal records. Therefore, their stays in Poland should be controlled exclusively by measures restricting or prohibiting their free movement within the borders of the Republic of Poland and that should be the only inconvenience that they encounter, particularly because such measures already substantially restrict their rights. When in a guarded center, they should be given as much freedom of movement within its boundaries as possible and be provided with means and opportunities to contact the world outside the center. Obviously, it is necessary to guarantee safety to all residents in the center; however, that should not constitute the basis for further universal restriction of the freedom of all isolated foreigners. On the contrary, that necessity should rather stimulate appropriate center management (through negotiation rather than physical strength) and encourage an individual approach to people who fail to observe the rules of social existence.

The following information is based on the monitoring conducted by the Helsinki Foundation for Human Rights and Legal Intervention Association in all guarded center for foreigners at the end of 2012.

Foreigners detained in guarded centers complained about a prison regime and had some remarks about the conduct of officers with whom they had direct contact. All centers are surrounded by very high walls or fences with barbed wire. Some are additionally secured with concertina wire, i.e. a loose spiral wire with razors instead of sharp edges. The wire causes serious injuries in case of attempts of crossing it. Windows in the rooms for foreigners are secured with bars that often prevent the windows from opening widely. Entries into individual wings of the centers are separated with bars. Only two detention centers provide detainees with the possibility to freely open windows (bars have been installed there away from building walls which enables foreigners to have windows wide open in their rooms and not just open them slightly).

Foreigners' rooms are open during the day and at night. The doors can only be closed and not locked. Foreigners are free to walk only within designated areas. Guards in some centers enter the rooms a few times during the day and perform control activities in order to check foreigners' conduct. Officers declare that they enter women's rooms only after knocking.

Foreigners in all centers where the Border Guard has precisely determined time frames for walks complain that this walk is too short and that the possibility to prolong it or go outside even if one does not feel well are largely limited. No center has roofing within the area intended for walks that would protect foreigners in case of rain/snow or hot sun.

One of the basic problems of foreigners detained in the centers, which is resolvable within the meaning of currently applicable provisions of law, is boredom. Due to lack of

interesting activities in the center, foreigners often sleep until dinner (unless they are obliged to come to breakfast) and then they watch TV or go to sleep again. The medical personnel in the centers also point out the issue of lack of activities – in their opinion, a visit at the doctor's office is an enrichment of the daily routine for foreigners who do not have any interesting alternatives.

Foreigners detained in guarded centers can contact non-governmental organizations by means of telephone, fax or email. There also are service hours of lawyers of non-governmental organizations in the centers. **However, they are not frequent, often take place less than once a month, and depend on projects under execution.** Appointments with lawyers also take place without the participation of Border Guard officers.

Foreigners in all centers have the possibility to use generally available telephones installed by a third party service provider. The telephones can be found in the corridors. There is no uniform policy of the Border Guard in relation to foreigners' personal mobile phones. A general rule in each of the centers is that foreigners can use their telephones, but there are some limitations in this respect depending on the center. The regulations only provide for a limitation concerning the use of audio and video recorders on the premises of a guarded center. Therefore, modern mobile phones with such functionalities are kept in the center's depository.

Foreigners have the right to send letters by mail or fax. Similarly to telephones, there have been different solutions adopted in different centers with regard to technical and organizational issues that make it possible to execute that right.

The issue of foreigners sending communication by fax is particularly important, since it influences a foreigner's access to legal assistance. Sending a fax requires a prior written application to a head of the center (Białystok, Lesznowola) or an oral request (Biała Podlaska, Przemyśl, Kętrzyn, Krosno Odrzańskie). The former of the solutions referred to above is too formal. Fax communication in official matters is free of charge in all centers (in Biała Podlaska only in the case when a foreigner lacks financial resources). Private communication of a reasonable amount is sent by fax free of charge (Białystok, Kętrzyn, Przemyśl) or in exchange for a fee (Biała Podlaska, Lesznowola, Krosno Odrzańskie). The rules and regulations of the center in Przemyśl provide for days intended for fax communication (Monday, Wednesday and Friday), but as the Border Guard states, "the days are not complied with strictly". Officers mentioned that fax communication is sent frequently (on all business days) as a way of meeting the needs of foreigners. However, foreigners mentioned the three days referred to above.

Communication related to legal proceedings of a foreigner is sent by mail at the expense of the Border Guard. This is true for all centers, at least in the case when foreigners cannot afford sending letters themselves. On the other hand, the cost of sending private letters is generally covered by the foreigners. Letters are not examined by officers and can be handed

over in a closed envelope (with the exception of Przemyśl where an open envelope is closed by a Border Guard officer).

Foreigners are provided with medical care in each center, although access to it differs depending on the center. There are doctors seeing foreigners from Monday to Friday during various hours in some centers (Biała Podlaska, Białystok and Przemyśl), whereas they are available only on some weekdays in others (it shall be noted that a lot depends on the size of the center and the number of detainees). For instance, doctor's office hours in Lesznowola take place twice a week for two hours, whereas in Krosno Odrzańskie they are held four times a week and last for an hour.

Specialist medical care is provided as a rule outside all centers under applicable contracts with local health care institutions. Foreigners are usually transported by convoy vans. Male or female officers are present during a foreigner's doctor appointment. At the request of the doctor or foreigner, in particular in the case of intimate procedures, the officers can wait outside the office or behind a screen in the same room.

Access to applicable psychological assistance is not provided in every center. Trauma or torture victims or people suffering from PTSD are not diagnosed in the centers. It was indicated in most centers that there are no applicable procedures, which would make it possible to diagnose such people.

Foreigners have also pointed out the only intermediate level of skills related to most common languages among medical personnel (English, Russian).

According to the Polish Foreigners Act, both children with families and unaccompanied minors can be placed in guarded centers for foreigners up to maximum period of 12 months. Apart from only few exceptions, the conditions of their stay in the center do not differ from the conditions for adults. Although since June 2013 children are detained only in two (best prepared) centers - in Biała Podlaska and Kętrzyn, their special needs are still not ensured.

It has to be pointed out that all guarded centers, including centers in which children are being detained, resemble regular prisons (i.e. window bars, prison-like day routine, limited walks, etc.). There are also no activities for children outside any centers due to the fact that regulations do not stipulate such possibility.

The best interest of a child is usually not taken into consideration when detention orders are issued by the court. Moreover, according to relevant regulations, the Border Guard is not legally obliged to apply to the court for placing unaccompanied children in the care of an educational facility, and there are no legal possibilities to order any alternatives to the detention even for families with small children or unaccompanied minors.

According to the results of monitoring conducted by the Ministry of the Interior and NGOs in all guarded centers for foreigners at the end of 2012, the obligation of the state to provide education to children in such centers is not properly executed. There are various forms of

educational classes conducted in the guarded centers in collaboration with local authorities but none of them can be considered as full implementation of compulsory education.

Referring to para. 269 of the Periodic Report, **it should be emphasized that facilities of guarded centers do not secure special needs of such vulnerable group like children.** Their unique situation is not properly taken into account either by the court issuing detention order or by the Border Guard responsible for management of the guarded centers for foreigners.

There is also insufficient psychological support for these children despite the fact that detention can affect the healthy psychological and physical development of a child. Therefore, it would be reasonable to introduce provisions according to which children would not be detained in guarded centers for foreigners while at the same time the effective system of alternatives to detention would be established. It's also worth pointing out that the Polish Human Rights Defender in letter no. RPO-695531-V/12/MS addressed to the Ministry of the Interior also expressed her position that migrant children should not be detained in any respect

Comments to the reply to question 19

The Human Rights Defender was appointed to act as the National Prevention Mechanism (NPM) starting from January 2008. However, the Human Rights Defender's Office was allocated no additional budget or personnel to fulfil these additional duties. This was recently the subject of a vocal public protest by the Human Rights Defender, Professor Irena Lipowicz. For this reason the control mechanisms provided in the Optional Protocol to CAT should be considered as ineffective and illusory. There are 1,800 units that need to be monitored; this requires the involvement of 38 persons, whereas in 2011 there were 7 persons. Therefore, there were only 89 inspections in 2011. According to information provided by the Human Rights Defender in the reported time, no sufficient grants were allocated in 2011 for this purpose. The budget projections for 2011 anticipating raising funds up to PLN 1,740,000 were unsuccessfully submitted to Polish Parliament and the final budget was PLN 1,265,000. The situation should slightly change post-2012 due to additional funds granted to the Human Rights Defender, which, however, still do not meet United Nations standards. In 2012 the overall budget for the Human Rights Defender was PLN 38,190,000. Out of this, the budget for the NPM amounted to PLN 1,629,000. According to the annual report of the Human Right Defender, the budget in 2012, as in previous years, was not sufficient to fulfil all the duties described by OPCAT.

According to information provided by the Human Rights Defender, after the second quarter of 2012, the team of the National Prevention Mechanism consist of 12 persons. Additionally, this team is supported by the employees of the departments of Human Rights Defender Bureau in Gdańsk, Wrocław, Katowice. Since February 2012 the inspections have been of an interdisciplinary character. External experts – psychiatrists and psychologists are also included in the team. Until June 30, 2012 there were 58 inspections conducted in total. No new statistics regarding functioning of the National Preventive Mechanism are yet available.

Owing to financial problems, activities of the Human Rights Defender are the subject of criticism of NGOs, especially of the coalition for the Agreement for the Implementation of OPCAT (*Porozumienie na rzecz wprowadzenia OPCAT*), which aims to ensure proper and comprehensive implementation of the document. The Helsinki Foundation for Human Rights shares most of this opinion.

With reference to the subject of the Mechanism's reports, whenever the NPM encounters examples of serious human rights violations or the risk of such breaches, its recommendations are formulated too gently. The NPM should firmly demand an immediate cessation of negative practices that have been noticed during the NPM's visits. In our opinion, it is also necessary to directly indicate institutions in which serious violation of human have been identified.

The NPM's annual reports analysis indicates that there is a lack of dialogue between the NPM and the Polish Government on issues that have been noticed during monitoring. After reading the NPM's report, it is not easy to determine whether NPM's recommendations have been introduced or whether any disciplinary actions have been taken against personnel responsible for violations. It would be far better if it could be known from the report how the NPM is reducing the risk of future human rights violations. In particular whether meetings with representatives of the prison system and police, judges or prosecutors are being conducted.

Re-visiting the institution should be assessed positively. **However, in NPM reports, no detailed comparison of the situation observed during the primary and secondary visit could be found.**

Unfortunately, the NPM is still not able to issue opinions on legislation affecting freedom of torture and other forms of ill-treatment. It is important for the prevention of torture that the NPM should take the floor in such cases, even if it has not been formally invited to prepare an opinion.

Last but not least, it should be emphasized that the language in NPM reports might be considered as technical and unclear. It negatively affects their perception in society, resulting in a low level of awareness about the content presented in the reports.

Comments to the reply to question 21

Police

One of the most current and crucial problems in Poland is still the issue of abuse of power by the Police. The statistics obtained by the HFHR lead to the conclusion that despite the existing possibility to file complaints against the Police, criminal proceedings based on such complaints are very rarely conducted. Even if an investigation is launched on the basis of a filed complaint, in the majority of cases it ends up being discontinued by the Prosecution

Service on the grounds of failure to collect enough evidence to file an indictment before the court.

The HFHR would also like to present information on legal proceedings against officials who have used illegal investigation methods and abused their authority.

First of all, it is necessary to mention that Art. 231 of the Criminal Code regulates offences of abuse of power by public officials. According to this Article a public official who has intentionally committed such offence shall be subject to a penalty of imprisonment of up to 3 years. Unintentional commitment of this crime carries a risk of imprisonment up to 2 years, restriction of liberty or a fine.

Nevertheless, according to statistics the court rarely finds the accused guilty of an offence under Art. 231 of the Criminal Code. For instance, in 2012 only 218 public officials were convicted. What is more, only in nine cases the court sentenced imprisonment without conditional suspension of punishment. A good example here is the case of a police officer who beat with his fists a participant of a demonstration that took place in Warsaw on the Independence Day in 2011. He also kicked him and used lacrimator. Following that, other police officers overpowered the participant. In 2013 the main offender was sentenced to 1.5 years of imprisonment with conditional suspension of punishment in spite of the fact that the court confirmed a disproportionate use of coercion.

Furthermore, the HFHR would like to mention another case showing illegal methods of investigation and lack of effective methods of prosecution. During an interrogation at the police headquarters in Lidzbark Warmiński, two suspects were beaten with batons in order to extort a confession. Police officers ordered the suspects to sit on the chair and turn round with their faces to the wall. Then they were beaten on their bare feet by the officers. One of the suspects was beaten over his head. As a result proceedings against police officers were instituted. They were accused of abuse of power and failure to render assistance. The prosecutor decided to discontinue proceedings due to ineffective identification of the offender. The court allowed the victim's complaint. Nevertheless, the prosecutor again discontinued proceedings for the same reason.

The last case, we would like to express our concerns regarding the abuse of power by police officers in Siedlce. Three men were suspected of jewel robbery. After being captured and transported to the police headquarters, police officers beat the suspects with batons, and used electric current and stun guns in order to extort a confession. This equipment was also used on their genitals. The suspects were also sloshed with water. Upon release, one of the suspects committed suicide. Proceedings against the involved officers are now being conducted.

Prison Service

We would like to observe that the data presented in para. 318 of the Report, which was devoted to the issue of abuses committed by officers of the Prison Service (PS), differ from the data made available at the website of the Ministry of Justice. Although the

report lists certain categories of complaints, the Foundation considers it reasonable to present also general statistics on all complaints of mistreatment by officers. As a result of the methodology approach adopted by Poland, it would be also reasonable to indicate the proposed changes to the Criminal Enforcement Code. In the opinion of the Foundation, the report should further inform whether or not PS officers received disciplinary penalties on account of their mistreatment of inmates.

According to information available at the Ministry of Justice website, in the years 2009 and 2010, respectively, 6083 and 7976 complaints of mistreatment by officers and staff of the PS were filed, out of which 18 and 22, respectively, were admitted. In the report the Government uses a narrower category of complaints heard within penitentiary facilities which concerned a selected range of behavior: assaults occasioning bodily harm, verbal aggression, use of direct coercive measures.

According to information of the Ministry of Justice, in 2010 the number of complaints of mistreatment by officers and staff of the PS increased by 26.24 percent, as compared with 2009. Complaints filed in 2010 related to: failures to take action (843, including 11 admitted), verbal aggression (846, no complaint was admitted), requests for a disciplinary penalty (753, 2 admitted), manner of conducting a search of a person/living cell (680, none admitted), assurance of safety (293, none admitted), assaults occasioning bodily harm (231, one admitted), the use of direct coercive measures (124, none admitted). The complaints of mistreatment by officers and staff of the PS included 20 charges of discrimination on grounds of race and ethnicity (none was admitted), 27 charges of discrimination on grounds of religion (one admitted) and eight charges of discrimination on grounds of sexual orientation (none admitted).

In cases involving mistreatment of inmates by officers and staff of the Prison Service (1297) heads of the Prison Service organizational units provided explanation primarily to courts (in 799 cases) and the Human Rights Defender (in 390 cases). There has been a 0.7 percent increase in the number of the explanations provided.

The case-law of the European Court of Human Rights, which repeatedly finds Poland in breach of Article 3 of the Convention, confirms that a number of inmates' complaints are indeed reasonable.

For example, ECtHR ruled against Poland in the case of *D.G. v. Poland* (Application no. 45705/07). The applicant in this case argued that the prison authorities failed to adapt the conditions of his detention to his special health needs (paraplegia). He further contended that during his detention he had not received a sufficient supply of personal hygiene products and since the facilities of the prison had not been adjusted to the needs of disabled persons he had limited access to the toilet and shower room. In its assessment of the case, the European Court of Human Rights held that there had been a violation of Article 3 of the Convention.

The Court came to similar conclusions also in other cases concerning the Polish penitentiary system. In the pilot judgments regarding living conditions in Polish penitentiary facilities issued in the cases of *Orchowski v. Poland* (Application no. 17885/04) and *Sikorski v. Poland* (Application no. 17599/05) the ECtHR concluded that the problem of overcrowding in Polish prisons was of a systemic nature, directly resulted in the infringement of the prisoner's personal rights and constituted the violation of Article 3 of the Convention.

Moreover, the HFHR would like to stress that an efficient system of complaints is a necessary element of the effective prevention of torture and inhuman or degrading treatment. The effectiveness of the complaint procedure depends on two factors: the actual opportunity to make a complaint and the accuracy of the inquiry. The European Prison Rules (Recommendation No. R/87/3 to member states of the Council of Europe) contain guidelines concerning the prisoners' right to information and their right of complaint.

Prisoners should have a daily opportunity to make requests or complaints to the director of the prison or to any other competent authority. They should also be able to make requests or complaints to the inspector of prisons or any other public authority competent to visit prisons and talk to inmates in the absence of a prison director or other prison staff.

The HFHR would like to point out that a draft amendment to the Criminal Enforcement Code, prepared during the reporting period, substantially modified the model of complaints procedure. The draft was adopted by the Sejm. The draft law introduces restrictions on prisoner's complaints by, for instance, requiring the complaint to be sufficiently justified and documented. In the HFHR's opinion such regulation materially restricts the right of inmates to use the complaints procedure also in the case of torture and inhuman or degrading treatment.

Comments to the reply to question 22

The government presents a number of activities geared towards raising awareness on the issue of discrimination and anti-Semitism. However, it is not clear what the scale of these activities is, i.e. how many Police officers have been trained in a systematic way. This information is provided only in the case of the LEOP program; this might suggest that this is the only training program that is managed professionally. There is no information on whether any kind of evaluation of the training programs has been performed. Similarly, there is no information on the scale and results of local action plans developed by the Police and dedicated to ensuring special protection of minority monuments and cemeteries. It is unclear what "ongoing diagnosis of nationalist, anarchist and other similar communities" means. It is a striking omission as problems involving far-right nationalist group activity are on the rise.

The Government reports (in para. 342) that in order to improve the efficiency of prosecution and penalization of racially motivated hate crimes, a request was addressed in 2009 to all appellate prosecutors to ensure that all possible and more effective measures be taken in

supervising the subordinate prosecutors. **It is important to note in this context that there is a persisting problem with the lack of effectiveness in investigating bias-motivated crimes.** For example, in 2012 many concerns were raised as to the competence of law enforcement authorities after a series of investigations dealing with racist and xenophobic incidents in the Podlaskie region were discontinued in the previous year. Cases were dismissed because perpetrators could not be determined. This lack of effectiveness in investigating bias-motivated crimes was highlighted by the international community, especially in consideration of the fact that during the Universal Periodic Review of Poland held on July 9, 2012 many States recommended to strengthen the efforts of the Police in combating hate crimes.

Comments to the reply to question 23

The reply to question 23 discusses only investigative (usually covert) methods which seriously interfere with civil rights and liberties. **Contrary to general assumptions not all investigative methods are legally regulated. The best example of this are the proceedings commenced before the Constitutional Tribunal by the Human Rights Defender and the Prosecutor General in joined cases K 23/11, K 29/11, K 34/11, K 21/12, K 48/12.** The Human Rights Defender notes that provisions in the Police laws only vaguely define which measures classified as “operational control” (in Polish: *“kontrola operacyjna”*, the umbrella term describing covert investigative methods employed by various law enforcement agencies) can be applied. These methods are not tantamount to the surveillance and recording of conversations referred to by the Ministry of Justice in its report. The mechanism featured in the report is called “procedural wiretapping” (*“podsluch procesowy”*, ordered at the pre-trial stage of criminal proceedings at the request of a prosecutor) and described in the Code of Criminal Procedure. Covert investigative methods are regulated in the Police laws. They may involve, among other things, surveillance of correspondence and communications, parcels and telephone conversations. What raises doubts, however, is the statutory wording that the legally permissible investigative techniques comprise any “technical measures enabling the secret acquisition and recording of information and evidence such as, in particular, the content of telephone conversations and other information transmitted through telecommunications networks”. In respect of the use of covert investigative methods jurisdiction of various agencies overlap in cases involving prosecution of particular types of offences (for instance, terrorism or corruption).

In all likelihood, the Constitutional Tribunal will not decide the case until 2013. **The case pending before the Tribunal is one of the main reasons why it seems necessary to develop a statutory regulation which would provide a detailed framework for the use of operational and investigative activities which currently are not included in any enactment of the universally applicable law.** An attempt at such an enactment was made in the previous term of the Sejm, but no law was adopted because legislative works were discontinued after the election of a new Parliament.

It is still not clearly stated what comes within the purview of the Internal Security Agency, which is responsible for, among other things, prosecuting offences against “state security” or “economic foundations of the state”. However, there is not a single provision that would list such offences. Doubts may be also raised by the fact that covert investigative methods can be applied to most offences laid down in the Criminal Code. **It should also be noted that not all investigative methods are subject to judicial review.** For instance, excluded from this requirement are such measures as acquiring telecommunication data, ordering controlled purchases or offering controlled bribes.

Publicly accessible information fails to provide a sufficient basis to conclude that a judicial review of wiretapping has been reinforced. There is a shortage of reliable statistical data on the application of judicial review by the Police, which most often apply for this measure. Also, an obligation to inform about the application of covert investigative methods has not been introduced, despite the explicit stance of the Constitutional Tribunal. The work on a comprehensive legislative scheme governing the operations chief

and secret services has also been abandoned.

The problematic issue is still the liability of law enforcement officers who have used illicit investigative methods or improperly used legal methods. This problem is exemplified by the discontinuation of the proceedings launched in the case of the so-called “multimedia conference” organized by the prosecution service in August 2007. It involved the leak of information on a sting operation carried out by the Central Anti-corruption Bureau at the Ministry of Agriculture. During the infamous press conference prosecutors, including then Deputy Prosecutor General, unveiled operational materials collected in the pending investigation. The materials included private conversations between the then-current Minister of Internal Affairs and his wife, Honorata K. The leak case was discontinued, but the investigation into the disclosure of information from the investigation was conducted by several prosecutor's offices. At the beginning of 2012 the investigation was discontinued. However, it was not until July 2013 that the District Court for Warszawa-Mokotów heard the complaint filed by the victims. It means that their complaint was examined after the end of the five-year limitation period.

Another point of concern regarding operations taken by the CAB in the case of Honorata K. is the fact that both the prosecutor and the court were denied access to files relating to the investigation carried out by the Bureau. The prosecutor investigating the alleged abuse of power by CAB officers (an offence under article 231 of the Criminal Code) requested the CAB to disclose the materials on Honorata K. that the Bureau had collected. The CAB's head not only did refuse to disclose the requested materials but also did not agree to discharge CAB officers from the requirement to maintain the confidentiality of a state secret. The court which heard the complaint against the discontinuation of proceedings requested a review of the constitutionality of article 28 of the CAB Act by the Constitutional Tribunal but the latter discontinued the constitutional review case (decision of the CT dated November 22, 2011, case no. P 20/11). This shows that the decision whether or not a prosecutor's office or a court

may review documents collected in the course of a clandestine operation remains at the discretion of the body which conducts the operation.

Another example of a failure to bring a public official to justice in criminal proceedings is the case of Mariusz Kamiński, former Head of the CAB. In 2010 the prosecution indicted Mr Kamiński in the case of the so-called “Land Corruption Scandal”, the matter first unveiled in 2007. It was not until two years later, in April 2012, that the first hearing in the trial took place. The case is still pending before a court.

Comments to the reply to question 26

The Polish penitentiary system is prepared for detaining optimally 40,000 to 60,000 inmates, which has been confirmed by the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). It follows from past experience that exceeding this number may lead to the loss of control of the Prison Service over the inmate population. And it certainly leads to a violation of the rights and dignity of human beings.

The judgments of the European Court of Human Rights entered in the cases *Orchowski v. Poland* and *Sikorski v. Poland* have been of enormous importance for the penitentiary and justice systems in Poland. The Court's landmark finding of the violation of Article 3 of the Convention and its acknowledgement of the systemic nature of the problem of overcrowding, which results in state authorities' failure to provide each inmate with the statutory guaranteed cell space, should persuade authorities to bring about solutions needed to mitigate and, finally eliminate the underlying causes of this problem. The commented decisions have indeed been of great importance, especially considering the fact that over 160 applications alleging violations of Article 3 have been submitted by Polish citizens to the ECtHR and accepted for hearing.

In its judgments against Poland, the ECtHR noted that for many years, the authorities ignored the existence of overcrowding and inadequate conditions of detention and attempted to legitimize the problem based on domestic law, which was ultimately declared unconstitutional. In the ECtHR's opinion, such practice undermined the rule of law and was contrary to the requirements of special diligence owed by the authorities to persons in a vulnerable position, such as those deprived of liberty.

It may be argued that the situation in the period following the ECtHR decisions has not changed significantly. The official statistics indicate the total capacity of penitentiary facilities and the number of prisoners. However, the statistics do not reflect problems directly related to the issue. These problems have been indicated by prisoners in their written complaints to the HFHR, the Human Rights Defender and the prison authorities.

It should be noted that in 1996, 2000, 2004 and 2009 the CPT made four periodic visits to various penitentiary facilities in Poland. In all the reports on the visited establishments, the CPT emphasized that Polish authorities should take decisive action to reduce prison overcrowding and achieve the standard of at least four square meters of living space per prisoner.

In the report on the visit to Poland in 2009, published on July 12, 2011, the CPT noted that the occupancy rate was 101% on the basis of the legal standard of 3 square meters of living space per prisoner. However, the delegation observed overcrowding in all the establishments visited. In certain areas of the prisons visited, the CPT's standard of at least 4 square meters of living space per prisoner was met. Unfortunately, this was not the case for the vast majority of inmates.

What is more, the situation will worsen in future. According to data obtained from the Ministry of Justice in 2013, **the number of convicts waiting for enforcement of their punishment exceeds 40,000 people**¹¹ Moreover in 2016, Council Framework Decision 2008/909/JHA of November 27, 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union will come into force. It will oblige EU Countries to transfer at least 12,000 Polish prisoners back to Poland.

To a large extent, the action taken by the Prison Service to tackle the problem consists in ensuring that inmates are spread evenly across all the facilities by transferring prisoners from over populated facilities to less populated prisons. However, transferring inmates to facilities situated several hundred kilometers away from their place of residence interferes with their right to family life, thus being another negative effect of overcrowding. It is also worth noting that the recent amendment to the Criminal Sentences Execution Code of January 1, 2012 set aside the previously applied principle that a convicted person was to serve his or her prison term 'in the appropriate facility located as close as possible to his or her place of residence'. **In our opinion, the amended provisions might be an additional factor contributing to the violation of prisoners' right to private life, and they will certainly have no bearing on reducing the practice of frequent transfer of inmates between facilities.**

Comments to the reply to question 27

Providing the security of penitentiary units is the legal obligation of the Prison Service, explicitly stated in the Prison Service Act. National legislation states that the level of security

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<http://orka.sejm.gov.pl/zapisy7.nsf/0/BB1ACADDD85542D9C1257BBB0047BDDE/%24File/0214607.pdf>.

in the penitentiary unit is a consequence of the organizational system of the facilities, the activities of the prison service officers and their numbers. Article 9 of the Prison Service Act indicates that the number of regular posts in different organizational units shall be calculated also on the bases of the unit's security rating.

According to Article 82(1) of the Criminal Enforcement Code in order to create adequate conditions in penitentiary facilities, inmates are classified according to specific criteria. The intention of prisoners' classification is to prevent the harmful effects of imprisonment, demoralization and to ensure personal safety of both inmates and prison staff. This classification is the basis for the choice of an appropriate system of serving the sentence as well as the type and location of inmates in a penitentiary unit. According to the law, the prison administration should take appropriate steps to ensure the personal safety of prisoners. The purpose of the classification is two-fold: it is designed to prevent harmful effects of imprisonment, and create an environment conducive to individual development. One of the most important elements of prison security is the allocation of inmates in the residential cells.

However, the actual possibility to comply with the classification criteria is most often illusory due to permanent overcrowding in the Polish prisons.

In 2011, four cases of a rape and 67 cases of physical abuse were identified. In 2012, two situations involving four inmates were recognized as rape and 53 were qualified as abuse, involving 169 inmates. The relevant statistics for 2010 were five cases of rape and 57 cases of physical abuse. In 2009, 10 rapes and 67 abuses were recorded, in 2008 – nine rapes and 78 cases of abuse, the figures for 2007 and 2006 being six rapes and 89 cases of abuse, and five rapes and 83 cases of abuse, respectively).

It should be noted that these figures do not include all situations that could be described as violence between prisoners because the above-mentioned cases are officially classified as extraordinary events with the material significance for the safety of penitentiary units. They should be treated as a specific and dangerous element of the prison subculture.

In 2008, inmates complained 213 times about abuse by other inmates, but the Prison Service considered these complaints baseless. The following year saw 192 complaints about mistreatment by inmates, but not a single one was deemed justified. In 2010, there were 218 such complaints, but none was classified as legitimate. In 2011, the organizational units of the Prison Service dealt with 421 inmates' complaints of mistreatment by fellow prisoners, but none of the complaints was admitted. The ratio of the justified to baseless complaints evokes doubts about the effectiveness of the whole complaint procedure. **The above statistics show that the complaint procedure cannot be regarded as a sufficient way of alleviating conflicts among inmates.** Of course, we cannot rule out the possibility that some of the complaints are not fully justified, but it is nevertheless highly doubtful that all of them are.

The case of *Chrostowski v. Poland* shows that Polish authorities do not sufficiently protect some categories of prisoners. As it follows from the summary of facts of the case provided in

the communication of the ECtHR, Michał Chrostowski was charged with the sexual abuse of a minor and with having recorded a pornographic image of the minor. This case reflects the Polish authorities' approach to the instances of violence in penitentiary units and the ineffective protection system. As it follows from the facts of the case referred in the case communication, on September 10, 2007, the Applicant notified the Warsaw-Mokotów District Prosecutor's Office that he had been abused at the Warsaw-Mokotów Remand Centre. Six weeks later, the Police opened an investigation into the allegation that an offence of abuse of a person deprived of liberty had been committed. After five months, the Warsaw Police Department discontinued the investigation into the allegation of physical and psychological abuse of the Applicant on grounds that there was insufficient evidence to justify the suspicion that a criminal offence against the Applicant had been committed.

Following the statistics, on December 31, 2010 in penitentiary units there were 3,399 persons convicted or accused of crimes against sexual freedom (654 persons detained pending trial and 2745 convicted inmates). Accordingly, the Prison Service was obliged to take adequate measures to guarantee the safety of these prisoners. In 2009, 3,688 people were convicted or accused of these crimes. **An analysis of the statistics shows that the number of prisoners requiring special security measures against acts of physical or sexual aggression has remained at the same level. In consequence, the Prison Service should prepare an effective strategy to minimize the violence against them. Unfortunately, our experience shows that the security system is not fully effective.**

Comments to the reply to question 29

At present there are three draft amendments to the Criminal Code presented by members of Parliament. All three bills propose significant changes in current legislation governing the issue of bias-motivated crimes. Two draft amendments propose the addition of the following grounds for granting special protection under the criminal law: **sex, sexual orientation, gender identity, age, disability**. The Government's opinion as to all of these projects is negative. **According to the Council of Ministers, there is no need for such an amendment.** It argues that even though there is no special provision in the Criminal Code enlisting these characteristics as part of specific crimes, persons exhibiting such characteristics are protected by general provisions of the Code while a discriminatory intent behind the perpetrator's act is to be considered by courts anyway at the sentencing stage of the criminal proceedings under the general sentencing principles.

The justification of the official position of the Government betrays extreme inaptitude in dealing with the very terms "sexual orientation", "sex", "gender identity", "age" and "disability". This conclusion is inevitable considering three arguments. First, the argument that special provisions introduced in the proposals would lead to the lessening of protection accorded by the law. As an example, the Government submitted that a special provision (i.e. the proposed Article 256 proscribing hate speech) would derogate special punishment provided for aggravated manslaughter under Article 148(2). This argument would suggest that, for example, aggravated manslaughter does not cover manslaughter motivated by racial,

ethnic or national hatred or other discriminatory grounds enumerated in Article 256. Such discriminatory types of the perpetrator's *mens rea* as racial, ethnic and national hatred cannot be considered as motives "deserving special condemnation" within the meaning of Article 148(2) of the Criminal Code. Second, the Government submitted that adding new discriminatory grounds works to the detriment of the victims because discriminatory criminal behavior would be prosecuted *ex officio*; it is to be understood that the only detriment in this is that victims would no longer be able to stop proceedings. Third, the new discriminatory grounds – such as sexual orientation, gender identity or sex – originate from international law instruments; it would thus be difficult to make sure that the terms are universally and uniformly construed.

The third draft amendment was presented on November 28, 2012 by the Civic Platform Parliamentary Grouping. The bill proposed significant changes to the current legislation governing the issue of bias-motivated crimes by, *inter alia*, adding additional grounds of granting protection under criminal law. According to the draft incitement of hatred and abuse of a person would be also penalized if motivated by the victim's "political or social affiliation" or "natural or acquired personal qualities or beliefs". The amendment was widely criticized by lawyers and Polish NGOs. For instance, on December 21, 2012 the HFHR presented official statement on the project arguing that the proposed changes to the Criminal Code (namely the above grounds for granting criminal law protection – "social affiliation", "natural or acquired personal qualities or beliefs") are inaccurate and thus in conflict with the legislator's obligation to lay down criminal provisions that are clear and precise. **Recently (on September 19, 2013), the Minister of Administration and Digitization made a public declaration that he would mediate between authors of the three draft amendments in order to achieve a compromise.**

In para. 433 of the Report, the Government mentions the law implementing the European Union's laws concerning equal treatment as an important activity of the Government Plenipotentiary on Equal Treatment (GPET). This major anti-discrimination enactment, which transposes the Racial Equality Directive standards into Poland's domestic law, was passed by the Polish Parliament in December 2010 and entered into force on January 1, 2011. The Equal Treatment Act was designed to improve the situation of individuals of any race and ethnic origin in areas such as access to and conditions of social security, services (including housing, movables and acquiring legal rights or energy), health care and education (including higher education) and employment (in particular, the taking up of vocational and professional skills development training).

However, the effectiveness of the Act raises many concerns and is subject to the open criticism of non-governmental organizations and human rights activists. On May 28, 2012 the incumbent Human Rights Defender presented her official statement concerning this issue in a letter to the Government Plenipotentiary for Equal Treatment. **The HRD indicated that the Equal Treatment Act does not provide adequate legal protection as its scope of application changes depending on the grounds of discrimination.** The HRD evoked the

argument of the non-governmental organizations and pointed out that the terminology of the Act is inconsistent. Furthermore, the HRD emphasized that due to incoherence with the provisions of the Polish Civil Code, the possibility of obtaining compensation on the basis of the Act is questionable. In the HRD's view, the Equal Treatment Act cannot be regarded as an effective mechanism of combating discrimination: in 2011 there were only 30 claims for compensation based on its provisions and in most cases, the compensation was not granted or the claim was dismissed. At present, a draft amendment to the Act is being discussed in the Polish Parliament, having already passed the stage of the first reading.

In the opinion of the HFHR, the powers conferred on the Government Plenipotentiary for Equal Treatment are rather narrow and do not allow for planning of an overall equality strategy. Some of the competences conferred on the GPET by the law implementing certain provisions of the EU on equal treatment cannot be independently discharged and have to be performed in concert with a competent minister. Such powers include:

- initiating cooperation in matters of equal treatment and counteracting discrimination with other states and international and foreign organizations and institutions;
- initiating cooperation in preparing reports on implementation of international treaties concerning equal treatment and counteracting discrimination in Poland;
- issuing opinions concerning possibility of acceding to international treaties on equal treatment and counteracting discrimination (Article 21(3)) and
- initiating, implementing, coordinating and monitoring programs on equal treatment and counteracting discrimination (Article 21(5)).

Moreover, proposals and draft documents which fall within the scope of GPET's activities (including programs to promote equal treatment and combat discrimination) can be submitted for consideration and adoption by the Council of Ministers only if the relevant consent of the Prime Minister is obtained (Article 21(4)).

The HFHR submits that the anti-discrimination policy cannot be meaningfully designed or implemented unless a meaningful structure of accountability for GPET's actions exists. This would require bestowing the GPET with tasks and competences that could be exercised independently, as well as awarding the body a status that would allow for a measure of independence from the executive.

The law implementing the European Union's provisions concerning equal treatment also amended Article 1(2) of the Human Rights Defender Act of 15 July 1987. The Act now stipulates that the HRD's tasks include "safeguarding the human and citizen's rights and freedoms enshrined in the Constitution of the Republic of Poland and other pieces of legislation and "overseeing the implementation of the principle of equal treatment" (Article 26(2) of the Act). As a consequence of this meaningful amendment, the Human Rights Defender has been empowered to take action and to intervene with authorities in cases where

the HRD receives information that certain freedoms or rights (including the principle of equal treatment) have been violated (Article 26(3) of the Act). Equally, the Act now obligates the HRD to perform studies to monitor and uphold equal treatment, to conduct independent research on discrimination and anti-discrimination policies, as well as to present research papers, memoranda and policy statements in the area of discrimination (Article 26(6) of the Act). The Act also obligates the HRD to submit a separate report to the Sejm and the Senate. The report concerns actions and the results of action taken in the area of anti-discrimination and equal treatment, as well as a concise assessment of and recommendations concerning further implementation of the equal treatment principle and recommendations.

In para. 437, the Government states that it is not possible to gather full data on victims of hate crimes in respect to their nationality, race, sexual orientation, etc. Whilst it is true that victims of crime are not obligated to give this information to the prosecution or other law enforcement authorities, the major problem with the current data collection methods is that statistical data are not divided into any categories other than those relating to the classification of the criminal act itself. Thus identifying the discriminatory nature of the crime and further analyses are impossible in respect to specific types of discrimination (e.g. anti-Semitism, racism, anti-Roma). Therefore, on the basis of the statistical data, one is able to see the overall number of instigated criminal proceedings in the reference period concerning racist and bias-motivated crimes (articles 119 and 256 of the Criminal Code), but there is no indication concerning specific discriminatory problems (racism, ethnic hatred, religious intolerance, etc.).

Comments to the reply to question 31-33

In the government's opinion, the Patients' Rights Act and the Ombudsman for Patients' Right improved the level of protection of patients' rights (para. 463). **HFHR contends that there is still a lack of effective mechanisms for review of doctors' decisions.** In 2007, in the case *Tysiąc v. Poland* (Application no. 5410/03) the European Court of Human Rights found that the Polish legal framework did not provide an effective mechanism to resolve disagreements as to the availability or legality of therapeutic termination of pregnancy, either between a pregnant woman and doctors or between medical staff themselves. **The present regulations of the Patients' Rights Act, introduced in the wake of *Tysiąc v. Poland*, do not provide effective measures to challenge a doctor's decision before a Medical Board.** The provisions of the Patients' Rights Act were also criticized by the Polish Human Rights Defender, who intervened with the Polish Prime Minister on this topic, indicating that the regulation was not in the best interest of patients and violated the patients' right to the court.¹²

The HFHR would like to underline that the procedure fails to answer the needs of women seeking legal abortion. It should be noted that as far as access to abortion is

¹² Human Rights Defender's letter to the Prime Minister, dated December 22, 2008, available at: <http://www.rpo.gov.pl/pliki/12299535250.pdf>.

concerned, a 30-day time limit for the Medical Board to review a doctor's decision is excessive because, in most of the cases, a pregnancy may only be legally terminated during the first 12 weeks. Moreover, the HFHR observes that since the duty to submit all relevant medical documents and provide the legal basis of the objection is imposed on the patient, patients may be discouraged from using the review procedure. In conclusion, the HFHR underlines that the review mechanism remains ineffective for females seeking legal abortion and places them in the most humiliating position. It should be noted that this matter is still subject to examination by the Committee of Ministers of the Council of Europe in the enforcement procedure.¹³

¹³ Decision adopted on 1115th meeting – June 8, 2011, available at:
[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2011\)1115/18&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1115/18&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)