Joint Stakeholder Submission to the UN Human Rights Council, 27th Session

Universal Periodic Review of Poland

Submitted by:

(1) The International Bar Association's Human Rights Institute
(2) The Polish Bar of Legal Advisers
(3) The Polish Bar Council

1. Introduction

1.1. This report is a joint submission by the International Bar Association's Human Rights Institute (IBAHRI), the Polish Bar of Legal Advisers (PBLA) and the Polish Bar Council (PBC). The PBLA and the PBC (together the 'Polish Bars'), established on 6 July 1982 and on 24 December 1918 respectively, are the two national bodies mandated to regulate the legal profession in Poland and protect lawyers' independence. Within their statutory mandate, they also provide support for the observance of human rights and civic freedoms, as well shape the application of national law. The IBAHRI, established in 1995, works with the international legal profession to promote, protect and enforce human rights under a just rule of law and to preserve the independence of the judiciary and legal profession worldwide. The PBLA and the PBC are members of the International Bar Association (IBA).

1.2. This submission will consider three issues in light of current developments in Poland and the country's international human rights obligations: (i) the independence of the judiciary; (ii) the right to respect of privacy; and (iii) the right to freedom of expression

and opinion. It will also provide an update to one 2012 UPR recommendation regarding lawyers' access to information.

2. Methodology

2.1. As professional associations of lawyers, the PBLA and the PBC closely monitor the impact of any legal and political development in Poland on human rights, the rule of law and access to justice. In 2007, when indications of threats to the rule of law arose, the PBLA called upon the IBA and the Council of Bars and Law Societies of Europe (CCBE) to deploy a delegation of experts to examine the impact of proposed legal reform on the independence of the judiciary and the legal profession. The IBAHRI and CCBE sent a high-level delegation of legal experts who presented recommendations to the Government of Poland.[1] A follow-up mission by the IBAHRI and the CCBE in 2008 revealed that positive reform had remedied many of the concerns raised in the 2007 report.[2]

2.2. This submission is informed by continuing dialogue between the IBAHRI and the Polish Bars and considers developments in Poland since May 2015. Its content is supported by contemporaneous legal examinations of developments in Poland undertaken by the European Commission for Democracy through Law (the 'Venice Commission').

3. Poland's 2nd Cycle Universal Periodic Review

3.1. Poland underwent its 2nd cycle UPR in May 2012. No recommendations were presented which concerned the judiciary; indeed, in Poland's 2008 UPR Mexico noted Poland's 'efforts to strengthen the judiciary'. The submitting organisations would likewise commend the positive measures introduced by Poland's Government in 2008 to strengthen judicial independence and protect the rule of law.

3.2. This submission will provide an update to one 2012 UPR recommendation (see 7.2 below and annexed NGO matrix) presented by Uzbekistan: 'Improve the access to lawyers and the level of access of lawyers to documents of the criminal cases in order

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[1] Joint IBAHRI-CCBE report 'Justice under Siege: a report on the rule of law in Poland': http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/11_2007_Nov06_Report1_1194344860.pdf

[2] Joint IBAHRI-CCBE report 'Follow up report to Justice under Siege: a report on the rule of law in Poland': http://www.ibanet.org/Article/Detail.aspx?ArticleUid=d5609a5f-dbf8-4e2f-bcae-f579a99b7847

to ensure the right to fair trial' (Uzbekistan) [Source of position: A/HRC/21/14 - Para. 90 & A/HRC/21/14/Add.1 - Para. 90.93].

4. First issue: The independence of the judiciary

NORMATIVE FRAMEWORK

4.1. The independence of the judiciary is the bedrock principle of the rule of law being prerequisite for the right to a fair trial and ensuring that individuals whose human rights have been violated can exercise their right to an effective remedy. An independent judiciary also acts as a democratic check and balance on legislative and executive action to prevent an abuse of power. The separation of powers doctrine is therefore paramount in upholding the rule of law and guaranteeing human rights.

4.2. The Universal Declaration of Human Rights (UDHR)[3] at Article 8 grants all individuals the 'right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' By Article 10, the determination of rights and obligations shall be undertaken by an 'independent and impartial tribunal'

4.3. The International Covenant on Civil and Political Rights (ICCPR),[4] ratified by Poland on 18 March 1977, reasserts the fundamental right to 'an effective remedy' (Article 2 paragraph 3 (a)) and further recalls the necessity of an individual being able to invoke and exhaust 'all available domestic remedies' (Article 41 paragraph c) in order to access international bodies for the determination of a human rights violation.

4.4. At the national level, the independence of the judiciary and the separation of powers doctrine are enshrined in the Constitution of Poland of 2 April 1997.[5] Article 10.1 states: 'The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.' By Article 173 of the Constitution, 'The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.' Article 178.1 further

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[3] Universal Declaration of Human Rights, proclaimed by UN General Assembly Res 217 A (III) (10 December 1948) http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

[4] International Covenant on Civil and Political Rights, adopted by UN General Assembly Res 2200A (XXI) (1966) http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[5] Constitution of the Republic of Poland of 2 April 1997: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

states: 'Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes'.

4.5. Judicial security of tenure is a precondition of judicial independence. According to the United Nations (UN) Basic Principles on the Independence of the Judiciary,[6] 'the term of office of judges [...] shall be adequately secured by law' (Principle 11) and, by Principle 12, '[j]udges, whether appointed or elected, shall have guaranteed tenure until the mandatory retirement age or the expiry of the term of office, where such exists.'

4.6. The Human Rights Committee, in its General Comment no. 32 on Article 14 of the ICCPR (Right to equality before courts and tribunals and to a fair trial) published on 23 August 2007, stated: 'The requirement of competence, independence and impartiality of a tribunal ... is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist,' (paragraph 19).

4.7. In Poland, Constitutional Tribunal judges are elected by the Sejm [Poland's legislature] for a 9-year term. According to Article 195.1 of Poland's Constitution, judges take an oath before the President of Poland before they can assume office.

4.8. By Article 179 of the Constitution, ordinary judges are appointed for an indefinite period of time by the President of Poland at the proposal of the National Council of the Judiciary (NJC). As set forth in Article 187.1 of the Constitution, the NJC is the body that safeguards the independence of courts and judges in Poland. According to Article 187.1, the NJC is composed as follows: 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 3) four members chosen by the Sejm from amongst its Deputies and two members chosen by the Senate from amongst its Senators.

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[6] UN Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985 and endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

FACTUAL DEVELOPMENTS

4.9. In May 2015, citizens of Poland elected a new President following two rounds of presidential elections held on 10 and 25 May 2015. The new Head of State was sworn into office on 20 July 2015.

4.10. On 25 June 2015, Poland's Parliament adopted a revised Constitutional Tribunal Act ('Act of 25 June 2015') which entered into force on 30 August 2015.[7] Under the new law, at Article 137, candidates for the office of judges of the Constitutional Tribunal were to be lodged with the Speaker of Parliament within 30 days following the date on which the Act came into force.

4.11. On 8 October 2015, Parliament elected, by resolution, five new judges of the Constitutional Tribunal to replace three judges whose nine-year terms were to expire on 6 November 2015 and two judges whose terms were to expire in December 2015. Although elected by a parliamentary resolution, the President of Poland did not accept the oath of the Constitutional Tribunal judges.[8] These judges are not, therefore, employees of the Tribunal as the contract of employment is dependent on a judge being sworn into office.

4.12. On 25 October 2015, parliamentary elections were held in Poland and a new governing party came into power, having gained a majority in both houses of the Parliament. The stakeholders to this submission express no concerns regarding the parliamentary elections which were reported to be free and fair.

4.13. On 25 November 2015, Poland's new Parliament passed a resolution to nullify the election of the five judges elected by the previous Parliament.

4.14. On 2 December 2015, Poland's new Parliament adopted resolutions to elect five new judges, in the place of five judges elected by the previous Parliament. These newly

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[7] The Constitutional Tribunal Act of 25 June 2015, published in the Official Journal of Laws on 30 July 2015, item 1064: http://dziennikustaw.gov.pl/du/2015/1064/1

[8] Venice Commission, 'Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland', Opinion no. 833/2015 (Council of Europe, 11-12 March 2016) paragraph 14: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e

elected judges were immediately sworn into office by the President of Poland but the President of the Constitutional Tribunal has refused to assign cases to them.

4.15. On 19 November 2015 Poland's Parliament further amended the Act of 25 June 2015 to, inter alia, shorten the tenure of the President of the Constitutional Tribunal to three years, renewable once, as well as terminating the tenure of the incumbent President and Vice-President of the Constitutional Tribunal.[9] The amended Act was signed into law by Poland's President on 20 November 2016 ('Act of 19 November 2015') and published in the Official Journal of Laws.[10]

4.16. In line with Article 189 paragraph 3 of Poland's Constitution, the Constitutional Tribunal reviewed the Act of 25 June 2015. By judgment dated 3 December 2016 (case No K 34/15), the Constitutional Tribunal clarified that Article 21 paragraph 1 of the Act provides that the President of the Republic is obliged to give the oath of office to elected judges without improper delay.[11] Also in this judgment, the Constitutional Tribunal determined that, while the three Constitutional Tribunal judges elected to replace the judges whose terms expired on 6 November 2015 has been elected in line with the Poland's Constitution, in the Tribunal's opinion, the election of the two judges replacing those whose terms expired in December 2015 had no legal ground. These two individuals are not, therefore, judges or employees of the Tribunal, due to the judgment of the Tribunal of December 3, 2016.

4.17. The Constitutional Tribunal rendered a subsequent judgment that the Act of 19 November 2015 was unconstitutional (Constitutional Tribunal judgment of 9 December 2015, case No K 35/15).[12]

4.18. At the request of the Polish Bars, the CCBE and the IBA observed the Constitutional Tribunal hearings held on 3 and 9 December 2015.[13]

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[9] Ibid Article 1 (1)

[10] The Act of 19 November 2015 amending the Constitutional Tribunal Act, published in the Official Journal of Laws on 20 November 2015, item 1928

[11] Poland's Constitutional Tribunal, Judgement of the Constitutional Tribunal Act, Ref K 34/15 (3 December 2015): http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym/

[12] Poland's Constitutional Tribunal, Judgement of the Act of 19 November 2015 amending the Constitutional Tribunal Act, Ref No K35/15 (9 December 2015): http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/

4.19. The three Constitutional Tribunal judges elected in line with the Constitution (see paragraph 4.16) have still not been sworn in by the President of Poland. However, the two judges elected by Poland's new Parliament to replace the two judges outgoing in December have taken up their functions. The Constitutional Tribunal judgments of 3 and 9 December 2016 have not, therefore, been implemented.

4.20. The result is that, at the time of submission of this report, the Constitutional Tribunal is composed of 12 rather than 15 (as required under Article 194.1 of Poland's Constitution) judges[14] and the Tribunal is consequently unable to perform its proper functions as the guarantor of constitutional right, thus limiting the right of access to a judicial remedy and opportunity to exhaust domestic remedies.[15]

4.21. On 22 December 2015, Poland's Parliament passed a further amendment to the Act of 19 November ('Act of 22 December 2015').[16] The Constitutional Tribunal found this Act to be unconstitutional (Constitutional Tribunal judgment of 9 March 2016, case No K 47/15). At the time of submission, this judgment was not published in the Official Journal of Laws.

4.22. On 22 July 2016, Poland's Parliament passed a new law on the Constitutional Tribunal (Act of 22 July 2016),[17] which repeals the Act of 25 June 2015 and amendments thereto.[18] Notably, Article 90 of the Act of 22 July 2016 establishes that 'The judges of the Tribunal who have taken the oath of office before the President of the Republic, and who have not so far assumed the judicial duties, shall be included in adjudicating

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[13] Report on current dispute on the Constitutional Court in Poland, of the CCBE and IBA Observer: http://kirp.pl/wp-content/uploads/2016/09/Current_dispute_on_the_Constitutional_Court_in_Poland_fi.pdf and at www.adwokatura.pl/admin/wgrane_pliki/file-raportccbe-13912.pdf

[14] The Constitutional Tribunal currently comprises: 10 judges elected before June 2015 (fully able to perform their functions); and two judges elected by the new Parliament on December 2 to replace those judges whose term of office expired in December. These judges were sworn by the President of Poland, are employees of the Tribunal and can perform their judicial functions.

[15] European commission, 'Commission Recommendation of 27 July 2016 regarding the rule of law in Poland', C(2006) 5703 final (27 July 2016) paragraphs 30 and 43 http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf

[16] Act of 22 December 2015 amending the Constitutional Tribunal Act, published in the Official Journal of Laws of Poland on 28 December 2015, item 2217

[17] Constitutional Tribunal Act of 22 July 2016, published in the Official Journal of Laws of Poland on 1 August 2016, item 1157

[18] Ibid Article 92

benches of the Tribunal, and shall be assigned cases, by the President of the Tribunal as of the date of entry into force of this Act.'[19] This would include the three judges appointed by the current Parliament but whose election the Constitutional Tribunal found to be inconsistent with the Constitution (see paragraph 4.16).

4.23. The Act of 22 July 2016 also stipulates that after judges have taken their oath before the President of Poland, the President of the Tribunal has the obligation to assign cases and 'create conditions enabling them to perform their duties'.[20] As a result, on 18 August 2016 the media and the spokesmen of the Regional Prosecutor's Office in Katowice informed the public that an investigation has been instigated into whether the President of the Constitutional Court exceeded his authority, by failing to fulfil his duties, when he prevented the three judges elected by the present Parliament from performing their duties as Constitutional Court judges (see paragraph 4.14).

4.24. Moreover, Article 38 of the Act of 22 July 2016 at paragraphs 3 to 6 establishes a general rule upon which the Constitutional Tribunal shall consider cases in chronological order according to their date of arrival, therefore interfering with the Tribunal's independent functioning and breaching the principle that the assignment of cases is an internal matter of judicial administration.[21]

4.25. The Constitutional Tribunal found the main provisions Act of 22 July 2016 to be unconstitutional by judgment dated 11 August 2016 (case No K 39/16),[22] including, as discussed above, Articles 90 and 38. The judgment of 11 August 2016 was not published in the Official Journal of Laws.

4.26. On 3 September 2016, the Extraordinary Congress of Polish Judges took place in Warsaw. The Congress adopted a resolution stating that: "*The Extraordinary Congress of the Polish Judges strongly states that never in the history of independent Poland, judges of various courts and tribunals were the subjected of so drastic actions aimed at downgrading their authority. Therefore, we call to respect the judgments of the Constitutional Tribunal and to publish them. We oppose the arbitrary refusal by the*

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[19] Ibid Article 90

[20] Ibid Article 7

[21] Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc A/HRC/11/41, 24 March 2009, paragraph 46, accessible at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41_en.pdf

[22] Constitutional Tribunal, judgement on the Constitutional Tribunal Act of 22 July 2016 (11 August 2016)

President of the Republic of Poland to appoint the candidates proposed by the National Council of the Judiciary of Poland. Such actions on the part of the President are a step towards the politicization of the judge function and towards the restriction of judiciary independence. The procedure of appointing judges ceases to be transparent and becomes deprived of any control whatsoever. We also oppose the decision of the President of the Republic of Poland who refused to take the oaths from lawfully selected judges of the Constitutional Tribunal. We disapprove of 'corrective' statutory acts relating to the Constitutional Tribunal. (...)"[23]

4.27. On 2 May 2016, the Minister of Justice presented a draft amendment of law on the NJC. For the purposes of this submission, the relevant provisions of the draft law concern the election of judges to the NCJ. The draft foresees that the current term of members of the NCJ, being judges, will end within the period of four months after the amendment enters into force. According to the Article 187.3 of the Polish Constitution, however, the term of office of those chosen as members of the NJC is four years.

CONCLUSION

4.28. The Government of Poland's amendments to the Constitutional Tribunal Act have introduced improper interference with the independent functioning of the Constitutional Tribunal thereby undermining the independence of the judiciary.

4.29. The decision of Polish legislature and executive not to implement the Constitutional Tribunal's judgments of 3 and 9 December 2015, regarding the legitimate election of the three Constitutional Tribunal judges by the previous Parliament and the ineffective election of the two judges elected by the present Parliament, undermines the separation of powers doctrine and raises serious concerns in respect of the rule of law.

4.30. Proposed reform to the Constitutional Tribunal Act and to the law on the NJC compromise the principle of judicial security of tenure: the former, by retroactively shortening the tenure of judges appointed to the NJC; the latter by, inter alia, shortening the tenure of the President of the Constitutional Tribunal to three years and terminating the tenure of the incumbent President and Vice-President of the Constitutional Tribunal.

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[23] Resolution No 2 of the Extraordinary Congress of the Polish Judges (3 September 2016): http://www.encj.eu/images/stories/pdf/speeches/extraordinary_congress_polish_judges_reolutions_1_3.pdf

In the light of the above, we propose the following recommendations be presented to the Government of Poland:

1) Undertake a review the Constitutional Tribunal Act to ensure that it respects the independent functioning of the Constitutional Tribunal and enables it to act as an effective guardian of the Constitution of Poland and the rights and freedoms enshrined therein.
2) Uphold the rule of law and ensure that current and future provisions of law respect the binding nature of Constitutional Tribunal judgments.
3) Protect the principle of judicial security of tenure in line with the UN Basic Principles on the Independence of the Judiciary at Principles 11 and 12.

5. Second issue: The right to respect of privacy

NORMATIVE FRAMEWORK

5.1. The UDHR at Article 12 provides that, 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.' This prohibition is reiterated in Article 17 of the ICCPR in paragraph 1: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. The UDHR (at Article 12) and the ICCPR (at Article 17 paragraph 2) both provide that: 'Everyone has the right to the protection of the law against such interference or attacks'.

5.2. In its General Comment no. 16 on Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) of the ICCPR published on 8 April 1988, the UN Human Rights Committee stated: 'The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances… relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis … Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and

other forms of communication, wire-tapping and recording of conversations should be prohibited,' (paragraph 4 and 8).

5.3. At the national level, the Constitution of Poland at Article 47 guarantees the right to privacy and at Article 49 ensures 'The freedom and privacy of communication' and protects against arbitrary infringements: 'Any limitations thereon may be imposed only in cases and in a manner specified by statute.' Furthermore, the Constitution at Article 31.3 establishes that limitations to constitutional freedoms 'may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.'

5.4. The stakeholders to this submission also highlight Principle 22 of the UN Basic Principles on the Role of Lawyers,[24] which embed the importance of the right to privacy in the context of the right to legal assistance and to a fair trial: 'Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

FACTUAL DEVELOPMENTS

5.5. On 30 July 2014, the Constitutional Tribunal issued a judgment in case K 23/11. The judgment concerned national legislation regulating surveillance by and the sharing of telecommunications data with the: Police, Border Guard, Military Gendarmerie, fiscal control authorities, Internal Security Agency, Military Counterintelligence Service, Central Anticorruption Bureau, and Customs Service. The judgment also considered the establishment of a catalogue of information on individuals collected during intelligence operations by authorized services and the rules for the destruction of acquired data. The provisions of law had aimed to implement the EU Data Retention Directive into the Polish law. The provisions, which were declared partially unconstitutional by the Constitutional Tribunal, governed the access of these bodies and services to telecommunications data. The Constitutional Tribunal set an 18-month period for the preparation of a new law governing access to such data.

[24] UN Basic Principles of the Role of Lawyers, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985 (endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985)

5.6. On 15 January 2016, Poland's Parliament adopted the 'Act of 15 January 2016' being partly an implementation of the Constitutional Tribunal's judgment in case K 23/11. However, the Act of 15 January 2016 allows law enforcement agencies and police authorities wide access to citizens' Internet and telecommunication usage data (e.g. billings of phone connections, geolocation, metadata of sent and received messages, logins, contacts, Internet profiles, visited websites, and personal settings) without prior review or approval from a judge. The Act of 15 January 2016 provides only half a year ex-post judiciary control, while not specifying the court's competences in this regard at all.

5.7. On 4 February 2016, the President of Poland approved the Act of 15 January 2016. Both at the time of legislative works and today, doubts are raised as to the insufficient protection of the right to privacy and confidentiality of communication. The Act of 15 January 2016 limits individuals' ability to exercise constitutional rights and freedoms, particularly the right to privacy, confidentiality of correspondence and the principle of information privacy. The new law allows for obtaining Internet-, telecommunication- and postal data without prior judicial authorization and, in so doing, permits the interception of privileged communication, including lawyer-client communication.

5.8. Moreover, the Act does not provide a remedy against disproportionate surveillance measures or against use of information covered by professional privilege. The Act envisages a general legal ground for obtaining telecommunications data by the Police and other special services, as it is possible for these entities to acquire such data just within the framework of "performing statutory tasks".

5.9. The Act of 15 January 2016 was submitted by the Commissioner for Human Rights in Poland to the Constitutional Tribunal on the grounds it is unconstitutional and incompatible with international human rights standards. The case is pending.[25]

5.10. On 13th June 2016, the Venice Commission issued an opinion on the Act of 15 January 2016 in which it expressed its critical view on the Act, underlining in paragraph 132 that "procedural safeguards and material conditions set in the Police Act for

[25] The application of the Commissioner for Human Rights to the Constitutional Court (in Polish): ipo.trybunal.gov.pl/ipo/dok?dok=F-1860511071%2FK_9_16_wns_2016_02_18_ADO.pdf

implementing secret surveillance are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals".[26]

CONCLUSION

5.11. The Act of 15 January 2016 does not specify the circumstances in which surveillance of individual data is permitted and lacks the requirement for an independent body to determine the conditions under which an individual's communications data can be captured and monitored. This brings the risk of disproportionate and excessive interferences and, consequently violations of the right to privacy.

5.12. Further, national law does not require an individual to be notified that he or she is subject to the surveillance. This brings the risk that the individual concerned will lack the necessary knowledge to challenge the surveillance and seek a remedy for a violation of his or her right to privacy.

5.13. Finally, the Act does not protect against the surveillance or interception of privileged communications (whether electronic mail or telecommunications data) between a lawyer and his or her client. The right to privacy in such circumstances holds significant importance in the context of the right to a fair trial. Any disclosure of communications protected by lawyer-client privilege without strict safeguards, including judicial oversight, will therefore breach the individual's right to effective legal assistance and to a fair trial.

In the light of the Act of 15 January 2016, we propose the following recommendations be presented to the Government of Poland:

1) Undertake a review of telecommunications legislation, in light of Article 17 of the ICCPR as interpreted by the Human Rights Committee in its General Comment 16, as well as legislation on the Police and secret services' operations to ensure that national laws protect the right to privacy and against arbitrary interference by requiring that police requests for wide surveillance and interception of individual communications can be reviewed by an independent and impartial institution.

[26] Opinion on the Act Of 15 January 2016 Amending The Police Act And Certain Other Acts, adopted by the Venice Commission at Its 107th Plenary Session (Venice, 10-11 June 2016: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)012-e

2) Uphold obligations under Principle 22 of the UN Basic Principles on the Role of Lawyers and ensure the confidentiality of all communications and consultations between lawyers and their clients within their professional relationship.

6. Third issue: Freedom of expression and opinion

NORMATIVE FRAMEWORK

6.1. The right to freedom of expression and opinion are essential to any democratic society and for the protection and promotion of other human rights. To realise this right, individuals need to be able to seek and exchange information and opinions to develop and form their own ideas. The media is a fundamental vehicle to facilitate this exchange of opinions and information.

6.2. Freedom of expression and opinion are enshrined in Article 19 of the UDHR: 'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

6.3. The right to freedom of expression and opinion is further guaranteed by Article 19 of the ICCPR which provides that 'everyone shall have the right to hold opinions without interference' (paragraph 1); and 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice' (paragraph 2).

6.4. In its General Comment no. 34 on Article 19 of the ICCPR published on 12 September 2011, the UN Human Rights Committee stated: 'A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society' (paragraph 13); and [...] 'States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom,' (paragraph 16).

6.5. At the national level, Article 54 of the Constitution of the Republic of Poland guarantees rights to obtain and disseminate information (freedom of expression).

6.6. Article 231 of Poland's Constitution establishes the National Council of Radio Broadcasting and Television as the guarantor of 'freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television'.

FACTUAL DEVELOPMENTS

6.7. The Act of 30 December 2015 on the amendment of the Broadcasting Act of 29 December 1992 ('Amending Act') entered into force on 8 January 2016. The Amending Act has made changes to the Broadcasting Act with regards to the functioning of public service broadcasting companies. According to the explanatory memorandum attached to the draft, the Act "serves as the first stage of the reform of Polish public media, aiming to establish a system of national media".

6.8. The draft law indicates: 'the act is focused on changing the way of establishing supervisory boards and boards of management of existing public service broadcasting companies and reducing the composition of said boards of management to 3 people. This involves eliminating the engagement of the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji – KRRiT), as an electronic media market regulatory body, in establishing the composition of management boards and supervisory boards of Treasury companies operating on in this market. Pending the implementation of the new organisation of national media, this should be the domain of the Minister competent for matters of the Treasury, who shall bear responsibility before the Sejm'.

6.9. The Amending Act stipulates that the terms of office for companies' management boards and supervisory boards expire and all the members of those bodies are nominated and revoked solely by the Minister of Treasury, without any participation of the constitutional body - KRRiT. In practise, the intermediate effect of the Amending Act was the dismissal of numerous journalists working in public media.

6.10. On 24 March 2016, Poland's Commissioner for Human Rights and a group of deputies to the Constitutional Tribunal have submitted an application to the Constitutional Tribunal seeking a review of the Amending Act, viewing it as

incompatible with the Polish Constitution, international human rights standards and the EU Charter for Fundamental Rights.[27]

6.11. On 22 June 2016, the Sejm passed a new Law on the Council of National Media. The Law establishes a new body – the Council of National Media, which in practice bypasses the KRRiT.

CONCLUSION

In the light of the above we propose the following recommendations be presented to the Government of Poland:

1) Ensure the functioning of free and independent public radio and television, without any political pressure and influence, based on an institutional architecture compatible with the Polish Constitution and international human rights standards, including respect for the constitutional role of the independent National Council of Radio Broadcasting and Television.
2) Ensure that human resources decisions affecting journalists, taken by public media management, are based solely on merit, without any political pressure and influence.

7. Fourth issue: Lawyers' access to information

7.1. As noted above, during Poland's 2nd cycle UPR, Uzbekistan recommended that Poland: *Improve the access to lawyers and the level of access of lawyers to documents of the criminal cases in order to ensure the right to fair trial (Uzbekistan).*

7.2. The organisations making this submission welcome the step taken by the Minister of Justice in 2012 to change the regulation on the right of access of lawyers to classified information in order to guarantee this right of lawyers. Poland also executed judgments of European Court of Human Rights (cases 38184/03 and 37469/05) on access of lawyers to information in lustration cases.

[27] Constitutional Tribunal application: https://www.rpo.gov.pl/sites/default/files/Application%20to%20the%20Constitutional%20Tribunal%20on%20media%20law.pdf