

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions 34/18, 34/35 and 36/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **recent passage of the Act of 26 January 2018 amending inter alia, the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation (hereafter the Act on INR), that penalizes certain statements about Poland's role in the period of time between 8 November 1917 and 31 July 1990.**

According to the information received:

On 26 January 2018, the Polish Sejm (lower house of the Parliament) approved an Act containing amendments to several Acts with regards to the role of Poland in the period of time between 8 November 1917 and 31 July 1990, including during the Second World War, including to the Act on the Institute of National Remembrance – Commission for Prosecution of Crimes against the Polish Nation.

With regard to the Act on INR, the amendments state, inter alia, in Article 55a. 1. that, “whoever publicly and contrary to the facts attributes to the Polish Nation or the Polish State responsibility or co-responsibility for Nazi crimes committed by the German Third Reich [...] or for other offences constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishes the responsibility of the actual perpetrators of these crimes, shall be liable to a fine or deprivation of liberty up to 3 years. The judgement shall be communicated to the public.” The amendment also introduced that a perpetrator of the act mentioned in Article 55a. 1., acting unentionally, “shall be liable to a fine of restriction of liberty”.

The amendment also states in Article 55a. 3, that a person does not commit a crime if they have committed that act “as part of artistic or scientific activity”.

On 6 February 2018, the President of Poland signed the amendment into law and stated that he would refer the Act to the Constitutional Tribunal for judicial review and to assess its conformity with the Polish Constitution.

It has been reported that the Polish Government has justified the Act on the basis that it merely “concerns protection of the “Polish Nation” and “Polish State” rather than of individuals or their groups,” and therefore the Act does not “prohibit public, or even contrary to the facts, attribution of responsibility or co-responsibility for Nazi crimes committed by the German Third Reich”.

Before we explain our concerns with the abovementioned Act and amendments, we would like to recall that the Constitution of Poland states that freedom of the press and other means of social communication shall be ensured (article 14) as well as freedom to express opinions, to acquire and to disseminate information (article 54).

In this connexion, we wish to reiterate Your Excellency’s Government’s obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Poland on 18 March 1977. In particular, Article 19 (2) of ICCPR establishes State Parties’ obligations to respect and ensure “the right to freedom of expression,” which includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Under Article 19 (3), restrictions on the right to freedom of expression must be “provided by law”, and necessary for “the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”. Under Article 20, States are obligated to prohibit by law “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,” but such restrictions must meet the strict conditions of Article 19(3) (CCPR/C//GC/34). Permissible restrictions on the internet are the same as those offline (A/HRC/17/27).

Under the Article 19(3) requirement of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34). The requirement of necessity also implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons”. The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion (A/HRC/29/32). Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result” (CCPR/C/GC/34). The prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under Article 20(2) of the ICCPR must be read in light of the strict requirements of Article 19(3).

The Human Rights Committee has unequivocally concluded that “[l]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the ICCPR imposes on States parties in relation to the respect for

freedom of opinion and expression.” Furthermore, the ICCPR “does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.” (CCPR/C/GC/34)

We also recall that the Durban Declaration emphasizes the importance and necessity of teaching history “with a view to achieving a comprehensive and objective cognizance of the tragedies of the past” (para. 98). Furthermore, the Declaration also emphasized that “remembering the crimes or wrongs of the past, wherever and whenever they occurred, unequivocally condemning its racist tragedies and telling the truth about history are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity” (para. 106). We are also mindful that the act and the amendments have been adopted at a time of heightened racist and xenophobic discourse across Europe, including in Poland. In light of this context, we would like to remind the Government of your Excellency’s obligations under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by Poland on 5 December 1968, to “condemn all propaganda and organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin”.

In light of these standards and analysing the Act of 26 January 2018, we express grave concern that the amendment to Article 55 of the Act on the Institute of National Remembrance – Commission for Prosecution of Crimes against the Polish Nation violates Your Excellency’s Government’s obligations under Article 19 (3) of the ICCPR. We are concerned that this broad criminalization of expression “attribute[ing] to the Polish Nation or the Polish State responsibility or shared responsibility for Nazi crimes” effectively affords the government “unfettered discretion” to determine the truthfulness and validity of interpretations of relevant historical events, in violation of the requirement of legality. We are also concerned that such criminalization does not serve a legitimate aim. While States may restrict freedom of expression to protect the “rights and reputations of others” subject to Article 19 (3), the scope of this interest does not extend to the reputation of the State or other institutions. Furthermore, given the wide variety of educative and other measures that Your Excellency’s Government may adopt to meaningfully engage with the public and the international community about relevant historical matters, the criminalization of interpretations of past events is an excessively punitive measure that violates the Article 19 (3) requirement of necessity and proportionality.

We are concerned that references to the protection of “the Polish State” and “the Polish Nation” do not adequately mitigate the disproportionality of this restriction. In fact, it is precisely these references that explicitly suppress critical aspects of public discourse concerning the vast Nazi crimes that took place in Poland. Furthermore, the defense for artistic and scientific activity is vaguely formulated and raises concern that Your Excellency’s Government will exercise broad authority to define the permissible scope of artistic and scientific activities concerning relevant historical matters. Such a defense also excludes large classes of individuals from exercising their right to seek,

receive, and impart information about the Nazi genocide, including journalists, civil society, human rights defenders, and religious groups.

To the extent that the Act seeks to prohibit “national ... hatred” under Article 20 of the ICCPR, we are concerned that the scope of criminalization violates the requirement that the prohibited expression must also constitute “incitement to discrimination, hostility, or violence.” The categorical prohibition of expression that the government deems inaccurate does not take into account considerations of context that inform the incitement standard, such as the intent of the speaker, the form, style, and magnitude of the expression, and the likelihood of harm occurring (including its imminence). In any event, any measure established under Article 20 must be in strict conformity with the requirements of Article 19(3).

Finally, we urge Your Excellency’s Government to ensure that any judicial review of the aforementioned Act takes into account Your Excellency’s obligations under the ICCPR and related international laws and standards, including the concerns identified above.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above mentioned issues.
2. Please provide detailed information on measures taken by your Government to ensure that the abovementioned Act and the amendment to Article 55a. is strictly compatible with Your Excellency’s Government’s obligations under international human rights law and standards, especially under Article 19 of the ICCPR and Article 4 of the ICERD.
3. Please provide detailed information about the objective of the aforementioned Act and the amendments.
4. Please provide information about the timeline that the Act will be introduced to the Constitutional Tribunal for its judicial review and assessment and detailed information about the procedure of examination and revision of an Act if the Constitutional Tribunal makes this decision.

We would appreciate a response within 60 days.

While awaiting a reply, we urge that all necessary measures be taken to bring this Act and its application into compliance with Poland’s international human rights obligations.

Finally, we would like to inform your Excellency’s Government that this communication, as a comment on pending or recently adopted legislation, regulations or

policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>. Your Excellency's Government's response will be made available on the same website as well as in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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