



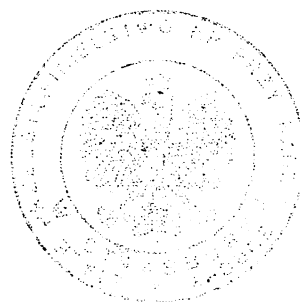
Permanent Representation of Poland to the Council of Europe
SPRE 10-11/06

The Permanent Representation of Poland to the Council of Europe presents its compliments to the Secretary General of the Council of Europe and referring to the *note verbale* of 17 February 2006 (SPRE 10-10/06) has the honour to transmit the original of the letter of Mr Stefan Meller, Minister for Foreign Affairs of the Republic of Poland containing the reply to the questions addressed by the Secretary General of the Council of Europe with regard to art. 52 of the European Convention on Human Rights.

The Permanent Representation of Poland to the Council of Europe avails itself of this opportunity to renew to the Secretary General the assurances of its high consideration.

A handwritten signature in black ink, appearing to be 'S. Meller', written over the end of the previous paragraph.

Strasbourg, 21 February 2006



The Secretary General
of the Council of Europe



Republic of Poland
Minister of Foreign Affairs
Stefan Meller

Warsaw, 17 February 2006

Mr Terry Davies
Secretary General of the Council of Europe

Excellency,

Further to your letter of 21 November 2005 in which, in accordance with Article 52 of the Convention on Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to as "the Convention") and its Protocols, you requested clarification in connection with reports suggesting that persons suspected of involvement in acts of terrorism may have been apprehended and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive cooperation of High Contracting Parties to the Convention, or by High Contracting Parties themselves, I hereby wish to present the position of the Polish Government on this matter.

The Government of the Republic of Poland wishes to recall that from the beginning these reports were not substantiated and of a purely speculative character. However, given the seriousness of these allegations, the competent authorities acted immediately in order to thoroughly investigate the matter. The outcome of these enquiries was presented in an official statement released on 10 November 2005 wherein it was unequivocally stated that: "the Polish Government strongly denies the speculation occasionally appearing in the media as to the existence of secret prisons on the territory of the Republic of Poland, supposedly used for the detention of foreigners suspected of terrorism. There are no such prisons in Poland and there are no prisoners detained in contravention of the laws and international conventions, to which Poland is a party".

The same position was taken by Polish Parliament, which exercises, among other duties, supervision over the secret services. In a letter to Mr. Dick Marty of 23 January 2006, Mr. Karol Karski, Head of the Polish delegation to the Parliamentary Assembly of the Council of Europe, stressed that these allegations were groundless in respect of Poland.

Having the above in mind, I would like to address your questions concerning the manner in which Polish law ensures effective implementation of the provisions of the Convention on Human Rights and Fundamental Freedoms and its Protocols with regard of the matters raised in your letter.

The Convention on Human Rights and Fundamental Freedoms plays a unique role in the Polish legal system. It was ratified by Poland, upon parliamentary consent granted by statute on 19 January 1993, and since its entry into force it has constituted binding law of the Republic of Poland. Article 9 of the Constitution of the Republic of Poland provides that Poland shall respect international law binding upon it. Moreover, Article 87 § 1 of the Constitution provides that ratified international agreements are among the sources of universally binding law of the Republic of Poland, whereas under Article 91 § 1 of the Constitution, a ratified international agreement, after promulgation thereof in the Journal of Law of the Republic of Poland, shall constitute part of the domestic legal order and shall be applied directly. The special significance of the Convention is further attested by the fact that in accordance with Article 91 § 2 of the Constitution, an international agreement ratified upon prior consent granted by statute takes precedence over domestic statutes, if such an agreement cannot be reconciled with the provisions of such statutes. It is particularly noteworthy that many provisions of the Convention are identical with the corresponding provisions of the Constitution.

With regard to the question on the activities of foreign agencies on the territory of the Republic of Poland, I would like to note that under Article 130 of the Penal Code of 1997 the activities of foreign intelligence agencies to the detriment of the Republic of Poland are prohibited and punishable.¹

Poland's Foreign Intelligence Agency (*Agencja Wywiadu*) is subject to civil supervision, both by Parliament and Government. Parliament, exercising its prerogatives through the Commission for Special Services, also controls the Polish Foreign Intelligence Agency in matters relating to its cooperation with partner secret services of other States. In the autumn of 2005, the new Polish Government reinstated the office of Minister-Coordinator for Special Services, which exercises effective control over these services on behalf of the Government.

The cooperation between the Polish Foreign Intelligence Agency and partner services encompasses operations conducted abroad in third countries and, in principle, is not performed within the territory of the Republic of Poland. The exceptions to the rule include consultations of experts/analysts and specialized training.

Secret services and other services of foreign States cooperate with Polish authorities in order, among others, to protect classified information and to fight organized crime. All agreements on the protection of classified information, binding upon the Republic of Poland, include provisions regulating visits by representatives of foreign services within the territory of the Republic of Poland. Such visits are subject to the consent and supervision of the competent authorities of the Republic of Poland.

¹ **Article 130 of the Penal Code** stipulates:

§ 1. Whoever takes part in the activities of a foreign intelligence service against the Republic of Poland shall be subject to the penalty of the deprivation of liberty for a term between 1 and 10 years.

§ 2. Whoever, taking part in the activities of a foreign intelligence service or acting for the benefit thereof, furnishes it with information, the passing of which may be detrimental to the Republic of Poland, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

§ 3. Whoever, in order to furnish a foreign intelligence service with information specified under § 2, collects and stores information, connects to a computer network with the purpose of obtaining it, or declares a readiness to work for the benefit of a foreign intelligence service against the Republic of Poland, shall be subject to the penalty of the deprivation of liberty for a term between 6 months to 8 years.

§ 4. Whoever organises or leads the activities of a foreign intelligence service, shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or for 25 years.

The international agreements on cooperation in combating organized crime binding upon the Republic of Poland incorporate general provisions relating to the implementation of mutually agreed activities by the competent authorities of the Contracting Parties. At the same time, the Republic of Poland has concluded agreements governing special forms of cooperation, including, e.g. trans-frontier surveillance.

One of the methods of control involves the application of regulations governing overflights and transit across the territory of the Republic of Poland operated by foreign States.

The use of Polish airspace by and landing of foreign aircraft is comprehensively regulated by the Law on Aviation of 3 April 2002 and the Law on Protection of National Border of 12 October 1990 and subordinate acts. These acts make explicit reference to international agreements Poland is party to.

Entry into airspace under the jurisdiction of the Republic of Poland by a foreign aircraft is subject to approval either by the Civil Aviation Agency, or the Chief of the Air Force, depending on the type of aircraft. Approval is granted on the basis of a request submitted by the aircraft operator, containing a detailed description of the aircraft type, flight schedule and purpose, as well as details on the crew and cargo. Thus, full control over a foreign aircraft is ensured prior to its entry into Polish airspace.

Within Polish airspace, the operation of such aircraft must comply with domestic law and international conventions Poland is party to, under the sanction of refusal of entry or litigation in the event of non-compliance. Apart from the regular passport and customs control, in justified cases foreign aircraft may be inspected by authorized Polish agencies.

Article 41 of the Constitution of the Republic of Poland ensures to everyone, that any deprivation or limitation of liberty may be imposed only in accordance with the principles and under procedures specified by law. Also, anyone who has been unlawfully deprived of liberty shall have a right to compensation.² Article 40 of the Constitution states that no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited. Article 37 ensures those freedoms and rights to everyone under the authority of the Polish State.

Detention of persons is regulated by chapter 27 (art. 243-248) of the Code of Criminal Procedure of 1997. In accordance with these provisions, the detention of any person without exception is subject to court control and is coupled with an obligation to ensure the detainee's rights and to immediately notify the competent judicial organs. These provisions also regulate the procedures concerning the preliminary detention of a national of a foreign State. In such

² **Article 41 of the Constitution of the Republic of Poland** stipulates:

1. Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute.

2. Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty.

3. Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him within 24 hours of the time of being given over to the court's disposal.

4. Anyone deprived of liberty shall be treated in a humane manner.

5. Anyone who has been unlawfully deprived of liberty shall have a right to compensation.

instances immediate notification is given to the appropriate consular office of the foreign State in question, or – in the event of absence of such an office – to the diplomatic mission of that State. The detainee should also be ensured the possibility of contacting the relevant consular office or diplomatic mission.³

Unlawful deprivation of liberty constitutes a criminal offence and the perpetrator shall be subject to the penalty of the deprivation of liberty for a term between 3 months and 5 years. If the deprivation of liberty was connected with particular torment, the perpetrator is subject to the penalty of the deprivation of liberty for a term between 1 to 10 years.⁴ The penal law is exceptionally severe when it comes to offences involving the deprivation of liberty connected with particular torment committed by a public official in the performance of official duties, since under Article 105 § 2 of the Penal Code the statute of limitations does not apply.

The same controls and the same obligations apply to secret service officers who carry out the detention.⁵ The activities of secret services officers fall directly within the provisions of the Code of Criminal Procedure.

In the event of a judicial investigation into activities of secret services, the law provides for a special procedure for the obtainment of classified information from the secret services, since their activities are confidential and classified as State secrets. According to the regulations in force, the prosecutor may demand that the secret service officers in question be released from their duty not to disclose State secrets, and that any classified documents relevant to the investigation be made available. If that is refused despite the demand of the judicial organs, the relevant organs to which the secret services are subordinated are duty-bound to submit the requested information, documents and explanations to the First President of the Supreme Court.⁶

With reference to the responsibility for the commitment of an offence it should be noted that under Article 5 of the Penal Code, the Polish judicial organs have jurisdiction with respect to any prohibited act committed within the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which Poland is a party stipulates otherwise.

Moreover, under Article 647 § 1 of the Code of Criminal Procedure, the jurisdiction of Polish military courts extends to members of the armed forces of foreign States staying on the territory of the Republic of Poland, and members of their civilian staff, in cases involving

³ **Article 612 of the Polish Code of Criminal Procedure** stipulates:

§ 1. Whenever an alien is subjected to preliminary detention, the consular office of that foreign State having territorial jurisdiction or, if there is no such office, the diplomatic mission of such State should be promptly notified.

§ 2. If an alien has been placed under preliminary detention, such a detainee should be given the opportunity to contact, in the form available, the relevant consular office or diplomatic mission.

⁴ **Article 189 of the Penal Code** stipulates:

§ 1. Whoever deprives a human being of their liberty shall be subject to the penalty of the deprivation of liberty for a term between 3 months and 5 years.

§ 2. If the deprivation of liberty exceeded longer than seven days, or was coupled with special torment, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term between 1 to 10 years.

⁵ Article 23 of the Law on Internal Security Agency and Intelligence Agency of 24 May 2002 and Article 20 of the Law on Military Information Services of 9 July 2003.

⁶ Article 39 of the Law on Internal Security Agency and Intelligence Agency of 24 May 2002 and Article 37 of the Law on Military Information Services of 9 July 2003.

crimes committed in connection with the discharging of their official duties, unless an international agreement to which Poland is a party stipulates otherwise.

However, it should be stressed that any exemptions from the principle of Polish jurisdiction with respect to foreigners must be specified by law.

Such exemptions in favor of the competent law-enforcement organs of foreign States are envisaged in the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (NATO – SOFA), done in London on 19 June 1951 (entered into force with regard to Poland in 2000).

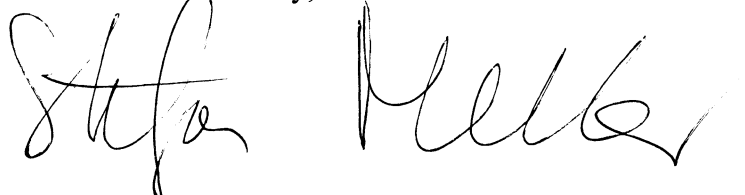
The Agreement, however, does not confer jurisdictional immunity on members of foreign armed forces, but elaborates the rules of determining jurisdiction with regard to prohibited acts on the territory of the host State. In particular, the Agreement grants the sending State the primary right to exercise jurisdiction over a member of its forces or of their civilian component in relation to offences arising out of any act or omission done in the performance of official duty [SOFA, Article VII 2, (II)].

It should also be underlined that in the light of the NATO-SOFA, all members of the armed forces of a foreign State staying on the territory of the Republic of Poland are obliged to respect Polish law.

In conclusion, let me share some general comments regarding your letter. The debate held at the Parliamentary Assembly of the Council of Europe and discussions in other international fora brought into focus the need for deeper reflection on whether the current international legal framework offers adequate mechanisms for an effective struggle to ensure the protection of our citizens against international terrorism. The struggle in which our commitment to human rights, international humanitarian law and the standards derived thereof should be adequately accounted for.

It seems that the Council of Europe could become an important forum of discussion on this subject.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Józef Meller', written in a cursive style.