RZECZNIK PRAW OBYWATELSKICH

Committee on the Elimination of Racial Discrimination

Observations of the Commissioner for Human Rights concerning measures aimed at the implementation of the provisions of the Convention on the elimination of all forms of racial discrimination in the years 2014-2019

The following information takes into consideration the concluding observations of the Committee on the Elimination of Racial Discrimination presented after the examination of the joint XX and XXI periodic report submitted by Poland (CERD/C/POL/CO/20-21)

Warsaw, 10 July 2019

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I. Information about the reporting institution

The Commissioner for Human Rights (CHR) is a constitutional body appointed to monitor the observance and protection of human and civil rights. The Commissioner performs his role as a body independent of other public authorities. The powers of the CHR are set out in the Constitution of the Republic of Poland and in the Act of 15 July 1987 on the Commissioner for Human Rights. The Commissioner is appointed by the Sejm (the lower chamber of the Polish Parliament), and approved by the Senate (the higher chamber of the Polish Parliament) for a 5-year term in office.

The Commissioner plays the roles of National Human Rights Institution (NHRI/Ombudsman), National Preventive Mechanism – NPM (visiting body for the prevention of torture and other cruel, inhuman or degrading treatment or punishment), independent equality body (referred to in the EU anti-discrimination directives) and independent body monitoring the implementation of the Convention on the rights of persons with disabilities (CRPD).

In the fulfilment of his duties, the CHR takes into account the human rights protection standards set out in international legal instruments including the Convention on the elimination of all forms of racial discrimination.

The CHR is a National Human Rights Institution with an "A status".

II. Observations on the implementation of the Committee's recommendations of 2014.

Bodies established under the international human rights treaties

Ensuring sufficient human and financial resources for the CHR

1. The CHR is a constitutional body that holds several mandates in the area of monitoring the observance and protection of human and civil rights in Poland (see item I) pursuant to the powers granted to the Commissioner under the Act on the Commissioner for Human Rights[1]. Despite the CHR's requests and recommendations of international monitoring institutions, including CERD[2], the CHR office has not been allocated sufficient resources that would ensure comprehensive and effective implementation of its tasks. The scope of duties of the CHR office has been increased but, at the same time, financial resources made available to the CHR for the implementation of those duties have been reduced.
2. The CHR's budget that is requested by the CHR is subject to approval by the Parliament. In the years covered by this report, the CHR was granted the budget in the amounts lower than requested. Over the subsequent years, that budget was reduced. In 2015, the CHR received a budget lower than in 2014 and amounting to PLN 38,602,000. In 2016, the CHR requested an increase of the amount by 18%, up to PLN 45,566, 000 but the Parliament decided to further reduce the allocated funds by PLN 9, 947, 000 i.e. to PLN 35,619,000 which was equivalent to the budget allocated to the CHR in 2011 (when it amounted to PLN 35,424,000). In 2017, the budget of the CHR totalled PLN 37,182,000, despite the fact that the amount requested by the Commissioner was PLN 41,039,000. The amount requested for 2018 was PLN 42,639,000 but the amount allocated by the Parliament was PLN 39,433,000 - the increase over the 2017 budget was primarily related to expenditures on the refurbishment works carried out in the CHR buildings in Warsaw.
3. To sum up, in the period 2014-2018 the Commissioner requested budgetary allocations in the overall amount of PLN 212 782 000. In practice, the total amount granted by the Parliament was PLN 190 007 000. The lowest budgetary allocation was the one for 2016: it amounted to PLN 35,619,000 and constituted 78.2% of the amount that the CHR applied for. The CHR budgetary allocations for the individual years are presented below (in Table 1).

[1] Act of 15 July 1987 (Journal of Laws - Dz. U. of 2018, item 2179, as amended).
[2] Item 9 of the CERD concluding observations (CERD/C/POL/CO/20-21).

Table 1. Financial resources of the CHR

	2014	2015	2016	2017	2018	Total
Draft budget (funds requested)	41,549,000	41,989,000	45,566,000	41,039,000	42,639,000	212,782,000
Financial plan (funds allocated)	39,171,000	38,602,000	35,619,000	37,182,000	39,433,000	190,007,000

4. At the end of 2018 the employment level in full-time equivalents amounted to 294. In recent years that number has remained on a similar level (Table 2). Additionally, it should be pointed out that the Team for Equal Treatment, which is largely responsible[3] for execution of tasks stemming from the Convention on the Elimination of All Forms of Racial Discrimination, counts only 11 employees: 9 lawyers, 1 person responsible for social research and 1 administrative employee.

Table 2. Employment level in the Office of the CHR in full-time equivalents

As of	Employment level in full-time equivalents
2014-12-31	288
2015-12-31	286
2016-12-31	294
2017-12-31	296
2018-12-31	294

Statutory powers of the CHR to combat racial discrimination

5. In cases where both sides are private entities, the CHR may indicate to the claimant what remedies can be used. If, in a given case, a decision has been reached by a relevant authority (e.g. the court), the CHR may consider getting involved in the proceedings and quoting the applicable standard of human rights protection in the particular area in question.
6. The statutory powers of the CHR fully materialize in cases when failure to act (despite a request of a competent authority) or action of a public authority or another body

[3] That team is vested with the execution of tasks of the CHR as an equal treatment body, in compliance with the Act of 3 December 2010 on the implementation of certain provisions on equal treatment (Journal of Laws - Dz. U. of 2016, item 1219) and the body responsible for the implementation of the CRPD.

commissioned to perform tasks on its behalf exert a negative impact on the freedoms and rights of an individual.

7. The basic duties of the CHR include responding to publicly manifested instances of prejudice on the grounds of one's nationality, ethnicity or religion. Manifestations of such prejudice, especially when they assume the form of violence or public incitement to hatred, may fulfil the constitutive elements of crimes prosecuted by public indictment but they also constitute a violation of the prohibition of discrimination specified in Article 32(2) of the Constitution of the Republic of Poland. Moreover, they also threaten the essence of the democratic society.
8. In order to ensure the proper execution of entrusted tasks, the legislator provided the CHR with legal means of action. Their application entails certain obligations on the part of public bodies and institutions. Only by establishing the link between the powers of the CHR with the obligation to act on the part of an authority addressed by the CHR in a given case one can be certain that the CHR will be able to effectively exercise his mandate and persons whose rights or freedoms were violated will be able to fully enjoy their constitutional right to seek help from the CHR[4].
9. The CHR may, *inter alia*, demand that the competent prosecutor instigates preparatory proceedings in cases concerning crimes prosecuted by public indictment[5]. This legal remedy is used by the CHR when he strives to break the passivity of an authority established to prosecute crimes as well when he determines, in the course of explanatory proceedings, that a crime could have been committed in the case at hand. In compliance with a well-established practice in the field of judicial doctrine and case law, enforcement agencies addressed by the CHR with a request to initiate preparatory proceedings in an indicated case should do so without delay. The request made by the CHR assumes the form of a qualified notification which is not subject to prosecutor's control and verification under pre-trial verification procedure and shall directly lead to the instigation of proceedings. The decision to instigate preparatory proceedings (in cases concerning crimes prosecuted by public indictment) is, therefore, the obligation of the Prosecutor’s Office, if it is requested by the CHR.
10. What raises CHR's concern are cases in which prosecutors, having received a qualified notification from the CHR, refuse to open an inquiry with regard to hate crimes, despite the fact that they constitute offenses prosecuted by public indictment and prosecutors are familiar with the judicial rulings concerning the powers of the Commissioner[6]. The CHR encountered such refusals with respect to cases of promoting the ideology of racial separatism by the so called Mazovian group of the National-Radical Camp (from Pol.

[4] Pursuant to Article 80 and Article 209 of the Constitution of the Republic of Poland.
[5] Article 14 (5) of the Act on the CHR.
[6] In each notification submitted pursuant to Article 14(5) of the Act on the CHR, the Commissioner mentioned the rulings of courts which explicitly specified the obligations of prosecutors who receive such notifications.

ONR)[7] as well as presenting an anti-refugee election campaign spot, broadcast prior to local elections in 2018 by the Election Committee of the Law and Order Party (PIS) which could satisfy the definition of a hate crime on the grounds of one's nationality, ethnicity and religion[8]. In both cases prosecutors first refused to instigate the inquiry and relevant proceedings were initiated only after they were ordered by the court which examined related complaints lodged by the CHR.

Incitement to hatred and hate crimes

The scale of hate-motivated crimes. The phenomenon of underreporting

11. The CHR is concerned to observe more and more instances of conduct that is penalized by the Penal Code[9] as hate crime[10]. What acts as a proof for the increasing scale of such crime is, *inter alia*, the number of preparatory proceedings conducted by prosecutors' offices across the country in hate crime cases, published every year by the National Prosecutor's Office[11]. As that data show, in 2015 1548 proceedings were conducted in hate crime cases, including 1169 in new cases, and in 2016 that number increased to 1631, including 1314 new cases. Data for 2017 mention 1449 proceedings in hate crime cases, including 1156 new cases. Those numbers, however, fail to include reported cases in which prosecutors refused to start the inquiry. The Prosecutor's Office Report mentions 1708 cases registered in 2017 and probably it is this number that should be compared with data from previous years. The Prosecutor's Office has not presented data for 2018 yet.
12. Statistical data published by the State Prosecution indicate a yearly increase of the number of proceedings conducted by enforcement agencies with relation to incidents motivated by hate and associated with the use of violence. In 2015 165 of such cases were recorded, in 2016 - 263 and in 2017 that number rose to 350, which accounted for 20% of all cases concerning hate crimes recorded in that year. Since 2016 it is the Muslims or persons associated with Islamic faith who have been the most popular target of attacks motivated by prejudice. In as many as 363 cases recorded in 2016, what motivated the perpetrator of a prohibited act was the fact that the victim or victims were allegedly or actually Muslim. That number, in comparison with 2015, almost doubled. That trend prevailed also in 2017

[7] XI.518.91.2017.
[8] XI.518.66.2018.
[9] Act of 6 July 1997 - Penal Code (Journal of Laws - Dz.U. of 2018, item 1600, as amended).
[10] Examples of such conduct include, *inter alia*, public promotion of a fascist or another totalitarian system and public incitement to hatred due to national, ethic, racial, religious grounds or lack of religious denomination (crime under Article 256(1) of the Penal Code), publicly insulting an individual or a group of people on the grounds of their nationality, ethnicity, race, religion of lack of religious denomination(crime under Article 257 of the Penal Code), as well as using violence or unlawful threats against a group of people or a particular person due to his/her nationality, ethnicity, race, political persuasion, religion or lack of religious denomination (crime under Article 119 of the Penal Code).
[11] Excerpts from annual reports are available at www.pk.gov.pl.

and Muslims were still the main target of hate-motivated crime (the Prosecutor's Office recorded 328 of such cases).

13. In 2018 the CHR, in cooperation with the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, implemented a project striving to examine the scale of the so called *underreporting*, that is to estimate the number of hate crimes that are not reported to the enforcement agencies[12]. The research was performed using the *Respondent Driven Sampling* method, which consist in conducting interviews with respondents who later recruited further research subjects from their own social networks. The research was conducted on Muslim and African community in the Mazowieckie voivodeship as well as Ukrainian community in Małopolskie voivodeship. More than 600 respondents from those communities were asked about experiencing hate crimes which were grouped in six categories indicated by researchers (insult, threat, property destruction, violation of physical integrity, violence and sexual assault). It has been established this way that over 18% of Ukrainians, 8% of Muslims and as much as 43% of individuals from Sub-Saharan Africa experienced at least one hate crime in the period 2016-2017. Results obtained in this way were used to estimate the number of hate crimes in analysed communities. As a result, it was determined that in case of the Ukrainian community in the Małopolskie voivodeship - the largest analysed group, as many as 44 000 hate crimes could have been committed in the period 2016-2017. With respect to Muslims and persons from Sub-Saharan Africa, those numbers for Mazowieckie voivodeship only, reached accordingly around 4300 and around 3000 crimes. The research revealed that only 5% of incidents in question is reported to enforcement agencies[13].

Combating hate speech online

14. The CHR observes the need to undertake actions aimed at creating effective tools for reducing the phenomenon of hate speech on the Internet, that is online statements which promote the racist, fascist or other ideologies and incite to hatred or insulting particular persons or groups of people on the grounds of their nationality, ethnicity, religion or lack of religious denomination. The Commissioner presented his recommendations in that scope in his letters of intervention forwarded in 2018 and 2019 to the Minister of the Interior and Administration[14] and to the President of the Council of Ministers[15]. Suggestions submitted by the CHR were supposed to be examined by the Interministerial

[12] Project entitled *Building a comprehensive criminal justice response to hate crime*, financed from the EU funds - see https://www.osce.org/projects/criminal-justice-response-hate-crime

[13] Full report entitled *Analysis of the nature and scale of non-reported hate crimes committed with respect to members of selected communities in Poland* available at: https://www.osce.org/odihr/412448.

[14] Letter of 11 April 2018, XI.518.50.2017.

[15] Letter of 19 February 2019, XI.518.50.2017.

Team for Combating Fascism and other Totalitarian Systems as well as Incitement to Hatred due to national, ethnic, racial or religious differences or lack of religious denomination appointed by the President of the Council of Ministers[16]. In the end, however, that issue was beyond the scope of tasks entrusted to the Team in question[17]. So far, neither the Ministry of the Interior and Administration nor the Chancellery of the President of the Council of Ministers presented their substantive stance on the suggestions put forward by the CHR.

15. Recommendations presented by the CHR still remain valid. The Commissioner believes that an effective fight with the phenomenon of hate speech requires the following measures:

a. appointment of a new institution which, in cooperation with the representatives of the online sector and non-governmental organizations, will develop or initiate the development of a code of best practices and will later monitor and enforce the fulfilment of obligations imposed on online services providers with respect to counteracting hate speech on the Internet,

b. the new institution should receive powers to examine complaints about the activity of website administrators and conduct own explanatory proceedings in that regard,

c. the principles of cooperation between Internet service providers and enforcement agencies should be made more precise, also with respect to the obligation to gather information about illegal content and its sources and make it available to the enforcement bodies,

d. commercial Internet service providers should be under the obligation to notify law enforcement agencies of any crimes related to hate speech and to inform relevant supervisory bodies in case of determining that an organization, in conducting its operations, refers to totalitarian methods or practices or accepts racial or national hatred, which is forbidden by law pursuant to Article 13 of the Constitution of the Republic of Poland,

e. the obligation that is already imposed on Internet service providers to remove any content constituting hate speech or to block access to it within a specified time as from receiving credible information about such content should be made more precise,

f. the obligation should be imposed on major Internet service providers to monitor stored data in terms of detecting and deleting content that constitutes hate speech,

[16] Team appointed under the order of the Prime Minister No. 24 of 20 February 2018 (M.P. item 205).
[17] The CHR was informed about the fact that the Interministerial Team received his demands in a letter from the Minister of the Interior and Administration of 8 May 2018, ref. No. BMP-0790-3-4/2018/MKa. In a letter of 7 May 2019, ref. No. BMP-0790-1-6/2019/PS, the Minster of the Interior and Administration notified the CHR that the issue of hate speech on the Internet was beyond the scope of tasks entrusted to that Team.

g. a statutory prohibition to the use hate speech online should be introduced – the content that should be perceived as hate speech is any comment that disseminates, incites, promotes or justifies hatred on the grounds of race, as well as xenophobia, anti-Semitism or other forms of hatred motivated by intolerance, including intolerance expressed in the form of aggressive nationalism, discrimination or hostility towards minorities, migrants or persons that originate from migrant communities[18].

Prevention of the public propagation of racist symbols and content as well as symbols and content referring to totalitarian systems, including fascist and Nazi ones as well as the enforcement of the prohibition of the operation of parties and organizations promoting the said ideologies

16. Recent years saw relatively frequent instances of the promotion, in the public space, of racist, fascist or Nazi symbols and content, as well as symbols and content that directly refer to the Third Reich ideology promulgating hate and disrespect for persons of other nationality, ethnic origin or religion. Such content was presented by radical nationalistic organizations: Szturmowcy, Niklot, National and Social Congress as well as Autonomic Nationalists during public gatherings - starting from the Independence March in Warsaw on 11 November 2017 and ending with the National Labour Day celebrated on 1 May 2018. In January 2018, the TVN24 TV station aired a documentary entitled: "Polish Neo-Nazi's" which depicted persons and organizations involved in a series of concerts and gatherings during which content directly derived from the Third Reich ideology was promoted and salutes were given to pay tribute to Adolf Hitler.

17. The CHR is alarmed about the activity of neo-fascist movements. At the same time, the Commissioner shares the view that one of the reasons for the disturbing growth of the acts of violence committed by some radical, right-wing organizations is the sense of impunity among members of such groups[19].

18. It is necessary to implement into the Polish legal order the solutions that recommend to states to penalize membership in organizations that promote or incite racial hatred or involvement in any types of such activity[20]. Article 13 of the Constitution of the Republic of Poland prohibits the existence of organizations whose programs are based upon totalitarian methods and practices of Nazism, fascism and communism, as well as those whose programs or activities presume or sanction racial or ethnic hatred. The fact that

[18] In compliance with the recommendation of the Committee of Ministers of the Council of Europe contained in recommendation No. R 97 (20).
[19] Resolution of the European Parliament of 25 October 2018 concerning an increasing number of neo-fascist acts of violence in Europe (2018/2869(RSP), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0428+0+DOC+XML+V0//PL
[20] In line with General Recommendations of CERD No. 35 of 26 September 2013, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11

such a provision is included in the Constitution demonstrates the legislative significance of this prohibition as a guarantee of the democratic system of state and respect for human dignity. The importance of that provision should, therefore, make the legislator implement such solutions which could make the prohibition in question truly effective. The mechanism enabling identification and de-legalization of an organization whose program or activity reflect the attributes specified in Article 13 of the Constitution seems to be insufficient: it does not, namely, act as a deterrent for groups which are willing to disseminate hateful ideologies under various banners and in changing organizational structures. This fact justifies the inclusion in the Penal Code of the provision which penalizes the membership in organizations that promote totalitarian ideologies or incite to racial hatred or the participation in any types of such activities. It should be pointed out that a similar solution was adopted in the Penal Code in the context of penalizing participation in an organized criminal group. Article 258 of the Penal Code, which could act as a model for the argued change, provides for criminal liability of persons who participate in organized groups aimed at committing a crime, set up such groups or lead them.

19. In his letter of intervention to the President of the Council of Ministers the Commissioner argued for the inclusion in the Penal Code of regulations penalizing organizations which promote totalitarian ideologies or incite to hatred or participation in any of such activities[21]. That letter of intervention alongside with the suggestions of the CHR concerning combating hate crime online was submitted to the Interministerial Team that was mentioned in the earlier part of this publication. Yet, the team failed to take presented ideas into consideration.

Outcomes of the work of the Interministerial Team for combating the promotion of fascism and other totalitarian systems as well as crimes consisting in incitement to hatred on the grounds of national, ethnic, racial or religious differences or lack of religious denomination - remarks of the Commissioner for Human Rights

20. Recommendations developed by the Interministerial Team focused on amendments to Article 256 of the Penal Code in the part referring to offenses of public promotion of fascist or other totalitarian system (Article 256(1) as well as Article 256(2) of the Penal Code), which provides for a penalty to a person who disseminates, produces, preserves or imports, acquires, stores, possesses, presents, transports or transfers a print, record or other object containing the content specified in item 1 of that Article or constituting medium comprising fascist, communist or other totalitarian symbols (Article 256(2)). The Team primarily suggested increasing criminal sanction for the prohibited acts mentioned in the provision from two to three years of deprivation of freedom. Further demands

[21] Letter of 15 February 2018, XI.518.5.2018.

concerned, *inter alia*, the inclusion in the list of attributes of an offence under Article 256(1) of the Penal Code of public promotion of a communist and Nazi system, criminalization of acts consisting in promoting fascist, Nazi, communist and other totalitarian ideologies that argue for using violence to influence political or social life, activity features of an offense specified in Article 256(2) of the Penal Code manifested in the activity of offering materials mentioned in the said provision. The team also suggested penalization of acts associated with paying tribute or other forms of commemorating individuals responsible for Nazi and communist crimes, committed in the public and non-public domain.

21. Some proposals put forward by the Interministerial Team have been incorporated into the draft act on amending the Act - Penal Code and some other acts. The Act was adopted by the Parliament on 13 June 2019. Yet, the President of the Republic of Poland decided to submit, as part of preventive control measures, a motion to the Constitutional Tribunal with a request to examine the compliance of that document with the Constitution of the Republic of Poland. The draft act gave a new wording to Article 256 of the Penal Code: public promotion of the Nazi and communist system was added as an attribute of a prohibited act mentioned in 1; conduct consisting in public promotion of Nazi, communist, fascist ideology or an ideology calling for the use of violence to influence political or social life (newly added item 1a) was penalized and the act of offering and disposing of printed materials, records or other objects containing symbols described in the act was added as an attribute of the prohibited act mentioned in 265(2) of the Penal Code. At the same time, the provision stated clearly that for the commission of the crime the symbols in question must be used for the purpose of promoting content penalized in the provision. The legislator also followed the recommendation of the Team with respect to increasing the scope of punishment: conduct described in Article 256 of the Penal Code is liable to the penalty of deprivation of freedom for three years. The regulation does not provide for the possibility to adjudicate fine or the penalty of restriction of freedom.

22. The Team appointed by the President of the Council of Ministers failed to put forward any proposals which could significantly increase the effectiveness of combating hate crimes. Increasing the criminal sanction for the crime described in Article 256 of the Penal Code from two to three years of deprivation of freedom will definitely not contribute to that. Additionally, supplementing the provision with previously unmentioned activities of promoting the communist and Nazi system as well as adding the crime of promoting Nazi, communist, fascist ideologies or an ideology calling for the use of violence to influence political or social life is merely a formality and will not bring a major breakthrough. In the view of the Commissioner, all the acts mentioned above already fulfilled the attributes of the crime specified in Article 256(1) consisting in public promotion of fascist or other totalitarian systems. There is, namely, no doubt that communist and Nazi system belonged

to totalitarian establishments that were mentioned previously by the provision and promoting fascist or other totalitarian ideologies, including ideologies calling for the use of violence, were tantamount to promoting fascist or other totalitarian systems that was already subject to punishment. The modification put forward by the Interministerial Team that was later reflected in the amendment of Article 256 of the Penal Code may eliminate possible interpretational ambiguities in that scope but it definitely fails to play a role in increasing the effectiveness of prosecuting hate crime.

23. The above-mentioned draft act amending the Penal Code additionally provides for a change of Article 53 of the Penal Code. Currently the provision allows the court to take into account the motivation of the perpetrator while determining the punishment but it fails to specify what kind of motivation deserves court's attention in such cases. Yet, in line with the draft, the provision in question will also include a new notion of "incriminating circumstances" that will also be taken into consideration by the court while determining the punishment. Such circumstances have been listed in an open catalogue contained in item 2a of the provision in question. In compliance with (2a)(7) one of the incriminating circumstances is the fact of "committing a hate crime with a use of violence due to victim's belonging to a certain national, ethnic, racial group, political persuasion or religion or lack of religious denomination". What is not considered as incriminating circumstance is the sole motivation of the perpetrator related to hatred on national, ethnic, racial or other grounds. In line with the literal wording of the provision, incriminating circumstances arise only when the perpetrator commits hate crime with a use of violence. The proposed amendment fails, therefore, to meet the recommendation of the Committee on the Elimination of Racial Discrimination[22], which explicitly called on Poland to acknowledge racial motivation of the perpetrator as incriminating circumstance. The rationale behind introducing incriminating circumstance in the version proposed in the amendment to the Penal Code is questionable also for another reason. It should be, namely, remembered that committing a hate crime with a use of violence due to victim's belonging to a certain national, ethnic, racial group, political persuasion or religion or lack of religious denomination constitutes an offence as such in line with Article 119(1) of the Penal Code. Therefore, it is difficult to justify the introduction to the Penal Code of an incriminating circumstance that is equivalent to a crime already described in the Code.

[22] Cf. Concluding observations on the joint XX and XXI periodic report submitted by Poland (CERD/C/POL/CO/20-21), letter C, item 8.

The effectiveness of law enforcement bodies' actions taken in hate crime cases. An example of the CHR's intervention in a case concerning the promotion of the racial separatism ideology

24. An ongoing monitoring of proceedings conducted by law enforcement bodies in hate crime cases led the CHR to express some doubts as to whether all groups that are at risk of that crime are duly protected from it and whether actions targeting some of those groups are not treated with certain leniency by the Polish enforcement authorities. Doubts of the Commissioner concerning the effectiveness of protection against hate crime refer in particular to migrants, including refugees, Muslims as well as some national or ethnic minorities. In numerous cases examined by the CHR, law enforcement authorities prematurely discontinued proceedings, groundlessly refused to instigate them or conducted them in a lengthy manner without explaining the reasons for taken decisions in a unambiguous way that is compliant with the principle of the rule of law. In the view of the Commissioner, they contributed in this way to the creation of the image of the society which accepts negative conduct, such as promoting fascism or racist ideology or spreading hatred motivated by prejudice.

25. In his letter of intervention to the Prosecutor General[23] the Commissioner referred to 31 cases conducted by the enforcement bodies between 2015 and 2019 which were, at various stages, subject to the CHR' monitoring and in which the actions of prosecutors' offices or their decisions raised concerns in terms of their compliance with the standards formulated, *inter alia*, by the European Court of Human Rights, such as the principle of objectivity and exceptional diligence in revealing hateful motivation in the acts of perpetrators. The Commissioner requested the Prosecutor General to examine all reported cases and assess, within his competencies, whether the proceedings in those cases were properly conducted. He also requested the Prosecutor General to verify whether decisions to discontinue proceedings or refuse to instigate them can find relevant justification in legal provisions and evidence gathered in respective cases. So far, the Commissioner has not received any response to this letter of intervention.

26. In the context of the implementation of the provisions of the Convention on the elimination of all forms of racial discrimination by Poland and in particular its Article 4 which orders State -Parties to the Convention to condemn all propaganda based on the ideals or theories stating the superiority of one race over another but also to take relevant measures aimed at eradicating all forms of incitement to this type of discrimination one should mention one case reported by the CHR to the Prosecutor General which related to the promotion of racial separatism ideology by the so called Mazovian group of the National-Radical Camp[24].

[23] Letter of 23 January 2019, XI.518.7.2019.
[24] XI.518.91.2017.

27. In the said case the CHR made a notification to the prosecutor's office about the suspected crime consisting in the public promotion of totalitarian system and public incitement to hatred on racial grounds, as referred to in Article 256(1) of the Penal Code, by publishing a text entitled: *Racial separatism - response to multi-culti in the XXI century* on the website www.onrbrygadamazowiecka.pl. In his notification the Commissioner pointed out those fragments of the publication in which the author calls for *the restoration of the primacy of the white race*, suggests that groups unaccepted by him/her, that is individuals with skin colour other than white, immigrants from beyond Europe as well as refugees, have a destructive impact on the European society and constitute serious threat to others, groundlessly blames persons of other descent for *increasing crime rates (assaults, robberies, rapes and murders)* or even ascribes blame for *the cultural and civilization genocide of the native white inhabitants.* The CHR also mentioned the conclusion of the publication's author who argued that the only effective method for protecting Europe against collapse is the need to create a society based on *the principle of white race superiority*, whose political system would prohibit *race mixing* and order the resettlement of individuals of certain ethnicity to their place of origin in order to *restore the world order.*
28. The prosecutor discontinued proceedings in the said case claiming that the act described by the CHR in the notification fails to fulfil the attributes of the public promotion of totalitarian system and public incitement to hatred on racial grounds[25]. In the opinion of the prosecutor, presenting racial content is not equivalent to incitement to hatred on racial grounds or promoting totalitarian systems. The prosecutor also failed to notice any fragments in the article that should be considered incitement to hatred on the grounds of one's nationality, ethnicity or race. The Commissioner made an appeal against the ruling of the prosecutor to the competent district court. The appeal is still waiting for examination.

The situation of national and ethnic minorities

29. The CHR is alarmed about the negative stereotypes concerning national and ethnic minorities, especially Roma and Jewish ones that still prevail in the Polish society.

30. In recent years, in the broadly understood public debate, there were more and more negative or even hateful comments directed at the Ukrainian community (both Ukrainian national minority as well as migrants from Ukraine). Such comments often referred to the Polish-Ukrainian history. Yet that history was treated in those instances in an instrumental and selective manner. The anti-Ukrainian tone in the public debate is also accompanied by an increasing number of attacks on persons speaking Ukrainian as well as recurring

[25] Ruling of the District Prosecutor's Office for the Ochota district of Warsaw, of 31 May 2019, ref. no. PR 2 Ds. 1343.2018.

instance of destroying memorials commemorating events and individuals of importance to Ukrainian community living in Poland. Increased number of such incidents is visible, *inter alia*, in the aforementioned statistics published on an annual basis by the National Prosecutor's Office. According to that data, the number of proceedings instigated by the prosecution in cases of hate-motivated acts directed at Ukrainian community or persons associated with it went up from 37 in 2015 to 190 in 2017. That data, as the research conducted by the CHR indicates[26], demonstrate an alarming trend but not the scale of the phenomenon.

31. To counteract the emergence and strengthening of negative stereotypes one needs to undertake educational measures consisting, first and foremost, in the incorporation of information regarding national and ethnic minorities as well as their history and culture to curricula of primary schools. It would be desirable to involve representatives of respective minorities in the creation of relevant teaching materials.

32. It is also necessary to pursue anti-discriminatory educational activities and promote an open and tolerant attitude to persons and social groups of different culture and background among pupils and students. The Minister of National Education confirms that one of the tasks of schools is to shape and develop the attitude of respect for human rights, equal treatment and tolerance among pupils[27]. In the opinion of the CHR the currently applicable core curriculum for schools fails to sufficiently cover the issue of human rights and equal treatment. At the stage of pre-school education it is difficult to notice any content devoted to that matter at all. Additionally, the previously clearly defined obligation to implement anti-discriminatory measures covering the whole group of pre-schools, schools and other education establishments[28], with the aim to shape the desired attitudes among people and ensure the observance of societal norms, was abolished. The failure to include that obligation in the provisions concerning the requirements for schools and other establishments [29] does not mean that pre-schools, schools and other educational establishments are not supposed to realize anti-discriminatory activities. Yet, it means that such activities are not subject to pedagogical supervision. Furthermore, an ongoing public debate in the course of which individuals express their aversion for "otherness" effectively discourages teachers from discussing such issues. In the opinion of the CHR the said change is unjustified and has a negative impact on the quality of educational offers.

[26] Cf. item 12 of this report.
[27] Letter of the Minister of National Education to the CHR of 5 October 2017, file No. DPPI-WPPiP.4010.457.2017 (XI.800.3.2017).
[28] The obligation to pursue such activities resulted from the regulation of the Minister of National Education of 6 August 2015 on the requirements for schools and other establishments (Journal of Laws - Dz.U. item 1214). The fulfilment of that obligation was verified under pedagogical supervision conducted pursuant to the provisions of the regulation of the Minister of National Education of 27 August 2015 on pedagogical supervision (Journal of Laws - Dz.U., item 1270).
[29] Regulation of the Minister of National Education of 11 August 2017 on the requirements for schools and other establishments (Journal of Laws - Dz.U. item 1611).

33. The exercise of the right of national and ethnic minorities to learn a minority language and be instructed in that language under the general education system requires one to provide access to relevant handbooks for children and teenagers. Yet, the CHR regularly receives signals that pupils who want to exercise their right to learn their language start a new school year without necessary didactic materials. It is the public authorities who are responsible for finding handbook authors and developing a publishing plan early enough to make sure that all interested parties have access to necessary educational materials.

34. It is imperative to create a relevant incentive plan to encourage pupils to learn the language or receive instruction in the language of the minority that they identify with. Under the current circumstances the decision to study a minority language is an additional burden for pupils and goes beyond the standard school obligations. Therefore, exercising the right to learn a given language results in negative consequences in the form of additional duties whose fulfilment is by no means rewarded.

The situation of the Roma community

35. The situation of the Roma minority undergoes gradual improvement, which can be attributed to the activity of numerous Roma organizations as well as the operation of the *Programme for the integration of Roma community in Poland in years 2014-2020*[30]. What deserves recognition is whole idea of the creation and existence of the *Roma Programme* which finances activities undertaken largely by Roma organizations aimed at supporting Roma culture but also improving dire conditions in which a significant part of that population lives. This form of support should be viewed as state's attempt at fulfilling the obligation to actively foster full and actual equality in the economic and social life[31].

36. The sheer existence of the *Roma Programme* does not suffice to effectively counteract exclusion from the social and economic life that a large part of the Roma community is facing. The example of Roma settlements in Małopolskie voivodeship shows that Roma who have been living in dramatically difficult housing conditions for several generations, deprived of any real opportunities on the local job market and fully dependent on social welfare are unable to improve their lot. Therefore, their fate depends, to a large extent, on the support from the state and in particular the involvement of the local self-government units. Yet, no cooperation between local communities and local authorities or even an obvious conflict between them often make it impossible to deliver actual assistance to the Romani people and use the funds from the *Roma Programme* in an effective way. The

[30] Programme established under resolution No. 202/2014 of the Council of Ministers of 7 October 2014; hereinafter: *Roma Programme.*

[31] That obligation stems from Article 4(2) of the Framework Convention for the Protection of National Minorities of 1 February 1995 (Journal of Laws - Dz.U. of 2002, No. 22, item 209), Article 6 (2)(1) of the Act of 6 January 2005 on national and ethnic minorities and regional languages (Journal of Laws - Dz. U. of 2017, item 823).

consequences of the lack of involvement of the local self-government units are particularly visible when the local self-government owns the land on which Roma settlements are located. In such an instance it is the local authorities that decide whether to undertake necessary repair and construction work in the said settlements.

37. Roman settlement in Maszkowice (in Łącko municipality, Małopolskie voivodeship) may serve as a good illustration showing how the reluctance of local authorities to get involved in real support measures affects the situation of the Roma community. The settlement in Maszkowice, inhabited by around 270 persons, comprises a group of residential and utility buildings, most of which constitute unpermitted structures that were largely constructed even several decades ago, mainly on the land owned by the municipality. The standard of those buildings is dramatically low. The quality of construction materials, the way they were used as well as the passage of time have rendered most of the buildings unsuitable for housing people. Most of them pose a real threat to the health or even life of their residents. Despite the suggestions of the Małopolskie voivodeship governor, the letters of intervention written by the CHR as well as expectations of the Roma community, the authorities of Łącko municipality decided not to undertake comprehensive measures, financed under the *Roma Programme*, which would result in the redevelopment of the settlement area, *inter alia*, by replacing the current, deteriorating structures with a new multi-family building or year-round residential containers with a suitable standard. Yet, the municipality's authorities are reluctant to embark on such a plan. Instead, they initiated proceedings before the locally competent District Inspector of Building Control which resulted in around 40 administrative decisions ordering the demolition of unpermitted structures located in the settlement. The residents of those unpermitted structures do not have means to voluntarily execute those decisions. In consequence, enforcement proceedings initiated by the building control inspectorate led to the imposition of fines of up to 40 thousand zloty on the Roma, which were supposed to force them to demolish their own homes.

38. What also raised the CHR's concern was the problem of using means provided under the *Roma Programme* by the municipal authorities of Limanowa (Małopolskie voivodeship). The resources in question were allocated for the purchase of new houses for several Roma families from Limanowa. Yet, they were located on the territory of other local self-government units, *inter alia*, in Czchów (Czchów municipality, also in Małopolskie voivodeship). The purchase of such real estate allowed the local self-government authorities to offer assistance to the Roma that could actually increase their standard of living but the condition for benefiting from that help was the resettlement to another municipality and abandonment of the current local community. Ultimately, despite the judgement of the Supreme Administrative Court which questioned the possibility of one municipality purchasing real estate located on the territory of another one, the Limanowa

authorities managed to persuade some Roma families to move to Czchów. The authorities of Czchów fail to come to terms with that fact: they consistently refuse the Roma the right to register at the new address, conclude an agreement for disposal of sewage and connecting the real estate to water. They even went as far as to discontinue the removal of municipal waste from the estate.

39. In the opinion of the CHR the concept of the *Roma Programme* requires modification. The Commissioner notices the need to, *inter alia*, allocate a separate part of the *Roma Programme* for investment activity. The execution of investment measures should at the same time be subject to increased supervision, also in terms of the quality and purposefulness of carried out investment work. One should also create financial mechanisms which would encourage local self-government units to make use of the available resources. What could constitute such a mechanism is, for example, an additional subsidy for the implementation of own tasks for municipality involved in providing assistance to Romani people. One should also consider creating legal conditions allowing individuals, that is residents of Roma settlements, to use resources available under the *Roma Programme*. In this sense, the support provided under the *Roma Programme* would be similar in its form to social welfare benefits and could be used in accordance with the wishes of beneficiaries - for the renovation of their current dwellings or the purchase of a new real estate.

40. The residents of the Maszkowice settlement as well as other, similar Roma settlements are regular social welfare beneficiaries. As an example, Romani people from Maszkowice, even though they account for merely 1,5% of the municipality's overall population and around 12% of the total number of people benefiting from various forms of social support, receive benefits accounting for 20% of all resources allocated yearly by the municipality for social welfare. It is difficult for the Roma to find an alternative source of income. While talking to the Commissioner they also point out that they have virtually no chances of finding employment. Neither completed supplementary training nor new professional qualifications seem to help in finding a job. Potential employers are not, namely, willing to employ persons of Roma nationality, which is perceived by the Roma as a sign of discrimination on the labour market. In many cases that the Commissioner is aware of the only real employer for the Roma are municipality and their municipal units which offer solely ad-hoc work or clean-up work. Yet, in principle, such work is performed on a temporary and part-time basis.

The situation of the Jewish community

41. According to the last report of the National Prosecutor's Office concerning proceedings conducted by law enforcement bodies in hate crime cases, 112 incidents of anti-Semitic nature were recorded in Poland in 2017. In comparison with similar data for previous years, one can observe that the number of incidents of such nature recorded by the law

enforcement bodies is declining: in 2016, 160 of such cases were recorded and in 2015 – 208 cases. When evaluating that trend, however, one needs to bear in mind that not all cases are reported to enforcement bodies. This, in turn, in the opinion of the CHR may result in significant underestimation of the scope, nature and characteristics of anti-Semitism in Poland.

42. The report of the EU's Fundamental Rights Agency[32] presents the results of the survey analyzing the experiences and perceptions of Jews on hate crime, discrimination and anti-Semitism. Over 16 000 respondents identifying with the Jewish nationality from 12 EU member states, also from Poland, participated in the survey. The study demonstrated that almost one third of respondents in Poland (32%) experienced at least one incident of anti-Semitic nature in the period of 12 months preceding the survey (similar results were obtained in Spain - 32% and Sweden - 30%; in Germany 41% of respondents had such experiences). Poland also stands out among 12 EU countries when it comes to offensive comments placed on the Internet and social media - 20% of respondents from Poland declared having encountered such comments (the report fails to provide clear data in that scope from other countries). At the same time, merely 7% of respondents claim that the Polish government is effectively combating the phenomenon of anti-Semitism. According to the report, in Poland 79% of anti-Semitic incidents is not reported to the authorities at all (that figure, however, does not differ from the average for the remaining EU countries covered by the research).

Discrimination of citizens of other countries

Detention of foreigners and juveniles

43. The act on foreigners[33] provides for the possibility for placing a foreigner in a guarded detention centre if a relevant decision obliging him/her to return to his/her country of origin may be issued. Pursuant to the act on providing foreigners with protection on the territory of the Republic of Poland[34] also foreigners applying for the refugee status, including families with children, may be placed in such centres. Both acts provide at the same time for the possibility to prescribe measures in relation to apprehended foreigners alternative to detention which may secure administrative proceedings conducted in their cases. Alternative, non-isolation measures mentioned by the acts include: the obligation to report at a prescribed authority at specified times, payment of financial surety or imposition of an obligation to reside in a designated place.

[32] Report *Experiences and perceptions of anti-Semitism - Second survey on discrimination and hate crime against Jews in the EU*, December 2018.
[33] Act of 12 December 2013 (Journal of Laws - Dz.U. of 2018, item 2094, as amended).
[34] Act of 13 July 2003 (Journal of Laws - Dz.U. of 2018, item 1109, as amended).

44. The data of the Border Guard demonstrate that the introduction of measures alternative to detention after 1 May 2014 resulted in the reduced number of families with children being placed in detention centres. However, such measures are not a rule in proceedings against apprehended foreigners, but rather an exception from the rule generally applied to foreigners, namely detention. This practice of the Border Guard and courts should be changed, which is possible under the currently applicable legal provisions.

45. On 10 April 2018 the European Court of Human Rights issued a judgement in the case of Bistieva and Others v. Poland (application no 75157/14). The case concerned a family from Chechnya, parents with three children born in the period 2006-2013, which was placed in the guarded centre for foreigners subordinate to the Border Guard where they were supposed to await the decision about their deportation from the territory of Poland. In the end the foreigners left the centre - it turned out that they are allowed to stay on the territory of Poland due to legal and residence-related situation of one of their children. In the application submitted to the ECHR the foreigners accused Poland of disproportionate interference in their right to private and family life caused by placing them in a guarded centre, which in their view did not constitute a necessary measure. The ECHR declared that detention should be the last resort applied only when no other, alternative measures which can secure ongoing proceedings can be adjudicated. Furthermore, the ECHR stated that in case of detaining children in guarded centres the authorities should, in particular, make sure that detention does not violate the child's best interest. The authorities cannot in such a situation content themselves with the statement that it is in the child's best interest to be placed in the guarded centre together with parents.

46. Under detention conditions the juveniles' constitutional right to education is not and cannot be realized. Despite unquestionable efforts of the Border Guard, educational authorities and schools, activities organized in centres fail to comply with core curricula. What is missing are comprehensive legal regulations which would specify the obligations resting on mentioned institutions in the area of providing instruction to juveniles residing in guarded centres. It is also unclear on what principles should that instruction be provided and funded. As a result, education to the said group of foreigners is only provided based on a mutual agreement between the Border Guard, public schools and educational authorities and depends on their good will and capabilities.

47. The CHR believes that a legislative initiative needs to be undertaken to introduce a total ban on placing juveniles and their parents or guardians in guarded centres for foreigners. There is, namely, no doubt that conditions prevailing in guarded centres, in particular prison-like regime, are not suitable for children. Staying in such establishments may be a traumatic experience for children and may negatively affect their psycho-physical development.

48. During the inspection visits carried out at guarded centres for foreigners the representatives of the National Mechanism for the Prevention of Torture encountered individual cases of persons whose stay in the said establishments proves the ineffectiveness of the system of identifying violence and torture victims, which would normally prevent the placement of such individuals in detention facilities. Guarded centre residents included persons who reported being victims of torture or violence either in their countries of origin or transit countries in respect to whom the NMPT experts could diagnose possible PTSD symptoms. In 2017 the NMPT identified six such individuals and in 2018 another six. Under the currently applicable regulations, persons whose psycho-physical state may indicate that they experienced violence should not be placed in guarded centres at all. In case they have already been placed there they should be released from them immediately. Yet, in cases identified by the NMPT that mechanism failed. It shows that a proper procedure for identifying torture victims residing in detention centres and those applying for refugee status should be established.

49. The CHR is also concerned about the planned implementation of the strategic document entitled "Polish Migration Policy" [35] by the Ministry of the Interior and Administration. The document outlining the direction of the state's migration policy is supposed to offer a response, *inter alia*, to the needs of economic policy concerning acquisition of foreign employees with relevant qualifications to fill in the gaps on the job market that can be attributed to demographic trends. The document specifies that one of the objectives of the migration policy will be the development of preventive measures consisting in the detention of foreigners in guarded centres or custody. The governmental draft amending the act on granting protection to foreigners on the territory of the Republic of Poland, which has been discussed for several years, is heading in the same direction. The draft foresees restricting the possibility of applying non-custodial measures, alternative to detention with relation to apprehended foreigners. It also provides for certain automatism in the placement in detention centres of foreigners whose requests for granting international protection are to be examined in the so called border mode foreseen for individuals filing the above-mentioned requests upon crossing the border of the Republic of Poland.

Lack of effective access to the refugee procedure

50. Since 2015 the Commissioner has been receiving numerous complaints from foreigners who attempt, in vain, to enter the territory of Poland through border crossings in Terespol (border with Belarus) or Medyka (border with Ukraine) with a view to applying for

[35] On 20 March 2017 the Ministry of the Interior and Administration published a communiqué announcing the annulment by the Council of Ministers of the document *Polish migration policy* that has been in force since 2012. So far no new document in that scope has been adopted.

international protection in Poland. By principle, declarations made at the border crossing during the clearance procedure concerning the intention to apply for international protection in the Republic of Poland should result in foreigner's admission to Poland and acceptance by the Border Guard of a relevant application for this protection. Yet, complaints addressed to the CHR as well as observations during the inspection visits carried out by the employees of the Office of the CHR on border crossings[36] suggest that in many cases Border Guard officers performing the border clearance procedure do not accept declarations from foreigners about the intention to file for protection, thus preventing them from submitting a relevant application. As a result, they refuse foreigners the right to enter the territory of the Republic of Poland.

51. Each time when following a border clearance a Border Guard officer decides that there are no grounds for admitting a given foreigner on the territory of Poland, he draws up a note from the conducted interview. Such a note, however, constitutes an internal document only and is usually laconic in nature: in most cases it comprises no more than three sentences. In line with the practice witnessed during the inspection visits, the officer does not describe the course of the whole interview and does not record all statements made by the foreigner but focuses only on information that, in his view, is of key importance for determining the purpose of foreigner's arrival to Poland. The content of the note and selection of comprised information lie solely at the discretion of the BG officer who conducts an interview with the foreigner. Interviews are not recorded in any other way and the notes are not read out to foreigners. Therefore, they have no opportunity to verify or rectify information contained therein. For the same purpose it is also not possible for other BG officers, including superiors of the officers conducting interviews, to verify the notes. The impossibility to verify the course of interviews which have a profound impact on the identification of foreigners seeking international protection in Poland denies that sensitive group guaranteed and effective access to procedures for examining applications for international protection. The need to establish such guarantees derives from the item 25 of the preamble and Article 6(2) of the 2013/32/EU directive on joint procedures for granting and withdrawing international protection[37]. In the opinion of the Commissioner the statutory obligations of officers in terms of documenting the course of an interview with foreigners during border checks should be made more precise. Interviews with foreigners during border checks should, as a rule, be documented using uniform interview forms that include, as an obligatory item, the question whether the foreigner intends to seek international protection in Poland. The Commissioner addressed, *inter alia*, the Minister

[36] The inspection visits at the border crossing in Terespol took place on 11 August 2016 and 15 May 2018 . The inspection visit at the border crossing in Medyka took place on 6 - 7 October 2016.

[37]The directive of the European Parliament and the Council dated 26 June 2013 on joint procedures for granting and withdrawing international protection (recast, OJ L.2013.18.60, as amended).

of the Interior and Administration with the request to introduce relevant regulations in that matter[38].

[38] Letter of 30 March 2019, XI.543.3.2019.