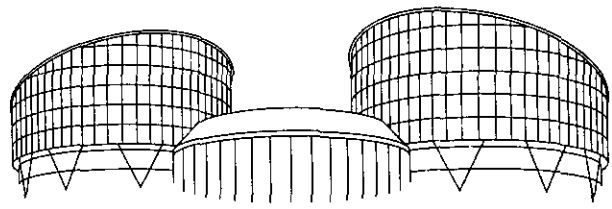


EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

PILOT-JUDGMENT PROCEDURE

AS TO THE ADMISSIBILITY OF

Application no. 52070/08
by Rafal ŁATAK
against Poland

The European Court of Human Rights (Fourth Section), sitting on 12 October 2010 as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi,
Vincent Anthony de Gaetano, *judges,*

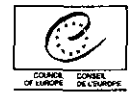
and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 13 October 2008,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the decision to examine the case simultaneously with the case of *Łomiński v. Poland* (no. 33502/09), pursuant to Rule 42 § 2 of the Rules of Court,

Having regard to the final pilot judgments in the cases of *Orchowski v. Poland* (no. 17885/04) and *Norbert Sikorski v. Poland* (no. 17599/05) delivered on 22 October 2009, in particular to the finding under Article 46 of the Convention that overcrowding in Polish prisons and remand centres revealed a structural problem,



Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Rafał Łatak, is a Polish national who was born in 1977 and lives in Pyskowice. He was represented before the Court by Ms B. Słupska-Uczkiewicz, a lawyer practising in Wrocław. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, of the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The applicant's detention

3. On 23 July 2008 the applicant started to serve a prison sentence. He was initially committed to Brzeg Prison and remained there until 10 September 2008.

4. From 10 September to 27 November 2008 he was detained in Gliwice Remand Centre (*Areszt Śledczy*).

5. From 27 November 2008 to 17 June 2009 he was detained in Cieszyn Prison.

6. On 17 June 2009 the applicant was moved to Jastrzębie Zdrój Prison, a "half-open" detention facility, where he had an opportunity to work outside prison. On 31 July 2009 the applicant escaped from the workplace and was on the run until 25 September 2009, the date on which he was detained in Warszawa-Białołęka Prison.

7. On 26 November 2009 the applicant was transferred to the Strzelce Opolskie Prison, where he remained until 2 December 2009.

8. Lastly, on 2 December 2009, he was transferred to the Brzeg Prison, where he is currently detained.

2. Conditions of the applicant's detention

9. The parties gave partly differing accounts of the conditions of the applicant's detention in the above-mentioned establishments.

(a) The applicant's account

10. The applicant submitted that during the entire period of his detention he had been held in overcrowded and dirty cells.

11. In Gliwice Remand Centre he was assigned to a cell designed for three persons. In fact, he shared it with five other inmates. The cell in question measured 12 m² (2 m² per person) but most of its space was taken up by a toilet annex, six beds, three tables and six stools. As a result, the prisoners could not move around the cell and they spent their entire day sitting on their beds. The furniture and cell fittings were old and shabby. There was no ventilation in the cell.

12. Later, after his transfer to Cieszyn Prison, the applicant was held in a cell which measured 6 m² and was designed for two persons. The applicant shared that cell with three other inmates, which meant that they had at their disposal 1.5 m² per person.

(b) The Government's account

13. The Government submitted that the period of the applicant's detention in cells in which the minimum statutory requirement of 3 m^2 per person was not respected amounted to 254 days.

They supplied the following details concerning the conditions of the applicant's detention in each establishment.

(i) Brzeg Prison (from 23 July to 10 September 2008)

14. From 23 July to 29 August 2008 the applicant was placed in a cell which measured 10.82 m^2 and in which the space available to each prisoner was less than the statutory minimum of 3 m^2 per person.

15. From 29 August to 10 September 2008 he was held in the same cell but the minimum space requirement was respected.

(ii) Gliwice Remand Centre (from 10 September to 27 November 2008)

16. During that period the applicant was held in a cell which did not meet the statutory minimum space per prisoner.

(iii) Cieszyn Prison (from 27 November 2008 to 17 June 2009)

17. Over that term the applicant was placed in a cell measuring 38.24m^2 which, at different times, he shared with 8 to 13 inmates. The Government supplied a table showing the movement of inmates at any given time, from which it emerges that the space available to one person ranged from 2.90 m^2 to 4.78 m^2.

(iv) Jastrzębie Zdrój Prison (from 17 June to 31 July 2009)

18. From 17 June to 21 July 2009 the applicant was detained in a cell measuring 21.21 m^2 in which the space available to each prisoner was less than the statutory minimum.

19. From 21 to 31 July 2009 the applicant was placed in two different cells. The statutory minimum size requirement was complied with.

20. Since the prison belonged to the category of so-called "half open" prisons, cells were open day and night and inmates could move freely within the premises. They could walk and also play football and volleyball.

(v) Białołęka Prison (from 25 September to 24 November 2009)

21. Over that period the applicant was placed in three different cells, measuring 15.04 m^2, 15.00 m^2 and 15.96 m^2 respectively, which he shared with 3 to 5 inmates. The space per person ranged from 2.50 m^2 to 3.75 m^2.

(vi) Strzelce Opolskie Prison (from 26 November to 2 December 2009)

22. The applicant was placed in a cell complying with the statutory requirement.

(vii) Brzeg Prison (from 2 December 2009 until present)

23. From 2 to 9 December the applicant was held in cell no. 2 measuring 12.85 m^2. Later, he was placed in cell no. 7 measuring 26.85 m^2. In both cells the statutory minimum size requirement was complied with. The applicant is apparently still detained in Brzeg Prison.

3. The applicant's actions concerning the conditions of his detention

24. The applicant did not lodge any formal complaints with the penitentiary authorities. Nor did he bring a civil action in tort to seek an improvement of his detention conditions or compensation for the alleged breach of his personal rights. He submitted, however, that he had raised the issue of his detention conditions at many meetings with the supervisors and the administration of the detention facilities in which he had been held.

B. Relevant domestic law and practice

1. Domestic law and practice before the Orchowski and Norbert Sikorski pilot judgments (adopted on 13 October 2009 and delivered on 22 October 2009)

(a) General rules on conditions of detention

(i) Code of Execution of Criminal Sentences

25. At the material time, Article 110 of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy* – "the Code") provided:

> "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."

26. Article 248 of the Code, which constituted a legal basis for a possible temporary placement of detainees in cells below the statutory size of 3 m^2, as applicable at the material time, read as follows:

> "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 communicated promptly 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 ..."

(ii) Minister of Justice's Ordinances

27. Acting on the basis of Article 248 of the Code, in 2000, 2003 and 2006 the Minister of Justice issued three subsequent ordinances bearing the same title: "Ordinance 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 first ordinance ("the 2000 Ordinance") was issued on 26 October 2000. It was repealed on 26 August 2003 by the second ordinance ("the 2003 Ordinance"), which entered into force on 1 September 2003 (see *Orchowski*, cited above, § 76).

On 19 April 2006, the third ordinance ("the 2006 Ordinance") was issued; it entered into force on the same day. It repealed the previous 2003 Ordinance and remained in force until 6 December 2009, i.e. the date on which the Constitutional Court's judgment of 26 May 2008 took effect

(see *Orchowski*, cited above, § 84; and paragraph 29 below). All the ordinances contained similar provisions authorising the prison authorities to place – temporarily – detainees in cells with surfaces below 3 m^2 in situations where the overall capacity of Polish detention facilities was exceeded on a nationwide scale.

28. Paragraph 1.1 of the 2006 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 on which the capacity is exceeded, shall convey information thereof, hereinafter referred to as '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 requirements for a cell.
>
> ...
>
> 3. Detainees shall be placed in supplementary cells for a specified period of time after the establishment's capacity is exceeded.
>
> 4. 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."

(b) Constitutional Court's judgment of 26 May 2008 (case no. SK 25/07)

29. On 26 May 2008 the Constitutional Court gave its landmark judgment concerning the unconstitutionality of Article 248 of the Code (see paragraph 26 above) in that it allowed, for all practical purposes, the indefinite and arbitrary placement of detainees in cells below the statutory size of 3 m^2 per person, thus causing chronic overcrowding in Polish prisons and exposing detainees to the risk of inhuman treatment.

30. The most relevant parts of that ruling are rendered in paragraph 85 of the *Orchowski* judgment and in paragraphs 79-88 of the *Norbert Sikorski* judgment, which also contain extensive citations from the reasoning.

For the purposes of the present decision the judgment can be summarised as follows.

31. The Constitutional Court held that Article 248 of the Code 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. It expressed the view that 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 statutory minimum standard of 3 m^2 cell space per person was one of the lowest in Europe.

32. 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. A legal provision designed to address exceptional situations 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 contrast, 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.

33. Having regard to "the permanent overcrowding of the Polish detention facilities", the Constitutional Court ruled that 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 judgment was published in the Journal of Laws (*Dziennik Ustaw)* on 6 June 2008.

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 needed with the aim of achieving a wider application 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 of overcrowding affected some 40,000 persons.

(c) Complaints to prison authorities and judicial review of decisions given by prison authorities

34. A detailed description of the relevant domestic law and practice (as applicable at the relevant time) concerning a detainee's right to make complaints, applications or to challenge unlawful decisions given by the prison authorities before a penitentiary judge and penitentiary court in the course of the enforcement of a criminal sentence or detention order, is

included in paragraph 77 of the *Orchowski* judgment and paragraphs 51-58 of the *Norbert Sikorski* judgment.

(d) Civil-law remedies

(i) Liability for infringement of personal rights under the Civil Code

35. Article 23 of the Civil Code contains a non-exhaustive list of so-called "personal rights" (*dobra 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."

36. 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 ..."

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

Article 417 § 1 of the Civil Code (as amended) 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."

(ii) Limitation periods for civil claims based on tort

38. Article 442^1 of the Civil Code sets out limitation periods for civil claims based on tort, including claims under Article 23 read in conjunction with Articles 24 and 448 of the Civil Code. This provision, in the version applicable as from 10 August 2007, reads, in so far as relevant, as follows:

> "1. A claim for compensation for damage caused by a tort shall lapse after the expiration of three years from the date on which the claimant learned of the damage

and of a person liable for it. However, this time-limit may not be longer than ten years following the date on which the event causing the damage occurred."

(e) Supreme Court's judgment of 28 February 2007 (case no. V CSK 431/06)

39. In its judgment the Supreme Court acknowledged for the first time that a detainee might, under Article 24, read in conjunction with Article 448 of the Civil Code, lodge a civil claim against the State Treasury and seek compensation for infringement of his personal rights, in particular, the right to dignity and private space (*intymność*), on account of overcrowding and inadequate living and sanitary conditions in a detention establishment. It further held that the burden of proof that conditions in a detention establishment complied with the required standards and that there was no infringement of personal rights lay with the defendant prison authority.

In that context, the Supreme Court referred to the statutory minimum space of 3 m^2 per person, recalling that only in justified cases defined in Article 248 of the Code and in accordance with the procedure laid down in the 2006 Ordinance could that minimum be reduced for a specific period, which had to be precisely determined and not be excessively long – as it constituted an exception to the rule.

The Supreme Court also reiterated two essential principles underlying Article 24. First, a defendant was liable under this provision regardless of whether or not there was any fault on his part. Second, there was a presumption of unlawfulness of actions infringing personal rights, which meant that a plaintiff was absolved from proving this circumstance, whereas a defendant had a duty to demonstrate before the court that his actions were in accordance with the law.

40. Further details of the civil action in which the judgment originated (and which was ultimately dismissed) are stated in paragraphs 80-81 of the *Orchowski* judgment and in paragraphs 66-70 of the *Norbert Sikorski* judgmentt.

(f) Related case-law of Polish civil courts

41. In the cases of *Orchowski* and *Norbert Sikorski,* the Government submitted twelve judgments delivered by the Polish civil courts in 2006 and 2007 and nine final judgments delivered in 2008, which concerned claims brought by former detainees on account of the alleged infringement of their personal rights. Those claims derived from various situations, including detention with inmates who smoked, food poisoning, bodily injury caused by an inmate, risk of HIV infection and, also, overcrowding in prison.

In four final judgments delivered in late-2007 and in ten final judgments delivered in 2008 the plaintiffs were awarded compensation for the infringement of their personal rights on account of overcrowding and insanitary conditions in their cells. In certain cases the plaintiffs were detained together with smokers or persons with hepatitis C.

A more detailed description of the relevant rulings is included in paragraphs 79 and 82-83 of the *Orchowski* judgment and in paragraphs 65 and 71-74 of the *Norbert Sikorski* judgment.

2. Developments following the above pilot judgments

(a) Implementation of the Constitutional Court's judgment of 26 May 2008

42. In implementation of the above-mentioned Constitutional Court's judgment, whereby Article 248 of the Code lost its force on 6 December 2009 (see paragraph 33 above), Parliament adopted the law of 9 October 2009 on amendments to the Code of Execution of Criminal Sentences (*ustawa o zmianie ustawy – Kodeks karny wykonawczy*) ("the 2009 Amendment"). The law entered into force on 6 December 2009 and introduced a number of new detailed rules governing temporary placement of detainees in cells below the statutory minimum size of 3 m^2.

43. In Article 110 of the Code, after paragraph 2, new paragraphs 2a-i were added.

Paragraph 2a gives a list of emergencies where the reduction of the cell space per person can be applied for a maximum period of 90 days. It reads, in so far as relevant, as follows:

> "2a. The Governor of a prison or remand centre may place a detainee for a specified period not longer than 90 days ...in a cell, in which the area per detainee is less than 3m^2 but not less than 2 m^2 in the event of:
>
> 1) introduction of martial law, state of emergency or natural disaster ...
>
> 2) announcement of an epidemic risk or an epidemic in the region in which the prison or remand centre is located or an outbreak of an epidemic or risk of an epidemic in the prison or remand centre – regard being had to the level of threat to life and health;
>
> 3) need to prevent other events amounting to a direct threat to security of a [detainee] or security of the prison or remand centre or to mitigate the consequences of such events;

Paragraph 2b lists specific circumstances where the prison authorities may reduce the cell space per person below 3 m^2 for a period not exceeding 14 days.

> 2b. The Governor of a prison or remand centre may place a detainee, for a specified period not longer than 14 days ... in a cell, in which the area per detainee is less than 3 m^2 but not less than 2 m^2 if it is necessary to place him immediately in the prison or remand centre that have no free places in cells:
>
> 1) a person sentenced to imprisonment exceeding 2 years;
>
> 2) a person referred to in Articles 64 §§ 1 or 2 and Article 65 of the Criminal Code [recidivist];
>
> 3) a person sentenced for the offences defined in Articles 197-203 of the Criminal Code [sexual offences and offences against morals];

4) a convicted person who [has escaped] from prison;

5) a convicted person who, during leave from prison or a remand centre has not returned to prison;

6) a person transferred from another prison or remand centre under a decision given by the court or prosecutor, in order to take part in a hearing or other procedural acts;

7) a person detained on remand, committed to prison for contempt of court or person in respect of whom other coercive measures have been applied;

Paragraph 2c reads as follows:

2c. The period referred to in paragraph 2b, may be extended only after approval by a penitentiary judge. The whole period of the placement in conditions defined in paragraph 2b may not exceed 28 days.

...

Paragraphs 2e-2i state the following:

2e. A decision issued pursuant to paragraphs 2a-2c shall specify the period of the placement and the reasons for placing a [detainee] in conditions where the area per detainee is less than 3 m^2 and state the term for which a [detainee] shall be held in these conditions.

2f. The court shall examine a complaint against a decision issued pursuant to paragraphs 2a-2c within 7 days.

2g. A decision to place a [detainee] in conditions referred to in paragraphs 2a-2c shall be quashed immediately if the reasons for which it has been issued no longer exist.

2h. In situations referred to in paragraphs 2b and 2c, a [detainee] shall be assured daily walks, half-hour longer [than regular ones] and the possibility of taking advantage of additional cultural and educational activities or sports activities.

2i. The provisions of paragraphs 2b or 2c may not be applied in respect of the same [detainee] earlier than 180 days from the end date of the period of the placement in conditions referred to therein.

44. Following the 2009 Amendment, in Article 151 of the Code, which lists circumstances in which the enforcement of a sentence may be suspended, a nationwide overcrowding in detention facilities was included as an additional circumstance justifying the suspension. This provision, in so far as relevant, reads as follows:

"1. The court may suspend the enforcement of a sentence of imprisonment for a period of up to 6 months if the immediate enforcement of the penalty would entail too harsh consequences for a convicted person or his family or if the number of persons detained in prisons or remand centres exceeds on a nationwide scale the overall capacity of such establishments."

45. The 2009 amendment repealed the 2006 Ordinance (see also paragraphs 27-28 above) and added a new paragraph 5 to Article 110 of the Code. Pursuant to that paragraph, the Minister of Justice shall determine by means of an ordinance the rules to be followed by the relevant authorities in

a situation where the number of persons detained exceeds, nationwide, the overall capacity of prisons and remand centres.

46. On 25 November 2009 the Minister of Justice issued the Ordinance on the rules to be followed by the relevant authorities when the number of persons detained in prisons and remand centres exceeded, nationwide, the overall capacity of such establishments. It entered into force on 6 December 2009.

(b) Jurisprudential developments in respect of claims for infringement of personal rights

(i) Civil courts' judgments produced by the Government

47. The Government, as they did in the *Orchowski* and *Norbert Sikorski* cases, produced a list of cases where the plaintiffs – detainees – sought, and were in some cases awarded, compensation for the infringement of their personal rights. The list partly overlapped with the one submitted in the pilot cases. It comprised 19 civil cases involving various claims for compensation under Articles 23 and 24 read in conjunction with Article 448 of the Civil Code brought by detainees against the prison authorities.

48. In five judgments, namely:

no. IACa 586/06, Gdańsk Court of Appeal, of 20 September 2006; case brought by A.B.;

no. IACa 1245/05, Gdańsk Court of Appeal, of 13 December 2005; case brought by W.L.;

no. IACa 709/07, Szczecin Court of Appeal, of 10 January 2008; case brought by Norbert Sikorski (for details of the action and its outcome, see *Norbert Sikorski* cited above, §§ 40-42);

no. IACa 814/07, Poznań Court of Appeal, of 31 October 2007; case brought by K.K.;

no. IVCa 193/07, Słupsk Regional Court, of 15 June; case brought by L.W.

the courts awarded plaintiffs compensation for damage to their health caused by their prolonged detention with inmates who smoked. No awards were made on account of overcrowding.

49. In the case of a certain S.G. (judgment of the Cracow Court of Appeal of 23 February 2007, no. IACa 103/07), the court held that there was no legal basis to grant the plaintiff compensation for overcrowding since the reduction of the cell space below the standard minimum had been applied under the provisions of the 2003 Ordinance. This measure could not, therefore, be considered an unlawful act justifying the application of provisions for the protection of personal rights (for further details see *Orchowski*, § 82).

50. In the remaining 13 cases the relevant courts awarded plaintiffs compensation on account of overcrowding and insanitary conditions in their

cells. The judgments were delivered on various dates between March 2007 and July 2008.

51. The Government also supplied copies of two further final judgments delivered in civil cases brought by detainees.

However, the first judgment, given by the Warsaw Court of Appeal on 18 March 2008 in the case no. IACa 587/07, brought by a certain M.M., a mentally ill person, concerned a claim for damages arising from a wrong diagnosis and resultant lack of psychiatric treatment in detention. The issue of overcrowding was not raised in that case.

52. The second judgment was given by the Łódź Court of Appeal on 16 June 2009 in the case no. IACa 332/09 brought by a certain J.P.

The plaintiff's claim for compensation for the infringement of his personal rights caused by overcrowding, insanitary conditions of detention and placement in cells with persons infected with HIV and HCV was dismissed at first instance by the Łódź Regional Court. While the court held that it was undisputed that J.P. had been held in overcrowded cells, which undoubtedly constituted an infringement of his personal rights, it concluded that he had not demonstrated that, as a result, he had suffered any damage to his health. Accordingly, it found no basis for awarding him any compensation.

The Court of Appeal amended the judgment and granted the applicant 5,000 Polish zlotys (approximately 1,300 euros at the material time) in compensation. It further reiterated a number of principles relevant for the determination of claims for the infringement of personal rights.

First, the Court of Appeal stressed that under Article 448 of the Civil Code a plaintiff was not obliged to prove that he had suffered any damage to his health but to show that he sustained non-material damage caused by the infringement of his personal rights. Second, he had to produce evidence demonstrating the extent of the damage suffered. In determining an award, the court, for its part, should take into account such factors as the intensity of the suffering, whether the damage was permanent or irreversible and whether it was possible for a plaintiff to reverse its consequences by recourse to other civil remedies. It should also have regard to the nature of the right infringed, the degree of culpability on the part of the defendant and the defendant's financial situation. The *ratio* of Article 448 was not purely compensatory – another aim was to provide the plaintiff with satisfaction, which meant that an amount awarded should constitute a tangible financial sanction for the defendant. However, the court explained further that, in general, sums awarded under Article 448 should be moderate and reflect the prevailing national financial circumstances. They should not be a source of enrichment for the plaintiff.

(ii) Supreme Court's judgment of 17 March 2010 (case no. II CSK 486/09)

53. On 17 March 2010 the Supreme Court examined, and allowed, a cassation appeal *(skarga kasacyjna)* lodged by a certain B.W. against the judgment of the Łódź Court of Appeal of 22 April 2008 (case no. IACa 221/08) upholding the first-instance dismissal of the plaintiff's claim for compensation for the infringement of his personal rights caused by overcrowding in prison.

The lower courts established that from the end of 2005 to July 2007, that is to say for some eighteen months, the applicant had been held in a cell designed for 11 persons with 16 or even more inmates. However, they considered that those conditions had not been in breach of Article 40 (prohibition of torture, cruel, inhuman or degrading treatment or punishment), Article 41 (duty to treat detained persons in a humane manner) and Article 47 (right to protection of private life) of the Constitution but had been a normal consequence of the execution of a penalty and constituted a form of suffering normally associated with serving a prison sentence. The prison authorities had informed the penitentiary court of the overcrowding in their establishment and the need to apply the measures foreseen by Article 248 of the Code. It was true that no specific term had been fixed for the application of those measures but Article 248 did not oblige them to set any specific time-frame. The applicant had not made any complaints about the conditions of his detention to the relevant authorities. Moreover, he had refused a proposal of transfer to a "half-open" prison, thus renouncing the possibility of improving his situation.

In view of the foregoing, the courts found that the actions taken by the defendant authorities had been legitimate and could not be considered unlawful for the purposes of Articles 23 and 24 of the Civil Code.

54. The Supreme Court quashed the Court of Appeal's judgment and remitted the case.

Referring to its earlier judgment of 28 February 2007 (see paragraphs 39-40 above), it restated the principle that the right to be detained in conditions respecting one's dignity undoubtedly belonged to the catalogue of personal rights and that actions infringing this right could involve the State Treasury's liability for the purposes of Articles 24 and 448 of the Civil Code.

The Supreme Court observed that the Court of Appeal, in determining the lawfulness of the defendant's actions, had failed to consider whether the requirements of Article 248 of the Code had been complied with. First, it had not established whether there had been a "particularly justified case" as required under this provision, allowing the authorities to place the plaintiff in a cell below the statutory minimum size of 3 m^2. The fact that there had been a temporary overcrowding in prison, without any explanation of the cause of this situation, was not sufficient to justify the application of Article 248. The notion of "particularly justified case" should be understood as an

exceptional or special circumstance and not simply any given situation. It could conceivably include such situations as an increase in crime and in sentences of imprisonment, imposition of martial law, emergency, epidemics or natural disasters. Accordingly, in order to establish whether there was a "particularly justified case" the court could not rely on a general phenomenon of overcrowding in prisons within the whole country.

Moreover, the Court of Appeal had been wrong in finding that the absence of any specific time-frame in Article 248 absolved the authorities from setting a precise period for which the measures would be applied in the plaintiff's case. Thus, the relevant rule spoke of a "specified period of time", which by no means meant an indefinite and unforeseeable term.

Finally, the Supreme Court referred to the argument that the plaintiff, by his refusal of a transfer to another prison, legitimised the authorities' decision to continue his placement in a reduced-size cell. This, the Supreme Court stressed, could not eliminate the unlawfulness of their actions. In that respect, it reiterated that, pursuant to Article 30 of the Constitution, the inherent and inalienable dignity of the person was inviolable and the respect and protection thereof was a duty incumbent on the authorities. This principle had a particular meaning in situations where the State imposed repressive measures. The exercise of this power could not restrict the right to dignity and the right of persons detained to be treated in a humane manner as these rights had an absolute character.

(c) Current situation in Polish prisons

55. Data relating to the total capacity of Polish detention establishments published by the Ministry of Justice – Central Board for Prison Service (available on the Prison Service's official website http://www.sw.gov.pl) show that those establishments can admit up to 85,000 persons (the figures given by the authorities range from 80,733 to 85,048).

According to monthly statistical reports published by the Ministry of Justice, as of 31 May 2010 the number of persons detained in Polish prisons stood at 83,954, of whom 88.33% were serving their sentences and 11.12% were detained on remand; the remaining persons served short sentences of imprisonment imposed for commission of administrative offences. As of 30 June 2010 the number of detained was 82,697 and as of 31 July 2010 it decreased to 81,351. The proportion of persons detained on remand and those serving sentences remained essentially unchanged. Over the period from January to July 2010 the prison population gradually decreased – by 690 persons in May 2010 and by 1,257 and 1,346 in June and July 2010 respectively.

56. On 13 July 2010 the Central Board for Prison Service published a communiqué on the prison population, stating that as of 5 July 2010 the number of persons detained in prisons and remand centres had not exceeded the overall capacity of those establishments on a nationwide scale within the

meaning of the 2009 Ordinance and that the occupancy rate was 98.4%, which meant that the overcrowding no longer existed.

57. On 6 September 2010 a similar communiqué was issued. It stated that as of that date the occupancy rate in detention facilities was 97.4%, which demonstrated that the problem of overcrowding had been handled. The summary statistical report of 6 September 2010 indicated that the total capacity of detention facilities was 80,733 persons and that the number of persons detained stood at 78,642.

COMPLAINT

58. The applicant complained under Article 3 of the Convention of overcrowding and inadequate living conditions during his detention.

THE LAW

59. The applicant alleged a breach of Article 3 of the Convention in that he had been detained in overcrowded cells and that the State had failed to secure to him adequate living conditions throughout his detention.

Article 3 of the Convention provides:

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

A. Application of the pilot-judgment procedure

60. The present case, like 271 other similar applications against Poland currently pending before the Court at various stages of the procedure, originated in the same widespread problem, arising out of the malfunctioning of the administration of the Polish prison system and a deficient regulatory framework. In the above-mentioned *Orchowski v Poland* and *Norbert Sikorski v. Poland* pilot judgments this situation was found by the Court to have affected, and to be capable of affecting in the future, an unidentified, but potentially considerable number of persons in detention on remand or serving prison sentences (see *Orchowski,* cited above, § 147 and *Norbert Sikorski*, cited above, §§ 149-150). The Court further found that, for many years, namely from 2000 until at least mid-2008, the overcrowding in Polish prisons and remand centres had revealed a structural problem consisting of "a practice that [was] incompatible with the Convention" (ibid. § 151 and §§ 155-156 respectively).

61. In consequence of the above conclusions under Article 46 of the Convention in respect of the nature of the violation of Article 3 found in the pilot cases and the general measures to be taken by the Polish State in order to solve the systemic problem identified by the Court, including redress for past violations (ibid. § 152 and § 157 respectively) and in accordance with the pilot-judgment procedure as applied by the Court, the ruling in the present case will necessarily extend beyond the sole interest of the individual applicant concerned and will be valid for all subsequent similar cases (see *Hutten-Czapska v. Poland (merits)*[GC], no. 35014/97, ECHR 2006-VIII, § 238; and *Wolkenberg and Others v. Poland* (dec.) no. 50003/99, 4 December 2007. ECHR 2007-..., §§ 32 and 35-36).

B. The Government's objection on exhaustion of domestic remedies

62. Article 35 § 1 of the Convention reads, in so far as relevant, as follows:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ...

1. The Government's submissions

(a) As regards the applicant's individual situation

63. The Government acknowledged that over the period of his detention the applicant had spent 254 days in cells in which the statutory minimum size of $3m^2$ had not been respected. However, they argued that he had not exhausted domestic remedies available to him, as required by Article 35 § 1 of the Convention.

In their view, under Polish law as it stood at the time of lodging the application, there were several legal means enabling him to put the substance of his Convention claim before the national authorities. To begin with, the applicant could have used remedies provided by the Code of Execution of Criminal Sentences, such as an appeal against any unlawful decision issued by the prison administration or a complaint to the relevant penitentiary judge about being placed in a particular cell in prison, or to use the possibility of filing a complaint about prison conditions with the authorities responsible for the execution of criminal sentences or with the Ombudsman.

64. Furthermore, having regard to the fact that already some time ago the applicant had been moved to cells complying with the standards imposed by Polish law, the situation giving rise to the alleged breach of Article 3 no longer existed and he could bring a civil action under Articles 24 and 448 of the Civil Code and seek compensation for the past violation.

The availability and effectiveness of that remedy had been confirmed unambiguously by the Supreme Court in its landmark judgment of 27 February 2007. That judgment had established a number of important principles that applied in the context of detainees' personal rights, such as the right to dignity and to private space in a prison cell. First of all, the Supreme Court held that those rights were protected by Articles 23 and 24 of the Civil Code and that a detained person could seek compensation for their infringement caused by overcrowding in a detention facility. It further held that the discomfort felt by a person detained in an overcrowded cell went beyond what could be considered an inevitable element of suffering inherent in detention. It recalled that in disputes involving claims based on overcrowding the burden of proof fell on the defendant prison authority, which was ultimately responsible for ensuring adequate conditions of detention.

65. The Government further cited the *Orchowski* judgment, reiterating that the Court, having regard to the fundamental principle of subsidiarity, had concluded that in cases where the alleged violation no longer continued and could not be eliminated with retrospective effect, the only means of redress for the applicant was pecuniary compensation.

Having regard to the Court's above finding, a claim for compensation for infringement of personal rights was an adequate, accessible and effective remedy in the circumstances of the present case. According to Article 442^1 of the Civil Code, such a claim was subject to the three-year limitation period, which started to run from the date on which the alleged breach had ended, that is to say, when a detained person either had been released or had been placed in conditions compatible with the requirements of Article 3 of the Convention. On 26 November 2009 the applicant had been transferred to the Strzelce Opolskie Prison and from that date onwards he had been held in cells in which the statutory minimum individual space of $3m^2$ had been respected. Consequently, on that date the limitation period began to run for the purposes of his seeking compensation for the infringement of his personal rights and it was still open to the applicant to use this remedy to obtain relief for the alleged violation of Article 3 of the Convention.

In view of the foregoing, the Government invited the Court to reject the application for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention.

(b) As regards other persons in a similar situation

66. The Government next addressed the question of when – in general – the remedy could be considered to have acquired the requisite effectiveness and accessibility in respect of all persons similarly affected, that is to say, when it had become available in practice, and could be considered accessible and offering reasonable prospects of success for other potential claimants.

67. In that context, the Government referred to the developments in the Polish civil courts' case-law described in the *Orchowski* judgment and to the Court's findings concerning the evolution of the relevant judicial practice (see paragraphs 39-41 above and *Orchowski*, cited above, §§ 82-83, 97, 108 and 154). They stressed that, while an action for compensation under Article 24 and 448 of the Civil Code had been "available" and "accessible" since the entry into force of the Code in 1965, a consolidated practice and interpretation of those provisions in favour of persons seeking compensation for inadequate conditions of detention, in particular overcrowding, had emerged at least from 28 February 2007, the date of the Supreme Court's judgment. This date, they maintained, should be considered material for the determination of the exhaustion issue in all the remaining applications involving similar complaints.

68. It was true that many applications had been lodged with the Court before that date. However, in the light of the Court's established case-law, an applicant could also be required to exhaust a remedy after the introduction of his application, provided that no decision on admissibility had yet been taken. Obviously, that remedy could not be used in cases where the alleged Convention breach had ended 3 years before the Supreme Court's ruling, that is to say, on 28 February 2004 at the latest. In contrast, whenever the violation came to an end after 28 February 2007, the applicants concerned should be directed to the Polish courts to have the substance of their complaints first examined at domestic level. The same rule should apply to cases where between the cessation of the breach and the delivery of the Supreme Court's judgment the three-year limitation period had not expired.

2. The applicant's submissions

69. The applicant argued that he had been continually held in overcrowded cells. He submitted that in the Brzeg Prison, in which he was currently detained, the statutory minimum of 3 m^2 per person was not respected. In addition to overcrowding, he had suffered from excessive heat in the summer since the cell was poorly ventilated and from the cold in the winter because the windows were not insulated. No educational or cultural activities were available in that establishment since the rooms designated for that purpose had been converted into cells because of the persistent overcrowding.

70. In the applicant's view, the remedies referred to by the Government were not effective and could not be considered adequate for the purposes of Article 35 § 1 of the Convention because they could not guarantee that he would serve his sentence in conditions complying with the domestic law requirements.

As regards the Supreme Court's judgment of 28 February 2007, the applicant agreed that it had in essence recognised that a person detained in

overcrowded cells had the right to seek protection of his dignity and private life in detention under Article 24 of the Civil Code. However, following the remittal to the Court of Appeal ordered by the Supreme Court, the plaintiff in that case had not been awarded any compensation for the infringement of his personal rights,

It was only on 26 May 2008, more than a year later, that the Constitutional Court expressly confirmed that Article 248 of the Code of Execution of Criminal Sentences was incompatible with Articles 40-42 of the Polish Constitution and that the situation obtaining in Polish prisons revealed a systemic problem. In consequence, following the Constitutional Court's ruling, the Code and the relevant ordinance were amended and new provisions were introduced in December 2009. According to the new procedure, a detainee could lodge a complaint against a prison administration decision to place him in a cell when the surface area fell below the statutory minimum of 3 m^2. However, in the context of his case this remedy was irrelevant since it could be used only after the introduction of the relevant amendments and, in view of the systemic nature of the violation of Article 3 as established by the Court in the *Orchowski* case, it could not be regarded as effective for the purposes of Article 35 §1 of the Convention.

In sum, the applicant invited the Court to reject the Governments' plea of inadmissibility on the ground of non-exhaustion of domestic remedies.

3. The Court's assessment

(a) The issues to be examined by the Court

(i) The scope of the Government's objection

71. The Government's objection is two-fold. They first allege that at the time when the applicant lodged his application – 13 October 2008 – he could have made use of a number of procedural means available under the Code of Execution of Criminal Sentences, in particular an appeal against any unlawful decision issued by the prison administration or a complaint to a penitentiary judge about being placed in an overcrowded cell (see paragraph 63 above). Secondly, the Government maintained that, given that the applicant already some time ago had been moved to a cell where the statutory minimum size requirement had been complied with, the conditions of his detention were no longer incompatible with Article 3 of the Convention and he could seek damages for the past violation under Article 24 taken in conjunction with Article 448 of the Civil Code (see paragraphs 63-65 above).

72. As regards the first limb of the objection, the Court notes that the Government already relied on identical arguments in the cases of *Orchowski* and *Norbert Sikorski* (see *Orchowski*, cited above, § 96 and

Norbert Sikorski, cited above, §§ 100-101). While in those case the Court rejected their objection mainly because the applicants had in fact made relevant complaints to the prison authorities (*ibid.* § 107 and §§ 111-112 respectively), it also held that irrespective of those considerations, the findings made by the Constitutional Court and by this Court that overcrowding in Polish detention facilities was of a structural nature, "undermined the effectiveness of any domestic remedy available, making them theoretical and illusory and incapable of providing redress in respect of the applicant's complaint" (ibid. § 111 and § 121 respectively). This conclusion equally applies to the present case and other similar cases, especially given that the Government explicitly acknowledged the existence and the systemic nature of the problem of overcrowding in Polish detention facilities at the relevant time (ibid. § 146 and § 148 respectively).

In view of the foregoing, this part of the Government's objection should be dismissed.

(ii) Developments at domestic level that require consideration by the Court

73. However, in this connection the Court would recall that in the *Orchowski* and *Norbert Sikorski* judgments, stressing the limited impact of the civil courts' rulings on general prison conditions and seeking to assist the Polish State in fulfilling its obligations under Article 46 of the Convention, it encouraged the respondent Government to develop an efficient complaints system so that authorities supervising detention facilities would in the future be able to react speedily to allegations similar to those raised in the present case and thereby ensure that a detainee would be placed in Convention compatible conditions (ibid. § 154 and §§ 160-161 respectively).

The Court observes that in implementation of the Constitutional Court's judgment, the Polish authorities, through the 2009 Amendment, introduced into the Code of Execution of Criminal Sentences new provisions that lay down detailed rules governing the temporary placement of detainees in cells below the statutory minimum space per person and legal means for contesting the application of that measure (see paragraphs 42-46 above). Having regard to the fact that the instant decision will have an impact on the admissibility of other similar cases pending before the Court or liable to be lodged with it (see paragraph 61 above), the Court considers it appropriate that in its examination of the present case it should take into account these developments at domestic level.

(iii) Conclusion

74. Accordingly, the Court will further examine the Government's objection in so far as it relates to the availability and effectiveness of a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code and will have regard to the impact of the new provisions of the Code

of Execution of Criminal Sentences on the application of the exhaustion rule to other similar cases.

(b) Principles deriving from the Court's case-law

75. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, *Demopoulos and Others v. Turkey* [GC], (dec.) no. 46113/99, ECHR 2010-..., § 69; and *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV).

The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Demopoulos* ibid.).

76. 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.

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.

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 (see, among other authorities, *Akdivar and Others v. Turkey*, cited above, §§ 66-69; *Orchowski*, cited above, §§ 105-106; and *Norbert Sikorski*, cited above, § 110).

(c) Application of the above principles in the present case

77. The Court recalls that it already made certain findings concerning the effectiveness of civil-law remedies and the need to develop an efficient complaints system vis-à-vis the penitentiary authorities in the *Orchowski* and *Norbert Sikorski* pilot judgments, which were adopted on 13 October 2009. Those findings, which relate to the situation as obtaining in Poland up until that date, are binding and valid for the Court in its assessment of the facts of the present case and other cases where applicants make similar allegations of a violation of Article 3 of the Convention on account of overcrowding in Polish detention establishments (see also paragraphs 60-61 and 72-73 above).

(i) As regards the applicant's individual situation

78. The parties gave partly differing accounts of the conditions of the applicant's detention (see paragraphs 10-23). The applicant submitted that he had been continually kept in cells in which the space per person was reduced below the statutory minimum (see paragraph 69 above). The Government admitted that the applicant had been placed in overcrowded cells at times. In their estimation, the overall period of his detention in conditions incompatible with Article 3 amounted to 254 days. However, as from 26 November 2009 until the present he has been placed in cells in which the statutory minimum space of 3 m^2 per person had been secured (see paragraphs 63-65). In support of their submissions, the Government supplied details of the applicant's detention in each prison, such as the respective numbers of cells, their surface area, number of inmates, periods of detention, availability of exercise and/or other activities (see paragraphs 14-23 above). In contrast, the applicant gave only a very general description of the conditions of his detention and did not produce any documentary or other evidence either confirming his statements or refuting the Government's version. That being so, the Court will proceed on the assumption that as from 26 November 2009 the applicant was detained in cells in which at least the statutory minimum space was secured to him.

79. Regarding this date as relevant for the purposes of Article 35 § 1 of the Convention, the Court will determine whether, in the circumstances of the present case, a civil action under Article 24 and 448 of the Civil Code

for compensation for the infringement of the applicant's personal rights on account of overcrowding and the insanitary conditions of his detention can be considered an effective remedy to be exhausted.

It reiterates that, in principle, the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court (see *Orchowski* cited above, § 109; *Norbert Sikorski*, cited above, § 108; and *Demopoulos and Others*, cited above § 87). However, as it has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Dempoulos and Others*, ibid., with further references). Among such exceptions there certainly are situations where, following a pilot judgment on the merits in which the Court has found a systemic violation of the Convention, the respondent State makes available a remedy to redress at domestic level grievances of similarly situated persons (see *Demopoulos and Others* §§ 87-88; *Broniowski v. Poland (merits)* [GC], no. 31443/96, §§ 191-193, ECHR 2004-V; and *Nagovitsyn v. Russia* no. 27451/09 and *Nalgiyev v. Russia* (no. 60650/09) (dec.), 23 September 2010, §§ 25-26 and 33-44). Accordingly, the Court takes the view that the exception applies to the present case and subsequent similar cases filed with the Court, which have not yet been declared admissible and that it is appropriate to assess the adequacy of the remedy relied on by the Government in the light of the present-day situation.

80. The Government maintained that a civil action under Article 24 taken in conjunction with 448 of the Civil Code had acquired sufficient prospects of success already in 2007 since its availability and effectiveness had unambiguously been confirmed by the Supreme Court in its landmark judgment of 27 February 2007 (see paragraph 64 above).

The Court does not accept this argument. First of all, on 13 October 2009, the date of the adoption of the *Orchowski* and *Norbert Sikorski* judgments, it established that at that time the domestic civil courts' practice allowing prisoners to claim damages under these provisions was only beginning to take shape in the wake of the Supreme Court's judgment. Furthermore, it emphasised the importance of the proper application by civil courts of the principles set out in that ruling (see *Orchowski* cited above, § 154 and *Norbert Sikorski,* cited above, § 159), These conclusions were prompted by the divergent interpretation of the relevant legal provisions, especially in the context of the lawfulness of measures reducing the cell space applied by the prison authorities (ibid. § 108 and §§ 115-116 respectively). As shown by the examples of judgments cited above, some courts have even recently held that the prison administration actions had been legitimate and lawful, regardless of the Constitutional Court's ruling of 26 May 2008 (see paragraphs 29-33 and 52-53 above). It is true that the number of judgments applying the principles stated by the Supreme Court in 2007 began to increase, especially as from 2008 (see paragraphs 41 and

47-52 above; *Orchowski* cited above, §§ 83 and 108 and *Norbert Sikorski*, cited above, §§ 73 and 116). However, it cannot be said that before the delivery of the Supreme Court's second judgment of 17 March 2010 there existed a fully consolidated, consistent and established practice of civil courts in respect of the interpretation and application of Article 24 taken in conjunction with Article 448 of the Civil Code in cases concerning overcrowding in prisons, a practice that would unambiguously confirm the effectiveness of that remedy for the purposes of Article 35 § 1 of the Convention. Indeed, this judgment reiterated the general applicable principles as stated in the 2007 ruling and, more importantly, gave supplementary guidance as to how the civil courts should verify and assess the justification for the application of exceptional measures enabling the authorities to reduce the statutory minimum cell space under Article 248 of the Code of Execution of Criminal Sentences. Consequently, it constituted a material element which was indispensable for the consolidation of the hitherto existing practice.

81. Turning to the circumstances of the present case, the Court recalls that, on the evidence before it, it has accepted that from 26 November 2009 the applicant was detained in cells where the statutory minimum cell space requirement was complied with (see paragraph 78 above). That being so and having regard to the above conclusion as well as to the fact that the applicable 3-year limitation period under Polish law has not yet expired (see paragraphs 38 and 65 above), the applicant should, before having his Convention claim examined by this Court, be required to seek redress at domestic level and bring a civil action for compensation for the infringement of his personal rights under Article 24 taken in conjunction with Article 448 of the Civil Code.

82. It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(ii) As regards other similar applications

(α) Civil action

83. The Court now wishes to determine what consequences should be drawn from the above conclusion in respect of other actual or potential applicants with similar cases.

84. As mentioned above, there are 271 cases pending before the Court where the applicants have raised complaints similar in substance, alleging a violation of Article 3 in that at various times and for various periods they had been adversely affected by the same structural problem, having been detained in overcrowded, insanitary cells (see paragraph 60 above).

The Government maintained that a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code had retrospective effect in the sense that, given the statutory limitation period, it could be lodged up to

3 years after the end of the alleged Convention breach. They invited the Court to rule that whenever the situation giving rise to the breach came to an end after the Supreme Court's judgment of 28 February 2007, the applicants concerned should be directed to the domestic courts and be required to use first the said civil-law remedy (see paragraph 68 above).

85. However, given the above conclusion that that remedy could be considered effective for the purposes of Article 35 § 1 only as from 17 March 2010 (see paragraph 80 above), the Court considers that only those applicants in respect of whom the 3-year limitation period has not yet expired and who, on the date of the adoption of the present decision, still have adequate time to prepare and bring a civil action for the infringement of personal rights can reasonably be required to make use of it. Holding otherwise would mean that applicants who, in good faith, lodged their applications with the Court at the time when the operation of the remedy in practice raised doubts as to its effectiveness would have been unable to make an effective, meaningful use of it and would have been left without any redress for the systemic violation suffered.

In practical terms, the Court considers that essentially in all cases in which in June 2008 the alleged violation was either remedied by placing the applicant in Convention compliant conditions or ended *ipso facto* because the applicant was released, the applicants concerned should bring a civil action for compensation under Article 24 taken in conjunction with Article 448 of the Civil Code.

In selecting this particular date, the Court has been guided, on the one hand, by its own case-law, requiring it to apply Article 35 § 1 with some degree of flexibility and to take realistic account of the context in which domestic remedies operate (see paragraph 76 above) and, on the other, by the implications of its findings in the pilot cases of *Orchowski* and *Norbert Sikorski*. In those judgments the Court concluded that "for many years, namely from 2000 until at least mid-2008, the overcrowding of Polish prisons and remand centres revealed a structural problem consisting of 'a practice that [was] incompatible with the Convention'" (see *Orchowski* cited above, § 147; *Norbert Sikorski*, cited above, § 156 and paragraph 60 above). While it will be for the Committee of Ministers, in discharging its functions under Article 46 of the Convention, to determine whether, and if so on what scale and for how long, the problem of overcrowding persisted after that date (ibid. § 89 and § 90 respectively; and paragraphs 55-57 above), in June 2008 the systemic violation of Article 3 was already identified as such by the Constitutional Court in its landmark judgment of 26 May 2008 (see *Orchowski* cited above §§ 85 and 123 and *Norbert Sikorski*, cited above, §§ 79-88 and 132) which, in the Court's view, is a relevant factor to be taken into account in the general context of the operation of the domestic remedy in question. A further factor relevant in that context is, as stated above, the need for the applicants concerned to

have adequate time in order to have realistic recourse to that remedy. In all cases where the alleged violation came to an end in June 2008 or later the time-limit for lodging their civil actions will expire in June 2011 at the earliest which, considering the date of the adoption of the present decision, gives them sufficient time to seek effectively redress before the national civil courts.

(β) New procedure under the Code of Execution of Criminal Sentences

86. Having regard to the facts as established in the present case, in particular the finding that after 26 November 2009 the applicant was no longer being held in overcrowded cells, the Court is not required, for the purposes of the instant cases, to pronounce on the effectiveness of a complaint under Article 110 § 2 (f) of the Code of Execution of Criminal Sentences, which was introduced into the domestic law on 6 December 2009. Nevertheless, the Court finds it necessary to refer to this remedy in relation to its potential general impact on the handling of future similar applications.

87. By virtue of Article 46, it will be for the Committee of Ministers to evaluate the new procedure from the point of view of the general measures taken by the Polish State in implementation of the *Orchowski* and *Norbert Sikorski* pilot judgments. However, the Court cannot but note that the amended Article 110 § 2 not only specifies the circumstances in which the statutory minimum space requirement can be reduced and sets time-limits for the application of that measure, but also provides a detainee with a new legal means enabling him to contest a decision of the prison administration to reduce his cell space. Having regard to the features of that procedure and without prejudice to its examination of that procedure in the particular circumstances of subsequent applications before it, in future cases where applicants allege a violation of Article 3 due to overcrowding, it cannot be excluded that the Court may require of them to make use of the new complaints system introduced by the Code of Execution of Criminal Sentences.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Nicolas Bratza
President