Warsaw, 29th September 2022

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The European Court of Human Rights
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

KRYSZKIEWICZ v. Poland
Application no. 17912/21

Pursuant to the letter of Ms. Renata Degener, the Section Registrar of the European Court of Human Rights, dated 5 September 2022, informing of the leave granted by the President of the First Section to make written submissions to the Court by 30 September 2022, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of *Kryszkiewicz v. Poland* (application no. 17912/21).

On behalf of the Helsinki Foundation for Human Rights

HELSIŃSKA FUNDACJA PRAW CZŁOWIEKA ★ 00-490 Warszawa, ul. Wiejska 16 ★

Piotr Kładoczny, Ph.D.

Vice President of the Board
Helsinki Foundation for Human Rights

Małgorzata Szuleka

Secretary of the Board
Helsinki Foundation for Human Rights

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WRITTEN COMMENTS
by the Helsinki Foundation for Human Rights

EXECUTIVE SUMMARY:

- × Currently there is no separate offence of torture in the Criminal Code and existing provisions may fall short in prosecuting its perpetrators, as required by the UNCAT. Due to legislative deficiencies, analysing prevalence of torture provides a particular challenge – nevertheless, available data suggests that the problem remains relevant.
- × Non-compliance with recommendations and lack of progress in respect of fundamental legal safeguards against ill-treatment, in particular safeguarding prompt access to a lawyer for persons apprehended by the police, has been recognised by the CPT among the issues of "persistent and systemic character".
- × Effectiveness of the investigation on allegations of Article 2 and 3 violations by the police has remained an area of concern. Reasons cited for low conviction rates are mostly evidentiary difficulties, incl. as result of negligence; excessive length was also raised.
- × In cases of deaths in police custody analysed by the HFHR min. a year after the incident, half of the cases were discontinued within 7 months to 2 years, while remaining were still at the pre-trial phase, with only one indictment brought 2.5 years later. Police officers were rarely suspended, usually in cases when disciplinary charges were brought against them and regarded excessive use of force.

I. INTRODUCTION

1. The Helsinki Foundation for Human Rights ("**HFHR**", "**Foundation**") submits these written comments pursuant to the leave granted by the President of the First Section of the European Court of Human Rights ("**ECtHR**", "**Court**") on 5 September 2022.

2. Issues related to the effective prevention of torture, inhuman or degrading treatment and punishment, as well as cases of alleged unlawful deprivation of life by state agents and the adequate state response when they occur have been a particular area of concern for the Foundation since its establishment. The Foundation has been tracking legislative developments in this area, advocating for changes that may lead to an improvement in this regard and in the past, the HFHR has also provided training for Police officers on the standards stemming from Articles 2 and 3 of the European Convention on Human Rights ("**ECHR**", "**Convention**"). In the course of its activities, the Foundation has also been providing legal assistance to victims through various interventions, monitoring and participating in court proceedings. In particular, the HFHR's Legal Intervention Programme, basing on the information received directly from the victims, their families and representatives, as well as from the media, takes action in cases where fundamental rights may have been violated, particularly the right to life and prohibition of torture. In some cases the HFHR sends a letter to a relevant prosecutor and police unit to inquire about preliminary findings, in the context of ECHR provisions and ECtHR jurisprudence. The HFHR lawyers regularly provide information on torture prevention for the Committee Against

Torture ("**CAT**")[1] and participate in meetings during visitations of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**SPT**")[2] and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("**CPT**"). The abovementioned circumstances led the HFHR to submit its *amicus curiae* brief in the present case.

3. The Foundation would like to note at the outset that this opinion – given the scope of the consent granted by the President of the First Section – does not address the factual realities of the present case. Bearing that in mind, ongoing proceedings before the ECtHR are particularly significant in the light of the Foundation's experience to date, as well as the long-standing discussion on police violence and combating officers' impunity in Poland. As the ECtHR had already issued a number of judgements in cases pursued against Poland concerning police brutality in the context of Articles 2 and 3 of the ECHR, regarding both their substantive and procedural aspects (see, *inter alia*, judgements in the cases of *Kanciał v. Poland*[3], *Dzwonkowski v. Poland*[4], *Bednarz v. Poland*[5], *Jabłońska v. Poland*[6] and *Kuchta and Mętel v. Poland*[7]), a certain standard in this regard had been established. Nonetheless, the Foundation's practical observations and new cases still emerging suggest that the Court's guidelines have still not been fully adopted. In order to provide the Court with up-to-date relevant data, the HFHR had sent information requests[8] to the National Prosecution Office ("**NPO**"), the Commissioner for Human Rights ("**CHR**"), Ministry of Justice ("**MoJ**") and Police Headquarters[9] and carried out an analysis of selected cases, in which the Legal Intervention Programme took actions earlier.

II. TORTURE PREVENTION IN POLISH LAW AND IN PRACTICE

4. *CRIMINALISATION OF TORTURE.* Poland is a state party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**UNCAT**") and it ratified its Optional Protocol ("**OPCAT**"). Under UNCAT's Article 4, it is obliged to ensure criminalization of all acts of torture, as understood under Article 1 (1) of UNCAT, including with regard to attempts to commit torture and complicity or participation in torture, punishable by *appropriate penalties*, reflecting grave nature of the crime. State's non-compliance with said obligation has been continuously underlined by the CAT [10] and noted by the SPT[11]. In 2019, CAT

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[1] HFHR provided information within the 4th, 5-6th, 7th and 8th reporting cycles for CAT in Poland.
[2] Visit to Poland undertaken from 9 to 18 July 2018 – see: Report of the SPT from the visit to Poland undertaken from 9 to 18 July 2018: recommendations and observations addressed to the State party, CAT/OP/POL/ROSP/1, 21 January 2020, Annex I.
[3] ECtHR, *Kanciał v. Poland*, application no. 37023/13, Judgement (First Section), 23 May 2019.
[4] ECtHR, *Dzwonkowski v. Poland*, application no. 46702/99, Judgement (First Section), 12 April 2007.
[5] ECtHR, *Bednarz v. Poland*, application no. 76505/14, Judgement (First Section), 13 June 2019.
[6] ECtHR, *Jabłońska v. Poland*, application no. 24913/15, Judgement (First Section), 14 May 2020.
[7] ECtHR, *Kuchta and Mętel v. Poland*, application no. 76813/16, Judgement (First Section), 2 September 2021.
[8] In accordance with Article 2 (1) of the Act of 6 September 2001 on access to public information, consolidated text: Journal of Laws from 2022, item 902.
[9] The Police Headquarters informed that due to the need to carry out additional activities, requested public information would be provided at a later date, after the written comments submission deadline – letter from the Police Headquarters dated 19 September 2022, no. Kwo-1679/1610/22/KR. Information provided earlier was used instead where possible.
[10] Report of the Committee against Torture 23rd session (8-19 November 1999) and 24th session (1-19 May 2000), A/55/44 §§ 88 and 92; Consideration of reports submitted by States parties under Article 19 of UNCAT. Conclusions and recommendations of the Committee Against Torture on Poland, CAT/C/POL/CO/4, 25 July 2007, § 6; Concluding observations on the combined fifth and sixth periodic reports of Poland, CAT/C/POL/CO/5-6, § 7; Concluding observations on the seventh periodic report of Poland, CAT/C/POL/CO/7, 29 August 2019, §§ 7-8.
[11] Report of the SPT from the visit to Poland undertaken from 9 to 18 July 2018, §§ 34-36. See also HFHR's 2018 report prepared prior to Subcommittee's visit to Poland: P. Kładoczny, K. Wiśniewska (eds.), *Rights of persons deprived of liberty. Fundamental legal and practical issues. HFHR perspective*, Warsaw 2018, https://www.hfhr.pl/wp-content/uploads/2018/07/Report-SPT-EN-FIN.pdf, p. 11-13, where the Foundation pointed out the non-compliance with UNCAT standard in this respect.

urged Poland to take "effective legislative measures to include torture as a separate and specific crime in its Criminal Code, and to adopt a definition of torture that covers all elements" contained in Article 1 (1) of UNCAT, ensure penalties commensurate with its nature and allowing for differentiation of torture and other acts of ill-treatment[12]. Currently Polish Criminal Code ("**CC**")[13] does not include a separate offence of torture, yet – as the state underlined in its' report to CAT – "all the characteristic elements provided for in the definition of torture (...) are penalised in Poland as constitutive elements of different offences"[14]. Perpetrators of torture can be prosecuted under various provisions of the CC, most importantly for the coercion of a confession by an officer (Article 246) and mistreatment of a person deprived of liberty (Article 247), as well as a number of other offences, for example causing severe bodily harm (Article 156) or punishable threats (Article 190)[15]. In the opinion of CAT, applying various provisions, covering a broader range of offences "do not reflect the gravity of such crimes adequately and render impossible fast and impartial investigations and the imposition of appropriate penalties"[16]. Similar arguments were raised by OSCE Office for Democratic Institutions and Human Rights ("**ODIHR**")[17], which also addressed specific aspects of the definition of torture not reflected in national legislation – due to the restrictive interpretation of the perpetrator's purpose in Article 246 (reduced to obtaining confession or extracting information) or a limited scope of protection in Article 247 (confined to persons legally deprived of liberty)[18]. Offence specified in Article 247 § 1-2[19] is a common offence[20], not limited to persons acting on behalf of the state (while its § 3 concerns directly state officials, it addresses only allowing the commission of the act specified in § 1 and 2). Therefore it is also applicable in cases that may not necessarily be qualified as torture, such as ill-treatment of a prisoner by a fellow inmate, without state involvement. While incidents not fulfilling the constituent elements of these offences may be prosecuted under Article 231, which is the general offence covering any excess of powers for a broad category of state officials, such classification has been considered too broad[21]. It has also been pointed out that there is a "clear legal gap", which cannot be overcome with prosecuting for different offences[22], especially as referring to the UNCAT definition by the judiciary is a rather rare occurrence as courts usually address only provisions present directly in the Polish law[23]. Lack of specific offence of torture may also cause statistical misrepresentation (see section III) of torture occurrences[24] and affect applicability of the statute of limitations[25].

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[12] Concluding observations on the seventh periodic report of Poland, CAT/C/POL/CO/7, 29 August 2019, § 8.
[13] Act of 6 June 1997 – Criminal Code, consolidated text: Journal of Laws from 2022, item 1138, 1726.
[14] State party report under List of Issues Prior to Reporting submitted by Poland, CAT/C/POL/5-6, 18 May 2012, §§ 7.
[15] *Ibidem.*
[16] Concluding observations on the seventh periodic report of Poland, § 8 (c).
[17] OSCE ODIHR, *Opinion on definition of torture and its absolute prohibition in Polish legislation,* opinion no. CRIM-POL/325/2018 [TO], Warsaw, 22 May 2018, p. 11, 22.
[18] *Ibidem,* p. 32.
[19] Article 247 § 1 addresses mistreatment (*znęcanie się*) of a person legally deprived of liberty, § 2 – mistreatment with particular cruelty.
[20] I. Zgoliński [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2020, LEX, Article 247, § 4.
[21] M. Czechowska, *Czy aktualnie obowiązujące przepisy kodeksu karnego chronią przed stosowaniem tortur?,* Państwo i Prawo 2/2022, p. 149.
[22] *Ibidem*, p. 146, own translation.
[23] M. Dziedzic, *Przestępstwo tortur w Polsce. Analiza prawomocnych wyroków dotyczących przestępstw z art. 231, 246 oraz 247 Kodeksu karnego*, Office of the Commissioner for Human Rights, Warsaw 2021, p. 11. See also: Wrocław District Court judgement of 19 February 2020, case no. IV Ka 1421/19 (torture of Igor Stachowiak on Wrocław-Stare Miasto police station), where the court, referring to the HFHR's opinion, said in § 3.48 that "Polish law does not know the concept of torture, hence there is no basis for the use of this phrase in the description of the acts attributed to the accused, although in the light of acts of international law (...) there is no doubt that the entirety of the defendants' behaviour towards the victim, including the use of the taser X2, is torture understood as an unauthorised action of police officers causing acute pain and physical suffering" (own translation).
[24] See, *mutatis mutandis*, OSCE ODIHR and Fair Trials, *Eliminating Incentives for Torture in the OSCE Region: Baseline Study and Practical Guidance*, Warsaw/London 2020, § 88.
[25] *Ibidem*, § 89. Under Article 105 § 2 of the Penal Code, statute of limitations is not applied in cases of intentional offence of murder, grievous bodily injury, grievous harm or deprivation of liberty associated with particular torment,

5. *FUNDAMENTAL SAFEGUARDS AGAINST ILL-TREATMENT*. Persons apprehended by the Police shall be allowed, in accordance with Article 245 of the Code of Criminal Procedure ("**CCP**")[26], to communicate with a lawyer. In practice, not safeguarding prompt access to legal aid for arrestees had been recognized by the CPT among the issues of "persistent and systemic character, which appear in an even more negative light when set against the ongoing phenomenon of ill-treatment of persons in police custody"[27]. In this respect CPT noted the "absolute lack of progress" with implementation of its long-standing recommendations[28] and that access to legal aid in police custody was "highly exceptional, even for juveniles" – available only to those "wealthy enough to have their own lawyer and lucky enough to have their lawyer's name and telephone number at the moment of apprehension"[29]. These observations are consistent with those of SPT[30] and the lawyers' own experience – as observed by the Polish Bar Council, police officers "often require the arrested person to indicate a specific name and contact details of a lawyer"; they also "tend to suggest that an appearance of a professional lawyer could impede the proceedings" or suggest immediate release after questioning without a lawyer present[31]. A chance to improve enduring problems in access to a lawyer came with the Directive 2013/48/EU on the right of access to a lawyer[32], which obliged EU states to safeguard accessibility of legal aid, *inter alia*, "without undue delay after deprivation of liberty"[33]. Although transposition deadline had lapsed on 27 November 2016, Poland failed to meet the required standards[34]. In 2017, while researching the degree of the Directive's implementation, the HFHR reached out to the MoJ to discuss the subject, but the proposal was found pointless by the Ministry, as in its opinion "Polish law fully reflects Directive's recommendations, therefore no adjustment measures are needed"[35]. More recently, in its 2021 annual report the National Preventive Mechanism ("**NPM**")[36] pointed out that "majority of apprehended persons do not in practice have access to a lawyer from the outset of their deprivation of liberty"[37]. The NPM

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committed by a public official in the performance of his official duties. In other cases, provided they do not constitute crimes against peace, humanity and war crimes, the statute of limitations is applied according to the general rules.

[26] Act of 6 June 1997 – Code of Criminal Procedure, consolidated text: Journal of Laws from 2022, item 1375.

[27] Report to the Polish Government on the visit to Poland carried out by the CPT from 9 to 16 September 2020, CPT/Inf (2020) 31, Strasbourg, 28 October 2020, § 19. See also HFHR's report prepared for the 2017 CPT visit to Poland: P. Kubaszewski et al., *Report on the human rights of persons deprived of liberty*, Warsaw 2017, https://www.hfhr.pl/wp-content/uploads/2017/05/Report-CPT-FIN.pdf, p. 11-12, where this issue had also been raised.

[28] *Ibidem*, §§ 9, 19.

[29] *Ibidem*, § 21.

[30] Report of the SPT from the visit to Poland undertaken from 9 to 18 July 2018, §§ 51-52.

[31] Polish Bar Council *amicus curiae* brief in the case of *Kuchta and Mętel against Poland*, no. NRA.015-2.13.2018, Warsaw, 26 April 2018, https://www.adwokatura.pl/admin/wgrane_pliki/file-amicuskuchtameteletpcz-22949.pdf (accessed: 25.09.2022), § 12.

[32] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ of 6 November 2013, Series L no. 294, p. 1–12.

[33] Article 3.2 (c) of the Directive.

[34] See, *inter alia*, B. Grabowska-Moroz, *Prawo dostępu do obrońcy w świetle prawa europejskiego*, Helsinki Foundation for Human Rights, Warsaw 2018, https://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf (accessed: 29.09.2022), p. 31-46; A. Klepczyński, P. Kładoczny, K. Wiśniewska, *O (nie)dostępnym dostępie do adwokata*, Helsinki Foundation for Human Rights, Warsaw 2017, https://www.hfhr.pl/wp-content/uploads/2018/01/HFHR_JUSTICIA2017_National-Report_PL.pdf (accessed: 25.09.2022).

[35] Letter from the MoJ dated 13 February 2017, no. DL IV 071-4/17.

[36] The National Preventive Mechanism is operating as a part of the Office of the Commissioner for Human Rights under OPCAT.

[37] *Raport Rzecznika Praw Obywatelskich z działalności w Polsce Krajowego Mechanizmu Prewencji Tortur, Nieludzkiego lub Poniżającego Traktowania lub Karania w 2021 r.*, Office of the CHR, Warsaw 2022, https://bip.brpo.gov.pl/sites/default/files/2022-07/Raport%20Roczny%202021%20KMPT_wersja%20elektroniczna.pdf (accessed: 25.09.2022) – hereinafter referred to as *NPM 2021 report*, p. 62.

described also that crucial to respecting the right to contact a lawyer for those detained by the Police are grassroots initiatives by advocates and legal advisers, not state action, although in some cases these face significant obstacles – including detainees being transferred to distant police stations[38]. These issues had also been raised by CAT, which recommended the state to ensure appropriate and accessible to lawyers recording of depravation of liberty of their clients and all their transfers to different facilities[39]. Right to contact a family member and notify them one's detention, also subject of the Directive 2013/48/EU, has been listed among the abovementioned fundamental safeguards against ill-treatment in police custody that remain areas of "deepest concern" due to the "absolute absence of progress" for the CPT[40]. Its delegation had heard numerous allegation of delayed or denied notification of custody and therefore called upon Polish authorities to ensure that this right can be exercised "as from the very outset of their deprivation of liberty", which should always be recorded in writing[41]. Similarly the SPT and the NPM observed that as a rule the notification is not exercised directly by the detainee, but by police officers who do not always provide feedback as to whether they managed to inform a family member[42].

6. Preliminary medical check-ups of persons apprehended by the Police remain an issue as well. According to the Minister of Internal Affairs Ordinance on medical examinations of persons detained by the Police[43], detainees undergo medical examinations only in certain circumstances, incl. when they inform of a medical condition requiring permanent or periodical treatment the discontinuation of which would cause a threat to life or health, demand a medical examination or have visible bodily injuries (§ 1.3 [1] of the Ordinance) or if they belong to one of the groups listed in the Ordinance, such as pregnant or breastfeeding persons or persons with mental disorders (§ 1.3 [2] of the Ordinance). The NPM noted, that although in the majority of facilities arrestees were provided with preliminary examination (if circumstances indicated in the Ordinance occurred), but in some cases, despite visible injuries, apprehended persons have not been subjected to a medical check-up prior to placement in police detention; if preliminary examination took place, they often did so in the presence of a police officers, possibly hindering preventive character of the examination[44]. This issue has also been addressed by SPT, which reported that in the majority of visited police stations medical check-ups were not routinely conducted upon placement and noted with concern that if examinations were carried out, they were superficial, done in the presence of police officers and improperly documented. In some cases medical records of detainees did not contain information on their visible injuries, even if they were examined by the doctor[45]. Bearing that in mind, the SPT recommended taking appropriate steps to ensure, that *all* persons arrested are promptly examined free of charge by a medical professional able to work independently and trained in line with the Istanbul Protocol[46], without a police officer present[47]. CPT added that persons deprived of liberty by the Police should be expressly guaranteed access to doctor as a right, from the very outset of their detention – and that such request by a detainee to see a doctor should always be granted, regardless of the opinion of the officers on its necessity[48].

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[38] *Ibidem*, p. 72-74.
[39] Concluding observations on the seventh periodic report of Poland, §§ 15 (d) and 16 (c).
[40] *Ibidem*, § 19.
[41] *Ibidem*, § 20.
[42] Report of the SPT from the visit to Poland undertaken from 9 to 18 July 2018, § 56-57; NPM 2021 report, p. 75.
[43] Ordinance of the Minister of the Internal Affairs of 13 September 2012 on medical examinations of persons detained by the Police, Journal of Laws of 2012, item 1102.
[44] NPM 2021 report, p. 76.
[45] Report of the SPT from the visit to Poland undertaken from 9 to 18 July 2018, § 53.
[46] *Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Office of the United Nations High Commissioner for Human Rights, Professional Training Series no. 8/Rev.1, New York/Geneva 2004.
[47] Report of the SPT from the visit to Poland undertaken from 9 to 18 July 2018, § 54-55.
[48] Report on the visit to Poland carried out by the CPT from 9 to 16 September 2020, §§ 24-25.

7. *ELIMINATING INCENTIVES FOR TORTURE*. Due to deficiencies in statistical data on torture, finding key incentives for the use of torture may be an issue. In a research note on torture in Poland the NPM noted that often victims of torture were persons allegedly guilty of minor offences and that torture in most cases occurred before formal interrogation, suggesting that the purpose may have been extraction of testimony or confession[49]. In a 2020 research commissioned by the Office of the CHR, 30% of respondents indicated that the use of torture can be justified, most of them (83%) citing the need to extract important information as a valid reason. A significant part of interviewees considered use of torture to break resistance (65% of those agreeing that use of torture may be justified), deter crime (65%) or punish the perpetrator (62%)[50]. Polish CCP precludes use of any coercive measures or threats to obtain testimony and statements extracted through such means cannot constitute evidence[51]. Yet, once the evidence is admitted, it can only be challenged in the appeal (as there is no incidental complaint procedure on evidence admissibility), only if inclusion of inadmissible evidence affected final outcome of the case[52]. Furthermore, in 2015 Article 168a CCP, allowing for inclusion of some illegally obtained evidence, entered into force. According to this provision, evidence may not be declared inadmissible solely on the grounds that it was obtained in violation of rules of procedure or by means of a criminal act, unless it was done in connection with the performance of official duties by a public official and as a result of murder, intentional infliction of bodily harm or deprivation of liberty. Although in practice some courts interpreted this provision as to safeguard non-admissibility of evidence obtained by violation of national and international human rights standards, it cannot be guaranteed that such interpretation would always be applied[53]. This has also been a ground of concern for CAT, who expressed as well, that statistical data on cases in which charges were dismissed on the grounds of improper treatment is not being collected[54]. The CPT considered introduction of Article 168a to be a "significant step backwards" if in fact it allowed for inclusion of evidence obtained by means of ill-treatment[55]. As obtaining an admission of guilt is considered one of the main incentives for torture[56], some recommended introducing prohibition of confession as the sole evidence of guilt or at least providing additional safeguards in such cases – for example by requiring the court to ensure procedural safeguards (such as access to a lawyer or right to notify of detention) were respected or not allowing confessions made before police officers and not repeated in court to be the sole evidence of guilt[57]. Polish law, however, does not include safeguards in this respect.

III. TORTURE AND DEATHS IN POLICE CUSTODY: STATISTICAL DATA

8. Analysing frequency of torture cases is a particularly challenging task. Leaving aside the so-called *dark (hidden) figure of crime*, lack of separate offence makes it harder to identify exact

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[49] R. Kulas, *Przestępstwo tortur – zmiany w prawie są konieczne*, NPM – Office of the CHR, https://bip.brpo.gov.pl/sites/default/files/Rafa%C5%82%20Kulas%20-%20artyku%C5%82%20o%20przest%C4%99pstwie%20tortur.pdf (accessed: 25.09.2022).

[50] Kantar Polska S.A., *Tortury – opinie Polaków. Wyniki badania Kantar dla Rzecznika Praw Obywatelskich*, Warsaw, 20 November 2020, https://bip.brpo.gov.pl/sites/default/files/Tortury_Kantar_%2011.2020.pdf (accessed: 25.09.2022), p. 8.

[51] Article 171 § 5 (1), § 7.

[52] M. Wolny, M. Szuleka, *Right to defense v. evidence procedures. Admissibility of evidence in the light of EU law and national legal standards,* Helsinki Foundation for Human Rights, Warsaw, June 2021, https://www.hfhr.pl/wp-content/uploads/2021/10/DREP_raport_EN_fin.pdf (accessed: 25.09.2022), p. 19.

[53] *Ibidem*, p. 21.

[54] Concluding observations on the seventh periodic report of Poland, § 11.

[55] Report of the SPT from the visit to Poland undertaken from 9 to 18 July 2018, § 18.

[56] *Eliminating Incentives for Torture...*, § 12.

[57] *Ibidem*, § 14. It is also worth noting that of all indictments rate of acquittals has steadily been under 3% for the last almost 20 years, with acquittal rate at 2.35% in 2021, 1.90% in 2020, 2.29% in 2019 – source: Informator Statystyczny Wymiaru Sprawiedliwości, *Osoby osądzone w pierwszej instancji w sądach okrgowych oraz rejonowych (łącznie) w latach 2004-2021*, available at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (accessed: 29.09.2022).

number of criminal complaints on torture filed with the prosecutor's office, proceedings initiated and discontinued, indictments and sentences[58]. While statistical data on Articles 231, 246 and 247 of the Criminal Code is available, due to the reasons specified in § 4 of the Written Comments they may be problematic in assessment of torture prevalence. Nevertheless, regarding coercion of confession (Article 246), in the years 2017-2020, 8 proceedings were initiated[59], but none of them resulted in finding of a criminal offence[60]. In the years 2017-2019[61] a total of 19 persons were convicted for coercion of confession (data regarding acquittals was not available)[62], but only one was sentenced for a non-probative custodial sentence[63]. Regarding mistreatment of a person deprived of liberty (Article 247), in the years 2017-2020 a total of 262 proceedings were initiated, 77 of which resulted in finding an offence[64]. In the years 2017-2019, a total of 74 persons were convicted for mistreating a person deprived of liberty, of which 5 were convicted for mistreatment with particular cruelty and 1 for allowing mistreatment[65]. Penalties were mostly custodial (80% in case of Article 247 § 1, all of the remaining), mostly under 1 year, exceeding 3 years in only two cases. As mentioned data did not address directly police officers, the HFHR requested such information from the NPO, but in reply it was informed that such data was not collected or processed and that recording profession of the offender is not obligatory – therefore providing information on the number of, for example, criminal complaints against police officers regarding mistreatment of persons deprived of liberty was not possible without conducting file analysis by respective prosecution units[66]. For the same reasons it was not possible to provide the Foundation with information regarding police officers charged with involuntary manslaughter in the line of duty. The Bureau of Police Internal Affairs, a specialised unit dealing with crimes committed by police officers, informed that 28 officers were charged with a total of 32 crimes connected with use of violence[67] in the line of duty in 2021[68]; in 2020 – 23 officers charged with 24 crimes, in 2019 – 26 officers with 28 crimes, in 2018 – 30 officers with 43 crimes[69]. The annual reports of the Bureau did not provide details in this respect.

9. As complaints on police officers may also be a useful indicator on frequency of ill-treatment, the Foundation had requested in the past statistical data on such complaints. In 2020 Police recorded 263 complaints regarding use of direct coercive measures, of which 2 were found substantiated (approx. 0,7%)[70]. In 2019, the Police handled 364 complaints on inhuman or degrading treatment, of which none was found substantiated and 43 was "dealt with in

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[58] R. Kulas, *Przestępstwo tortur*...

[59] One in 2017, 3 in 2018, 4 in 2019, none in 2020.

[60] Statistics available at https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63593,Wymuszanie-zeznan-art-246.html (accessed: 26.09.2022).

[61] Data for 2020 is not available yet – the HFHR requested them through a public information request and was informed that they would be available at a later date – letter from the Ministry of Justice dated 23 September 2022, no. DSF-II.082.203.2022.

[62] Informator Statystyczny Wymiaru Sprawiedliwości, *Skazania prawomocne – z oskarżenia publicznego – dorośli – według rodzaju przestępstw i wymiaru kary w l. 2008-2019*, available at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (accessed: 26.09.2022).

[63] Polish: *kara pozbawienia wolności bez warunkowego zawieszenia jej wykonania.*

[64] Statistics available at https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63595,Znecanie-sie-nad-pozbawionym-wolnosci-art-247.html (accessed: 26.09.2022).

[65] Informator Statystyczny Wymiaru Sprawiedliwości, *Skazania prawomocne*...

[66] Letter from the National Prosecution Office dated 19 September 2022, no. 1001-1.lp.232.2022.

[67] The Bureau does not specify how it understood "use of violence" and if it encompassed only unjustified use of force or also justified but not proportional use of force.

[68] Bureau of Police Internal Affairs, *Informacja o działalności Biura Spraw Wewnętrznych Policji w 2021 roku*, Warsaw, March 2022, available at: https://policja.pl/pol/bswp/aktualnosci/dane-statystyczne/6796,Dane-statystyczne.html (accessed: 26.09.2022), p. 4.

[69] Bureau of Police Internal Affairs, *Informacja na temat stanu zagrożenia przestępczością dotyczącą Policji w 2019 roku*, Warsaw March 2020, available at https://policja.pl/pol/bswp/aktualnosci/dane-statystyczne/6796,Dane-statystyczne.html (accessed: 26.09.2022), p. 18.

[70] Letter from the Police Headquarters dated 27 September 2021, no. Kwo-1977/1702/21/KR.

a different way" (left without examination, withdrawn or forwarded for information to the competent authority)[71]. In 2018, the Police handled 408 complaints on the matter, of which 4 were found substantiated (approx. 0,9%) and 39 dealt with in a different way[72]. The Foundation also inquired at Office of the CHR on various statistical data regarding torture and other forms of ill-treatment. In reply it was informed that in 2021 the CHR received 86 off-complaint reports[73], which the Police and Border Guard are obliged to provide in case due to officers' actions or inaction occurs death of a person in custody, they attempt suicide or are a victim of a bodily harm, their sexual autonomy is violated or there is an unjustified use of coercive measures[74]. In 2020 the CHR received 55 such reports, in 2019 – 76 and in 2018 – 90. In the years 2018-2021 the CHR received 3 complaints regarding death in police custody and (in the years of 2019-2021) a total of 56 complaints regarding use of torture, inhuman or degrading treatment or punishment by police officers. On its own, the Commissioner intervened in 25 cases concerning death in police custody in 2021 (of total 47 cases in the years 2018-2021) and 6 concerning torture, inhuman or degrading treatment or punishment (of total 17 in the years 2019-2021)[75]. The Supreme Audit Office in its 2022 report on preparedness to carry out tasks with the use of direct coercive measures pointed out that in 2020 the Police recorded 8 incidents of death resulting from use of force and 136 in which use of force resulted in bodily harm. Causal link between use of force and death has been established in 3 cases[76]. The HFHR in its practice recorded 11 cases of death in police custody, during interventions or immediately after in 2021, operating on media reports and asking the Police to comment on the case for verification.

IV. EFFECTIVE INVESIGATION IN CASES OF ALLEGED VIOLATIONS OF ARTICLES 2 OR 3 OF THE CONVENTION

10. *INVESTIGATION OF ALLEGATIONS OF TORTURE*. In the light of national and international obligations, allegations of torture and cases of death in state custody shall be followed by an effective, prompt and impartial investigation. Yet, this area has been as well an area of serious concern for the CAT, which noted incidents that "officers, who were charged with offences were not sentenced; that, in one case, it was impossible to determine the identities of the police officers who were responsible for using violence; and that persons who have suffered injuries by the police are most likely to obtain justice only when applying to and receiving judgement from the European Court of Human Rights"[77]. CAT recommended therefore ensuring prompt, effective and impartial investigations of all allegations of torture and ill-treatment and all deaths in custody, as well as ensuring punishment commensurate with the gravity of their acts. It also stressed that all persons under investigation shall be immediately suspended from their duties and remain so throughout the investigation[78]. The Polish Bar Council noted that in years 2014-2016 approx. 50% of criminal complaints did not lead to institution of criminal proceedings and only about 2% of those initiated resulted in indictment[79]. As key problems in effective prosecution it listed obstacles in collection of evidence, due to incomplete or vague police documentation, delayed autopsies and searches and traces not being timely secured for forensic analysis. Consequently, it observed that most often reason for the discontinuation of proceedings would be lack of evidentiary basis for the allegations, but also finding the use of force justified by the behaviour of the victim and obstacles in establishing the causal link

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[71] Mail from the Police Headquarters dated 28 October 2020, no. Kwo-1245/20.
[72] Mail from the Police Headquarters dated 11 February 2020, no. Gip-428/20.
[73] Polish: *informacja pozaskargowa*.
[74] Supreme Audit Office, *Przygotowanie wybranych podmiotów do realizacji zadań na rzecz zapewnienia porządku wewnętrznego z wykorzystaniem środków przymusu bezpośredniego*, Warsaw 2022, no. 14/2022/P/21/040/KPB, p. 66.
[75] Letter from the Office of the Commissioner for Human Rights dated 14 September 2022, no. II.0134.20.2022.PS.
[76] Supreme Audit Office, *Przygotowanie wybranych podmiotów...*, p. 70-71.
[77] Concluding observations on the seventh periodic report of Poland, § 19 (b).
[78] *Ibidem*, § 20 (b).
[79] Polish Bar Council *amicus curiae* brief in the case of *Kuchta and Mętel*, § 17.

between injuries and force used by the officers[80]. Similar conclusions were reached in the research conducted by the HFHR in 2018 among lawyers, who cited evidentiary difficulties, the disregard and failure to respond to allegations of ill-treatment, as well as inadequate response of the judges as key issues with regard to investigations of torture[81]. Torture and death-in-custody cases are not immune to the persistent and systemic issues with excessive length of proceedings[82], which may sometimes affect their outcome. In her research, M. Dziedzic of NPM recalled proceedings in which the district court issued a judgement 10 years after torture[83] occurred in which it conditionally discontinued the proceedings because in the decade after committing said offence none of the perpetrators committed another crimes[84]. The HFHR monitored a criminal case addressing police brutality, in which the proceedings began after an alleged ill-treatment took place in 2008 and are still ongoing, as district court firstly found the accused guilty, regional court overturned its judgement, then district court acquitted the accused, regional court upheld the judgement, until in 2022, 14 years after the incident, Supreme Court overturned its verdict. Supreme Court referred, among other things, to the quality of the appeal court's reasoning, including its argument that the descriptions of excessive force, which allegedly occurred in the presence of other people, "contradicted life experience". The Supreme Court emphasised that "it is the quoted view that is in flagrant contradiction with life experience (...) – this is proven by the well-known incidents of flagrant brutality of officers acting openly"[85].

11. *PROSECUTOR GENERAL GUIDELINES.* In 2014, the Prosecutor General issued a set of guidelines for investigating deaths in custody and inhuman or degrading treatment or punishment if the perpetrator is a police officer or other public official[86]. According to the guidelines, entrusting the Police with the performance of particular investigative acts may only take place in exceptional cases and to a limited extent, while key activities are carried out by the prosecutor (§ 4). In all cases, the prosecutor should draw up an investigation plan to ensure the dynamics of the investigation and the concentration of evidentiary activities (§ 5). Such cases, in accordance with §§ 12-14, should be particularly closely monitored by the supervising prosecutors, including an obligation to inform a supervising prosecutor about the initiation of proceedings and biannual reporting on the correct handling of investigations by the Office of the Prosecutor General. The National Prosecution Office[87] confirmed that that such reports are being drafted (although annually, not biannually), it was however unable to provide the statistical data on informing a supervising prosecutor on the initiation of proceedings, as such data was not in the possession of the National Prosecution Office[88].

12. *DEATH IN CUSTODY INVESTIGATIONS – RESEARCH ON HFHR CASES:* In order to address the investigations in death in custody[89] cases, the HFHR sent follow-up letters to relevant prosecutors and police commanders with a similar set of questions on 14 selected cases from

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[80] *Ibidem*, §§ 30-31.

[81] A. Klepczyński, *Złe traktowanie osób podejrzanych i zatrzymanych przez funkcjonariuszy Policji. Raport z badania ankietowego przeprowadzonego wśród adwokatów*, Helsinki Foundation for Human Rights, Warsaw 2018, p. 8.

[82] See, for example, ECtHR, *Rutkowski and Others v. Poland*, Judgement (Fourth Section), applications no. 72287/10, 13927/11 and 46187/11 and 591 others, 7 July 2015 – and its status of execution.

[83] According to the description in the research note, it involved, *inter alia*: unjustified use of OC spray, also after putting on handcuffs, dragging on the ground, throwing against walls, putting a bag over the detainee's head, beating their feet with a baton.

[84] M. Dziedzic, *Przestępstwo tortur w Polsce...*, p. 18-20.

[85] Supreme Court judgement of 24 March 2022, case no. III KK 505/21. The District Court in Gdańsk, to which the case was referred, upheld the regional court's acquittal in August 2022.

[86] Guidelines of the Prosecutor General on the conduct by prosecutors of proceedings for offences involving deprivation of life and inhuman or degrading treatment or punishment committed by police officers or other public officials, Warsaw, 27 August 2014, PG VII 021/4/14.

[87] Due to the reorganisation of the prosecution, tasks previously carried out by the Office of the Prosecutor General are currently being carried out by the National Prosecution Office.

[88] Letter from the National Prosecution Office dated 19 September 2022, no. 1001-1.lp.232.2022.

[89] Cases of death during police interventions, immediately after them and at police stations.

the years 2017-2021[90]. In all cases at least a year passed from the incident. Inquiries were sent to 9 police commanders and 13 prosecutors – 5 remained unanswered and some of the received answers were only partial. Information available from other sources, such as records from a parliamentary hearing[91], were used when possible to fill in the gaps.

13. Regarding criminal proceedings, of 10 cases where stage was known, 5 were in pre-trial phase and among them charges were brought in only one case[92], while others were still at the *in rem* stage – one of them for 2 years and in 1 an indictment was brought to court (after more than 2.5 years of pre-trial proceedings) and 4 were discontinued (after, respectively, 7 months [2 cases], 10 months, 2 years after the incident). As a rule, proceedings were carried out by the prosecutors out of their territorial jurisdiction (as to safeguard impartiality) – only in one case the prosecutor carrying out the proceedings was of the office of the prosecutor from the same city in which death of a person in police custody occurred. In some cases distance between the incident site and the office conducting the investigation was quite significant – in one case it reached approx. 350 km. As for the legal qualification under which the case has been investigated, most often it was Article 155 (involuntary manslaughter), in a number of cases in connection with Article 231 (abuse of powers). Other qualifications appeared rarely – in one case Article 246 was invoked, but the case was eventually discontinued. In one particular case, being at the same time the only one, where a suspect was held in detention on remand, one suspect was charged with causing great bodily harm, resulting in the death of a person (Article 156 § 3 of the CC) and unlawful deprivation of liberty (Article 189 of the CC), while their partner was charged with endangering the safety of a person which the offender has a duty to protect (Article 160 § 2)[93]. The most commonly identified cause of death was cardiorespiratory failure (due to agitation asphyxia), but most of the prosecutors did not provide more information in this respect. If prosecutors provided information as to their cooperation with the police, they generally answered this question in the affirmative – in most cases, however, stipulating that this was not the unit in which the suspect had served. When asked on planning of the investigation, in four cases answer was positive[94] (of those one case had been discontinued, charges were brought in one).

14. Referring to the police internal procedures, in all cases explanatory procedures were initiated, but of 12 cases, in which such data is available, only in four cases disciplinary charges were brought – of which one regarded directly excessive use of force (among others) and two non-compliance with internal regulations (recording intervention with a body-worn camera, notifying and documenting detainee's death)[95]. In the only case where a police officer was indicted, no disciplinary charges were brought against him. Suspending a police officer in the course of the proceedings remained rather rare: of cases in which such information was provided, it happened only twice (incl. a case where charges were brought against officers in disciplinary proceedings regarding excessive use of force). Although all of the incidents happened after body-worn cameras gradually started to be introduced[96], police officers were equipped with them in two cases – in both cases disciplinary proceedings encompassed also irregularities in the use of cameras.

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[90] 5 cases from 2021, 2 cases from 2020, 3 cases from 2019, 2 cases from 2018, 1 case from 2017.
[91] Record of a session of the parliamentary Commission of Administration and Internal Affairs from 21 July 2022, https://www.sejm.gov.pl/sejm9.nsf/biuletyn.xsp?skrnr=ASW-139 (accessed: 26.09.2022).
[92] The information whether charges were brought in one case was not disclosed.
[93] The information was provided in the original answer (October 2021), the newer inquiry has not yet been answered.
[94] In two cases the answer was negative, in remaining it was left unanswered.
[95] Exact disciplinary charges brought in one case are unknown.
[96] Body-worn cameras were introduced on a larger scale as a part Police Modernisation Programme 2017-2021 and are being further introduced within the Police Modernisation Programme 2022-2025 – for more, see *supra note 91*.