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UN Committee Against Torture

UNOG-OHCHR

CH-1211 Geneva 10 (Switzerland)

Dear Honourable Members of the UN Committee Against Torture,

on behalf of the Helsinki Foundation for Human Rights (Warsaw, Poland), we would like to present the following list of issues concerning Poland for your consideration ahead of CAT 73rd session in April-May 2022.

The Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989, based in Warsaw (Poland). HFHR is one of the largest and most experienced non-governmental organizations operating in the field of human rights in Eastern and Central Europe. Since 2007, HFHR has a consultative status with the United Nations Economic and Social Council (ECOSOC). HFHR's objective is the promotion and protection of human rights. Its main activity areas include domestic education in the field of human rights, international activities and public interest activities aimed at increasing the standards of human rights protection in Poland. HFHR is also a member the National Focal Point within the European Union Fundamental Rights Agency's research network FRANET.

HFHR participated in the previous CAT reporting cycles and presented shadow reports concerning the situation in Poland. Based on the outcomes of previous reporting cycles as well as the results of HFHR on-going monitoring of human rights in Poland, we would like to present the following list of problems concerning torture prevention in Poland.

1. Systemic defectiveness (Article 1-4, Article 15)

In the first place, the HFHR would like to bring your attention to the systemic defectiveness of the torture prevention mechanisms in Poland. The problem includes inter alia the functioning of the Constitutional Tribunal, lack of effective access to lawyer assistance, as well as the situation of the National Preventive Mechanism.

The ongoing rule of law crisis in Poland has significantly undermined the independence and impartiality of the Constitutional Tribunal, the only body competent to strike out from the legal system the legislation violating the Constitution. Since 2016 the Constitutional Tribunal has been used by the ruling majority to rubber-stamp the most controversial statutes adopted by the parliament.¹ On the other hand, its wrongful composition (confirmed in ECtHR's case *Xero Flor v. Poland*)² forced the Commissioner for Human Rights to withdraw from the Constitutional Tribunal the case concerning art. 168a of the Code of Criminal Proceedings. This provision forbids the public prosecution office or the court to recognize a piece of evidence only because it has been obtained as a result of a breach of the procedure or the forbidden act. The exception to that rule concerns pieces of evidence obtained in connection with the fulfilment of the official duties by a public officer, as a result of homicide, the cause of deliberate damage to health, or the deprivation of liberty. Therefore, the art. 168a forces inter alia the court to conduct a specific piece of evidence, even if it has been obtained as the result of tortures, inhuman and degrading treatment.

Another major problem in the area of criminal law concerns access to the lawyer at the initial stage of criminal proceedings. The Code of Criminal Proceedings does not guarantee either the apprehended persons or defendants the possibility to contact a lawyer before their initial interrogation. It is particularly visible in the field of state-funded legal aid, where the right to be assisted by a lawyer is granted days or even weeks after the initial interrogation in the case. Moreover, despite systemic defectiveness in that field, the Code does not prevent use in the criminal proceedings statement made in the absence of a lawyer.

Furthermore, the Penal Code still lacks in a specific offense referring to tortures. In the opinion of HFHR, other types of crimes used in the cases of tortures do not reflect the gravity of such offenses. They hinder the possibility to monitor such cases and give them priority in recognition.

Finally, the HFHR would like to emphasize the difficult situation of the Commissioner for Human Rights, which acts in Poland as the National Preventive Mechanism. In the last years, the Commissioner's Bureau faced attacks on its independence (aimed, among others, to force previous Commissioner to leave its position) and general reduction of the budget, resulting in constant and serious underfunding of NPM.³

2. Humanitarian crisis at the Polish-Belarusian border (Articles 3 and 13-16)

Since mid-2021 the gravest migration and humanitarian crisis so far has been lasting at the Polish-Belarusian border. With 3,000 attempts of crossing the border illegally by migrants, forced brutally by Belarusian uniformed services, in August 2021 (according to the Polish Border Guard), on 2 September 2021 the President of Poland decided to introduce a 30-day state of emergency in the area adjacent to

¹ M. Szuleka, M. Wolny. A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021, Warsaw 2021, available at: <https://www.hfhr.pl/wp-content/uploads/2021/09/TK-narzedzie-w-rekach-wladzy-EN-FIN14092021.pdf>.

² ECtHR judgment of 7 May 2021 in the case *Xero Flor v. Poland*, application no. 4907/18, § 289-291.

³ M. Kalisz, M. Szuleka, M. Wolny. Rule by law replaced the rule of law. Threats to human rights in Poland, 2015-2019, Warsaw 2020, available at: <https://www.hfhr.pl/wp-content/uploads/2020/01/EN-Rz%C4%85dy-prawem-web-FIN.pdf>

the Polish-Belarusian border, imposing certain limitations to civic rights and freedoms. The state of emergency was later prolonged until 2 December 2021. On 1 December 2021, the amendment to the Act on border protection, signed by the President, *de facto* extended these limitations indefinitely, which constitutes a dangerous circumvention of the constitutional provisions.

Firstly, it is widely reported that foreigners apprehended on the border are removed (pushed back) by Polish Border Guard to Belarus without consideration of their individual situation and regardless of their will of applying for international protection. This practice was sanctioned by the Regulation of 20 August 2021, stipulating that individuals who are not authorized to enter the Republic of Poland are instructed to leave its territory immediately and are returned to the state border), and later by the amendment to the Act on foreigners and certain other acts, which came into force on 26 October 2021 (the “expulsion law”).

Secondly, migrants who are pushed back to Belarus are subjected to harsh conditions in the forests and swamps located on the border, which poses a threat to their lives, as well as violence from the hands of Belarusian law enforcement officers forcing them to return to Poland. According to a consortium of NGOs’ (Grupa Granica) report, there is a growing body of evidence proving that Belarusian uniformed services use violence amounting to torture against migrants (e.g. beating them).⁴ The large scale of abuses on the part of Belarusian forces was also documented in a Human Rights Watch report.⁵

Thirdly, there are reported cases of migrants who got to Poland and were deprived of liberty there by the Polish uniformed services, mainly the Border Guard, without being placed in a detention facility. With the declared large number of “attempts of crossing the border illegally” (more than 29,000) and “prevented attempts of crossing the border illegally” (nearly 28,000) — approximately 1,400 individuals have been arrested by 11 November 2021.⁶ The number of such persons, to whom the Border Guard officials refer as “illegal immigrants”, is usually much lower than the number of “attempts of crossing the border illegally” and “prevented attempts”. In all likelihood, it represents the number of people who were subsequently brought to detention centers (i.e. people formally detained based on a court decision), but there is no certainty that this was the case of every person who has been described as “arrested”. They might have been arrested, transported to a Border Guard station and then taken to the Belarusian border (such situations have been repeatedly reported by activists).⁷ The most notable example is a group of 32 Afghan citizens detained at the border nearby Usnarz Górny for around 2 months without shelter and access to basic medical, humanitarian and legal aid;⁸ their case was communicated by the ECtHR to the Polish government (R.A. and Others v. Poland; application no. 42120/21). Between 20 August

⁴ Grupa Granica, Humanitarian crisis at the Polish-Belarusian border, 10 December 2021. Available at: <https://www.grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf>

⁵ Human Rights Watch, “Die Here or Go to Poland”. Belarus’ and Poland’s Shared Responsibility for Border Abuses, 24 November 2021, available at: <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>

⁶ Grupa Granica, Humanitarian crisis at the Polish-Belarusian border, 10 December 2021. Available at: <https://www.grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf>

⁷ Ibid.

⁸ Amnesty International, Usnarz Górny: raport z wizyty, 10 September 2021. Available at: <https://amnesty.org.pl/usnarz-gorny-raport-z-wizyty/>

and 3 December 2021, the ECtHR processed a total of 47 requests for interim measures, brought mainly by people staying in the border area, but not in the formal places of deprivation of liberty.

Fourthly, according to NGOs monitoring the crisis, the situation in places of detention where migrants are placed after being apprehended in the Polish territory is also alarming. Such places are generally overcrowded and offer poor living conditions. These places include:

- a. **the registration centres for foreigners** located in a restricted zone, to which neither lawyers nor NGOs have access and are not able to contact migrants placed there. According to the information provided by migrants, the conditions there are inadequate (e.g. they sleep on the floor on mattresses). These centres are monitored by representatives of the Commissioner for Human Rights, however, due to the regulations of the state of emergency, reports from these visits are not disclosed;
- b. **the Border Guard stations** in the border area, where foreigners are often detained before push-backs to Belarus or their transfer to detention centres. These places are not easily accessible for lawyers and NGOs, but according to the reports of foreigners, the conditions there are also inadequate and are not meeting the minimum standards, there is a problem with the access to food or water;

the access of lawyers and NGOs to the abovementioned premises is also hindered.

- c. At the same time, the conditions in **the detention centres for foreigners** are currently not meeting the minimum standards and are worsening, especially detention centres in Wędrzyn and in Kętrzyn. The experience of HFHR shows also that vulnerable persons (including victims of torture and violence, whose exceptional status is not examined by courts thoroughly, with participation of expert witnesses, but only based on documents provided by the Border Guard) are placed there, in violation of the law. Furthermore, the best interest of the children is usually not assessed when deciding on their detention. Pursuant to a regulation recently adopted in Poland, the living space in detention centres can be as small as 2 square metres per person, which is below the standard set by the ECtHR and generates overpopulation. For instance, in the temporary detention centre in Wędrzyn, which is located in an active military camp, approximately 600 men are placed. The centre's sanitary facilities are in a bad condition and do not ensure intimacy, and migrants placed there do not have appropriate contact with the outside world. In the detention centre in Kętrzyn, where approximately 500 people are placed, including families with children, migrants are accommodated in open-air containers, which do not guarantee adequate living conditions for winter. The harsh living conditions there were acknowledged twice in the National Preventive Mechanism's reports from October 2021⁹ and December 2021.¹⁰ Migrants complain also of the lack of access to medical and psychological assistance in detention centres, as well as limited access to information, legal assistance and private psychologists, computers and the Internet. Furthermore, due to the increasingly frequent occurrence of violent conflicts between migrants in detention centres, they do not feel safe there. HFHR is aware of at least one case of sexual abuse of a migrant child by an adult in such centre.

⁹ Human Rights Commissioner, Poor conditions can exacerbate trauma. Ad hoc visits to centres for foreigners (Rzecznik Praw Obywatelskich, Złe warunki mogą pogłębiać traumy. Wizytacje ad hoc w ośrodkach dla cudzoziemców), available at: <https://bip.brpo.gov.pl/pl/content/rpo-osrodki-cudzoziemcy-wizytacje-zle-warunki>

¹⁰ Commissioner for Human Rights, Kolejna wizytacja KMPT w ośrodkach dla cudzoziemców w Krośnie Odrzańskim i Wędrzynie, available at: <https://bip.brpo.gov.pl/pl/content/rpo-kmpt-wizytacja-cudzoziemcy-osrodki-krosno-wedrzyn>

3. Inhuman treatment by the police (Articles 13-16)

Furthermore, HFHR would also draw attention to the problem of combatting torture, inhuman and degrading treatment in the actions of law enforcement officers, especially police. This includes the problem of an alarming increase in the number of cases in which the use of coercive measures by the police resulted in the death of an apprehended person. In the years 2020-2021 the HFHR was able to identify at least 10 suspicious deaths of people during police intervention. The most shocking case concerned 25 year old Ukrainian who was taken to detoxification detention centre in Wrocław, where he was tortured by centre's staff and law enforcement officers with the use of baton. During the whole incident the law enforcement officers had their body-worn cameras turned off.¹¹

Another major problem concerns the use of coercive measures against peaceful protesters. In October and November 2021, during the protests connected with the Constitutional Tribunal ruling concerning access to abortion, HFHR witnessed and documented police actions aimed at dispersing peaceful protesters. This included inter alia excessive use of force by the law enforcement officers acting in operational units or in plain clothes.

In that context, HFHR would like to underline that the law enforcement officers acting in operational units are not obliged to wear identification badges. As a result, the individuals who faced the use of excessive force by the police are usually not able to bring law enforcement officers to criminal and disciplinary liability. This prevents victims of torture, inhuman and degrading treatment from effectively seeking protection in other state organs.

Moreover, the problem of growing violence in police activities must be assessed in the context of the insufficient number of preventive measures used by the police to counteract tortures, inhuman and degrading treatment. In that field, HFHR would like to emphasize the problem of an inappropriate amount of training provided to law enforcement officers (especially the Minister of Interior decision to shorten the initial police training to the minimum due to COVID-19 pandemic), lack of specific training in the area of human rights, and the insufficient use of body-worn cameras.

4. Violence against women (Articles 2 and 16)

On one hand, in November 2020 the “anti-violence package” (a set of governmental amendments to various legal acts aimed at preventing and combating domestic violence)¹² came into force. It allowed, in particular, to isolate the perpetrators of violence from their victims more effectively, by ordering to vacate the premises or applying restraint orders. The Ministry of Justice announced that next changes in this field would follow, among others the extension of restraint orders to any other areas than households

¹¹ J. Hartukowicz. Śmierć Ukrainka we Wrocławiu. Pół godziny katorgi w izbie wytrzeźwień, available in Polish: <https://wroclaw.wyborcza.pl/wroclaw/7,35771,27521568,wyborcza-ujawnia-smierc-ukrainca-podczas-policyjnej-interwencji.html>

¹² Poland, Act amending the Code of Civil Procedure and certain other acts (*Ustawa o zmianie ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw*), 30 April 2020.

and its vicinities or the possibility of prohibition of contacting the victim of domestic violence by the perpetrator via phone or social media.

On the other hand, however, there were certain developments weakening the protection of women against violence. In July 2020, the Minister of Justice made a request that Poland withdraw from the Council of Europe's Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).¹³ The Istanbul Convention, which in fact provides a framework for preventing, combating and prosecuting domestic violence and violence against women, has been repeatedly criticised by right-wing MPs and conservative NGOs. Moreover, the government has not taken any actions to implement the provisions of the Convention. In response to the Minister's of Justice request, the Prime Minister informed that he had directed a motion to the Constitutional Tribunal to verify the Convention's compliance with the Polish Constitution. The proceedings in this case are still pending.¹⁴

Moreover, the functioning of the system of support for victims of domestic and gender-based violence in Poland is weakened by ongoing irregularities concerning the Victim Assistance and Post-Penitentiary Fund (the Justice Fund). In September 2021, the Supreme Audit Chamber published the first complex report on the functioning of the Justice Fund.¹⁵ According to the report, the Justice Fund, supervised by the Minister of Justice, due to the lack of clear definition of its tasks, spent public funds in a "thrifless and unreasonable" manner, whereas its activities favoured the emergence of "corruptive mechanisms". Furthermore, the Minister of Justice has not ensured that all potential beneficiaries of the Fund have equal and transparent access to its resources.

Lastly, although each year the government adopts the National Programme for Domestic Violence Prevention, which envisages providing protection and help for victims of domestic violence and applying correctional and educational measures to perpetrators, local government units (which are responsible for the Programme's implementation) indicate that funds allocated to them in this regard are disproportionate to the tasks conferred by the Programme. Therefore, in the opinion of local government units' representatives, effective implementation of the Programme is impossible.

5. Access to abortion (Article 16)

On 22 October 2020, the Polish Constitutional Tribunal declared abortion on the grounds of severe or fatal impairment of the foetus unconstitutional.¹⁶ By eliminating one of the three legal grounds for abortion, based on which 98% pregnancies were terminated in 2020, the constitutional court's decision

¹³ Tvn24.pl, Ziobro: złożymy wniosek o wypowiedzenie konwencji stambulskiej, 25 July 2020, available in Polish at: <https://tvn24.pl/polska/konwekcja-stambulska-zbigniew-ziobro-zlozimy-wniosek-o-wypowiedzenie-konwencji-4647878>

¹⁴ Poland, Constitutional Tribunal, case no. K 11/20, available at: <https://trybunal.gov.pl/s/k-11-20>

¹⁵ Poland, Supreme Audit Chamber, NIK o realizacji ustawowych zadań Funduszu Sprawiedliwości, 20 September 2021, available in Polish at: <https://www.nik.gov.pl/aktualnosci/realizacja-zadan-funduszu-sprawiedliwosci.html>

¹⁶ Poland, Constitutional Tribunal, Judgement of 22 October 2020, case no. K 1/20, available in Polish at: <https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=22412&cid=1>

has outlawed access to the procedure in Poland almost entirely, except for cases of pregnancy resulting from prohibited acts, or if the mother's health or life is in danger due to her pregnancy.

As a result of the Constitutional Tribunal's judgment, women were forced to give birth to children with severe or fatal impairment, which violates human rights standards. On 8 October 2021, the European Court of Human Rights communicated to the Polish government the case *M.L. v. Poland*, concerning a refusal to conduct abortion on the grounds of foetal abnormality after the date of publication of the judgement. The applicant, who had the procedure scheduled for 28 January 2021 in a public hospital, was denied it after the constitutional court's decision had been published the previous day. The applicant raised in particular that Poland had violated the prohibition of torture (Article 3 of the European Convention of Human Rights).

The ECtHR already communicated to the Polish authorities (in January 2021) another case concerning the lack of access to abortion based on severe foetal impairment (*B.B. v. Poland*). The applicant in that case also raised a complaint of violation of her rights protected under Article 3 ECHR. In addition, Poland still has not taken general measures to implement previous ECtHR judgments in the cases *Tysi c v. Poland* and *R.R. v. Poland*, concerning, respectively, access to legal abortion due to a threat to mother's health and prenatal genetic testing.

Recently, a heated debate arose again as to the practical results of the 2020 judgement with regard to a tragic death of a 30-year-old pregnant woman in a hospital in P szczyna. According to the prosecution's findings, the woman was admitted to the hospital feeling unwell in her 22nd week of pregnancy, where the foetus' severe defects, enabling termination of the pregnancy, were confirmed by doctors. The woman died the next day due to the septic shock and infection, which might have resulted directly from the foetus' earlier demise in her womb. In the opinion of the late woman's legal representative, the delay in conducting abortion until the foetus dies of natural causes in this case was the result of the legal uncertainty and chilling effect, caused by the Constitutional Tribunal's decision.

6. Detention facilities (Article 11)

The problem of inhuman and degrading treatment and punishments concerns also Polish detention facilities. HFHR would like to particularly turn the spotlight on the increasing number of prisoners and pre-trial detainees, combined with the lack of specific actions aimed at improving the standard of living space per inmate. Despite various recommendations of the international bodies, such a standard remains on the insufficient level of only 3 m² per prisoner.

Furthermore, the ongoing COVID-19 pandemic impacted prisons and detention facilities. For a few months, inmates were deprived of the possibility to receive visits from their relatives. HFHR received also several complaints on the adoption of suicidal prevention measures to all inmates omitting their actual mental condition, as well as inmates' inappropriate access to healthcare during the pandemic. The pandemic has been also used as an excuse to provide Prison Service with a right to use stun guns as a coercive measure. The appropriate solutions in that field were adopted within preventing COVID-19 legislation, without any discussion and public consultation.

Finally, in the last years, HFHR observes a growing number of complaints on the situation of LGBTQ inmates in prisons. To give an example, one of the cases concerned a situation of a transgender woman who was serving a sentence in a male prison. Despite the medical recommendation to carry on hormone therapy, the inmate was deprived of this possibility.¹⁷

In the area of detention facilities, HFHR would also bring attention to the situation of the National Centre for the Prevention of Dissocial Behaviour in Gostynin, the institution established to continue the detention of specific inmates after the formal expiration of their criminal sentence. In the last years, the Centre faced a huge increase in the number of inmates, resulting in the continuous overcrowding of the establishment. The HFHR received also specific complaints of inmates kept in the Centre regarding COVID-19 restrictions and their access to healthcare.

Finally, the HFHR would point out the very difficult situation of psychiatric care for children manifesting in the insufficient number of beds in psychiatric hospitals for children. This results in situations in which children seeking psychiatric help have been detained in psychiatric hospitals for adults. Such a situation generally endangers their safety and already resulted in at least a few situations in which the children have been victims of a crime.

We hope you find the information presented above relevant and remain at your disposal in case of any questions.

Yours faithfully

Maciej Nowicki
HFHR President

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¹⁷ The letter of HFHR to the Director of the Prison Unit, available in Polish: https://www.hfhr.pl/wp-content/uploads/2020/07/3421_001.pdf