

Ref: CommHR/MoF/sf 075-2024

Ms Małgorzata KIDAWA-BŁOŃSKA
Marshal of the Senate of the Republic of Poland

Strasbourg, 17 July 2024

Dear Marshal,

My mandate is to foster the effective observance of human rights in the member states of the Council of Europe. An important part of my work is to engage in dialogue with the governments and parliaments of member states, and to assist them in addressing possible shortcomings in their laws and practices.

In connection with the human rights situation on the Polish-Belarusian border, I am concerned about the government-sponsored bill which was adopted by the Polish Sejm on 12 July. The bill, which is before the Polish Senate (No. 125), proposes, among other things, to exempt from criminal liability certain categories of state agents deployed in border areas who, under certain conditions and in situations of urgency, use direct force or firearms in violation of the applicable rules, or who authorise such use by others.

The bill raises questions of its compatibility with the Council of Europe standards, especially the requirements of Articles 2 and 3 of the European Convention on Human Rights (ECHR). I recall that, according to the relevant case-law of the European Court of Human Rights (the Court), States are obliged to take necessary legislative, administrative, and regulatory measures to reduce as far as possible the adverse consequences of the use of force. National law must secure a system of adequate and effective safeguards against arbitrariness and abuse of force by state agents. Unregulated and arbitrary action by state agents is incompatible with effective respect for human rights. Furthermore, the above-mentioned provisions of the ECHR require that some form of effective official investigation is carried out whenever the use of force by state agents results in loss of life or in bodily harm, and one of the purposes of such investigations is, in cases involving state agents, to ensure their accountability for such incidents occurring under their responsibility. Finally, the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials stipulate that governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

The bill, if adopted, may create a legal and policy framework that provides a disincentive for state agents deployed in the border areas, or in other situations within its scope, to act in respect of the rules on the proportionality in the use of force and firearms. It may also lead to a situation where the circumstances in which the arbitrary use of force or firearms by state agents may result in the loss of life or bodily harm are not properly investigated, particularly in cases where the victims are on the other side of the border. Combined with the effects of the so-called buffer zone (*strefa buforowa*) recently established on some parts of the Polish-Belarusian border and the resulting decrease in the level of public scrutiny of the actions of security forces deployed there, the bill could thus foster a lack of accountability and suggest a lack of commitment to human rights obligations.

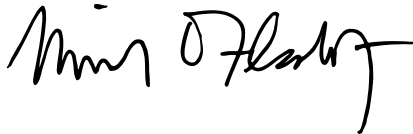
I understand that the tabling of the bill was motivated by considerations of national security and related to a number of reported incidents of cross-border attacks on Polish state agents. I was deeply saddened to learn that a young soldier died as a result of one such attack. I acknowledge the seriousness and complexity of the tasks faced by the Polish authorities in managing migration at the border. However, although the member states are given a certain margin of appreciation in restricting certain rights on grounds of national security, the invocation of national security cannot serve as a *carte blanche* to adopt measures that raise questions of compatibility with human rights standards.

I recognise the challenges posed by the instrumentalisation of irregular migration. Such actions are to be condemned as they exploit migrants, placing them in a situation of great vulnerability, while at the same time imposing burdens on the member states. Nevertheless, the Court has made clear that the problems which states may encounter in managing migratory flows or in the reception of asylum seekers cannot justify having recourse to practices that are not compatible with the ECHR. This is also reflected in Resolution 2404 (2021) of the Parliamentary Assembly of the Council of Europe on Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus.

In light of the foregoing, I respectfully ask the members of the Senate to refrain from adopting the bill in its current form and, more generally, to ensure that any laws adopted in connection with the situation on Poland's border with Belarus comply with relevant Council of Europe human rights standards.

I would be grateful if you could ensure that all members of the Senate receive a copy of this letter and I look forward to continuing our dialogue and cooperation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Michael O'Flaherty', written in a cursive style.

Michael O'Flaherty