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URGENT OPINION ON THE IMPACT OF LEGISLATIVE ACTS INTRODUCING A STATE OF EMERGENCY ON THE MANDATE OF THE COMMISSIONER FOR HUMAN RIGHTS

Poland

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Based on an unofficial English translation of the legislative acts provided commissioned by the OSCE Office for Democratic Institutions and Human Rights.



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

On 3 September 2021, Permanent Mission of the Republic of Poland to OSCE, pursuant to the par. 28 of the Moscow Document 1991 informed ODIHR that President of Poland declared state of emergency in part of Podlaskie and Lubelskie voivodships “in connection to particular threat to the security of citizens and public order.” The declaration of the state of emergency was connected with the arrival of refugees on the border between Poland and Belarus.

Poland’s Commissioner for Human Rights (the HRC), requested ODIHR to provide an urgent legal opinion, analyzing the legal acts introducing and regulating the state of emergency, also stating that while its constitutionally is not being questioned, the measures taken by the authorities are not proportional to the threat at hand.

At the outset, this Urgent Opinion welcomes that the HRC has been able to visit locations where the individuals seeking asylum and international protection are staying, and has been fulfilling the mandate of the NPM.

However, it is of concern that the overbroad nature of state of emergency regulations may potentially conflict with the mandate of the HRC as defined by the Polish Constitution, the Act of the Commissioner for Human Rights as well as with international standards. Furthermore, imposed regulations appear to disproportionately restrict the entry to the regions under state of emergency for media representatives as well as civil society organisations wishing to report or help the asylum seekers, including legal representatives.

During a state of emergency, a NHRI is expected and should be able to conduct itself with a heightened level of vigilance and independence, and in strict accordance with its mandate, including monitoring, documenting, and reporting in a timely manner to address urgent human rights violations.

As a general principle, under international human rights law and a constitutionalist legal order that respects fundamental values such as democracy, human rights and the rule of law, emergency powers are only justified on the basis that they are temporary and necessary. Furthermore, even if a state of emergency is fully in line with national constitutional provisions, under international law, this does not release a State from the requirement to ensure that the measures imposed by the state of emergency conform to the conditions of “necessity, proportionality and temporariness.” Strict limits on the duration, circumstance and scope of such powers are therefore essential. State security and public safety can only be effectively secured in a democracy, which fully respects the rule of law, which, *inter alia*, requires existence of the effective mechanisms of control of the imposition and duration of a declared emergency situation in order to avoid abuse.

More specifically, and in addition to what is stated above, ODIHR recommends and affirms as follows :

- A. While it is welcome that the HRC is able to access and monitor the regions under the state of emergency and other regions on the border between Poland and Belarus, it is recommended to revise the state of emergency related regulations, clarifying their impact on the HRC's mandate. It remains crucial to ensure that the mandate of the HRC is unhindered throughout the period of state of emergency and beyond, in accordance with international standards, to monitor, record, react, and report on blatant human rights violations. Any requirements for non-disclosure of information should be specified and assessed in an individual and proportionate manner, subject to judicial review if necessary. Furthermore, the HRC should be guaranteed the right to challenge proportionality and grounds for state of emergency measures if required. [par 38-45]
- B. It is important to ensure that the HRC maintains the right of full and unhindered access to the persons currently deprived of their liberty, while individuals seeking asylum and international protection should be able to appeal to the HRC and/or access and receive legal representation. [par 51]
- C. It is recommended to review the legislative acts having an impact of a complete ban for media representatives and instead provide regulated access to the regions under the state of emergency on the basis of objective criteria, clear and transparent procedure, avoiding a situation in which access would be provided in discriminatory manner or only to a selected media outlets. Alternatively, the legislator should find other ways to provide media access in a non-discriminatory and transparent manner. [55-57]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

TABLE OF CONTENT

I. INTRODUCTION.....	5
II. SCOPE OF THE OPINION	5
III. LEGAL ANALYSIS AND RECOMMENDATIONS	6
1. Relevant International Human Rights Standards and OSCE Human Dimension Commitments	6
1.1 <i>On State of Emergency.....</i>	6
1.2 <i>On Freedom of the Media and Access to Public Information.....</i>	7
1.3 <i>On the Mandate of the NHRI in a State of Emergency.....</i>	10
1.4 <i>On the mandate of the HRC as the NPM (National Preventative Mechanism) during a state of emergency.....</i>	11
2. Analysis.....	12
2.1 <i>The Impact of the State of Emergency on the HRC’s mandate.....</i>	12
2.2 <i>The Mandate of the NHRI and its role as the National Preventative Mechanism.....</i>	14
2.3 <i>The Exclusion of the Media, Prohibition on Access to Information and Denial of Entry.....</i>	16

ANNEX:

- (1) Regulation of the President Of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency in part of the Podlaskie Province and in part of the Lubelskie Province, Journal of the Republic of Poland item 1613
- (2) Regulation of the Council of Ministers of 2 September 2021 item 1614

I. INTRODUCTION

1. By letter of 15 October 2021, the Polish Deputy Ombudsman (Human Rights Commissioner, hereafter “HRC”) requested the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) to provide an urgent opinion analyzing the legal acts introducing the state of emergency, these were: (a) Regulation of the President Of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency in part of the Podlaskie Province and in part of the Lubelskie Province¹ (b) Regulation of the Council of Ministers of 2 September 2021² on restrictions on freedoms and rights in connection with the introduction of the state of emergency. The request was to review the acts from the perspective of the Commissioner’s mandate, which encompasses the tasks of the National Preventive Mechanism. The letter also asked for an opinion on the proportionality of the complete ban introduced by the state of emergency regulations herein referred to preventing reporting by all journalists and organisations about the situation in the affected regions.
2. This legal opinion assesses these questions against international human rights standards and OSCE human dimension commitments. Given the short timeline to prepare this legal review, ODIHR prepared an Urgent Opinion, which does not provide a detailed analysis but primarily focuses on the most concerning issues relating to the questions posed.

II. SCOPE OF THE OPINION

3. The scope of this Opinion covers the legal acts submitted for review that introduce the state of emergency (listed above). The HRC’s mandate, which can be found in the Constitution of the Republic of Poland³ as well as the Act of the Human Rights Commissioner,⁴ encompasses the tasks of the National Preventive Mechanism.⁵ The Opinion also attempts to answer the questions posed by the HRC in the current context of the ongoing crisis on the Polish-Belorussian Border, directed to the OSCE/ODIHR. It is noteworthy that the ongoing crisis at the border and its impact on the right of asylum seekers was also the subject of a recent OSCE/ODIHR Opinion.⁶
4. The Opinion raises key issues and provides indications of areas of concern. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments.

¹ Journal of the Republic of Poland item 1613

² Journal of the Republic of Poland item 1614

³ Article 208-212 of the [Constitution of the Republic of Poland](#), 2 April, 1997

⁴ Act of 15 July, 1987 (Journal of Laws 2020 pos 627)

⁵ Article 1 par 4 of the Act on the Human Rights Commissioner, Act of 15 July, 1987 (Journal of Laws 2020 pos 627), also

⁶ [OSCE/ODIHR Urgent Opinion On Draft Amendments To The Aliens Act And The Act On Granting Protection To Aliens On The Territory Of The Republic Of Poland And Ministerial Regulation On Temporary Suspension Of Border Traffic At Certain Border Crossings, Warsaw, 10 September 2021 Opinion-Nr.: MIG-POL /428/2021](#)

5. The Opinion is based on an unofficial translation commissioned by the OSCE/ODIHR. Errors from translation may result. The Urgent Opinion is also available in Polish; however, the English version shall prevail.
6. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Poland in the future.
7. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

1.1 On State of Emergency

8. The relevant international standards to the case described by the HRC concern the state of emergency, the mandate of an Ombudsperson in his or her ordinary role, and in his or her role as the National Preventative Mechanism under the Optional Protocol to the Convention Against Torture (hereinafter, “OPCAT”).⁷ In this opinion, the standards in each of these areas converge to some degree.
9. Regarding, the state of emergency, international human rights treaties such as Article 15.1 of the European Convention on Human Rights (hereinafter “ECHR”)⁸ and Article 4 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”)⁹ permit the declaration of a state of emergency in times of ‘public emergency threatening the life of the nation’.
10. On 3 September 2021, Permanent Mission of the Republic of Poland to OSCE, pursuant to the par. 28 of the Moscow Document 1991 informed ODIHR that President of Poland declared state of emergency in part of Podlaskie and Lubelskie voivodships “in connection to particular threat to the security of citizens and public order”. Thus, Poland’s declaration of emergency to protect public order can *prima facie* constitute a legitimate limitation on human rights. In *Lawless v Ireland*,¹⁰ a ‘public emergency threatening the life of the nation’ was described by the European Court of Human Rights (hereinafter “ECtHR”) as ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed’.¹¹

⁷ [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006](#). Poland ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 26 July 1989 and the Optional Protocol on 14 September 2005.

⁸ The Republic of Poland ratified the European Convention on Human Rights in 1993

⁹ The Republic of Poland ratified the International Covenant on Civil and Political Rights on 18 Mar 1977

¹⁰ *Lawless v Ireland* 3 ECHR (Ser.A) (1960-1961) 56.

¹¹ *Lawless v Ireland* 3 ECHR (Ser.A) (1960-1961) 56.

11. However, deference towards the political branches as to the existence of a state of emergency, or according a margin of appreciation to national authorities is not tantamount to a complete abdication of the competence to review the existence of a state of emergency. Thus, this question is not a ‘non-justiciable’ or ‘purely political question’; it is one that is bound by law and may be subject to judicial oversight.
12. The Court held that where an emergency legislative decree did not contain clear and explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it should always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness could be avoided.¹²
13. Even in a state of emergency, it would not be consistent with the rule of law in a democratic society if a State could, without restraint or control by the Court, remove from the jurisdiction of the courts a whole range of civil claims or confer immunity from civil liability on certain categories of persons.¹³
14. According to the second limb of derogation clauses such as Article 15 par. 1 of the ECHR and Article 4 of the ICCPR, the measures taken must be ‘proportionate to the exigencies of the situation’. A state therefore is not given ‘carte blanche’ to act as it sees fit once a valid emergency has been declared. As a general principle, emergency powers under international human rights law and a constitutionalist legal order that respects fundamental values such as democracy, human rights and the rule of law are only justified on the basis that they are temporary and necessary— i.e. the state has no choice but to take this course of action or that the use of emergency powers amount to the lesser of two evils. The exceptionality of these powers is further underlined by the assumption that these emergency powers should negate their own necessity: once the threat is defeated, the *status quo ex ante* is restored. In turn, this negation of their own necessity should ensure that emergency powers are temporary.
15. In other words, even if a state of emergency is fully in line with national constitutional provisions, under international law, this does not release the State from the requirement to ensure that the measures imposed by the state of emergency conform to the conditions of “necessity, proportionality and temporariness.”
16. Strict limits on the duration, circumstance and scope of such powers are therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.

1.2 On Freedom of the Media and Access to Public Information

17. The ECtHR has repeatedly stressed the importance of a free press in a democratic society,¹⁴ and that democracy thrives on freedom of expression and given the importance of what is at stake under Article 10, the State is the ultimate guarantor of pluralism.¹⁵ The media perform a vital role as a ‘public watchdog’ that is fundamental to the democratic

¹² *Pişkin v. Turkey*, 2020, par 153; *Al-Dulimi and Montana Management Inc. v. Switzerland*, 2016, par 146

¹³ *Pişkin v. Turkey*, 2020; *Fayed v. the United Kingdom*, 1994, par 65

¹⁴ See eg *Sunday Times v UK* (1979) 30(2) EHRR 245.

¹⁵ *Animal Defenders International v. the United Kingdom*, par. 101; *Manole and Others v. Moldova*, par. 99; *Informationsverein Lentia and Others v. Austria*, par. 38

- process. The media are also crucial in vindicating the public's right to receive information and ideas of public concern,¹⁶ including those on divisive political issues.¹⁷ Furthermore, news is a 'perishable commodity,' meaning that its value depreciates rapidly as time progresses.¹⁸ If content is wrongfully removed for even a short period of time, this may have a substantial impact on the media's important watchdog role.
18. The ECtHR has also taken a highly sceptical view of 'blanket ban' approaches to a number of different interferences with rights. Blanket bans, that is complete prohibition of the exercise of a right without exception (even where the right is not absolute, such as freedom of expression) are difficult to justify from a proportionality perspective owing to the requirement that 'there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned'.¹⁹
 19. The undisputed integral part of freedom of information is access to information which can be defined as the right to seek, receive and impart information held by public bodies. This is enshrined in Article 19 of the Universal Declaration of Human Rights (1948).²⁰ Access to Information has also been enshrined as a constituent of freedom of expression in other major international instruments, including the ICCPR, the ECHR, the UN Convention against Corruption, Council of Europe Convention on Access to Official Documents, No 205.²¹ Indeed as with the freedom of expression, access to information may be restricted where it is done proportionally and in accordance with the exhaustive list of exceptions permitted by international instruments.
 20. As regards a state of emergency, the ECtHR concludes that the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.²²
 21. The ability to seek, receive and impart information effectively is part of the right to freedom of expression, which is protected under international human rights law.²³ According to the UN Human Rights Committee, "Article 19, paragraph 2 embraces a right of access to information held by public bodies. The jurisprudence of the European Court of Human Rights also highlights that denial of access to information constitutes an interference with the right to freedom of expression."²⁴
 22. The UN Human Rights Committee's General Comment No. 34²⁵ and several reports by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, provide further guidance on the freedom of access to

¹⁶ *News Verlags GmbH and Co KG v Austria* (2001) 31 EHRR 146, [56].

¹⁷ *Lingens v Austria* (1986) 8 EHRR 407;.

¹⁸ *Observer and Guardian v UK* App No 13585/88 judgment of 26 November 1991, [60].

¹⁹ *Glor v Switzerland* [94] (Application no. 13444/04) ECtHR 30 April 2009

²⁰ General Assembly as Resolution 217 during its third session on 10 December 1948, at the time, Poland abstained from voting for the adoption of the resolution on the UDHR.

²¹ <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=205>, ratified by the Republic of Poland on 15 Sep 2006.

²² *Şahin Alpay v. Turkey*, par. 180

²³ Art. 19 of the ICCPR and Art. 10 of the ECHR.

²⁴ See e.g. *Sdružení Jihočeské Matky v. Czech Republic* (2006), *Társaság A Szabadságjogokért v. Hungary* (2009), *Youth Initiative for Human Rights v. Serbia* (2013), *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* (2013).

²⁵ [UN Human Rights Committee General Comment No. 34](#), Freedom of Opinion and Expression, CCPR/C/GC/34, 21 July, 2011.

- information and the way an enabling legal framework should be shaped, including the maximum disclosure principle, the presumption of the public nature of meetings and key documents, broad definitions of the type of information that should be accessible, reasonable fees and time limits, independent reviews of refusals and sanctions for non-compliance.²⁶
23. The OSCE participating States have reaffirmed since the Helsinki Final Act in 1975, the importance of a free media and press. Indeed, they have declared that “The participating States reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.”²⁷ Furthermore, when a participating State imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The relation between right and restriction and between norm and exception must not be reversed.²⁸ It is not compatible with Article 19 paragraph 3 of the ICCPR, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.²⁹
24. In the Copenhagen Document (1990), participating States committed to safeguarding the right to freedom of expression, including the freedom “*to receive and impart information and ideas without interference by public authority and regardless of frontiers*”.³⁰ The Istanbul Document (1999) reiterated the importance of the public’s access to information.³¹
25. Furthermore, participating States committed to endeavour maintaining freedom of expression and freedom of information, consistent with their international obligations and commitments, with a view to enabling public discussion on the observance of human rights and fundamental freedoms *as well as on the lifting of the state of public emergency*. [emphasis added] They will, in conformity with international standards regarding the freedom of expression, take no measures aimed at barring journalists from the legitimate exercise of their profession other than those strictly required by the exigencies of the situation.³²

²⁶ [Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression to the General Assembly on the right to access information](#) (4 September 2013), A/68/362 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, submitted to the UN Human Rights Council, 14th session, 20 April 2010

²⁷ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991, Moscow

²⁸ [UN Human Rights Committee General Comment No. 34](#), Freedom of Opinion and Expression, CCPR/C/GC/34, 21 July, 2011; See also UN Concluding observations on the Russian Federation (CCPR/CO/79/RUS)

²⁹ [UN Human Rights Committee General Comment No. 34](#), Freedom of Opinion and Expression, CCPR/C/GC/34, 21 July, 2011.

³⁰ Copenhagen Document (1990) para. 9.1.

³¹ Istanbul Document (1999), para. 26.

³² Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991, Moscow

1.3 On the Mandate of the NHRI in a State of Emergency

26. The international standards which are the pillars to the mandate of the HRC are the United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights, the so-called “Paris Principles”,³³ UN Resolution A / RES / 75/186 (the “UN Resolution”) on the role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law,³⁴ Council of Europe Recommendation CM / Rec (2019)6 on the development of the Ombudsman institution³⁵ and the recent “Principles on the protection and promotion of the ombudsman institution (hereinafter “Venice Principles”).³⁶
27. The abovementioned UN Resolution, in its paragraph 2, strongly encourages Members States to create and strengthen Ombudsman institutions “consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)”; in paragraph 8 it “[e]ncourages Ombudsman and mediator institutions, where they exist, (a) To operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles”.
28. Council of Europe Recommendation CM / Rec (2019) 6 on the development of the Ombudsman institution, Part I point 1 states clearly that “Ombudsman institutions should be in place in all member States. The choice of one or more of these institutions should be made by each State in the light of its organisation, particularities and needs. These institutions should be directly and easily accessible to everyone in respect of all public services, however provided. Particular attention should be paid to persons who may not be aware of the existence of Ombudsman institutions, who may have difficulties in accessing Ombudsman institutions or who may be in a situation of vulnerability, *such as migrants, persons deprived of liberty* [emphasis added], persons with disabilities or older persons and children.”
29. OSCE participating States, in the Copenhagen Document of 1990, have committed to facilitating “the establishment and strengthening of independent national institutions in the area of human rights and the rule of law”.³⁷ “The participating States further affirm that, where violations of human rights and fundamental freedoms are alleged to have occurred, the effective remedies available include (...) the right of the individual to seek and receive assistance from others in defending human rights and fundamental freedoms, and to assist others in defending human rights and fundamental freedoms” (OSCE Copenhagen Document).
30. Moreover, “in the situation of a state of emergency, it is expected that an NHRI will conduct itself with a heightened level of vigilance and independence, and in strict accordance with its mandate. NHRIs are expected to promote and ensure respect for human

³³ The UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter “the Paris Principles”) were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

³⁴ adopted by the UN General Assembly on 16 December 2020 (75 th session).

³⁵ adopted by the Committee of Ministers of the Council of Europe on 16 October 2019 (1357th meeting), in particular point I.1 and I.5

³⁶ adopted by the European Commission for Democracy through Law (the Venice Commission), 118th Plenary Session, Venice, 15-16 March 2019; The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345th Meeting of the Ministers’ Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019 ; by the Congress of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019

³⁷ See OSCE Copenhagen Document (1990), par 27, available at <http://www.osce.org/odihr/elections/14304?download=true>.

rights, democratic principles and the strengthening of the rule of law in all circumstances and without exception. In situations of conflict or a state of emergency, this may include monitoring, documenting, issuing public statements and releasing regular and detailed reports through the media in a timely manner to address urgent human rights violations.”³⁸

31. While the impact of emergency circumstances varies from one case to another, they almost always have a dramatic impact on the rights recognized in international human rights standards, particularly on vulnerable groups. In such circumstances, the protection of human rights becomes all the more important, and NHRIs must ensure that individuals have accessible and effective remedies to address human rights violations.³⁹
32. According to the Venice Principles, which state that “The Ombudsman shall not be given nor follow any instruction from any authorities”⁴⁰, “the Ombudsman shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, *including those deprived of their liberty* [emphasis added] and the Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector”.⁴¹
33. Additionally, the Venice Principle state that “following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts.”⁴².

1.4 On the mandate of the HRC as the NPM (National Preventative Mechanism) during a state of emergency

34. The Polish HRC serves also as the National Preventative Mechanism under the OPCAT⁴³. Article 1 of OPCAT clearly states the intention of the entire protocol as the establishment of “a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.” It is appropriate at this juncture to recall that in accordance with Article 7 of the ICCPR, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” As established by Article 4 par 2 of the ICCPR, the right is absolute in nature meaning that it

³⁸ Global Alliance of National Human Rights Institutions (GANHRI), “General Observations of the Sub-Committee on Accreditation”, General Observation 2.5, 2018.

³⁹ Global Alliance of National Human Rights Institutions (GANHRI), “General Observations of the Sub-Committee on Accreditation”, General Observation 2.5, 2018

⁴⁰ Par 14

⁴¹ Par 16

⁴² Par 19

⁴³ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006

may not be derogated under any circumstances, whether in times of war or state of emergency.

35. The right of everyone to have unimpeded access to the NHRI is a fundamental characteristic of ombudsperson institutions confirmed by the Venice Principles: “Any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint”.⁴⁴ This right is not impeded in any way by a state of emergency. The right of unrestricted access to the ombudsman applies to any person, natural or legal, without conditions. It concerns Polish citizens who are in the area but also foreign nationals, civil society organisations and members of the armed forces in the area. As noted above already, the Venice Principles establish that special attention should be paid to people who are unaware of the existence of the ombudsman and those who find themselves in a vulnerable situation, such as migrants in particular.
36. As already mentioned above, in relation to the Polish HRC’s ordinary mandate, it is welcomed that in particular as a result of the special role the HRC holds as the NPM, the office is making regular monitoring visits to places where the migrants are being held or expelled. This fulfils the requirements bestowed upon the HRC by the OPCAT as the NPM, and unrestricted access to the area which is within the realm of state of emergency must continue. Article 4 of OPCAT states that “Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be *deprived of their liberty* [emphasis added].” Article 4 par 2 of OPCAT, continues to clarify that “deprived of their liberty” is defined as “deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”
37. Furthermore, according to the Paris Principles cited above, the HRC has a responsibility not only to monitor but also to report on government action or inaction (Paris Principle A.3(a)(iv)), as well as publicize its views on “any matters concerning the promotion and protection of human rights” (Paris Principle A.3(a)). It should be noted that within its mandate, the HRC continues to publicly report on the situation it is monitoring on the Polish -Belorussian border and is encouraged in continuing this important work.

2. ANALYSIS

2.1 The Impact of the State of Emergency on the HRC’s mandate

38. The HRC request does not question the actual introduction of the state of emergency in the Podlaskie and Lubelskie Voivodships, *sensu stricto* as it has been done in accordance with the Polish Constitution. Rather the HRC expresses concerns that the measures imposed under the state of emergency are not proportionate, in particular regarding access by the media and representative of social organizations and access to information as an important corollary of the right to freedom of expression and the freedom of the press.
39. While the HRC has not requested an assessment of the legitimacy of introduction of the state of emergency (in the constitutional/legal sense) it must be emphasized that, as stated

⁴⁴ Venice Principles, par 15

above, international standards indicate that this option remains open to the HRC, as “following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts”.⁴⁵ That is, on the basis of observations, monitoring and recording, the HRC should be able to also question not only the proportionality of measure taken during a state of emergency but also the grounds based on which it is introduced.

40. Among the restrictions imposed by the state of emergency the following measures may hinder the effective exercise of the general mandate of the HRC and his specific mandate as NPM; In particular, Para 1, section 1, (4) of the Regulation of the Council of Ministers; prohibiting 24-hour prohibition of presence on the territory under state of emergency (5) prohibition on recording (6) restriction of access to public information concerning activities carried out in the area subject to the state of emergency in connection with the protection of the state border and preventing and counteracting illegal migration.
41. The exceptions to the to the 24 -hour prohibition presence with respect to the territory under state of emergency is found in par. 2 Section (1) and (2) of the Regulation of the Council of Ministers on restrictions on freedoms and rights in connection with the introduction of the state of emergency. This includes persons who permanently reside or study in the area, or conduct economic activities, are owners of the real estate, or attend religious ceremonies, etc. Exception may also be granted to the persons with disabilities placed in the facilities located in the area and their guardians. The exception is also granted to persons who can demonstrate that they provide services to a public authority performing public tasks in the area subject to the state of emergency, the second officers and employees of state services in the performance of official duties. There are no exceptions to the prohibition of recording and none on the restriction of access to information.
42. Potentially such a broad restriction could hamper the activities and mandate of the HRC. Any exclusion of the HRC from the area covered by the state of emergency would be disproportionate to the degree and nature of the threat in this instance, as described above. It is welcome that regardless the Council of Minister’s Regulation the HRC continues to access the regions under the state of emergency, monitors the border between Poland and Belarus, visits locations and temporary shelters for refugees. As per above described norms and GANHRI recommendations in particular, it is crucial that the mandate of the HRC remains unhindered even during, or especially during state of emergency (see par 30 above). Article 13 of the Act on the Commissioner for Human Rights, gives the Polish Commissioner broad powers to record and store sound and visual information for the purpose of investigation rather than dissemination. It should be clarified that the HRC, within the remit of the mandate, is able to continue this evidence collection, even during the state of emergency, or in fact, particularly during it. The Council of Ministers decision should not affect negatively or disproportionately restrict the mandate of the HRC to develop and issue “independent reports and recommendations” (as per Article 17b of the same Act), or access information, which is relevant to the execution of the mandate in accordance with international norms, and as defined by the Polish Constitution and the Act on the Commissioner for Human Rights. It should be stated that imposing blanket restrictions denying the completely the HRC to implement the above activities would be disproportionate and unjustified.
43. Furthermore, the introduction of a state of emergency does not by itself limit the mandate of the HRC, monitoring and further, reporting obligations. In case if implementation of

⁴⁵ Venice Principles, par 19

the HRC's mandate during the state of emergency leads to collection of confidential information (or information that constitutes a state secret), it may indeed be subject to non-disclosure. However, it should also be possible to assess the nature of information and the need for non-disclosure in an individual and proportionate manner. State of emergency regulations established by the authorities resulting in restriction of constitutional mandate of the HRC "to safeguard the freedoms and rights of persons and citizens" (Article 208 of the Constitution), including a restriction on reporting, should be subject to a judicial review where necessary, for example, in a case of reporting on human rights violations.

44. It should also be noted that in accordance with the General Observations of the Sub-Committee on Accreditation, "disruptions to peace and security in no way nullify or diminish the relevant obligations of the NHRI. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship."⁴⁶
45. **It therefore recommended to revise the state of emergency related regulations, clarifying their impact on the HRC's mandate, and ensure that in view of the fluctuating circumstances on the Polish-Belarussian border, the HRC continues monitoring and when necessary react and report on human rights violations.**

RECOMMENDATION A.

While it is welcome that the HRC is able to access and monitor the regions under the state of emergency and neighboring regions at the border between Poland and Belarus, it is recommended to revise the state of emergency related regulations, clarifying their impact on the HRC's mandate. It remains crucial to ensure that the mandate of the HRC is unhindered throughout the period of state of emergency, in accordance with international standards, including its ability to monitor, record, react and report on blatant human rights violations. Any requirements for non-disclosure of information should be specified and assessed in an individual and proportionate manner, subject to judicial review if necessary. Furthermore, the HRC should be guaranteed the right to challenge proportionality and grounds for state of emergency measures.

2.2 The Mandate of the NHRI and its role as the National Preventative Mechanism

46. The right of the NHRI and their staff to have unlimited access to information and to premises, even in areas under state emergency is a prerequisite to fulfil its mandate, as stated in international standards described in detail above. It is positive in this respect that the staff of the HRC has visited the places of detention of the refugees at the border areas covered by the state of emergency.⁴⁷
47. In the context of the ordinary mandate of the HRC (Article 1 (3) of the Act on the Commissioner for Human Rights)⁴⁸ and in particular in the context of the role of the HRC as the NPM (Article 1 (4) of the Act on the Commissioner for Human Rights),⁴⁹ the HRC has a broad mandate, one which he himself noted in the letter to the Minister of

⁴⁶ Global Alliance of National Human Rights Institutions (GANHRI), "General Observations of the Sub-Committee on Accreditation", General Observation 2.5, 2018.

⁴⁷ <https://bip.brpo.gov.pl/pl/content/rpo-pomoc-humanitarna-granica-cudzoziemcy>

⁴⁸ Dz. U. 1987 Nr 21 poz. 123

⁴⁹ Dz. U. 1987 Nr 21 poz. 123

Interior dated 3 September 2021, requesting that all security forces are informed of the unhindered access that the HRC should have to the territories under the state of emergency. This is in line with international standards, including the Venice Principles, requiring that Ombuds institution shall have discretionary power to investigate cases with due regard to available administrative remedies, to request the co-operation of any individuals or organisations as well as to have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential (Principle 16 of the Venice Principles). Furthermore, to avoid or minimize the risk of and to provide an effective response to potential cases of mistreatment, it is also important that refugees seeking asylum and protection have a possibility to appeal to the HRC and/or have access to legal representation. This also means that any restrictive measures taken by executive under the state of emergency cannot restrict the investigative powers of the HRC.

48. Through their mandate to promote and protect human rights, both Ombudsman institutions and National Human Rights institutions play an essential role in flagging human rights issues during emergency times, effectively complement parliamentary and judicial control.⁵⁰
49. As concerns the role of the HRC as the NPM it is essential to recall the clear mandate proscribed by OPCAT, which states in Article 20:
50. “In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:
 - (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
 - (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
 - (c) Access to all places of detention and their installations and facilities;
 - (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
 - (e) The liberty to choose the places they want to visit and the persons they want to interview;
 - (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.
51. As already applauded above, it is positive that the office of the HRC has been making regular visits to the border areas under the state of emergency and has been disseminating information to the public. This good practice is recommended to be continued. **The prohibition on torture is non-derogable and it is therefore important to ensure that the HRC maintains the right of full and unhindered access to the persons currently deprived of their liberty.**

⁵⁰ Venice Commission “Report Respect For Democracy, Human Rights And The Rule Of Law During States Of Emergency : Reflections” Strasbourg, 19 June 2020, Study n° 987/2020, CDL-AD(2020)014, par. 90

RECOMMENDATION B.

It is important to ensure that the HRC maintains the right of full and unhindered access to the persons currently deprived of their liberty, while individuals seeking asylum and international protection should be able to appeal to the HRC and/or access and receive legal representation.

2.3 The Exclusion of the Media, Prohibition on Access to Information and Denial of Entry

52. The Law on State of Emergency, Article 20. 1, allows for preventive censorship of the mass media, inspections of the contents of correspondence sent using telecommunications networks and telephone conversations or signals transmitted in telecommunications networks. It also limits access to public information.
- Furthermore, according to the Presidential Regulation on State Emergency in part of the Podlaskie Province and in part of the Lubelskie Province, paras. 2. 5 and 7., it is envisaged to impose prohibition “on recording by technical means the appearance or other characteristics of designated places, facilities or areas located in the area subject to the state of emergency; ... access to public information concerning activities carried out in the area subject to the state of emergency in connection with the protection of the state border and preventing and counteracting illegal migration.”
53. In addition, Regulation of the Council of Ministers also prohibits “recording by technical means the appearance or other characteristics of places, facilities or areas comprising border infrastructure...”, as well as envisages “restriction of access to public information by way of refusal to provide access in the manner stipulated in the Law of 6 September 2001 on Access to Public Information (2020) item 2176 and of 2021 item 1598) to public information concerning activities carried out in the area subject to the state of emergency in connection with the protection of the state border and preventing and counteracting illegal migration.
54. Thus, the ban which applies for a 24 hour period throughout the state of emergency does not seem to allow for exception and thus appears to constitute a blanket ban for media to access and report from locations under the state of emergency. Although States enjoy wider margin of appreciation in cases of public emergency, arising under Article 15, determining whether or not "the life of [its] nation" is threatened and if so, how far it was necessary to go in attempting to overcome the emergency⁵¹ this discretionary powers are not unlimited. Under certain circumstances prohibitions to access areas under the state of emergency may be justified by exigencies of the situation, however, the need and proportionality for such a drastic measures banning the presence of all media and social organisations in the current context is not immediately obvious.
55. States may impose certain restrictions to the freedom of expression, *inter alia*, introducing special rules on access to particular types of public information to protect public health or rights of others. However, they also have an obligation to demonstrate the necessity and proportionality of means chosen.⁵² Blanket or indefinite bans are difficult to justify from a proportionality perspective owing to the requirement that ‘there must be no other means of achieving the same end that would interfere less seriously with

⁵¹ Ireland v. the United Kingdom, 18 January 1978

⁵² General Comment No. 34 on Art. 19: Freedom of opinion and expression, para. 35.

the fundamental right concerned'.⁵³ Also, overly long deadlines covering all access to information requests can, in essence, encroach on the right to access to information as some of the submitted requests are likely to be time sensitive. It is not a proportionate nor a necessary measure to ban the presence of all media and social organisations.

56. It is difficult to see how a near total prohibition on media and civil society representatives entering an area affected by the state of emergency is 'proportionate to the exigencies of the situation'. The exclusion of journalistic oversight is all the more concerning given the degree of deference afforded to the Government when declaring the state of emergency and enacting the emergency measures. The HRC quite pointedly also notes that a complete lack of information, may indeed lead to the proliferation of misinformation, raise fear and create security concerns which are not based on recorded facts and indeed, may serve to undermine confidence rather than strengthen it. It is therefore recommended to revise the Presidential Regulation and Regulation of the Council of Ministers, removing the total prohibition on entering and reporting from the regions under the state of emergency.
57. **As suggested by the HRC, instead of a complete ban, media representatives may be offered with "passes" to the area in order to also, which, among others, may ensure their health and safety. It is clear however, that any such system of passes must be conducted in a transparent manner based on public and objective criteria, to avoid a situation in which passes would be provided in discriminatory manner or only to a selected media outlets. It is therefore recommended to review the existing regulations accordingly. Alternatively, the legislator should find other ways to ensure media access in a non-discriminatory and transparent manner.**

RECOMMENDATION C.

It is recommended to review the legislative acts having an impact of a complete ban for media representatives and instead provide regulated access to the regions under the state of emergency, on the basis of objective criteria, clear and transparent procedure, avoiding a situation in which access would be provided in discriminatory manner or only to a selected media outlets. Alternatively, the legislator should find other ways to ensure media access in a non-discriminatory and transparent manner.

[END OF TEXT]

⁵³ *Glor v Switzerland* [94] (Application no. 13444/04) ECtHR 30 April 2009