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SUBMISSION TO THE 100TH SESSION OF THE HUMAN RIGHTS COMMITTEE OCTOBER 2010 REVIEW ON POLAND

Comments of Helsinki Foundation for Human Rights on the replies provided by the Government of Poland to the list of issues (CCPR/C/POL/Q/6) raised by the Human Rights Committee to be taken up in connection with the consideration of the sixth periodic report on Poland (CCPR/C/POL/6) regarding implementation of the International Covenant on Civil and Political Rights.

INTRODUCTION

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

The main areas of activity of the HFHR are as follows:

- domestic education in the field of human rights;
- activities of the Legal Department of HFHR, this includes: public interest counseling, monitoring of the legislation process in the light of its conformity with

- the Constitution and international human rights standards, litigation of strategic cases in order to achieve significant amendments in the law and practice;
- other activities in public interest such as, *inter alia*, international activity, legal assistance to refugees and migrants, activities regarding minority rights, children rights, prevention of torture, inhuman and degrading treatment or punishment;
- HFHR is also a member of FRALEX and RAXEN networks within European Union Agency for Fundamental Rights;
- since 2007 HFHR has a Consultative Status with the UN Economic and Social Council.

HFHR is submitting written comments to the UN Human Rights Committee in view of its forthcoming examination on the 100th Session in the days of 12 – 13 October 2010 of the replies of Polish Government to the list of issues. It was raised by the Committee in connection with the sixth periodic report on Poland regarding implementation of the International Covenant on Civil and Political Rights. 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 edition of the report of the HFHR of the day of 15 September 2010 submitted to the Government of Poland in relation to the replies to the list of issues of the UN Human Rights Committee.

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COMMENTS TO THE REPLIES OF THE GOVERNMENT OF POLAND

Comments to the reply to question 1:

The list of cases enumerated by the Polish Government in its reply to the list of issues by the Human Rights Committee should be supplemented with the judgement of the Constitutional Tribunal of 23 November 2009 (P 61/08) rendered in the case concerning discrimination of a police officer who was refused access to active duty on the basis of his HIV-positive status. In submitting its legal question for the Tribunal's consideration, the trial court referred to Article 25 (c) of the International Covenant on Civil and Political Rights (ICCPR) as a benchmark for assessing the legality of the Polish legal regulation. The significance of the ICCPR is even greater as there are no similar guarantees (of equal access to public service) in the European Convention on Human Rights.

Comments to the reply to question 2:

As regards the reply of the Polish Government to this question, it is impossible to subscribe to the Government's position that none of the Polish legal regulations on terrorism and anti-terrorist actions have resulted in limiting or revoking any rights guaranteed in the International Covenant on Civil and Political Rights. Above all, there is no comprehensive regulation on combating terrorism in the Polish legal system. Instead, we are dealing with extensive legislative separatism.

As far as the issues of the observance of the rights guaranteed under the ICCPR are concerned, in the context of combating terrorism one must pay attention specifically to the regulations of the Foreigners Act (*Ustawa o cudzoziemcach*) of 13 June 2010. The Act gives the authorities the power to refuse to grant a foreigner the fixed-term residence permit on grounds concerning state defence 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 the fixed-term residence permit is issued by an administrative body on the basis of a classified opinion drafted by the Border Guards (*Straż Graniczna*), the Police or Internal Security Agency (*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 has no appropriate security clearance.

The problem is visible in the case of a Morocco national accused of engaging in terrorist activity in Poland. He was deported from Poland pursuant to the administrative decision, based on a secret opinion by the ABW, subsequently upheld by the judgment of the Provincial Administrative Court in Warsaw. In the course of the proceedings neither the appellant nor his attorney was able to learn about the content of the classified opinion which constituted the basis of the deportation. This case shows that there are no procedural guarantees such as the accused person's right to see classified documents used in the course of the legal proceedings.

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

Comments to the reply to question 4:

In its reply the Government of Poland makes reference to the amendment of the Criminal Code (*Kodeks karny*) introduced in June 2010 which expands the prohibition against the advocacy of totalitarian regimes and acts of hate speech. The objections raised by the HFHR to the new law concern mainly the insufficiently precise wording of the amendment. The amendment made it illegal, for example, to produce, possess or import with intent to disseminate any items carrying symbols of totalitarian regimes and expressing hate speech. The very wording of this provision raises a number of doubts. First, it is disputable what will be classified as an item carrying a symbol of a totalitarian regime. Second, the discussed amendment establishes four defences against criminal liability for advocacy of totalitarian regimes and acts of hate speech: artistic, scientific, educational or collector's activities. Also the definition of such activities (especially the artistic activity) is ambiguous and may lead to divergent interpretation and excessive discretion in applying the law by state authorities and courts.

A group of left wing Sejm deputies challenged the amendment of the Criminal Code in its part regarding the Communist symbols before the Constitutional Tribunal, asking the judges to review the conformity of the law with the Poland's Constitution, the European Convention on Human Rights and the ICCPR, article 17 (case no. K 11/10).

Comments to the reply to question 5:

In 2008 Never Again Association published the Brown Book, a study presenting the scale of the racist crimes in Poland committed since 1989 onwards. The publication is prepared on the basis of the monitoring of national and local press, etc. The results of the study show the number of racist crimes has been significantly increasing since 2000. On the other hand, it has also shown that law enforcement authorities have been increasingly effective in combating these crimes. In any case, the problem has not yet been entirely dealt with. There are still cases where, despite evident violations of law, actions undertaken by prosecution service are ineffective or highly protracted.

Even if an indictment is filed, it may be impossible to eliminate the hate act itself. A good example of this is the case of the www.redwatch.info website. Here, three persons were charged with committing hate crimes. In spite of the charges being filed, the site operates uninterrupted because it is hosted at a server in the US. In this case, Polish law seems to be ineffective.

Still not all authorities of the justice system are sufficiently sensitised to hate crimes and hate speech. A decision by the District Court in Strzelce Opolskie, concerning members of the National Rebirth of Poland (*Narodowe Odrodzenie Polski*, a far right-wing nationalist organisation) can be given as an example of such insensitivity. The nationalist activists were accused of propagating totalitarian regime by raising arms in the gesture of the Nazi salute. The court held that such conduct should be treated as “the Roman greeting” and acquitted the defendants.

The decision handed by the District Court for Wrocław-Krzyków was equally controversial. The District Court adjudged that the public articulation of expressions like ‘There’s nothing you can do around here, Jew’ does not fulfil the statutory criteria of an offence because of the minor social harm related to this act.

The Helsinki Foundation for Human Rights also intervened with the Human Rights Defender (*Rzecznik Praw Obywatelskich, RPO*) in the case against Anna L. In 2009 Anna L. several times displayed in the centre of Warsaw banners with anti-Semite and hate-mongering slogans. The Prosecutor’s Office instituted but later discontinued the proceedings in this case. The decision was justified on the grounds that the slogans presented by Anna L. are within the limits of the freedom of speech.

Comments to the reply to question 6:

The answer of the Polish Government to this question should be supplemented with the following information. First, it must be indicated that there is a debate in Poland about amending articles 256 and 257 of the Criminal Code to expand the scope of criminal liability for hate speech also on homophobic speech. The initiative are being undertaken by the Campaign Against Homophobia (*Kampania przeciw Homofobii*, an NGO working for equal rights of LGBT persons) which prepared the relevant draft amendment to the Criminal Code. Second, there is no information about court actions brought because of discrimination based on sexual orientation and based on legal regulations regarding defamation, insult or provisions of the Civil Code. At this point, one should list the following cases heard during the last few years in Poland: the case concerning politicians comparing homosexual orientation to paedophilia, necrophilia and zoophilia, concluded with a final settlement pursuant to which the respondents apologised the homosexual public, the case of criminal threats involving the www.redwatch.info site, the case of violent crimes against persons of a different sexual orientation.

Comments to the reply to question 7:

It is worth emphasising that the Polish authorities currently have no comprehensive concept of integration policy. The integration assistance does not cover all the foreigners staying in Poland but only refugees and subjects of subsidiary protection. Those not included in these two groups receive no welfare benefits.

The welfare services system supporting the integration process should be assessed negatively since it does not contribute in practice to real integration of foreigners in Poland. The reality is that the welfare aid is limited only to the payment of money and Polish language courses are inappropriately conducted and organised. In practice, the foreigners receiving the above-mentioned aid are unable to use specialist consultancy support.

There are also other tools to assist immigrant integration in Poland. They include, among other things, the right to go to school for minors, the right to start a business or lawful employment without the permit and the ability to obtain funds from welfare services to finance these actions.

Comments to the reply to question 8:

At the outset, it must be stressed that the reply of the Polish Government failed to cover all the issues raised in the answer, in particular with regard to the practical course of the asylum-granting procedure in Poland.

Filing an application for granting the refugee status

Polish law recognises an international form of protection known as asylum. However, asylum is granted extremely rarely and only where granting it serves the interest of the State. In practice, if a foreigner files the asylum application, it is treated as an application for granting the refugee status. Authorities examine, within the same procedure, whether or not the applicant fulfilled the conditions of granting the refugee status. If such conditions are not satisfied, it is considered whether or not the foreigner may receive subsidiary protection and the permit for tolerated stay.

If a foreigner applies for the refugee status, a visa, allowing him or her to enter/stay in the territory of Poland, is cancelled. The foreigner's travel document is retained, instead, he or she receives a temporary identity document confirming the legality of his or her stay in Poland. This document expires after one month but can be renewed until the proceedings for granting the refugee status are concluded. In practice, the waiting time for issuing a renewed document can be even six weeks.

Considering an application for granting the refugee status

Whenever Poland is responsible for considering an application for granting the refugee status, the actual substantive proceedings are initiated. Pursuant to the law, the first instance proceedings should be concluded with issuing a decision within six months. In practice, the standard procedure takes much longer, often more than 12 or even 18 months. If the decision is not issued within six months, the foreigner should receive a letter designating the expected date of the proceedings otherwise being entitled to file the complaint on inactivity of the body conducting the proceedings. The foreigner may apply for the certificate enabling him or her to lawfully perform work in the territory of the Republic of Poland. In practice, it is very difficult for foreigners to find a job with the documents of such a short validity period.

Welfare benefits and healthcare during the proceedings

A foreigner applying for the refugee status is entitled to receive welfare benefits and healthcare during the continuance of the proceedings for granting the refugee status. Should the foreigner return to his or her country of origin and file another application for granting the refugee status in the Poland's territory within maximum two years after the return, he or she is entitled to receive healthcare and the welfare benefits amounting to one third of the benefits granted for a person staying outside a refugee centre. It must be emphasised that such benefits are insufficient to provide the means of subsistence for a person.

Issuing the decision and the appellate procedure

An applicant who received the negative decision is legally entitled to appeal against the decision before the Polish Refugee Council (*Rada do Spraw Uchodźców*) whose resolutions are final in administrative proceedings. If the decision provides for a deportation, the foreigner must leave the territory of Poland within 30 days. Such a resolution can be appealed against before the court.

In practice, foreigners who receive a negative decision on granting the refugee status, subsidiary protection or a decision declaring that there are no circumstances justifying granting the tolerated stay permit or a deportation decision often elect to file another application for the refugee status. In the application, the foreigners move that the enforcement of the deportation decision be suspended but such a motion is rarely granted. This decision can be appealed by the motion to re-examine the case. However, it is an illusory appellate measure as the re-examination of the case in practice results in repeating the reasons of the original decision issued in the matter.

The issue of streamlining asylum procedures

It often happens in Poland that refugee applicants submit the application in Poland and then go to other member state of the European Union. This state, if applies Dublin II Regulation, submits a relevant motion for receiving the foreigner back in Poland. Often the other country fails to disclose all circumstances of the case in the motion (e.g. that the foreigner has a family member in that country). Poland accepts the motion without verifying the circumstances in question and, after the foreigner is transferred to Poland, he or she requests to be united with the family member, in accordance with Dublin II. In a significant number of cases such request cannot be satisfied (a country where the foreigner wants to go argues that Poland has already taken responsibility for considering the motion for granting the refugee status) and the whole procedure additionally protracts the proceedings in the case (proceedings for considering the motion for granting the refugee status is suspended until the moment the state responsible for considering this motion is specified).

Comments to the reply to question 10:

In order to supplement the information about participation of women in political life presented by the Polish Government it needs to be mentioned that works relating to adoption of the Parity Act (The law on the equal presence of women and men on party tickets). This proposal, brought forward during the First Congress of Women, was put on paper as a citizen bill signed by over 150,000 Poles. The bill was delivered to the Sejm in December 2009. It shows the problem of insufficient participation of women in works of both the Sejm and the Senate. Legal opinions discussing the bill clearly indicate that enacting the Parity Act is required by the provisions of articles 3 and 25 of the ICCPR.

Comments to the reply to question 11:

The Helsinki Foundation for Human Rights notes that the mechanism of victim protection implemented under the Family Violence Prevention Act (*Ustawa o przeciwdziałaniu przemocy w rodzinie*) is not always an effective tool to eliminate family violence. As an example may be given the case of K.S. conducted by the HFHR Strategic Litigation Programme. The claimant brought action for damages against the State Treasury arguing inaction of state authorities. K.S. many times reported alleged offences committed by her husband, both to the Prosecution Service and the Police. She accused her husband of abusing her and her children, stealing from her and threatening her to set her house on fire.

In September 2005 the prosecutor filed with the court the indictment against the claimant's husband charging him with the offences of appropriation and maltreating the wife. The hearing date was set on 8 March 2006. At the hearing the court admitted the expert evidence given by two psychiatrists. The experts found that the defendant was unable to adjust emotionally and was possibly delusional and recommended that he be referred for psychiatric evaluation. On 19 April 2006 the court issued a decision to perform psychiatric evaluation. On 4 May 2006 the claimant's husband set his and his wife's house on fire. The fire destroyed the building almost completely and the claimant lost her remaining effects (earlier on, the husband took all her savings). Only two months before the incident, the claimant was once again seeking assistance from law enforcement authorities. Nevertheless, on 26 April 2006 (eight days before the fire) the investigation in the case was discontinued. No credit was given to the successive testimonies given by the claimant and her daughters. The decision to discontinue the proceedings was based on the fact that there were no 'objective witnesses who could corroborate the claimant's testimony'.

The investigation into the allegations against the claimant's husband is an example of a sluggishly and negligently conducted criminal proceedings.

Comments to the reply to question 12:

The answer of the Polish government can be supplemented with the information about the draft amendment to the Patient Rights and Patients Advocate Act (*Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta*) of September 2010. The draft law provides for an alternative non-judicial mechanism of enforcing patients' rights in cases of medical malpractice. Although at this stage of legislative works the draft amendment is not error-free, the very concept of introducing such a solution should be considered.

Comments to the reply to question 13:

Above all, a reference must be made to the judgement of the European Court of Human Rights rendered in the case *Tysic v. Poland*. This judgement is a direct and explicitly expressed confirmation of the previous positions and recommendations of the UN Human Rights Committee regarding the Poland's failure to ensure that abortions can be performed in medically justified cases. Moreover, another two similar matters are pending before the ECHR (*R.R. v. Poland*, application no. 27617/04 and *Z. v. Poland*, application no. 46132/08). Both concern the issue of unavailability of abortion in medically justified cases. Furthermore, national courts heard two landmark cases on liability for wrongful birth. The cases concerned, respectively, refusal of prenatal tests resulting in claimant's inability to take decision whether to abort her pregnancy or not and refusal to abort pregnancy resulting from a rape.

According to the HFHR, the failure to provide the above details may significantly affect the

assessment of the Polish Government report's accuracy. In our opinion, the Government should exercise a highest degree of care in presenting all the information which is examined by international bodies and organisations and considered as one of the key human rights issues in Poland.

Comments to the reply to question 14:

In 2007, the Council of Europe Commissioner of Human Rights suggested to the Polish Government the creation of a separate, fully independent body examining the cases of Police abuses. Having analysed the law in force, the Government declared that there is no need to create a new body and the relevant duties will be delegated to the Human Rights Defender (RPO).

The Helsinki Foundation for Human Rights would like to note that the position of the RPO in the Polish legal system guarantees a full independence of this body and extensive powers to monitor, examine and influence the national human rights protection system. On the other hand it must be said that the independence itself does not guarantee that a given body will work effectively.

There are two procedures for submitting complaints for actions of police officers to the RPO. The first consists in filing the complaint directly with the RPO office. The law grants the right to do so to all citizens (article 9 (1) of the Human Rights Defender Act). No charges are collected upon filing the complaint and there are no formal requirements which must be satisfied by the complaint apart from providing identity of the complainant and describing the subject-matter of the case. In this way, the RPO can be informed about any instance of the violations of civil rights and freedoms by the Police, not only the cases of abuse and tortures taking place in police detention facilities. The second procedure, described by the Polish Party in its response to the Committee's questions, consists in reporting cases of police officers abuses to Human Rights Plenipotentiaries (*Pełnomocy ds. Praw Człowieka*) by making a complaint.

The complaints regarding abuses of police and Prison Service officers which reach the RPO office usually concern tortures and other types of degrading treatment. The complaints are reviewed by two teams of RPO staff. Actions undertaken by the Human Rights Defender include, for example, contacting the head of a given unit, independently examining the matter and requesting the commencement of criminal proceedings by a prosecutor's office (article 14 of the Human Rights Defender Act).

While the first presented procedure (submitting the complaint directly to the RPO office) is straightforward and informal, the second complaint mechanism cannot be considered as a fast-track route for reviewing complaints in the matter presented in the question. It should be further noted that the RPO has no authority to initiate and conduct investigations within the meaning of the criminal law, being only entitled to request that such investigation be launched by a prosecutor. In consequence, it may be the case that the procedure which was designed to examine complaints directly and independently becomes an obstacle protracting the proceedings against abuses of power, used rather to doctor statistics than actually resolve difficult cases.

The National Centre for Prison Service Training admits that there are no specialist courses entirely dedicated to the humanitarian treatment of inmates. The issues of humanitarianism and human rights are included into modules of the standard training underwent by Prison Service officers. According to information given by the Spokesperson for the National Centre for

Prison Service Training, the Prison Service NCOs training covering the issues of the international standards of protecting the rights of prisoners and ways of treating prisoners comprises of four hours of classes in the 29 hour training module.

Comments to the reply to question 15:

15 a)

Replying to the Committees' question, the Polish Government quotes statistical data to challenge the statement that there is a significant variance between the number of the abuse complaints lodged against police officers and the number of criminal proceedings initiated and indictments filed as a result of such complaints.

The analysis of the statistics referred to by the Government leads 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 a majority of cases it is discontinued by the Prosecution Service on the grounds of the failure to collect enough evidence to file an indictment before the court.

The case *Rachwalski and Ferenc v. Poland* decided by the European Court of Human Rights (judgement of 28 July 2009, application no. 47709/99) confirmed that proceedings in matters of offences committed by police officers are unfairly conducted. In this case, the Applicants successfully argued that Poland infringed the prohibition of degrading and inhumane treatment enshrined in Article 3 of the European Convention on Human Rights. While the prosecutor conducting the proceedings in Poland decided that the police officers had not acted illegally, the ECHR explicitly held that the officers treated the Applicants in an inhumane way and applied disproportionate measures to enforce the law. The holding of the Court was entirely different than the decision of the Polish prosecutor who discontinued the investigation in the case.

15 b)

The Government quoted provisions of the Organisational Bylaws regulating the stay of foreigners detained in a secured facility and a detention centre pending deportation, constituting Annex to the Regulation of the Minister of Interior and Administration of 26 August 2004 on the conditions to be satisfied by secured facilities and detention centres and the organisational bylaws regulating the stay of foreigners detained in a secured facility and a detention centre pending deportation (Journal of Laws No. 190, item 1953) which provide that boards, containing information on the rights of the detained and contact to organisations assisting them, must be placed in interrogation rooms and living quarters. Pursuant to the Regulation, the boards must display content in Polish and, if possible, a language understandable for the detained foreigners. According to reports drafted by the National Preventive Mechanism (*Krajowy Mechanizm Prewencji*), a visiting body operating within the structure of the RPO Office, the tables are generally displayed only in offices and interrogation rooms and only in Polish. Consequently, detained foreigners are often entirely unable to learn about their rights as they can see the tables only for a short time and even then they may be unable to understand the content of the information.

As regards the duty to provide a detained foreigner with assistance of an interpreter, it should be noted that sometimes an interpreter fails to communicate to the foreigner all information or cannot speak the language spoken by the foreigner. For example, the Foundation was

contacted by an English-speaking foreigner who was given a French-speaking interpreter because the court decided that as a national of a country where both English and French are spoken she should have known French (which was not the case). Also, foreigners report problems relating to translations from and into less popular languages. In such cases, other foreigners are appointed as interpreters despite their insufficient command of Polish.

15 c)

The Police

In its reply to the question about the measures guaranteeing in-depth examination and explanation of the complaints about tortures allegedly applied by police officers, the Polish Government declared that such cases are investigated by an external and independent body, namely a prosecutor. The prosecutor acts upon a received complaint describing the events satisfying the statutory criteria of an offence. Further, the efforts undertaken to resolve the problem of police abuse are reinforced by the establishment of a post of coordinating prosecutor in the circuit and appellate prosecutor's offices. Coordinating prosecutors handle the cases of offences committed by police officers. The post was to be created by virtue of the letter of the National Prosecutor (*Prokurator Krajowy*) dated 8 August 2007.

However, it should be noted that the posts of coordinating prosecutors either do not function at all or are inaccessible through websites of individual prosecutor's offices. Out of the three key circuit prosecutor's offices contacted by the Foundation (in Cracow, Gdańsk and Poznań), only one (Circuit Prosecutor's Office in Gdańsk) has a functioning post of a coordinating prosecutor dealing with offences committed by police officers. Even in this case, no information on the coordinating prosecutor's activities was given on the prosecutor's office website. On the whole, it must be said that the letter of the National Prosecutor of 8 August 2007 ordering to establish the post of a coordinating prosecutor dealing with offences committed by police officers was implemented to a very limited extent.

Comments to the reply to question 16:

An amendment to the Criminal Code (*Kodeks karny, k.k.*) deleted its article 253 previously prohibiting trafficking in human beings and illegal adoption. The key element of the revoked regulation was the principle of criminal liability of parents participating in an illegal abortion, largely based on the broadly-interpreted concept of trafficking in humans. On the other hand, the newly introduced definition of trafficking in human beings under article 115 (2) of the Criminal Code may seem to be too narrow to include illegal adoption and, in consequence, result in criminal liability of anyone engaged in illegal adoption.

In this context one should note a highly controversial case in Poland concerning a married couple who bought from a woman (Mirosława M.) her daughter, paying PLN 4,000. The Prosecution Service decided to discontinue the investigation of the alleged trafficking in humans. According to media reports, the prevailing argument to drop the case was a decision of a Cracow court rendered several years ago. The court held in this decision that '[to be considered a crime] trafficking in human beings needs to serve a purpose contrary to the human subjectivity'. Prosecutors also argued that the child has not been harmed, has been raised in good conditions and has become attached to her 'parents'.

As regards the statistics presented by the Polish Government in respect of the final sentences imposed on perpetrators of the offences contrary to article 253 (1) of the k.k., one must

consider cross-checking them with the data collected by organisations assisting victims of trafficking in humans as the number of new cases of trafficking grows on a daily basis.

Moreover, the issue of trafficking in human beings is inseparably connected with the prohibition of forced labour. Preparations for Euro 2012 Football Championships cause the demand for labour force to grow. Workers are often hired from among nationals of Eastern European and Asian countries and receive very low wages in Poland. For example, two Uzbekistan nationals worked for a Polish company each of whom was paid about one zloty a day. The Helsinki Foundation for Human Rights intervened in this case. However, we learned that the proceedings in the case were discontinued by the Prosecution Service.

Comments to the reply to question 17:

In the opinion of the HFHR, the explanations given by the Polish Government with regard to the Committee's question 17 were superficial and do not provide an exhaustive response to the accusations regarding the alleged existence of secret CIA prisons in Poland. 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 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. The Polish intelligence facility in Stare Kiejkuty was a part of such a network.

Responding to the above-indicated reports, the Sejm examined the case of the CIA secret prisons allegedly existing in Poland during the closed meeting of the Special [Intelligence] Services Committee that was held on 21 December 2005. The minutes of the Committee meeting have not yet been disclosed and the public was only informed that there had been no CIA prisons in Poland and the matter was considered dealt with.

On 11 March 2008 the Attorney General initiated the investigation conducted at the 5th Department (Organised Crime and Corruption) of the Appellate Prosecutor's Office in Warsaw. The inquiry concerns the alleged abuse of power by state officials that is the offence under article 231 (1) of the k.k.. As the investigation was classified as 'top secret', state authorities consequently refuse to divulge any information on the scope of the proceedings or its findings. So far, the Prosecutor's Office made only one disclosure in the case, confirming on 4 February 2009 that CIA planes were flying in and out of the Polish territory, landing at the Szymany airport. In conclusion, the discussed investigation has been conducted for more than two years but so far the case has not been resolved. Due to secret character of the proceedings, the public knows nothing about its course or an approximate date of conclusion.

The HFHR wishes to emphasise that the majority of the information about the CIA secret prisons in Poland which has been already disclosed to the public was obtained thanks to the 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 was able to obtain from the Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*) the flight logs which showed that CIA planes many times landed in Poland and both Polish and US authorities were covering up their flight plans. It was the first time when a Polish government agency officially confirmed this. In addition, the Border Guard Service disclosed that the planes were carrying passengers. From 5 December 2002 to 22 September 2003 five out of seven planes that landed at the 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.

Moreover, newspapers lately reported, quoting an unofficial source within the Prosecution Service, that the prosecutors conducting the investigation had collected evidence sufficient to prosecute the top state officials in office during the period when the operations of the CIA prisons in Poland allegedly took place before the Court of State on the charges of committing war crimes (the offence under article 123 (2) of the Criminal Code).

So far a number of information was gathered to support the allegations regarding multiple cases of using tortures, illegal detention of persons and other major violations of human rights taking place during the war on terror waged after 11 September 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. Firstly, 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. Secondly, it was underscored that the fact that the proceedings are conducted by a specialised 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 can doubt whether the case of the alleged existence of CIA prisons in Poland and resulting human rights violations is treated with appropriate solemnity and diligence.

Comments to the reply to question 18:

Legislative changes of the operating provisions of the Criminal Procedure Code (*Kodeksu postępowania karnego, k.p.k.*) could be significantly more far-reaching. In this respect, the following issues should be addressed:

- 1) Legislators have not yet introduced to the k.p.k. a maximum, non-extendible term of pre-trial detention. It can only be mentioned that in the judgment of 24 July 2006 (case file SK 58/03) the Constitutional Tribunal held that specifying a maximum term during which pre-trial detention can be applied would encourage the authorities conducting criminal proceedings to work more efficiently;
- 2) The Code's regulation concerning appellate review of the decisions imposing pre-trial detention shows deficiencies resulting in unreasonably protracted proceedings before an appellate court. During the appellate review of the decision, the case files are transferred from the prosecutor's office to the court which results in the former being unable to effectively handle the proceedings. Considering the above, introduction of a seven day instructive time-limit for hearing the appeal by an appellate court should be recommended.
- 3) As pre-trial detention is a measure seriously affecting the rights and freedoms of a person, it would be worth to consider modifying the current pre-trial detention extension procedure by

granting only the Attorney General the right to apply to the court for extension of the detention period for more than 12 months which right would be exercised at the request of a prosecutor conducting the case;

4) The deficit in the Supreme Court's judicature on pre-trial detention may lead to the conclusion that it is the Supreme Court who should decide on applying this measure for the period longer than a year;

In the opinion of the Helsinki Foundation for Human Rights, the Government should take action in the following areas relating to pre-trial detention which were not addressed in the Government's answer to the respective Committee's question:

1. Public character of the pre-trial detention hearings.

In Poland there is no uniform practice regarding the participation of the public in the court hearings during which the issue of application/extension of pre-trial detention is decided. The experience of the Helsinki Foundation for Human Rights is that courts often refuse to allow the Foundation's representatives to be present at hearings as the public. However, pursuant to the resolution of the Supreme Court (dated 25 March 2004, case no. I KZP 46/03) [as a rule,] all court hearings must be held in open court.

2. Access to the case files of preparatory proceedings in respect of the application of pre-trial detention.

The Constitutional Tribunal reviewed the regulation regarding the defendant's and defendant counsel's access to case files in preparatory proceedings [i.e. criminal investigation] in respect of the application or extension of pre-trial detention. In the judgment of 3 June 2008 (case no. K 42/07) the Tribunal held that any arbitrary exclusion of the public character of records of preparatory proceedings is unconstitutional. In the reasons for the judgment the Tribunal reminded that the constitutional right to defence is not only the fundamental principle of the criminal procedure but also a fundamental standard of a democratic state ruled by law. The consequence of the Tribunal's judgment was the amendment to the Criminal Procedure Code introduced as of 16 August 2009. The new law provides that *in the course of preparatory proceedings the defendant and counsel for the defendant shall be provided access to the case files in their part including the evidence indicated in the motion for applying or extending pre-trial detention and enumerated in the [court's] decision to apply or extend pre-trial detention.*

Moreover, it should be noted that the Excessively Lengthy Proceedings Complaint Act (*Ustawa o skardze na przewlekłość postępowania*) raised numerous objections. This legal measure (the complaint about excessively lengthy proceedings) cannot be used, for instance, in proceedings pending before administrative bodies.

Instead, administrative proceedings can be accelerated by the following measures: the objection submitted to an administrative body regarding its failure to deal with the case and the complaint about inaction, filed with a provincial administrative court. However, in the judgments rendered in the cases *Kamecki and Others v. Poland* (Application no. 62506/00) and *Stevens v. Poland* (Application no. 13568/02) the European Court of Human Rights held that there is no obligation to use such measures before filing an application to the ECHR accusing Poland of infringing the Applicant's right to have a case heard in a reasonable time. Another problem with the Act is the fact that the filing and hearing of the complaint itself protracts the proceedings.. The procedure triggered by filing the complaint about the

excessively lengthy proceedings can delay the conclusion of the original proceedings by even two months (the time-limit given to the court to consider the complaint). This time-limit is of an instructive character which means that courts will not be held liable in any way for the failure to timely dispose of the complaint.

Furthermore, the ruling on the complaint is entered in a single instance proceedings and is not subject to any appellate measure, either ordinary or extraordinary. A separate issue is the amount of the compensation awarded by the court if the proceedings are held to be excessively lengthy. The Act fails to provide any guidelines for the court in this respect. It must be taken into account that, according to the Government's statistics, the value of an average compensation awarded in the discussed cases is almost at the minimum statutory level and remains at a significant variance with the average 'fair compensation' awarded by the European Court of Human Rights in cases where the Court ruled that the right to have a case heard in a reasonable time was infringed (e.g. in *Sokołowska v. Poland*, Application no. 7743/06). The reason for awarding such low amounts of money may be the fact that the courts have no guidelines regarding the factors to be taken into consideration in ordering to pay to the complainant a suitable sum.

Comments to the reply to question 19:

The Helsinki Foundation for Human Rights has been approached by foreigners who claim that they were placed in detention pending deportation despite being under the age of majority. It should be noted that the manner of establishing foreigners' age raises serious reservations. The compulsory medical examination, and in particular X-ray scans performed to establish whether the minors, who illegally crossed the border and apply for the refugee status or were illegally staying in the EU, are at least 14 years old or younger, raise justified doubts as potentially violating the minors' right to privacy. Furthermore, the issue of methods and procedures of assessing the age of persons applying for the refugee status should be governed by a generally applicable legal act rather than exclusively internal bylaws or similar regulations. In such a way, everyone would be given access to information regarding these procedures and the procedures could be transparently applied. At the same time the law would safeguard the rights of the persons subject to the medical examination.

The proceedings for detaining and placing a foreigner in a secured facility or detaining a foreigner pending deportation are conducted on the basis of the Criminal Procedure Code. Cases received by the HFHR show that foreigners very rarely appeal against District Courts decisions ordering their placement in a secured facility or detention pending deportation. Courts tend to grant Border Guard Service motions for placing a foreigner in a secured facility or detention, although pursuant to the law in force a foreigner can be obliged to stay in a certain area until the decision is enforced. The foreigner can also be obliged to periodically report to a body named in the decision.

Comments to the reply to question 20:

Overpopulation and conditions in prisons, detention centres and jails

Police detention facilities

Referring to the conditions of deprivation of liberty the Government indicated visits and audits conducted by authorised entities: the RPO (acting as the National Preventive Mechanism) and Circuit Courts judges.

Pursuant to Article 18 (3) of the Optional Protocol to the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (OPCAT) a state undertakes to provide the necessary financial and human resources for visiting all the 'places of detention' defined in Article 4 of the OPCAT. In 2010 the visitation group lost its ability to act as an interdisciplinary body because of a difficult financial situation caused by the complete elimination of the funding of the National Preventive Mechanism. During the first quarter of 2010 visits were conducted in seven facilities for detainees or intoxicated persons. The RPO report did not raise the issue of overpopulation but noted poor living conditions in one of the visited facilities, which, in the RPO's opinion might have resulted in inhuman treatment of the inmates.

The Government indicated that the audits may be also performed by Circuit Courts judges acting as authorised entities. Unfortunately, it is difficult to access any results of the judges' visits. In the context of efficacy of the mechanism it is worth to note the report regarding the Alliance for Implementing the OPCAT, the meeting of the Coalition of NGOs and university circles of 8 December 2008. The report showed 'inertia and unreliability' of the judicial supervision which played a significant role only in the early period of its functioning when prisons were not monitored by any other independent institutions. According to the Alliance, presently the judicial supervision is illusory.

Prisons and detention centres

As regards the statistical data on overpopulation presented by the Polish Government, it must be noted that the quoted figures represent the average inmate population in the whole country. There are facilities with the occupancy rate of zero or 50 per cent but also those with the rate reaching 130 per cent. According to the Report on the Occupancy Rate at Residential Units of Penitentiary Facilities, as of 9 August 2010 242 residential units were overpopulated (as indicated by the occupancy rate of 100 per cent and more). In respect of the average occupancy in particular circuits, the limit was exceeded in the Łódź and Opole Circuits (in both cases the occupancy rate was 100.1 per cent). In consequence, there are still facilities where the statutory minimum area of a living cell (three square meters per a person) is not guaranteed. As of January 2010 the problem of insufficient living space was experienced by 2,391 inmates. In the following months this figure grew to 3,474. On the other hand, beginning from April 2010, the respective number started to decrease systematically; in July only 98 inmates were not guaranteed the statutory living area. The problem of overpopulation does remain a very relevant issue which is confirmed by its ongoing media coverage. On 18 August 2010, *Rzeczpospolita* (a nationwide daily) ran the article on the lawsuits for damages filed by inmates of Polish penitentiary facilities. Ninety per cent of the complaints concern the issue of overpopulated cells. The article notes that the scale of the phenomenon is still large and emphasises the consequences of putting inmates in too small cells that must be faced by the state.

Despite the legislative changes the authorities failed to completely remedy the problem of inmates being placed in cells with the living area lower than three square meters per a person. According to the above-mentioned data provided by the Central Prison Service Authority the number of the inmates without sufficient living space in January, February/March, April, May, June and July 2010 was, respectively 2,391; 3,574; 2,198; 1,369, 829 and 98.

Legislative changes concerning the issue of prison overpopulation

The penalty of limitation of liberty

Although not revolutionary, the changes to the system the penalty of limitation of liberty introduced in the amendment of 5 November 2009, effective as of 8 June 2010, are a step into the right direction. As they became binding law relatively recently, it is hard to say how effectively in practice they will contribute to eliminating the problem of prison overpopulation. However, as far as the application of the non-custodial penalties is concerned, it seems that the problem is not the law but the established judicial practice: the courts are more willing to impose conditionally suspended custodial sentences than the penalty of limitation of liberty.

Electronic Surveillance System

Another initiative taken by the state to tackle the issue of overpopulated prisons was the introduction of a new system of serving the penalty of deprivation of liberty. The new regulation was implemented in a statute of 7 September 2007, effective as of 1 September 2009. Pursuant to the new law, the new electronic surveillance system (*system*) may be used in the case of defendants either sentenced to a prison term of not more than six months or sentenced to a prison term of not more than one year providing the remaining time of the sentence does not exceed six months. The court decides whether to apply the new system or not upon the motion by the defendant. The SDE cannot be used by persons convicted for an intentional offence or a tax offence previously sentenced to the penalty of deprivation of liberty. In practice, these conditions proven to be too restrictive, very significantly reducing the number of prospective SDE participants. This was one of the reasons the act was amended, effective as of 25 June 2010. According to the calculations presented by the Government, the amendment resulted in a four-fold increase in the number of convicts eligible to be covered by the system.

From the perspective of human rights protection, the new system should be assessed positively as it allows its subjects to serve custodial sentences outside the correctional facility. However, the necessity to amend the Act of 7 September 2007 after such a short time following its promulgation shows that the regulations of the Act are completely ineffective. Implementation of the electronic surveillance system was extremely costly and yet, as from 31 May 2010, only 50 persons were admitted to participate in the SDE programme. On the other hand, as the amended law entered into force only quite recently, it is difficult to unambiguously state what is the extent of the amendment's practical impact on the efficacy of the electronic surveillance system.

Conditions in police sobering-up centres

The 4th District Police Station in Warsaw Warszawa – Wola District

In its reply to the question about the conditions in sobering-up centres, the Polish Government failed to mention that on 8 December 2009 the NPM visited the facility referred to in the question, namely the 4th District Police Station in Warsaw (Wola District). The Government only declared that in 2005 'the facility was thoroughly renovated which resulted in remedying the raised issues'. Contrary to this statement, the report on the activities of the NPM in the 4th quarter 2009 says that during the visitation several irregularities were found, primarily in the areas indicated by the UN Human Rights Committee as those requiring the most attention. For instance, according to the report it was necessary to upgrade the lighting system in detainees rooms, reconstruct the sanitary room and improve general hygienic conditions in the facility. Moreover, the visit found that the Police Station had no permit of the National Hygiene Inspectorate for the use of the detainees rooms located in the basement. The NPM report did not cover the issue of detainees difficulties in accessing potable water.

Comments to the reply to question 21:

Advising a person deprived of liberty on the right to a free legal counsel under article 78 of the Criminal Procedure Code

As it was indicated by the Government, Polish criminal procedure guarantees that a detained suspect is advised on the right to a free legal counsel. The duty to inform the suspect about this right is imposed on the authorities conducting criminal proceedings. The advice on the right to counsel is not followed by the information that the suspect may request a court-appointed (free) counsel if covering the costs of legal defence by the suspect would cause any deficiency in the necessary means of subsistence for the suspect and his or her family. A separate problem arising under the Polish law is the question whether or not a person detained but not yet formally suspected of committing a crime may request a court-appointed counsel.

The problem of giving information about the right to receive free legal aid can be easily solved by including the relevant advice into the written notice of the suspect's rights and duties which is handed to the suspect each time upon presenting formal charges and during the first questioning.

Possibility of supervising defendant's contact with counsel and inspecting the defendant's mail

The Government correctly informed that during his or her stay in a detention facility a person detained pending trial has the right to contact his or her counsel without anyone else present. Detainees are also entitled to contact the counsel by mail. At the same time, in particularly justified cases and for the period not longer than 14 days from the date the suspect was detained, a prosecutor may order that the suspect contacts with his or her counsel will take place in the presence of the prosecutor or a person authorised by the prosecutor. The prosecutor can also order that the suspect correspondence with the counsel be inspected for the same duration.

It must be noted that the discussed prosecutor's power is exercised only incidentally but it is much doubtful that the power is used solely in exceptional and particularly justified cases.

Other, this time practical, problem relating to correspondence between the detained suspect and his or her counsel is the manner and timeframe of its delivery. Even if the correspondence is not inspected, it is still forwarded by the administration of the pre-trial detention centre to the prosecutor conducting or supervising the case. In consequence, sometimes a letter from the detainee reaches the attorney after four or six weeks.

The possibility of communication between a detained defendant and his or her defence counsel prior to a court hearing

As far as exercising the right to effective defence is concerned there is another much more important problem consisting in practical lack of conditions for a confidential contact between a detained person conveyed for a hearing to a court and his or her attorney prior to the hearing. It is so because a police officer responsible for the conveyance of the detained is present during any consultations between a detained person and his or her attorney taking place before the hearing.

The right to effective defence could be exercised only then where rooms intended for a direct and confidential contact of a defendant with an attorney were set up in courts.

The possibility of real-time confidential communication between a defendant and his or her defence counsel in an enhanced security court room

As regards the possibility of confidential communication of a detained defendant with his or her counsel for defence the most far-reaching objections are raised with respect to the proceedings conducted in enhanced security courtrooms. The problem which must be commented on lies in the fact that the conditions in such courtrooms prevent any form of confidential contact between the detained defendant and his or her counsel not only prior to but also during the hearing before the court.

An example of this situation is a secure courtroom used by the Warsaw-based courts located at ul. Kocjana. Defendants are seated on the opposite side of the courtroom from their attorneys and are kept behind armoured glass. It prevents effectively any form of real-time communication between a defendant and his or her attorney during the trial, even in such fundamental issues as the content of testimonies given by the witnesses and questions they are asked. Direct and real-time communication between a defendant and an attorney is extremely valuable and indispensable element of the right to effective legal defence.

Comments to the reply to question 22:

Inmates have many times raised in their complaints the issue of censoring correspondence addressed to the European Court of Human Rights in Strasbourg. Among cases pending before the ECHR in recent years there are few representative and relatively new judgements worth mentioning, i.e.: *Matwiejczuk v. Poland* (Application no. 37641/97, Judgement of 2 December 2003), *Jasiński v. Poland* (Application no. 72976/01, Judgement of 6 December 2007), *Wenerski v. Poland* (Application no. 44369/02, Judgement of 20 January 2009) and *Pasternak v. Poland* (Application no. 42785/06, Judgement of 16 July 2009). In all these cases the ECHR found a breach of Article 8 (1) of the European Convention on Human Rights and each time stated that as long as the Polish authorities will be attaching a stamp 'censored' to inmates' letters the Court has no other choice as only assume that envelopes have been opened and the content of the letters read. At the same time the ECHR acknowledged that under the Polish law and specifically the Criminal Execution Code [*Kodeks karny wykonawczy*] any censorship of letters between inmates and international human rights protection bodies is illegal, which proves that the problem lies not in the faulty legislation but unlawful practices.

It seems that such breaches of the Convention could be eliminated provided that clear standards on exchange of letters with the ECHR are developed. In view of that preparing the *Manual of the Head of the Prison Service no. 4/2007 of 16 November 2007 on the manner of handling the letters addressed to the ECHR in Strasbourg and other international human rights bodies* must be perceived as a step in the right direction. The Manual governs the procedural aspects of delivering inmates letters which are to ensure confidentiality of such communication. It provides, among other things, for the possibility of installing special post boxes in prisons which would be designed for the letters to the ECHR. All these are the positive initiatives worth mentioning.

A low number of complaints on the censorship of correspondence addressed to the ECHR (according to the information given by the Ministry of Justice, only one complaint was filed in the period from October 2003 to October 2008) indicates that the complaint procedure provided under the Polish law is used neither sufficiently nor effectively. The very number of the complaints filed with the ECHR suggests that there must have been significantly more cases of such breaches. Comparison of the number of the ECHR cases with only one

complaint which has been submitted in Poland within the last five years gives a clear indication of the ineffectiveness of the discussed procedure. Obviously, disparities between the number of complaints filed in domestic and international proceedings result from, among other things, specific nature of the breach and the inmate's inability to decide whether his or her mail was in fact censored and also from the fact that the ECHR responds immediately to any breach of confidentiality of mail. Nevertheless, taking into account the above information one ought to consider whether the complaint procedure is actually effective and efficient under the Polish law.

Comments to the reply to question 23:

It seems that it is necessary to include the statistical data in the deliberations on submitting complaints, even more so since such data were omitted in the Government's reply, regardless of being publicly available at the Ministry of Justice website. In 2008 and 2009 the number of the complaints submitted by the inmates of the detention centres and correction facilities amounted to, respectively 23,094 and 27,925. It must be noted that in 2008 alone 310 complaints (1.3 per cent of all the complaints filed) were accepted on their merit, whereas in 2009 the relevant figures was 323 (1.2 per cent).

In the context of these statistics one can question the efficiency of the complaint mechanism and the accuracy of the procedures for processing complaints submitted by inmates. It seems highly questionable that merely one per cent of all complaints was legitimate. In view of the above it may be assumed that serious problems described by inmates in their complaints tend to be ignored or overlooked. Moreover, the disparity between the number of complaints which were submitted and those found of merit may adversely influence the inmates' trust in the correctional system. Despite the fact that the procedure for processing complaints is comprehensively regulated and disciplinary liability of prison service officers who have breached the law is provided for a complaints system still leaves much to be desired.

The HFHR receives several dozen letters every week, a great proportion of which comes from detained persons. The analysis of these letters indicates that though legal guarantees have been granted to the inmates submitting complaints there are still cases of ostracising such inmates and making threats against them. Further, it is worth stressing that some inmates request the HFHR to take supervision over the complaints procedure. It is another proof of inmates lack of trust to this procedure.

As a result of the detailed analysis of the available statistical data regarding the complaints proceedings it is worth mentioning what kind of conclusions are drawn by the Ministry of Justice in its annual *Information on the manner of accepting and processing complaints and motions filed with the Ministry of Justice*. There are no details of the measures taken by the Central Prison Service Authority and district Inspectorates of Prison Service in the known cases of infringements of particular duties related to the processing of complaints by the Prison Service officers. The very fact of recording in the statistics developed by the Team for Detainee Complaints at the Legal Office of the Central Prison Service Authority for the Minister of Justice that the proceedings were timely completed cannot be deemed a sufficient disclosure which may enhance the citizen's trust in the entire procedure as well as belief in the efficiency of such proceedings. To avoid accusations that explanatory proceedings are not conducted with appropriate care (which might have resulted in a negligible number of cases found of merit) and bring no real effects one should consider introducing a more detailed and easily accessible manner of describing outcomes of the complaints proceedings. Even if the legal provisions explicitly state what measures are to be taken against prison service officers if the court finds them guilty of misconduct, it must be remembered that inmates are not

competent enough to know the applicable law. Therefore providing more detailed descriptive information could be essential for the promotion of this procedure.

Comments to the reply to question 24:

Please indicate details on the implementation of the vetting law in Poland.

The Vetting Law Act (*Ustawa lustracyjna*) of 2006 takes a unique approach to the issue of the public character of vetting proceedings and access to case files. On the one hand, the Act excluded the possibility of conducting the proceedings in camera solely upon the request of the vetted person without such a person having to justify his or her motion. On the other hand, the Act introduced the rule that case files in the proceedings which have been concluded with a final and binding court decision are public and widely available at the Institute of the National Remembrance [*Instytut Pamięci Narodowej*, IPN]. Such understanding of the public character of vetting proceedings is not tantamount to what is known as the principle of internal disclosure, i.e. the right of parties to the proceedings to the review case files. Contrary to the Government's arguments, public character of the vetting proceedings has nothing in common with the rights of a vetted person, his or her access to court records or shaping the defence strategy in vetting proceedings. Thus it can be only considered with regard to the right to respect one's privacy.

With respect to the case-law of the ECHR and starting specifically from the Judgement of 24 April 2007 in the case *Matyjek v. Poland* (Application no. 38184/03), the ECHR found that the arms length principle and the right to effective legal defence of the vetted person in vetting proceedings (Article 6 (1) read in connection with Article 6 (3) of the European Convention on Human Rights) are regularly violated. Such violations are the consequence of limiting the vetted person access to the classified archive documentation. At the same time the ECHR indicated that the Commissioner for Public Interest [*Rzecznik Interesu Publicznego*] and a vetted person are not on equal terms with respect to their access to case files at the pre-trial stage of the proceedings.

Principles specifying access of parties to the proceedings to classified materials are governed by the provisions of the Criminal Procedure Code, applied *mutatis mutandis* in vetting proceedings. According to the law currently in force parties are not allowed to make any notes while reading classified materials in a secret office. Such a situation causes a far more serious infringement of the right to the effective defence of the vetted person than these indicated in the ECHR caselaw. It follows from the experience of the Helsinki Foundation for Human Rights that classified materials are still used in vetting proceedings.

At the same time the HFHR sees a new area where the arm's length principle in vetting proceedings can be breached. The risk results from the fact that the IPN has obtained a number of powers which may prove to be mutually exclusive. The Vetting Act of 2006 abolished a separate body, the Commissioner for Public Interest, which was responsible for preliminary verification of vetting declarations and acted as prosecuting party in vetting proceedings. The Act entrusted the said powers to a new department established within the IPN structures, namely the Vetting Office [*Biuro Lustracyjne*].

The Government's position focuses on the importance of the public character of the majority of the materials kept by the IPN. Meanwhile, the practice shows that persons listed in the archive materials have significant problems in gaining access to such documents. This issue remains outside of the scope of vetting procedure itself but nevertheless is very problematic. Until recently it was practically impossible to be granted access to documents stored by the

IPN in administrative procedure if such documents indicated that the applicant was treated by the security forces as secret informant or a person assisting in collecting intelligence or that the applicant agreed to provide information to the state security forces or provided them with any assistance in security operations or performed tasks commissioned by the state security forces, in particular delivered intelligence to such body. The above situation continued despite the Constitutional Court judgement of 11 May 2007 (case file no. K 2/07) stating that limiting access to materials on such grounds is contrary to the Constitution. The law in force was changed as of 27 May 2010 that is on the date of the entering into force of the Act amending the Institute of National Remembrance (Commission for the Prosecution of Crimes against the Polish Nation) Act and the Act on Disclosing the Information on Documents of the State Security Forces in 1944-1990 and the Content of such Documents of 18 March 2010.

Comments to the reply to question 25:

Works on the Juvenile Code (*Kodeks nieletnich*) have been performed for several years now. In the process two completely disparate views of the procedure for handling juvenile offenders who show signs of deprivation were confronted. In fact, this dispute comes down to the question of whether, considering the reality of the Polish legal system, it is reasonable to extend the age at which juvenile delinquents may be held criminally liable or, alternatively, introduce less stringent principles of liability.

Polish Government informs that it has developed a draft amendment to the on Juvenile Delinquency Procedure Act [*Ustawa o postępowaniu w sprawach nieletnich*]. It is difficult to comment on the reply of the Polish Government to the asked question without having the chance to read the said draft which, *inter alia*, is not available on the Ministry website. In view of the government's comments it seems possible that the new law will introduce the practice of accommodating deprived fugitives from youth custody centres and youth social therapy centres in the police custody centres. However, since the draft act is not available to the public the Foundation is unable refer to the information provided by the Ministry of Justice.

Polish Government continues to ignore in its replies the problems which have been widely discussed recently. On 2 March 2010 the ECHR entered the judgment in the case *Adamkiewicz v. Poland* (Application no. 54729/00, Judgment of 2 March 2010). In the said judgement the ECHR found that the Applicant's right to defence (Article 6 (3) of the Convention) was violated as the Applicant was allowed to contact his defence counsel only after six weeks after he was detained. The ECHR also held that the Applicant was refused the right to be given a fair hearing (Article 6 (1) of the Convention). The ECHR emphasised that in the proceedings involving elements of repression conducted against a juvenile suspect, the state is burdened with the special responsibility to ensure effective legal assistance to the suspect. The ECHR also pointed out that the state is obliged to act in such proceedings in the best interest of the juvenile suspect. Another directive in that respect is the principle of individual approach to the defendant according to which the course of the proceedings needs to be adjusted to the defendant's age, health condition and level of intellectual and mental development.

The Government's answer omits the issue of the circumstances of adopting the *Regulation of 20 July 2009 amending the regulation on the youth custody centres and youth shelters* (Journal of Laws No. 119, item 996) whose § 1 (24) introduces Chapter 9a entitled '*Safety measures in youth custody centres and youth shelters*'. Especially important are the provisions imposing an obligation of 24-hour monitoring of rooms in the facilities with a full or limited protection system or enabling the same to be applied at facilities having simplified

protection systems. The fundamental problem related to this issue concerns adopting the above regulations in the form of secondary legislation which has to be considered unacceptable with regard to the human rights guarantees. The protection of the rights of juvenile persons appears to be an issue of exceptional significance and sensitivity as such persons, owing to their age, are specifically at risk of suffering irreparable damage caused as a result of their rights being violated. Thus, the regulations on using image recording devices ought to be included in an act of the statutory rank which is the only way by which the public authorities may justify the interference in human rights and freedoms protected under the law.

Comments to the reply to question 26:

In its reply to the question regarding the measures taken by the state to improve the conditions in the Police facilities to which children are transferred, the Government failed to present the practical aspects of functioning of the police detention centres to a satisfactory extent. The Government's reply was limited to indicating the binding legal provisions governing the organisation of such facilities.

The RPO requested that a new legislation be proposed to issue a regulation governing in detail the living conditions to be secured in police children's custody centres and the rules governing the children's stay in such facilities. In a reply to such position the MSWiA indicated that it would be optimal to include the relevant regulations in the Police Act [*Ustawa o Policji*]. Unfortunately, the amendments to this Act enacted so far failed to introduce any new provisions on the issue. On 19 March 2010 the RPO again addressed the Minister of the Interior and Administration in this matter.

Currently the most serious problem is where to place the children who have not committed a crime and are not suspected of a crime but have only escaped from e.g. foster care centres. It must be explicitly stated that police children's custody centres are not proper facilities for the children who have not been appropriately looked. It must be stressed that only minors who either have committed or are suspected of committing a punishable act (a crime) may be detained at police children's custody centres. Detention of any other persons at isolation centres violates the law, irrespective of any contrary arguments raised (e.g. no consent given to accept escapees at intervention facilities subordinate to the Ministry of Labour and Social Policy). In this context it is particularly disturbing to hear that the Ministry of Justice prepares a draft amendment of the current regulations which would legalise the practice mentioned above.

Comments to the reply to question 27:

According to the HFHR the presented by the Polish Government legislation changes may contribute to the enhanced protection of children against sexual and economical exploitation. Yet, one still has to wait for measurable effects (such as the reduction of sexual offences against minors). The expected result of the discussed amendments, if any, will manifest itself within the next few years. At the moment, one may say that the indicated changes to the provisions of the criminal law have their consequences in expanding a range of criminalised behaviours harmful to the wellbeing of children as well as introducing tougher penalties against sexual offenders.

It ought to be remembered that the above-discussed amendments, though adopted for the sake of children, sometimes were not given enough consideration. At that point it is worth taking a closer look at the procedure of punishing offenders who have committed a paedophile or incestuous rape which was introduced under the 2009 amendment. The said amendment

provides for the penalty of between 3 and 15 years of deprivation of liberty for the offence discussed. And after offenders have served the adjudicated sentence, they are referred for pharmacological therapy or psychotherapy in a secured facility or out-patient clinic for an unspecified time, depending upon progress in treatment.

The very essence of precautionary measures in the form of detention for treatment lies in the fact that they are applied against perpetrators of an offence who, for various reasons, are either unable to be held criminally liable (due to mental disease, mental incapacitation, etc.) or their ability to bear criminal liability is limited (because of alcohol and drug addiction, etc.). It is emphasized that precautionary measure is not a minimum criminal penalty and is not intended to be a punishment but a therapeutic action and a method of treatment which are to enable the offender to function in the society. At the same time, precautionary measures (e.g. detention in a secured psychiatric facility) are applied to protect the society against a dangerous offender who is unable to identify the consequences of his or her actions. But in the case of perpetrators of a paedophile or incestuous rape the criminal liability (in the form of the penalty of deprivation of liberty) is combined with precautionary measures (imposed compulsory after the sentence has been served). It shows the inconsistency of the legislators' assessment and ambiguity of the amended procedure. If we assume that sexual offenders, who are to be punished under the binding law, suffer from a sexual preference disorder, then imposing a prison sentence on them only delays the moment of starting the therapy as they do not undergo any effective therapy while serving a sentence in a correctional facility. The conclusion may be drawn that the penalty of deprivation of liberty imposed on them serves only to satisfy the public's sense of the breached justice, completely ignoring individual and preventive as well as social rehabilitation functions of the penalty.

Comments to the reply to question 28:

According to the HFHR the reply given to the answer on teaching ethics at schools is by far insufficient. The problem of no classes on ethics being conducted at Polish schools is not a new one. The HFHR has repeatedly attracted public attention to that issue, even more after the *amicus curiae* opinion was submitted in the case *Grzelak v. Poland* in 2008. We feel that despite a broad debate on the subject no political actions have been taken to solve the problem. In our opinion the judgement of the ECHR in the case *Grzelak v. Poland* cannot lead to conclusion that it is an isolated issue or related to some specific schools only. On the contrary, inaction on the part of Polish government, especially the Ministry of Education, lead to a situation where headmasters do not feel responsible for organising the teaching of ethics at schools. The Ministry of Education does not take sufficient efforts to ensure the appointment of ethics teachers and to allocate appropriate budget funds to that aim.

We cannot accept the statement that *'The Constitutional Court has neither disputed Polish legal regulations governing the issues of organising the teaching of religion and ethics nor those which pertain to including the grades from religion and ethics classes in the student's grade point average'*. Obviously the ECHR cannot question a legal regulation (The ECHR is not a constitutional court but it may assess how the law is applied). However, the ECHR explicitly stated that including the grades from religion/ethics classes to the grade point average in a situation where only religion classes are held in most school is an additional manifestation of discrimination. According to the HFHR the above position of the ECHR will require the amendment of the provisions in question. It will be also necessary to solve the problem of crossing out the box where the grade from religion/ethics classes should be placed on a school certificate as it may indirectly result in disclosing religious beliefs of a student.

Comments to the reply to question 29:

Article 212 of the Criminal Code introducing criminal liability for the crime of defamation (*zniesławienie*) has stirred controversies for many years. The basic question comes down to whether it is reasonable to punish a journalist for actions which are performed as part of his or her professional duties in a situation where he or she (or the editor-in-chief and the publisher) could be sued in a civil court in the case involving protection of personal interests.

Article 212 of the k.k. is often overinterpreted. In practice, the cases of adjudicating a penalty of deprivation of liberty carried by this article are rare. Much more severe is the very threat of criminal liability, standing trial as a defendant in a criminal case, as well as the possibility of applying preventive measures in the pre-trial proceedings. At the same time the studies reveal that an exceptional majority of defamation cases end with the same sanction as a typical civil case, i.e. financial sanctions. That even more justifies abolishing Article 212 of the k.k. and replacing the same with civil-law liability.

On 8 June 2010 the amendment of Article 212 of the k.k. came into force (the Act of 5 November 2009, Journal of Laws, item 1589). The original idea of the amendment was to abolish criminal liability for defamation entirely, irrespective of the fact whether the defamatory statement was recorded by mass media or not. Nevertheless, the Sejm changed the scope of the amendment. Pursuant to the introduced changes the crime specified in article 212 (1) of the k.k. is punishable with a fine or the penalty of limitation of liberty. Hence, the legislators removed the penalty of deprivation of liberty which existed in the pre-amended article. For the aggravated form of defamation (Article 212 (2) of the k.k.) the maximum penalty of deprivation of liberty was reduced from two years to one year.

The proposed changes are heading in the right direction. Still, they are insufficient in the light of international standards, specifically the case-law of the European Court of Human Rights. Poland is repeatedly found guilty of breaching Article 10 of the European Convention on Human Rights in cases of Polish courts sentencing journalists and local politicians under Article 212 k.k.

The key decision on defamation entered by the Polish courts is the judgement delivered in the case *Długolecki v. Poland* (Application no. 23804/03). A local politician instigated criminal proceedings for defamation against Mr Długolecki. Finally, the proceedings were conditionally discontinued for a year. In its judgement of 24 July 2009 the European Court of Human Rights found that the penalty imposed on the Applicant was relatively low and the proceedings pending in his case were conditionally discontinued, but the fact remains that domestic courts found the Applicant guilty of defamation. As a result, the Applicant's personal data were entered into the register of convicted persons. Further, the authorities left open the possibility to start the proceedings at any time during the probation period which constitutes an undue interference into the freedom of speech. A similar decision was issued by the Constitutional Tribunal on 2 February 2010 in a case *Kubaszewski v. Poland* (Application no. 571/04) and on 22 June 2010 in a case *Kurlowicz v. Poland* (Application no. 41029/06). It must be indicated that standards emerging from the case law of ECHR are extremely rarely applied by Polish courts.

The constitutionality of provisions of Articles 212 § 1 and 2 k.k. (in their wording binding until 7 June 2010) was resolved under the judgement of the Constitutional Tribunal of 30 October 2006 (Journal of Laws, No. 202, item 1492). In its response to the question of one of the courts the Tribunal adjudicated that these provisions are in compliance with the Constitution.

Further, in its judgement of 12 May 2008 (SK 4305) the Constitutional Tribunal found that Article 213 (2) of the k.k.¹ (which contains a defence for the offence of defamation) is in violation of Articles 14 and 54 (1) in conjunction with Article 31(3) of the Constitution in its scope referring to the offence under 212 (2) of the k.k. containing the following wording ‘intended for the protection of the justified interest’ in cases where the charge pertains to the conduct of public officials. The Court decided that raising or spreading true charges concerning public officials of such conduct or features which may expose such a person to risk of losing public trust necessary to hold a certain position, perform certain profession or type of activity, is an act which, *ex definitione*, serves the justified public interest.

In the light of the judgements of the Constitutional Tribunal listed above and declaration of constitutionality of Article 212 of the k.k. the only form of action that may lead to criminal liability for defamation being abolished is exerting political pressure or applying the standards specified by the case-law of the European Court of Human Rights by the courts deciding in cases involving the freedom of speech.

Comments to the reply to question 30:

Concrete legislation works on the current provisions of the Assemblies Act (*Prawo o zgromadzeniach*) of 5 July 1990 are required since the binding regulations, in many aspects, fail to address the problems of today. Specifically an appeal procedure against the prohibition on holding an assembly needs to be amended. The judgment of the European Court of Human Rights in *Bączkowski and others v. Poland* of 3 May 2007 (Application no. 1543/06) regarded the above issue. The Assemblies Act obliges the assembly organiser to notify the commune official (head of the commune/mayor or president of a city) of their intention to hold the assembly. The commune’s body does not have to issue a consent to holding the assembly. It suffices when the same does not object to its convening by issuing a prohibition. The notice must be given not earlier than 30 days and not later than three days prior to the assembly’s date and the ban must be delivered within three days after the notification has been received but not later than 24 hours before the opening of the assembly. The appeal against the ban should be submitted with the office of the province governor within three days following the day the ban has been issued but there is no obligation imposed on the province governor under the Assembly Act to consider the appeal before the planned Assembly’s date. The decision of the province governor may be appealed against with the provincial administrative court within 3 days following the delivery of the decision on the ban. The provincial administrative court must determine the hearing date within seven days from the day the appeal has been received.

The amendment to the Assembly Act drafted by the Ministry of Interior and Administration which was referred to the public consultations in December 2009 provided for that the organizer will have to file a notice of the assembly not later than four days before the assembly’s opening date. The body will have the chance to issue a ban on the assembly but it will have to be delivered within 24 hours from the day the notice has been received. It will be possible for the organizer to file an appeal to the province governor within next 24 hours and the latter will have to examine the appeal within maximum 24 hours from the date it has been submitted. The amendment leaves intact the appeal procedure against the province governor’s

¹ Article 213 (1) The offence specified in Article 212 (1) is not committed, if the allegation not made in public is true. (2). Whoever raises or publicises a true allegation 1) regarding the conduct of a person performing a public function and/or 2) serving the purpose of protecting a justifiable public interest shall be deemed to have not committed the offence specified in Article 212 § 1 or 2; if the allegation regards private or family life the evidence of truth shall only be carried out when it serves to prevent a danger to someone's life or to prevent demoralisation of a minor.

decision with a court. The proceedings before administrative courts do not have to be completed before the assembly's date.

However, individual cases which come in to the Helsinki Foundation for Human Rights, including the case of the Poznań Critical Mass, reveal that it takes long to exhaust all legal measures available before administrative courts. In the case of the Poznań Critical Mass the Supreme Administrative Court entered a final decision not until 6 August 2010 and the assembly took place on 30 October 2009, i.e. after nearly nine months. In such conditions it is a good idea to reconsider the concept which was born during a debate "Freedom of Assemblies – the Urgency of Change" ("*Wolność zgromadzeń – konieczność zmian*") held by the Helsinki Foundation of Human Rights on 16 March 2010. The HFHR's representatives suggested limiting the jurisdiction of administrative courts in cases involving appeals against ban on assemblies and referring them directly to the Supreme Court which could hear the appeal against the province governor decision in one instance.

Because of the rigid time frames for providing notices it becomes necessary to convene the 'spontaneous assemblies'. In view of the short deadline given, where each and every hour counts and the resulting urgent need for action it becomes often impossible to notify the authorities of the assembly. The Assemblies Act does not provide for the convening of spontaneous assemblies as special category of assemblies. The only legal act which contains any reference to them is the Petty Offences Code (*Kodeks Wykroczeń*) which introduces the penalty for convening an assembly without filing a required notice or leading such an assembly (Article 52 of the Petty Offences Code). The legally binding provision enabling organizers of spontaneous assemblies to be punished may suppress the freedom of assemblies. Thus, the judgement of the Constitutional Tribunal of July 2008 in which it examined the compliance of Article 52 the Petty Offences Code with the Constitution carries such a weight. The judgement is a source of valuable guidelines, the most important of which is that authorities have to guarantee that applying the provision allowing an assembly organiser to be punished cannot lead to suppressing the freedom of holding peaceful assemblies.

The draft amendment to the Assemblies Law prepared by the Ministry of Interior and Administration provided for the introduction of a definition of a spontaneous assemblies. However, according to the MSWiA the holding of a spontaneous assembly ought to be made dependent upon notifying the chief of the police services at a district (municipal) level 24 hours before the assembly is planned to start. The Legislative Council at the President of the Council of Ministers has issued a negative opinion of the draft regulation on spontaneous assemblies which indicated that the bill introduces a category of the notified spontaneous assembly. The Governmental Legislation Centre has raised a similar objection.

Exercising the freedom of holding peaceful assemblies may also be limited under Article 7 (2) (3) of the Assemblies Act which says that an organiser is obliged to indicate the route of the march. In 2009 the municipal authorities in Poznań prohibited a bike assembly on that ground classifying it as some "other event" referred to in Article 65 of the Traffic Law (*Prawo o ruchu drogowym*). Such classification of the marching route imposed an obligation on the organisers to obtain an approval in the form of administrative decision issued under formalised proceedings governed by the provisions of the Traffic Law. Consequently, the draft amendment prepared by the MSWiA imposes upon organisers an obligation to indicate the marching or driving route of the participants.

Another matter for discussion is the issue of creating 'hyde parks' in communal grounds i.e. places where assemblies may be held without a need for prior notification of the commune bodies. Currently commune bodies have discretion in deciding about the creation of such

areas. The idea of setting up hyde parks has not received much acclaim, though. Hence the amendment draft contains a regulation imposing an obligation on local government authorities to create such places of exchange of ideas and opinions. The issue was shifted into the Centre of public attention with regard to the issue of the cross standing before the Presidential Palace, at ul. Krakowskie Przedmieście in Warsaw. It is worth mentioning that in November 2007 Warsaw councillors adopted the resolution on the creation of hyde park before the Palace of Culture and Science and thus rejected a proposition to establish the area at ul Krakowskie Przedmieście due to the strategic location of this street. From the perspective of thirty months of the existence of hyde park in Warsaw it must be said that its creation (even a postrum was mounted in front of the Palace) did not bring the expected results. While considering the MSWiA proposition the question should be resolved whether local government bodies will be, in fact, creating parks in areas suitable for their intended purpose.

On behalf of the Helsinki Foundation for Human Rights



A handwritten signature in black ink, which appears to read 'Danuta Przywara', is written over a horizontal line.

Danuta Przywara

President of the Board

Helsinki Foundation for Human Rights