



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

GRAND CHAMBER

**CASE OF MURŠIĆ v. CROATIA**

*(Application no. 7334/13)*

JUDGMENT

STRASBOURG

20 October 2016

*This judgment is final but it may be subject to editorial revision.*



**In the case of Muršić v. Croatia,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,  
András Sajó,  
Luis López Guerra,  
Mirjana Lazarova Trajkovska,  
Angelika Nußberger,  
Kristina Pardalos,  
Vincent A. De Gaetano,  
Paulo Pinto de Albuquerque,  
Paul Mahoney,  
Aleš Pejchal,  
Krzysztof Wojtyczek,  
Faris Vehabović,  
Ksenija Turković,  
Jon Fridrik Kjølbro,  
Yonko Grozev,  
Armen Harutyunyan,  
Pauliine Koskelo, *judges*,

and Roderick Liddell, *Registrar*,

Having deliberated in private on 6 January and 23 June 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in an application (no. 7334/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Kristijan Muršić (“the applicant”), on 17 December 2012.

2. The applicant, who had been granted legal aid, was represented by Mr Z. Vidović, a lawyer practising in Varaždin. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged in particular, relying on Article 3 of the Convention, that the conditions of his imprisonment had been inadequate, principally owing to a lack of personal space.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 8 October 2013 the President of the First Section decided to give notice of the application to the Government. On 12 March 2015 a Chamber of that Section, composed of Isabelle Berro,

President, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turković and Dmitry Dedov, judges, and Søren Nielsen, Section Registrar, gave judgment. The Chamber unanimously declared the complaint under Article 3 of the Convention admissible and the remainder of the application inadmissible. It held by a majority that there had been no violation of Article 3 of the Convention. The dissenting opinion of Judge Sicilianos was annexed to the judgment.

5. On 10 June 2015 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 6 July 2015 the panel of the Grand Chamber granted that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. At the final deliberations, Krzysztof Wojtyczek and Pauliine Koskelo, substitute judges, replaced Işıl Karakaş and Egidijus Kūris, who were unable to take part in the further consideration of the case (Rule 24 § 3).

7. The applicant and the Government each filed observations (Rule 59 § 1) on the merits of the case. In addition, joint third-party comments were received from the Observatoire international des prisons – section française (OIP-SF), Ligue belge des droits de l’homme (LDH) and Réseau européen de contentieux pénitentiaire (RCP). Further third-party comments were received from the Documentation Centre “L’altro diritto onlus”. The third parties had been given leave by the President on 7 and 20 October 2015, respectively, to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 January 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms	Š. STAŽNIK, Representative of the Republic of Croatia before the European Court of Human Rights,	<i>Agent,</i>
Mr	A. MOSTOVAC, Office of the Representative of the Republic of Croatia before the European Court of Human Rights,	
Ms	M. KONFORTA, Office of the Representative of the Republic of Croatia before the European Court of Human Rights,	
Ms	M. BARIĆ, Ministry of Justice Prison Administration, Head of Section,	<i>Advisers;</i>

(b) *for the applicant*

Mr	Z. VIDOVIĆ, Lawyer,	<i>Counsel,</i>
Ms	A. VIDOVIĆ, Lawyer,	<i>Adviser.</i>

The Court heard addresses by Mr Vidović and Ms Stažnik, and also replies by Mr Vidović and Mr Mostovac to questions from judges.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1987 and lives in Kuršanec.

#### A. Background to the case

10. In a judgment of the Čakovec County Court (*Županijski sud u Čakovcu*) of 19 June 2008, upheld by the Supreme Court (*Vrhovni sud Republike Hrvatske*) on 3 February 2009, the applicant was sentenced to two years' imprisonment for armed robbery.

11. On 2 July 2010 the Čakovec Municipal Court (*Općinski sud u Čakovcu*) sentenced him to one year's imprisonment for theft, which was confirmed by the Čakovec County Court on 3 November 2010.

12. Following a request by the applicant, on 26 August 2011 a three-judge panel of the Čakovec County Court took into account those two convictions and sentenced him to a single term of two years and eleven months' imprisonment.

#### B. Conditions of the applicant's detention in Bjelovar Prison

13. On 16 October 2009 the applicant was transferred from a semi-open regime in Turopolje State Prison (*Kaznionica u Turopolju*) to Bjelovar County Prison (*Zatvor u Bjelovaru*) to serve the prison sentence originally imposed by the Čakovec County Court on 19 June 2008 (see paragraph 10 above). The reason for the transfer, as indicated in a report of Turopolje State Prison, was the applicant's inappropriate behaviour and threats of escape.

14. The applicant remained in Bjelovar Prison until 16 March 2011, when he was transferred to Varaždin County Prison (*Zatvor u Varaždinu*) following a decision by the Ministry of Justice Prison Administration (*Ministarstvo pravosuđa, Uprava za zatvorski sustav*) of 11 March 2011.

15. According to the applicant, during his stay in Bjelovar Prison he was placed in overcrowded cells. He alleged in particular that for a period of fifty days in total he disposed of less than 3 square metres (sq. m) of personal space, including for a period of twenty-seven consecutive days. There were also several non-consecutive periods in which he was allocated

between 3 and 4 sq. m of personal space in the cells (see paragraph 17 below).

16. The applicant further submitted that the cells in which he had been held were badly maintained, humid, dirty and insufficiently equipped with lockers and chairs for all inmates. The sanitary facilities were in the same room as the living area, from which they were not fully separated. Those facilities were about half a metre away from the dining table and there was a constant smell in the cell. Moreover, he had not been given any opportunity to engage in prison work and in general was not provided with sufficient access to recreational and educational activities. The prisoners were allowed to move freely outside the locked part of the prison between 4 and 7 p.m., and the out-of-cell facilities were inadequate and insufficient, particularly given that there was only an open recreation yard. The nutrition was poor and the hygiene conditions were inadequate, especially since the toilet was not separated from the living area. The inmates did not have sufficient access to hot water and were allowed to shower only once or sometimes three times per week.

17. According to the Government, while in Bjelovar Prison the applicant had at his disposal an average of 3.59 sq. m of personal space. He was held in four different cells, the conditions of which are detailed in the table below.

The measurements of the cells indicate their overall size (as provided by the Government) and with the in-cell sanitary facility deducted (based on the methodology enunciated in paragraph 114 below). That calculation is based on an approximate measurement of the sanitary facility (1.9 sq. m) according to the floor plans of Bjelovar Prison, which the Government provided to the Court and which are not disputed by the applicant.

Cell no.	Period of detention	Total number of inmates	Overall surface area in sq. m	Personal space in sq. m	Surface minus sanitary facility in sq. m	Personal space in sq. m
1/O	16.10-15.11.2009	6	19.7	3.28	17.8	2.96
1/O	16.11-19.11.2009	5	19.7	3.94	17.8	3.56
1/O	20.11.2009-05.02.2010	6	19.7	3.28	17.8	2.96
1/O	06.02-08.02.2010	5	19.7	3.94	17.8	3.56
1/O	09.02-10.04.2010	6	19.7	3.28	17.8	2.96
1/O	11.04.-20.04.2010	5	19.7	3.94	17.8	3.56
8/O	21.04.2010	8	22.88	2.86	20.98	2.62
8/O	22.04-29.04.2010	7	22.88	3.27	20.98	2.99
8/O	30.04-02.05.2010	6	22.88	3.81	20.98	3.49
8/O	03.05-05.05.2010	5	22.88	4.58	20.98	4.19

8/O	06.05-07.05.2010	6	22.88	3.81	20.98	3.49
8/O	08.05-09.05.2010	5	22.88	4.58	20.98	4.19
8/O	10.05.-25.05.2010	6	22.88	3.81	20.98	3.49
8/O	26.05.2010	5	22.88	4.58	20.98	4.19
8/O	27.05-02.06.2010	6	22.88	3.81	20.98	3.49
8/O	03.06-04.06.2010	5	22.88	4.58	20.98	4.19
8/O	05.06-16.06.2010	6	22.88	3.81	20.98	3.49
8/O	17.06-19.06.2010	5	22.88	4.58	20.98	4.19
8/O	20.06-30.06.2010	6	22.88	3.81	20.98	3.49
8/O	01.07-02.07.2010	7	22.88	3.27	20.98	2.99
8/O	03.07-05.07.2010	8	22.88	2.86	20.98	2.62
8/O	06.07-17.07.2010	7	22.88	3.27	20.98	2.99
8/O	18.07-13.08.2010	8	22.88	2.86	20.98	2.62
14.08-17.08.2010 Period spent in the prison hospital						
8/O	18.08-26.08.2010	7	22.88	3.27	20.98	2.99
8/O	27.08-30.08.2010	5	22.88	4.58	20.98	4.19
4/O	31.08-02.09.2010	8	22.36	2.80	20.46	2.55
4/O	03.09.2010	7	22.36	3.19	20.46	2.92
8/O	04.09-06.09.2010	6	22.88	3.81	20.98	3.49
8/O	07.09.2010	4	22.88	5.72	20.98	5.24
8/O	08.09-16.09.2010	5	22.88	4.58	20.98	4.19
8/O	17.09.2010	6	22.88	3.81	20.98	3.49
8/O	18.09.2010	5	22.88	4.58	20.98	4.19
8/O	19.09-01.10.2010	6	22.88	3.81	20.98	3.49
8/O	02.10-05.10.2010	5	22.88	4.58	20.98	4.19
8/I	06.10-07.10.2010	5	22.18	4.44	20.28	4.05
8/I	08.10-19.10.2010	4	22.18	5.55	20.28	5.07
8/I	20.10-21.10.2010	3	22.18	7.39	20.28	6.76
8/I	22.10-23.10.2010	4	22.18	5.55	20.28	5.07
8/I	24.10-25.10.2010	5	22.18	4.44	20.28	4.05
8/I	26.10-28.10.2010	6	22.18	3.70	20.28	3.38
8/I	29.10-30.10.2010	5	22.18	4.44	20.28	4.05
8/I	31.10-04.11.2010	6	22.18	3.70	20.28	3.38
4/O	05.11.2010	6	22.36	3.73	20.46	3.41
4/O	06.11-09.11.2010	5	22.36	4.47	20.46	4.09
4/O	10.11-13.11.2010	6	22.36	3.73	20.46	3.41
4/O	14.11-18.11.2010	7	22.36	3.19	20.46	2.92
4/O	19.11-26.11.2010	8	22.36	2.80	20.46	2.55
4/O	27.11-30.11.2010	7	22.36	3.19	20.46	2.92
8/O	01.12-03.12.2010	6	22.88	3.81	20.98	3.49
8/O	04.12-09.12.2010	7	22.88	3.27	20.98	2.99

8/O	10.12-12.12.2010	8	22.88	2.86	20.98	2.62
8/O	13.12-21.12.2010	7	22.88	3.27	20.98	2.99
8/O	22.12-24.12.2010	8	22.88	2.86	20.98	2.62
8/O	25.12-31.12.2010	7	22.88	3.27	20.98	2.99
8/O	01.01-16.01.2011	6	22.88	3.81	20.98	3.49
8/O	17.01-25.01.2011	7	22.88	3.27	20.98	2.99
8/O	26.01-27.01.2011	6	22.88	3.81	20.98	3.49
8/O	28.01-23.02.2011	7	22.88	3.27	20.98	2.99
8/O	24.02-25.02.2011	8	22.88	2.86	20.98	2.62
8/O	26.02-28.02.2011	7	22.88	3.27	20.98	2.99
8/O	01.03-15.03.2011	5	22.88	4.58	20.98	4.19
8/O	16.03.2011	6	22.88	3.81	20.98	3.49

18. The Government further explained that each cell in which the applicant had been accommodated had had windows allowing in natural light and fresh air. Artificial light was also secured and all cells were heated by a central heating system and equipped with a communication system enabling the inmates to contact prison staff immediately in case of need. All cells had a toilet fully separated from the living area and equipped with its own ventilation system. All cells had direct access to drinking water. The cells were constantly maintained and some necessary reconstruction work and improvements to the facilities had been carried out in 2007, July 2009 and May-July 2010, as well as in 2011, 2012 and 2013. Furthermore, the inmates were provided with all necessary hygiene and sanitary facilities. This included a shower three times per week and after sports activities. Every inmate was also regularly provided with the necessary toiletries and cleaning supplies for keeping the cells clean. The inmates were provided with clean bedding and bedspreads every fifteen days, or more often if necessary. In addition, the inmates were provided with the necessary clothing although they were allowed to use their own clothes. Nutrition was based on an assessment by experts and the quality of the food was constantly monitored by the competent State authorities. The inmates were provided with three meals per day meeting the necessary nutrition requirements, as supervised by the prison doctor. Meals could be taken to cells or eaten in a common room.

19. The Government also explained that the inmates were allowed to move freely outside their cells in the morning and afternoon, and to use the indoor and outdoor facilities of Bjelovar Prison. This in particular included two hours of outdoor exercise and in addition free out-of-cell movement inside the prison between 4 and 7 p.m. Specifically, in the ordinary daily regime, the inmates would wake up at 7 a.m. on working days and at 7.30 a.m. on weekends and public holidays. They would then wash, tidy their beds, and have breakfast, followed by the morning cleaning of the cell.



Leisure time was scheduled afterwards, until 1 p.m., when they had an opportunity to take part in a number of activities. Leisure time was followed by lunch served between 1 and 2 p.m. The period after lunch was usually set aside for various group activities and meetings with lawyers and prison staff. Between 4 and 7 p.m. all cell doors were opened again, enabling the inmates to move about within the prison and to use its facilities as they saw fit. Dinner was served from 7 p.m., followed by the evening tidying and cleaning of the cells and other rooms in the prison.

20. The Government submitted that Bjelovar Prison was equipped with a recreation area located in the courtyard, which, in addition to the asphalted parts, included a lawn. The surface area of the courtyard was 305 sq. m. There was also direct access to drinking water and artificial light as well as protection from inclement weather available in the recreation area. The gym was open between 8 a.m. and 12.30 p.m. and between 2 and 6 p.m., and the basketball court was open on working days between 3 and 4 p.m. and at the weekends in both the morning and the afternoon. The recreation area was also equipped with a badminton court and ping-pong tables. The inmates were able to borrow books and use other services of the Bjelovar library, which were regularly available in the prison. The prison administration also organised religious ceremonies and contacts with cultural and religious associations. Each cell was equipped with cable television, which could be watched between 7 a.m. and 11 p.m. during working days, and between 7.30 a.m. and midnight at weekends and on public holidays. There were also radio receivers in the cells and the possibility of borrowing and watching films from a collection available in Bjelovar Prison. In addition, the inmates were allowed to socialise by playing board games. There was also a room for spousal visits and the inmates were allowed to obtain various goods from outside the prison. Bjelovar Prison also offered a possibility of education in prison but the applicant had decided not to avail himself of that opportunity. Remunerated work in prison was available in accordance with the economic possibilities, which were at the time limited due to the general economic crisis. A possibility of work outside the prison existed but the applicant's previous threats to escape and his inadequate behaviour in detention had not made him eligible for this possibility. During his stay in Bjelovar Prison, the applicant had regularly received medical treatment. He had seen his family four times while standing trial for another offence in Čakovec and had been allowed to speak to them by telephone twenty minutes per week, with an additional ten minutes on public holidays.

21. The Government substantiated their arguments with photographs taken in 2007, 2010 and 2011 in the context of the renovation of the prison and visits by various officials to the prison, floor plans and other relevant documentation related to the available facilities in Bjelovar Prison and the applicant's health care and nutrition.

### **C. The applicant's complaints about the prison conditions**

22. On 24 March 2010 the applicant lodged a request with the Bjelovar Prison administration through a lawyer, asking to be transferred to Varaždin Prison for personal and family reasons.

23. On 26 April 2010 he complained to the Ministry of Justice Prison Administration in general terms about the conduct of the Bjelovar Prison administration, alleging that they had never offered him the opportunity to have a meeting with the relevant officials, that his request for a transfer had been ignored and that the prison food had been inadequate.

24. The applicant again reiterated his request for a transfer to Varaždin Prison on 6 May 2010, citing personal and family reasons, particularly his family's lack of financial means, which made it difficult for them to visit him.

25. On 14 July 2010 the Ministry of Justice Prison Administration replied to the applicant's complaints, finding them ill-founded in all respects. It pointed out that he had been given sufficient opportunity to have contact with his family by telephone and while attending the court hearings in March, April and July 2010 in the criminal proceedings against him, that he had not been engaged in any work because there had been an insufficient number of work posts in Bjelovar Prison, that he had had seven meetings with the prison governor and twenty-five meetings with various other Bjelovar Prison officials, and that food had been prepared in consultation with experts, the prison diet having been continuously supervised by the prison doctor.

26. On 24 August 2010 the applicant complained about the conditions of his detention to a sentence-execution judge of the Bjelovar County Court (*Županijski sud u Bjelovaru*). He pointed out that central to his complaints was his wish to be transferred to another prison closer to his family. He also complained, in particular, that his request to engage in prison work had not been answered. He was being detained with seven other inmates in cell no. 8, which measured 18 sq. m in total and was inadequately equipped and maintained. Hygiene conditions were poor, given that he had been allowed to take a shower only three times per week.

27. Following the applicant's complaint, the sentence-execution judge requested a detailed report from Bjelovar Prison concerning the conditions of his detention.

28. After obtaining the relevant report and hearing the applicant in person, on 7 October 2010 the sentence-execution judge dismissed his complaints as ill-founded. She found, in particular, that the applicant had sufficient personal space at his disposal, given that four other persons were at the time placed with him in the same cell. The sentence-execution judge also found that the applicant was provided with sufficient hygiene and

sanitary facilities, and that he was not engaged in prison work since such opportunities did not exist for all prisoners in Bjelovar Prison.

29. On 15 October 2010 the applicant lodged an appeal against the sentence-execution judge's decision with a three-judge panel of the Bjelovar County Court, alleging that she had erred in her factual findings, as cell no. 8 had been occupied by up to eight inmates.

30. On 21 October 2010 a three-judge panel of the Bjelovar County Court dismissed the applicant's appeal as ill-founded, endorsing the reasoning of the sentence-execution judge. It also explained that the required standard for personal space under the Enforcement of Prison Sentence Act, namely 4 sq. m, was the recommended minimum standard that should in principle be respected, but that there could be no automatic violation of a prisoner's rights if such a standard was temporarily not complied with. In view of the fact that a reduction in the applicant's personal space in cell no. 8 had only been temporary, the three-judge panel considered that there had been no violation of his rights.

31. On 5 November 2010 the applicant complained to the Bjelovar County Court about the decision of its three-judge panel. He argued that for the first six months following his arrival at Bjelovar Prison, he had been detained in cell no. 1, measuring 17.13 sq. m, where six inmates in total had been detained. He had then spent one month in cell no. 8 on the first floor with six inmates, which had measured 17.13 sq. m. He had then been placed in another cell, also marked "cell no. 8", which again measured 17.13 sq. m, where he had spent six months with eight inmates. At the time of his complaint he was being held in cell no. 4 with six inmates.

32. On 20 November 2010 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), relying on Article 14 § 2 (equality before the law), Article 26 (equality before the State authorities) and Article 29 (right to a fair trial) of the Constitution, complaining in general terms of a lack of personal space and work opportunities in Bjelovar Prison. He also relied on section 74(3) of the Enforcement of Prison Sentences Act, guaranteeing adequate personal space to detainees, and alleged that this provision had not been complied with in his case.

33. On 26 November 2010 the applicant complained to the Ombudsperson (*Pučki pravobranitelj*) that he had not been granted a transfer to a prison closer to his family, and alleged in general terms that the conditions of his detention had been inadequate.

34. Meanwhile, in November 2010 the applicant joined a group of inmates who complained to the sentence-execution judge about inadequate general conditions in Bjelovar Prison.

35. By a letter of 7 December 2010 the Ombudsperson invited the applicant to further substantiate his complaints.

36. The applicant replied to that request on 21 December 2010, indicating that the sentence-execution judge and the three-judge panel of the Bjelovar County Court had never examined his complaints properly, and that he had not been granted 4 sq. m of personal space in detention as required under the Enforcement of Prison Sentences Act.

37. In March 2011 the applicant saw a psychiatrist, who found that the applicant was frustrated with his internment and the impossibility of seeing his family.

38. On 12 April 2011 the Ombudsperson replied to the applicant's letter that, according to the information available, his accommodation in Bjelovar Prison had fallen short of the requirements of adequate personal space under the Enforcement of Prison Sentences Act. The Ombudsperson also pointed out that the cell where the applicant was being detained had been renovated in 2010, and complied with all hygiene and health standards. The Ombudsman also noted that, just like ninety-two other inmates, the applicant had not been engaged in prison work, as there had been an insufficient number of work posts for all prisoners.

39. On 5 June 2012 the Constitutional Court declared the applicant's constitutional complaint (see paragraph 32 above) inadmissible as manifestly ill-founded. The relevant part of the decision reads:

“In his constitutional complaint, the complainant was unable to show that the Bjelovar County Court had acted contrary to the constitutional provisions concerning human rights and fundamental freedoms or had arbitrarily interpreted the relevant statutory provisions. The Constitutional Court therefore finds that the present case does not raise an issue of the complainant's constitutional rights. Thus, there is no constitutional law issue in the case for the Constitutional Court to decide upon ...”

40. The Constitutional Court's decision was served on the applicant's representative on 18 June 2012.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Relevant domestic law

#### 1. Constitution

41. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010 and 5/2011) read as follows:

#### Article 23

“No one shall be subjected to any form of ill-treatment ...”

### Article 25

“All detainees and convicted persons shall be treated in a humane manner and with respect for their dignity.”

42. The relevant part of section 62 of the Constitutional Act on the Constitutional Court (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette nos. 99/1999, 29/2002, 49/2002) reads:

“1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that a decision (*pojedinačni akt*) of a State body, a body of local and regional self-government, or a legal person with public authority, which has decided about his or her rights and obligations, or about a suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms, or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter ‘constitutional right’) ...”

### 2. Enforcement of Prison Sentences Act

43. The relevant provisions of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, Official Gazette no. 128/1999, 55/2000, 99/2000, 129/2000, 59/2001, 67/2001, 11/2002, 190/2003, 76/2007, 27/2008, 83/2009 and 18/2011) read as follows:

#### The purpose of enforcement of prison sentences

##### Section 2

“The main purpose of the enforcement of prison sentences is, ensuring humane treatment and respect for the dignity of the person serving the prison sentence (hereinafter the ‘inmate’), to prepare him or her for life after release in accordance with the law and social rules.”

#### Basic rights and their restrictions

##### Section 3

“(1) An inmate shall enjoy the protection of basic rights established in the Constitution of the Republic of Croatia, international agreements and the present Act.

(2) The basic rights of an inmate may be restricted by the enforcement of a prison sentence only to the extent necessary for the achievement of the purpose of the enforcement of the sentence and subject to the procedure specified in the present Act.

(3) The rights of an inmate may be restricted only exceptionally, if it is indispensable for the protection of order and security in a State prison or [county] prison, and for the protection of other inmates.

(4) Any restrictions on the basic rights of inmates provided for in the present Act shall be proportionate to the reasons for which they are implemented.”

### **Bodies responsible for the enforcement of prison sentences**

#### **Section 6**

“(1) The task of the enforcement of prison sentence shall lie within the jurisdiction and competence of the [Ministry of Justice Prison Administration] and the sentence-execution judge. ...”

### **Prohibition of unlawful treatment**

#### **Section 9**

“(1) Prison sentences shall be enforced so that the respect for the human dignity of inmates is guaranteed. Treatment subjecting inmates to any form of torture, ill-treatment or humiliation, or medical or scientific experiments, shall be prohibited and punishable.

(2) Prohibited treatment under paragraph 1 of the present section shall particularly include any treatment which is disproportionate to the need to maintain order and discipline in State prisons or prisons, or which is unlawful and could result in suffering or inappropriate restriction of the basic rights of inmates.”

### **Rights of inmates**

#### **Section 14**

“(1) Subject to the conditions set forth in the present Act, every inmate shall be entitled to:

...

(9) a minimum of two hours per day to be spent outdoors within a State prison or [county] prison ...”

### **Complaints**

#### **Section 15**

“(1) An inmate shall have the right to complain about an act or decision of an employee of a State prison or [county] prison.

(2) Complaints shall be lodged orally or in writing with the prison governor, or the head office of the Prison Administration [of the Ministry of Justice]. ...

(5) If an inmate lodges a complaint with the sentence-execution judge, it shall be considered a request for judicial protection under section 17 hereof.”

### **Judicial protection against acts and decisions of the administration of a State prison or [county] prison**

#### **Section 17**

“(1) An inmate may lodge a request for judicial protection against any acts or decisions unlawfully denying him or her any of the rights guaranteed by the present Act or unlawfully restricting such rights.

(2) The sentence-execution judge shall dismiss the request for judicial protection if he or she finds that it is unfounded. If the request is well-founded, the sentence-

execution judge shall order that the unlawful deprivations or restrictions of rights be remedied. If that is not possible, the sentence-execution judge shall find a violation and prohibit its repetition.

(3) The inmate and the prison facility may lodge an appeal against the sentence-execution judge's decision ...”

### **Accommodation of inmates**

#### **Section 74**

“(1) Accommodation of inmates has to meet health, hygienic and spatial standards and be appropriate to the climate.

(2) Inmates shall, as a rule, be accommodated in separate rooms. Inmates who are believed not to be causing mutual negative influence can be accommodated in the same room. Each inmate shall have his or her own bed. Inmates shall spend free time in living rooms, together with other inmates.

(3) Premises where inmates are accommodated have to be dry, clean and large enough. There shall be a minimum space of 4 square metres and 10 cubic metres per prisoner in each dormitory.

(4) Each room in which inmates live or work must have daily and artificial light which enables reading and work without causing any difficulties for eyesight.

(5) State prisons and [county] prisons must be equipped with sanitary facilities which enable regular satisfaction of physiological needs in a clean and appropriate environment, whenever inmates need them.

(6) Drinking water must always be accessible to inmates.”

### **Personal hygiene and cleaning of premises**

#### **Section 76**

“(1) All premises in a State prison or [county] prison must be well maintained and regularly cleaned.

(2) Assignments specified in paragraph 1 of this section shall be performed by inmates up to two hours a day, without financial compensation.

(3) Inmates shall be enabled to wash their bodies every day. Inmates are required to maintain personal hygiene. A State prison or [county] prison shall provide water and toiletries for ensuring personal hygiene and clean laundry, clothing, shoes and bedding. Beards, moustaches and long hair may be exceptionally prohibited for reasons of security or health.

(4) Supervision of personal hygiene and tidiness shall be performed by a medical doctor or by another medical expert.”

### **Meals**

#### **Section 78**

“(1) Inmates shall be offered appropriately prepared and served meals at regular intervals. The quality and quantity of meals shall satisfy the requirements of nutrition and hygiene and shall be appropriate to the inmate's age, health, nature of work and,

depending on the possibilities of a State prison or [county] prison, religious and cultural preferences. ...”

### **Employment of inmates**

#### **Section 80**

“(1) An inmate shall be entitled to work, subject to his state of health, [level of] knowledge and the opportunities [available] in a State prison or [county] prison. ...”

### **Use of free time**

#### **Section 96**

“(1) A State prison or [county] prison shall provide for space and equipment for meaningful use of free time.

(2) A State prison or [county] prison shall organise various kinds of activities in order to meet the physical, spiritual and cultural needs of inmates.

(3) The free time of inmates shall be used in workshops organised for painting, technical activities, music, literature, theatre, journalism, computing, debating clubs, exercising and the like.

(4) The content of organised free time shall be determined in the enforcement programme.

(5) In accordance with the possibilities of a State prison or [county] prison an inmate shall be permitted to organise his or her own free time (his or her hobby) at his or her own expense, if it does not endanger security and order and does not disturb other inmates. ...”

## **B. Relevant practice**

44. In the periodic annual reports between 2009 and 2011 the Croatian Ombudsperson reported on the general problem of prison overcrowding in Croatia, including in Bjelovar Prison, as one of the central organisational problems of the prison system which had generated the majority of complaints and violations of the rights of prisoners. The Ombudsperson also observed that prisons generally addressed the problem by converting various premises into dormitories and cells for prisoners and by providing greater freedom of movement inside the prisons. In the reports, the Ombudsperson constantly pointed out the need to adequately secure the rights of prisoners as guaranteed under the relevant domestic law and international standards.

45. In a general report on the conditions of detention in Croatia, no. U-X-5464/2012 of 12 June 2014, the Constitutional Court identified the problem of prison overcrowding and instructed the competent authorities to take more proactive measures in securing adequate conditions of detention for all types of detainees, as provided under the relevant domestic law and international standards. The relevant part of the report reads as follows:



**“Conclusions**

13. The Constitutional Court points out that the State authorities are obliged to introduce effective normative and enforcement measures, which must ensure that every detainee is placed in conditions such as to guarantee respect for his or her human dignity. Notwithstanding the financial limitations in the designated budgetary expenses for the criminal justice system, and in view of the economic crisis, an appropriate financial position should be adopted concerning the construction of new custodial capacities, and with regard to other infrastructural investments within the prison system.

13.1. The Constitutional Court observes that to persons who are serving a prison sentence or are detained [pending trial], the State authorities are obliged to secure the minimum personal space as provided for under the Enforcement of Prison Sentences Act or in accordance with the standards which [the Court] set out in the *Ananyev and Others v. Russia* case (judgment of 10 January 2012). These are as follows: each detainee must have an individual sleeping place in the cell, each detainee must dispose of at least 3 sq. m of floor space, and the overall surface area of the cell must be such as to allow detainees to move freely between furniture.

...”

**III. RELEVANT INTERNATIONAL MATERIALS****A. Council of Europe standards on the question of prison overcrowding****1. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”)****(a) Explanatory report to the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

46. The relevant part of the Explanatory report to the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf/C (89) 1 [EN]) reads:

“27. The case-law of the Court and Commission of Human Rights on Article 3 provides a source of guidance for [the CPT]. However, the Committee’s activities are aimed at future prevention rather than the application of legal requirements to existing circumstances. The Committee should not seek to interfere in the interpretation and application of Article 3.”

**(b) General Reports**

47. The relevant part of the First General Report, CPT/Inf (91) 3 [EN], of 20 February 1991, reads:

“47. Four important consequences follow from the fact that ‘prevention’ constitutes the lynchpin of the whole monitoring system set up by the Convention.

48. First, the CPT must always look into the general conditions of detention existing in the countries visited. It must examine not only whether abuses are actually occurring but also be attentive to those ‘indicators’ or ‘early signs’ pointing to

possible future abuses. For instance, it must - and indeed does - scrutinise the physical conditions of detention (the space available to detainees; lighting and ventilation; washing and toilet facilities; eating and sleeping arrangements; the medical care provided by the authorities, etc.) as well as the social conditions (for example, relationships with other detainees and the law enforcement personnel; links with families, social workers, the outside world in general, etc.). The CPT also pays close attention to the extent to which certain basic safeguards against ill-treatment exist in the country visited e.g. notification of police custody; access to a lawyer; access to a medical doctor; the possibilities of lodging complaints about ill-treatment or conditions of detention.

49. Second, often one cannot understand and assess the conditions under which persons are deprived of their liberty in a given country without considering those conditions in their general (historical, social, economic) context. Although human dignity must be effectively respected in all Parties to the Convention, the background of each of these countries varies, and can account for differences in their response to human rights issues. It follows that, to fulfil its task of preventing abuses, the CPT must often look into the underlying causes of general or specific conditions conducive to mistreatment.

50. The third consequence is closely associated with the two previous ones. In a number of instances the CPT - after investigating the conditions of detention in a particular country - may not find it appropriate to confine itself to merely suggesting immediate or short-term measures (such as, for example, administrative action) or even such measures as legislative improvements. It may find it necessary to recommend long-term measures, at least whenever it has become apparent that unacceptable conditions exist in a country as a result of deep-rooted factors that cannot be alleviated simply by judicial or legislative fiat or by resort to other legal techniques. In such cases, educational and similar long-term strategies may prove essential.

51. A fourth consequence flows from all the above remarks, namely that for the CPT to accomplish its preventive function effectively, it must aim at a degree of protection that is greater than that upheld by the European Commission and European Court of Human Rights when adjudging cases concerning the ill-treatment of persons deprived of their liberty and their conditions of detention.”

48. In a document titled “CPT standards” [CPT/Inf/E (2002) 1 - Rev. 2015] the CPT summarised the relevant standards flowing from its General Reports with a view to “[giving] a clear advance indication to national authorities of its views regarding the manner in which persons deprived of their liberty ought to be treated and, more generally, to stimulate discussion on such matters”. The relevant part of the document concerning conditions of detention reads (pp. 17-24, footnotes omitted):

**“II. Prisons**

**Imprisonment**

*Extract from the 2nd General Report [CPT/Inf (92) 3]*

...

46. Overcrowding is an issue of direct relevance to the CPT’s mandate. All the services and activities within a prison will be adversely affected if it is required to cater for more prisoners than it was designed to accommodate; the overall quality of

life in the establishment will be lowered, perhaps significantly. Moreover, the level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint.

47. A satisfactory programme of activities (work, education, sport, etc.) is of crucial importance for the well-being of prisoners. This holds true for all establishments, whether for sentenced prisoners or those awaiting trial. The CPT has observed that activities in many remand prisons are extremely limited. The organisation of regime activities in such establishments - which have a fairly rapid turnover of inmates - is not a straightforward matter. Clearly, there can be no question of individualised treatment programmes of the sort which might be aspired to in an establishment for sentenced prisoners. However, prisoners cannot simply be left to languish for weeks, possibly months, locked up in their cells, and this regardless of how good material conditions might be within the cells. The CPT considers that one should aim at ensuring that prisoners in remand establishments are able to spend a reasonable part of the day (8 hours or more) outside their cells, engaged in purposeful activity of a varied nature. Of course, regimes in establishments for sentenced prisoners should be even more favourable.

48. Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard (preferably it should form part of a broader programme of activities). The CPT wishes to emphasise that all prisoners without exception (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily. It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather.

...

50. The CPT would add that it is particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners.

***Extract from the 7th General Report [CPT/Inf (97) 10]***

12. In the course of several of its visits during 1996, the CPT once again encountered the evils of prison overcrowding, a phenomenon which blights penitentiary systems across Europe. Overcrowding is often particularly acute in prisons used to accommodate remand prisoners (i.e. persons awaiting trial); however, the CPT has found that in some countries the problem has spread throughout the prison system.

13. As the CPT pointed out in its 2nd General Report, prison overcrowding is an issue of direct relevance to the Committee's mandate (cf. CPT/Inf (92) 3, paragraph 46).

An overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff. This list is far from exhaustive.

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

...

15. The problem of prison overcrowding is sufficiently serious as to call for cooperation at European level, with a view to devising counter strategies. Consequently, the CPT was most pleased to learn that work on this subject has recently begun within the framework of the European Committee on Crime Problems (CDPC). The CPT hopes that the successful conclusion of that work will be treated as a priority.

*Extract from the 11th General Report [CPT/Inf (2001) 16]*

...

#### **Prison overcrowding**

28. The phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and seriously undermines attempts to improve conditions of detention. The negative effects of prison overcrowding have already been highlighted in previous General Reports. As the CPT's field of operations has extended throughout the European continent, the Committee has encountered huge incarceration rates and resultant severe prison overcrowding. The fact that a State locks up so many of its citizens cannot be convincingly explained away by a high crime rate; the general outlook of members of the law enforcement agencies and the judiciary must, in part, be responsible.

In such circumstances, throwing increasing amounts of money at the prison estate will not offer a solution. Instead, current law and practice in relation to custody pending trial and sentencing as well as the range of non-custodial sentences available need to be reviewed. This is precisely the approach advocated in Committee of Ministers Recommendation N° R (99) 22 on prison overcrowding and prison population inflation. The CPT very much hopes that the principles set out in that important text will indeed be applied by member States; the implementation of this Recommendation deserves to be closely monitored by the Council of Europe."

#### **(c) The CPT's basic minimum standard for personal living space in prison establishments**

49. On the basis of standards which have been frequently used in a large number of CPT country visit reports, the CPT decided in November 2015 to provide a clear statement of its position and standards regarding minimum living space per prisoner. This was the aim of the document entitled "Living space per prisoner in prison establishments: CPT standards" (CPT/Inf (2015) 44 of 15 December 2015).

50. The CPT explained that the document at issue concerned ordinary cells designed for prisoners' accommodation, as well as special cells, such as disciplinary, security, isolation or segregation cells. However, waiting rooms or similar spaces used for very short periods of time (such as police stations, psychiatric establishments, and immigration detention facilities) were not covered there. In that connection the CPT underlined that minimum standards for personal living space were not a

straightforward matter and that such standards differed according to the type of establishment. Likewise, a difference needed to be made between the intended occupancy level of the accommodation in question, that is to say whether a single cell or a cell designed for multiple occupancy (cells for two to four inmates) was at issue, and what was the regime offered to prisoners.

51. The CPT further stressed that it had developed in the 1990s a basic “rule of thumb” standard for the minimum amount of living space that a prisoner should be afforded in a cell. That was 4 sq. m of living space per prisoner in a multiple-occupancy cell, excluding the sanitary facilities within a cell. This standard was, however, a minimum standard. The CPT had therefore decided to promote a desirable standard regarding multiple-occupancy cells of up to four inmates by adding 4 sq. m per additional inmate to the minimum living space of 6 sq. m of living space for a single-occupancy cell.

52. With regard to the difference between minimum standards and the question of inhuman and degrading treatment, the CPT explained:

“19. The European Court of Human Rights is approached with an ever-increasing number of complaints from prisoners who allege that they are detained in inhuman or degrading conditions, having to share cells with large numbers of fellow-inmates, which leaves them with very little living space. The Court, in its judgments, is obliged to decide whether or not the holding of prisoners in cells offering a very limited living space per person (usually less than 4m<sup>2</sup>) constitutes a violation of Article 3.

20. The role of the CPT, as a preventive monitoring body, is different. Its responsibility does not entail pronouncing on whether a certain situation amounts to inhuman or degrading treatment or punishment within the meaning of Article 3, ECHR. However, in the course of its visits the Committee has been confronted with prison conditions that beggared belief and were, as described in one visit report, an ‘affront to a civilised society’. Hence, in a number of visit reports it has stated that the conditions observed in grossly overcrowded prisons could be considered as amounting to ‘inhuman and degrading treatment’.

21. The CPT has never considered that its cell-size standards should be regarded as absolute. In other words, it does not automatically hold the view that a minor deviation from its minimum standards may in itself be considered as amounting to inhuman and degrading treatment of the prisoner(s) concerned, as long as other, alleviating, factors can be found, such as, in particular, the fact that inmates are able to spend a considerable amount of time each day outside their cells (in workshops, classes or other activities). Nevertheless, even in such cases, the CPT would still recommend that the minimum standard be adhered to.

22. On the other hand, for the Committee to say that conditions of detention could be considered as amounting to inhuman and degrading treatment, the cells either have to be extremely overcrowded or, as in most cases, combine a number of negative elements, such as an insufficient number of beds for all inmates, poor hygiene, infestation with vermin, insufficient ventilation, heating or light, lack of in-cell sanitation and in consequence the use of buckets or bottles for the needs of nature. In fact, the likelihood that a place of detention is very overcrowded but at the same time well ventilated, clean and equipped with a sufficient number of beds is extremely low.

Thus, it is not surprising that the CPT often enumerates the factors that constitute appalling detention conditions, rather than just referring to inadequate living space. In addition – but by no means in every case – other factors not directly related to the conditions are taken into account by the CPT when assessing a particular situation. These factors include little out-of-cell time and generally a poor regime; reduced outdoor exercise; deprivation of contacts with relatives for several years, etc.

23. The Appendix to this document contains a non-exhaustive list of factors (other than the amount of living space per prisoner) to be taken into consideration when assessing detention conditions in prison.

### **Conclusion**

24. This document seeks to give guidance to practitioners and other interested parties, by clearly stating the CPT's minimum standards regarding living space for prisoner(s) in a given cell. Ultimately, it is for the courts to decide whether a particular person has experienced suffering that has reached the threshold of inhuman or degrading treatment within the meaning of Article 3, ECHR, taking into account all kinds of factors, including the individual's personal constitution. The number of square metres available per person is but one factor, albeit often a very significant or even decisive one.

25. Conditions where inmates are left with less than 4m<sup>2</sup> per person in multiple-occupancy cells, or single cells measuring less than 6m<sup>2</sup> (both excluding a sanitary annexe) have consistently been criticised by the CPT, and authorities have regularly been called upon to enlarge (or withdraw from service) single cells or reduce the number of inmates in multiple-occupancy cells. The CPT expects that these minimum living space standards will be systematically applied in all prison establishments in Council of Europe member states, and hopes that more and more countries will strive to meet the CPT's "desirable" standards for multiple-occupancy cells."

53. In the Annex to the document in question, the CPT referred to the following non-exhaustive list of factors to be taken into consideration when assessing detention conditions in prison:

#### *"State of repair and cleanliness*

- Cells, including furniture, should be in a decent state of repair and every effort should be made to keep the living areas clean and hygienic.
- Any infestation with vermin needs to be tackled vigorously.
- Inmates should be provided with the necessary personal hygiene products and cleaning materials.

#### *Access to natural light, ventilation and heating*

- All living accommodation for prisoners (both single- and multiple-occupancy cells) should have access to natural light as well as to artificial lighting which is sufficient for reading purposes.
- Equally, there needs to be sufficient ventilation to ensure a constant renewal of the air inside the cells.
- Cells should be adequately heated.

#### *Sanitary facilities*

- Each cell should possess a toilet and a washbasin as a minimum. In multiple-occupancy cells the sanitary facilities should be fully partitioned (i.e. up to the ceiling).

- In those few prisons where no in-cell sanitary facilities are available, the authorities must ensure that prisoners have ready access to the toilet whenever needed. Today, no prisoner in Europe should be obliged to ‘slop out’, a practice that is degrading both for the prisoners and for the staff members who have to supervise such a procedure.

*Outdoor exercise*

- The CPT considers that every prisoner should be offered a minimum of one hour of outdoor exercise every day. Outdoor exercise yards should be spacious and suitably equipped to give inmates a real opportunity to exert themselves physically (e.g., to practise sports); they should also be equipped with a means of rest (e.g., a bench) and a shelter against inclement weather.

*Purposeful activities*

- The CPT has long recommended that prisoners should be offered a range of varied purposeful activities (work, vocation, education, sport and recreation). To this end, the CPT has stated since the 1990s that the aim should be for prisoners – both sentenced and on remand – to spend eight hours or more a day outside their cells engaged in such activities, and that for sentenced prisoners the regime should be even more favourable.”

**(d) CPT reports concerning Croatia**

54. The CPT visited Croatia four times: in 1998, 2003, 2007 and 2012. Neither of these visits concerned Bjelovar Prison. In the report concerning its last visit in 2012 [CPT/Inf (2014) 9], the CPT addressed in general the problem of overcrowding and the efforts of the domestic authorities in dealing with that problem. The relevant parts of the report read:

**“B. Prison establishments**

**1. Preliminary remarks**

...

**a. prison overcrowding**

27. The overall prison population of Croatia has increased by 1,200 inmates to 5,400 (i.e. more than 25%) since the CPT’s last visit in 2007, while the official capacity of the prison estate has risen by only some 400 places to 3,771. Overcrowding is thus becoming more acute within the prison system. The delegation observed the negative impact of prison overcrowding on many aspects of prison life in the establishments visited, notably in Zagreb and Sisak County Prisons. Originally conceived as prisons (zatvori) for remand prisoners and persons serving sentences of up to six months’ duration, 50 percent of the population now held in these establishments are convicted prisoners serving sentences of up to five years. At Zagreb County Prison, the resultant increase in the number of prisoners has meant, for example, that rooms previously assigned for common activities have been converted into cellular accommodation.

Recognising the ever worsening serious problem of overcrowding and the need to combat it, the Croatian Government adopted an Action Plan for the Improvement of the Prison System of the Republic of Croatia from 2009 to 2014 which envisages the

construction of new prison establishments in Glina, Zagreb and Šibenik, with a combined total of 2,072 places. It also envisages a set of additional measures, such as recruiting more staff and enhancing the initial and in-service training provided to staff. The delegation visited the recently inaugurated building at Glina State Prison which can accommodate up to 420 inmates and was shown the building site of a new section of Zagreb County Prison which, once completed in 2016, will raise the capacity of the prison by 382 places. Representatives of the Ministry of Justice informed the delegation that the extension had been funded with the assistance of a loan from the Council of Europe Development Bank (CEB) and that another loan application with the CEB had been completed for the construction of the new State Prison in Šibenik with a proposed capacity of 1,270 places.

28. These steps demonstrate a commitment by the Croatian authorities to tackle overcrowding. However, as already stressed by the CPT in its previous reports to the Croatian authorities, providing additional accommodation cannot offer a lasting solution to the problem of prison overcrowding, at least not without adopting, in parallel, policies designed to limit or modulate the number of persons sent to prison. In this respect, the Committee takes note of the efforts invested by the Ministry of Justice since 2007 in elaborating a legal framework and putting into place a probation system at the national level, which includes the possibility for State Prosecutors, Courts and Probation Offices to enlarge the scope and number of persons subject to alternative measures such as community work and protected supervision. At least 15 percent of the current convicted prison population (i.e. those inmates serving sentences of up to one year) could potentially benefit from non-custodial measures once the new Law on Probation is adopted.

The CPT recommends that the Croatian authorities pursue their efforts to combat prison overcrowding taking into account the recommendations adopted by the Committee of Ministers of the Council of Europe, in particular Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation, Recommendation Rec(2003)22 on conditional release (parole), Recommendation Rec(2006)13 on the use of remand in custody and Recommendation Rec2010(01) on the Council of Europe probation rules. The Committee would like to receive updated information on the impact of the measures being taken to tackle prison overcrowding.

### **Prisons**

Preliminary remarks

recommendations

- the Croatian authorities to pursue their efforts to combat prison overcrowding taking into account the recommendations adopted by the Committee of Ministers of the Council of Europe, in particular Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation, Recommendation Rec(2003)22 on conditional release (parole), Recommendation Rec(2006)13 on the use of remand in custody and Recommendation Rec(2010)01 on the Council of Europe probation rules (paragraph 28).

### **Conditions of detention of the general prison population**

recommendations

...

- the Croatian authorities to take steps to reduce cell occupancy levels in all the prisons visited (as well as in other prisons in Croatia), so as to provide for at least 4 m<sup>2</sup>



of living space per prisoner in multi-occupancy cells; for this purpose, the area taken up by any in-cell sanitary facilities should not be counted (paragraph 36);

- the smaller cells (measuring 7m<sup>2</sup>) at Zagreb County Prison to accommodate not more than one person (paragraph 36);

...

- the Croatian authorities to improve the programme of activities, including work and vocational training opportunities, for prisoners at Glina State Prison, Zagreb and Sisak County Prisons and, where appropriate, at other prisons in Croatia (paragraph 40);

...”

## 2. *Committee of Ministers*

### (a) **European Prison Rules**

55. The European Prison Rules are recommendations of the Committee of Ministers to member States of the Council of Europe on the minimum standards to be applied in prisons. The 1987 European Prison Rules (featuring as an appendix to Recommendation No. R (87) 3) were adopted on 12 February 1987. On 11 January 2006 the Committee of Ministers, noting that the 1987 Rules “needed to be substantively revised and updated in order to reflect the developments which ha[d] occurred in penal policy, sentencing practice and the overall management of prisons in Europe”, adopted Recommendation Rec(2006)2 on the European Prison Rules. The new, 2006 version of the Rules featured as an appendix to this Recommendation. It reads, in so far as relevant, as follows:

#### **“Part I**

##### *Basic principles*

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

2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.

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

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

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

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

...

##### *Scope and application*

10.1. The European Prison Rules apply to persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction.

10.2. In principle, persons who have been remanded in custody by a judicial authority and persons who are deprived of their liberty following conviction should only be detained in prisons, that is, in institutions reserved for detainees of these two categories.

10.3 The Rules also apply to persons:

- a. who may be detained for any other reason in a prison; or
- b. who have been remanded in custody by a judicial authority or deprived of their liberty following conviction and who may, for any reason, be detained elsewhere.

...

## **Part II**

### *Conditions of imprisonment*

...

### *Allocation and accommodation*

...

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

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

- a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system;
- b. artificial light shall satisfy recognised technical standards; and
- c. there shall be an alarm system that enables prisoners to contact the staff without delay.

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

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

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

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

18.7. As far as possible, prisoners shall be given a choice before being required to share sleeping accommodation.

18.8. In deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain:

- a. untried prisoners separately from sentenced prisoners;

- b. male prisoners separately from females; and
- c. young adult prisoners separately from older prisoners.

18.9. Exceptions can be made to the requirements for separate detention in terms of paragraph 8 in order to allow prisoners to participate jointly in organised activities, but these groups shall always be separated at night unless they consent to be detained together and the prison authorities judge that it would be in the best interest of all the prisoners concerned.

18.10. Accommodation of all prisoners shall be in conditions with the least restrictive security arrangements compatible with the risk of their escaping or harming themselves or others.

...

#### *Hygiene*

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

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

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

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

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

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

...

#### *Clothing and bedding*

...

21. Every prisoner shall be provided with a separate bed and separate and appropriate bedding, which shall be kept in good order and changed often enough to ensure its cleanliness.

#### *Nutrition*

22.1 Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

...

#### *Prison regime*

25.1 The regime provided for all prisoners shall offer a balanced programme of activities.

25.2 This regime shall allow all prisoners to spend as many hours a day outside their cells as are necessary for an adequate level of human and social interaction.

25.3 This regime shall also provide for the welfare needs of prisoners.

...

*Work*

26.1 Prison work shall be approached as a positive element of the prison regime and shall never be used as a punishment.

26.2 Prison authorities shall strive to provide sufficient work of a useful nature.

...

*Exercise and recreation*

27.1 Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits.

27.2 When the weather is inclement alternative arrangements shall be made to allow prisoners to exercise.

27.3 Properly organised activities to promote physical fitness and provide for adequate exercise and recreational opportunities shall form an integral part of prison regimes.

27.4 Prison authorities shall facilitate such activities by providing appropriate installations and equipment.

27.5 Prison authorities shall make arrangements to organise special activities for those prisoners who need them.

27.6 Recreational opportunities, which include sport, games, cultural activities, hobbies and other leisure pursuits, shall be provided and, as far as possible, prisoners shall be allowed to organise them.

27.7 Prisoners shall be allowed to associate with each other during exercise and in order to take part in recreational activities.

*Education*

28.1 Every prison shall seek to provide all prisoners with access to educational programmes which are as comprehensive as possible and which meet their individual needs while taking into account their aspirations.

...

**Part VIII**

*Sentenced prisoners*

*Objective of the regime for sentenced prisoners*

102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.

102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment.

*Implementation of the regime for sentenced prisoners*

103.1 The regime for sentenced prisoners shall commence as soon as someone has been admitted to prison with the status of a sentenced prisoner, unless it has commenced before.

103.2 As soon as possible after such admission, reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release.

103.3 Sentenced prisoners shall be encouraged to participate in drawing up their individual sentence plans.

103.4 Such plans shall as far as is practicable include:

- a. work;
- b. education;
- c. other activities; and
- d. preparation for release.

...

*Work by sentenced prisoners*

105.1 A systematic programme of work shall seek to contribute to meeting the objective of the regime for sentenced prisoners.

...

*Education of sentenced prisoners*

106.1 A systematic programme of education, including skills training, with the objective of improving prisoners' overall level of education as well as their prospects of leading a responsible and crime-free life, shall be a key part of regimes for sentenced prisoners.

..."

**(b) Recommendation No. R (99) 22**

56. The relevant parts of the Recommendation No. R (99) 22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation, of 30 September 1999, read:

“The Committee of Ministers ...

Considering that prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions;

Considering that the efficient management of the prison population is contingent on such matters as the overall crime situation, priorities in crime control, the range of penalties available on the law books, the severity of the sentences imposed, the frequency of use of community sanctions and measures, the use of pre-trial detention, the effectiveness and efficiency of criminal justice agencies and not least public attitudes towards crime and punishment;

Affirming that measures aimed at combating prison overcrowding and reducing the size of the prison population need to be embedded in a coherent and rational crime policy directed towards the prevention of crime and criminal behaviour, effective law enforcement, public safety and protection, the individualisation of sanctions and measures and the social reintegration of offenders;

Considering that such measures should conform to the basic principles of democratic States governed by the rule of law and subject to the paramount aim of guaranteeing human rights, in conformity with the European Convention on Human Rights and the case-law of the organs entrusted with its application;

Recognising moreover that such measures require support by political and administrative leaders, judges, prosecutors and the general public, as well as the provision of balanced information on the functions of punishment, on the relative effectiveness of custodial and non-custodial sanctions and measures and on the reality of prisons;

Bearing in mind the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

...

Recommends that governments of member states:

- take all appropriate measures, when reviewing their legislation and practice in relation to prison overcrowding and prison population inflation, to apply the principles set out in the Appendix to this Recommendation;
- encourage the widest possible dissemination of the Recommendation and the report on prison overcrowding and prison population inflation elaborated by the European Committee on Crime Problems.

#### **Appendix to Recommendation No. R (99) 22**

##### *I. Basic principles*

1. Deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate.
2. The extension of the prison estate should rather be an exceptional measure, as it is generally unlikely to offer a lasting solution to the problem of overcrowding. Countries whose prison capacity may be sufficient in overall terms but poorly adapted to local needs should try to achieve a more rational distribution of prison capacity.
3. Provision should be made for an appropriate array of community sanctions and measures, possibly graded in terms of relative severity; prosecutors and judges should be prompted to use them as widely as possible.
4. Member states should consider the possibility of decriminalising certain types of offence or reclassifying them so that they do not attract penalties entailing the deprivation of liberty.
5. In order to devise a coherent strategy against prison overcrowding and prison population inflation a detailed analysis of the main contributing factors should be carried out, addressing in particular such matters as the types of offence which carry long prison sentences, priorities in crime control, public attitudes and concerns and existing sentencing practices.

##### *II. Coping with a shortage of prison places*

6. In order to avoid excessive levels of overcrowding a maximum capacity for penal institutions should be set.
7. Where conditions of overcrowding occur, special emphasis should be placed on the precepts of human dignity, the commitment of prison administrations to apply humane and positive treatment, the full recognition of staff roles and effective modern

management approaches. In conformity with the European Prison Rules, particular attention should be paid to the amount of space available to prisoners, to hygiene and sanitation, to the provision of sufficient and suitably prepared and presented food, to prisoners' health care and to the opportunity for outdoor exercise.

8. In order to counteract some of the negative consequences of prison overcrowding, contacts of inmates with their families should be facilitated to the extent possible and maximum use of support from the community should be made.

9. Specific modalities for the enforcement of custodial sentences, such as semi-liberty, open regimes, prison leave or extra-mural placements, should be used as much as possible with a view to contributing to the treatment and resettlement of prisoners, to maintaining their family and other community ties and to reducing the tension in penal institutions.

...

*V. Measures relating to the post-trial stage*

*The implementation of community sanctions and measures – The enforcement of custodial sentences*

22. In order to make community sanctions and measures credible alternatives to short terms of imprisonment, their effective implementation should be ensured, ...

24. Parole should be regarded as one of the most effective and constructive measures, which not only reduces the length of imprisonment but also contributes substantially to a planned return of the offender to the community.

...”

**(c) Standards adopted in the execution of the Court's judgments**

57. In its 2014 report on supervision of the execution of the Court's judgments (available at [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2014\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf)), with regard to the enforcement of two judgments against Italy (*Sulejmanovic v. Italy*, no. 22635/03, 16 July 2009; and *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013) the Committee of Ministers noted:

“In response to the CM's earlier decision, the authorities have provided additional information in April, indicating the adoption of various structural measures in view of complying with the judgments in this group, accompanied by statistical data showing an important and continuing drop in the prison population and an increase in living space to at least 3m<sup>2</sup> per detainee. In addition, a preventive remedy was established within the deadline set by the *Torreggiani and Others* pilot judgment and steps were taken to establish a compensatory remedy through the adoption of a Law-Decree, later in June. The CM welcomed the authorities' commitment to resolve the problem of prison overcrowding and the significant results achieved in this area and invited them to provide further information regarding the implementation of the preventive remedy, notably in the light of the monitoring to be undertaken in this context.”

### 3. *The Council of Europe Committee on Crime Problems*

58. In its Commentary to the European Prison Rules, the Council of Europe Committee on Crime Problems explained the scope of the requirements for adequate accommodation and prison regimes under the Rules. The relevant part of the Commentary reads:

“Rule 18 includes some new elements. The first, in Rule 18.3, is intended to compel governments to declare by way of national law specific standards, which can be enforced. Such standards would have to meet wider considerations of human dignity as well as practical ones of health and hygiene. The CPT, by commenting on conditions and space available in prisons in various countries has begun to indicate some minimum standards. These are considered to be 4 m<sup>2</sup> for prisoners in shared accommodation and 6 m<sup>2</sup> for a prison cell. These minima are, related however, to wider analyses of specific prison systems, including studies of how much time prisoners actually spend in their cells. These minima should not be regarded as the norm. Although the CPT has never laid down such a norm directly, indications are that it would consider 9 to 10 m<sup>2</sup> as a desirable size for a cell for one prisoner. This is an area in which the CPT could make an ongoing contribution that would build on what has already been laid down in this regard. What is required is a detailed examination of what size of cell is acceptable accommodation of various numbers of persons. Attention needs to be paid to the number of hours that prisoners spend locked in the cells, when determining appropriate sizes. Even for prisoners who spend a large amount of time out of their cells, there must be a clear minimum space, which meets standards of human dignity.

...

Rule 25 underlines that the prison authorities should not concentrate only on specific rules, such as those related to working, education and exercise, but should review the overall prison regime of all prisoners to see that it meets basic requirements of human dignity. Such activities should cover the period of a normal working day. It is unacceptable to keep prisoners in their cells for 23 hours out of 24, for example. The CPT has emphasised that the aim shall be that the various activities undertaken by prisoners should take them out of their cells for at least eight hours a day ... “

## **B. The relevant United Nations standards**

59. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), A/C.3/70/L.3, 29 September 2015, as the global key standards for the treatment of prisoners adopted by the United Nations General Assembly, in the relevant part provide:

### **“I. Rules of general application**

#### **Basic principles**

##### *Rule 1*

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a



justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

...

*Rule 4*

1. The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.

2. To this end, prison administrations and other competent authorities should offer education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners.

...

**Accommodation**

*Rule 12*

1. Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself or herself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.

2. Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.

*Rule 13*

All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

*Rule 14*

In all places where prisoners are required to live or work:

(a) The windows shall be large enough to enable the prisoners to read or work by natural light and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

*Rule 15*

The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

*Rule 16*

Adequate bathing and shower installations shall be provided so that every prisoner can, and may be required to, have a bath or shower, at a temperature suitable to the

climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.

*Rule 17*

All parts of a prison regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.

**Personal hygiene**

*Rule 18*

1. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

2. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be able to shave regularly.

**Clothing and bedding**

*Rule 19*

1. Every prisoner who is not allowed to wear his or her own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him or her in good health. Such clothing shall in no manner be degrading or humiliating.

...

*Rule 21*

Every prisoner shall, in accordance with local or national standards, be provided with a separate bed and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.

**Food**

*Rule 22*

1. Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

2. Drinking water shall be available to every prisoner whenever he or she needs it.

**Exercise and sport**

*Rule 23*

1. Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

2. Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end, space, installations and equipment should be provided.

...

**II. Rules applicable to special categories**

**A. Prisoners under sentence**

...

**Privileges***Rule 95*

Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every prison, in order to encourage good conduct, develop a sense of responsibility and secure the interest and cooperation of prisoners in their treatment.

**Work***Rule 96*

1. Sentenced prisoners shall have the opportunity to work and/or to actively participate in their rehabilitation, subject to a determination of physical and mental fitness by a physician or other qualified health-care professionals.

2. Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.

...

**Education and recreation***Rule 104*

1. Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterate prisoners and of young prisoners shall be compulsory and special attention shall be paid to it by the prison administration.

...

*Rule 105*

Recreational and cultural activities shall be provided in all prisons for the benefit of the mental and physical health of prisoners.”

**C. The International Committee of the Red Cross (ICRC)**

60. On the basis of its visits to places of detention in diverse situations where it monitored conditions of detention and treatment of prisoners, the ICRC first published in 2005 a document titled “Water, Sanitation, Hygiene and Habitat in Prisons”, which was updated in 2012. In 2009 it held an international roundtable in order to discuss developments in the establishment of international guidance on the basis of which it published Supplementary guidance to the Water, Sanitation, Hygiene and Habitat in Prisons standards (available at [www.icrc.org](http://www.icrc.org)).

61. The ICRC observed that there is no universal standard for detainee accommodation space and that different organisations and fora had made recommendations in this context affecting various groups of countries. Likewise, the ICRC noted that in the absence of universal standards, national standards had been developed by numerous countries but they vary widely. For instance in Europe standards ranged from 4 sq. m in Albania to 12 sq. m in Switzerland. Moreover, some jurisdictions prescribed greater

space for pre-trial detainees, others specified greater space requirements for women (for example, Iceland, Poland and Slovenia), and others still differentiated between adults and juveniles (for example, Hungary and Latvia).

62. In the absence of a universal standard, and based on its experience, the ICRC developed specifications concerning space requirements. For the multi-occupancy accommodation of prisoners this recommendation was 3.4 sq. m per person, including bunk beds and toilet facilities. The ICRC emphasised, however, that this was a recommended specification and not a standard. It stressed that in practical terms the amount of space required by a detainee could not be assessed only on the basis of a specific area measurement. A number of other factors contributed to the assessment of space requirements, including management factors and the facilities and services available in the prison. According to the ICRC, this reflected a comprehensive approach that provided a more accurate picture of the reality for detainees.

63. The ICRC therefore considered that the space factor alone was a limited measurement of the quality of life and conditions of detention. As such, it was merely a starting point when evaluating the conditions in which detainees were held. However, space norms could not be specified separately from the overall environment and thus the appropriateness of the ICRC's recommended specifications in any given situation would depend on a number of other factors including: the specific individual needs of, for example, sick, old or young prisoners, women and/or people with disabilities; the physical condition of the buildings; the amount of time spent in the accommodation area; the frequency and extent of opportunities to take physical exercise, work and be involved in other activities outside the accommodation area; the number of people in the accommodation area (to allow a degree of privacy and avoid isolation); the amount of natural light and the adequacy of the ventilation; other activities being undertaken in the accommodation area (such as cooking, washing, drying); other services available (such as toilets and showers); and the extent of supervision provided.

64. In particular, with regard to the amount of time spent in the cell, the ICRC emphasised that the longer a detainee was held in a confined accommodation space in any twenty-four hour period, the greater the amount of space he or she would require. In other words, the more hours a detainee spent engaged in positive activities in a safe, secure environment outside the accommodation area each day, the greater the possibility of mitigating the negative effects of close confinement. Positive activities in this context include work and education, meeting visitors, engaging in organised exercise or sport, spending extended periods of unstructured time in outdoor exercise areas, and participating in hobbies and recreation programmes.

65. The ICRC also made a distinction between the general accommodation requirements and accommodation requirements in emergency situations (such as political crisis, natural disasters, fire, riots, health crises in which large numbers of detainees needed to be separated from the others or events which required the transfer of detainees from a prison that had been damaged to another prison). The ICRC's initial indication that in such situations 2 sq. m per prisoner should be provided had been subsequently criticised by the experts. The emphasis was thus placed not on the indication of minimum requirement of personal space but the necessity of returning a prison to normal conditions (including minimum space specifications) as soon as possible. In particular, it was emphasised that in such instances it is necessary to avoid a situation in which the restrictions introduced to deal with the emergency situation developed into a chronic deficiency.

## THE LAW

### I. THE GOVERNMENT'S PRELIMINARY OBJECTION

#### A. The parties' submissions

66. The Government reiterated the objection they had raised before the Chamber as to the non-exhaustion of domestic remedies (see paragraph 37 of the Chamber judgment). They contended that the applicant had not properly exhausted domestic remedies as he had failed in his constitutional complaint to provide details concerning the allegedly inadequate conditions of his detention, and had failed to cite the relevant provisions of the Convention and the Constitution.

67. The applicant maintained that he had properly exhausted domestic remedies as in his constitutional complaint he had specifically relied on section 74 of the Enforcement of Prison Sentences Act, which guaranteed a minimum of 4 sq. m of personal space, and had complained that this provision had not been complied with in his case. He thereby gave an adequate opportunity to the Constitutional Court to examine all the relevant circumstances of his case.

#### B. The Chamber's findings

68. The Chamber observed that the applicant had complained to the Constitutional Court in substance that his rights had been violated on account of the lack of personal space and work opportunities in Bjelovar Prison. The Chamber therefore held that, by bringing his complaints in

substance before the Constitutional Court, the applicant had properly exhausted domestic remedies.

### C. The Court's assessment

69. The Court reiterates that the Grand Chamber is not precluded from examining, where appropriate, questions concerning the admissibility of an application under Article 35 § 4 of the Convention, as that provision enables the Court to dismiss applications it considers inadmissible “at any stage of the proceedings”. Therefore, even at the merits stage and subject to Rule 55, the Court may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, for example, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 78, ECHR 2014).

70. However, having examined the Government's submission, the Court finds no grounds for reconsidering the Chamber's decision to dismiss the objection of non-exhaustion. Indeed, the Court has consistently held that the rule on exhaustion of domestic remedies under Article 35 § 1 of the Convention requires that the complaints intended to be made subsequently before it should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014; and also, generally, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 84-87, 9 July 2015).

71. As regards the remedies concerning prison conditions in Croatia, the Court has held that a complaint lodged with the competent judicial authority or the prison administration is an effective remedy, since it can lead to an applicant's removal from inadequate prison conditions. Moreover, in the event of an unfavourable outcome, the applicant can pursue his complaints before the Constitutional Court (see *Štitić v. Croatia* (dec.), no. 29660/03, 9 November 2006; and *Dolenec v. Croatia*, no. 25282/06, § 113, 26 November 2009), which also has the competence to order his release or removal from inadequate prison conditions (see, *inter alia*, *Peša v. Croatia*, no. 40523/08, § 80, 8 April 2010). Accordingly, in order to satisfy the requirement of exhaustion of domestic remedies and in conformity with the principle of subsidiarity applicants are required, before bringing their complaints to the Court, to afford the Croatian Constitutional Court the opportunity of remedying their situation and addressing the issues they wish to bring before the Court (see *Bučkal v. Croatia* (dec.), no. 29597/10, § 20,

3 April 2012; and *Longin v. Croatia*, no. 49268/10, § 36, 6 November 2012).

72. In the present case the Court notes that, after having duly used all available remedies before the competent judicial authorities and the prison administration (see paragraphs 22-24, 26 and 29 above), the applicant brought his complaints before the Constitutional Court where he expressly complained, albeit in a succinct manner, about the problem of overcrowding in Bjelovar Prison. He relied on section 74(3) of the Enforcement of Prison Sentences Act which guarantees adequate personal space to detainees and alleged that this provision had not been complied with in his case (see paragraph 32 above). It follows that the applicant provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely of putting right the violations alleged against them (see, amongst many others, *Jaćimović v. Croatia*, no. 22688/09, §§ 40-41, 31 October 2013, and cases cited therein).

73. The Court thus finds that the applicant properly exhausted domestic remedies. The Government's preliminary objection must therefore be dismissed.

## II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

74. The applicant complained of inadequate conditions of detention in Bjelovar Prison. He alleged that he had been allocated less than 3 sq. m of personal space for several non-consecutive periods amounting in total to fifty days, and that there had also been several non-consecutive periods in which he was allocated between 3 and 4 sq. m of personal space in the cells. In this connection he also alleged poor sanitary and hygiene conditions and nutrition, a lack of work opportunities, and insufficient access to recreational and educational activities. He relied on Article 3 of the Convention, which reads as follows:

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

### A. The Chamber judgment

75. In view of the fact that the central tenet of the applicant's complaint before the Chamber concerned his alleged lack of personal space in Bjelovar Prison, the Chamber reiterated the general principles laid down in the pilot judgment *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, § 148, 10 January 2012), concerning the question of prison overcrowding. In particular, the Chamber reiterated that the test set out in *Ananyev and Others* for deciding whether or not there has been a violation of Article 3 of the Convention in respect of detainees' lack of personal

space was three-fold, namely: (1) each detainee must have an individual sleeping place in the cell; (2) each detainee must dispose of at least 3 sq. m of floor space; and (3) the overall surface of the cell must be such as to allow detainees to move freely between furniture. The absence of any of these elements created a strong presumption that the conditions of an applicant's detention were inadequate.

76. Accordingly, the Chamber stressed that where a detainee disposed of less than 3 sq. m of floor space a strong presumption arose that the conditions of detention had amounted to degrading treatment and were in breach of Article 3. However, in certain circumstances that strong presumption could be rebutted by the cumulative effects of the other conditions of detention.

77. In the light of the above principles, the Chamber observed that whereas it was true that the personal space afforded to the applicant fell short of the standard of 4 sq. m of personal space per prisoner set out by the CPT in its recommendations, it did not consider it so extreme as to justify in itself a finding of a violation of Article 3 of the Convention. The Chamber noted that occasionally the applicant's personal space fell slightly below 3 sq. m for short, non-consecutive periods of time, including one period of twenty-seven days, which the Chamber noted with concern. However, the Chamber observed that the applicant had been allowed three hours a day to move freely outside his cell; that the cells where he had been detained had unobstructed access to natural light and air, as well as drinking water; that he had been provided with an individual bed and nothing impeded him from moving freely within the cell. Moreover, the Chamber noted various out-of-cell activities which the prisoners at Bjelovar Prison had at their disposal, such as a library and access to recreational facilities.

78. In these circumstances, as the applicant's detention had been accompanied by sufficient freedom of movement inside the prison, and his confinement had taken place in an otherwise appropriate facility, the Chamber found that the conditions of his detention did not reach the threshold of severity required to consider his treatment to be inhuman or degrading under Article 3 of the Convention.

## **B. The parties' submissions**

### *1. The applicant*

79. The applicant pointed out that he had been allocated less than 3 sq. m of personal space in detention for several non-consecutive periods amounting in total to fifty days. One of those periods had amounted to twenty-seven days, which the applicant did not consider to be a "short and occasional" reduction in the required personal space. The applicant stressed that it followed from the Court's case-law that when a detainee disposed of



less than 3 sq. m of personal space in multi-occupancy accommodation it was in itself sufficient to find a violation of Article 3. Some other deficiencies could be noted simply to corroborate that finding. The applicant also stressed that the relevant CPT standard was 4 sq. m and, in his view, the Court should follow that standard. In his particular case, there had also been several non-consecutive periods in which he was allocated between 3 and 4 sq. m of personal space in the cells.

80. The applicant further pointed out that the sanitary facility should be deducted from the overall size of the cells. He also stressed that he had been unable to pace out the cell normally given that, during periods when five to eight inmates had been placed in the same cell, the space was reduced by five to eight beds, cupboards, tables and chairs. In reality, throughout his stay in Bjelovar Prison, he had had on average only 2.25 sq. m of personal space. The applicant also argued that he had not been provided with sufficient recreational and educational activities or a possibility to work in Bjelovar Prison. The only possibility of movement outside his cell had been for three hours per day, in the period between 4 and 7 p.m. The applicant therefore considered that, in view of his personal circumstances and his young age, the reduction in his personal space had not been adequately compensated for, which had made him feel humiliated and debased.

81. In the applicant's view, this was all corroborated by the fact that Bjelovar Prison had been built in the nineteenth century and that since then there had been no relevant reconstructions or improvement of the facilities. There had been however some renovation of the facilities in 2011 and some of the photographs of Bjelovar Prison provided by the Government had been taken following that renovation. They included photographs of some of the cells where he had not been accommodated. Moreover, the applicant referred to a complaint made by other detainees and to an interview given in November 2010 by the Prison Director who had stressed that while the prison administration had managed to increase the number of places in Bjelovar Prison from the original capacity of fifty-three to seventy-nine, at times up to 129 prisoners had been accommodated there. At the same time, the applicant considered that the Government had failed to provide sufficient evidence of strong counterbalancing factors that could have alleviated the extreme lack of personal space.

82. Lastly, the applicant contended that he had never been given adequate protection by the sentence-execution judge and that the prison authorities had hindered his complaints to the Ombudsperson by transferring him to Varaždin Prison before the Ombudsperson managed to see him.

## *2. The Government*

83. The Government submitted that the applicant's complaints had been examined in detail at the domestic level by the competent sentence-

execution judge, who had heard the applicant and who had regularly visited Bjelovar Prison in the period at issue, namely twelve times during the applicant's stay there. The sentence-execution judge had not found a violation of his right to adequate conditions of detention. These findings had been reviewed and upheld by a three-judge panel of the Bjelovar County Court and the Constitutional Court. Likewise, the Ombudsperson had examined the applicant's complaints and noted that they principally concerned matters related to his transfer to a prison closer to his family. The Ombudsperson also noted that Bjelovar Prison had been recently renovated. Moreover, in the case of *Pozaić v. Croatia* (no. 5901/13, 4 December 2014), raising an issue of conditions of detention in Bjelovar Prison dating from the same period in which the applicant had been detained there, the Court had also found no violation of Article 3 of the Convention. In this connection the Government pointed out that, given that the CPT had never visited Bjelovar Prison, the Court's finding in *Pozaić* was the only determination of conditions of detention in that prison by an international institution.

84. The Government further stressed that recently in the leading case of *Varga and Others v. Hungary* (nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015) the Court had reiterated the *Ananyev* test of a "strong presumption" of a violation of Article 3 when the personal space available to a detainee fell below 3 sq. m. It noted, however, that this presumption had been rebutted in a number of cases by the cumulative effects of the conditions of detention (in this connection the Government cited *Dmitriy Rozhin v. Russia*, no. 4265/06, § 53, 23 October 2012; *Fetisov and Others v. Russia*, nos. 43710/07, 6023/08, 11248/08, 27668/08, 31242/08 and 52133/08, 17 January 2012; *Kurkowski v. Poland*, no. 36228/06, 9 April 2013; and *Vladimir Belyayev v. Russia*, no. 9967/06, 17 October 2013).

85. In the Government's view, concluding on the basis of the space allocated that there has been an automatic violation would be a formalistic approach which would disregard a number of relevant counterbalancing factors and the CPT's position according to which all aspects of detention should be taken into account. This approach could moreover dissuade States from developing and implementing various measures aimed at improving the quality of life for prisoners. This could be observed in the case of Croatia where, despite the standard of 4 sq. m set out in the relevant domestic law, the overall flexible approach to the question of conditions of detention had allowed for some important steps to be taken in reducing and solving the problems related to the level of prison overcrowding in recent years. The Croatian prisons were at present at eighty-five percent of their full capacity. Moreover, the automatic approach would run counter to the basic principles of the Court's case-law and, although appearing to be a simple solution, would not secure effective protection of the rights of

prisoners. Thus, in the Government's view, a possibility to rebut the presumption should exist and it should operate in a realistic and practical manner.

86. In the case at issue, and taking into account these principles and the overall conditions of the applicant's detention described above (see paragraphs 18-21 above), the Government considered that the general issue of overcrowding existing in Bjelovar Prison at the time, had not infringed any of the applicant's rights and that he had not been subjected to inhuman or degrading treatment under Article 3 of the Convention.

### *3. The third-party interveners*

#### **(a) Observatoire international des prisons – section française (OIP-SF), Ligue belge des droits de l'homme (LDH) and Réseau européen de contentieux pénitentiaire (RCP)**

87. The interveners submitted that the Court's case-law on the questions of conditions of detention, and in particular the minimum personal space under Article 3 of the Convention, was inconsistent and unclear, particularly with regard to the question of the minimum number of square metres of personal space that should be allocated to a detainee. In their view, this impeded a proper implementation of the relevant standards at the domestic level.

88. In the interveners' view the question of personal space allocated to a detainee should be examined as the central element in the assessment of conditions of detention. The standard of minimum personal space to be allocated to a detainee should be set at 4 sq. m, as followed from the relevant CPT recommendations, national and other European and international standards. The interveners further argued that, should the Grand Chamber adopt the approach of a "strong presumption" of a violation of Article 3 when the personal space allocated to a detainee fell below the required minimum standard, it should operate as a strong presumption which could be rebutted only exceptionally. The central factor in this respect would be sufficient freedom of movement within the prison facility and it would be for the domestic authorities to demonstrate that the scarce allocation of personal space was adequately compensated for. On the other hand, the interveners stressed that when the personal space allocated to a detainee fell below 3 sq. m, that should be considered so severe that it should lead to an irrebuttable presumption of a violation of Article 3, and such a situation could not be compensated for or mitigated by other factors.

#### **(b) The Documentation Centre 'L'altro diritto onlus'**

89. The intervener stressed that the Court's case-law on the question of conditions of detention needed clarification and harmonisation, particularly with regard to the question of adequate personal space. In the intervener's

view, this element needed to be established in a clear and reasoned manner as a minimum requirement, and any departure from such minimum should per se always lead to a finding of a violation of the Convention.

90. The intervener invited the Court to reaffirm the *Ananyev* test by making it clear, in particular, that failure to meet the minimum of 3 sq. m of personal space allocated to a detainee created a strong presumption of a violation of Article 3 that could be challenged only in cases of extreme urgency and necessity and when it concerned a considerably limited period of time. Moreover, every prisoner should have his or her own bed and sufficient freedom of movement inside the cell. With regard to the distribution of the burden of proof the intervener considered that, after an applicant had made a *prima facie* case, the burden should be shifted to the respondent Government to provide a solid factual basis to rebut the strong presumption of a violation by adducing the relevant evidence on the basis of the findings of independent and impartial national tribunals or other competent authorities. The intervener further submitted that other relevant factors relating to conditions of detention, beyond the question of adequate personal space, needed also to be taken into account in making an assessment under Article 3.

### **C. The Court's assessment**

#### *1. Introductory remarks*

91. The Court is frequently called upon to rule on complaints alleging a violation of Article 3 of the Convention on account of insufficient personal space allocated to prisoners. In the present case, the Court finds it appropriate to clarify the principles and standards for the assessment of the minimum personal space per detainee in multi-occupancy accommodation in prisons under Article 3 of the Convention.

92. The Court would further note that different questions might arise in the context of single-occupancy accommodation, isolation or other similar detention regimes, or waiting rooms or similar spaces used for very short periods of time (such as police stations, psychiatric establishments, immigration detention facilities), which are however not in issue in the present case (see paragraph 50 above; and *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 192-205, ECHR 2014 (extracts)).

93. The matter of prison overcrowding in multi-occupancy accommodation was one of the issues considered by the Grand Chamber in the *Idalov v. Russia* case ([GC], no. 5826/03, §§ 96-102, 22 May 2012). It has also been addressed in several pilot and leading judgments in which the Court has already indicated specific aspects related to the assessment of the problem of prison overcrowding, and the duty of the States to address the deficiencies identified by the Court in these judgments.

94. In particular, the Court has so far adopted pilot judgments addressing the question of prison overcrowding in respect of the following States: Bulgaria (see *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015); Hungary (see *Varga and Others*, cited above); Italy (see *Torreggiani and Others*, cited above); Poland (see *Orchowski v. Poland*, no. 17885/04, 22 October 2009; and *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009); and Russia (see *Ananyev and Others*, cited above),

95. The Court has also addressed the question of prison overcrowding by indicating the necessity of improving conditions of detention under Article 46 of the Convention in leading judgments with regard to the following States: Belgium (see *Vasilescu v. Belgium*, no. 64682/12, 25 November 2014); Greece (see *Samaras and Others v. Greece*, no. 11463/09, 28 February 2012; *Tzamalis and Others v. Greece*, no. 15894/09, 4 December 2012; and *Al. K. v. Greece*, no. 63542/11, 11 December 2014); Romania (see *Iacov Stanciu v. Romania*, no. 35972/05, 24 July 2012); Slovenia (see *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2011; and *Štrucl and Others v. Slovenia*, nos. 5903/10, 6003/10 and 6544/10, 20 October 2011); and the Republic of Moldova (see *Shishanov v. the Republic of Moldova*, no. 11353/06, 15 September 2015).

## 2. Recapitulation of the relevant principles

### (a) General principles

96. Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV; and *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 113, ECHR 2014 (extracts)).

97. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum 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 (see, among other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25; *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX; *Idalov*, cited above, § 91; and also, *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

98. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable

of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see, among other authorities, *Idalov*, cited above, § 92; and also, *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III; *Ananyev and Others*, cited above, § 140; *Varga and Others*, cited above, § 70). Indeed, the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity (see *Bouyid v. Belgium* [GC], no. 23380/09, § 81, ECHR 2015).

99. In the context of deprivation of liberty the Court has consistently stressed that, to fall under Article 3, the suffering and humiliation involved must in any event go beyond that inevitable element of suffering and humiliation connected with detention. The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him or her 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 or her health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI; *Idalov*, cited above, § 93; *Svinarenko and Slyadnev*, cited above, § 116; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 178, ECHR 2016; and also, *Valašinas v. Lithuania*, no. 44558/98, § 102, ECHR 2001-VIII; and *Ananyev and Others*, cited above, § 141).

100. Even the absence of an intention to humiliate or debase a detainee by placing him or her in poor conditions, while being a factor to be taken into account, does not conclusively rule out a finding of a violation of Article 3 of the Convention (see, *inter alia*, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III; *Mandić and Jović*, cited above, § 80; *Iacov Stanciu*, cited above, § 179; and generally under Article 3, *Svinarenko and Slyadnev*, cited above, § 114, and *Bouyid*, cited above, § 86). Indeed, it is incumbent on the respondent Government to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties (see, amongst many others, *Mamedova v. Russia*, no. 7064/05, § 63, 1 June 2006; *Orchowski*, cited above, § 153; *Neshkov and Others*, cited above, § 229; and *Varga and Others*, cited above, § 103).

101. 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. The length of the period during which a person is detained in the particular conditions has also to be considered (see, amongst many others, *Idalov*, cited above, § 94; and also *Orchowski*, cited above, § 121; *Torreggiani and Others*, cited above, § 66; and *Ananyev and Others*, cited above, § 142).

**(b) Principles concerning prison overcrowding**

102. The Court notes that the relevant principles and standards for the assessment of prison overcrowding flowing from its case-law in particular concern the following issues: (1) the question of minimum personal space in detention under Article 3 of the Convention; (2) whether the allocation of personal space below the minimum requirement creates a presumption or leads in itself to a violation of Article 3 of the Convention; and (3) what factors, if any, could compensate for the scarce allocation of personal space.

*(i) The question of minimum personal space under Article 3*

*(α) The relevant case-law*

103. The Court has stressed on many occasions that under Article 3 it cannot determine, once and for all, a specific number of square metres that should be allocated to a detainee in order to comply with the Convention. Indeed, the Court has considered that a number of other relevant factors, such as the duration of detention, the possibilities for outdoor exercise and the physical and mental condition of the detainee, play an important part in deciding whether the detention conditions satisfied the guarantees of Article 3 (see *Samaras and Others*, cited above, § 57; *Tzamalis and Others*, cited above, § 38; and *Varga and Others*, cited above § 76; see further, for instance, *Trepashkin v. Russia*, no. 36898/03, § 92, 19 July 2007; *Semikhvostov v. Russia*, no. 2689/12, § 79, 6 February 2014; *Logothetis and Others v. Greece*, no. 740/13, § 40, 25 September 2014; and *Suldin v. Russia*, no. 20077/04, § 43, 16 October 2014).

104. Nevertheless, extreme lack of space in prison cells weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were “degrading” within the meaning of Article 3.

105. In a substantial number of cases when the allocation of space to a detainee in multi-occupancy accommodation fell below 3 sq. m, the Court found the overcrowding so severe as to justify the finding of a violation of Article 3 (see the cases cited in *Orchowski*, cited above, § 122; *Ananyev and Others*, cited above, § 145; and *Varga and Others*, cited above, § 75).

106. When inmates appeared to have at their disposal personal space measuring between 3 and 4 sq. m the Court examined the (in)adequacy of other aspects of physical conditions of detention when making an assessment under Article 3. In such instances a violation of Article 3 was found only if the space factor was coupled with other aspects of inappropriate physical conditions of detention related to, in a particular context, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (see *Orchowski*, cited above, § 122; *Ananyev and Others*, cited

above, § 149; *Torreggiani and Others*, cited above, § 69; *Vasilescu*, cited above, § 88; and *Varga and Others*, cited above, § 78; see also, for example, *Jirsák v. the Czech Republic*, no. 8968/08, §§ 64-73, 5 April 2012; *Culev v. Moldova*, no. 60179/09, §§ 35-39, 17 April 2012; *Longin*, cited above, §§ 59-61; and *Barilo v. Ukraine*, no. 9607/06, §§ 80-83, 16 May 2013).

107. In the above-mentioned pilot and leading judgments the Court has fixed for its assessment the relevant minimum standard of personal space allocated to a detainee in multi-occupancy accommodation at 3 sq. m of floor surface (see *Orchowski*, cited above, § 123; *Ananyev and Others*, cited above, § 148; *Torreggiani and Others*, cited above, § 68; *Vasilescu*, cited above, § 88; *Neshkov and Others*, cited above, § 232; *Samaras and Others*, cited above, § 58; *Tzamalīs and Others*, cited above, § 39; *Varga and Others*, cited above, § 74; *Iacov Stanciu*, cited above, § 168; and *Mandić and Jović*, cited above, § 75). Moreover, in the Grand Chamber *Idalov* case (cited above, § 101), when finding a violation of Article 3 on account of inadequate conditions of the applicant's detention, the Grand Chamber noted, among other things, that "the applicant's detention [had not met] the minimum requirement, as laid down in the Court's case-law, of 3 square metres per person".

108. However, in a minority of cases the Court has considered that personal space of less than 4 sq. m is already a factor sufficient to justify a finding of a violation of Article 3 (see, *inter alia*, *Cotleț v. Romania (no. 2)*, no. 49549/11, §§ 34 and 36, 1 October 2013; and *Apostu v. Romania*, no. 22765/12, § 79, 3 February 2015). This standard corresponds to the minimum standard of living space per detainee in multi-occupancy accommodation as developed in the practice of the CPT and recently elaborated in its policy document (see paragraph 51 above).

(β) The approach to be taken

109. The Court reiterates that, while it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 104, 17 September 2009; and *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 50, 29 June 2012).

110. The Court sees no grounds for departing from the approach taken in the pilot judgments and leading cases cited above and in the Grand Chamber *Idalov* case (see paragraph 107 above). It therefore confirms that the requirement of 3 sq. m of floor surface per detainee in multi-occupancy accommodation should be maintained as the relevant minimum standard for its assessment under Article 3 of the Convention (see paragraphs 124-128 below).



111. With regard to the standards developed by other international institutions such as the CPT, the Court would note that it has declined to treat them as constituting a decisive argument for its assessment under Article 3 (see, for instance, *Orchowski*, cited above, § 131; *Ananyev and Others*, cited above, §§ 144-145; *Torreggiani and Others*, cited above, §§ 68 and 76; see also *Sulejmanovic*, cited above, § 43; *Tellissi v. Italy* (dec.), no. 15434/11, § 53, 5 March 2013; and *G.C. v. Italy*, no. 73869/10, § 81, 22 April 2014). The same applies with regard to the relevant national standards, which, although capable of informing the Court's decision in a particular case (see *Orchowski*, cited above, § 123), cannot be considered decisive for its finding under Article 3 (see, for instance, *Pozaić*, cited above, § 59; and *Neshkov and Others*, cited above, § 229).

112. The central reason for the Court's reluctance to take the CPT's available space standards as a decisive argument for its finding under Article 3 relates to its duty to take into account all relevant circumstances of a particular case before it when making an assessment under Article 3, whereas other international institutions such as the CPT develop general standards in this area aiming at future prevention (see paragraph 47 above; see also, *Trepashkin*, cited above, § 92; and *Jirsák*, cited above, § 63). Likewise, the relevant national standards vary widely and operate as general requirements of adequate accommodation in a particular penitentiary system (see paragraphs 57 and 61 above).

113. Moreover, as the CPT has recognised, the Court performs a conceptually different role to the one assigned to the CPT, whose responsibility does not entail pronouncing on whether a certain situation amounts to inhuman or degrading treatment or punishment within the meaning of Article 3 (see paragraph 52 above). The thrust of CPT activity is pre-emptive action aimed at prevention, which, by its very nature, aims at a degree of protection that is greater than that upheld by the Court when deciding cases concerning conditions of detention (see paragraph 47 above, the First General Report, § 51). In contrast to the CPT's preventive function, the Court is responsible for the judicial application in individual cases of an absolute prohibition against torture and inhuman or degrading treatment under Article 3 (see paragraph 46 above). Nevertheless, the Court would emphasise that it remains attentive to the standards developed by the CPT and, notwithstanding their different positions, it gives careful scrutiny to cases where the particular conditions of detention fall below the CPT's standard of 4 sq. m (see paragraph 106 above).

114. Lastly, the Court finds it important to clarify the methodology for the calculation of the minimum personal space allocated to a detainee in multi-occupancy accommodation for its assessment under Article 3. The Court considers, drawing from the CPT's methodology on the matter, that the in-cell sanitary facility should not be counted in the overall surface area of the cell (see paragraph 51 above). On the other hand, calculation of the

available surface area in the cell should include space occupied by furniture. What is important in this assessment is whether detainees had a possibility to move around within the cell normally (see, for instance, *Ananyev and Others*, cited above, §§ 147-148; and *Vladimir Belyayev*, cited above, § 34).

115. The Court would also observe that no distinction can be discerned in its case-law with regard to the application of the minimum standard of 3 sq. m of floor surface to a detainee in multi-occupancy accommodation in the context of serving and remand prisoners. Indeed, in the *Orchowski* pilot judgment the Court applied the same standards for the assessment of minimum personal space under Article 3 with regard to prisons and remand centres (see *Orchowski*, cited above, § 124), and the same standard was applicable in other pilot judgments relevant for the conditions of detention of remand prisoners (see *Ananyev and Others*, §§ 143-148) and serving prisoners (see *Torreggiani and Others*, cited above, §§ 65-69). Other leading judgments on the matter followed the same approach (see *Iacov Stanciu*, cited above, §§ 171-179; *Mandić and Jović*, cited above, §§ 72-76; and *Štrucl and Others*, cited above, § 80). Moreover, the same standard was applied in more recent case-law with regard to Russian correctional colonies (see *Butko v. Russia*, no. 32036/10, § 52, 12 November 2015; for the previous case-law see, for example, *Sergey Babushkin v. Russia*, no. 5993/08, § 56, 28 November 2013 and cases cited therein).

(ii) *Whether the allocation of personal space below the minimum requirement creates a presumption or in itself leads to a violation of Article 3*

(a) *The relevant case-law*

116. In assessing whether there has been a violation of Article 3 on account of an extreme lack of personal space in detention the Court has not always been consistent with regard to the question whether the allocation of personal space falling below 3 sq. m leads in itself to a violation of Article 3 or whether it creates a presumption of a violation, which could be rebutted by other relevant considerations. Different approaches can be distinguished in this respect.

117. First, in a number of cases the finding that a detainee had disposed of less than 3 sq. m of personal space in itself led to the conclusion that there had been a violation of Article 3 (see, for example, *Sulejmanovic*, cited above, § 43; *Trepashkin v. Russia* (no. 2), no. 14248/05, § 113, 16 December 2010; *Mandić and Jović*, cited above, § 80; *Lin v. Greece*, no. 58158/10, §§ 53-54, 6 November 2012; *Blejușcă v. Romania*, no. 7910/10, §§ 43-45, 19 March 2013; *Ivakhnenko v. Russia*, no. 12622/04, § 35, 4 April 2013; *A.F. v. Greece*, no. 53709/11, §§ 77-78, 13 June 2013; *Kanakis v. Greece* (no. 2), no. 40146/11, §§ 106-107, 12 December 2013; *Gorbulya v. Russia*, no. 31535/09, §§ 64-65, 6 March 2014; and *T. and A. v. Turkey*, no. 47146/11, §§ 96-98, 21 October 2014).

118. There are also cases where the Court has held that personal space allocated to a detainee below 3 sq. m was a violation of Article 3, and then examined other conditions of detention only as further aggravating circumstances (see, for example, *Torreggiani and Others*, cited above, § 77; and *Vasilescu*, cited above, §§ 100-104).

119. Another approach is based on the “strong presumption” test set out in the *Ananyev and Others* pilot judgment (cited above). On the basis of a thorough analysis of its previous case-law on the matter, in the *Ananyev and Others* judgment, the Court set out the following test for overcrowding: (1) each detainee must have an individual sleeping place in the cell; (2) each must dispose of at least 3 sq. m of floor space; and (3) the overall surface area of the cell must be such as to allow detainees to move freely between items of furniture. It stressed that the absence of any of the above elements created in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3 (see *Ananyev and Others*, cited above, § 148).

120. Similarly to the “strong presumption” test, in the *Orchowski* pilot judgment (cited above, § 123) the Court emphasised that all situations in which a detainee was deprived of the minimum of 3 sq. m of living space inside his or her cell would be regarded as giving rise to a strong indication that Article 3 had been violated (see further *Olszewski v. Poland*, no. 21880/03, § 98, 2 April 2013). Moreover, the “strong presumption” test has been reiterated in several of the above-mentioned pilot judgments on the question of prison overcrowding (see *Neshkov and Others*, cited above, § 232; and *Varga and Others*, cited above, §§ 74 and 77).

121. In line with that approach, the finding of a violation of Article 3 was based on the assessment whether or not, in the circumstances, “a strong presumption” of a violation was rebutted by other cumulative effects of the conditions of detention (see *Orchowski*, cited above, § 135; *Ananyev and Others*, cited above, § 166; *Lind v. Russia*, no. 25664/05, §§ 59-61, 6 December 2007; *Kokoshkina v. Russia*, no. 2052/08, §§ 62-63, 28 May 2009). Accordingly, in a number of post-*Ananyev* cases concerning various factual circumstances, the Court consistently examined the cumulative effects of the conditions of detention before reaching a final conclusion as to the alleged violation of Article 3 on account of prison overcrowding (see, for example, *Idalov*, cited above, § 101; *Iacov Stanciu*, cited above, §§ 176-178; *Asyanov v. Russia*, no. 25462/09, § 43, 9 October 2012; *Nieciecki v. Greece*, no. 11677/11, §§ 49-51, 4 December 2012; *Yefimenko v. Russia*, no. 152/04, §§ 80-84, 12 February 2013; *Manulin v. Russia*, no. 26676/06, §§ 47-48, 11 April 2013; *Shishkov v. Russia*, no. 26746/05, §§ 90-94, 20 February 2014; *Bulatović v. Montenegro*, no. 67320/10, §§ 123-127, 22 July 2014; *Tomoiagă v. Romania* (dec.), no. 47775/10, §§ 22-23, 20 January 2015; *Neshkov and Others*, cited above, §§ 246-256; *Varga and Others*, cited above, § 88; and *Mironovas and Others v. Lithuania*,

nos. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 and 70065/13, §§ 118-123, 8 December 2015).

(β) The approach to be taken

122. In harmonising the above divergences, the Court will be guided by the general principles of its well-established case-law under Article 3 of the Convention. In this connection it would reiterate that according to this case-law the assessment of the minimum level of severity for any ill-treatment to fall within the scope of Article 3 is, in the nature of things, relative (see paragraphs 97-98 above). The assessment of this minimum, as emphasised ever since the *Ireland v. the United Kingdom* case (cited above, § 162), will depend 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 (see paragraph 97 above).

123. Accordingly, the Court's assessment whether there has been a violation of Article 3 cannot be reduced to a numerical calculation of square metres allocated to a detainee. Such an approach would, moreover, disregard the fact that, in practical terms, only a comprehensive approach to the particular conditions of detention can provide an accurate picture of the reality for detainees (see paragraphs 62-63 above).

124. Nevertheless, having analysed its case-law and in view of the importance attaching to the space factor in the overall assessment of prison conditions, the Court considers that a strong presumption of a violation of Article 3 arises when the personal space available to a detainee falls below 3 sq. m in multi-occupancy accommodation.

125. The "strong presumption" test should operate as a weighty but not irrebuttable presumption of a violation of Article 3. This in particular means that, in the circumstances, the cumulative effects of detention may rebut that presumption. It will, of course, be difficult to rebut it in the context of flagrant or prolonged lack of personal space below 3 sq. m. The circumstances in which the presumption may be rebutted will be set out below (see paragraphs 130-135).

126. It follows that, when it has been conclusively established that a detainee disposed of less than 3 sq. m of floor surface in multi-occupancy accommodation, the starting point for the Court's assessment is a strong presumption of a violation of Article 3. It then remains for the respondent Government to demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space. The cumulative effect of those conditions should inform the Court's decision whether, in the circumstances, the presumption of a violation is rebutted or not.

127. With regard to the methodology for that assessment, the Court refers to its well-established standard of proof in conditions-of-detention cases (see, for example, *Ananyev and Others*, cited above, §§ 121-125). In

this context the Court is particularly mindful of the objective difficulties experienced by applicants in collecting evidence to substantiate their claims about conditions of their detention. Still, in such cases applicants must provide a detailed and consistent account of the facts complained of (ibid. § 122). In certain cases applicants are able to provide at least some evidence in support of their complaints. The Court has considered as evidence, for example, written statements by fellow inmates or if possible photographs provided by applicants in support of their allegations (see, for example, *Golubenko v. Ukraine* (dec.), no. 36327/06, § 52, 5 November 2013, and cases cited therein; see further *Tehrani and Others v. Turkey*, nos. 32940/08, 41626/08 and 43616/08, § 88, 13 April 2010).

128. Once a credible and reasonably detailed description of the allegedly degrading conditions of detention, constituting a *prima facie* case of ill-treatment, has been made, the burden of proof is shifted to the respondent Government who alone have access to information capable of corroborating or refuting these allegations. They are required, in particular, to collect and produce relevant documents and provide a detailed account of an applicant's conditions of detention. Relevant information from other international bodies, such as the CPT, on the conditions of detention, as well as the competent national authorities and institutions, should also inform the Court's decision on the matter (see further *Ananyev and Others*, cited above, §§ 122-125; and *Neshkov and Others*, cited above, §§ 71-91).

(iii) *Factors which may compensate for the scarce allocation of personal space*

129. In view of its findings above (see paragraphs 124-125 above), the Court has to determine which factors may compensate for the scarce allocation of personal space to a detainee, and thus rebut the strong presumption of a violation of Article 3 arising where the detainee disposes of less than 3 sq. m of personal space in multi-occupancy accommodation in prisons.

130. The Court firstly notes, in the light of its post-*Ananyev* case-law, that normally only short, occasional and minor reductions in the required personal space will be such as to rebut the strong presumption of a violation of Article 3. This was, for example, the case in *Fetisov and Others* (cited above, §§ 134-138) where a prisoner disposed of approximately 2 sq. m of floor surface for nineteen days (see further *Dmitriy Rozhin*, cited above, §§ 52-53), or *Vladimir Belyayev* (cited above, §§ 33-36) where a prisoner disposed of 2.95 sq. m of personal space for a period of ten days, and then non-consecutively 2.65 sq. m for a period of two days and 2.97 sq. m for a period of twenty-six days. Moreover, referring to its case-law in *Fetisov and Others* and *Dmitriy Rozhin*, the Court found no violation of Article 3 in the *Kurkowski* case (cited above, §§ 66-67) where the applicant disposed of approximately 2.1 sq. m of floor space for four days, and then subsequently 2.6 sq. m of floor space for another four days.

131. Nevertheless, the Court has already held that, while the length of a detention period may be a relevant factor in assessing the gravity of suffering or humiliation caused to a detainee by the inadequate conditions of his or her detention, the relative brevity of such a period alone will not automatically remove the treatment complained of from the scope of Article 3 if other elements are sufficient to bring it within the scope of that provision (see, for example, *Vasilescu*, cited above, § 105; *Neshkov and Others*, cited above, § 249; and *Shishanov*, cited above, § 95).

132. The Court would further note that in other cases concerning the inadequate allocation of personal space to detainees it examined whether the reductions in the required personal space were accompanied by sufficient freedom of movement and adequate out-of-cell activities, as well as confinement in, viewed generally, an appropriate detention facility (see, for example, *Samaras and Others*, cited above, §§ 63-65; and *Tzamalis and Others*, cited above, §§ 44-45). The examples of cases in which the scarce allocation of personal space did not give rise to a violation of Article 3 include: *Andrei Georgiev v. Bulgaria*, no. 61507/00, §§ 57-62, 26 July 2007; *Alexov v. Bulgaria*, no. 54578/00, §§ 107-108, 22 May 2008; and *Dolenec*, cited above, §§ 133-136. In the Court's view, the strong presumption of a violation of Article 3 arising from the allocation of less than 3 sq. m in multi-occupancy accommodation will normally be capable of being rebutted only where the requirements are cumulatively met, namely where short, occasional and minor reductions of personal space are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities and confinement in what is, when viewed generally, an appropriate detention facility (see, *mutatis mutandis*, *Varga and Others*, cited above, § 77; and *Mironovas and Others*, cited above, § 122).

133. With regard to the question of sufficient freedom of movement, in particular, in the *Ananyev and Others* case (cited above, §§ 150-152) the Court has referred to the relevant CPT standards according to which all prisoners, without exception, must be allowed at least one hour of exercise in the open air every day and preferably as part of a broader programme of out-of-cell activities, bearing in mind that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather (see further *Neshkov and Others*, cited above, § 234). Indeed, according to the relevant international standards prisoners should be able to spend a reasonable part of the day outside their cells, engaged in purposeful activity of a varied nature (work, recreation, education). Regimes in establishments for sentenced prisoners should be even more favourable (see further paragraphs 48, 53, 55 and 59 above).

134. Lastly, with regard to the overall appropriateness of the detention facility, the Court refers to general aspects of detention identified in its case-law (see further *Ananyev and Others*, cited above, §§ 153-159; and *Neshkov*

*and Others*, §§ 237-244; see further *Iacov Stanciu*, cited above, §§ 173-179; and *Varga and Others*, cited above, §§ 80-92) and the relevant international standards (see paragraphs 48, 53, 55, 59 and 63-64 above). Accordingly, in addition to sufficient freedom of movement and adequate out-of-cell activities, no violation of Article 3 would be found where no other aggravating circumstance arises with regard to general conditions of an applicant's detention (see, for instance, the approach in *Alver v. Estonia*, no. 64812/01, § 53, 8 November 2005; *Andrei Georgiev*, cited above, § 61; and *Dolenec*, cited above, § 134).

135. It follows from the above that, when considering whether measures of compensation for the scarce allocation of personal space below 3 sq. m of floor surface in multi-occupancy accommodation are capable of rebutting the strong presumption of a violation of Article 3, the Court will have regard to factors such as: the time and extent of restriction; freedom of movement and adequacy of out-of-cell activities; and general appropriateness of the detention facility.

**(c) Summary of relevant principles and standards for the assessment of prison overcrowding**

136. In the light of the considerations set out above, the Court confirms the standard predominant in its case-law of 3 sq. m of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 of the Convention.

137. When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space (see paragraphs 126-128 above).

138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:

(1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor (see paragraph 130 above):

(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see paragraph 133 above);

(3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see paragraph 134 above).

139. In cases where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is

coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (see paragraph 106 above).

140. The Court also stresses that in cases where a detainee disposed of more than 4 sq. m of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention referred to above (see paragraphs 48, 53, 55, 59 and 63-64 above) remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under Article 3 of the Convention (see, for example, *Story and Others v. Malta*, nos. 56854/13, 57005/13 and 57043/13, §§ 112-113, 29 October 2015).

141. Lastly, the Court would emphasise the importance of the CPT's preventive role in monitoring conditions of detention and of the standards which it develops in that connection. The Court reiterates that when deciding cases concerning conditions of detention it remains attentive to those standards and to the Contracting States' observance of them (see paragraph 113 above).

### 3. Application of the above principles in the present case

142. The Court observes at the outset that, although the problem of prison overcrowding has been examined in several cases against Croatia in which a violation of Article 3 was found (see *Cenbauer v. Croatia*, no. 73786/01, ECHR 2006-III; *Testa v. Croatia*, no. 20877/04, 12 July 2007; *Štitić v. Croatia*, no. 29660/03, 8 November 2007; *Dolenec*, cited above; *Longin*, cited above; and *Lonić v. Croatia*, no. 8067/12, 4 December 2014), it has not so far considered that conditions of detention in Croatia disclosed a structural problem from the standpoint of Article 3 of the Convention (see, by contrast, paragraphs 94-95 above). Moreover, none of the cited cases concerned the conditions of detention in Bjelovar Prison which give rise to the applicant's complaints in the present case. With regard to the conditions of detention in Bjelovar Prison the Court has so far examined one case, in which it found no violation of Article 3 (see *Pozaić*, cited above).

143. The present case does not raise a structural issue concerning the conditions of detention in Croatia. The Court's task is to address the applicant's particular complaint of overcrowding in Bjelovar Prison, where he was serving a prison sentence in the period between 16 October 2009 and 16 March 2011 (see *Polufakin and Chernyshev v. Russia*, no. 30997/02, §§ 155-156, 25 September 2008).

144. The applicant in particular complained that for several non-consecutive periods, amounting in total to fifty days, including a period of



twenty-seven consecutive days, he disposed of less than 3 sq. m of personal space, and that there were also several non-consecutive periods in which he was allocated between 3 and 4 sq. m of personal space in the cells (see paragraph 15 above).

145. In view of the relevant test enunciated above (see paragraphs 136-139 above), the Court will address the applicant's complaints separately with regard to the period in which he disposed of less than 3 sq. m of personal space, and the period in which he was allocated between 3 and 4 sq. m of personal space in Bjelovar Prison.

**(a) Period in which the applicant disposed of less than 3 sq. m of personal space**

*(i) Whether the strong presumption of a violation of Article 3 arises in the present case*

146. The Court notes that the particular details of the personal space allocated to the applicant are based on the documentation provided by the respondent Government which the applicant did not contest (see paragraph 17 above). Specifically, during his stay in Bjelovar Prison, which lasted for one year and five months (see paragraphs 13-14 above), the applicant was detained in four cells in which he had between 3 and 6.76 sq. m of personal space. Only during the following non-consecutive periods did he have personal space which fell below 3 sq. m, by 0.45 and 0.38 sq. m: on 21 April 2010 (one day – 2.62 sq. m), and between 3 and 5 July 2010 (three days – 2.62 sq. m); 18 July and 13 August 2010 (twenty-seven days – 2.62 sq. m); 31 August and 2 September 2010 (three days – 2.55 sq. m); 19 and 26 November 2010 (eight days – 2.55 sq. m); 10 and 12 December 2010 (three days – 2.62 sq. m); 22 and 24 December 2010 (three days – 2.62 sq. m); and 24 and 25 February 2011 (two days – 2.62 sq. m).

147. There were also certain periods in which there were reductions in the minimum required personal space of 3 sq. m by 0.08, 0.04 and 0.01 sq. m (see paragraph 17 above). Although such reductions are not of the same degree and extent as those noted above, particularly given that some of them can hardly be demonstrated and distinguished in terms of space, and are therefore not decisive for the determination of the case at issue, the Court considers that they cannot be ignored in the overall assessment of conditions of the applicant's confinement in Bjelovar Prison.

148. In view of these findings, and the relevant principles enunciated in its case-law (see paragraph 137 above), the Court finds that a strong presumption of a violation of Article 3 arises in the case at issue. Accordingly, the question to be answered is whether there were factors capable of rebutting that presumption.

(ii) *Whether there were factors capable of rebutting the strong presumption of a violation of Article 3*

149. The Court notes that the relevant reductions in the applicant's personal space below 3 sq. m were of relatively short duration. This is in particular true as to single non-consecutive periods of one (2.62 sq. m), two (2.62 sq. m) and eight days (2.55 sq. m), three non-consecutive periods of three days during which the applicant had 2.62 sq. m of personal space, and one period of three days during which the applicant had 2.55 sq. m of personal space. The Court notes, however, that there was also a period of twenty-seven days (between 18 July and 13 August 2010) in which the applicant disposed of 2.62 sq. m of personal space (see paragraph 146 above).

150. In these circumstances, sharing the Chamber's concerns with regard to the period of twenty-seven days, the Court will first consider whether that period could be regarded as a short and minor reduction in the required personal space.

(α) *The period of twenty-seven days*

151. In this connection the Court observes that in a comparably similar case of *Vladimir Belyayev* (cited above), concerning several non-consecutive periods of reductions in the applicant's personal space below 3 sq. m, the longest period lasted twenty-six days during which the applicant disposed of 2.97 sq. m of personal space (see paragraph 130 above). However, in the case at issue the applicant disposed of 2.62 sq. m of personal space for a period of twenty-seven days (see paragraph 146 above).

152. These circumstances are sufficient for the Court to conclude that the period of twenty-seven days when the applicant had only 2.62 sq. m at his disposal cannot call into question the strong presumption of a violation of Article 3.

153. Accordingly, the Court finds that in the period of twenty-seven days in which he disposed of less than 3 sq. m of personal space in Bjelovar Prison, the conditions of the applicant's detention subjected him to hardship going beyond the unavoidable level of suffering inherent in detention and thus amounting to degrading treatment prohibited by Article 3 of the Convention.

(β) *The remaining periods*

154. As regards the remaining periods which were of short duration and in respect of which the strong presumption of a violation of Article 3 of the Convention can accordingly be rebutted on other grounds, the Court must have regard to other relevant factors, namely the possibility of sufficient freedom of movement and out-of-cell activities and the general conditions of the applicant's detention (see paragraphs 137-138 above). The burden of proving that there were such factors is on the Government.

155. With regard to the question of freedom of movement and out-of-cell activities, the Court notes the Government's submissions concerning the amenities available for inmates in Bjelovar Prison. The Government explained that the inmates were allowed to move freely outside their cells in the morning and afternoon, and to use the indoor and outdoor facilities of Bjelovar Prison. This in particular included two hours of outdoor exercise and in addition free out-of-cell movement inside the prison between 4 and 7 p.m. The Government also explained in detail the prisoners' daily regime and described the facilities available in Bjelovar Prison (see paragraphs 19-20 above).

156. In support of their claims the Government provided photographs, floor plans and other relevant documentation related to the available facilities in Bjelovar Prison (see paragraph 21 above). This in particular concerns the photographs, taken in 2007, 2010 and 2011 in the context of the renovation of the prison and visits of various officials to the prison, showing the interior of Bjelovar Prison, the recreation yard, the cells and their sanitary facilities. These photographs correspond to the Government's description of the relevant facilities available to prisoners. The Government also provided documentation concerning the availability of entertainment for prisoners in Bjelovar Prison, which further supports the claims made in their submissions (see, by contrast, *Orchowski*, cited above, §§ 125 and 129).

157. For his part, the applicant sought to challenge the Government's submission only in very general terms insisting on the fact that he had not been engaged in any work. At the same time he did not provide a detailed description disputing the Government's claims concerning the opportunities for outdoor exercise and other details of the relevant prison regime in Bjelovar Prison (compare *Golubenko*, cited above, § 61). He conceded the fact that he had had a possibility of three hours per day of movement outside his cell but argued that the outdoor facilities were inadequate and insufficient, particularly given that there was only an open recreation yard (see paragraph 16 above).

158. The Court observes at the outset that the Government's submissions are very detailed and consistent with their position in the *Pozaić* case concerning the relevant facilities available to detainees in the same prison at the relevant time (see *Pozaić*, cited above, §§ 15 and 60; and, by contrast, *Idalov*, cited above, § 99). Moreover, there is no indication that the relevant materials submitted by the Government were prepared after they had been given notice of the applicant's complaint. There is therefore no reason for the Court to doubt the authenticity, objectivity and relevancy of such materials (see *Sergey Chebotarev v. Russia*, no. 61510/09, §§ 40-41, 7 May 2014).

159. On the other hand, in the absence of any detailed information from the applicant about his daily routines at Bjelovar Prison, and regard being

had to the materials submitted by the Government on the issue, the Court is unable to accept the applicant's submissions as sufficiently established or credible (see *Ildani v. Georgia*, no. 65391/09, § 27, 23 April 2013). It also attaches particular importance to the fact that the applicant never complained at the domestic level about certain aspects of his confinement, such as, in particular, the lack of outdoor exercise or insufficient time for free movement.

160. In view of the above, the Court's task in the present case is to determine whether it can be ascertained, from the material submitted before it, that the applicant was given sufficient freedom of movement and adequate out-of-cell activities, which were capable of alleviating the situation created by the scarce allocation of personal space.

161. In this connection the Court notes that in the ordinary daily regime in Bjelovar Prison the applicant was allowed the possibility of two hours of outdoor exercise, which is a standard set out in the relevant domestic law (see paragraph 43 above, section 14 (1.9) of the Enforcement of Prison Sentences Act above) and above the minimum standards set out by the CPT (see paragraph 53 above). The photographs available to the Court show the recreation yard, which according to the Government's undisputed submission, has a surface area of 305 sq. m and includes a lawn and asphalted parts as well as protection from inclement weather and is equipped with various recreational facilities, such as a gym, basketball court and ping-pong table.

162. Furthermore, it is undisputed by the applicant that he was allowed three hours per day of free movement outside his cell within the prison facility. Taking also into account the period of two hours of outdoor exercise, as well as the periods necessary for serving breakfast, lunch and dinner, it cannot be said that the applicant was left to languish in his cell for a significant proportion of his day without any purposeful activity. This is particularly true given the entertainment facilities available in Bjelovar Prison, such as the possibility of watching TV or borrowing books from the local library, as follows from the material available before the Court (compare *Valašinas*, cited above, § 111).

163. Against the above background, the Court finds that, even taking into account that the applicant was unable to obtain work, which related not only to the objective impossibility (see paragraph 20 above) but also arguably to the applicant's previous behaviour (see paragraph 13 above), the possibility of free out-of-cell movement and the facilities available to the applicant in Bjelovar Prison could be seen as significantly alleviating factors in relation to the scarce allocation of personal space.

164. It remains to be determined whether the applicant was detained in generally appropriate conditions in Bjelovar Prison (see paragraphs 134 and 138 above). The Court is of the view that the above considerations concerning the material available before it hold true for the general

conditions of the applicant's detention. In particular, the Government's detailed submission is corroborated by relevant evidence (see paragraph 21 above) and the findings of the competent domestic authorities in the applicant's case, notably the competent judicial authorities, the Ministry of Justice Prison Administration and the Ombudsperson (see paragraphs 25, 28, 30 and 38 above). In this context the Court would note that there is no reason for it to call into question these findings of the competent domestic authorities. It also attaches particular importance to the fact that the applicant did not raise, let alone substantiate, allegations concerning poor hygiene conditions in the cells and poor nutrition, or notably inadequate recreational and educational activities, in his constitutional complaint before the Constitutional Court.

165. Moreover, the applicant's statements concerning the general conditions of his detention are inconsistent and contrary to the available evidence. Specifically, at one instance the applicant argued that the cells where he had been accommodated were insufficiently equipped with the relevant furniture for every inmate (see paragraph 16 above), whereas elsewhere, when he intended to show that he had not had sufficient freedom of movement inside the cell, he argued that he had been unable to pace normally due to the furniture available to every inmate (see paragraph 80 above), which contradicts his own above-cited statement. Moreover, the applicant argued that the sanitary facilities were in the same room as the living area from which they were not fully separated (see paragraph 16 above), while the photographs and floor plans of the prison dating back to 1993, the authenticity and relevancy of which are not in dispute, show that the prison cells in Bjelovar Prison were equipped with a fully partitioned sanitary facility.

166. Likewise, the Court observes that it appears from the material available to it that the food served to the prisoners was regularly inspected by the prison doctor and the competent State authorities, and that prisoners were served three meals per day which, on the basis of the menu presented by the Government, do not appear substandard or inadequate (compare *Alexov*, cited above, § 106; and, by contrast, *Kadiķis v. Latvia (no. 2)*, no. 62393/00, § 55, 4 May 2006, where prisoners had only one meal per day). Moreover, prisoners had free access to the sanitary facilities and there is no issue with regard to the access to natural light and fresh air in the cell.

167. There was also, as it appears from the available materials, a possibility to shower three times per week (see paragraph 26 above; see further paragraph 55 above, Rule 19.4 of the European Prison Rules; and by contrast *Shilbergs v. Russia*, no. 20075/03, § 97, 17 December 2009, where the applicant had a possibility to shower no more than once every ten days). The facilities of Bjelovar Prison were constantly renovated and maintained, including in the period before and during the applicant's stay in that prison (see paragraphs 18 and 38 above). In this connection the Court notes the

photographs, the authenticity of which is not in dispute, showing the interior of Bjelovar Prison, the recreation yard, the cells and their sanitary facilities, which appear to be in an adequate state of repair and cleanliness (see, by contrast for example, *Zuyev v. Russia*, no. 16262/05, § 59, 19 February 2013), and which accordingly correspond to the Government's description of the relevant facilities available to prisoners.

168. In view of the above, the Court considers that the applicant was detained in generally appropriate conditions in Bjelovar Prison.

169. Against the above background, as regards the other periods during which the applicant disposed of less than 3 sq. m of personal space, the Court finds that the Government have rebutted the strong presumption of a violation of Article 3. Those non-consecutive periods can be regarded as short and minor reductions in personal space, during which sufficient freedom of movement and out-of-cell activities were available to the applicant. Moreover, he was detained in, viewed generally, an appropriate detention facility.

170. The Court therefore considers that it cannot be established that the conditions of the applicant's detention, although not completely adequate as regards personal space, reached the threshold of severity required to characterise the treatment as inhuman or degrading within the meaning of Article 3 of the Convention. This conclusion is not altered by the fact that the relevant domestic law provided for a standard of 4 sq. m of personal space per detainee, which, as already indicated above, may inform the Court's decision but cannot be considered a decisive argument for its assessment under Article 3 (see paragraph 111 above). This is particularly true in the context of the Croatian domestic system given that the Constitutional Court, in its assessment of the minimum personal space allocated to a detainee, referred to the Court's minimum standard of 3 sq. m of personal space set out in its *Ananyev and Others* judgment (see paragraph 45 above).

171. In the light of the above, the Court considers that the conditions of the applicant's detention during the remaining periods in which he disposed of less than 3 sq. m of personal space did not amount to degrading treatment prohibited by Article 3 of the Convention.

(γ) Conclusion

172. The Court finds that there has been a violation of Article 3 of the Convention with regard to the period of twenty-seven days (between 18 July and 13 August 2010) in which the applicant disposed of less than 3 sq. m of personal space (see paragraph 153 above).

173. Conversely, with regard to the remainder of the periods in which the applicant disposed of less than 3 sq. m (see paragraph 171 above), the Court finds that there has been no violation of Article 3 of the Convention.

**(b) Periods in which the applicant disposed of between 3 and 4 sq. m of personal space**

174. As the applicant also complained about the periods in which his personal space in detention was more than 3 sq. m but less than 4 sq. m, where the space element remains a weighty factor in the Court's assessment (see paragraph 139 above), it remains to be examined whether the impugned limitation on personal space was incompatible with Article 3.

175. The Court notes that it follows from the undisputed material available before it concerning the details of the applicant's confinement in Bjelovar Prison that for several non-consecutive periods he disposed of between 3 and 4 sq. m of personal space ranging from 3.38 sq. m to 3.56 sq. m (see paragraph 17 above).

176. In view of the above considerations concerning the remainder of the period in which the applicant disposed of less than 3 sq. m of personal space (see paragraphs 154-171 above), the Court finds that it cannot be considered that the conditions of his detention in the period when he disposed of between 3 and 4 sq. m of personal space amounted to inhuman or degrading treatment within the meaning of Article 3 of the Convention.

177. The Court therefore finds that in this respect there has been no violation of Article 3 of the Convention.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

178. Article 41 of the Convention provides:

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

#### A. Damage

179. The applicant claimed 30,000 euros (EUR), plus any tax that may be chargeable, in respect of non-pecuniary damage.

180. The Government considered the applicant's claim excessive and unsubstantiated.

181. The Court finds that the suffering caused to a person detained in conditions that are so poor as to amount to inhuman or degrading treatment within the meaning of Article 3 of the Convention cannot be made good by a mere finding of a violation; it calls for an award of compensation (see *Neshkov and Others*, cited above, § 299). When making its assessment with regard to the applicant's claim, the Court considers that the length of stay in inadequate conditions of detention is an important factor for the assessment of the extent of non-pecuniary damage (see *Ananyev and Others*, cited above, § 172; *Torreggiani and Others*, cited above, § 105; and *Vasilescu*,

cited above, § 132). However, the Court also notes certain undeniable efforts made by the domestic authorities to alleviate the problem of overcrowding in Bjelovar Prison, which should be taken into account in determining the amount of any just satisfaction (see *Samaras and Others*, cited above, § 63 *in fine*; and *Sergey Babushkin*, cited above, § 51). Making its assessment on an equitable basis, and taking into account the fact that a violation of Article 3 was found with regard to a period of twenty-seven days in which the applicant disposed of less than 3 sq. m of personal space (see paragraph 172 above), the Court awards the applicant EUR 1,000 plus any tax that may be chargeable to him, in respect of non-pecuniary damage.

### **B. Costs and expenses**

182. The applicant claimed EUR 5,025, plus any tax that may be chargeable, for costs and expenses incurred before the domestic authorities and before the Court.

183. The Government considered the applicant's claim excessive and unsubstantiated.

184. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, as well as the sum to which the applicant's lawyer is entitled on account of the granted legal aid (EUR 1,933.50), the Court considers it reasonable to award the sum of EUR 3,091.50, plus any tax that may be chargeable to the applicant, in respect of his costs and expenses before the domestic authorities and before the Court.

### **C. Default interest**

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



## FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objection of non-exhaustion of domestic remedies;
2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention with regard to the period between 18 July and 13 August 2010 in which the applicant disposed of less than 3 sq. m of personal space in Bjelovar Prison;
3. *Holds*, by ten votes to seven, that there has been no violation of Article 3 of the Convention with regard to the remainder of the non-consecutive periods in which the applicant disposed of less than 3 sq. m of personal space;
4. *Holds*, by thirteen votes to four, that there has been no violation of Article 3 of the Convention with regard to the periods in which the applicant disposed of between 3 and 4 sq. m of personal space in Bjelovar Prison;
5. *Holds*, unanimously,
  - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Croatian kunas, at the rate applicable at the date of settlement:
    - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 3,091.50 (three thousand ninety-one euros and fifty cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, by twelve votes to five, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 October 2016.

Roderick Liddell  
Registrar

Guido Raimondi  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint partly dissenting opinion of Judges Sajó, López Guerra and Wojtyczek;
- (b) joint partly dissenting opinion of Judges Lazarova Trajkovska, De Gaetano and Grozev;
- (c) partly dissenting opinion of Judge Pinto de Albuquerque.

G.R.A.  
R.L.

## JOINT PARTLY DISSENTING OPINION OF JUDGES SAJÓ, LÓPEZ GUERRA AND WOJTYCZEK

1. We respectfully disagree with the majority in the instant case because we consider that there has been a violation of Article 3 both with regard to the non-consecutive periods in which the applicant disposed of less than 3 sq. m of personal space and the periods in which the applicant disposed of between 3 and 4 sq. m of personal space.

2. The methodology of interpretation and application of Article 3 may be different for the purposes of different types of cases brought under this provision. In some cases, it may be necessary to clarify the meaning of words used in this Article. In prison overcrowding cases, the difficulty lies not in the open texture of the provision. The wording seems sufficiently clear for the purpose of assessing conditions of detention. The main difficulty is connected with the establishment and assessment of certain factual elements which are decisive in such cases, namely in terms of the impact that personal space of a certain dimension (or lack thereof) has on the detainees and their personality.

3. We agree with the general approach adopted by the majority to assess the conditions in prisons and especially with most of the general directives set out in paragraphs 96-101. The majority rightly point to the difficulties of setting a clear-cut numerical standard for the purpose of evaluating prison conditions from the perspective of Article 3. At the same time, one cannot dispute that, for practical reasons, setting a clear numerical standard as the point of departure for the evaluation of prison conditions is unavoidable. We also agree that if the personal space available to a detainee falls below a certain pre-determined standard there is a strong presumption of a violation of Article 3. We do not contest that this presumption may be rebutted by the Government, by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space.

We differ, however, with the majority on two important points:

- (i) the choice of a specific numerical space standard, and
- (ii) the strength of the presumption which arises once this standard has not been met.

The first point will be discussed in detail below. On the second point, we would like to stress that, in our view, the presumption of a violation of Article 3 is particularly strong and can be rebutted only in exceptional circumstances.

4. The majority take as their point of departure for the assessment of prison conditions the standard of 3 sq. m per prisoner in multi-occupancy cells. In our view, this standard is not satisfactory and leads to the acceptance of untenable conditions in prison. It does not sufficiently take into account prison realities. The standard of 3 sq. m per prisoner means in practice that the inmates constantly breach their so-called personal distance

and often enter into the so-called intimacy zone. Numerous studies show that such proximity has a detrimental effect on the personality of detainees. Those who may have doubts about this can easily test on themselves the quality of life in 3 sq. m of personal space. Prison overcrowding not only entails strong psychological suffering but also undermines the aims of the punishment, making the whole resocialisation effort much less effective. In such conditions life in prison easily becomes completely devoid of any sense. Adequate space in prison is one of the preconditions for effective resocialisation. Resocialisation of prisoners living in 3 sq. m per person or less cannot be effective.

5. Several international bodies have addressed the issue of space in prison. The ICRC has set a recommended minimum specification of 5.4 sq. m in a single occupancy cell and 3.4 sq. m per prisoner in shared accommodation. The CPT has established the following minimum standard: 6 sq. m of living space for a single occupancy cell and 4 sq. m of living space per prisoner in a multi-occupancy cell.

The majority attempt to explain why they do not refer to the standards laid down by the CPT as the point of departure for the assessment of prison conditions, but instead prefer to set their own standard. On the one hand, we agree with the argument put forward by the majority that the role of the CPT differs from that of the Court. Furthermore, we likewise consider that the recommendations of the CPT, though relevant, are not decisive for interpretation of the Convention. On the other hand, we are not convinced at all by the part of the reasoning where the majority underline the duty of the Court to take into account “all relevant circumstances” in order to justify their reluctance to adopt the CPT standard (see paragraph 112). The CPT not only has special expertise in the field of prison systems but also unique experience of conditions in prisons throughout Europe. Therefore, when setting its space standards, the CPT had in mind a comprehensive picture of the overcrowding problem and the interrelations between different factors. According to the CPT itself, the space factor is “often a very significant one or the decisive one” for the purpose of assessing whether the prison conditions amount to inhuman or degrading treatment (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, “Living space per prisoner in prison establishments”, Strasbourg, 15 December 2015, paragraph 24).

In any event, the question of the legal force of CPT documents is not the most important one. What matters is the question whether the content of the CPT recommendations is rational and relevant for the purpose of assessing the impact on detainees of the space available to them. On the specific point of space in prisons we consider that the CPT standards reflect the minimum which, in the context of the knowledge gathered by social sciences, has to be ensured in order to avoid inhuman and degrading treatment prohibited by Article 3 of the Convention.

Therefore, in our view, the minimum standard should be at least 4 sq. m per person, as has been stated in some judgments of the Court (see paragraph 108). If the personal space available to a detainee falls below 4 sq. m of floor surface in a multi-occupancy cell, there is a strong presumption of a violation of Article 3.

We are aware that the 4 sq. m standard is not a fully satisfactory one and may trigger criticism on different counts. In particular, it still remains below the desirable space recommended in the most recent documents of the CPT (see the CPT document quoted above, paragraphs 12-17). However, we do not see a better alternative to the proposed approach.

6. We note that the majority refer to various CPT recommendations concerning different aspects of prison conditions for the purposes of adjudication under Article 3. The approach does not seem fully consistent as some of those standards are accepted as such (see, for instance, paragraphs 114, 133 and 141) and some are rejected. Such a differentiated treatment of CPT standards would require an explanation.

7. The important issue tacitly underlying the adjudication in prison condition cases is the cost of the standards chosen as the basis for the assessment of those conditions. We are fully aware that ensuring decent conditions in prisons has an enormous economic cost. Some of the High Contracting Parties to the Convention have adopted a standard that is below 4 sq. m per prisoner. In those States, to implement that standard would require significant additional funds.

The Court has rightly emphasised on many occasions that “it is incumbent on the respondent Government to organise its penitentiary system in such a way as to ensure respect for human dignity of detainees regardless of financial or logistical difficulties” (see paragraph 100 and the judgments cited therein). We fully subscribe to this view. Budgetary considerations cannot justify non-compliance with the prohibition of torture, inhuman and degrading treatment. We would like to add, however, an important additional consideration in this respect. In our view, the Court, when prescribing measures to implement a judgment, is nonetheless entitled to grant an adequate time-frame for adjustment to the Convention standards, especially if it departs from its earlier case-law. Such a solution, consisting in granting a transitory period to High Contracting Parties, may facilitate the implementation of the Convention and further human rights protection. We regret that the majority did not consider it necessary to take this point into account.

It is important to add that – assuming the economic arguments cannot be completely ignored in human rights adjudication – the economic analysis of law applied to prison condition questions has to take into account not only the costs of implementing the most fundamental human rights standards but also the enormous social and financial costs of a penitentiary system which does not ensure adequate space in prisons.

8. As stated above, we consider that the presumption of a violation of Article 3 if the personal space falls below the 4 sq. m standard can be rebutted only in exceptional circumstances. The discomfort of life in such a space has to be counterbalanced by special factors which substantially alleviate the situation of detainees and go beyond the normal prisons conditions which should accompany the 4 sq. m standard. In our view, the respondent State has to show that the impact of those factors is such that the suffering experienced in prison does not exceed the level inherently connected with detention. We acknowledge that the Croatian Government has presented a number of factors which alleviated the lack of sufficient space in prison in the instant case. However, the measures taken do not seem to exceed what should be the norm in prisons where the 4 sq. m standard is observed. Therefore, in our view, all those factors taken together do not rebut the strong presumption mentioned above. Accordingly we consider that the respondent State violated Article 3 also with regard to the periods in which the applicant disposed of between 3 and 4 sq. m per person.

9. We note that the Court found a violation with regard to a period of twenty-seven days of consecutive detention with less than 3 sq. m and no violation as regards the remainder of the non-consecutive periods in which the applicant disposed of less than 3 sq. m. In fact, there were forty-seven days in a period of less than half a year when the applicant disposed of less than 3 sq. m. In our view – even assuming that the 3 sq. m standard were the correct one – there are no grounds for differentiating between those periods, given their proximity in time and their cumulative effect. The longer the deprivation of sufficient space, the stronger its psychological effects. In those circumstances, the intervals during which the applicant had slightly better accommodation did not provide any relief against the dehumanising effect of longer term detention without adequate space.

10. In conclusion, we regret to say that the judgment in the instant case petrifies and spreads standards that are difficult to accept under the Convention.

## JOINT PARTLY DISSENTING OPINION OF JUDGES LAZAROVA TRAJKOVSKA, DE GAETANO AND GROZEV

1. While we agree with the majority on a number of issues in the present case, it is both on a principal issue and on a question of principle that we find ourselves unable to follow them. Consequently, we voted for a finding of a violation with respect to the whole time period during which the applicant had less than 3 square metres of personal space (operative point 3 of the judgment).

2. The principal issue on which we find ourselves in disagreement with the majority is the standard for minimum personal space, which triggers closer scrutiny under Article 3. With this decision, the Court has set the standard at 3 square metres per person in a multi-occupancy cell, at variance with the position espoused by the CPT, which has set the minimum requirement at 4 square metres. While we fully agree with the approach that space below a minimum requirement should not automatically trigger a violation, we respectfully disagree with the majority on what that minimum space should be. In our view, the Court should have followed the standard set by the CPT and should have held that personal space of less than 4 square metres triggers the closer scrutiny mentioned above.

3. Our disagreement with the majority is founded on our understanding that with respect to prison conditions, even more than in other cases, the Court acts in a complex institutional set-up, not only at the national level, but also at the international level. As a direct result of this, it has limited powers to remedy a situation when it finds that there has been a violation of Article 3 because of inhuman treatment due to prison conditions. Thus it is of particular importance that the position of the Court is well and truly synchronised with that of the other actors in this field. This synchronisation is crucial for the overall effectiveness of its interventions and the clarity of the standards it lays down.

4. Prison overcrowding is, in most cases, a systemic problem, and one that affects not just a single individual (the applicant). It is therefore not easy to place it in the conceptual framework of classical litigation, where courts adjudicate on matters which are of interest to a single applicant or plaintiff. The remedies required are of also of a systemic nature, necessitating a complex policy response.

5. This Court, on the other hand, has a limited arsenal of tools that it can use to respond to the issue of inadequate prison conditions. It can find a violation of Article 3 and can also award damages under Article 41 of the Convention. In the specific context of prison conditions, the second of those tools – the award of damages – which plays an important role in other types of human rights violations, is particularly problematic. Such awards (generally in respect of non-pecuniary damage) certainly do have their place as a compensatory remedy, but when it comes to the overriding interest in

putting an end to systemic inhuman prison conditions, just satisfaction awards create a particular tension. This tension between retrospective relief – the awards – and prospective relief – improving the conditions in prisons – is very real. In an ideal world, awards of damages should prompt governments to respond with measures addressing the underlying issues of inhuman prison conditions, but in the real world that link is far from being so direct and immediate. While awards in many cases have prompted reform efforts, they could also easily create a debt encumbrance, inhibiting proactive measures that could avoid and prevent inhuman treatment of prisoners in the future.

6. This apparent need for a multifaceted policy response to inhuman conditions in prisons has forced courts in other jurisdictions to develop a more “hands on” approach, through a general review of conditions in a specific prison and the granting of injunctive relief<sup>1</sup>. In the experience of the United States, this approach has been noted to have significant advantages in terms of providing a check on prison administration that is both independent and sufficiently powerful to force change<sup>2</sup>. Such injunctive relief could cover numerous areas of the daily management of a prison establishment, going well beyond the question of occupancy levels, into areas such as personnel recruitment, training and complaints mechanisms. It is also noteworthy that, unlike the outcome of classical litigation, such injunctive orders usually take years to be implemented and are monitored on a continuous basis by the courts. This approach of direct involvement of the courts in the daily management of prisons, while posing certain challenges, has clearly established itself as a successful model<sup>3</sup>.

7. The Court has also recognised the need to go beyond the damages approach in tackling inhuman prison conditions. It has addressed the issue through the prism of Article 46, by indicating more specific policy measures. As noted in the present judgment (see paragraph 95), it has urged governments in a number of countries, such as Belgium, Greece, Slovenia, Romania, and the Republic of Moldova, to improve conditions of detention, in a number of leading judgments. In *Orchowski v. Poland* (no. 17885/04,

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<sup>1</sup> The experience of federal courts in the United States in ordering injunctive relief, which started in the sixties and gradually developed to become an integral part of legal guarantees against inhuman treatment, is well described in the legal literature, see Michele Deitch, “The Need for Independent Prison Oversight in a Post-PLRA World”, *Federal Sentencing Reporter*, Vol. 24, No. 4, pp. 236-44.

<sup>2</sup> Elizabeth Alexander, “Watching the Watchmen after Termination of Injunctive Relief”, *Pace Law Review*, Vol. 24, Issue 2, Spring 2004.

<sup>3</sup> While federal legislation was enacted in 1996 to limit the involvement of the courts in ordering injunctive relief with respect to prison establishments, the approach as such was not challenged. Studies have noted that following those legislative amendments injunctive orders *vis à vis* prison establishments have become less broad and more focused, see Margo Schlanger, “Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders”, *N.Y.U.L. Rev.* 81, no. 2 (2006), pp. 550-630.



§ 154, 22 October 2009) the Court explicitly recognised that an award of damages could not have “any impact on general prison conditions because it cannot address the root cause of the problem” and recommended both that measures be taken to reduce the occupancy level in cells and that a procedure be introduced to ensure a speedy reaction to complaints concerning inadequate conditions of detention, with transfers where necessary.

8. While this Court, because of the institutional set-up in which it works, cannot provide injunctive relief (the Rule 39 interim measures being limited to cases where life or irreparable damage to health are in issue), when dealing with prison condition cases it is still facing a problem which requires a multifaceted policy response. It is our view that in order to deliver the best response, the Court should first focus, through the prism of Article 46, on the structural response needed in the specific circumstances of the case before it. It should take special care to identify the underlying causes of the inhuman prison conditions it has established and, where possible, indicate specific policy measures, the implementation of which would then fall within the sphere of competence of the other actors in the field. Moreover, the Court should be alert to the need for coordination with the other institutions in the field, and to the limits this need for coordination necessarily imposes.

9. Turning to the specifics of the present case, it is our view that the majority judgment does not provide sufficiently convincing arguments for departing from the standard set by the CPT. It is also our view that in moving away from the minimum personal space standard set by the CPT of 4 square metres, this Court is overruling the specialised agency within the Council of Europe, an agency which has the particular expertise and competence to decide on such matters. In doing so, the Court has disregarded the need for a coordinated, synchronised approach at the international level. The Court has advanced two principal arguments in this respect: the need for a holistic assessment under Article 3 of the conditions of detention, and the difference between the functions of this Court and those of the CPT. We find neither argument sufficiently convincing. Setting the standard that triggers closer scrutiny at 4 square metres clearly does not exclude a holistic approach in evaluating all relevant aspects of the conditions in a specific prison or, indeed, even in a specific wing of a prison. As to the second argument, we find this even more difficult to accept. While the Court and the CPT clearly have different functions, it is perfectly possible, and in our view highly necessary, for those two institutions to use the same standards, in this case the same measurement of 4 square metres of minimum personal space, if they are to achieve the complex tasks they have before them.

10. Finally, considering the circumstances of the instant application, and applying the standard of strict scrutiny with respect to the non-consecutive

periods during which the applicant was held in conditions with less than 3 square metres of personal space, we do not find that there were sufficient factors to counterbalance this lack of space. While certain additional activities provided within the prison facility might be such as to alleviate the lack of cell space, the primary factor to compensate for the scarce allocation of personal space in the cell is still the existence of additional space in the common areas. To hold otherwise would imply diminishing the importance of space as a key factor in the Article 3 analysis. Taking this into account, we do not consider that in the present case those counterbalancing factors were sufficient. The extra space available to the prisoners, namely the corridors connecting the cells and the common room, which were accessible during the hours when the cell doors were open, did not significantly increase the overall space available to prisoners. Neither did the two hours allowed for use of the outside yard go significantly beyond the minimum requirement of one hour of outdoor activities. These factors, taken as whole, did not sufficiently compensate for the lack of personal space with respect to the periods during which the applicant had less than 3 square metres of personal space in the cell. However, they were sufficient, to our mind, in order to compensate for the lack of personal space with respect to the periods during which he had less than 4 square metres of personal space.

## PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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## I. Introduction (§§ 1-2)

1. Unlike the majority, I voted in favour of finding a violation of Article 3 of the European Convention on Human Rights (the “Convention”) with regard to the placement of the applicant in Bjelovar prison, during the entire period of time in which he disposed of less than 4 sq. m of personal space.

2. Since the majority assume that they are not bound by the standards set by the Committee of Ministers, the Committee for the Prevention of Torture (the CPT) and the Council for Penological Cooperation (PC-CP) of the European Committee on Crime Problems (CDPC) of the Council of Europe, I address, in the first part of this opinion, the underlying crucial issue of the legal nature of these standards<sup>1</sup>. After an introductory note on the role of soft law in general international law, I turn to a detailed analysis of its specific function within European human rights law, whereby I seek to prove that evolutive interpretation, European consensus and hardening of soft law compose the three pillars of the Council of Europe’s normative system. For the limited purposes of this opinion, I entertain a discussion on the Council of Europe’s rule of recognition, having regard to its long-standing, deep-seated commitment to the hardening of soft law in certain legal fields with a view to the “further realisation of human rights” and “economic and social progress” in Europe.

Subsequently, in the second part of this opinion, I will show that there has been a pan-European and worldwide trend towards hardening prison soft law in view of the phenomenon of prison overcrowding. I further demonstrate that the European Prison Rules (EPR) are the prototype of hardened soft law in the Council of Europe’s normative system. On the basis of the crystal-clear standards set out in this hardened soft law, I conclude that the majority are mistaken when they find that areas of 3 sq. m and even less of floor surface in multi-occupancy accommodation in prisons do not breach Article 3 of the Convention.

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<sup>1</sup> I used the expression “soft law” in my opinion appended to the judgment in the case of *Herrmann v. Germany* [GC], no. 9300/07, 26 June 2012. I did not define the word then, but I find it necessary to do so now. This is the purpose of paragraphs 3-9 of this opinion.

## First Part (§§ 3-33)

### II. Soft law in international law (§§ 3-9)

#### A. The sources of international law in Article 38 § 1 of the ICJ Statute (§§ 3-7)

3. Soft law has been considered an inherently redundant and even pernicious *contradictio in terminis*. For some it is an empty catchphrase disguising an inflating conception of international law, an attempt to impose on States political engagements to which they did not wish to consent in the first place<sup>2</sup>. For others, soft law is a “fig leaf for power”, hiding the extensive power and influence of some States and non-State actors in the international arena, a problematic instrument which circumvents State consent and therefore the domestic democratic ratification process<sup>3</sup>. In both cases, the principle of sovereign and equal States is supposedly in jeopardy.

4. Admittedly, soft law is not included among the classical sources of international law listed in the Statute of the International Court of Justice (the “ICJ Statute”). Any jurisprudential or doctrinal attempt to extend that list carries with it a heavy burden of proof. This is all the more so, the critique goes, because deformalisation of sources of law would undermine the clarity and predictability provided by a binary approach to the definition of international law. Put simply, soft law would be nothing but a by-product of politics, causing an inexorable drift towards anarchy and randomness and thus a disservice to the essential function of international law<sup>4</sup>. Claims for a return to all-or-nothing, black-and-white, binary simplicity, which alone could face the everyday complexity with its simplifying dichotomic rigour, have been raised against the cataclysmic Leviathan of soft law.

But the argument drawn from the ICJ Statute is not decisive in the pitched battle between opponents and advocates of soft law.

5. Article 38 of the ICJ Statute, which corresponds to Article 38 of the Statute of the former Permanent Court of International Justice, is not exhaustive in itself, in view, for instance, of the existence of unilateral legal

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<sup>2</sup> Prosper Weil, “Towards relative normativity in international law?”, in *American Journal of International Law*, volume 77 (1983), p. 441.

<sup>3</sup> For a caustic critique, see Klabbers, “The Undesirability of Soft Law”, in *Nordic Journal of International Law* 67 (1998), p. 391; and Koskenniemi, “Formalism, Fragmentation, Freedom: Kantian Themes in Today’s International Law”, (2007) 4 *No Foundations*, p. 18.

<sup>4</sup> See, among other critical writings, Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford, 2011, and “The Politics of Deformalization in International Law”, *Goettingen Journal of International Law* 3 (2011) 2, 503-550.

acts<sup>5</sup> or legal acts of international organisations. In the light of the Copernican change in international law after the Second World War<sup>6</sup>, it would be difficult to maintain that Article 38 is an immutable, enumerative provision, which petrified international law once and for all according to its stage of development in 1920.

6. Since the question is not closed by the ICJ Statute, it may usefully be reframed if soft law is confronted with hard law in order to verify their respective essential features and the added value of soft law, if any.

No unique substantive legal parameter is decisive for the purposes of distinguishing between hard and soft international law. Like hard law, soft law aims at setting a general rule of conduct for its addressees. Both exhibit a normative claim, with a command-like structure, which may be couched with more or less accurate terminology and precise content. Regardless of the multiple forms it assumes, soft law may appear as any other ready-to-apply norm of treaty or customary law. As a further complication, international law is not entirely hard in terms of its enforceability and justiciability. Traditionally, a lack of enforcement measures and judicial review makes international law soft.

7. Nevertheless, international soft law is distinct and distinguishable from hard law by its consequences. In spite of its normative claim, soft law may, in principle, be disregarded without the classical consequences of responsibility for internationally wrongful acts. But its non-observance may bring about adverse consequences. Hence, the addressees of soft law are not entirely free not to follow it, because they may have to endure other negative consequences of such a choice. These are not merely moral, political or reputational in nature.

### **B. Soft law where there is codification (§ 8)**

8. Where treaty law exists, complementary soft law may reveal the intention of its authors<sup>7</sup>. While strengthening the normative commitments embedded within the binding aspects of treaty law, soft law adds to its

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<sup>5</sup> The argument was admitted by the ICJ itself in *Nuclear Tests (Australia v. France)*, *Judgment*, *ICJ Reports* 1974, § 46.

<sup>6</sup> On this change, see my opinion appended to the judgment in *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016.

<sup>7</sup> I am not referring here to the category of cases in which a treaty rule makes reference to non-legal norms, respect for which is made obligatory by such reference, like Article 18 (1) (b) and (c) of the International Convention for the Suppression of Acts of Nuclear Terrorism. In this category of cases, incorporation of the non-legal standards into hard law changes the nature of those standards. These are, therefore, improper soft law instruments. In the text, I mean only proper soft law instruments, which are complementary to hard law, but have not been formally absorbed by it. This is the case, for instance, when hard and soft law instruments have an overlapping subject matter and the preamble to a treaty refers to a soft law instrument.

normative density and coherence<sup>8</sup>. It also facilitates the application of binding instruments by resolving complex, technical issues that were not envisaged when they were approved or deadlocks that had not been anticipated. It adapts them more easily to the changing needs of organisations, institutions and societies<sup>9</sup>.

### C. Soft law where there is little or no codification (§ 9)

9. Where there is no codification at all or insufficient codification of international law, soft law counts as a relevant practice of international organisations, States and non-State operators. When a legal issue becomes the object of international soft law, it is no longer part of the reserved domain of States and this paves the way for future binding international law based on State consent<sup>10</sup>. It may ultimately be formative of the *opinio juris* and State practice that generates customary international law<sup>11</sup>.

Significantly, no effort has been made until today to shed light on the way the Council of Europe – and especially the Court – uses soft law, in spite of the proliferation of all sorts of deformed sources of law in its legal discourse and some criticism as to the muddying of the waters between

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<sup>8</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 171, § 86, which refers to “relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council” as sources of rules and principles of international law which are relevant in assessing the legality of measures taken by Israel. These rules and principles can be found in the United Nations Charter, other treaties, customary international law and the resolutions are interpretative of these instruments. See even earlier, *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, pp. 77-78, § 140, which refers to “new norms and standards” that have been developed in the field of environmental law, set forth in a great number of instruments over the last two decades, stating that “[s]uch new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.”

<sup>9</sup> The choice between hard and soft law is more often than not framed in terms of obligations codified in treaties, with no mention of obligations condensed into non-negotiated, unwritten, universal customary law. The claim has been made that soft law has rendered custom obsolete. The counter-claim that a certain acceleration of the custom-formation process, in the light of the ICJ’s case-law, could make soft law unnecessary has also been raised. Neither of those claims is borne out by the Court’s case-law, as will be explained below.

<sup>10</sup> One of the most telling examples is the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965, which drew on the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly Resolution 1904 (XVIII), of 20 November 1963.

<sup>11</sup> See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p. 255, § 70, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. ICJ Reports 1986*, p. 100, §§ 188 and 191.

law and politics in the Court’s reading of the Convention<sup>12</sup>. The following reflections seek to provide such conceptualisation.

### III. Soft law in European human rights law (§§ 10-22)

#### A. The constitutional principle of evolutive interpretation (§§ 10-13)

10. The Convention cannot be interpreted in a vacuum, but must be interpreted in harmony with other international law and soft law. Ever since *Golder*, account must be taken of any relevant principles and rules of international law applicable in the relations between the parties, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969<sup>13</sup>. From the Court’s perspective, there is no methodological difference between the interpretation of international human rights law and other international law, or between contractual and law-making treaties, and therefore it assumes that the same interpretative methods can be applied in both fields of international law. Thus the European Court of Human Rights (the “Court”) departs from the contested position that there are “self-contained regimes” within international law<sup>14</sup>. As Judge Rozakis so elegantly put it, the judges of Strasbourg “do not operate in the splendid isolation of an ivory tower built with material originating solely from the [Court]’s interpretative inventions or those of the States part[ies] to the Convention”<sup>15</sup>.

11. This methodology is warranted by the Court’s cardinal principle of interpretation to the effect that the Convention must be interpreted in the light of present-day conditions<sup>16</sup>. It was in the seminal case of *Tyrer v. the United Kingdom* that the Court for the very first time used the leitmotiv of

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<sup>12</sup> With the laudable exceptions of Luis Lopez Guerra, “Soft law y sus efectos en el ámbito del derecho europeo de los derechos humanos”, in *Teoría y derechos*, vol. 11 (2012), p. 150-67; Tulkens *et al*, “Le soft law et la Cour Européenne des droits de l’homme : Questions de légitimité et de méthode”, in *Revue Trimestrielle des Droits de l’Homme*, 23 (2012), no. 91, pp. 433-89, and Tulkens and van Drooghenbroeck, “Le soft law des droits de l’homme est-il vraiment si soft? Les développements de la pratique interprétative récente de la Cour européenne des droits de l’homme”, in *Liber amicorum Michel Mahieu*, Brussels, 2008, pp. 505-26. Other more general studies, like the New York University School of Law project on Global Administrative Law, the Heidelberg project on International Institutional Law and the exercise of international public authority and the project on Informal International Lawmaking promoted by the Hague Institute for the Internationalisation of Law, did not grapple specifically with this topic.

<sup>13</sup> *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18.

<sup>14</sup> The point was already made in my opinions in *Al-Dulimi and Montana Management Inc.*, cited above, § 71, *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015, footnote 23, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014, footnote 14.

<sup>15</sup> Rozakis, “The European Judge as Comparatist”, *Tulane Law Review*, 2005, p. 278.

<sup>16</sup> *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.



“the Convention as a living instrument”, whose interpretation has to take account of evolving norms of national and international law<sup>17</sup>. Deeply entrenched in American<sup>18</sup> and Canadian<sup>19</sup> constitutional law since the early twentieth century, this interpretation technique was introduced in European human rights law in 1978.

12. In *Tyrer*, confronted with the arguments advanced by the Attorney General of the Isle of Man under former Article 63 of the Convention that, “having due regard to the local circumstances in the Island”, the continued use of judicial corporal punishment on a limited scale was justified as a deterrent, the Court replied (§ 38):

“it is noteworthy that, in the great majority of the member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times; ... If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country.”

By concluding that the Isle of Man must be regarded as sharing fully that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble to the Convention refers, the Court rejected the idea that there were local requirements affecting the application of Article 3 in the Isle of Man and, accordingly, found that the applicant’s judicial corporal punishment constituted a violation of that Article.

13. Accordingly, from the very beginning of the Court’s existence, the evolutive interpretation of the Convention was closely linked to the need for a consensual reading of the text, based on consideration of the domestic legal framework of the “great majority” of the member States of the Council

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<sup>17</sup> *Ibid.*, § 31, and later on repeated in many other leading cases, such as for example in *Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161.

<sup>18</sup> *Missouri v. Holland* 252 U.S. 416 (1920). Writing the majority’s opinion, Justice Holmes made this remark on the nature of the constitution: “With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.” The Supreme Court’s reference to “evolving standards of decency” is also understood as a clear mention of the “living constitutionalism” (see *Trop v. Dulles*, 356 U.S. 86 (1958): “The words of the [Eighth] Amendment are not precise, and ... their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

<sup>19</sup> *Henrietta Muir Edwards and others v. The Attorney General of Canada* [1929] UKPC 86, [1930] A.C. 124 (18 October 1929). The case is not only memorable because it established that Canadian women were eligible to be appointed senators, but also because it introduced the “living tree doctrine” in Canadian constitutional law, according to which the constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing times.

of Europe and, ultimately, of the common heritage of political traditions, ideals, freedom and the rule of law, to which the Preamble makes reference.

### **B. Deformalisation of sources of law (§§ 14-20)**

14. In Strasbourg, soft law has provided, and still provides, the most important source of crystallisation of the European consensus and the common heritage of values. In fact, soon after *Tyrer*, the Court took the fundamental step of enlarging the array of sources of law in the light of which the European consensus may be established. In *Marckx v. Belgium*<sup>20</sup> the Court took into consideration the European shared values based on the domestic law of the “great majority” of member States of the Council of Europe, as well as the 1962 Convention on the Establishment of Maternal Affiliation of Natural Children, prepared by the International Commission on Civil Status, and signed but not ratified by the respondent State, the Council of Europe 1975 Convention on the Legal Status of Children born out of Wedlock, not even signed by the respondent State, and finally the Committee of Ministers Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children. To the argument that the 1962 and the 1975 conventions had only a small number of parties, the Court replied (*ibid.*, § 41):

“Both the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between ‘illegitimate’ and ‘legitimate’ children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.”

Mirroring the interpretative techniques of constitutional courts, the Court went even further and modulated the effects of its judgment in view of the principle of legal certainty, “which is necessarily inherent in the law of the Convention as in Community Law”, dispensing the respondent State from re-opening legal acts or situations that antedated the delivery of the judgment. For that purpose, it made reference to the fact that “a similar solution [was] found in certain Contracting States having a constitutional court: their public law limit[ed] the retroactive effect of those decisions of that court that annul[led] legislation.”<sup>21</sup> As if it were a European Constitutional Court, the Court resorted to the principle of legal certainty to accord itself the implied power of modulation of the temporal effect of its own judgments.

15. Later on, in *Mazurek v. France*<sup>22</sup>, the Court again invoked the Convention on the Legal Status of Children born out of Wedlock, which at

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<sup>20</sup> *Marckx v. Belgium*, 13 June 1979, Series A no. 31.

<sup>21</sup> *Ibid.*, § 58.

<sup>22</sup> *Mazurek v. France*, no. 34406/97, § 49, ECHR 2000-II.

that time had been ratified by only a third of the member States of the Council of Europe, but not by the respondent State, as evidence of the “great importance” attached by member States to the equal legal treatment of children born out of wedlock.

16. In the cases of *Christine Goodwin*<sup>23</sup>, *Vilho Eskelinen*<sup>24</sup>, and *Sørensen and Rasmussen*<sup>25</sup>, the Court was guided by the European Union’s Charter of Fundamental Rights, even though this instrument was not yet binding. Furthermore, in *McElhinney*<sup>26</sup>, the Court took note of the European Convention on State Immunity, which at the time had been ratified by eight member States, not including the respondent State. In *Glor*<sup>27</sup>, the Court referred to the Convention on the Rights of Persons with Disabilities as the basis of “a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment”, despite the fact that the relevant facts had taken place before the adoption of the Convention by the United Nations General Assembly and the respondent State had not ratified the Convention at the time of the Court’s judgment.

17. Finally, in the landmark case of *Demir and Baykara v. Turkey*, after reiterating the principle that:

“the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies”

and having regard to the developments in labour law, both international and national, and to the pertinent practice of Contracting States, the Court concluded that the right to bargain collectively with the employer had, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of the interests set forth in Article 11 of the Convention. For that purpose, it cited the relevant ILO conventions, which the respondent State had ratified, the corresponding interpretations of the ILO Committee of Experts, as well as Article 28 of the European Union’s Charter of Fundamental Rights, Article 6 § 2 of the European Social Charter, which Turkey had not ratified, the European Committee of Social Rights’ interpretation of this Article, and Principle 8 of Recommendation No. R (2000) 6 of the Council of Europe’s Committee of Ministers on the status of public officials in Europe<sup>28</sup>.

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<sup>23</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

<sup>24</sup> *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II.

<sup>25</sup> *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, ECHR 2006-I.

<sup>26</sup> *McElhinney v. Ireland* [GC], no. 31253/96, ECHR 2001-XI.

<sup>27</sup> *Glor v. Switzerland*, no. 13444/04, § 53, ECHR 2009.

<sup>28</sup> *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 146-54, ECHR 2008-VI. In paragraph 78, the Court stated, in a remarkably clear way, as follows: “The Court observes in this connection that in searching for common ground among the norms of international

18. In other words, for the purposes of interpreting the Convention, the legal relevance of human rights standards set out in other treaties and conventions depends neither on the number of their respective ratifying parties, nor on the number of Council of Europe member States bound by them, nor even on whether the respondent State itself has ratified them. Thus, under European human rights law, hard law is profoundly interwoven with soft law.

19. Evolutive interpretation of the Convention has also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has made use, for example, of the work of the European Commission against Racism and Intolerance (ECRI)<sup>29</sup> and the European Commission for Democracy through Law (the Venice Commission)<sup>30</sup>.

### **C. European consensus as the conceptual framework of normativity (§§ 21-22)**

20. From the seminal formulation of the European consensus in *Tyrer* emanates a vision of a deliberative, international democracy in which a majority or representative proportion of the Contracting Parties to the Convention is considered to speak in the name of all and is thus entitled to impose its will on other Parties. As a matter of constitutional principle guiding the Council of Europe, consensus is decoupled from unanimity.

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law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State”. Another feature of this judgment worth mentioning is that the Court sometimes referred to the situation of domestic law in the “great majority” of States (§§ 76, 79) and other times in the “majority” of States (§§ 82, 85, 106, 165). In paragraph 151, it refers to both! This clearly shows that the Court did not accord much relevance to the quantitative weight of the majority relevant for the purposes of building a European consensus, admitting that such majority may well be a narrow one, when articulated with other sources of international law.

<sup>29</sup> The first case where the Court cited an ECRI General Policy Recommendation was *Beard v. the United Kingdom* [GC], no. 24882/94, § 70, 18 January 2001. The source quoted was Recommendation No. 3: Combating Racism and Intolerance against Roma/Gypsies.

<sup>30</sup> The first case where the Court cited the Venice Commission was *Hirst v. the United Kingdom* (No. 2), no. 74025/01, § 24, 30 March 2004. The source quoted was the Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 51st Plenary Session (5-6 July 2002).

Consensus as a *volonté générale* can still exist even if not all Contracting Parties concur in the same reading of the Convention<sup>31</sup>.

As has been shown above, it cannot be argued today that the founding fathers did not want this to happen, and that States have been trapped into engagements that they did not agree upon<sup>32</sup>. The now worn-out argument of lack of State consent is sometimes accompanied, as the other side of the coin, by the no less *démodé* critique about the Court's lack of political legitimacy to interpret innovatively the Convention, still less to create law<sup>33</sup>, using soft law to circumvent the competent legislative bodies and to flout the principles of democracy, rule of law and subsidiarity<sup>34</sup>. Underlying this speech is almost invariably the sovereigntist leitmotiv *in dubio pro mitius*.

21. The Preamble sets the Convention against the background of the Council of Europe's general aims, with a view to creating "greater unity" between its member States, based on "a common understanding and observance of the Human Rights upon which they depend". In the Statute of the Council of Europe, the language used makes reference not only to a "closer unity between all like-minded countries of Europe", but also to an "organisation which will bring European States into closer association". The very first Article of the Statute sets as the aim of the Council "to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". In the explicit terms of the Statute, the realisation of these ideals and principles warrants "agreements and common action" in all relevant areas of social life (economic, social, cultural, scientific, legal and administrative matters) and "in the maintenance and further realisation of human rights and fundamental freedoms". No better words could proclaim the primacy of human rights obligations in all areas of governance. The principle *in dubio pro persona* could find no better formulation. Social and economic progress is thus intimately connected to the progress of human rights, representing two sides to the same coin.

22. This being so, evolutive interpretation, European consensus and hardening of soft law compose the three pillars of the European normative system within which State consent is relevant. Based upon these pillars

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<sup>31</sup> It is highly symbolic that the Court resorts to this historically and philosophically much charged expression (*volonté générale*) in the French version of *Demir and Baykara*, cited above, § 84.

<sup>32</sup> See above, footnote 13.

<sup>33</sup> See on this critique my opinion appended to *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above.

<sup>34</sup> It is interesting to note that a similar critique was addressed by the European Parliament to the use of soft law by the Commission, which has been accused of acting *ultra vires* and extending the competence of the Union beyond the principle of *compétence d'attribution* (European Parliament Resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments (2007/2028(INI)).

from the very beginning, and animated by a common quest for “economic and social progress”, the Council of Europe legal order can no longer be confused with the traditional international accord of juxtaposed egoisms. Sovereignty is no longer an absolute given, as in Westphalian times, but an integral part of a human rights-serving community<sup>35</sup>.

In this context, the Convention cannot but be interpreted in the light of the formally binding “agreements” (i.e. treaties)<sup>36</sup> and the immense plethora of formally non-binding “common actions” performed by the political and technical bodies of the Council of Europe<sup>37</sup>, such as recommendations, guidelines and declarations of its Committee of Ministers<sup>38</sup>. Furthermore, the Convention itself calls for an open-minded approach to international law and soft law, since it is inspired by the Universal Declaration on Human Rights, as the Preamble states, and remains open to other legal instruments, both domestic and international, when these offer a better human rights protection (Article 53 of the Convention). In sum, this interpretative latitude is dictated by the letter and the very nature and purpose of the Convention itself.

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<sup>35</sup> On this point see my opinion appended to *Sargsyan*, cited above.

<sup>36</sup> There are two types of Council of Europe treaties: harmonisation treaties which seek to achieve harmonisation of national legislation and cooperation treaties which aim at facilitating and improving international cooperation between national law enforcement agencies (see Bartsch, “The Implementation of Treaties Concluded within the Council of Europe”, in Jacobs and Roberts (eds), *The Effect of Treaties in Domestic Law*, 1987, p. 197; “The specificity and added value of the acquis of the Council of Europe treaty law”, Working document prepared by Mr Jeremy McBride, AS/Jur (2009) 40, 17 September 2009.

<sup>37</sup> As the Court itself put it in *Soltysyak v. Russia*, no. 4663/05, § 51, 10 February 2011: “The Court reiterates its constant approach that it takes into account relevant international instruments and reports, and in particular those of other Council of Europe organs, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field.”

<sup>38</sup> On Council of Europe law, see Kleijssen, “Council of Europe standard-setting in the human rights field”, in *NJCM-Bulletin*: jaarg. 35, nr. 7 (nov.-dec. 2010), pp. 897-904; Benoit-Rohmer and Klebes, *Council of Europe Law - Towards a pan-European legal area*, Strasbourg: Council of Europe Press, 2005; Polakiewicz, *Treaty-making in the Council of Europe*, Strasbourg, Council of Europe Press, 1999. As put by Kleijssen, soft law instruments in the Council of Europe “are usually adopted by all member states and thus represent a common European position which refers to legally-binding standards (such as the case-law of the Court).” This means that “the relationship between the Court’s case-law and other Council of Europe standards is not circular, but it could be rather described as a spiral, or even as a symbiosis.”

#### IV. Soft law and the Council of Europe’s rule of recognition (§§ 23-33)

##### A. The rule of recognition of a democratic international community (§§ 23-26)

23. In European human rights law, a formal theory of sources of law is still prevailing. Based on the doctrine that the International Court of Justice expounds in its *North Sea Continental Shelf* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* judgments<sup>39</sup>, the Court admits that a treaty provision may become customary international law, if the following conditions are fulfilled: the provision concerned must be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law; there must be corresponding settled State practice and evidence of a belief that such practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*)<sup>40</sup>. The Court has also expressed its position on the existence of peremptory norms in international law, such as the prohibition of torture<sup>41</sup> or the prohibition of genocide<sup>42</sup>.

Yet, as has been demonstrated, there is no water-tight, binary distinction between hard law and non-law, since European human rights law evolves by means of a rich panoply of sources that do not necessarily share the classical, formal features of hard international law<sup>43</sup>. The “further realisation

<sup>39</sup> *North Sea Continental Shelf, Judgment (ICJ Reports 1969, pp. 41-44, §§ 71-78)* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 98, § 186*.

<sup>40</sup> See on the Court’s formal theory of sources of law, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 165-75, ECHR 2015; *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 266-68, ECHR 2015; *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, §§ 88-94 and 202-215, ECHR 2014; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 75, ECHR 2012; *Van Anraat v. the Netherlands (dec.)*, no. 65389/09, §§ 90-92, 6 July 2010; *Kononov v. Latvia* [GC], no. 36376/04, §§ 203, 211, 215 and 221, ECHR 2010, and the dissenting opinion in that case of Judge Costa joined by Judges Kalaydjieva and Poalelungi; *Medvedyev and Others v. France* [GC], no. 3394/03, §§ 65, 85 and 92, ECHR 2010; *Cudak v. Lithuania* [GC], no. 15869/02, § 66, ECHR 2010; *Stoll v. Switzerland* [GC], no. 69698/01, § 59, ECHR 2007-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 61-66, ECHR 2001-XI; and *Banković and Others v. Belgium and Others (dec.)* [GC], no. 52207/99, § 66, ECHR 2001-XII. In *Jones and Others*, cited above, § 198, the Court considered the ICJ’s case-law to be “authoritative as regards the content of customary international law”. It has been argued that a certain acceleration of the custom-formation process, in the light of the ICJ’s doctrine, could render soft law unnecessary, but the Court’s case-law does not confirm this point of view.

<sup>41</sup> *Al-Adsani*, cited above, § 61.

<sup>42</sup> *Jorgić v. Germany*, no. 74613/01, § 68, ECHR 2007-III.

<sup>43</sup> The typology of these forms is immensely rich. They include non-conventional international agreements, like the Helsinki Final Act (see for example, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, no. 23885/94, § 40, 8 December 1999); treaties not ratified by the respondent State (see for example, *Marckx*, cited above); declarations of

of human rights” calls for a certain degree of deformalisation, without abandoning the formal theory of sources of law. In fact, in Strasbourg there has never been a monopoly of formalism in the ascertainment of international law.

24. However, the inherent deformalisation of European human rights law is not a synonym of nihilist dissolution of legality, and there is a very fundamental reason for this. In the Council of Europe’s legal order, State consent is framed within the context of a cosmopolitan perspective of the universality of human rights and a dialogic understanding of the common heritage of values of European societies.

25. In the Council of Europe, the recognition rule is no more a *Lotus*-type<sup>44</sup>, State-centred, narrowly bilateral, exclusively voluntaristic, top-down norm-creation mechanism, but a democratic-type, individual-centred, broadly multi-lateral, purposefully consensual, bottom-up norm creation mechanism which involves European States and other European and non-European non-State actors. Distancing itself from an outdated *jus inter gentes*, the Council of Europe legal order has become a truly *jus gentium*, based on a participated, accountable and multi-level international law-making system which is not the preserve of States<sup>45</sup>.

Cosmopolitanism links the Council of Europe legal order with the world, as much as the dialogue with the European domestic legal orders, and notably with their apex domestic courts, links it with the values of European society. Since the Council of Europe normative order already meets standards of democracy, its recognition rule is not linked to democratic decision-making processes on the domestic level. Soft law, which does not

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international organisations, like the Universal Declaration on Human Rights and other General Assembly Declarations (see for example, *K.-H. W. v. Germany* [GC], no. 37201/97, § 95, ECHR 2001-II); resolutions and recommendations of international organisations, like those of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe (see for example, *Mosley v. United Kingdom*, no. 48009/08, §§ 87, 119 and 124, 10 May 2011); General Comments of international organisations, like those adopted by the United Nations treaties bodies (see for example, *Bayatyan v. Armenia* [GC], no. 23459/03, § 105, ECHR 2007); and Codes of Conduct and Guidelines of international organisations, like those of the World Health Organisation (see for example, *Oluic v. Croatia*, no. 61260/08, § 60, 20 May 2010); commentaries and studies by ONGs, like the International Committee of the Red Cross study on customary international humanitarian law and commentaries on the Geneva conventions (see for example, *Korbely v. Hungary*, no. 9174/02, §§ 50, 51 and 90, ECHR 2008), and reports of individuals, like those of the United Nations Secretary-General (*Korbely*, cited above, § 90). This latter case is also remarkable due to the high relevance given to scholarly opinion in paragraphs 82 and 87.

<sup>44</sup> “*Lotus*”, *Judgment No. 9, 1927, PCIJ, Series A, No. 10*, at p. 18: “The rules of law binding upon States ... emanate from their own free will ...”

<sup>45</sup> This is not a new claim (see on the role of other subjects in international law, *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: ICJ Reports 1949*, p. 178, and also Lauterpacht, “The Subjects of International law”, in Lauterpacht (ed.), *International Law, The Collected Papers of Hersch Lauterpacht, volume I: The General Works*, Cambridge, CUP, 1970, § 48).



require formal domestic ratification, is in any case not exempt from democratic control within the Council of Europe, performed by the Committee of Ministers, the Parliamentary Assembly and, ultimately, the Court, as a politically legitimised guarantor of the Convention (Articles 19 and 22 of the Convention). Furthermore, the involvement of States and grass-roots non-State actors in the exercise of law-making powers is not only testament to the principle of subsidiarity, but indeed reinforces the democratic nature of the process and the responsiveness of the international public policy-making system towards the European people.

Put differently, the European normative order exists beyond sovereign statehood, bilateralism and opposability. Since the State is not the sole possible subject capable of creating international law, a State-will theory of sources of law gives way to a democratic international community-based normativity theory.

26. The obvious higher degree of complexity of such a recognition rule should not be misunderstood as entailing a higher degree of legal uncertainty, and therefore as meaning that the value of the rule of law diminishes or entirely vanishes. There is no necessary correlation between the former and the latter. The degree of legal certainty will rather depend on the substance of the legal discourse<sup>46</sup>. In a world of decentralised and deformalised international law, legal certainty is more a question of substance than one of form and procedure, and certainly not a question of the more or less transparent intent of the stakeholders. The touchstone of legal certainty is neither the form which encapsulates the norm nor the procedure by which the norm is created, but definitely the substance of the norm. This is all the more so in a constitutional order, like that of the Council of Europe, where the rule of recognition is not neutral and value-free, but substantive and value-charged.

### **B. The deep-seated commitment to hardening soft law (§§ 27-30)**

27. In the *continuum* between hard law and soft law, several factors may harden the text. Like a *degradé normatif*<sup>47</sup>, the gradual normativity of the text increases with the number of these factors that are present and

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<sup>46</sup> On this point see my opinion appended to *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, and its main message: legal discourse, and particularly judicial discourse, is not an instrument of interest-oriented *Realpolitik*. The present opinion on law sources must be read in the light of my reflections in the *Câmpeanu* case on legal argumentation.

<sup>47</sup> Pellet, “Le ‘bon droit’ et l’ivraie –plaidoyer pour l’ivraie”, in *Mélanges offerts à Charles Chaumont, Le droit des peuples à disposer d’eux-mêmes. Méthodes d’analyse du droit international* (1984), p. 488.

decreases with their absence<sup>48</sup>. In this gradualist logic, it is ultimately up to the Court to decide “how much weight” to attribute to these hardening factors of soft law<sup>49</sup>.

28. Soft European human rights law may be hardened by certain factors that relate either to the rule-making procedure or to the rule-application procedure. These are “building bricks in a wall of normativity”<sup>50</sup>.

First, the prescriptive language adopted in a text or the label attached to the instrument is indicative of its normative nature. A text with a prescriptive language or label must be read, in principle, as a standard-setting text, which goes beyond a mere declaratory statement or a purely programmatic assertion.

Second, the degree of linguistic accuracy and content precision of the text is a clear indication of its normative nature. The more accurate the terminology of the text and the more precise its content, the stronger its normative claim<sup>51</sup>. An extensive, detailed description of what is being regulated speaks in favour of a hardened law, which leaves no room for grey areas.

Third, the existence of *travaux préparatoires*, explanatory reports and commentaries, with a thorough discussion of the causes and consequences of the policy choices made, increases the text’s normative density.

Fourth, the complexity of the deliberation procedure, including the voting pattern, is an additional hardening factor<sup>52</sup>. Widespread acceptance of the text tends to legitimise its normative claim.

Fifth, wide publicity given to the normative text seeks to secure general awareness and effective compliance from its addressees.

Sixth, the delegation of authority for interpretation and conflict resolution to an independent third body and the existence of follow-up

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<sup>48</sup> The idea of a graduated normativity in international law has been acknowledged both in general international law (see the provisions on *jus cogens* of the Vienna Convention on the Law of Treaties, Articles 53 and 64), and in the Convention itself, Article 15.

<sup>49</sup> *Tanase v. Moldova* [GC], no. 7/08, § 176, ECHR 2010.

<sup>50</sup> The expression comes from Klabbers, “Reflections on Soft International Law in a Privatized World”, in *Finnish Yearbook of International Law*, volume XVI (2005), p. 322.

<sup>51</sup> The same could be said of some hard law provisions, like treaty provisions of a programmatic nature related to the obligation to undertake to take steps “to the maximum of its available resources” towards full realization of economic and social rights (see my separate opinion in *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012), or the obligation to co-operate in good faith or to consult together (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, ICJ Reports 1980, p. 95, § 48).

<sup>52</sup> *Aegean Sea Continental Shelf, Judgment*. ICJ Reports 1978, p. 39, § 96, and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment*, ICJ Reports 1994, p. 121, § 23: in order to ascertain if an international agreement has been concluded, “the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up”.

mechanisms strengthen the compliance obligation<sup>53</sup>. Norm inobservance may have not only a reputational or political cost, but also other negative consequences, such as an obligation to justify or even change the infringing conduct and provide remedies<sup>54</sup>. Accountability mechanisms reinforce the counter-factual force of the normative text.

Seventh, and finally, subsequent practice confirming or developing the standards set out in the text reinforce the standard-setting function of the text<sup>55</sup>. Even before reaching the point of crystallisation of customary law, the repetition of soft law by the same or different public authorities hardens its normative claim<sup>56</sup>. While the mere accumulation of non-law instruments cannot *per se* create international law, the emergence of an *opinio juris*, if accompanied by other hardening factors, can transmute such instruments into international legal norms, by sliding them up the scale of international normativity and thus integrating them into the Council of Europe's binding normative system.

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<sup>53</sup> Kleijssen, cited above, p. 899: “such instruments may provide for a ‘follow-up’ mechanism in which the Committee of Ministers may ask member states to inform it about measures taken to implement that recommendation. This is a measure that has been used in all the most recent Council of Europe recommendations in the human rights field, in order to ensure that such instruments become a concrete source of reference for action in the member states”. In fact, he continues: “The first point to make is that the Council of Europe spends already far more resources on human rights monitoring than on human rights standard-setting, which reflects the high priority attached to monitoring and implementation of standards.” On the impact of these monitoring mechanisms, including the CPT, on member States, see “Practical impact of the Council of Europe monitoring mechanisms in improving respect for human rights and the rule of law in member states”, Directorate General of Human Rights and Legal Affairs of the Council of Europe, 2014, pp. 16-56, and especially pp. 32-35; and Benoît-Rohmer, “Mécanismes de supervision des engagements des États membres et autorité du Conseil de l'Europe”, in Haller *et al*, *Law in Greater Europe*, 2000; and de Vel and Markert, “Importance and weaknesses of the Council of Europe Conventions and of the Recommendations addressed by the Committee of Ministers to member states”, in Haller *et al*, cited above. Monitoring mechanisms that are not established by a treaty rely at least to some extent on treaty-based standards, like those of the Convention, or the more general commitment in Article 3 of the Statute of the Council of Europe (McBride, cited above, § 54).

<sup>54</sup> Such obligations have been acknowledged even for purely political commitments. In its Resolution on International Texts of Legal Import in the Mutual Relations of their Authors and Texts Devoid of Such Import, 29 August 1983, the Institute of International Law concluded as follows: “The violation of purely political commitments justifies the aggrieved party in resorting to all means within its power in order to put an end to, or compensate for, its harmful consequences or drawbacks, in so far as such means are not prohibited by international law.” *A fortiori*, remedies may be requested for harm caused by violation of soft law.

<sup>55</sup> This is not to say that law only exists to the extent with which it is complied. Such impact-based approach to law-ascertainment is too strict, since it puts the cart before the horse.

<sup>56</sup> See *Demir and Baykara*, cited above, §§ 48-52, and *Bayatyan v. Armenia*, cited above, §§ 46-49, and contrast *Stummer v. Austria* [GC], no. 37452/02, §§ 105-106, ECHR 2011.

29. The Court considers these hardening factors of its own motion, even when the parties have not invoked them in their pleadings, or where they have occurred after the facts complained of<sup>57</sup>. It is also telling that, in the eyes of the Court, they are not a *factum*, to be regarded as a mere sociological reality, but a source of *jura*, subject to the principle *jura novit curia*.

30. Once hardened by one or more of the above-mentioned factors, soft law produces the same legal effects as hard law, regardless of the absence of the formal and procedural requirements of the latter. Hardened soft law is on a par with binding international law. First, hardened soft law has an entitling effect, so that any State acting in conformity with hardened soft law cannot thereby be committing an internationally unlawful act, and can invoke it before a court of law or arbitrator. Second, hardened soft law is an imperative constraint, the flouting of which constitutes an internationally unlawful act. Thirdly, hardened soft law also has an abrogatory effect on other conflicting law. Fourthly, hardened soft law may not be re-softened. Once it has passed the hard-law threshold, there is no turning back. The softening of law has its limit in the constitutional force of the Convention and its protocols. I will now take this line of argument one step further.

### C. The constitutional prohibition on softening hard law (§§ 31-33)

31. There is a major caveat to the acknowledgement of the role of soft law in European human rights law. Let there be no misunderstanding: the body of European human rights as posited in the Convention and the additional protocols is hard law, and the authority for their interpretation is delegated to an independent third body, the Court. This is very hard law and it does not bow gracefully to overriding political demands, regardless of the size of the demanding majority, prevailing even over conflicting constitutional law of the member States of the Council of Europe<sup>58</sup>.

32. Decidedly, the constitutionalisation of the European legal order puts an absolute bar on the softening of law. Hard European human rights law may not be softened. Softening of existing hard international law would be tantamount to circumventing binding international obligations. This would evidently constitute a fraudulent evasion of international law, defeating the purpose of the Convention and the aim of the Council of Europe. When implementing the Convention and the Court's judgments, as any other

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<sup>57</sup> Both Judge Zagrebelsky in his opinion attached to the *Demir and Baykara* judgment, cited above, and Judge Gyulumyan in her opinion in *Bayatyan*, cited above, underscored the fact that the soft law instruments used by the majority were produced after the facts complained of.

<sup>58</sup> See my joint separate opinion, with Judge Dedov, appended to *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, and my separate opinion appended to *Fabris v. France* [GC], no. 16574/08, ECHR 2013.

agreement and common action of the Council of Europe, member States have an enforceable obligation to “collaborate sincerely and effectively in the realisation of the aim of the Council”, as set out in Article 3 of the Statute of the Council of Europe. Should it fail to fulfil its Article 3 obligation, any member State may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7 of the Statute; and if such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

33. Hence, soft law must not be a vehicle of political considerations to dilute or undermine the legal force of existing hard obligations. In practice, the obligatory law and non-obligatory non-law conceptual distinction still holds much water. In European human rights law, the drawing of the line between law and non-law is crystal-clear in order to preclude the downgrading of a binding norm of hard law to soft law. The boundary line is only blurred in order to upgrade a non-binding norm of soft law to hard law.

In a few words, the relationship between hard and soft law in European human rights law is a one-way street: where there is hard law, soft law may enrich it, but it may not weaken it. Were soft law to weaken existing hard law, it would be fraudulent, a breach of the European human rights normative threshold and thus a pathological phenomenon of international normativity. Soft law is one of the ways in which European law development may occur, not a way in which it regresses.

Where there is no hard law, there is evidently no relationship between two poles, and soft law may exercise alone its normative claim, in accordance with the relevant hardening factors that it puts forward.

## **Second Part (§§ 34-59)**

### **V. The hardening of prison law (§§ 34-42)**

#### **A. Worldwide (§§ 34-38)**

34. No international organisation or body has done as much for the development of prison law as the Council of Europe and particularly its Committee of Ministers and its Committee for the Prevention of Torture. Composed of highly qualified independent experts, the Committee is tasked with the implementation of prison law standards in any place of detention in Europe and elsewhere, under the jurisdiction of any member State of the Council of Europe<sup>59</sup>. The Committee of Ministers’ resolutions and

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<sup>59</sup> The CPT was set up under the Council of Europe’s European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT

recommendations, the CPT General Reports and the CPT standards<sup>60</sup> are remarkable sources of Council of Europe soft law in this field. Their language is undoubtedly prescriptive (“standards”, “rules”) and technically rigorous. Their content excels in precision. Normally, explanatory reports or commentaries enrich the normative content of the rules set out in the text. Preparatory work by experts, providing a multidisciplinary vision of the pertinent issues, provides a solid basis for the policy choices made by a unanimous decision of all the stakeholders. Wide dissemination of these standards fosters effective compliance by member States of the Council of Europe. These are not virtual, *de lege ferenda* or *in fieri* standards, but truly normative instruments which “provide guidance as to the approach which should be taken to interpreting” the Convention<sup>61</sup>.

35. The Court itself has stated repeatedly that, in spite of their strictly non-binding nature, it attaches “considerable importance” or “great weight” to these normative instruments, “which are regularly taken into account by the Court in its examination of cases concerning ill-treatment”<sup>62</sup>. It did so with regard to, among many others, Resolution (73) 5 of the Committee of Ministers<sup>63</sup>, Resolution 76(2) of the Committee of Ministers on the

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Convention), which came into force in 1989. The CPT Convention has been ratified by all the 47 member States of the Council of Europe.

<sup>60</sup> The CPT draws up a general Report on its activities, which is published once a year. In a number of its General Reports the CPT has described some of the substantive issues which it pursues when carrying out visits to places of deprivation of liberty. In this way, the CPT gives a clear advance indication to national authorities of its views regarding the manner in which persons deprived of their liberty ought to be treated. The sections drawn up to date deal with police custody, imprisonment, training of law enforcement personnel, health care services in prisons, foreign nationals detained under aliens legislation, involuntary placement in psychiatric establishments and juveniles and women deprived of their liberty. They have been brought together in a document called the “CPT standards”.

<sup>61</sup> See, *mutatis mutandis*, *Manole and Others v. Moldova*, no. 13936/02, §§ 102, 107, ECHR 2009.

<sup>62</sup> See *Meier v. Switzerland*, no. 10109/14 § 78, 9 February 2016: “importance considérable”; *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 204 and 264, ECHR 2014 (extracts): “considerable importance”, which also refers to the CPT’s eleventh general report and the twenty-first general report; *Slawomir Musiał v. Poland*, no. 28300/06, § 96, 20 January 2009: “importance of this recommendation”, *Dybeku v. Albania*, no. 41153/06, § 48, 18 December 2007: “importance of this recommendation”; *Rivière v. France*, no. 33834/03, § 72, 11 July 2006: “grand poids”. In *Shtukaturov v. Russia*, no. 44009/05, § 95, 27 March 2008: “Although these principles have no force of law for this Court, they may define a common European standard in this area”. In *Volkan Özdemir v. Turkey*, no. 29105/03, § 39, 20 October 2009: “regularly taken into account by the Court.”

<sup>63</sup> In the seminal case of *S. v. Switzerland*, no. 12629/87, § 48, 28 November 1991, the Court decided that an accused’s right to communicate with his lawyer out of hearing of a third person was part of the basic requirements of a fair trial in a democratic society and followed from Article 6 § 3 (c) of the Convention, on the basis of Article 93 of the Standard Minimum Rules for the Treatment of Prisoners, annexed to Resolution (73) 5 of the Committee of Ministers, which set forth that right.

treatment of long-term prisoners, Recommendation No. R (87) 3 on the EPR (revised and updated by Recommendation Rec(2006)2)<sup>64</sup>, Recommendation No. R (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison, Recommendation Rec (99) 4 on principles concerning the legal protection of incapable adults, Recommendation 2003(23) on the management by prison administrations of life sentence and other long-term prisoners, and Resolution 2010 (2014) of the Parliamentary Assembly of the Council of Europe on child-friendly juvenile justice: from rhetoric to reality<sup>65</sup>.

36. In paragraphs 113 and 141 of the judgment, the majority depart from this perspective. They no longer consider that the CPT standards have “considerable importance” or “great weight”, but only affirm that the Court “remains attentive to the standards developed by the CPT”. In blunt terms, the majority downgrade the importance of the CPT’s work. This is a regrettable step backwards in the protection of prisoners and other persons in detention in Europe. But that is not all.

37. The Committee of Ministers’ normative choice must be seen against the background of the hardening of prison soft law in Europe and worldwide, a point which the majority fail to consider.

Worldwide, there has been a persistent effort of the United Nations and other international organisations and bodies to extend the scope and reinforce the accuracy of the 1957 Standard Minimum Rules for the Treatment of Prisoners, namely by approving the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)<sup>66</sup>, the 1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment<sup>67</sup>, the 1990 UN Rules for the

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<sup>64</sup> See *Enea v. Italy* [GC], no. 74912/01, § 101, ECHR 2009: “Although this Recommendation is not legally binding on the member States, the great majority of them recognise that prisoners enjoy most of the rights to which it refers and provide for avenues of appeal against measures restricting those rights.”

<sup>65</sup> In addition, the Court has used the CPT national reports as reliable, impartial sources of factual information on the situation of prisons and centres of detention, since *Amuur v. France* (19776/92, § 28, 25 June 1996) and *Aerts v. Belgium* (30 July 1998, § 42, *Reports of Judgments and Decisions* 1998-V). Although the CPT is not an investigative body, its reports are important elements in describing the situation on the ground in European States.

<sup>66</sup> Adopted by General Assembly Resolution 40/33 of 29 November 1985. The Court first cited them in *V. v. the United Kingdom*, no. 24888/94, § 73, 16 December 1999: “Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low”.

<sup>67</sup> Adopted by General Assembly Resolution 43/173 of 9 December 1988. The Court first cited them in *Brannigan and McBride v. the United Kingdom*, no. 14553/89, § 61, 26 May 1993.

Protection of Juveniles deprived of their Liberty (the Havana Rules)<sup>68</sup>, the 1990 UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)<sup>69</sup>, the 2007 Istanbul statement on the use and effects of solitary confinement<sup>70</sup>, the 2010 UN Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (the Bangkok Rules)<sup>71</sup>, and, most recently, the new, much more detailed version of the Standard Minimum Rules (the 2015 Mandela Rules)<sup>72</sup>.

On 10 December 1984 the General Assembly of the United Nations adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee against Torture, composed of 10 independent members and entrusted with broad powers of examination and investigation, was established pursuant to Article 17 of that Convention and began to function on 1 January 1988.

38. This effort has been emulated at regional level, with the 1996 Kampala Declaration on Prison Conditions in Africa<sup>73</sup>, the 1999 Arusha Declaration on Good Prison Practice<sup>74</sup>, the 2002 Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa<sup>75</sup>,

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<sup>68</sup> Adopted by General Assembly Resolution 45/113 of 14 December 1990. Cited by the Court in *Blokhin v. Russia* [GC], no. 47152/06, § 87, 23 March 2016. The first reference was made in a separate opinion in *Ertuş v. Turkey*, no. 37871/08, 5 November 2013.

<sup>69</sup> Adopted by General Assembly Resolution 45/112 of 14 December 1990. Cited by the Court in *Blokhin*, cited above, § 88. The first reference was made in a separate opinion in *Ertuş*, cited above.

<sup>70</sup> Adopted by a working group of 24 international experts on 9 December 2007, annexed to the interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, of 28 July 2008. The Special Rapporteur considered it “a useful tool to promote the respect and protection of the rights of detainees”. It was recently cited by the Court in *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 120, 10 April 2012.

<sup>71</sup> Adopted by General Assembly Resolution 65/229 on 21 December 2010. It was recently cited in *Korneykova and Korneykov v. Ukraine*, no. 56660/12, § 91, 24 March 2016. The first reference was made in a separate opinion in *Khoroshenko v. Russia* [GC], no. 41418/04, ECHR 2015.

<sup>72</sup> Adopted unanimously by General Assembly Resolution 70/175 on 17 December 2015.

<sup>73</sup> Adopted by consensus in September 1996 by 133 delegates from 47 countries, including 40 African countries, which met in Kampala, Uganda. The President of the African Commission on Human and Peoples’ Rights, Ministers of State, Prison Commissioners, Judges and international, regional and national non-governmental organisations concerned with prison conditions took part in the meeting.

<sup>74</sup> Approved by the Prison Services in Central, Eastern and Southern Africa (CESCA), in Arusha, Tanzania, 23-27 February 1999.

<sup>75</sup> Approved by the second pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso, 18-20 September 2002.



the revised 2006 EPR and the 2008 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas<sup>76</sup>.

### **B. In the Council of Europe (§§ 39-42)**

39. The hardening of prison soft law is particularly visible in Europe. The majority do not take into account the fact that the revised 1987 EPR and explanatory report did not deal with the appropriate personal space in individual cells and multi-occupancy accommodation in prisons<sup>77</sup>, but the 2006 EPR revision did fill that lacuna, by providing in the Commentary to Rule 18 a clear indication of the normative standard for European prisons along the lines of previous CPT work. The purpose of this exercise, let us not forget, was to “strengthen” the rules about accommodation, as the Commentary itself states<sup>78</sup>.

40. Worse still, the majority do not seem to care about the fact that the CPT position was confirmed politically at the highest level within the Council of Europe, by its own ruling body, the Committee of Ministers<sup>79</sup>. The majority ignore the fact that the Commentary to Rule 18 of the EPR took on board, to the letter, the CPT standards on the minimum space in multi-occupancy accommodation in prisons. It is worth recalling the tenor of that Commentary<sup>80</sup>:

“Rule 18 includes some new elements. The first, in Rule 18.3, is intended to compel governments to declare by way of national law specific standards, which can be enforced. Such standards would have to meet wider considerations of human dignity as well as practical ones of health and hygiene. The CPT, by commenting on conditions and space available in prisons in various countries has begun to indicate

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<sup>76</sup> OEA/Ser/L/V/II.131 doc. 26. Inter-American Commission on Human Rights Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 13 March 2008, No. 1/08.

<sup>77</sup> Recommendation No. R(87)3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 and Explanatory memorandum. In the 1987 version, the only reference to the allocation of floor space to prisoners was in Rule 15 (“The accommodation provided for prisoners, and in particular all sleeping accommodation, shall meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially the cubic content of air, a reasonable amount of space, lighting, heating and ventilation”), which was explained as follows: “it is desirable that standard specifications should be drawn up at national level to meet the requirements of this rule according to local circumstances and practice.”

<sup>78</sup> Quite eloquently, the Commentary to Rule 18 starts this way: “This Rule concerns accommodation. Developments in European human rights law have meant that rules about accommodation have to be strengthened.” The Commentary further adds that “The importance of ensuring appropriate accommodation is further strengthened in the new version of the rules by treating it in combination with issues of allocation ...”

<sup>79</sup> As the Court itself put it, the Committee of Ministers is the best intermediary of the European consensus (*M.C. v. Bulgaria*, no. 39272/98, § 162, 4 December 2003).

<sup>80</sup> Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, p. 6.

some minimum standards. These are considered to be 4m<sup>2</sup> for prisoners in shared accommodation and 6m<sup>2</sup> for a prison cell. These minima are, related however [sic], to wider analyses of specific prison systems, including studies of how much time prisoners actually spend in their cells. These minima should not be regarded as the norm. Although the CPT has never laid down such a norm directly, indications are that it would consider 9 to 10m<sup>2</sup> as a desirable size for a cell for one prisoner. This is an area in which the CPT could make an ongoing contribution that would build on what has already been laid down in this regard. What is required is a detailed examination of what size of cell is acceptable for the accommodation of various numbers of persons. Attention needs to be paid to the number of hours that prisoners spend locked in the cells, when determining appropriate sizes. Even for prisoners who spend a large amount of time out of their cells, there must be a clear minimum space, which meets standards of human dignity.”

41. The EPR and the corresponding Commentary have the seal of the highest political body of the Council of Europe, its Committee of Ministers, which recommended that governments of member States “be guided in their legislation, policies and practice by the rules contained in the appendix to this recommendation” and “ensure that this recommendation and the accompanying commentary to its text are translated and disseminated as widely as possible and more specifically among judicial authorities, prison staff and individual prisoners”. Such a clear and unanimous expression of political will and legal understanding that “Council of Europe member states continue to update and observe common principles regarding their prison policy” should not so easily be discarded by the majority<sup>81</sup>. The majority cannot at one and the same time refer to the accommodation standards of the EPR and ignore what their purpose is, according to the relevant Commentary itself. Such superficial interpretation would only pay lip-service to the EPR. In the Commentary’s own very clear words, the EPR are intended to “compel Governments to declare by way of national law specific standards, which can be enforced” and these enforceable standards include certain European “minimum standards” in terms of accommodation: first and foremost, “there must be a clear minimum space”.

42. Moreover, by ignoring the “strengthened”, “compelling”, *minimum* standards on accommodation set out by the EPR and the Commentary thereto, the majority are also setting aside the penological work performed by the PC-CP of the CDPC which is at the root of the EPR<sup>82</sup>. Without any

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<sup>81</sup> The sole dissenting voice was the representative of Denmark, on a very strict point. The Representative of Denmark reserved the right of his government to comply or not with Rule 43, paragraph 2, of the appendix to the recommendation with regard to the requirement that prisoners held under solitary confinement be visited by medical staff on a daily basis.

<sup>82</sup> Other than the European Convention on the supervision of conditionally sentenced or conditionally released offenders (1964), ETS N°51, the Convention on the transfer of sentenced persons (1983), ETS N°112, and the Additional Protocol to the Convention on the transfer of sentenced persons (1997), ETS N°167, the Council of Europe has had an immensely rich standard setting activity in prison law since its early days, as witnessed by, among others, CM/Rec (2014) 4 on electronic monitoring, CM/Rec (2014) 3 concerning

scientific background study to contradict the PC-CP experts' opinion, the majority simply affirm *ex cathedra* their own different point of view. In fact, the majority do not adduce any expert opinions or scientific analysis that would be capable of gainsaying the unanimous view of international experts expressed in soft law instruments<sup>83</sup>. No consideration is given to the well-established scientific correlation between prison overcrowding, lack of proper living conditions and negative psychosocial effects on prisoners, including emotional instability, aggressiveness and self-harm<sup>84</sup>. *In umbris est potestas*.

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dangerous offenders, CM/Rec (2012) 12 concerning foreign prisoners, CM/Rec (2012) 5 on the European Code of Ethics for Prison Staff, CM/Rec (2010) 1 on the Council of Europe Probation Rules, Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures, Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, Rec (2003) 23 on the management of life-sentence and other long-term prisoners, Rec (2003) 22 concerning conditional release (parole), Rec (2000) 22 on improving the implementation of the European rules on community sanctions and measures, R (99) 22 concerning prison overcrowding and prison population inflation, R (99) 19 concerning mediation in penal matters, R (98) 7 concerning the ethical and organisational aspects of health care in prison, R (97) 12 on staff concerned with the implementation of sanctions and measures, R (93) 6 concerning prison and criminological aspects of the control of transmissible diseases, including aids and related health problems in prison, R (92) 18 concerning the practical application of the Convention on the transfer of sentenced persons, R (92) 16 on the European rules on community sanctions and measures, R (89) 12 on education in prison, R (88) 13 concerning the practical application of the Convention on the transfer of sentenced persons, R (84) 11 concerning information about the Convention on the transfer of sentenced persons, R (82) 17 on the custody and treatment of dangerous prisoners, R (82) 16 on prison leave, R (79) 14 concerning the application of the European Convention on the supervision of conditionally sentenced or conditionally released offenders, Resolution (70) 1 on the practical organisation of measures for the supervision and after-care of conditionally sentenced or conditionally released offenders, Resolution (67) 5 on research on prisoners considered from the individual angle and on the prison community, and Resolution (62) 2 on electoral, civil and social rights of prisoners.

<sup>83</sup> This argument was used by the Court itself in *Kiyutin v. Russia*, no. 2700/10, § 67, 10 March 2011.

<sup>84</sup> See, for example, the White Paper on prison overcrowding adopted recently by the CDPC, PC-CP (2015) 6 rev 7, 30 June 2016, §§ 33-39; Criminal Justice Alliance, "Crowded Out? The impact of prison overcrowding on rehabilitation", 2012; and ICRC, "Water...", cited above, p. 35, which refers to "serious negative effects on the physical and psychological health of detainees", as well as increased prison unrest. Overcrowding is highly disruptive to prisoners' living routines, activities, and treatment. For example, a 2004 report by the Joint Committee on Human Rights raised concerns about the link between prison overcrowding and self-inflicted deaths in custody.

## VI. The fight against prison overcrowding (§§ 43-47)

### A. The minimum living space in the ICRC standards (§§ 43-45)

43. Prison overcrowding, as a systemic problem of European criminal justice systems, has been on the agenda of the Court since 2009<sup>85</sup>. The structural nature of the problem and the consequent need to address it in general terms were first acknowledged in respect of Polish prisons<sup>86</sup> and subsequently also Russian remand prisons<sup>87</sup>, Italian prisons<sup>88</sup>, Belgian prisons<sup>89</sup>, Bulgarian prisons<sup>90</sup>, Hungarian prisons<sup>91</sup> and Lithuanian prisons<sup>92</sup>.

44. Resocialisation is the primary purpose of imprisonment of human beings<sup>93</sup>. Prison overcrowding, with its physical, psychological and social consequences, is the first obstacle to the implementation of any resocialisation programme. Adequate personal living space is a *sine qua non* condition for the resocialisation of prisoners<sup>94</sup>. This absolute minimum space requirement is not essentially different for mentally fit or unfit prisoners, remand prisoners, prisoners serving sentences for the first time or recidivists, since there is no objective reason from an Article 3 perspective to subject mentally fit persons to a different standard of protection from that applicable to mentally unfit persons, still less to distinguish between

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<sup>85</sup> The expression “prison overcrowding” is used in the present opinion in its widest possible sense, including not only prison facilities, but all other publicly governed detention facilities, like police stations and prison hospitals. Likewise, I will refer to “prisoners” in order to include people detained on remand, serving a sentence or confined in prison hospitals.

<sup>86</sup> *Orchowski v. Poland*, no. 17885/04, 22 October 2009, and *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009.

<sup>87</sup> *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 239, 10 January 2012.

<sup>88</sup> *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013. The new domestic remedies were assessed in *Stella and Others v. Italy* (dec.), nos. 49169/09, 54908/09, 55156/09, 61443/09, 61446/09, 61457/09, 7206/10, 15313/10, 37047/10, 56614/10, 58616/10, 16 September 2014.

<sup>89</sup> *Vasilescu v. Belgium*, no. 64682/12, § 128, 25 November 2014.

<sup>90</sup> *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, §§ 281, 292, 27 January 2015.

<sup>91</sup> *Varga and Others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, 10 March 2015.

<sup>92</sup> *Mironovas and Others v. Lithuania*, nos. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 and 70065/13, 8 December 2015.

<sup>93</sup> See my separate opinion in *Oçalan v. Turkey* (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014.

<sup>94</sup> As the UNODC Handbook on strategies to reduce prison overcrowding (2010) has indicated, prison overcrowding is “the root cause of a range of challenges and human rights violations in prison systems worldwide, threatening, at best, the social reintegration prospects, and at worst, the life of prisoners”.

mentally fit prisoners according to the harshness of their sentence or to whether they have been remanded or finally convicted.

45. In the absence of any universal standard, the International Committee of the Red Cross (ICRC) has recommended 5.4 sq. m per person in single-cell accommodation (excluding toilet facilities) and 3.4 sq. m per person in shared or dormitory accommodation (including toilet facilities)<sup>95</sup>. The ICRC has calculated the space needed for sleeping on the bed as 1.6 sq. m and toilet and shower space as 1.2 sq. m. In emergency situations<sup>96</sup>, the ICRC initially stipulated that the floor space in cells and dormitories must never be less than 2 sq. m per person, but more recently rescinded that recommendation and only provides guidance for returning a prison to normal conditions (including minimum space specifications) “as soon as possible”.

### **B. The minimum living space in the EPR standards (§§ 46-47)**

46. In the European penological context, the “strengthened” 2006 EPR standards on accommodation are more generous. As the Committee of Ministers and the CPT have stated<sup>97</sup>, the minimum living space of each prisoner must not be less than 6 sq. m in a single-occupancy space, excluding the sanitary facility, and 4 sq. m per person in a shared space, excluding a fully-partitioned sanitary facility, with at least 2 m between the walls of the cell and at least 2.5 m between the floor and the ceiling of the cell. For multiple-occupancy cells of up to four inmates 4 sq. m should be added per additional inmate to the minimum living space of 6 sq. m. Thus, this bare minimum of personal living space in prison facilities is an absolute condition whose non-fulfilment entails *per se* a violation of Article 3 of the Convention.

47. Moreover, the EPR require domestic law to set specific minimum requirements in respect of the accommodation provided to prisoners, with particular regard being had to the floor space, the cubic content of air,

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<sup>95</sup> See the *ICRC Water, Sanitation, Hygiene and Habitat in Prisons Supplementary Guidance*, 2012. The ICRC adds that the appropriate amount of space cannot be assessed by a simple measuring of space alone, other factors having to be taken in account, such as the condition of the building, the amount of time prisoners spend in the sleeping area, the number of people in that area, the other activities occurring in the space, the ventilation and light, the facilities and services available in the prison, and the extent of supervision available.

<sup>96</sup> From the ICRC’s perspective, “Emergency situations are sudden events of short duration. They may be caused by a political crisis, natural disasters, fire, riots, health crises in which large numbers of detainees need to be separated from the others or events which require the transfer of detainees from a prison that has been damaged to another prison.”

<sup>97</sup> See the Commentary to Rule 18 of the EPR, the CPT’s “Living space per prisoner in prison establishments: CPT standards”, adopted in December 2015, and the CM White Paper on prison overcrowding, 23 August 2016, § 37.

lighting, heating and ventilation (Rules 18.1-18.3). It is therefore appropriate to establish the maximum capacity (*numerus clausus*) for each prison through the definition of space per inmate as a minimum expressed in square and cubic meters. Hence, prison capacity must not be assumed to be a slippery concept whose elasticity can be used to manipulate prison reality and make overcrowding more or less apparent. Preventive remedies should be immediately available if and when the prison capacity minima are disregarded.

## **VII. The application of Convention standards to the present case (§§ 48-59)**

### **A. The majority’s contradictory cumulative approach (§§ 48-53)**

48. Quite contradictorily, the majority circumvent the “absolute” nature of the Article 3 prohibition and the “relevant minimum standard” for multi-occupancy accommodation in prisons (see paragraphs 110 and 113 of the judgment) by considering that the assessment of the level of severity required for any treatment to fall within the scope of that Article is “relative” and dependent on “a comprehensive approach to the particular conditions of detention” (see paragraphs 122 and 123 of the judgment).

49. In fact, the majority use the “cumulative effect” approach in two very different senses: on the one hand, the cumulative effect of “compensating factors” serves to attenuate the Article 3 obligations, in order to exonerate the respondent Government of any Convention liability (see paragraphs 137 and 138 of the judgment); on the other hand, the cumulative effect of “aggravating circumstances”, such as poor material conditions and lack of out-of-cell activities, can be considered inhuman or degrading, even in the case of sufficient cell space (see paragraph 140 of the judgment).

50. I agree with the latter argument, but disagree with the former.

Where the prisoner has had at his or her disposal sufficient personal living space, other negative aspects of the material conditions of detention may lead to the finding of a violation of Article 3. Whenever the adequate size of the personal living space is coupled with inadequate conditions of sleeping, lighting, ventilation, heating, sanitation and health care, the ill-treatment of the prisoner must still unequivocally be censured.

In the case of post-trial detention of mentally unfit prisoners, as well as mentally fit prisoners sentenced to a term of five years or more, the inexistence of an individual sentence plan or, where there is one, any serious shortcomings in its implementation will be major aggravating factors. Personal living space in the prison should be viewed in the context of the applicable resocialisation regime<sup>98</sup>. The inexistence of health, exercise,

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<sup>98</sup> *Varga and Others*, cited above, §§ 15, 16 and 51.

education and work programmes, or the existence of deficient programmes, will worsen the prisoner's situation. Being closely linked to this aspect, any breach of the rules on the separation of prisoners is also a factor to be considered.

51. But I cannot agree with the submission that the lack of sufficient personal living space can be offset by the presence of other material conditions, such as personal sleeping space, access to natural light during the day and electric lighting at night, ventilation, heating, proper hygiene conditions and adequate food. Otherwise, a cumulative effect of "compensating" factors would water down the absolute Article 3 standard, inviting the prison authorities to go down a slippery slope with no objective limits<sup>99</sup>.

52. This is exactly the temptation to which the majority succumb. The majority refer to a rebuttable, "strong" presumption of a violation of Article 3 when 3 sq. m of personal space in the cell is not guaranteed, with the possibility for the Government of rebutting it if they can show that the periods of deprivation of such personal space were "short, occasional and minor". But the majority do not provide for the slightest definition of these limits. In times of economic crisis, the duty to protect the dignity of detained persons is more relevant than ever, and for that purpose to be fulfilled clear rules are needed, as the European and the UN anti-torture bodies have recently stated<sup>100</sup>. In addition, the majority include space occupied by furniture in the available surface area (see paragraph 114), even though this may diminish considerably the capacity to circulate freely within the cell.

53. Furthermore, the offsetting factors referred to by the majority should already be part of the normal conditions within a prison, such as "sufficient freedom of movement outside the cell and adequate out-of-cell activities", and even very broadly speaking the existence of "an appropriate detention facility". There is a serious logical flaw in this reasoning. Here the majority's criteria can hardly withstand Ockham's razor. *Pluralitas non est ponenda sine necessitate*.

In an absolutely redundant way, the majority make use of what should be ordinary features of a prison facility in order to justify an extraordinarily low level of personal space for individuals in detention. For the majority, normal living conditions justify abnormal space conditions. Logic would require that extraordinary negative circumstances be offset only by extraordinary positive counter-circumstances. This is not the case in the majority's logic. No extraordinary positive features of prison life are

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<sup>99</sup> See already in this sense, my opinion in *Miranovas and Others*, cited above.

<sup>100</sup> See the declaration by Malcolm Evans, Chairperson of the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment (SPT), and Mykola Gnatovskyy, President of the CPT, 24 June 2016.

required by the majority to compensate for the deprivation of each prisoner's right to adequate accommodation in detention.

**B. A coherent, *pro persona* cumulative approach (§§ 54-59)**

54. The applicant spent 240 days in detention in the present case. According to the floor plans of Bjelovar Prison, which the Government provided to the Court and which are not disputed by the applicant, he was allocated 4 sq. m or more of personal space in the cells for a non-consecutive period of 70 days in total.

Cell no.	Period of Detention	Total number of inmates	Overall surface area in sq. m	Personal space in sq. m	Surface minus sanitary facility in sq. m	Personal space in sq. m
8/O	03.05-05.05.2010	5	22.88	4.58	20.98	4.19
8/O	08.05-09.05.2010	5	22.88	4.58	20.98	4.19
8/O	26.05.2010	5	22.88	4.58	20.98	4.19
8/O	03.06-04.06.2010	5	22.88	4.58	20.98	4.19
8/O	17.06-19.06.2010	5	22.88	4.58	20.98	4.19
8/O	27.08-30.08.2010	5	22.88	4.58	20.98	4.19
8/O	07.09.2010	4	22.88	5.72	20.98	5.24
8/O	08.09-16.09.2010	5	22.88	4.58	20.98	4.19
8/O	18.09.2010	5	22.88	4.58	20.98	4.19
8/O	02.10-05.10.2010	5	22.88	4.58	20.98	4.19
8/I	06.10-07.10.2010	5	22.18	4.44	20.28	4.05
8/I	08.10-19.10.2010	4	22.18	5.55	20.28	5.07
8/I	20.10-21.10.2010	3	22.18	7.39	20.28	6.76
8/I	22.10-23.10.2010	4	22.18	5.55	20.28	5.07
8/I	24.10-25.10.2010	5	22.18	4.44	20.28	4.05
8/I	29.10-30.10.2010	5	22.18	4.44	20.28	4.05
4/O	06.11-09.11.2010	5	22.36	4.47	20.46	4.09
8/O	01.03-15.03.2011	5	22.88	4.58	20.98	4.19

55. Again according to the same data, the applicant spent 170 non-consecutive days with less than 4 sq. m of personal space in the cells.

Cell no.	Period of Detention	Total number of inmates	Overall surface area in sq. m	Personal space in sq. m	Surface minus sanitary facility in sq. m	Personal space in sq. m
1/O	16.10-15.11.2009	6	19.7	3.28	17.8	2.96



1/O	16.11-19.11.2009	5	19.7	3.94	17.8	3.56
1/O	20.11.2009-05.02.2010	6	19.7	3.28	17.8	2.96
1/O	06.02-08.02.2010	5	19.7	3.94	17.8	3.56
1/O	09.02-10.04.2010	6	19.7	3.28	17.8	2.96
1/O	11.04.-20.04.2010	5	19.7	3.94	17.8	3.56
8/O	21.04.2010	8	22.88	2.86	20.98	2.62
8/O	22.04-29.04.2010	7	22.88	3.27	20.98	2.99
8/O	30.04-02.05.2010	6	22.88	3.81	20.98	3.49
8/O	06.05-07.05.2010	6	22.88	3.81	20.98	3.49
8/O	10.05.-25.05.2010	6	22.88	3.81	20.98	3.49
8/O	27.05-02.06.2010	6	22.88	3.81	20.98	3.49
8/O	05.06-16.06.2010	6	22.88	3.81	20.98	3.49
8/O	20.06-30.06.2010	6	22.88	3.81	20.98	3.49
8/O	01.07-02.07.2010	7	22.88	3.27	20.98	2.99
8/O	03.07-05.07.2010	8	22.88	2.86	20.98	2.62
8/O	06.07-17.07.2010	7	22.88	3.27	20.98	2.99
8/O	18.07-13.08.2010	8	22.88	2.86	20.98	2.62
8/O	18.08-26.08.2010	7	22.88	3.27	20.98	2.99
4/O	31.08-02.09.2010	8	22.36	2.80	20.46	2.55
4/O	03.09.2010	7	22.36	3.19	20.46	2.92
8/O	04.09-06.09.2010	6	22.88	3.81	20.98	3.49
8/O	17.09.2010	6	22.88	3.81	20.98	3.49
8/O	19.09-01.10.2010	6	22.88	3.81	20.98	3.49
8/I	26.10-28.10.2010	6	22.18	3.70	20.28	3.38
8/I	31.10-04.11.2010	6	22.18	3.70	20.28	3.38
4/O	05.11.2010	6	22.36	3.73	20.46	3.41
4/O	10.11-13.11.2010	6	22.36	3.73	20.46	3.41
4/O	14.11-18.11.2010	7	22.36	3.19	20.46	2.92
4/O	19.11-26.11.2010	8	22.36	2.80	20.46	2.55
4/O	27.11-30.11.2010	7	22.36	3.19	20.46	2.92
8/O	01.12-03.12.2010	6	22.88	3.81	20.98	3.49
8/O	04.12-09.12.2010	7	22.88	3.27	20.98	2.99
8/O	10.12-12.12.2010	8	22.88	2.86	20.98	2.62
8/O	13.12-21.12.2010	7	22.88	3.27	20.98	2.99
8/O	22.12-24.12.2010	8	22.88	2.86	20.98	2.62
8/O	25.12-31.12.2010	7	22.88	3.27	20.98	2.99
8/O	01.01-16.01.2011	6	22.88	3.81	20.98	3.49
8/O	17.01-25.01.2011	7	22.88	3.27	20.98	2.99
8/O	26.01-27.01.2011	6	22.88	3.81	20.98	3.49
8/O	28.01-23.02.2011	7	22.88	3.27	20.98	2.99

<b>8/O</b>	24.02-25.02.2011	8	22.88	2.86	20.98	2.62
<b>8/O</b>	26.02-28.02.2011	7	22.88	3.27	20.98	2.99
<b>8/O</b>	16.03.2011	6	22.88	3.81	20.98	3.49

56. Of the total amount of 170 days of detention with under 4 sq. m, the applicant spent fifty days with less than 3 sq. m.

Cell no.	Period of detention	Total number of inmates	Overall surface area in sq. m	Personal space in sq. m	Surface minus sanitary facility in sq. m	Personal space in sq. m
<b>1/O</b>	16.10-15.11.2009	6	19.7	3.28	17.8	2.96
<b>1/O</b>	20.11.2009-05.02.2010	6	19.7	3.28	17.8	2.96
<b>1/O</b>	09.02-10.04.2010	6	19.7	3.28	17.8	2.96
<b>8/O</b>	21.04.2010	8	22.88	2.86	20.98	2.62
<b>8/O</b>	22.04-29.04.2010	7	22.88	3.27	20.98	2.99
<b>8/O</b>	01.07-02.07.2010	7	22.88	3.27	20.98	2.99
<b>8/O</b>	03.07-05.07.2010	8	22.88	2.86	20.98	2.62
<b>8/O</b>	06.07-17.07.2010	7	22.88	3.27	20.98	2.99
<b>8/O</b>	18.07-13.08.2010	8	22.88	2.86	20.98	2.62
<b>8/O</b>	18.08-26.08.2010	7	22.88	3.27	20.98	2.99
<b>4/O</b>	31.08-02.09.2010	8	22.36	2.80	20.46	2.55
<b>4/O</b>	03.09.2010	7	22.36	3.19	20.46	2.92
<b>4/O</b>	14.11-18.11.2010	7	22.36	3.19	20.46	2.92
<b>4/O</b>	19.11-26.11.2010	8	22.36	2.80	20.46	2.55
<b>4/O</b>	27.11-30.11.2010	7	22.36	3.19	20.46	2.92
<b>8/O</b>	04.12-09.12.2010	7	22.88	3.27	20.98	2.99
<b>8/O</b>	10.12-12.12.2010	8	22.88	2.86	20.98	2.62
<b>8/O</b>	13.12-21.12.2010	7	22.88	3.27	20.98	2.99
<b>8/O</b>	22.12-24.12.2010	8	22.88	2.86	20.98	2.62
<b>8/O</b>	25.12-31.12.2010	7	22.88	3.27	20.98	2.99
<b>8/O</b>	17.01-25.01.2011	7	22.88	3.27	20.98	2.99
<b>8/O</b>	28.01-23.02.2011	7	22.88	3.27	20.98	2.99
<b>8/O</b>	24.02-25.02.2011	8	22.88	2.86	20.98	2.62
<b>8/O</b>	26.02-28.02.2011	7	22.88	3.27	20.98	2.99

57. In other words, a simple statistical assessment of the available data shows that the applicant spent more than two thirds of his detention in overcrowded cells, according to the standard of the Committee of Ministers, the CPT and PC-CP of the CDPC. The data above show that the applicant

spent 29.1% of his detention time with 4 sq. m or more of personal space in the cells and 70.9% with less than that. Of the total amount of days in detention, 20.8% were spent with less than 3 sq. m of personal space in the cells. It is beyond my understanding how the majority can argue that 20.8%, i.e., one fifth of the applicant's detention days, represents a "short, occasional and minor" reduction of the required minimum personal space. With such a statistically odd evaluation, the majority totally dilute the common meaning of these adjectives. This is particularly grave in view of the additional flagrant breach of national law, which was aligned with the Council of Europe's 4 sq. m standard. In fact, the same white-washing exercise had already been performed by the Constitutional Court, which used some Strasbourg case-law to bluntly disregard national law.

58. Finally, the majority have not considered two main complaints that the applicant constantly presented to the national authorities. First, he wanted to work and no work possibilities were provided in the prison facilities where he was detained. The majority confuse the purposeful, productive occupation of the prisoner's time with watching TV most of the day and occasionally playing basketball or ping-pong for a couple of hours. Lack of productive occupation of those willing to work is no less degrading than unpaid or poorly paid work.

59. Second, he was not given any real possibility of meeting his relatives or of keeping in contact with his family. Bearing in mind that his family could not afford to travel to the prison, which is not disputed by the Government, arrangements should have been made by the prison authorities to provide the applicant with more telephone time than a mere twenty minutes per week, with an additional ten minutes on public holidays. Moreover, it is also unclear from the Government's arguments why the applicant's request for transfer to a prison facility closer to his family's place of residence was first ignored and later repeatedly rejected.

Set against the backdrop of the overcrowded cells where he had to live, these shortcomings only aggravated the violation of Article 3 of the Convention.

### **VIII. Conclusion (§§ 60-63)**

60. The Convention and its protocols have full and undiluted legal force. Yet in European human rights law there is no straightforward "either/or" answer to the problem of the normative threshold. Once removed from the reserved domain of the States, soft law may slide up the scale of international normativity, depending on the presence of certain hardening factors. In the light of an evolutive interpretation of the Convention and the other "agreements" and "common action" instruments of the Council of Europe, the normativity threshold will be placed where the societal needs

for “further realisation of human rights” and “economic and social progress” lie.

61. Hardened soft law is a source of law with “considerable importance” or “great weight” in European human rights law. The EPR and the Commentary thereto are the prototype of Council of Europe soft law. The majority’s decision seems to me to be out of step with the longstanding reform efforts made by the Council of Europe and in the rest of the world in the field of prison law. The EPR are intended to “compel Governments to declare by way of national law specific standards, which can be enforced”, and these enforceable standards include certain European “*minimum standards*”: “there must be a clear minimum space”. The circular nature of the majority’s redundant argument is obvious: when the lack of personal space is justified by an impressionistic image of the general situation of the detention facility, the offsetting exercise becomes a question-begging masquerade to cover up a downgrading of the general level of human rights protection of prisoners.

62. The present judgment pays no heed to what the representatives of the forty-seven democratically elected European governments unanimously agreed upon in the Committee of Ministers of the Council of Europe, or indeed to the most laudable work of renowned legal, medical, psychological, sociological and penological experts such as those in the CPT and the Council for Penological Cooperation of the Council of Europe.

63. By failing to pay due attention to the Council of Europe’s own sources of law, and ignoring the hardening of the soft law concerning prison standards in Europe and worldwide, the majority set a standard that will lead to a strictly casuistic, fact-sensitive application of the Convention, leaving the door wide open to a slippery-slope regression of the human rights protection level already attained by the Council of Europe itself. With judgments of this kind, weakening as they do the Council of Europe’s human rights protection system from within, the Court not only discourages the work of other Council of Europe bodies, but, worse still, reinforces the impression of an incoherent European human rights protection system.