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Warsaw, 26th September 2023

**WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
Epler and Skubiszewski v. Poland
(Applications nos. 8520/22 and 10335/22)**

EXECUTIVE SUMMARY

- The case of *Epler and Skubiszewski v. Poland* is of fundamental importance because it concerns the controversial introduction of a state of emergency on the territory in the vicinity of Polish-Belarusian border by Polish authorities in September 2021.
- The HFHR assessed that the Polish authorities did not provide convincing arguments which could justify such far-reaching steps as an introduction of a state of emergency, which consequently led to disproportionate restrictions of many human rights.
- Polish legal doctrine, Polish Supreme Court included, agrees that several aspects of the restrictions to the freedoms and rights of persons and citizens introduced in times of the state of emergency were disproportionate to the actual threat and actually did not prioritize taking actions aimed at the swiftest restoration of conditions allowing for the normal functioning of the state that would limit, as much as possible, burdens on those subjected to the restrictions.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights (hereinafter: HFHR or Foundation), pursuant to the leave granted by the President of the Section on 7 September 2023.

2. The case of *Epler and Skubiszewski v. Poland* is of fundamental importance because it concerns the controversial introduction of a state of emergency on the territory in the vicinity of Polish-Belarusian border by Polish authorities in September 2021. The HFHR assessed that the Polish authorities did not provide convincing arguments which could justify such far-reaching steps, which led to disproportionate restrictions of many human rights.¹

3. In our written comments we focus on three issues. Firstly, we briefly present the constitutional regulations concerning the state of emergency, in particular the grounds on which it may be introduced as well as the rules concerning limiting human rights when extraordinary measures are introduced. Secondly, we present the main controversies

¹ Opinion of the Helsinki Foundation for Human Rights on restrictions on media freedom introduced in the Regulation of the President of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency in the area of part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship and in the Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedoms and rights in connection with the introduction of a state of emergency, https://hfhr.pl/upload/2021/12/opinia_hfpc_stan-wyjatkowy_media_10_09_2021.pdf.

regarding introduction of state of emergency on the Polish-Belarusian border in Autumn 2021. In this regard we refer to both the existence of grounds justifying introduction of the state of emergency as well as the scale of the human rights restrictions. Finally, we present as well selected judgments of Polish courts concerning human rights restrictions introduced in times of state of emergency.

II. CONSTITUTIONAL REGULATIONS CONCERNING THE STATE OF EMERGENCY

4. In situations of particular danger, if ordinary constitutional measures are deemed inadequate, the Constitution of the Republic of Poland (hereinafter: Constitution) allows to introduce any of three types of extraordinary measures: martial law, a state of emergency or a state of natural disaster². Such introduction can be done solely by regulation (*rozporządzenie*) issued by the competent organ³.

5. State of emergency may be introduced upon the basis of the Article 230 of the Constitution and the Act of 21 June 2002 on the state of emergency (hereinafter: Act on the State of Emergency)⁴. This statute (*ustawa*) establishes the principles for activity by organs of public authority as well as the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring the state of emergency⁵. Actions undertaken as a result of the introduction of the state of emergency (as well as any other extraordinary measure) must be: 1) proportionate to the degree of threat and 2) intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the state⁶.

6. State of emergency can be introduced by the President's regulation, on request of the Council of Ministers, in case of the threat to: 1) the constitutional order of the State, 2) security of the citizenry or 3) public order⁷. Polish legal doctrine clearly recognizes that this extraordinary measure applies to the internal state affairs⁸. Within the scope of this regulation, one should not identify incidental breaches of the Constitution as a threat to the constitutional order of the state. However, circumstances constituting a serious threat to the existence of democratic state – ruled by law and implementing the principles of social justice – (e.g. political coup d'etat or secession of the part of the country) may be recognized as basis to introduce the state of emergency⁹. Furthermore, within the meaning of Article 230, as a threat to security of citizenry or to public order one should consider widespread and intensifying actions against social order connected with e.g. danger to citizens' life, loss of a property of great value or substantial disturbance in state institutions' operations¹⁰. Moreover, Article 2 of the Act on the State of Emergency specifies that the threats justifying introduction of the state of emergency may also stem from terrorist activities or activities in cyberspace¹¹.

² Article 228.1 of the Constitution of the Republic of Poland; available in English at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

³ Article 228.2 of the Constitution of the Republic of Poland.

⁴ Consolidated text: Journal of Laws of 2017, item 1928, as amended.

⁵ See Article 228.3 of the Constitution of the Republic of Poland.

⁶ Article 228.5 of the Constitution of the Republic of Poland.

⁷ Article 230 of the Constitution of the Republic of Poland.

⁸ See e.g. P. Radziejewicz [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. II*, red. P. Tuleja, LEX/el. 2021, Article 230.

⁹ *Ibidem*.

¹⁰ *Ibidem*.

¹¹ Article 2 of the Act of 21 June 2002 on the state of emergency.

7. State of emergency may be introduced for a definite period no longer than 90 days in a part of or upon the whole territory of the state¹². With consent of the Sejm, this period may be extended only once, for no longer than 60 days¹³.

8. Polish Constitution, even for the duration of any of the extraordinary measures, prohibits limitation of the freedoms and rights of persons and citizens only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property¹⁴. Furthermore, the Constitution does not allow the statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of the state of emergency to limit the freedoms and rights specified in: Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41.4 (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children)¹⁵. However, one should not understand this provision as a type of absolutization, meaning that rights and freedoms listed above cannot be restricted at all¹⁶ – they can be limited but in accordance with normal rules of limiting constitutional rights and freedoms provided by the Article 31.1 of the Constitution and their essence cannot be infringed upon¹⁷. On the other hand, the rights and freedoms not listed above can be limited (or suspended) in times of state of emergency in accordance with less strict rules than those provided by the Article 31.1 of the Constitution, namely with the principle of proportionately expressed in Article 228.5 of the Constitution and the prohibition of discrimination expressed in Article 233.2 of the Constitution¹⁸.

9. As already pointed out in the paragraph II.5. of the written comments, Actions undertaken as a result of the introduction of the state of emergency (as well as any other extraordinary measure) must be: 1) proportionate to the degree of threat and 2) intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the state. The Act on the State of Emergency reiterates in Article 15.2, that the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of the state of emergency, as well as the type of said limitations, must be appropriate considering character and intensity of threats which constituted basis for such extraordinary measure to be introduced¹⁹. Having said that, the statute in Chapter 3 sets a scope of limitations of freedoms and rights of persons and citizens allowed during the state of emergency. Those provisions *inter alia*: allow state to control contents of telecommunications correspondence and conversations held over the phone²⁰, allow state to conduct preventive censorship of mass media²¹, allow to order/prohibit to stay or leave a particular place, building or area at a set time²², allow to order/prohibit to

¹² Article 230.1 of the Constitution of the Republic of Poland.

¹³ Article 230.2 of the Constitution of the Republic of Poland.

¹⁴ Article 233.2 of the Constitution of the Republic of Poland.

¹⁵ Article 233.1 of the Constitution of the Republic of Poland.

¹⁶ See e.g. M. Florczak-Wątor [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. II*, red. P. Tuleja, LEX/el. 2021, Article 233.

¹⁷ See e.g. S.Steinbor [in:] *Konstytucja RP*, ed. 1, red. Safjan/Bosek, 2016, Article 233.

¹⁸ *Ibidem*.

¹⁹ Article 15.2 of the Act of 21 June 2002 on the state of emergency.

²⁰ Article 20.1(3) of the Act of 21 June 2002 on the state of emergency.

²¹ Article 20.1(1) of the Act of 21 June 2002 on the state of emergency.

²² Article 18.2(2) of the Act of 21 June 2002 on the state of emergency.

record by technical means appearance or other features of particular places, buildings or areas²³ as well as allow to suspend the right to organise public gatherings²⁴.

III. MAIN CONTROVERSIES REGARDING INTRODUCTION OF THE STATE OF EMERGENCY ON THE POLISH-BELARUSIAN BORDER IN AUTUMN 2021

10. At the request of the Committee of Ministers, on 2 September 2021 President Andrzej Duda issued a regulation²⁵ declaring a 30-day state of emergency in parts of the Podlaskie and Lubelskie Voivodeships. Subsequently, on 1 October 2021 the state of emergency in this area was extended by the President²⁶, with Sejm consent, for another 60 days, which means that the state of emergency remained in force for the total amount of 90 days²⁷. The area affected by the regulation covered 115 towns and villages in the Podlaskie Voivodeship and 68 in the Lubelskie Voivodeship along the border with Belarus. On the same day, the Committee of Ministers issued additional regulation on the basis of Article 22.1 of the Act on the State of Emergency, which allows the Committee to provide presidential regulation with details regarding introduction and implementation of restrictions of freedoms and rights of persons and citizens implemented for the duration of the state of emergency. The regulations introduced following rules: 1) suspension of the right to organise public gatherings within the area covered by the state of emergency; 2) suspension of the right to organise mass events, artistic events and entertainment events; 3) obligation to have an identity card or another identity document upon one's person at all times; 4) prohibition to stay within the area covered by the state of the emergency, effective 24 hours a day with exceptions provided for in regulation²⁸; 5) prohibition to capture, record or photograph structures and areas encompassing the border infrastructure, including the images of Border Guard officers, Police officers and soldiers; 6) limitation of access to public information concerning the activities undertaken within the area covered by the state of emergency related to protection of state borders and prevention of illegal migration.

11. Abovementioned regulations were met with immediate reaction of various entities, the HFHR included²⁹. The Foundation stated, that above all, circumstances that can be observed on the Polish eastern border did not provide substantial grounds to introduce a state of emergency. Next, the HFHR pointed out that the Committee Ministers and the President did not provide public opinion with sufficient information on why ordinary

²³ Article 18.2(4) of the Act of 21 June 2002 on the state of emergency.

²⁴ Article 16.1(1) of the Act of 21 June 2002 on the state of emergency.

²⁵ Available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001612/O/D20211612.pdf>.

²⁶ See <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001788/O/D20211788.pdf>.

²⁷ Although this issue remains outside of the scope of the topic of this written comments, it is also worth pointing out that subsequently Polish government undertook further actions that *de facto* led to further extension of the *quasi* state of emergency and as a result to the extension of restrictions of the freedoms and rights of persons and citizens. Those actions are widely considered by Polish legal experts as unconstitutional (see e.g. <https://konstytucyjny.pl/piotr-tuleja-czasowy-zakazu-przebywania-w-strefie-nadgraniczne-a-kryzys-humanitarny/>).

²⁸ Certain groups were excluded from that restriction, included *inter alia*: permanent residents of the areas affected by the state of emergency; employees of companies permanently operating in the areas affected by the state of emergency; students (and their guardians) learning in institution in the area affected by the state of emergency; persons accessing the area affected by the state of emergency in order to participate in or perform religious rituals as well as in order to participate in a wedding, a funeral or a christening party; see Article 2 of the Committee of Ministers Regulation of 2 September 2021 on limitations of freedoms and rights in connection with the introduction of the state of emergency.

²⁹ See <https://archiwumosiatynskiego.pl/images/2021/10/Stanowisko-HFPC-w-sprawie-wprowadzenia-stanu-wyjatkowego.pdf>.

constitutional measures were deemed inadequate to resolve the situation and on what exact circumstances occurred at the Polish-Belarusian border that would justify introduction of a state of emergency. President's regulation of 2 September 2021 referred solely and vaguely to the "current situation at the border". Finally, the Foundation highlighted that the measures introduced by the regulations essentially excluded public opinion from conducting any form of control over the events at the Polish-Belarusian border and in particular over the way in which Polish public officers would behave in such circumstances. All of the above led the HFHR to become extremely concerned whether the state's actions were really aimed at ensuring safety of Polish citizens and not at limiting ways to monitor breaches of the domestic and international law committed by the state's officials (in particular regarding obligations to provide humanitarian aid and international protection).

12. In this part of the written comments, it is worth examining more closely controversies regarding grounds justifying introduction of the state of emergency in autumn 2021, as this issue alone caused a strong reaction amongst Polish legal professionals³⁰. As mentioned above, presidential regulation provided essentially no explanation on why the situation on the Polish-Belarusian border required introduction of the state of emergency. However, subsequently, on numerous occasions Polish government officials pointed out that taking such severe measures (It was the first time since the introduction of the new Constitution in 1997 that the Polish authorities decided to take such actions) was justified as the situation on the border was a part of provocations and so called "hybrid warfare" conducted by Russia and Belarus against Poland and Polish allies³¹. In HFHR's opinion, even if we were to accept such rhetoric, it should rather lead the government to declare a martial law in this part of the Polish territory, instead of a state of emergency. Article 229 of the Constitution clearly states that the President, on request of the Council of Ministers, may introduce such measures in the case of: 1) external threats to the State, 2) acts of armed aggression against the territory of the Republic of Poland or, 3) when an obligation of common defence against aggression arises by virtue of international agreement. Whereas, as already mentioned in the paragraph II.6 of the written comments, a state of emergency is an extraordinary measure applying rather to the internal state affairs.

13. No clear justification provided by the Polish government, makes it virtually impossible to appropriately assess reasoning behind the decision to introduce the state of emergency on the Polish-Belarusian in September 2021. Having said that, in the HFHR's opinion, at the moment the decision was made and based on the data available publicly at that time, it was impossible to claim that hundreds or thousands of refugees seeking international protection in Poland could constitute a threat to security of the Polish citizenry or public order of such severity, that ordinary constitutional measures were inadequate to address it. Therefore the Foundation upholds its assessment presented in the introduction of the written comments, that Polish authorities did not provide any convincing arguments which could justify such far-reaching steps as the introduction of the state of emergency.

14. Furthermore, it must be highlighted that the actual result of the introduction of the state of emergency, meaning severe restrictions of a number of human rights, was deemed even more controversial by the doctrine – particularly whether the limitations met the

³⁰ See e.g. <https://legalden.pl/stan-wyjatkowy-na-granicy-z-bialorusia-czy-sa-podstawy-aby-go-wprowadzic/>.

³¹ See e.g. <https://www.money.pl/gospodarka/pierwszy-od-40-lat-stan-nadzwyczajny-wprowadzony-jest-publicacja-6678962971560800a.html>.

constitutional requirement of proportionality regarding the degree of threat and whether those actions taken by the government were actually intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the state.

15. Immediately after the regulations of 2 September 2021 were published, Polish Ombudsman addressed the Polish Prime Minister³² and stated that some of the introduced provisions may not meet the requirement of proportionality set out in Article 228.5 of the Constitution³³. The Ombudsman pointed out that the prohibition to stay within the area covered by the state of emergency³⁴ applying also to professional journalists, cumulated with the limitation of access to public information concerning the activities undertaken within the area covered by the state of emergency related to protection of state borders and prevention of illegal migration³⁵, essentially excluded any forms of social control over the conduct of public authorities within the area covered by the state of emergency. The Ombudsman highlighted that such situation is particularly worrisome as the events at the Polish-Belarusian border are of significant social interest and concern fundamental human rights. Consequently, in the Ombudsman's opinion, said provisions may lead to disproportionate restriction of constitutional rights and freedoms, in particular freedom to acquire and disseminate information (Article 54 of the Constitution) and right to obtain information on the activities of organs of public authority (Article 61 of the Constitution), as well as rights and freedoms guaranteed by the European Convention on Human Rights (Article 10).

16. It is also worth highlighting that during the period of the state of emergency, journalists attempting to cover events on the Polish-Belarusian border were experiencing various ill-treatments, *inter alia* alleged attacks, short-term detentions, cases of stop and search or harassment even if they were operating outside of the area covered by the prohibition to stay³⁶. One of the cases of this kind is being currently examined by the European Court of Human Rights³⁷.

17. Similarly, the Polish Bar Council (*Naczelna Rada Adwokacka*) addressed Polish Minister of the Interior and Administration³⁸ to point out that the that the prohibition to stay within the area covered by the state of emergency applying also to attorneys performing their professional duties, cumulated with the practice of Polish Border Guard officers – that is denying any access to, or information on, refugees seeking international protection in Poland – leads to unlawful restriction of the right of defence and the right to a fair and public hearing.

³² The Ombudsman's letter to PM of 6 September 2021 available at: https://bip.brpo.gov.pl/sites/default/files/RPO_do_premiera_stan_wyjatkowy_6.09.2021.pdf.

³³ As well as consequently standards stemming from Article 15.1 of the European Convention on Human Rights and Article 4.1. of the International Covenant on Civil and Political Rights; see also ECHR judgments in e.g. *Mehmet Hasan Altan v. Turkey* (app. no. 13237/17).

³⁴ See Article 1.1(4) of the Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedoms and rights in connection with the introduction of a state of emergency.

³⁵ See Article 1.1(6) of the Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedoms and rights in connection with the introduction of a state of emergency.

³⁶ See <https://srdefenders.org/poland-hrds-on-poland-belarus-border-attacked-detained-searched-ill-treated-joint-communication/>.

³⁷ See *Maciej Nabrdalik against Poland* and *Maciej Moskwa against Poland* (Applications nos. 30614/22 and 30848/22).

³⁸ Letter of 10 September 2021 with attached opinion of the atty. Katarzyna Ciulkin-Sarnocińska available at: https://www.adwokatura.pl/admin/wgrane_pliki/file-20210910sprawa-cudzoziemcow-adwoacki-stan-wyjatkowy-kaminski-skonwertowany-31731.pdf.

18. Moreover, members of civil society on numerous occasions³⁹ pointed out that the prohibition to stay within the area covered by the state of emergency applying also to those providing humanitarian aid, contrary to *inter alia* EU law⁴⁰, resulted in denying those seeking international protection in Poland effective access to medical, legal and psychological aid.

19. On 13 October 2021, Polish Ombudsman once again formally contacted the Prime Minister⁴¹, to address the issue of the compatibility of the prohibition to stay within the area covered by the state of emergency – effective 24 hours a day, with exceptions provided for in regulation – introduced by the Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedoms and rights in connection with the introduction of a state of emergency, with the Constitution. As pertinently observed by the Ombudsman, Article 22.1 of the Act on the State of Emergency allows the Committee of Ministers solely to specify presidential regulation, provide it with details regarding introduction and implementation of restrictions of freedoms and rights of persons and citizens introduced for the duration of the state of emergency. Article 2(4) of the Regulation of the President of the Republic of Poland of 2 September 2021 on declaration of a state of emergency in parts of the Podlaskie Voivodeship and in parts of the Lubelskie Voivodeship introduced a prohibition to stay in particular time, in particular sites, building and areas within the area covered by the state of emergency. Whereas Article 1.1(4) of the Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedoms and rights in connection with the introduction of a state of emergency introduced the prohibition to stay within the area covered by the state of the emergency, effective 24 hours a day. This means that the Committee of Ministers actually introduced a general prohibition to stay in the whole area covered by the state of emergency, rather than specifying when and where exactly such prohibition to stay is in force. Thus, in Ombudsman’s opinion Committee of Ministers actually broadened restriction introduced by the President, which consequently constituted a breach of Article 92.1 of the Constitution⁴².

20. Lastly, the HFHR would like to highlight the Foundation’s opinion that the general suspension of the right to organise and hold assemblies on the whole territory of the state of emergency introduced by the regulations, may constitute a disproportionate restriction of the right to freedom of peaceful assembly. Without a doubt, the Act on the State of Emergency allows for such measures to be taken⁴³. However, as already mentioned above, the Constitution requires that the actions undertaken as a result of the introduction of the state of emergency (as well as any other extraordinary measure) must be: 1) proportionate to the degree of threat and 2) intended to achieve the swiftest restoration

³⁹ See e.g. the HFHR’s report *Gdzie prawo nie sięga*, available at: https://hfhr.pl/upload/2022/12/raport_gdzie_prawo_nie_siega-hfpc-30062022_1.pdf.

⁴⁰ See Article 8.2 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032>.

⁴¹ Letter of 13 October 2021 available at: https://bip.brpo.gov.pl/sites/default/files/2021-10/RPO_do_premiera_13.10.2021.pdf.

⁴² According to Article 92.1 of the Constitution, regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.

⁴³ See Article 16.1(1) of the Act of 21 June 2002 on the state of emergency.

of conditions allowing for the normal functioning of the state⁴⁴. It is worth noting that in particular situations, the regulations allowed for assemblies of big groups of people within the area covered by the state of emergency – e.g. during weddings or christening parties⁴⁵. Therefore it is hard to find justification for complete suspension of such a fundamental right as the right to freedom of peaceful assembly, which allows citizens to publicly express their opinions and objections regarding decisions and actions taken by the authorities.

21. In the HFHR's opinion, chance to enjoy this right has even more meaning in the area where public authorities commit continuous breaches of domestic and international law, which was and unfortunately still is the case on the Polish-Belarusian border (e.g. pushbacks, ignoring interim measures indicated by the European Court of Human Rights, intentionally dismissing declarations of a will to apply for international protection)⁴⁶. One of the aims and potential effects of a protest may be to turn public attention to a particular place where the particular problem is the most prevalent in order to highlight a particular issue even more – e.g. protests against the pushbacks will understandably rang out louder on the beaches of Lampedusa or marshes of Polish-Belarusian border than on some city streets.

22. The Foundation would like to express its serious doubts whether Polish authorities suspended the right to organise and hold assemblies on the whole territory of the state of emergency actually in order to achieve the swiftest restoration of conditions allowing for the normal functioning of the state, rather than to limit social and political impact of potential protests against the actions taken by the authorities with regards to humanitarian crisis on the Polish eastern border.

IV. SELECTED JUDGMENTS OF POLISH COURTS CONCERNING HUMAN RIGHTS RESTRICTION INTRODUCED IN TIMES OF THE STATE OF EMERGENCY

23. Polish Supreme Court in case no. I KK 171/21⁴⁷ examined the issue of the the prohibition to stay within the area covered by the state of emergency, effective 24 hours a day, introduced by the Committee of Ministers. The case concerned three employees of TV stations ARTE and AFP who were punished (by a reprimand) by the District Court in Sokółka as the court found them guilty of breaching the prohibition to stay within the area covered by the state of emergency in September 2021. Polish Ombudsman filed a successful cassation appeal against the said ruling in which he reiterated reasoning already described in paragraph III.18 of the written comments.

24. Firstly, the Supreme Court agreed with the Ombudsman that the Committee of Ministers unlawfully exceeded the statutory authorization when introducing a general prohibition to stay within the area covered by the state of emergency for the whole duration of that state being in force. Consequently, the Court pointed out that several aspects of the examined regulation exceeded the statutory authorization included in the Act on the State of Emergency – e.g. Committee of Ministers had no authorization to prohibit Polish Red Cross to provide humanitarian aid within the area covered by the state of emergency as doing so is this entity's statutory right. Moreover, the Supreme Court addressed the issue of the proportionality of the actions taken by the Committee of Ministers by stating that the prohibition to stay within the area covered by the state of

⁴⁴ See Article 228.5 of the Constitution of the Republic of Poland.

⁴⁵ See Article 2.1(13) of the Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedoms and rights in connection with the introduction of a state of emergency.

⁴⁶ See e.g. <https://hfhr.pl/en/news/situation-on-the-polish-belarusian-border>.

⁴⁷ Available at: <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20kk%20171-21.pdf>

emergency – no matter the time or place – cannot be justified by a threat to citizens' security or public order related to the situation on the Polish-Belarusian border and it also cannot be deemed as an action aimed at limiting burdens related to the restrictions imposed on the freedoms and rights of persons and citizens. Thus, the Court concluded that such prohibition should be considered as a disproportionate interference with one's right to freedom of movement as well as the choice of place of residence and sojourn⁴⁸. Furthermore, in Supreme Court's opinion journalists should rather be a group specifically allowed to enter the area covered by the state of emergency in order to fulfil their professional duty, particularly when the Committee of Ministers' regulation exempts from the above mentioned prohibition a relatively significant number of groups⁴⁹. The Court agreed with the Ombudsman that such action may lead to presumption that they are not actually aimed at maximally limiting a number of people present in the area covered by the state of emergency, but rather at excluding from this area particular professional groups. Thus, the Supreme Court concluded that fashioning the discussed prohibition in such manner leads to a breach of one's freedom to express opinions as well as to acquire and to disseminate information⁵⁰.

V. CONCLUSIONS

25. In HFHR's opinion, considering all of the above should make one question whether the situation on the Polish-Belarusian border in autumn 2021 even justified taking such severe measures as introducing state of emergency in 183 Polish towns and villages. To this day Polish authorities did not provide any sufficient explanation on why ordinary constitutional measures were deemed insufficient to address the situation that occurred.

26. Furthermore, Polish legal doctrine, Polish Supreme Court included, agrees that several aspects of the restrictions to the freedoms and rights of persons and citizens introduced in times of the state of emergency were disproportionate to the actual threat and actually did not prioritize taking actions aimed at the swiftest restoration of conditions allowing for the normal functioning of the state that would limit, as much as possible, burdens on those subjected to the restrictions. Thus, the HFHR believes that the measures taken by the authorities did not meet the standards required by domestic and international law.

On behalf of the Helsinki Foundation for Human Rights,

Piotr Kładoczny, ph.D.

Vice-president of the Board

⁴⁸ Article 52 of the Constitution.

⁴⁹ See Article 2.1 of the Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedoms and rights in connection with the introduction of a state of emergency.

⁵⁰ Article 54 of the Constitution; Article 10 of the European Convention on Human Rights.