IRISH PENAL REFORM TRUST
& IRISH CRIMINAL BAR ASSOCIATION

LITIGATION IN PRISON CASES

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'PRISON OVERCROWDING'

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1. On 22nd October, 2009, the European Court of Human Rights handed down judgments in *Orchowski v. Poland*[1] and *Sikorski v. Poland*[2]. *Orchowski* was in English and *Sikorski* in French, the Courts two official languages. In both judgments, the Court found a structural problem of overcrowding in Poland's prisons that was of such seriousness as to violate Article 3 of the European Convention on Human Rights ('the Convention'). In identifying a systemic problem in Poland, the Court was utilising its relatively recently developed 'pilot judgment procedure'. This short paper aims to touch on the following aspects of the *Orchowski* judgment and issues arising from it:

    (i) its summary of previously established principles relating to prison conditions and Article 3 of the Convention;
    (ii) its re-assertion that prison overcrowding can, of itself, violate an individual's rights under Article 3 of the Convention;
    (iii) the extra-territorial duty imposed by Article 3 and its potential application to European Arrest Warrant cases;
    (iv) if cases arise under (iii), the appropriate standard and burden of proof;
    (v) the 'pilot judgment procedure' of the European Court of Human Rights;
    (vi) allied to (iv) and (v), the interplay between a State's duties under EU criminal law instruments (such as the Framework Decision on the European Arrest Warrant) and its obligations under the Convention.

Article 3 and prison conditions

2. Article 3 of the Convention provides:

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

    It is absolute and non-derogable.

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[1] Application Number 17885/04, 22nd October, 2009, hereafter '*Orchowski*'
[2] Application Number 17599/05.

3. In *Orchowski*, the European Court of Human Rights referred to some of the general principles that have been established in respect of prison conditions and a State's duty not to subject a person to inhuman or degrading treatment. These include the following: (i) that a minimum level of severity must be met in order to engage a potential violation of Article 3; (ii) an assessment of severity requires consideration of all the circumstances of the case, including the sex, age and health of the person in prison; (iii) persons in custody are in a vulnerable position and the authorities are under a duty to protect them; and (iv) the cumulative effect of conditions should be assessed. The Court stated:

> *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).*

Prison overcrowding and Article 3

4. As stated in paragraph 122 of the Court's judgment in *Orchowski* set out above, an "extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account" in assessing whether conditions are "degrading" for the purpose of Article 3. Previously, the Court has held that less than 3 square meters of personal space was "so severe as to justify of itself" a finding of a violation of Article 3, citing four cases brought against Russia.

5. When it came to assessing whether Mr Orchowski had suffered a violation, the European Court of Human Rights adopted the approach of the Polish Constitution Court to the case, and held:

> *"... 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."*

6. On the evidence, the Court held (at paragraph 131) 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.

7. Under the sub-heading "other elements", the Court held:

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).*

8. Under "Conclusion", the Court held:

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.

9. In respect of whether the applicant's rights under Article 8 of the European Court of Human Rights were violated, the Court stated:

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.

10. In the very recent judgment in *Racareanu v. Romania*,[3] 1st June, 2010, the Court cited *Orchowksi* and found that the prison conditions that Mr Racareanu was subjected to violated Article 3:

49. The focal point in the instant case is the assessment by the Court of the living space afforded to the applicant in Jilava and Rahova Penitentiaries. The

[3] Application Number 14262/03.

Government denied that the number of prisoners per cell had exceeded that of beds per cell. However, even at the occupancy rate indicated by the Government, the applicant's personal space seems to have been consistently below 3 sq. m,, which falls short of the standards imposed by the case-law (see Kokoshkina v. Russia*, no. 2052/08, § 62, 28 May 2009, and* Orchowski v. Poland*, no. 17885/04, § 122, ECHR 2009-... (extracts)). The amount of outdoor exercise stated by the Government cannot compensate, in the circumstances of this case, for the severe lack of personal space (see, conversely,* Sulejmanovic v. Italy*, no. 22635/03, §§ 8-49, 16 July 2009).*
Moreover, the applicant's description of the overcrowding corresponds to the findings of the CPT (see paragraph 33 above).
50. The Court considers that as the parties' submissions about the sanitary conditions corroborate the CPT reports, it cannot but conclude that the applicant was deprived of the possibility to maintain adequate bodily hygiene in prison.
51. The Court has frequently found a violation of Article 3 of the Convention on account of the lack of personal space afforded to detainees and unsatisfactory sanitary conditions (see, in particular, Ciorap v. Moldova*, no. 12066/02, § 70, 19 June 2007;* Kalashnikov v. Russia*, no. 47095/99, §§ 97 et seq., ECHR 2002-VI; and* Kokoshkina*, § 64, and* Petrea*, §§ 49-50, judgments cited above).*
In the case at hand, the Government failed to put forward any argument that would allow the Court to reach a different conclusion.
52. In the light of the above, the Court considers that the conditions of the applicant's detention caused him distress that exceeded the unavoidable level of suffering inherent in detention and that attained the threshold of degrading treatment proscribed by Article 3.
There has accordingly been a violation of Article 3 of the Convention.

Article 3 and European Arrest Warrants

11. Section 37 of the European Arrest Warrant Act 2003 as amended provides that :

(1) A person shall not be surrendered under this Act if—
(a) his or her surrender would be incompatible with the State's obligations under—
(i) the Convention, or
(ii) the Protocols to the Convention,
(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),
(c) there are reasonable grounds for believing that—
(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—

(I) is not his or her sex, race, religion, nationality or ethnic origin,

(II) does not hold the same political opinions as him or her,

(III) speaks a different language than he or she does, or

(IV) does not have the same sexual orientation as he or she does,

or

(iii) were the person to be surrendered to the issuing state—

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment.

(2) In this section—

*"*Convention*" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994; and*

*"*Protocols to the Convention*" means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:*

(a) the Protocol to the Convention done at Paris on the 20th day of March, 1952;

(b) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of September, 1963;

(c) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;

(d) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984.

12. Section 37(1) requires the State to comply with its obligations under the Convention when asked to give effect to a European Arrest Warrant. Article 3 of the Convention can impose an extra-territorial obligation on the State. It is well established that Article 3 is engaged where a contracting State decides to expel or remove a person and where there is a risk that that person will suffer inhuman or degrading treatment in the receiving State. The test to be applied was set out in the extradition case, *Soering v. UK*[4], where the European Court of Human Rights held that:

[4] (1989) 11 EHRR 439. See also *Mamatkulov v. Turkey*, Judgment of 4th February 2005, where the European Court of Human Rights held that *"For an issue to be raised under Article 3, it must be established that at the time of their extradition there existed a real risk that the applicants would be subjected in Uzbekistan to treatment proscribed by Article 3.*"

… the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.

13. This test was re-affirmed recently in *Saadi v. Italy*[5] where the Grand Chamber of the European Court of Human Rights surveyed its previous case law on Article 3 and identified the following principles as applicable in cases involving the removal of a person from a State:

(i) the Court takes as its basis all the material placed before it or, if necessary, material obtained *proprio motu*[6];

(ii) the Court's examination of the existence of a real risk is necessarily rigorous;

(iii) it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it;

(iv) the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances;

(v) the Court has attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department;

(vi) the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3, and, where the sources available describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence;

(vii) in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned;

(viii) if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court; accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.

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[5] Application No. 37201/06, 28th February, 2008

[6] In *N v. Finland* (Application 38885/02, 26th July, 2005, paragraph 160) the European Court of Human Rights obtained material of its own motion.

14. In *Minister for Justice, Equality and Law Reform v. Rettinger*, Poland has sought the surrender of the respondent so that he can complete a prison sentence that was imposed on him in 2007. The respondent has sought to prohibit his surrender on the ground that his surrender would violate his rights under Article 3 of the Convention because it will put him at risk of being subjected to inhuman or degrading treatment due to Poland's systemic problem of prison overcrowding and poor conditions as described by the European Court of Human Rights in *Orchowski*. The High Court refused to prohibit surrender, but certified the case as involving two points of law of exceptional public importance, and the case was heard by the Supreme Court on 17th June. At the time of writing this paper, judgment has not been handed down. For that reason, no further comment will be made on the case of *Rettinger*, save than to state the certified points of law that are in issue.

15. The High Court certified the following points of law pursuant to section 16 (12) of the European Arrest Warrant Act 2003, as amended:

    (a) Where a respondent relies upon section 37(1)(a) of the European Arrest Warrant Act 2003 in order to prevent his surrender to a requesting State by reason of an apprehended breach of his rights under Article 3 of the European Convention on Human Rights and adduces evidence capable of establishing substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 were he to be surrendered, does the onus of proof then shift back to the applicant to adduce evidence in order to dispel any doubts as to the treatment the respondent would face if surrendered?

    (b) Where a respondent relies upon section 37(1)(a) of the European Arrest Warrant Act 2003 in order to prevent his surrender to a requesting State by reason of an apprehended breach of his rights under Article 3 of the European Convention on Human Rights, is the respondent required to prove that there is a probability that, if surrendered, he will suffer treatment contrary to Article 3, or is it sufficient for him to show that, on the balance of probabilities, there is a real risk that he will suffer such treatment?

16. The appellant has relied on the principles set out above in *Saadi* to argue that (a) should be answered 'yes', and, in respect of (b), that it was re-affirmed in *Saadi* that for a planned forcible expulsion to be in breach of Article 3 it is necessary – and sufficient – for *substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3*, and that a higher test should not be applied (see paragraph 140 of *Saadi*). The Minister has argued that in a case involving surrender under a European Arrest Warrant, a higher test is appropriate.

The ECtHR's 'pilot judgment procedure'

17. In *Orchowski*, the European Court of Human Rights dealt not only with the applicant's claim for just satisfaction under Article 41 of the Convention but also

included an analysis of Poland's duties under Article 46 of the Convention. It was therefore a judgment that fell within the Court's relatively developed 'pilot judgment procedure'.

18. 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.*

19. Under the heading 'Article 46', the Court held:

> ***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.

20.

21. In 2004, the European Court of Human Rights began to issue 'pilot judgments', the aim of which was to identify 'structural' or 'endemic' defects in a state apparatus in order to exert pressure on a national authorities to tackle such problems and to stop the Court being inundated with the same type of cases. The recently published book *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level'*, Intersentia, 2010[7], describes the procedure. At the time the book was written (January, 2010), there Court had issued six 'full' pilot judgments between June, 2004, and November, 2009. The cases are *Broniowski v. Poland* (2004), *Hutten-Czapska v. Poland* (2006), *Burdov v. Russia (No 2)* (2009), *Olaru v. Moldova* (2009), *Ivanov v. Ukraine* (2009) and *Suljagic v. Bosnia and Herzegovina* (2009). In each case the right to property (Article 1 of Protocol Number 1) was found to have been violated. The right to a fair hearing (Article 6)

[7] The authors are Philip Leach, Helen Hardman, Svetlana Stephenson and Brad K. Blitz. The book can be ordered from Intersentia's office in Belgium – email: mail@intersentia.be.

was breached in three cases, and the right to an effective domestic remedy (article 13) was violated in two cases.

'Full pilot' judgments and 'quasi-pilot' (or Article 46) judgments

22. The six cases above share the following features which the authors suggest are the criteria that define a 'full' pilot judgment:

    (i) the explicit application by the Court of the pilot judgment procedure;
    (ii) the identification by the Court of a systemic violation of the Convention;
    (iii) general measures are stipulated in the operative part of the judgment in order that the respondent state should resolve the systemic issue (which may be subject to specific time limits).

    A pilot judgment may also adjourn all other cases arising from the same systemic issue, either for a particular period of time, or, more generally, pending the resolution of the issue by the state (as was in fact the case for each of the six 'full pilot' judgments above).

23. The authors state that in addition to the 'full' pilot judgments, the European Court of Human Rights has in recent years been issuing another category of decisions which also highlight systemic violations of the Convention – variously known as 'quasi-pilot' judgments or 'Article 46 judgments'. As with the full pilot judgment, the Court identifies a widespread or systemic dysfunction in legislation or practice and invokes Article 46 of the Convention to remind the respondent state in question that it is bound to remedy the violation holistically through appropriate means. According to the authors[8], these decisions can be distinguished from 'full' pilot judgments for a number of reasons. Firstly, the Court itself does not describe them as pilot judgments. Secondly, although the Court does identify a systemic issue that has arisen and requires the state to take appropriate steps to resolve the problem, it does not go on to prescribe general measures in the operative part of the judgment, although there are rare exceptions to this second element. Thirdly, in 'quasi-pilot' judgments, other similar cases are usually not adjourned.

24. *Orchowski* has all the hallmarks of a 'quasi-pilot' judgment and the European Court of Human Rights has recently confirmed that it was a decision handed down as part of the pilot procedure.

25. The status as a 'quasi-pilot' judgment should give *Orchowski* more weight as evidence of an ongoing problem in Poland's prisons. However, the Appeal Court of the High Court of Justiciary in Scotland has recently taken a narrow view as to the reach of *Orchowski*. In Scotland, several Polish nationals who have been made the subject of European Arrest Warrants have relied on *Orchowski* to resist their extradition to Poland. In two judgments of the Appeal Court of the High Court of Justiciary in Scotland, *Kropiwnicki v. The Lord Advocate* and *Engler v. The Lord Advocate*, both handed down on 4th May, 2010, the Court refused to prohibit the

[8] See pages 24-5.

appellants' surrender. The Appeal Court did not appear to recognise the 'pilot judgment' nature of the judgments in *Orchowski* and *Sikorski* and their forward-looking assessment under Article 46 of the Convention. In *Kropiwnicki*, the Appeal Court cited paragraph 152 of the judgment in *Orchowski*, but failed to refer to the important findings in paragraphs 147 to 151. The Appeal Court took the view (at paragraph 13 of its judgment) that: *"The Court in* Orchowski *was concerned with the question whether the prison conditions that that applicant had suffered constituted a breach of his human rights. It is clear from paragraph 152 of the decision, that the focus of the Court's attention was on the alleged violations of article 3 that the applicant had experienced in the specified jails in which he had been detained in the period 2003-2009"*. It went on to make what appears to be a questionable finding (at paragraph 15 of its judgment) that: *"The findings in* Orchowski *merely provide a snapshot of the prison conditions that were suffered by that particular applicant during the period then under review. They also show that the Polish Government has improved prison conditions significantly and the process of improvement is continuing."* In *Engler*, the Appeal Court went even further by appearing to endorse the view that: *"At most,* Orchowski *showed that in certain prisons there had been a level of occasional overcrowding that had in the past breached the article 3 rights of certain prisoners".*

The interplay between EU instruments and the European Convention on Human Rights

26. What is the consequence for the implementation of EU legislation where the European Convention on Human Rights identifies a systemic failing in one of the EU member States?

27. The potential problem of Polish prison overcrowding was referred to at the very start of a collection of essays entitled *Still not resolved? Constitutional Issues of the European Arrest Warrant*, Guild & Marin, Wolf Legal Publishing, 2009, as follows:

> "On 20 January 2009, the European Court of Human Rights handed down judgment in the case of *Slawomir Musial v. Poland* (Application No. 28300/06) in which it found that the conditions in a Polish prison contravened article 3 of the European Convention on Human Rights. The Court went on to state:
>
> > 'Moreover, the Court finds that the fact that for the most part the applicant has received the same attention as the other inmates, notwithstanding his particular state of health, shows the failure of the authorities' commitment to improving the conditions of detention in compliance with the recommendation of the Council of Europe.' (para. 96)
>
> "Poland is a country which issues among the most substantial number of EAWs to other Member States for the surrender and return of individuals. The decision of the European Court of Human Rights that Polish prison conditions can, and do in some circumstances, contravene the duty of Poland to ensure there is no inhuman or degrading treatment within its jurisdiction creates new

problems for the EAW. The Court has already held that the surrender or return of an individual to a country where he or she fears inhuman or degrading treatment is contrary to article 3 ECJR (*Soering v. United Kingdom* Application Number 14038/88; 7 July 1989).
"... The new challenge which faces the EU as regards Member States' compliance with EAWs in light of their human rights obligations is only just starting to emerge."

28. In a paper presented to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, on 11th September, 2009, Professor Rick Lawson, of the University of Leiden, pointed to two examples of potential conflict between EU legislation and Convention duties: (1) prison overcrowding in Poland and the European Arrest Warrant system, and (2) the defects of Greece in its treatment of refugee applicants and the Dublin II Regulation. Professor Lawson wrote (his footnotes are included as footnotes in this paper):

"... how sustainable can [the European Arrest Warrant] system be if human rights standards are not complied with in all EU Member States? If a judge knows that the prison conditions in another Member State are degrading, that the length of pre-trial detention is disproportionate, that access to interpreters and effective legal aid is problematic and that judicial corruption occurs – if he knows all that, is he going to execute a European Arrest Warrant issued by the authorities from that particular State? One would hope not.

"Therefore the EU has a serious problem if, for instance, the European Court of Human Rights detects a structural problem affecting the administration of justice or the penal system of an EU Member State. This is not a theoretical concern: it happened this spring to one Member State – twice *within two weeks.*[9]

"My second example comes from EU asylum law. As we all know, the reception facilities for asylum seekers and irregular immigrants tend to be sober at best in most European countries. In this respect Greece has been subject to strong criticism from various quarters for a number of years.[10] Against that background

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9 See ECtHR, 20 January 2009, *Slawomir Musial v. Poland* (Appl. No. 28300/06) (overcrowding and inadequate living conditions in detention facilities) and ECtHR, 3 February 2009, *Kauczor v. Poland* (Appl. No. 45219/06) (excessive length of pre-trial detention). The latter finding was confirmed in ECtHR, 19 May 2009, *Kulikowski v. Poland* (Appl. No. 18353/03), § 85: "...the present case is by no means an isolated example of the imposition of unjustifiably lengthy detention but a confirmation of a practice found to be contrary to the Convention (...). Consequently, the Court sees no reason to diverge from its findings made in the *Kauczor* case as to the existence of a structural problem and the need for the Polish State to adopt measures to remedy the situation".

10 See for instance the most recent CPT report on Greece (published 30 June 2009), esp. § 53-54: "The CPT must reiterate that the conditions of detention of the vast majority of irregular migrants deprived of their liberty in Greece remain unacceptable. (...) recommendations intended to fundamentally improve the conditions of detention for irregular migrants have been made in every report since 1997, but have been largely ignored by the Greek authorities. The CPT has gone to great lengths over the years to convince the Greek authorities to implement the Committee's recommendations. The Committee has visited Greece eight times since 1993 and has also held high-level talks with the Greek authorities on two occasions, most recently in February 2007. Until now, to little avail".

an interesting phenomenon occurred this summer. After the European Court of Human Rights had found, in the case of *S.D. v. Greece*,[11] that Greek detention facilities for irregular migrants were "degrading" and hence incompatible with Article 3 ECHR, the Court immediately received dozens of complaints *addressed against the Netherlands.* The applicants were third-country nationals who found themselves in the Netherlands after they had entered the EU via Greece. They were about to be sent back by Dutch authorities to Greece, pursuant to the so-called 'Dublin II system'. Relying on *S.D.*, the applicants claimed that the Netherlands was under an obligation not expose them to a situation incompatible with Article 3 ECHR.

"The two examples illustrate that the consequences of human rights violations – which are obviously unacceptable in themselves – are not confined to one country alone: they 'spill over' to other EU Member States.

"Hence co-operation in the EU, especially (but arguably not exclusively)[12] in the area of police and judicial co-operation, is sustainable only if each Member State may assume that all other Member States comply with common standards as regards human rights and the rule of law. There is, if you want, a "must for trust".

"Against this background it is not so much of an exaggeration to speak of a new stage in the development of international human rights law.

- During the first 'classical' stage of *non-intervention*, respect for human rights was an issue considered to belong to the internal affairs of each State. Foreign States were presumed not to enter the *domaine réservé* of the sovereign State.
- Since World War II we have moved on to a second stage – that of *collective responsibility*. The Council of Europe may take credit for that: no other international organisation has done so much to the pierce the veil of national sovereignty. Its achievements are enormous. But the underlying idea has always remained that 'we' have a common task to defend Europe against the emergence of a new dictatorship and against human rights violations when they occur. This is, if you want, a matter of decency, reinforced by lessons from history: a dictatorship in one country may sooner or later affect the entire continent.
- We are now witnessing the development of a third stage: that of *inter-dependence*. Co-operation and integration in the framework of the EU

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11 ECtHR, 11 June 2009, *S.D. v. Greece* (Appl. No. 53541/07).

12 But the argument could be made more in general as well. See for instance the following statement by AG Maduro: "[Articles 6 and 7 EU] give expression to the profound conviction that respect for fundamental rights is intrinsic in the EU legal order and that, without it, common action by and for the peoples of Europe would be unworthy and unfeasible. In that sense, the very existence of the European Union is predicated on respect for fundamental rights. Protection of the 'common code' of fundamental rights accordingly constitutes an existential requirement for the EU legal order. … For instance, it would be difficult to envisage citizens of the Union exercising their rights of free movement in a Member State where there are systemic shortcomings in the protection of fundamental rights. Such systemic shortcomings would, in effect, amount to a violation of the rules on free movement". Opinion of AG Maduro in *Centro Europa 7* (Case C-380/05) of 12 September 2007.

> have become so close, that Member States have a direct interest in human rights compliance in other Member States. An element of reciprocity enters the scene: if your prisons are poor, then I end up in trouble. Without adequate respect for human rights in all EU Member States, their common projects are under threat. It is this self-interest that distinguishes the second phase from the third, and that explains why respect for human rights may suddenly become a political priority.
>
> "As a result, the EU *needs* to secure Member State compliance with the rule of law and human rights. This is not a matter of free choice, it is not a media trick – it is inherent in the European project. Not all EU Member States may realise this, not all of them will be prepared to admit this publicly, but the EU will develop its own human rights policy. For this, it needs input and, thus, monitoring. This is not a value judgment, but a factual observation. Indeed, next month, after the Irish referendum, the Swedish presidency will table a number of proposals to further develop the 'Area of Freedom, Security and Justice'. The introduction of an EU monitoring mechanism will be part of it."

29. Measures are being promoted now to try to strengthen procedural safeguards in criminal law across the European Union in order to ensure that minimum standards are met so that increasing co-operation between EU member states can continue. The Swedish Presidency presented on 1st July, 2009, its *Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings* which intends to build upon the European Convention on Human Rights and *'to expand existing standards or to make their application more uniform*.' This reflects a concern that some member States do not comply with appropriate standards. The Irish Council for Civil Liberties is currently part of a coalition of NGOs which is promoting stronger procedural safeguards and has met with the EU's Fundamental Rights Agency. One of the NGOs is Fair Trials International, which has campaigned against abuses under the EAW system and highlighted injustices that have occurred in the EU. The growing co-operation between EU member States in the area of criminal law brings with it a corresponding risk that an extraditing State may be culpable of failing to respect and protect an individual's human rights by sending that person to a State where the individual's fair trial rights, or prison rights, may be violated.