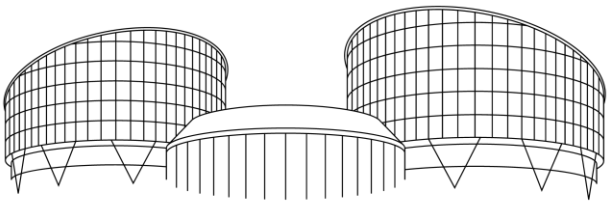

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

CASE OF ORCHOWSKI v. POLAND

(Application no. 17885/04)

JUDGMENT

STRASBOURG

22 October 2009

FINAL

22/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Orchowski v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 13 October 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 17885/04) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Krzysztof Orchowski ("the applicant"), on 11 May 2004.

2. The applicant was represented by Ms K. Burska, a lawyer practising in Kobierzyce. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the conditions of his detention had given rise to inhuman and degrading treatment contrary to Article 3 of the Convention. The Court also considered it appropriate to raise of its own motion the issue of Poland's compliance with the requirements of Article 8 of the Convention with regard to the issue of overcrowding *vis-à-vis* the applicant's right to respect for his physical and mental integrity or his right to privacy and the protection of his private space.

4. On 30 March 2007 the President of the Fourth Section of the Court decided to give notice of the application. Under the provisions of Article 29 § 3 of the Convention, it was also decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Krzysztof Orchowski, is a Polish national who was born in 1971 and is currently serving a prison sentence in Wrocław Remand Centre in Poland.

A. Conditions of the applicant's detention

6. By the time the instant case was communicated to the Polish Government, the applicant had been detained subsequently in four detention facilities (see paragraphs 8 – 45 below). On 26 April 2007, however, he was transferred to Kamińsk Prison and from there, on 3 July 2007, to Gdańsk Remand Centre. Subsequently, on 13 February 2008 the applicant was taken to Goleniów Prison. On an unspecified date, as it appears, in late-2008 he was transferred to Warszawa Mokotów Remand Centre. Finally, as it appears, on 13 February 2009 the applicant was committed to Wrocław Prison, where he remained.

7. The parties' statements relating to the conditions of the applicant's detention prior to April 2007 are, to a large extent, contradictory. The Government did not make any comments with regard to the applicant's detention after that date, except for the period when the applicant was detained in Goleniów Prison.

1. Słupsk Remand Centre

(a) Uncontested facts

8. From 5 September until 11 December 2003, from 30 December 2004 until 11 February 2005, from 19 July until 2 December 2005 and from 20 December 2005 until 6 March 2006 the applicant was detained in Słupsk Remand Centre.

9. Detainees in Słupsk Remand Centre had a right to a one-hour long outdoor exercise in one of the two yards, measuring 276 and 141 square metres ("m²") respectively. Groups of thirty and fifteen inmates respectively shared the yards at a time. The applicant had access to the TV and entertainment room in the remand centre twice a week for two hours at a time. He could watch television or play table tennis.

(b) Facts in dispute

(i) The Government

10. The Government submitted that during the first term of his detention in Słupsk Remand Centre (from 5 September until 11 December 2003) the applicant was held in six different cells. The size of those cells varied between 8 and 27 m² and the occupancy rate fluctuated between one and six persons. In either case, the space per person ranged between 3 and 13 m².

11. As regards the other periods of the applicant's detention, the Government submitted that Słupsk Remand Centre had not kept any records of the applicant's accommodation or of the number of prisoners assigned to each cell. They noted that it had not been possible to keep records because the number of detainees assigned to a particular cell changed very often, even several times per day.

12. The Government acknowledged the existence of overcrowding in Słupsk Remand Centre at the time when the applicant was detained there. They submitted that the remand centre's governor had been obliged to regularly inform the competent penitentiary judges about the fact that the detainees had less than the statutory 3 m² of space per person.

13. The Government also submitted that the prisoners were entitled to one hot shower at least once per week. The shower-room in Słupsk Remand Centre was, at the relevant time, equipped with twelve shower-heads. Prisoners showered in groups of twelve.

14. Between July 2003 and February 2006 the Słupsk State Sanitary Inspectorate (*Państwowy Inspektorat Sanitarny*) carried out five inspections at Słupsk Remand Centre. The Government did not provide any information as to the results of those inspections. They noted that cells in Słupsk Remand Centre were disinfected once a week. In addition, a sufficient amount of hygiene and sanitary products was distributed among detainees every month. Prisoners had their underwear changed once a week and their clothes and shoes, as often as necessary. The bed linen was washed every two weeks. Detainees had their meals inside their cells.

15. The applicant's cells were well-lit and ventilated. They were in a good condition as they had been renovated only a few years previously.

(ii) The applicant

16. The applicant submitted that his cell during his first detention in the Słupsk Remand Centre measured 17 m² and was shared by ten detainees, including the applicant (1.7 m² per person).

17. The official statistics obtained by the applicant's lawyer from the Head of the Press and Communication Unit in the Office of the General Director of the Prison Service (*Kierownik Zespołu Prasowego i Komunikacji Społecznej w Biurze Dyrektora Generalnego Służby*

Więziennej) reveal the following data. The overcrowding (the degree by which the number of prisoners exceeds the maximum allowed capacity of a particular detention facility) at Słupsk Remand Centre during the applicant's first detention was nearly 11 %, during his second detention – 3%, during his third detention – 14 % and during his fourth detention – nearly 4 %.

2. Sztum Prison

(a) Uncontested facts

18. From 12 December 2003 until 28 January 2004, from 23 until 29 March 2006, from 22 June until 2 August 2006, and from 30 August 2006 until 18 October 2006, the applicant was detained in Sztum Prison.

(b) Facts in dispute

(i) The Government

19. The Government submitted that throughout his detention in Sztum Prison the applicant was held in eight different cells. The size of each of those cells was over 6.5 m² and the occupancy rate ranged from one to three persons, including the applicant. Most of the time the space was between 3.2 and 3.5 m² per person. However, from 30 August until 18 October 2006 the applicant was assigned to cell no. 295 which measured 6.6 m² and was shared by three detainees, including the applicant. In that particular cell, the space per person did not exceed 2.2 m².

On the other hand, the Government stressed that between 12 December 2003 and 28 January 2004, 23 and 29 March 2006 and 22 June and 2 August 2006 the living conditions provided to the applicant in Sztum Prison had been in compliance with domestic standards.

20. At the relevant time, four sanitary inspections took place in the prison (9 December 2003 and 9 March, 9 June and 11 November 2006). The inspections did not reveal any irregularities. The cells in Sztum Prison were clean, sufficiently ventilated and lit, and in an overall good condition.

21. Prisoners had at least one hot shower per week and they entered the bathhouse in groups of a maximum of twenty-five people.

22. The applicant had access to the prison's "day-room" where he could watch television or play games and to a 476 square metre-large fitness room, where he could play volleyball and practise other sports. In addition, prisoners were entitled to an hour long outdoor exercise in one of four yards. Two of the yards in question measured 1,800 and 1,200 m² respectively. The strolling paths within these yards were 136 and 108 metres long respectively and two metres wide. The other two yards measured 500 m² each. The strolling paths within these yards were

fifty-six metres long and two metres wide. The outdoor exercise took place in groups of a maximum of forty prisoners.

23. Meals in Sztum Prison were served three times a day inside the cells. At lunchtime prisoners received a hot meal. The food served in prison was tasty and of a good nutritional value.

(ii) The applicant

24. The applicant submitted that his cell during his first detention in the Sztum Prison measured 24 m² and was shared by nine persons, including the applicant (2.6 m² per person). During his second detention in the Sztum Prison, the applicant was held in cell no. 394 ward IV, which measured 9 m² and was shared by four persons, including the applicant (2.25 m² per person).

25. According to the official data obtained by the applicant's lawyer from the Office of the General Director of the Prison Service the rate of overcrowding in Sztum Prison was nearly 10% during the applicant's first detention, 20% during his second and third periods of detention and nearly 25 % during his fourth detention in this facility.

3. Gdańsk Remand Centre

(a) Uncontested facts

26. From 28 January until 15 April 2004, from 10 March until 19 July 2005, from 2 until 20 December 2005, from 10 May until 6 June 2006, from 2 until 30 August 2006, from 18 October 2006 until 13 February 2007, and from 3 July 2007 until 13 February 2008 the applicant was detained in Gdańsk Remand Centre.

(b) Facts in dispute

(i) The Government

27. The Government submitted that throughout his detention in Gdańsk Remand Centre the applicant was held in twenty-three different cells. The size of those cells ranged from 5.5 to 24.5 m². They submitted that the occupancy rate (the number of prisoners in a cell and the living space per prisoner) during the first two of the applicant's detention terms in Gdańsk Remand Centre had not been recorded.

During the applicant's third, fourth, fifth and sixth periods of detention the number of the applicant's cellmates ranged from two to six. The space per person during that time was usually a little over 3 m². However, for twenty days in May 2006 and twenty days in August 2006 the applicant shared his cells with four other inmates and the surface available was 2.8 m²

per person. In addition, the number of the applicant's cellmates during one week between May and June 2006 had not been recorded.

28. The Government acknowledged the fact that, at the relevant time, the remand centre was facing a problem of overcrowding. On 19 June and 13 September 2006 the governor decided to reduce the available space per person to less than the statutory standard of 3 m². On each occasion a competent penitentiary judge was duly informed about the situation.

On the other hand, the Government submitted a letter from the administration of Gdansk Remand Centre dated 19 December 2007, which stated that during an unspecified period the applicant was assigned to a cell measuring nearly 6.5 m². He had shared that cell with only one inmate.

29. The Government did not submit any other information as to the occupancy rate in Gdańsk Remand Centre during the applicant's detention from 3 July 2007 until 13 February 2008.

30. At the relevant time fifteen sanitary inspections were carried out by the Gdańsk District or Regional Sanitary Inspectorate (*Stacja Sanitarno-Epidemiologiczna*): one in 2004, four in 2005, five in 2006 and five by May 2007. The cells were clean and sufficiently ventilated and lit.

31. The applicant could take a minimum of one hot shower per week. Detainees accessed the shower room in a number equal to the number of shower heads in a particular unit.

The bed linen was usually changed once every two weeks, more often if it was considered necessary.

32. The applicant had a right to an hour-long outdoor exercise in a group of thirty in one of four outdoor yards. The size of the yards ranged from 36 to 101 m².

33. Meals were served three times per day inside cells. They were tasty and of a good nutritional value. A hot meal was always served at lunchtime.

(ii) The applicant

34. The applicant submitted that Gdańsk Remand Centre had been overcrowded.

35. To that effect he furnished a copy of a document, which had been issued by the administration of Gdańsk Remand Centre, containing the list of the applicant's cells. The history of the applicant's transfers within the remand centre, namely the cells' numbers and the dates of the applicant's placement, is concordant with the data submitted by the Government. The document submitted by the applicant, however, also shows the information which was missing from the records submitted by the Government, namely the occupancy rate of the applicant's cells during the first two periods of his detention.

36. According to that information, from 11 until 25 February 2004 the applicant was placed in cell no. 31 of ward II (PC2), which measured 12.6 m² and was occupied by six people, including the applicant

(2.1 m² per person). From 25 February until 25 March 2004 he was held in cells no. 27 and 19 of ward V (PC5). Both cells measured approximately 12.5 m² and they were occupied by five detainees (2.5 m² per person). From 25 March until 5 April 2004 the applicant was assigned to cell no. 18 in ward II (PC2), which measured 5.5 m² and was shared by two people including the applicant (2.7 m² per person). From 5 until 7 April 2004 he was in cell no. 41 of ward II (PC2). This cell measured 6.7 m² and was occupied by two persons including the applicant (3.3 m² per person). From 7 until 15 April 2004 the applicant was detained in cell no. 9 of ward V (PW5), which measured 7.1 m² and was occupied by two people, including the applicant (3.5 m² per person).

37. In the second period of his detention in Gdańsk Remand Centre, the applicant was assigned to the following cells: from 10 until 21 March 2005 – to cell no. 4 of ward III (PW3), which measured 12.2 m² and was occupied by four people, including the applicant (3 m² per person); from 25 March until 3 June 2005 – to cell no. 8 in ward V (PZ5), which measured 15.2 m² and was shared by a total number of seven detainees (2.1 m² per person); and from 3 June until 19 July 2005 – to cell no. 7 in ward V (PZ5), which measured 20.3 m² and was occupied by a total number of eight people (2.5 m² per person).

38. Lastly, the document submitted by the applicant contains a detailed list of the applicant's cells during the last period of his detention in Gdańsk Remand Centre, namely from 3 July 2007 until 13 February 2008.

In the relevant period of seven months the applicant was moved twenty times between different cells. The size of the cells in question ranged from 5.5 to 13.6 m² and their occupancy rate, from one to six persons. In most of the cells the space per person oscillated around 2.5 m². In addition, for a total number of approximately thirty-five days the applicant was detained in cells in which the space per person was 2 m². His detention in cells, in which the space per person was slightly over 3 m², amounted to approximately 120 days.

The document also reveals that from 16 until 19 November 2007 the applicant was detained alone in a cell, measuring nearly 7 m².

39. According to the official data obtained by the applicant's lawyer from the Office of the General Director of the Prison Service the rate of overcrowding in Gdańsk Remand Centre was nearly 15% during the applicant's first detention, 4% during his second detention, 17% during his third detention, 14% during his fourth detention and nearly 9% during his fifth detention in this facility.

4. Wejherowo Remand Centre

(a) Uncontested facts

Finally, from 15 April until 30 December 2004, from 11 February until 10 March 2005, from 6 until 23 March 2006, from 29 March until 10 May 2006, from 6 until 22 June 2006, and, from 13 February until 26 April 2007, the applicant was detained in Wejherowo Remand Centre.

(b) Facts in dispute

(i) The Government

40. The Government submitted that throughout his detention in Wejherowo Remand Centre the applicant was moved seventeen times between different cells. The size of those cells varied between 5 and 20 m². The occupancy rate had not been recorded, although the applicant was twice kept in solitary confinement.

41. The Government submitted that the problem of overcrowding had been recorded for the first time in August 2000. It persisted until 24 January 2007, with the exception of two periods of downslide, namely from 24 March until 14 April 2005 and from 20 February until 8 March 2006. Between April 2005 and November 2006, the remand centre's governor issued four decisions on reducing the statutory standard of 3 m² per detainee and informed the competent penitentiary judge accordingly.

42. In the absence of the necessary data, the Government could not rule out that during a certain time, the applicant was detained in cells in which the space per person was below 3 m². In particular, at the relevant time there was a practice of placing eight detainees in six-person cells.

On the other hand, the Government stressed that during the applicant's last period of detention in Wejherowo Remand Centre (from 13 February until 26 April 2007), he shared his cells only with one person, thus having nearly 4 m² of individual space.

43. At the relevant time, regular sanitary inspections were carried out in the remand centre by the Wejherowo Sanitary Inspectorate (*Stacja Sanitarno-Epidemiologiczna*): two in 2004, one in 2005, two in 2006 and one in 2007. The inspections did not reveal any irregularities. The cells were clean and well-equipped. They were sufficiently lit and ventilated.

44. The applicant could take a minimum of one hot shower per week. Detainees accessed the shower room in a number equal to the number of shower heads in a particular unit.

45. The applicant had a right to an hour-long outdoor exercise in a spacious yard together with a group of ten to twenty fellow inmates. In addition, he had a right to spend two hours in the remand centre's "TV-room" four times per week.

Bed linen was changed once every two weeks. Prisoners' underwear, towels and dishcloths were washed twice a week.

46. Meals, which conformed to the standard quality requirements, were served inside the cells.

(ii) The applicant

47. The applicant submitted that his cell during his first detention in the Wejherowo Remand Centre measured 18 m² and was shared by a total number of eight people (2.2 m² per person). During the applicant's second detention in the Wejherowo Remand Centre he was held in cell no. 12 ward V, which measured 13 m² and was shared by six persons (2.1 m² per person). The applicant stressed that the problem of overcrowding in that facility persisted from 2000 until 24 January 2007. The only periods when Wejherowo Remand Centre was not overcrowded were from 24 March until 14 April 2005 and 20 February until 8 March 2006.

48. The applicant furnished a copy of a letter from the governor of Wejherowo Remand Centre dated 19 June 2008. It was stated in it that the applicant had been detained in cells in which the statutory space of 3 m² per person had been reduced due to the general problem of overcrowding persisting in the country. At the relevant time, and with the exception of the period from 13 February until 26 April 2007, the maximum allowed population rate in the remand centre was exceeded by 4 to 15%, depending on the specific moment.

49. Moreover, the official statistics from the Office of the General Director of the Prison Service revealed that the rate of the overcrowding in Wejherowo Remand Centre was at 8.5% during the applicant's first detention, nearly 9.5 or 12.5% (the document reveals contradictory figures) during his second detention, 2 or 3% (contradictory figures) during his third detention, nearly 11% during his fourth detention, and 14.5% during his fifth detention in this facility. During the sixth and last period of the applicant's detention in Wejherowo Remand Centre, the occupancy rate was 16% below the maximum allowed capacity of this establishment.

5. Kamińsk Prison

(a) Uncontested facts

50. It appears that from 26 April until 3 July 2007 the applicant was detained in Kamińsk Prison.

(b) Facts in dispute

(i) The Government

51. The Government did not make any submissions with reference to Kamińsk Prison.

(ii) The applicant

52. The applicant submitted that he had been assigned to cell no. 19 in ward III. The cell in question measured 13 m² and was occupied by six inmates, including the applicant (2.1 m² per person). The toilet annex took up 130 cm of the cell's space. There were also three bunk beds, two tables and six stools. The applicant submitted that his cell was cramped and overcrowded.

53. The applicant submitted a copy of a letter of 31 May 2007 sent by the Kamińsk Prison administration to the Ministry of Justice. It was stated in the letter that from 26 April 2007 until 31 May 2007 the applicant had been detained in cell no. 50, which measured 16.4 m² and was shared by six people, including the applicant (2.7 m² per person). It was also noted that on 2 February 2007 a competent penitentiary judge had again been informed of the fact that Kamińsk Prison was overcrowded and that that problem would persist for at least another six months.

54. In addition, according to the official statistics from the Office of the General Director of the Prison Service the overcrowding in Kamińsk Prison at the time of the applicant's incarceration there reached almost 15%.

6. Goleniów Prison

(a) Uncontested facts

55. It appears that from 3 July 2007 until an unspecified date in late-2008 the applicant was detained in Goleniów Prison.

(b) Facts in dispute

(i) The Government

56. The Government submitted that as of 20 February 2008 the applicant had been detained in a cell in which the minimum statutory standard of 3 m² of space per person had been respected.

(ii) The applicant

57. The applicant submitted the official statistics from the Office of the General Director of the Prison Service which showed that the overcrowding in Goleniów Prison at the time of his incarceration there reached almost 7%.

58. Moreover, the applicant specified that he was at first detained in cell no.100 in wing E. The cell in question measured 10 m² and was shared by four prisoners including the applicant (2.5 m² per person). He was then transferred to cell no. 103 in wing E. That cell measured 18 m² and was shared by seven people including the applicant (2.57 m² per person).

59. Lastly, the applicant confirmed that from 20 February 2008 until an unspecified date he had been assigned to a cell in which the space of 3 m² was available for each prisoner.

7. Warszawa Mokotów Remand Centre

(a) Uncontested facts

60. From an unspecified date in late-2008 until 13 February 2009 the applicant was detained in Warszawa Mokotów Remand Centre.

(b) Facts in dispute

(i) The Government

61. The Government did not make any submissions with reference to this detention facility.

(ii) The applicant

62. The applicant submitted that in Warszawa Mokotów Remand Centre he had been detained subsequently in: cell no. 10 in wing B1, cell no. 1 in wing A1 and cell no. 23 in wing C1. The first cell measured 7 m² and was shared by three people including the applicant (2.3 m² per person). The second of the mentioned cells measured 21 m² and was shared by twelve prisoners including the applicant (1.75 m² per person). Lastly, the third cell measured 10 m² and was shared by four people including the applicant (2.5 m² per person).

8. Wrocław Prison

63. Finally, as it appears, on 13 February 2009 the applicant was committed to Wrocław Prison, where he remained.

64. The parties did not make any submissions with regard to this detention facility.

B. The applicant's complaints to domestic courts and authorities

65. The applicant lodged numerous complaints about the conditions of his detention with the domestic authorities. He also applied on numerous occasions for a break in serving the sentence on account of the poor

conditions of detention, as well as his difficult family situation. All of the applicant's complaints and requests were to no avail.

66. The Government in their submissions to the Court, acknowledged the fact that the applicant had lodged numerous complaints about the various aspects of his detention. The complaints lodged on 3, 5 and 7 May and 28 May 2004, 18 April, 12 May and 28 December 2005, and 18 May and 29 June 2006 related, among other issues, to the problem of overcrowding and inadequate living conditions in Wejherowo, Gdańsk and Słupsk Remand Centres. The relevant authorities, including the competent Regional Inspectorates of the Prison Service, considered them all manifestly ill-founded.

67. The applicant, for his part, submitted a copy of a letter of 30 June 2004 of the Deputy Director of the Gdańsk Regional Inspection of Prison Services (*Okręgowy Inspektorat Służby Więziennej*) who had acknowledged the existence of overcrowding in Gdańsk Remand Centre at a level of 10% above the norm.

68. Likewise, the problem of overcrowding was acknowledged by the Director of the Gdańsk Remand Centre in his letter of 31 March 2005, which had been issued in reply to the applicant's complaint of 14 March 2005. However, the complaint that the applicant had diminished contact with the warden due to overcrowding was found to be unsubstantiated. It was indicated that the applicant had three meetings with the warden in less than one month.

69. The applicant's requests to be granted a break in serving the sentence were dismissed as manifestly ill-founded. The most recent decision was delivered by the Słupsk Regional Court on 6 February 2006.

C. The applicant's civil action against the State Treasury

70. In his additional submissions of 25 November 2008 the applicant stated that on 19 February 2008 he had lodged with the Warsaw Regional Court (Sąd Okręgowy) an action for compensation under Articles 23 and 24 of the Civil Code in conjunction with Article 448 of the Civil Code. The applicant sued the State Treasury for the alleged damage resulting from overcrowding and inadequate living conditions in all the detention facilities in which he had so far been detained.

71. It appears that the case is currently pending before the court of first-instance.

D. Criminal proceedings against the applicant

72. On 9 March 2006 the applicant submitted new complaints related to the criminal proceedings against him. However, despite the Registry's

request he failed to provide copies of the relevant domestic courts' decisions delivered in the course of the impugned proceedings.

73. It appears that on 11 December 2002 the Gdynia District Court convicted the applicant of unspecified offences and sentenced him to four years' imprisonment (no. II K 1200/01). It also appears that on 3 November 2003 the Gdańsk Regional Court dismissed an appeal against that judgment (no. Ka 469/03). The applicant submitted that he had not been present at the appeal hearing. He was, however, represented by a legal-aid lawyer and, ultimately, he was informed about the outcome of the case. The applicant's conviction became final as he failed to lodge a cassation appeal. It appears that the applicant subsequently asked the Ombudsman (*Rzecznik Praw Obywatelskich*) to lodge an extraordinary cassation appeal against the second-instance judgment, but his request was to no avail.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant constitutional provisions

74. Article 2 of the Constitution reads as follows:

> "The Republic of Poland shall be a democratic State ruled by law and implementing the principles of social justice."

Article 40 of the Constitution reads:

> "No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment."

Article 41 of the Constitution, in its relevant part, provides:

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

B. General rules on conditions of detention

1. Code of Execution of Criminal Sentences

75. Article 110 of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy* – "the Code") provides:

> "1. A sentenced person shall be placed in an individual cell or a cell shared with other inmates.
>
> 2. The area of the cell shall be no less than 3 square metres per detainee."

Article 248 of the Code provides:

> "1. In particularly justified cases a governor of a prison or remand centre may decide to place detainees, for a specified period of time, in conditions where the area

of the cell is less than 3 square metres per person. Any such decision shall be promptly communicated to a penitentiary judge.

2. The Minister of Justice shall determine, by means of an ordinance, the rules which are to be followed by the relevant authorities in a situation where the number of persons detained in prisons and remand centres exceeds on a nationwide scale the overall capacity of such establishments ...”

2. The 2000 and 2003 Ordinances

76. On the basis of Article 248 of the Code, the Minister of Justice issued the Ordinance of 26 October 2000 on the rules to be followed by the relevant authorities when the number of persons detained in prisons and remand centres exceeded on a nationwide scale the overall capacity of such establishments (*Rozporządzenie Ministra Sprawiedliwości w sprawie trybu postępowania właściwych organów w wypadku, gdy liczba osadzonych w zakładach karnych lub aresztach śledczych przekroczy w skali kraju ogólną pojemność tych zakładów* – “the 2000 Ordinance”). On 26 August 2003 the Minister of Justice issued a new ordinance with the same title (“the 2003 Ordinance”), which replaced the previous ordinance. It entered into force on 1 September 2003.

Paragraph 1.1 of this Ordinance provided:

“In the event that the number of detainees placed in prisons and remand centres, as well as in subordinate detention facilities, hereinafter referred to as ‘establishments’, exceeds on a nationwide scale the overall capacity of such establishments, the Director General of the Prison Service, within seven days from the day the capacity is exceeded, shall convey the relevant information to the Minister of Justice, the regional directors of the Prison Service and the governors of the establishments ...”

Paragraph 2 of the Ordinance read:

“1. Having received the relevant information, the regional director of the prison service and the governor of the establishment are under a duty, each within their own sphere of competence, to take action in order to adapt quarters not otherwise included in the establishment’s [accommodation] capacity, to comply with the conditions required for a cell.

...

3. In the event that the establishment’s capacity is exceeded, detainees shall be placed in supplementary cells for a specified period of time.

4. In the event that the additional accommodation in the supplementary cells is used up, detainees may be placed in conditions where the area of a cell is less than 3 square metres per person.”

C. Judicial review and complaints to administrative authorities

77. Detention and prison establishments in Poland are supervised by penitentiary judges who act under the authority of the Minister of Justice.

Under Article 6 of the Code of Execution of Criminal Sentences ("the Code") a convicted person is entitled to make applications, complaints and requests to the authorities enforcing the sentence.

Article 7, paragraphs 1 and 2, of the Code provides that a convicted person can challenge before a court any unlawful decision issued by a judge, a penitentiary judge, a governor of a prison or a remand centre, a regional director or the Director General of the Prison Service or a court probation officer. Applications relating to the execution of prison sentences are examined by a competent penitentiary court.

The remainder of Article 7 of the Code reads as follows:

> "3. Appeals against decisions [mentioned in paragraph 1] shall be lodged within seven days of the date of the pronouncement or the service of the decision; the decision [in question] shall be pronounced or served with a reasoned opinion and an instruction as to the right, deadline and procedure for lodging an appeal. An appeal shall be lodged with the authority which issued the contested decision. If [that] authority does not consider the appeal favourably, it shall refer it, together with the case file and without undue delay, to the competent court.
>
> 4. The Court competent for examining the appeal may suspend the enforcement of the contested decision ...
>
> 5. Having examined the appeal, the court shall decide either to uphold the contested decision, or to quash or vary it; the court's decision shall not be subject to an interlocutory appeal."

In addition, under Article 33 of the Code, a penitentiary judge is entitled to make unrestricted visits to detention facilities, to acquaint himself with documents and to be provided with explanations from the management of these establishments. A penitentiary judge also has the power to communicate with persons deprived of their liberty without the presence of third persons and to examine their applications and complaints.

Article 34 of the Code in its relevant part reads as follows:

> "1. A penitentiary judge shall quash an unlawful decision [issued by, *inter alia*, the governor of a prison or remand centre, the Regional Director or the Director General of the Prison Service] concerning a person deprived of his liberty.
>
> 2. An appeal to the penitentiary court lies against the decision of a penitentiary judge...
>
> 4. In the event of finding that the deprivation of liberty is not in accordance with the law, a penitentiary judge shall, without undue delay, inform the authority [in charge of the person concerned] of that fact, and, if necessary, shall order the release of the person concerned."

Article 35 of the Code in its relevant part provides:

> "1. If in the opinion of the penitentiary judge it is necessary to issue a decision which would exceed his competence, in particular an administrative decision, [the penitentiary judge] shall transfer his observations and conclusions concerning the matter to the competent authority.
>
> 2. The competent authority shall inform the penitentiary judge, within 14 days or within another time-limit determined by the latter, about their position. Should the penitentiary judge consider this position unsatisfactory, he shall transfer the matter to the [superior] authority; the superior authority shall inform the penitentiary judge about the outcome of the case.
>
> 3. In the event of the repetition of flagrant omissions in the functioning of a prison, remand centre or another establishment, in which persons deprived of liberty [are quartered], or if the conditions existing [there] do not secure the respect of the rights of persons who are held there, a penitentiary judge shall appeal to the competent superior authority to [remedy the situation] within a set deadline. Should the [situation be not resolved] within the deadline, a penitentiary judge shall appeal to a competent minister to suspend the activity or to close down entirely or partly the prison, remand centre or establishment concerned."

Lastly, Article 102, paragraph 10, of the Code guarantees a convicted person a right to lodge applications, complaints and requests with other competent authorities, such as the management of a prison or remand centre, heads of units of the Prison Service, penitentiary judges, prosecutors and the Ombudsman. Detailed rules on the procedure are laid down in the Ordinance of the Minister of Justice issued on 13 August 2003 on dealing with applications, complaints and requests by persons detained in prisons and remand centres (*Rozporządzenie w sprawie sposobów załatwiania wniosków, skarg i próśb osób osadzonych w zakładach karnych i aresztach śledczych* – "the August 2003 Ordinance").

D. Civil remedies

1. Relevant legal provisions

78. Article 23 of the Civil Code contains a non-exhaustive list of so-called "personal rights" (*prawa osobiste*). This provision states:

> "The personal rights of an individual, such as, in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements, shall be protected by the civil law regardless of the protection laid down in other legal provisions."

Article 24, paragraph 1, of the Civil Code provides:

> "A person whose personal rights are at risk [of infringement] by a third party may seek an injunction, unless the activity [complained of] is not unlawful. In the event of infringement [the person concerned] may also require the party who caused the

> infringement to take the necessary steps to remove the consequences of the infringement ... In compliance with the principles of this Code [the person concerned] may also seek pecuniary compensation or may ask the court to award an adequate sum for the benefit of a specific public interest."

Article 445 § 1 of the Civil Code, applicable in the event a person suffers a bodily injury or a health disorder as a result of an unlawful act or omission of a State agent, reads as follows:

> "…[T]he court may award to the injured person an adequate sum in pecuniary compensation for the damage suffered."

Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. That provision, in its relevant part, reads:

> "The court may grant an adequate sum as pecuniary compensation for non-material damage (*krzywda*) suffered to anyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of seeking any other relief that may be necessary for removing the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific public interest ..."

In addition, Articles 417 et seq. of the Polish Civil Code provide for the State's liability in tort.

Article 417 § 1 of the Civil Code formerly provided:

> "The State Treasury shall be liable for damage (*szkoda*) caused by an agent of the State in carrying out acts entrusted to him."

After being amended in 2004, Article 417 § 1 of the Civil Code provides:

> "The State Treasury, or [as the case may be] a self-government entity or other legal person responsible for exercising public authority, shall be liable for any damage (*szkoda*) caused by an unlawful act or omission [committed] in connection with the exercise of public authority."

2. Case-law of civil courts as submitted by the Government

79. In their submissions on the admissibility and the merits of the case the Government referred to the judgment of the Supreme Court of 28 February 2007 (see paragraph 70 below). They further referred to two groups of civil law cases in which domestic courts had examined claims for compensation brought by former detainees on account of the alleged infringement of their personal rights. To that effect the Government submitted copies of twelve judgments which were delivered by domestic courts in 2006 and 2007 and nine final judgments which were delivered in 2008 (see paragraphs 72 and 73 below).

(a) Supreme Court's judgment of 28 February 2007

80. On 28 February 2007 the Supreme Court recognised for the first time the right of a detainee under Article 24, read in conjunction with

Article 448 of the Civil Code, to lodge a civil claim against the State Treasury for damage resulting from overcrowding and inadequate living and sanitary conditions in a detention establishment.

That judgment originated from the civil action brought by a certain A.D., who was remanded in custody shortly after he had suffered a complicated fracture of his leg and arm. The plaintiff argued that he had not received adequate medical care in detention and that he had been detained in overcrowded cells in poor sanitary conditions.

The Supreme Court quashed the second-instance judgment in which the applicant's claim had been dismissed. The Supreme Court held that the case should have been examined under Article 24 in conjunction with Article 448 of the Civil Code, and that it was the respondent who had the burden of proving that the conditions of detention had been in compliance with the statutory standards and that the plaintiff's personal rights had not been infringed. The case was remitted to the appeal court.

81. On 6 December 2007 the Wrocław Court of Appeal examined the case under Article 24 in conjunction with Article 448 of the Civil Code, as interpreted by the Supreme Court. The appeal court reiterated that overcrowding coupled with inadequate living and sanitary conditions in a detention facility could give rise to degrading treatment in breach of a detainee's personal rights. The court condemned the practice of maintaining high rates of occupancy in detention facilities throughout the country and stressed that the minimum standard of 3 m² per person was to be reduced only in exceptional circumstances and for a short period of time. On the other hand, the Wrocław Court of Appeal observed that in the light of the Supreme Court's established case-law, a trial court did not have a duty to award compensation for every infringement of a personal right. One of the main criteria in assessing whether or not to award compensation for a breach of a personal right was the degree of fault on the part of a respondent party. The court held that in relation to overcrowding, no fault could be attributed to the management of a particular detention facility since the management were not in a position to refuse new admissions even when the average capacity of a detention facility had already been exceeded. Considering the large scale of the problem in the country and the fact that the competent authorities had not acted with a particular intent to humiliate the plaintiff or in bad faith, the appeal court found that awarding compensation for a breach of personal rights on account of overcrowding and poor conditions of detention would contradict the universal sense of justice. Ultimately, the case was dismissed.

(b) Judgments of other civil courts

(i) Delivered in 2006 and 2007

82. In four of the other cases cited by the Government, which had been examined by domestic courts in 2005, 2006 and 2007, the plaintiffs, non-smokers detained with smoking inmates, had been awarded compensation (raging from PLN 2,000 to PLN 5,000) because it had been found that they were at risk of suffering or had actually suffered a health disorder. The first of those judgments was delivered by the Gdańsk Court of Appeal on 13 December 2005.

Another of the early cases referred to concerned a prisoner who had suffered food poisoning in prison (plaintiff, a certain S.L.; judgment of the Olsztyn Regional Court of 6 March 2007) and another concerned a detainee who had been beaten up by his fellow inmate (plaintiff, a certain M.P.; judgment of the Szczecin Court of Appeal of 29 March 2007).

In another case, brought by a certain J.K., who had been detained for seven days in an overcrowded and insanitary cell, the Warsaw Court of Appeal (judgment of 27 July 2006) granted partial compensation on account of the fact that the prison's governor had failed to inform the competent penitentiary judge, in compliance with the applicable procedure, about the problem of overcrowding at the time the plaintiff was serving his sentence there.

In the case of a certain S.G. the Cracow Court of Appeal (judgment of 23 February 2007) held that there had been no legal basis to grant compensation for detaining the plaintiff in an overcrowded cell. The court observed that the protection of personal rights offered by Article 24 § 1 of the Civil Code was conditional on two elements: firstly, there must have been an infringement or a risk of infringement of the right protected; secondly, the infringement must have resulted from an unlawful act or omission. It was reiterated that an act or omission was not unlawful, even though it might breach personal rights, as long as it was based on a valid legal provision. The court further noted that the plaintiff had the burden of proving the infringement or the risk of infringement while the respondent had the burden of proving that his acts or omissions were not unlawful. The Cracow Court of Appeal held that detaining the plaintiff in conditions below the minimum standard established by Article 110 § 2 of the Code of Execution of Criminal Sentences was not unlawful, as it was regulated by the 2003 Ordinance.

In the case of a certain R.D. the Łódź Court of Appeal (judgment of 8 September 2006) awarded the applicant compensation in the amount of PLN 7,500 because the plaintiff was found to have been at a real risk of contracting a disease from his HIV positive inmates and had experienced significant psychological suffering.

Lastly, in four judgments which were delivered by the second-instance courts in late-2007 the plaintiffs (W.W., M.B, Z.Rz and H.T.) were awarded compensation (ranging from PLN 1,000 to PLN 3,600) on account of the infringement of their personal rights which they had suffered because of the overcrowding and insanitary conditions in their prison cells, and additionally in one case, of the deterioration of the plaintiff's health.

(ii) Delivered in 2008

83. In the ten final judgments delivered in 2008, the civil courts awarded compensation (ranging from PLN 1,000 to PLN 5,900) to plaintiffs who proved that they had have been detained in overcrowded and insanitary cells in certain cases, together with smokers or persons with hepatitis C.

E. Constitutional Court's practice

1. The Ombudsman's application

84. On 13 December 2005 the Ombudsman made an application under Article 191, read in conjunction with Article 188 of the Constitution, to the Constitutional Court, asking for the 2003 Ordinance to be declared unconstitutional. More specifically, the Ombudsman asked for it to be declared incompatible with Articles 40 and 41 of the Constitution and Article 3 of the European Convention on Human Rights. In particular, the Ombudsman challenged paragraph 2(4) of the 2003 Ordinance, which allowed the prison authorities to place a detainee in a cell where there was an area of less than 3 m² per person, for an indefinite period of time. This, in his opinion, was contrary to the interim nature of Article 248 of the Code of Execution of Criminal Sentences and led to the legitimisation of the chronic overcrowding in detention facilities.

On 18 April 2006 the Ombudsman limited the scope of his initial application, asking the Constitutional Court (*skarga konstytucyjna*) to declare paragraph 2(4) of the 2003 Ordinance to be in breach of Article 41 of the Polish Constitution.

On 19 April 2006, the day before the date set for the Constitutional Court's hearing, the Minister of Justice abrogated the impugned Ordinance in its entirety and issued a new one under the same title and with immediate effect ("the 2006 Ordinance"). The provisions of the new 2006 Ordinance remained the same as in the previous instrument, except for paragraph 2(4), which read as follows:

> "In the event that the additional accommodation in the supplementary cells is used up, detainees may be placed, for a specified period of time, in conditions where the area of a cell is less than 3 square metres per person."

As a consequence of these changes, on 19 April 2006 the Ombudsman withdrew his application.

2. Judgment of 26 May 2008

85. On 22 May 2006 a certain J.G., who was at the time in prison, made a constitutional complaint (*skarga konstytucyjna*) under Article 191, read in conjunction with Article 79 of the Constitution, asking for Article 248 of the Code of Execution of Criminal Sentences to be declared unconstitutional. He alleged that the impugned provision infringed, *inter alia*, the prohibition of torture and inhuman or degrading treatment as derived from Articles 40 and 41 of the Constitution. He challenged Article 248 in particular in so far as it allowed for the placement of detainees for an indefinite period of time in cells below the statutory size.

On 26 May 2008 the Constitutional Court held, *inter alia*, that the impugned Article 248 of the Code of Execution of Criminal Sentences was in breach of Article 40 (prohibition of torture or cruel, inhuman, or degrading treatment or punishment), Article 41 § 4 (right of a detainee to be treated in a humane manner) and Article 2 (the principle of the rule of law) of the Constitution. The court stressed that the provision lacked clarity and precision, which allowed for a very broad interpretation.

The Constitutional Court found that, in effect, the provision in question allowed for an indefinite and arbitrary placement of detainees in cells below the statutory size of 3 m² per person, thus causing chronic overcrowding in Polish prisons and exposing detainees to the risk of inhuman treatment. The Constitutional Court expressed its view as follows:

> "In the opinion of the Constitutional Court, the text of the impugned Article 248 of the Code of Execution of Criminal Sentences and its interpretation in practice make this provision incompatible with Articles 40 and 41 paragraph 4 of the Constitution. Overcrowding in prisons, resulting from the implementation of the impugned provision, may lead to inhuman treatment of prisoners. It is difficult to imagine [that a person could be afforded] humane treatment in a cell, in which the space per person is less than 3 m² ..."

The court also observed that the overcrowding of detention facilities had to be treated as a serious problem, since it posed a permanent threat to the rehabilitation of prisoners. This view was expressed, *inter alia*, in the following paragraph:

> "The postulate of humane treatment entails also the requirement of affording to detainees educational activities, which [would] prepare them for life after release from prison and prevent them from relapsing into crime, allowing for the achievement of the aims of a punishment."

The Constitutional Court also made the following reference to Article 3 of the Convention:

> "The Constitutional Court, while interpreting constitutional provisions resorts to, both, the substantive law of Article 3 of the Convention and *acquis humanitarire*

> which has been developed on the basis of the [Convention]. The court will not, however, consider the question of a violation of the Convention itself, since this does not lie within its competencies."

Moreover, in the view of the Constitutional Court, the overcrowding in itself could be qualified as inhuman and degrading treatment. If combined with additional aggravating circumstances, it might even be considered as torture. In that connection the court noted that already the minimum statutory standard of 3 m² per person was one of the lowest in Europe.

The Constitutional Court further stressed that the provision in question was meant to be applied only in particularly justified cases, for example the occurrence of an engineering or building disaster in prison. Such a provision should not leave any doubt as to the definition of those permissible circumstances, the minimum size of the cell and maximum time when the new standards would apply. It should also lay down clear principles on how many times a detainee could be placed in conditions below the standard requirements and the precise procedural rules to be followed in such cases. In this connection, the court made a following remark:

> "The Constitutional Court does not exclude, however, a possibility of placing convicted persons on a temporary basis in cells, in which the space per person would be below 3 m² ([derived from] Article 110 § 2 of the Code of Execution of Criminal Sentences). [Such possibility could occur] in genuinely exceptional circumstances (for example, a sudden increase of crime rate and the number of judgments imposing a prison sentence). The principles governing a temporary placement of convicted persons in such cells should, nevertheless, be clearly indicated. [The necessary] regulations cannot [be dubious] as to the exceptional character of the situation [in question], the maximum time in which a detainee can be placed in a cell with reduced space, the possibility and eventual principles and procedure regulating multiple placements in such cells."

The court further observed that, conversely, in practice Article 248 of the Code of Execution of Criminal Sentences gave a wide discretion to prison governors to decide what constituted "particularly justified circumstances" and in consequence condoned the permanent state of overcrowding in detention facilities. It allowed for the placement of detainees in a cell where the area was below the statutory size for an indefinite period of time and it did not set a minimum permissible area.

The Constitutional Court, taking into consideration "the permanent overcrowding of the Polish detention facilities", ruled that the unconstitutional Article 248 of the Code of Execution of Criminal Sentences should lose its binding force within eighteen months from the date of the publication of the judgment. The Constitutional Court justified the delayed entry into force of its judgment by the need to undertake a series of measures to reorganise the whole penitentiary system in Poland in order to, ultimately, eliminate the problem of overcrowding. It was also noted that, in parallel, a reform of criminal policy was desired with the aim of achieving a wider implementation of preventive measures other than

deprivation of liberty. The court observed that an immediate entry into force of its judgment would only aggravate the already existing pathological situation where, because of the lack of cell space in Polish prisons, many convicted persons could not serve their prison sentences. At the time when the judgment was passed, the problem concerned 40,000 persons. To this end the court made the following observation:

> "The Constitutional Court has decided, on the basis of Article 190 § 3 of the Constitution, to postpone the date on which the impugned Article 248 § 1 of the Code of Execution of Criminal Sentences will lose its binding force, taking into consideration the factual situation of the Polish penitentiary system, namely the permanent overcrowding in prisons and the lack of places for serving a prison sentence.
>
> The [above] decision (...) results, not even, from the need to amend legal provisions but from the necessity to undertake numerous actions of organisational nature, in order to eliminate overcrowding in prisons. What also seems to be desired is shifting penal policy in the direction of wider use of non-isolation [preventive] measures.
>
> An imminent loss of binding force of Article 248 § 1 of the Code of Execution of Criminal Sentences would deepen the already existing pathological situation, in which many convicted persons cannot serve their [prison] sentences because of the lack of space in prisons. This problem concerns currently over 40,000 convicted persons. Such *status quo*, in which final judgments of [criminal] courts are not enforced, leads to the weakening of the authority of the State."

In addition, the Constitutional Court under the principle of the so-called "right of privilege" (*przywilej korzyści*) ordered an individual measure, namely that with regard to the author of the constitutional complaint the judgment should enter into force immediately after its publication. The right of privilege is relied on by the Constitutional Court in the event the proceedings instituted by an individual terminate with a judgment with a delayed entry into force. This principle aims at rewarding the individual who brought the first constitutional complaint concerning a particular matter for his or her proactive attitude.

As regards the context of the case, all the State authorities involved in the proceedings before the Constitutional Court, namely the Prosecutor General, the Ombudsman and the Speaker of the *Sejm*, acknowledged the existence of overcrowding in the Polish detention facilities. The Prosecutor General, in his pleadings of 6 December 2007, submitted that the problem of overcrowding in Polish detention facilities had continually existed since 2000, arising from the flawed interpretation of the impugned provision by domestic courts and penitentiary authorities. He also pointed out that, with the rate of overcrowding peaking at 118.9% on 31 August 2007, the prison authorities estimated that 15,000 new places were needed in order to secure to detainees the statutory space of 3 m² per person.

III. RELEVANT INTERNATIONAL INSTRUMENTS

86. In 1996, 2000 and 2004 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) carried out three periodic visits to different detention establishments in Poland. The following recommendation has been repeatedly included in the relevant CPT's reports concerning the visited establishments [CPT/Inf (98) 13, CPT/Inf (2002) 9 and CPT/Inf (2006) 11]:

> "Strenuous efforts to be made [by the Polish authorities] to reduce the cell occupancy rates, the objective being to provide a minimum of 4 m² of living space per prisoner"

87. The relevant extracts from the General Reports prepared by the CPT read as follows:

A. Extracts from the 2nd General Report [CPT/Inf (92) 3]

> "46. Overcrowding is an issue of direct relevance to the CPT's mandate. All the services and activities within a prison will be adversely affected if it is required to cater for more prisoners than it was designed to accommodate; the overall quality of life in the establishment will be lowered, perhaps significantly. Moreover, the level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint.
>
> 47. A satisfactory programme of activities (work, education, sport, etc.) is of crucial importance for the well-being of prisoners... [P]risoners cannot simply be left to languish for weeks, possibly months, locked up in their cells, and this regardless of how good material conditions might be within the cells. The CPT considers that one should aim at ensuring that prisoners in remand establishments are able to spend a reasonable part of the day (8 hours or more) outside their cells, engaged in purposeful activity of a varied nature...
>
> 48. Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard... It is also axiomatic that outdoor exercise facilities should be reasonably spacious...
>
> 49. Ready access to proper toilet facilities and the maintenance of good standards of hygiene are essential components of a humane environment...
>
> 50. The CPT would add that it is particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners."

B. Extracts from the 7th General Report [CPT/Inf (97) 10]

"13. As the CPT pointed out in its 2nd General Report, prison overcrowding is an issue of direct relevance to the Committee's mandate (cf. CPT/Inf (92) 3, paragraph 46). An overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff. This list is far from exhaustive.

The CPT has been led to conclude on more than one occasion that the adverse effects of overcrowding have resulted in inhuman and degrading conditions of detention..."

C. Extracts from the 11th General Report [CPT/Inf (2001) 16]

"28. The phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and seriously undermines attempts to improve conditions of detention. The negative effects of prison overcrowding have already been highlighted in previous General Reports...

29. In a number of countries visited by the CPT, particularly in central and eastern Europe, inmate accommodation often consists of large capacity dormitories which contain all or most of the facilities used by prisoners on a daily basis, such as sleeping and living areas as well as sanitary facilities. The CPT has objections to the very principle of such accommodation arrangements in closed prisons and those objections are reinforced when, as is frequently the case, the dormitories in question are found to hold prisoners under extremely cramped and insalubrious conditions... Large-capacity dormitories inevitably imply a lack of privacy for prisoners in their everyday lives... All these problems are exacerbated when the numbers held go beyond a reasonable occupancy level; further, in such a situation the excessive burden on communal facilities such as washbasins or lavatories and the insufficient ventilation for so many persons will often lead to deplorable conditions.

30. The CPT frequently encounters devices, such as metal shutters, slats, or plates fitted to cell windows, which deprive prisoners of access to natural light and prevent fresh air from entering the accommodation. They are a particularly common feature of establishments holding pre-trial prisoners. The CPT fully accepts that specific security measures designed to prevent the risk of collusion and/or criminal activities may well be required in respect of certain prisoners... [E]ven when such measures are required, they should never involve depriving the prisoners concerned of natural light and fresh air. The latter are basic elements of life which every prisoner is entitled to enjoy..."

88. The relevant extracts from the Recommendation of the Committee of Ministers to Member States of the Council of Europe on the European Prison Rules (Rec (2006)2, adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), read as follows:

"...

1. All persons deprived of their liberty shall be treated with respect for their human rights.

...

3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.

4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources.

5. Life in prison shall approximate as closely as possible the positive aspects of life in the community.

6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.

...

18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

18.2 In all buildings where prisoners are required to live, work or congregate:

a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system;

b. artificial light shall satisfy recognised technical standards (...)

18.3 Specific minimum requirements in respect of the matters referred to in paragraphs 1 and 2 shall be set in national law.

18.4 National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.

18.5 Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation.

18.6 Accommodation shall only be shared if it is suitable for this purpose and shall be occupied by prisoners suitable to associate with each other.

...

19.1 All parts of every prison shall be properly maintained and kept clean at all times.

19.2 When prisoners are admitted to prison the cells or other accommodation to which they are allocated shall be clean.

19.3 Prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

19.4 Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interest of general hygiene.

19.5 Prisoners shall keep their persons, clothing and sleeping accommodation clean and tidy.

19.6 The prison authorities shall provide them with the means for doing so including toiletries and general cleaning implements and materials."

IV. MEASURES UNDERTAKEN BY THE STATE TO REDUCE THE RATE OF OVERCROWDING IN POLISH DETENTION FACILITIES

89. The Government submitted that the problem of overcrowding in Polish detention facilities had started in September 2000. It was at its worse in November 2006 with the rate of overcrowding peaking at 24%. Since then, however, a series of robust measures had been undertaken to fight the problem of overcrowding. As a result, the rates of overcrowding, calculated for all detention facilities, dropped by September 2008 to 6.8% and calculated only for prisons and remand centres, to 8.1%. According to the statistics published by the prison service authorities, in June 2009 those rates were 3.2% and 4% respectively.

A. New laws and amendments to the relevant legislation

90. The Law of 7 September 2007 on the electronic surveillance of persons serving a penalty of imprisonment outside penitentiary facilities (*Ustawa o wykonywaniu kary pozbawienia wolności poza zakładem karnym w systemie dozoru elektronicznego*; Journal of Laws of 2007, No. 191, item 1366;) enters into force on 1 September 2009. The law introduces a possibility of serving short-term sentences under a non-incarceration system. It aims, among other things, at reducing the number of prisoners. In the Government's submission, within the first two years after the implementation of the new law, 3,000 convicts would be taken under the programme, the ultimate target being 15,000 convicted persons per year.

In addition, the Ministry of Justice prepared a series of draft laws, amending the relevant provisions of the Code of Execution of Criminal Sentences and other relevant acts. The proposed amendments aim at eradicating the problem of overcrowding by employing different means, among others, by empowering the governors of detention facilities to stay the enforcement of a prison sentence in the event that the detention facility, to which a particular convicted person had been assigned, has no vacant places.

In addition, Article 248 of the Code of Execution of Criminal Sentences which had been declared unconstitutional and other related provisions are to be repealed or amended in enforcement of the judgment of the Constitutional Court of 26 May 2008 (see paragraph 85 above). As of the date of the Court's judgment the draft law in question had not yet been submitted to the Parliament.

B. Other measures

91. In the Government's submission a special programme had been drawn up for the years 2006 to 2009, with the aim of obtaining 17,000 new places in detention facilities.

As submitted by the Government, more than 50% of the target had already been reached within the first two years of the programme's implementation. In addition, 1,500 new places were created by the end of 2007 in former schools and army compounds in Dąbrowa, Przytuły and Przywary.

The plan also envisaged to obtain 3,900 new places by the end of 2008 and another 2,499 by the end of 2009.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

92. The applicant complained that his detention in the conditions of the prisons and remand centres in which he had been held since 2003, amounted to inhuman and degrading treatment contrary to Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

93. The applicant maintained that the overcrowding and insanitary conditions, which had persisted during the long years of his incarceration,

had had an adverse effect on his physical health and caused him humiliation and suffering.

A. Admissibility

1. Government's preliminary objection

94. The Government raised a preliminary objection, arguing that the applicant had not exhausted the domestic remedies available to him.

(a) The Government

95. The Government acknowledged that the applicant had filed a number of complaints with various State authorities. Those complaints, however, with only one exception, had been lodged after the date of introduction of the application with the Court. The one complaint lodged prior to 11 May 2004 concerned the living conditions in Wejherowo Remand Centre. The applicant, however, had not waited for his complaint to be examined before bringing his application to the Court.

96. The Government argued that there were several effective remedies available to the applicant under the Code of Execution of Criminal Sentences, including an appeal against any unlawful decision of a penitentiary authority and a complaint to a penitentiary judge about detention conditions, even in the absence of any formal decision on that matter.

97. In addition, the Government argued that the applicant could have, but had not, made use of the remedies of a compensatory nature governed by the provisions of Articles 23 and 24 of the Civil Code, in conjunction with Article 445 or Article 448 of the Civil Code, in order to bring an action for compensation for alleged damage to health sustained as a result of the inadequate conditions of his detention.

In that connection the Government referred to the judgment of the Supreme Court of 28 February 2007 which recognised for the first time the right of a detainee under Article 24, read in conjunction with Article 448 of the Civil Code, to lodge a civil claim against the State Treasury for damage resulting from overcrowding and inadequate living and sanitary conditions in a detention establishment (see paragraphs 70 - 71 above). They also submitted copies of judgments in which domestic courts had examined claims for compensation brought by former detainees on account of the alleged infringement of their personal rights (see paragraphs 72 and 73 above).

The Government further submitted that under the above mentioned provisions a plaintiff could also ask the civil court to impose an injunction, requiring the penitentiary authorities to cease the infringement of his

personal rights, for example, by relocating him to another cell. They did not supply any specific example of a successful request to this effect.

The Government did not refer to the fact that on 19 February 2008 the applicant had lodged a civil action for compensation, of which the applicant informed the Court in his pleading of 25 November 2008 (see paragraphs 70-71 above).

98. Lastly, the Government submitted that the applicant should have made an application to the Constitutional Court under Article 191, read in conjunction with Article 79 of the Constitution, asking for the 2006 Ordinance to be declared unconstitutional.

(b) The applicant

99. The applicant contested the Government's preliminary objection.

100. He submitted that according to the Court's case-law it was for the individual to select the legal remedy which could be considered adequate in the circumstances of his or her case and the legal remedy to pursue (*Airey v. Ireland*, 9 October 1979, § 23, Series A no. 32).

101. In this respect, the applicant recalled that on 14 March 2005 he had lodged a complaint about the overall conditions of his detention with the Governor of Gdańsk Remand Centre. His complaint, however, had been considered ill-founded (see paragraph 68 above).

102. Moreover, the applicant submitted that an appeal to the penitentiary judge under Article 7 of the Code of Execution of Criminal Sentences had not been available to him. The provision in question allowed for an appeal against a final decision to detain a person in a cell below the statutory 3 m² but no such individual decision had ever been issued with regard to the applicant.

103. Lastly, the applicant argued that the constitutional complaint was not an effective remedy in the circumstances of the case. He referred to the Court's ruling in the *Pachla* decision, in which the Court pointed out two important limitations of the Polish model of constitutional complaint, namely its scope and the form of redress it provided (*Pachla v. Poland*, no. 8812/02, 8 November 2005).

104. In his pleading of 25 November 2008 the applicant submitted that on 19 February 2008 he had lodged with the Warsaw Regional Court an action for damages under Articles 23 and 24 of the Civil Code, read in conjunction with Article 448 of the Civil Code. The applicant sued the State Treasury for the alleged damage resulting from overcrowding and inadequate living conditions in all the detention facilities in which he had so far been detained.

The applicant argued that he had availed himself of the remedy offered by civil law. He stressed, however, that the pending civil proceedings had not improved his situation in prison as he continued to be detained in conditions incompatible with the Convention standards.

2. General principles relating to exhaustion of domestic remedies

105. The Court observes that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

106. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (ibid., § 68).

In addition, Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (ibid., § 69).

3. Application of these principles to the present case

107. Recourse to the administrative authorities could be considered an effective remedy in respect of complaints concerning the application or implementation of prison regulations (see, among other authorities, *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 26, § 65). The Court notes that before bringing his application to the Court the applicant had lodged one formal complaint in compliance with the Code of Execution of Criminal Sentences with the penitentiary authorities (see paragraph 68 above). He also lodged many similar complaints afterwards (see paragraphs 65-68 above). In his complaints the applicant clearly raised the issue of overcrowding and inadequate living conditions in different remand centres and prisons in which he had been held at the particular time. The relevant authorities, including the competent Regional Inspectorates of the Prison Service, considered them all manifestly ill-founded, even in circumstances, when, as in the case of Gdańsk Remand

Centre, the existence of the overcrowding had been acknowledged by the authorities (see paragraphs 67-68 above).

It follows that in the present case the applicant made use of the remedy referred to by the Government although he failed to secure redress for his complaints.

108. With regard to the remedies provided by the civil law, the Court observes that the judgments of domestic courts referred to by the Government clearly illustrate that prior to the judgments: of the Supreme Court of 28 February 2007 and of the Constitutional Court of 26 May 2008 the domestic courts have consistently interpreted Article 24 § 1 of the Civil Code as being conditional on two elements, one of them being that the infringement alleged must have resulted from an unlawful act or omission. The analysis of the relevant Polish case-law shows that at the time the applicant lodged his application with the Court the policy of reducing the space for each individual in detention establishments was considered to be in accordance with domestic law.

The Court acknowledges that developments in the domestic jurisprudence have indeed occurred since the delivery of the above-mentioned judgments. The sporadic decisions delivered in late-2007 became more consolidated in 2008. It appears that the domestic civil courts have become more inclined to find an infringement of a prisoner's personal rights and to award him compensation when the latter proved that he had been detained for a considerable amount of time in inadequate living and sanitary conditions in a cell in which the minimum statutory standard of 3 m² per person was not respected.

Welcoming the new developments in the case-law of the domestic courts, the Court, nevertheless, observes that the Government have not alluded to any decisions of the domestic courts indicating that individuals detained in inadequate conditions have succeeded in obtaining an improvement of the *status quo*. The civil remedies referred to by the Government have proved to be merely of a compensatory nature since no domestic court has so far imposed an injunction in order to change the situation which had given rise to the infringement of the prisoner's personal rights (see paragraphs 79-83 above).

Thus, the applicant's own situation does not appear to have been improved by the fact that his civil action, lodged under Articles 23 and 24 of the Civil Code, read in conjunction with Article 448 of the Civil Code, has been pending before the domestic court since 19 February 2008. On the contrary, he has continued to be detained in cells which, with the exception of a relatively short period of time in Goleniów Prison, were as overcrowded as those at the earlier stages of his incarceration (see paragraphs 128-131 below).

109. Consequently, neither at the time the applicant introduced his application with the Court nor as things stand could the institution of civil

proceedings remedy the applicant's situation such that the above-mentioned civil action could be considered an effective remedy within the meaning of Article 35 § 1 of the Convention.

This conclusion is without prejudice to the Court's ruling in future similar cases introduced with it where the applicant at the time of lodging his application with the Court was already at liberty or had been transferred to a place of detention where conditions complied with the Convention standards. When the alleged violation no longer continues and cannot, therefore, be eliminated with retrospective effect, the only means of redress is pecuniary compensation. In such situations, regard being had to the principle of subsidiarity, it cannot be excluded that applicants who complain of degrading treatment because of the conditions of their detention, may be required to first avail themselves of the civil action relied on by the Government.

110. Lastly, the Government provided an example of a constitutional complaint in which an individual had alleged essentially that Article 248 of the Code of Execution of Criminal Sentences Court was unconstitutional in so far as it allowed for the placement of detainees for an indefinite period of time in cells below the statutory size.

The Court takes note of the Constitutional Court's judgment of 26 May 2008 in which the impugned provision had been declared unconstitutional (see paragraph 85 above). However, the Court observes that the Polish model for applications to the Constitutional Court is characterised by a significant limitation as to the form of redress it provides. By virtue of Article 190 of the Constitution, the principal direct effect of a judgment of the Constitutional Court is the abrogation of the statutory provision which has been found to be unconstitutional. As illustrated by the recent practice of the Constitutional Court, that direct effect may not necessarily be an immediate one. The Court observes that on 26 May 2008 the Constitutional Court declared Article 248 of the Code of Execution of Criminal Sentences unconstitutional, ruling, however, that the unconstitutional provision should lose its binding force no later than within eighteen months from the date of the judgment (ibid.). The Constitutional Court, in the case referred to, indeed ordered an individual measure with regard to the author of the constitutional complaint. That ruling, however, was by its nature exceptional as it was effected under the principle of the so-called "right of privilege", which aims at rewarding the individual who brought the first constitutional complaint concerning a particular matter for his or her proactive attitude. Furthermore, it must be noted that the practice of the Constitutional Court to rely on the above mentioned principle is not yet well established. Consequently, it is not certain that it would be applied in a similar way with regard to each constitutional complaint.

It follows that an individual complaint to the Constitutional Court cannot be recognised as an effective remedy, within the meaning of the Convention, in the circumstances of the applicant in the instant case.

111. Irrespective of the above considerations, it can only be noted that the finding made by the Constitutional Court in its judgment of 26 May 2008 (see paragraph 85 above) and by this Court (see paragraph 147 below) that the overcrowding in Polish detention facilities was, at the relevant time, of a structural nature undermined the effectiveness of any domestic remedies available, making them all theoretical and illusory and incapable of providing redress in respect of the applicant's complaint.

Accordingly, the Court dismisses the Government's preliminary objection as to the non-exhaustion of domestic remedies.

112. The Court also considers that the instant application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant

113. The applicant submitted that the conditions of his detention in the prisons and remand centres in which he had been held since 2003 had fallen short of standards compatible with Article 3 of the Convention. In particular, he complained that he had been detained in overcrowded cells with less than 3 m² of space per person.

114. The applicant also complained that he had been allowed to spend a very limited time outside the cell, i.e. he had only a one-hour long outdoor exercise per day. The applicant also claimed that the sanitary conditions in the detention facilities in question had been inadequate. In particular, he had a right to take only one shower per week and his clothes and bed linen had not been washed often enough.

115. Lastly, in the applicant's view the problem of overcrowding in Polish detention facilities was of a systemic nature in that it was widespread and persistent.

2. The Government

116. The Government argued that during his detention the applicant had not suffered inhuman or degrading treatment which attained the minimum level of severity within the meaning of Article 3 of the Convention.

117. The Government acknowledged the existence and the systemic nature of the problem of overcrowding in Polish detention facilities. They submitted, however, that during four of the periods of the applicant's

detention, the statutory requirement concerning the living space for each prisoner (3 m²), had been met. The periods referred to were the following: in Sztum Prison (1) from 12 December 2003 to 28 January 2004; (2) from 23 to 29 March 2006 and (3) from 22 June to 2 August 2006; and in Wejherowo Remand Centre (4) from 13 February to 26 April 2007. In their later submissions, the Government also noted that from 20 February 2008 until an unspecified date, as it appears, no later than the late-2008, the applicant was detained in Goleniów Prison in a cell in which the minimum statutory standard was respected.

118. Moreover, the Government maintained that the sanitation and hygiene throughout the applicant's entire period of detention had met the required standards. They also submitted that the applicant could spend, on average, two hours per day outside his cell, including one hour in the outdoor yard.

3. The Court's assessment

(a) General principles

119. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (*Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

As the Court has held on many occasions, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Peers v. Greece*, no. 28524/95, §§ 67-68, 74, ECHR 2001-III; *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII).

120. Measures depriving a person of his liberty may often involve an inevitable element of suffering or humiliation. Nevertheless, the suffering and humiliation involved must not go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.

In the context of prisoners, the Court has already emphasised in previous cases that a detained person does not, by the mere fact of his incarceration, lose the protection of his rights guaranteed by the Convention. On the contrary, persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured. (*Valašinas*, cited above, § 102; *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI).

121. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in the particular conditions also has to be considered (see among others *Alver v. Estonia*, no. 64812/01, 8 November 2005).

122. The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see *Karalevičius v. Lithuania*, no. 53254/99, 7 April 2005).

In its previous cases where applicants had at their disposal less than 3 m² of personal space, the Court found that the overcrowding was so severe as to justify of itself a finding of a violation of Article 3 of the Convention (see, among many others, *Lind v. Russia*, no. 25664/05, § 59, 6 December 2007; *Kantyrev v. Russia*, no. 37213/02, § 50-51, 21 June 2007; *Andrey Frolov v. Russia*, no. 205/02, §47-49, 29 March 2007; *Labzov v. Russia*, no. 62208/00, § 44, 16 June 2005).

By contrast, in other cases where the overcrowding was not so severe as to raise in itself an issue under Article 3 of the Convention, the Court noted other aspects of physical conditions of detention as being relevant for its assessment of compliance with that provision. Such elements included, in particular, the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private. Thus, even in cases where a larger prison cell was at issue – measuring in the range of 3 to 4 m² per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting (see, for example, *Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007; *Ostrovar v. Moldova*, no. 35207/03, § 89, 13 September 2005, and *Peers v. Greece*, no. 28524/95, §§ 70-72, ECHR 2001-III) or the lack of basic privacy in his or her everyday life (see, *mutatis mutandis*, *Belevitskiy v. Russia*, no. 72967/01, §§ 73-79, 1 March 2007; *Valašinas*,

cited above, § 104; *Khudoyorov*, cited above, §§ 106 and 107; *Novoselov v. Russia*, no. 66460/01, §§ 32, 40-43, 2 June 2005).

(b) Application of these principles to the present case

(i) Overcrowding

123. The Court must have regard to the findings of the Constitutional Court and different State authorities, which identified the systemic nature of the problem of overcrowding of detention facilities in Poland (see paragraph 85 above). In this connection the Court refers to the judgment of 26 May 2008 in which the Constitutional Court found that a person cannot be afforded humane treatment in a prison cell, in which individual living space is less than 3 m² (Article 41 § 4 of the Constitution) and that overcrowding of such a serious character as had existed in Poland, could in itself be qualified as inhuman and degrading treatment (Article 40 of the Constitution).

The Court observes that Article 40 of the Constitution is drafted almost identically to Article 3 of the Convention. Therefore, the Court, mindful of the principle of subsidiarity, finds that the above-mentioned ruling of the Constitutional Court can constitute a basic criterion in the Court's assessment whether the overcrowding in Polish detention facilities breaches the requirements of Article 3 of the Convention. In consequence, all situations in which a detainee is deprived of the minimum of 3 m² of personal space inside his or her cell, will be regarded as creating a strong indication that Article 3 of the Convention has been violated.

124. Applying the above principles to the present case, the focal point for the Court's assessment is the living space afforded to the applicant during his detention in Słupsk, Gdańsk, Wejherowo, Warszwa Mokotów and Wrocław Remand Centres and Sztum, Kamińsk and Goleniów Prisons.

125. The Government acknowledged that Słupsk, Gdańsk and Wejherowo Remand Centres had been generally overcrowded at the time when the applicant had been detained there (see paragraphs 11, 28, 41 above). On the other hand, their submissions as to the precise occupancy rate of the applicant's cells there are selective and not corroborated by any official documents (see paragraphs 11, 27, 29 and 40 above).

The applicant for his part submitted a copy of a letter from the Office of the Prison Service which confirmed that at the relevant time the overcrowding ranged from 3 to 14 % in Słupsk Remand Centre (see paragraph 17 above), from 3 to 17% in Gdańsk Remand Centre (see paragraph 39 above) and from 3 to nearly 11% in Wejherowo Remand Centre (see paragraph 49 above).

He further claimed that for the most part he had been detained in cells in which the space per person had been below 3 and at times, even below 2 m² (see paragraphs 16, 36-38, 47 and 58 above). To that effect the applicant

corroborated his submissions by furnishing copies of the Gdańsk Remand Centre's detailed records which the Government claimed not to have been able to produce (see paragraphs 35-38 above) and of the letter from the governor of Wejherowo Remand Centre (see paragraph 48 above).

126. As concerns Sztum Prison, the Government acknowledged that for two months in 2006 the applicant had been assigned to a cell in which the space per person had not exceeded 2.2 m², whereas for the remainder of the time the living conditions afforded to him had been in compliance with domestic standards (see paragraph 19 above).

The applicant, however, claimed that during his first and second periods of detention in that prison, he had been held in cells in which the personal space available to prisoners had been 2.6 and 2.25 m² per person respectively. To that end he supported his submission by providing a letter obtained from the Office of the Prison Service which stated that Sztum Prison had been overpopulated by 10% during the applicant's first detention, 20% during his second detention and by 25% during his last period of detention there (see paragraphs 24-25 above).

127. The Government did not make any comments with regard to Kamińsk Prison.

The applicant on the other hand submitted a copy of a letter sent by the Kamińsk Prison administration to the Ministry of Justice in which it had been stated that for one month in mid-2007 the applicant had been detained in a cell in which the personal space available to prisoners had not exceeded 2.7 m² per person (see paragraph 53 above). In addition, the letter obtained from the Office of the Prison Service indicates that the rate of overcrowding in this prison peaked at the relevant time at nearly 15 % (see paragraph 54 above).

128. Lastly, in the period following the applicant's civil action for compensation filed with the domestic court on account of the allegedly inadequate conditions of his detention, namely in the period from February 2008 onwards, the applicant was detained subsequently in Goleniów Prison and Warszawa Mokotów and Wrocław Remand Centres.

129. The Court notes that the Government commented on the short period of the applicant's detention in Goleniów Prison and did not make any submissions with regard to the remainder of the applicant's detention (see paragraphs 56, 61 and 64 above). The applicant, for his part, made submissions regarding the entire period of his detention in Goleniów Prison and Warszawa Mokotów Remand Centre (see paragraphs 57-59 and 62 above). He did not, however, make any comments regarding Wrocław Remand Centre, where he is currently detained (see paragraph 64 above).

130. The Court takes note of the fact, which is not in dispute, that from 20 February 2008 until an unspecified date, no later than the end of 2008, the minimum statutory standard of 3 m² of space per person was respected in the applicant's cell in Goleniów Prison (see paragraphs 56 and 59 above).

At the same time, however, the Court observes that the applicant's argument that during approximately seven months prior to that date, he was detained in cells in which the space per person ranged between 2.5 and 2.57 m² was not challenged by the Government. Moreover, the fact that the maximum capacity of Goleniów Prison was indeed exceeded by almost 7%, is confirmed by the official statistics from the Office of the General Director of the Prison Service (see paragraph 57 above).

As regards the Warszawa Mokotów Remand Centre in which the applicant was detained from an unspecified date in late-2008 until 13 February 2009, the Court, in the absence of the Government's comments, takes note of the applicant's submission that the space afforded to him in that facility ranged between 1.75 and 2.5 m² (see paragraph 62 above).

Lastly, the Court refers to the official general statistics, confirmed by the Government, that the rate of overcrowding in Polish prisons and remand centres was still at 8.1% in September 2008 and at 4% in June 2009 (see paragraph 89 above).

131. The Court notes that the Government acknowledged that the majority of the detention facilities in question had been overpopulated at the material time. Moreover, it is not convinced by the Government's assertion, which is not supported by conclusive documentary evidence, that the applicant's cells, only with the exception of a few short periods of time, had remained unaffected by that problem and that the living conditions which he had been afforded had complied with Convention standards.

It is to be further observed in this connection that the applicant's allegations of overcrowding were, to a great extent, corroborated by the letter sent to his lawyer by the Office of the Prison Service and the letter sent by the prison administration to the Ministry of Justice.

The Court therefore finds it established to the standard of proof required under Article 3 of the Convention that the majority of the applicant's cells, in which he had been held for most of his detention were overcrowded beyond their designated capacity, leaving the applicant with less than 3 m² of personal space and at times, with less than 2 m². Even if occasionally the cell was within or below its designated capacity, the applicant was usually afforded only a little more than 3 m² of personal space (see paragraphs 28, 38 and 42 above).

In connection with the latter, the Court would reiterate that the CPT's standard recommended living space per prisoner for Polish detention facilities is higher than the national statutory minimum standard, namely 4 m² (see paragraph 86 above).

The applicant's situation was further exacerbated by the fact that he was confined to his cells day and night, save for one hour of daily outdoor exercise and, possibly, an additional, although short, time spent in an entertainment room.

(ii) Other elements

132. The applicant also complained of a number of additional aggravating features of the living and sanitary conditions during his detention.

In the light of the parties' submissions the Court considers the following elements to be established: (1) the applicant was allowed a one-hour long outdoor exercise daily, and (2) one hot shower per week; (3) he had his showers together with a group of fellow inmates equal to the number of shower heads available, sometimes between twelve and twenty-five; (4) his bed linen was changed once every two weeks, and (5) his underwear, usually once a week; (6) he had all his meals inside the cell; and (7) the overall conditions of the applicant's cells, including their cleanliness, ventilation and lighting, was adequate vis-à-vis the Convention standards.

133. The Court also takes note of another important element, namely the fact that during his detention, which has so far lasted approximately six years, the applicant had been transferred twenty-seven times between eight different prisons and remand centres. He was also very frequently moved between cells within each of the detention facilities in question.

In this connection the Court notes that too frequent transfers of a person under the existing system of rotating transfers of detainees may create a problem under the Convention. By using this system, the authorities provide an urgent but short-term and superficial relief to the individuals concerned and to the facilities in which the rate of overcrowding is particularly high. As shown by the example of the applicant in the instant case, in the light of massive overcrowding the system does not provide a real improvement of a detainee's situation. On the contrary, such frequent transfers may, in the Court's opinion, increase the feelings of distress experienced by a person deprived of liberty and who is held in conditions which fall short of the Convention (see *Khider v. France*; no. 39364/05; §§110 and 111).

(c) Conclusion

134. It has been established that the applicant in the instant case for the most part of his detention had been afforded below 3 and at times, even below 2 m² of personal space inside his cells.

In addition, as the applicant's personal space was particularly limited for almost the entire day and night, he had to have his meals inside his overcrowded cell and to shower along with the group of strangers, sometimes as many as twenty-four, and finally, as he had constantly been moved between cells and facilities, the Court considers that those conditions obviously did not allow any elementary privacy and aggravated the applicant's situation (see *Kalashnikov v. Russia*, no. 47095/99, § 99, ECHR 2002-VI).

135. Having regard to the circumstances of the case and their cumulative effect on the applicant, the Court considers that the distress and hardship

endured by the applicant exceeded the unavoidable level of suffering inherent in detention and went beyond the threshold of severity under Article 3. Therefore, there has been a violation of Article 3 of the Convention on account of the conditions in which the applicant has been detained since 2003.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

136. With regard to the issue of overcrowding *vis-à-vis* the applicant's right to respect for his physical and mental integrity or his right to privacy and the protection of his private space, the Court considered it appropriate to raise of its own motion the issue of Poland's compliance with the requirements of Article 8 of the Convention, which in its relevant part reads as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

137. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

138. Having found a violation of Article 3, the Court considers that no separate issue arises under Article 8 of the Convention with regard to the conditions of the applicant's detention. The Court would observe, nevertheless, that the Constitutional Court had found that the law setting the standards for conditions of detention in Poland was unconstitutional (see paragraph 85 above). This in itself could have given rise to a violation of Article 8 on account of disrespect of the "in accordance with the law" requirement.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

139. Lastly, the applicant complained of the fact that he had not been present at the hearing of his appeal and of the outcome of the criminal proceedings against him. These complaints fall to be examined under Article 6 § 1 of the Convention, which in its relevant part reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

140. However, pursuant to Article 35 § 1 of the Convention:

> "The Court may only deal with the matter ... within a period of six months from the date on which the final decision was taken"

141. The complaints pertaining to the course and the outcome of the criminal proceedings against the applicant were submitted to the Court on 9 March 2006, whereas the final ruling in the case had been delivered by the Gdańsk Regional Court on 3 November 2003 (see paragraphs 72-73 above). Although the applicant implied that he had not been immediately served with that decision, he nevertheless failed to indicate any date which could be taken into account in the assessment of his compliance with the six-month rule.

It follows that this part of the application must be considered as introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

142. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

143. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Article 46

1. The parties' submissions

(a) The applicant

144. In the applicant's view the problem of overcrowding in Polish detention facilities was of a systemic nature in that it was widespread and persistent. The *status quo* had for many years been legitimised by the practice of the penitentiary authorities and domestic courts, which interpreted Article 248 of the Code of Execution of Criminal Sentences, constantly and uniformly, as allowing for a common and unlimited reduction of the statutory living space of 3 m² per person.

145. The applicant also referred to the *amicus curiae* opinion of the Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*), which had been submitted to the Constitutional Court in the course of the proceedings leading to the judgment of 26 May 2008

(see paragraph 85 above). It was claimed in that document that the official rates of the population in Polish detention facilities were not accurate. The penitentiary authorities, in their calculations, compared the number of detainees held in each detention facility not to the actual living space but to the total surface of the relevant detention facility, including entertainment rooms, gymnasia and larger single-person cells. As a result, the official figures of overcrowding were much lower than what they should be in reality. According to the Foundation's sources, in many Polish detention facilities, i.e. in Warsaw Służewiec, Grodków, Bielsko Biała and Racibórz Prisons, the maximum occupancy rate allowed was exceeded by as much as 50%.

The applicant stressed that already the statutory space of 3 m² per person was much lower than the standards existing in other European countries. Referring to the Constitutional Court's reasoned judgment of 26 May 2008 (see paragraph 85 above) he noted that in the Czech Republic the minimum statutory occupancy rate per person was 3.5 m²; in Bosnia and Herzegovina – 4 m²; in Bulgaria, Romania, Spain and Austria – 6 m²; in Germany, Portugal and Finland – 7 m²; in Croatia – 8 m²; in Turkey – 8-9 m²; in Belgium, Cyprus, Italy - 9 m²; and in Greece, Ireland and the Netherlands, as much as 10 m². He also pointed out that the total space of the cell was reduced in reality by the bulk of the furniture and equipment inside.

(b) The Government

146. The Government acknowledged the existence and the systemic nature of the problem of overcrowding in Polish detention facilities. They stressed, however, that since the problem had already been identified at the national level, a number of measures had been undertaken to improve gradually the situation and to ultimately eradicate the problem. The Government also observed that it was unlikely that further similar applications would be brought before the Court since the civil law in Poland provided an effective remedy for persons detained in inhuman and degrading conditions. Taking into account the above considerations and the Constitutional Court's judgment of 26 May 2008 ordering further reforms of the law and the reorganisation of the penitentiary system, there was no need for the Court to order any general measures in this area.

2. The Court's assessment

147. In this context, the Court observes that approximately 160 applications raising an issue under Article 3 of the Convention with respect to overcrowding and consequential inadequate living and sanitary conditions are currently pending before the Court. Ninety-five of these applications have already been communicated to the Polish Government.

Moreover, the seriousness and the structural nature of the overcrowding in Polish detention facilities have been acknowledged by the Constitutional

Court in its judgment of 28 May 2008 and by all the State authorities involved in the proceedings before the Constitutional Court, namely the Prosecutor General, the Ombudsman and the Speaker of the *Sejm*, (see paragraph 85 above), and by the Government (see paragraph 146 above).

The statistical data referred to above taken together with the acknowledgements made by the Constitutional Court and the State authorities demonstrate that the violation of the applicant's right under Article 3 of the Convention originated in a widespread problem arising out of the malfunctioning of the administration of the prison system insufficiently controlled by Polish legislation, which has affected, and may still affect in the future, an as yet unidentified, but potentially considerable number of persons on remand awaiting criminal proceedings or serving their prison sentences (see *mutatis mutandis Broniowski v. Poland* [GC], no. 31443/96, §§ 189, ECHR 2004-V).

The Court concludes that for many years, namely from 2000 until at least mid-2008, the overcrowding in Polish prisons and remand centres revealed a structural problem consisting of "a practice that is incompatible with the Convention" (see *mutatis mutandis Broniowski v. Poland*, cited above, §§ 190-191, ECHR 2004-V; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 229-231, ECHR 2006-...; *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V with respect to the Italian length of proceedings cases).

148. In this connection, it is to be reiterated that, where the Court finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Broniowski v. Poland* cited above, §§ 192).

149. The Court observes that the Constitutional Court in its judgment of 26 May 2008 obliged the State authorities to bring the situation concerning the overcrowding of detention facilities in Poland into compliance with the requirements of the Constitution, namely with the relevant provisions prohibiting, in absolute terms, torture and inhuman and degrading treatment. The Constitutional Court observed in particular, that apart from the indicated legislative amendments the authorities had to undertake a series of measures to reorganise the whole penitentiary system in Poland in order to, ultimately, eliminate the problem of overcrowding. It was also noted that, in parallel, a reform of criminal policy was desired with the aim of achieving a

wider implementation of preventive measures other than deprivation of liberty.

150. In this connection, it must be observed that recently in the case of *Kauczor v. Poland* (see *Kauczor v. Poland*, no. 45219/06, § 58 *et seq*, 3 February 2009), the Court held, referring to the conclusions of the Committee of Ministers of the Council of Europe, that the excessive length of pre-trial detention in Poland revealed a structural problem consisting of a practice that was incompatible with Article 5 § 3 of the Convention. The Court observes that the solution of the problem of overcrowding of detention facilities in Poland is indissociably linked to the solution of the one identified in the *Kauczor* case.

151. The Court also notes that for many years the authorities appeared to ignore the existence of overcrowding and inadequate conditions of detention and, instead, chose to legitimise the problem on the basis of a domestic law which was ultimately declared unconstitutional (see paragraph 85 above). As was observed by the Polish Constitutional Court in its judgment of 26 May 2008, the flawed interpretation of the relevant provision, which through its imprecision allowed for an indefinite and arbitrary placement of detainees in cells below the statutory size of 3 m² per person, sanctioned the permanent state of overcrowding in Polish detention facilities.

In the Court's opinion, such practice undermined the rule of law and was contrary to the requirements of special diligence owed by the authorities to persons in a vulnerable position such as those deprived of liberty.

152. On the other hand, the Court takes note of the fact that the respondent State has recently taken certain general steps to remedy the structural problems related to overcrowding and the resulting, inadequate conditions of detention (see paragraphs 89-91 above). By virtue of Article 46 of the Convention, it will be for the Committee of Ministers to evaluate the general measures adopted by Poland and their implementation as far as the supervision of the Court's judgment is concerned. However, the Court cannot but welcome these developments and considers that they may ultimately contribute to reducing the number of persons detained in Polish prisons and remand centres, as well as to the improvement of the overall living and sanitary conditions in these facilities. They cannot, however, operate with retroactive effect so as to remedy past violations. However, as already noted by the Constitutional Court (see paragraph 85 above), in view of the extent of the systemic problem at issue, consistent and long-term efforts, such as the adoption of further measures, must continue in order to achieve compliance with Article 3 of the Convention.

153. The Court is aware of the fact that solving the systemic problem of overcrowding in Poland may necessitate the mobilisation of significant financial resources. However, it must be observed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention

(see among others *Nazarenko v. Ukraine*, no. 39483/98, § 144, 29 April 2003) and that it is incumbent on the respondent Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties (see *Mamedova v. Russia*, no. 7064/05, § 63, 1 June 2006). If the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment.

154. Lastly, the Court takes note of the civil courts' emerging practice which allows prisoners to claim damages in respect of prison conditions. In this connection, the Court would like to emphasise the importance of the proper application by civil courts of the principles which had been set out in the judgment of the Polish Supreme Court of 26 February 2007.

The Court observes, nonetheless, that a civil action under Article 24 of the Civil Code, in conjunction with Article 445 of this code, may, in principle, due to its compensatory nature, be of value only to persons who are no longer detained in overcrowded cells in conditions not complying with Article 3 requirements (see paragraphs 108-109 above).

The Court would in any event, observe that a ruling of a civil court cannot have any impact on general prison conditions because it cannot address the root cause of the problem. For that reason, the Court would encourage the State to develop an efficient system of complaints to the authorities supervising detention facilities, in particular a penitentiary judge and the administration of these facilities which would be able to react more speedily than courts and to order, when necessary, a detainee's long-term transfer to Convention compatible conditions.

B. Article 41

1. Damage

155. The applicant claimed EUR 3,500 in respect of non-pecuniary damage.

156. The Government submitted that the applicant's claim was excessive.

157. The Court awards the applicant EUR 3,000 in respect of non-pecuniary damage on account of the violation of Article 3.

2. Costs and expenses

158. The applicant also claimed EUR 12 (approximately 53 Polish zlotys (PLN)) for the costs and expenses incurred before the Court by his lawyer.

159. The Government submitted that the amount claimed for the costs and expenses incurred by the applicant's lawyer in the proceedings before the Court was reasonable.

160. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 12 for the proceedings before the Court.

3. Default interest

161. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Articles 3 and 8 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 8 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention:

(i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;

(ii) EUR 12 (twelve euros) in respect of costs and expenses;

plus any tax that may be chargeable, in respect of non-pecuniary damage and costs and expenses, to be converted into Polish zlotys at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Nicolas Bratza
Registrar	President