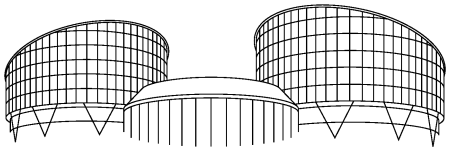

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MURŠIĆ v. CROATIA

(Application no. 7334/13)

JUDGMENT

STRASBOURG

12 March 2015

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

In the case of Muršić v. Croatia,

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

Isabelle Berro, *President*,
Khanlar Hajiyev,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 3 February 2015,

Delivers the following judgment, which was adopted on that 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 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 complained of inadequate conditions of detention in prison, in particular a lack of personal space and work opportunities, and the absence of any effective remedy in that regard, contrary to Articles 3 and 13 of the Convention.

4. On 8 October 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. Background to the case

6. By 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 robbery.

7. 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.

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

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

9. On 16 October 2009 the applicant was transferred from Turopolje State Prison (*Kaznionica u Turopolju*) to Bjelovar Prison (*Zatvor u Bjelovaru*) to serve the prison sentence originally imposed by the Čakovec County Court on 19 June 2008 (see paragraph 6 above).

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

11. According to the applicant, he spent eleven months with seven other inmates in a cell measuring 18 square metres including the sanitary facilities. The cell was badly maintained, dirty and insufficiently equipped with enough lockers and chairs for all inmates. Moreover, he was not given any opportunity to engage in prison work, and in general was not provided sufficient access to recreational and educational activities.

12. According to the Government, while in Bjelovar Prison the applicant had at his disposal an average of 3.59 square metres of personal space. He was detained in four different cells, the conditions of which are detailed in the table below:

Cell no.	Period of detention	Total number of inmates detained	Surface area of the cell in square metres	Personal space in square metres
1/O	16.10-15.11.2009	6	19.7	3.28
1/O	16.11-19.11.2009	5	19.7	3.94
1/O	20.11.2009-05.02.2010	6	19.7	3.28
1/O	06.02-08.02.2010	5	19.7	3.94

1/O	09.02-10.04.2010	6	19.7	3.28
1/O	11.04.-20.04.2010	5	19.7	3.94
8/O	21.04.2010	8	22.88	2.86
8/O	22.04-29.04.2010	7	22.88	3.27
8/O	30.04-02.05.2010	6	22.88	3.81
8/O	03.05-05.05.2010	5	22.88	4.58
8/O	06.05-07.05.2010	6	22.88	3.81
8/O	08.05-09.05.2010	5	22.88	4.58
8/O	10.05.-25.05.2010	6	22.88	3.81
8/O	26.05.2010	5	22.88	4.58
8/O	27.05-02.06.2010	6	22.88	3.81
8/O	03.06-04.06.2010	5	22.88	4.58
8/O	05.06-16.06.2010	6	22.88	3.81
8/O	17.06-19.06.2010	5	22.88	4.58
8/O	20.06-30.06.2010	6	22.88	3.81
8/O	01.07-02.07.2010	7	22.88	3.27
8/O	03.07-05.07.2010	8	22.88	2.86
8/O	06.07-17.07.2010	7	22.88	3.27
8/O	18.07-13.08.2010	8	22.88	2.86
14.08-17.08.2010 Period spent in the prison hospital				
8/O	18.08-26.08.2010	7	22.88	3.27
8/O	27.08-30.08.2010	5	22.88	4.58
4/O	31.08-02.09.2010	8	22.36	2.80
4/O	03.09.2010	7	22.36	3.19
8/O	04.09-06.09.2010	6	22.88	3.81
8/O	07.09.2010	4	22.88	5.72
8/O	08.09-16.09.2010	5	22.88	4.58
8/O	17.09.2010	6	22.88	3.81
8/O	18.09.2010	5	22.88	4.58
8/O	19.09-01.10.2010	6	22.88	3.81
8/O	02.10-05.10.2010	5	22.88	4.58
8/I	06.10-07.10.2010	5	22.18	4.44
8/I	08.10-19.10.2010	4	22.18	5.55
8/I	20.10-21.10.2010	3	22.18	7.39
8/I	22.10-23.10.2010	4	22.18	5.55
8/I	24.10-25.10.2010	5	22.18	4.44
8/I	26.10-28.10.2010	6	22.18	3.70
8/I	29.10-30.10.2010	5	22.18	4.44
8/I	31.10-04.11.2010	6	22.18	3.70
4/O	05.11.2010	6	22.36	3.73
4/O	06.11-09.11.2010	5	22.36	4.47

4/O	10.11-13.11.2010	6	22.36	3.73
4/O	14.11-18.11.2010	7	22.36	3.19
4/O	19.11-26.11.2010	8	22.36	2.80
4/O	27.11-30.11.2010	7	22.36	3.19
8/O	01.12-03.12.2010	6	22.88	3.81
8/O	04.12-09.12.2010	7	22.88	3.27
8/O	10.12-12.12.2010	8	22.88	2.86
8/O	13.12-21.12.2010	7	22.88	3.27
8/O	22.12-24.12.2010	8	22.88	2.86
8/O	25.12-31.12.2010	7	22.88	3.27
8/O	01.01-16.01.2011	6	22.88	3.81
8/O	17.01-25.01.2011	7	22.88	3.27
8/O	26.01-27.01.2011	6	22.88	3.81
8/O	28.01-23.02.2011	7	22.88	3.27
8/O	24.02-25.02.2011	8	22.88	2.86
8/O	26.02-28.02.2011	7	22.88	3.27
8/O	01.03-15.03.2011	5	22.88	4.58
8/O	16.03.2011	6	22.88	3.81

13. The Government also submitted that each cell had a toilet fully separate from the living area, each with its own air ventilation system. All cells had access to drinking water, and had windows allowing in natural light and fresh air. During the winter, cells were heated by a central heating system. They were constantly maintained and some necessary reconstruction work and improvements to the facilities had been carried out in 2007, 2009 and 2010, which the Government substantiated with photographs, floor plans and other relevant documentation. Furthermore, the inmates were provided with all the necessary hygiene and sanitary facilities. The nutrition was based on the assessment of experts and the quality of the food was constantly monitored by the competent state authorities, which the Government substantiated with the relevant documentation.

14. The Government also explained that for three hours per day, between 4 and 7 p.m., the applicant had been allowed to move freely outside his cell. In addition, he had been able to use the gym, which had been open between 8 a.m. and 12.30 p.m. and 2 and 6 p.m., and the basketball court, which had been open on working days between 3 and 6 p.m. and at the weekends both in the morning and afternoon. The prison had also been equipped with a badminton court, ping-pong tables and chessboards, all of which had been available to the applicant. He could have also borrowed books from the Bjelovar library, which provided its services to the prison, and he had been allowed to watch TV and borrow films.

C. The applicant's complaints about the prison conditions

15. 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.

16. On 26 April 2010 he complained to the Ministry of Justice Prisons 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.

17. The applicant again reiterated his request for a transfer to Varaždin Prison on 6 May 2010, citing personal and family reasons.

18. 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, that he had not been engaged in any work because there had been an insufficient number of working positions 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.

19. On 24 August 2010 the applicant complained about the conditions of his detention to a sentence-execution judge of the Bjelovar County Court. He pointed out that central to his complaints was his wish to be transferred to another prison closer to his family. He also complained, *inter alia*, that his request to engage in prison work had not been answered, and that he was being detained with seven other inmates in cell no. 8, which measured 18 square metres in total and was inadequately equipped and maintained.

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

21. 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 was not detained in inadequate conditions of detention, that he was provided with sufficient hygiene and sanitary facilities, and that was not engaged in prison work since such opportunities did not exist for all prisoners in Bjelovar Prison.

22. 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 actually accommodated eight inmates.

23. 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 standards for personal space under the Enforcement of Prison Sentence Act, namely 4 square metres, 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.

24. On 8 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 since arriving at Bjelovar Prison, he had been detained in cell no. 1, measuring 17.13 square metres, 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 square metres. He had then been placed in another cell, also marked "cell no. 8", which again measured 17.13 square metres, 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.

25. 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.

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

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

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

29. On 12 April 2011 the Ombudsman 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 Ombudsman 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 working positions for all prisoners.

30. On 5 June 2012 the Constitutional Court declared the applicant's constitutional complaint (see paragraph 25 above) inadmissible as manifestly ill-founded. The relevant part of the decision reads:

"In his constitutional complaint, the appellant 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 on ... "

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

II. RELEVANT DOMESTIC LAW

A. Constitution

32. 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 and 85/2010) read as follows:

Article 14

"Everyone in the Republic of Croatia shall enjoy rights and freedoms regardless of their race, colour, sex, language, religion, political or other beliefs, national or social origin, property, birth, education, social status or other characteristics.

All shall be equal before the law."

..."

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."

Article 26

"All citizens of the Republic of Croatia and foreigners shall be equal before the courts and other State or public authorities."

Article 29

"In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law."

33. The relevant part of section 62 of the Constitutional Court Act (*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") ..."

B. Enforcement of Prison Sentences Act

34. The relevant provisions of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, Official Gazette nos. 128/1999, 190/2003, 76/2007, 27/2008, 83/2009) read as follows:

Complaints

Section 15

"(1) A prisoner shall have the right to complain about an act or decision of a prison employee.

(2) Complaints shall be lodged orally or in writing with a prison governor, or the head office of the Prisons Administration [of the Ministry of Justice]. Written complaints addressed to the head office of the Prisons Administration [of the Ministry of Justice] shall be submitted in an envelope, which the prison authorities may not open ...

(5) If a prisoner lodges a complaint with the sentence-execution judge, it shall be considered a request for judicial protection under section 17 of this Act."

Judicial protection against acts and decisions of the prisons administration

Section 17

"(1) A prisoner may lodge a request for judicial protection against any acts or decisions unlawfully denying him, or limiting him in, any of the rights guaranteed by this Act.

(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 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 prisoner and the prison facility may lodge an appeal against the sentence-execution judge's decision ... "

Accommodation of prisoners

Section 74

"...

(3) Premises in which prisoners are detained shall be clean, dry and sufficiently spacious. There shall be a minimum space of 4 square metres and 10 cubic metres per prisoner in each dormitory."

Employment of prisoners

Section 80

"(1) A prisoner shall be entitled to work, subject to his state of health, []evel of] knowledge and the opportunities [available] in the State prison or prison.

..."

III. RELEVANT INTERNATIONAL MATERIAL

35. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") visited Croatia from 19 to 27 September 2012. In its report CPT/Inf (2014) 9 of 18 March 2014, it noted the problem of prison overcrowding in Croatia. The relevant recommendations in that regard (Appendix I) read:

"**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 m² 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 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);

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

36. The applicant complained of inadequate conditions of detention in Bjelovar Prison. In particular, he alleged a lack of personal space, 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. Admissibility

1. The parties' arguments

37. The Government submitted that in his constitutional complaint before the Constitutional Court, which had been an effective domestic remedy concerning the conditions of his detention, the applicant had only alleged discrimination following the decisions of the Bjelovar County Court related to the fact that he had not been engaged in prison work. However, he had failed to raise any other argument or substantiate his complaints concerning prison overcrowding. Furthermore, he had not invoked any of the provisions of the Constitution guaranteeing protection from ill-treatment and respect for human dignity, notably Articles 23 and 25 (see paragraph 32 above), nor, for that matter, Article 3 of the Convention. The Government also pointed out that the applicant had been legally represented, and that it had been incumbent on his lawyer to properly make use of the constitutional complaint before the Constitutional Court. Had he done that appropriately, it would have been also open for the applicant to lodge a civil action for damages, in the event of the Constitutional Court finding that his rights had been violated.

38. The applicant maintained that he had properly exhausted domestic remedies.

2. The Court's assessment

39. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of directly resolving the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

40. The rule of exhaustion of domestic remedies normally requires that complaints intended to be made subsequently at the international level should have been raised before the domestic courts, at least in substance and

in compliance with the formal requirements and time-limits laid down in the domestic law. The purpose of the rule requiring domestic remedies to be exhausted is to allow the national authorities (primarily the judiciary) to address an allegation that a Convention right has been violated and, where appropriate, to afford redress before that allegation is submitted to the Court. In so far as there exists at the national level a remedy enabling the national courts to address, at least in substance, any argument as to an alleged violation of a Convention right, it is that remedy which should be used (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

41. 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 still 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). Indeed, in order to comply with the principles 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).

42. The Court notes that it is true that in his constitutional complaint, the applicant indeed did not rely on Articles 23 and 25 of the Constitution, provisions that arguably correspond to Article 3 of the Convention. Nor did he rely on Article 3 of the Convention directly. Instead, he referred to Articles 14 § 2, 26 and 29 of the Constitution, provisions that correspond to Articles 6 and 14 of the Convention and Article 1 of Protocol No. 12 thereto (see paragraph 32 above and compare *Merot d.o.o. and Storitve Tir d.o.o. v. Croatia* (dec.), nos. 29426/08 and 29737/08, § 35, 10 December 2013).

43. However, the applicant 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 (see paragraph 25 above). Thus, the Court finds that the applicant, by bringing his complaints in substance before the Constitutional Court, properly exhausted domestic remedies (compare *Jaćimović v. Croatia*, no. 22688/09, §§ 40-41, 31 October 2013; and, by contrast, *Merot d.o.o. and Storitve Tir d.o.o.*, cited above, § 36). The Court therefore rejects the Government's objection.

44. The Court further notes that the applicant's complaint about the conditions of his detention in Bjelovar Prison is not manifestly ill-founded

within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant

45. The applicant contended that the cells in which he had been accommodated during his stay in Bjelovar Prison had not provided sufficient allocation of personal space per detainee and had not been sufficiently equipped with chairs and cupboards. Moreover, the nutrition had been poor and the hygiene conditions had also been inadequate particularly given that the toilet area had not been appropriately separated from the living area. In addition, the recreational and educational activities had been insufficient and he had not been engaged in any prison work. The applicant stressed that the information provided by the Government concerning his personal space in Bjelovar Prison had related to the average personal space of 3.59 square metres, which could only have been so if the Government had taken into account the short periods in which one of his cellmates had been transferred to another cell, and if they had counted the toilet area in the overall space calculation. The Government had thus made the erroneous calculations with regard to the cells where he had been detained in Bjelovar Prison. In fact, he had only actually had 2.25 square metres of personal space throughout his stay in Bjelovar Prison. The applicant considered that in any event, whether the Court accepted his or the Government's submissions in that regard, the fact remained that he had been placed in overcrowded cells, particularly taking into account the required 4 square metres of personal space per prisoner.

(b) The Government

46. The Government argued that while in Bjelovar Prison, the applicant had been provided with an average of 3.59 square metres of personal space, which had been just slightly below the minimum standard of 4 square metres required under the Execution of Prison Sentences Act. The Government cited as an example cell no. 8/O, where the applicant had been placed for only one day (21 April 2010) with seven other inmates, Between 30 April and 30 June 2010 he had enjoyed either 3.81 or 4.58 square metres of personal space. Similarly, in cell no. 1/O between 11 April and 20 April 2010, the applicant had enjoyed 3.94 square metres of personal space. Between 7 September and 13 November 2010 in cells nos. 8/O, 8/1 and 4/O, the applicant had enjoyed personal space above the required standard. It had only been between 31 October and 5 November 2010 that he had had 3.7 and 3.73 square metres of personal space. The Government pointed out

that this had been confirmed by the sentence-execution judge on 7 October 2010, who had not found that the applicant had been placed in inadequate conditions of detention (see paragraph 21 above). The judge had also found that the applicant had been provided with appropriate hygiene and sanitary facilities. Moreover, Bjelovar Prison had been constantly renovated, which was one of the main reasons why the prisoners had been transferred from one cell to another leading up to a temporary reduction of their personal space.

47. In any event, in the Government's view, any lack of personal space had been compensated for by the other facilities in Bjelovar Prison. Thus, all the cells the applicant had been detained in had had access to natural light and fresh air, as well as heating and air ventilation. They had been regularly maintained and renovated, and the applicant had been allowed to move freely and engage in various sports and recreational activities. As regards his complaints about prison work, the Government pointed out that it had been impossible to secure employment for all prisoners. Thus, because of a general lack of work, the applicant, just like ninety-two other prisoners, had not been provided any employment while serving his sentence in Bjelovar Prison.

2. The Court's assessment

(a) General principles

48. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of a 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). 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; and *Orchowski v. Poland*, no. 17885/04, § 119, 22 October 2009).

49. 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 *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III, with further references).

50. 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 the 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 to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Popov v. Russia*, no. 26853/04, § 208, 13 July 2006).

51. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II; *Idalov v. Russia* [GC], no. 5826/03, § 94, 22 May 2012). The length of time a person is detained in the particular conditions also has to be considered (see, among other authorities, *Alver v. Estonia*, no. 64812/01, 8 November 2005).

52. The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see *Karalevičius v. Lithuania*, no. 53254/99, § 36, 7 April 2005). However, the Court has always refused to determine, once and for all, how many square metres should be allocated to a detainee in terms of the Convention, having considered that a number of other relevant factors, such as the duration of detention, the possibilities for outdoor exercise, the physical and mental condition of the detainee and so forth, play an important part in deciding whether the detention conditions complied with the guarantees of Article 3 of the Convention (see, for example, *Trepashkin v. Russia*, no. 36898/03, § 92, 19 July 2007; *Sergey Babushkin v. Russia*, no. 5993/08, § 50, 28 November 2013; *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).

53. In the *Ananyev* case the Court set out the relevant standards for deciding whether or not there has been a violation of Article 3 on account of a lack of personal space. In particular, the Court has to have regard to the following three elements: (a) each detainee must have an individual sleeping place in the cell; (b) each must dispose of at least 3 square metres of floor space; and (c) the overall surface area of the cell must be such as to allow detainees to move freely between items of furniture. The absence of any of the above elements creates 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 v. Russia*, nos. 42525/07 and 60800/08,

§ 148, 10 January 2012; see further *Olszewski v. Poland*, no. 21880/03, § 98, 2 April 2013).

54. Thus, based on this presumption, the Court has considered in a number of cases that where the applicants have at their disposal less than three square metres of floor surface, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of Article 3 of the Convention (see, for example, *Dmitriy Sazonov v. Russia*, no. 30268/03, §§ 31-32, 1 March 2012; *Nieciecki v. Greece*, no. 11677/11, §§ 49-51, 4 December 2012; *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, § 77, 8 January 2013; *Kanakis v. Greece (no. 2)*, no. 40146/11, §§ 106-107, 12 December 2013; *Tatishvili v. Greece*, no. 26452/11, § 43, 31 July 2014; *Tereshchenko v. Russia*, no. 33761/05, §§ 83-84, 5 June 2014; *Bulatović v. Montenegro*, no. 67320/10, §§ 123-127, 22 July 2014; and *T. and A. v. Turkey*, no. 47146/11, § 96, 21 October 2014).

55. However, when assessing in particular the conditions of detention in post-trial detention facilities, the Court always had regard to the cumulative effect of the conditions of detention (see, for example, *Dmitriy Rozhin v. Russia*, no. 4265/06, § 53, 23 October 2012; *Kulikov v. Russia*, no. 48562/06, § 37, 27 November 2012; *Yepishin v. Russia*, no. 591/07, § 65, 27 June 2013; *Sergey Babushkin*, cited above, §§ 52-58). Accordingly, the question of personal space should be viewed in the context of the applicable regime, enabling detainees to benefit from a wider freedom of movement during the day than those subject to other types of detention regime and their resulting unobstructed access to natural light and air. Thus, the Court has already found that the freedom of movement allowed to inmates in a facility and unobstructed access to natural light and air have served as sufficient compensation for the scarce allocation of space per convict (see, for example, *Shkurenko v. Russia* (dec.), no. 15010/04, 10 September 2009; *Norbert Sikorski v. Poland*, no. 17599/05, § 129, 22 October 2009; *Vladimir Belyayev v. Russia*, no. 9967/06, §§ 32-36, 17 October 2013; and *Semikhvostov*, cited above, § 79).

56. It follows that a strong presumption that the conditions of detention amounted to degrading treatment in breach of Article 3 on account of a lack of personal space, set out in the *Ananyev* case (see paragraph 54 above), may in certain circumstances be refuted by the cumulative effect of the conditions of detention (see, for example, *Fetisov and Others v. Russia*, nos. 43710/07, 6023/08, 11248/08, 27668/08, 31242/08 and 52133/08, §§ 134-138, 17 January 2012; *Dmitriy Rozhin*, cited above, §§ 53-53; and *Sergey Babushkin*, cited above, § 57). This will, however, hardly occur in the context of flagrant lack of personal space (see, for example, *Dmitriy Sazonov v. Russia*, cited above, §§ 31-32; *Logothetis and Others v. Greece*, no. 740/13, § 41, 25 September 2014; and *Nikolaos Athanasiou and Others v. Greece*, no. 36546/10, § 77, 23 October 2014), confinement in an

altogether inappropriate detention facility (see, for example, *A.F. v. Greece*, no. 53709/11, §§ 71-80, 13 June 2013; *Horshill v. Greece*, no. 70427/11, §§ 47-52, 1 August 2013; and *T. and A.*, cited above, § 96) or in the case of established structural problems in prisons (see, for example, *Khuroshvili v. Greece*, no. 58165/10, §§ 84-89, 12 December 2013; *Gorbulya v. Russia*, no. 31535/09, §§ 64-65, 6 March 2014; and *Ślusarczyk v. Poland*, no. 23463/04, §§ 136-140, 28 October 201). However, it cannot be excluded, for example, in the case of short and occasional minor restrictions of the required personal space accompanied with sufficient freedom of movement and out-of-cell activities and the confinement in an appropriate detention facility (see, for example, *Vladimir Belyayev*, cited above, §§ 33-36).

57. Lastly, the Court stresses that a quite different question from that observed above arises in cases where a larger prison cell is at issue – measuring in the range of three to four square metres per inmate. In such instances a violation of Article 3 will be found only if the space factor would be 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 heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (see *Ananyev and Others*, cited above, § 149; *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; *Torreggiani and Others*, cited above, § 69; and *Barilo v. Ukraine*, no. 9607/06, §§ 80-83, 16 May 2013).

(b) Application of these principles to the present case

58. The Court observes that the applicant was detained in Bjelovar Prison for one year and five months, between 16 October 2009 and 16 March 2011, where he was placed in four different cells (see paragraphs 9 and 10 above). While it is not disputed between the parties that these cells differed in size and the number of inmates who were placed there with the applicant, there are discrepancies in their submissions as to their actual size of and the extent of the alleged overcrowding.

59. Thus, the applicant submitted, notably in very general terms, that throughout his stay in Bjelovar Prison he had had 2.25 square metres of personal space (see paragraphs 11 and 27 above), while the Government submitted a detailed account of the size of the cells and the number of prisoners placed in them with the applicant while he was in Bjelovar Prison (see paragraph 12 above)

60. According to the information provided by the Government, in the four cells in which the applicant was detained, he had between 3 and 7.39 sq. m of personal space. Only occasionally, notably on 21 April 2010 (one day – 2.86 sq. m), and between 3 and 5 July 2010 (three days – 2.86 sq. m); 18 July and 13 August 2010 (twenty-seven days – 2.86 sq. m);

31 August and 2 September 2010 (three days – 2.80 sq. m); 19 and 26 November 2010 (eight days – 2.80 sq. m); 10 and 12 December 2010 (three days – 2.86 sq. m); 22 and 24 December 2010 (three days – 2.86 sq. m); and 24 and 25 February 2011 (two days – 2.86 sq. m), did he have slightly below 3 square metres of personal space in the proportion of 0.14 and 0.20 square metres, as indicated with regard to each of the periods noted (see paragraph 12 above).

61. The Court notes that the information provided by the Government does not appear implausible, given that it corresponds to the material available before the Court, namely the relevant documentation concerning Bjelovar Prison (see paragraph 13 above) and it was confirmed by the sentence-execution judge in her findings (see paragraph 24 above). Moreover, the Court notes that the applicant did not substantiate his allegations that he had enjoyed 2.25 square metres of personal space throughout his stay in Bjelovar Prison. Not only was this not possible given that the size of the four cells where the applicant was detained and the number of inmates placed in those cells differed, it appears contrary to the material available before the Court, which the applicant sought to challenge only in general terms. Moreover, the Court notes that in his initial complaints at the domestic level, concerning the refusal of the prison authorities to transfer him to another prison closer to his family, the applicant did not raise the issue of overcrowding, relying on it only after he finally failed to obtain the transfer (see paragraphs 15, 16, 17 and 19 above).

62. In any event, while it is true that the personal space afforded to the applicant fell short of the CPT's recommendations (see paragraph 35 above) and the requirements of the Enforcement of Prison Sentences Act (see paragraph 34 above), the Court does not consider that it was so extreme as to justify in itself a finding of a violation of Article 3 of the Convention (see paragraph 51 above; *Dolenec*, cited above, §§ 133 and 136; and *Vladimir Belyayev*, cited above, §§ 33-34).

63. In particular, the Court notes the Government's submission that the applicant was allowed three hours a day, between 4 p.m. and 7 p.m., to move freely outside his cell, a fact which was not disputed by the applicant.

64. Furthermore, each cell where the applicant was detained had unobstructed access to natural light and air, as well as drinking water (see paragraph 15 above). The applicant was also provided with an individual bed and he never alleged that the arrangements of the cells, due to their fixtures such as tables, beds and toilets, impeded him from moving freely within the cell (compare *Vladimir Belyayev*, cited above, § 34; and, by contrast, *Yevgeniy Alekseyenko v. Russia*, no. 41833/04, § 87, 27 January 2011; and *Manulin v. Russia*, no. 26676/06, § 46, 11 April 2013).

65. Moreover, the Government submitted that the prisoners could use the gym, which was open between 8 a.m. and 12.30 p.m. and 2 p.m. and 6 p.m., and the basketball court, which was open on working days between

3 p.m. and 6 p.m. and on the weekends both in the morning and afternoon. The prison also had a badminton court, ping-pong tables and chessboards, all of which were available to the prisoners. They could in addition borrow books from the Bjelovar library, which provided its services to the prison, and they could watch TV and borrow films (see paragraph 14 above). The Court notes, in this respect, that the applicant did not provide any relevant arguments which would allow the Court to conclude that he was unable to make use of these facilities as described by the Government.

66. As for the remainder of the applicant's submissions concerning allegedly poor hygiene conditions in the cells, poor nutrition and inadequate recreational and educational activities, the Court is unable, in view of the lack of substantiation, to accept the applicant's allegations as credible (see *Vladimir Belyayev*, cited above, § 35). This is moreover so given that the applicant, other than generally alleging lack of possibility to engage in prison work, did not raise, let alone specify, such allegations in his constitutional complaint before the Constitutional Court (see paragraph 25 above) and his submissions contradict the material available to the Court (see paragraphs 13, 21 and 29 above). The Court has also taken note of the photographs showing the interior of the Bjelovar Prison, the recreation yard, the dormitory cells and their sanitary facilities, which do not appear to be in an appalling state of repair or cleanliness.

67. Lastly, with regard to the applicant's complaints about being unable to engage in prison work, the Court finds that this cannot in the present circumstances raise an issue under Article 3 of the Convention.

68. In view of the above, the Court is mindful that the size of the cells where the applicant was placed was not always adequate in that during occasional non-consecutive short periods he suffered a restriction of slightly less than three square metres of personal space (see paragraph 60 above). In this connection, it notes with concern a period of twenty-seven days during which the applicant disposed of less than three sq. m. However, this was at the same time accompanied with sufficient freedom of movement and the confinement in an appropriate detention facility. Thus, the Court concludes that, in the circumstances of the case, it cannot establish that the conditions of the applicant's detention, although not always adequate, reached the threshold of severity required to characterise the treatment as inhuman or degrading within the meaning of Article 3 of the Convention (compare *Vladimir Belyayev*, cited above, § 36).

69. There has therefore been no violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

70. The applicant alleged that he had not had an effective remedy for his complaints concerning the conditions of his detention in Bjelovar Prison. He relied on Article 13, which reads as follows:

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' arguments

71. The applicant argued that he had been denied judicial protection concerning the conditions of his detention in Bjelovar Prison, since the competent sentence-execution judge and three-judge panel of the Bjelovar Court had erred in their findings of the relevant facts and interpretation of the relevant law when examining his complaints. Moreover, the Constitutional Court had not properly examined his complaints, and had declared them inadmissible without proper substantiation.

72. The Government submitted that the applicant's complaints had been examined in detail by the competent sentence-execution judge of the Bjelovar County Court, who had taken into account all his allegations and adopted a decision on the merits, finding his complaints ill-founded. Furthermore, the Constitutional Court, limiting itself to the applicant's specific complaints, had declared his constitutional complaint inadmissible because it had not raised any issue of a violation of his rights.

B. The Court's assessment

73. The Court notes that the applicant's complaints concerning the conditions of his detention in Bjelovar Prison were examined on the merits by the competent sentence-execution judge of the Bjelovar County Court, who had taken into account all the circumstances of his detention and his specific complaints. The judge obtained a report from the Bjelovar Prison administration and heard the applicant in person (see paragraph 21 above).

74. Furthermore, the applicant had been able to lodge an appeal against the sentence-execution judge's decision with a three-judge panel of the Bjelovar County Court, which had examined it on the merits and dismissed it as ill-founded, endorsing the reasoning of the sentence-execution judge. The applicant had also been able to lodge a constitutional complaint which was, in so far as it was substantiated and in view of the decisions of the Bjelovar County Court, rejected as manifestly ill-founded.

75. In these circumstances, having regard to the fact that the applicant did not challenge the effectiveness of the domestic remedies as such, and that Article 13 does not guarantee success in respect of a remedy used (see, for example, *Vanjak v. Croatia*, no. 29889/04, § 77, 14 January 2010), the Court does not find any appearance of a violation of that provision.

76. Having regard to the above, the Court considers that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

77. The applicant also relied on Articles 6 and 14 of the Convention, reiterating his above complaints.

78. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 (a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint under Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 3 of the Convention.

Done in English, and notified in writing on 12 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sicilianos is annexed to this judgment.

I.B.L
S.N.

DISSENTING OPINION OF JUDGE SICILIANOS

1. To my regret, I have been unable to follow the majority in finding that there has been no violation of Article 3 of the Convention in the present case, especially in view of the fact that the applicant was placed in cells where he was afforded less than 3 sq. m of personal space for a number of days. Furthermore, I consider that the case raises more general issues concerning both the applicable general principles and the methodology of the Court in applying such principles.

A. General principles applicable in the context of prison overcrowding

i. Less than 3 sq. m of personal space creates a "strong presumption" of a violation

2. In relation to the minimum space a detainee should have at his disposal, the judgment refers to a series of previous judgments, stating that "the Court has always refused to determine, once and for all, how many square metres should be allocated to a detainee in terms of the Convention" (see paragraph 52 of the judgment, with further references). In the next paragraph, however, the judgment reiterates the criteria used in *Ananyev and Others v. Russia*, namely that: (a) each detainee must have an individual sleeping place in the cell; (b) each detainee must have at least 3 sq. m of floor space; and (c) the overall surface area of the cell must be such as to allow detainees to move freely between items of furniture. Those criteria should be satisfied cumulatively. As stressed in *Ananyev and Others*, the absence of any one of the above aspects creates 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 v. Russia*, nos. 42525/07 and 60800/08, § 148, 10 January 2012; see also *Olszewski v. Poland*, no. 21880/03, § 98, 2 April 2013).

ii. Less than 3 sq. m of personal space is a violation in itself

3. Contrary to what the judgment clearly implies in paragraph 54, the Court's case-law is not systematically "based on this presumption". In a number of judgments the Court, although referring to *Ananyev and Others*, does not necessarily mention such a "presumption", but seems to suggest that 3 sq. m is a bare minimum to be observed in all circumstances. Failure to observe this minimum is in itself sufficient for a finding of a violation of Article 3 of the Convention. For instance, in *Bygylashvili v. Greece* the Court held:

> "58. With regard to the space allocated to each detainee, the Court has frequently pointed out that although a surface area of 4 sq. m per detainee constitutes a desirable standard, *the provision of less than 3 sq. m of floor space per detainee results in such severe overcrowding as to justify in itself a finding of a violation of Article 3 of the*

Convention (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 145, 10 January 2012, emphasis added). In the case cited, the Court found a violation of Article 3 because, *inter alia*, the applicants were afforded less than 3 sq. m of personal space while also being required to remain inside their cell all the time, except for a one-hour daily period of outdoor exercise (ibid., § 166).

59. The Court notes that in the present case the applicant claimed that her cell, which she shared with between fifteen and twenty other prisoners, had a surface area of 12 sq. m. The Government, for their part, maintained that the applicant had been held with four other prisoners in a 12 sq. m cell. However, regardless of the precise surface area of the cell where the applicant spent most of the day, the space she was allocated according to the Government was less than the surface area which, in accordance with the case-law cited in the *Ananyev and Others* judgment (cited above), *is sufficient in itself to justify a finding of Article 3*" (*Bygylashvili v. Greece*, §§ 58-59, 25 September 2012, emphasis added; see also *Nieciecki v. Greece*, § 49, 4 December 2012, and further references.)

4. More recently and in a similar vein, the judgment adopted in *Tereshchenko v. Russia* reiterated the following:

"84. The Court has found in many previous cases that where the applicants had less than three square metres of floor space at their disposal, the overcrowding was considered to have been so severe as to justify *in itself* a finding of a violation of Article 3 (see *Lind v. Russia*, no. 25664/05, § 59, 6 December 2007; *Starokadomskiy v. Russia*, no. 42239/02, § 43, 31 July 2008; and *Dmitriy Rozhin v. Russia*, no. 4265/06, §§ 49 and 50, 23 October 2012)" (*Tereshchenko v. Russia*, 5 June 2014, § 84, emphasis added).

5. Other deficiencies may also have been mentioned in the relevant cases (see, for instance, *Bygylashvili*, cited above, §§ 60-61). But they are emphasised simply to corroborate the finding of a violation. They constitute aggravating circumstances. The reference to such additional factors is not meant to call into question or to relativise the bare minimum of 3 sq. m.

iii. Less than 4 sq. m of personal space is a violation in itself

6. Furthermore, there is another group of cases not referred to in the judgment, which have closely adhered to the practice and recommendations of the CPT, according to which 4 sq. m should be the minimum personal space allocated to detainees, excluding the area taken up by any in-cell sanitary facilities (see, for instance, the recommendations of the CPT in respect of Croatia, cited in paragraph 35 of the judgment). However, here again the relevant judgments are not identically worded. In some judgments 4 sq. m seems to be regarded as a bare minimum. Less than that is sufficient in itself for a finding of a violation of Article 3. In the case of *Apostu v. Romania*, for example, the Court held:

"In its previous cases where applicants had less than 4 sq. m of personal space at their disposal, the Court has found that the overcrowding was so severe as to justify *of itself* a finding of a violation of Article 3" (*Apostu v. Romania*, § 79, 3 February 2015, with further references – emphasis added).

iv. Less than 4 sq. m of personal space creates a "strong presumption" of a violation

7. In other cases in the same group, the Court seems to have applied the "strong presumption" approach, by also taking other aspects into account in concluding that there has been a violation. For example, in *Tomoiaga v. Romania*, the Court reiterated:

> "... detainees should have at their disposal at least four square metres of personal space in order not to fall short of the standards imposed by its case-law (see *Flămînzeanu v. Romania*, no. 56664/08, §§ 92 and 98, 12 April 2011; and *Cotleţ v. Romania (no. 2)*, no. 49549/11, § 34, 1 October 2013). In establishing whether or not in the specific circumstances of a case the overcrowding was severe enough to justify in its own right a finding of a violation of Article 3 of the Convention, other aspects of the physical conditions of detention may be taken into account (see, for example, *Lind v. Russia*, no. 25664/05, §§ 59 and 61, 6 December 2007; and *Kokoshkina v. Russia*, no. 2052/08, § 62, 28 May 2009). Such elements include the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private (see, for example, *Ostrovar v. Moldova*, no. 35207/03, § 89, 13 September 2005; *Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007; and *Novikov v. Russia* (dec.), no. 11303/12, § 33, 10 December 2013)" (*Tomoiaga v. Romania* (dec.), § 22, 20 January 2015).

v. 3 or 4 sq. m? Bare minimum or "strong presumption"?

8. As is apparent from the above examples, there are a range of approaches to the issue of the minimum personal space that detainees should have at their disposal. The most flexible or "minimalist" approach is the one applied in the present judgment, according to which even 3 sq. m should not be seen as a bare minimum in all circumstances. The most demanding or "maximalist" approach is the one whereby 4 sq. m should always be seen as a minimum. In between, there are the other two approaches mentioned above. At first sight the difference between the "extremes" (and, *a fortiori*, between the two "median" approaches) may not seem to be so significant. In reality, however, it is sufficient to consult the facts of the cases cited above and other relevant cases – or, more broadly, the statistics on prison overcrowding recently made available by the Council of Europe[1] – in order to realise that adopting one or the other approach can have a decisive impact in a large proportion of cases relating to overcrowding in European prisons and other detention centres. It is therefore important to clarify those issues. The same holds true in relation to the methodology to be adopted when applying the "strong presumption" approach.

1. Council of Europe Annual Penal Statistics, SPACE I (Custody) & SPACE II (Community Sanctions and Measures), published on 11 February 2015. Available at http://wp.unil.ch/space/space-ii/annual-reports

B. Application of the "strong presumption" approach

i. A "strong presumption" is neither a simple nor an unrebuttable presumption

9. The first clarification to be made in respect of the methodology to be applied if one embraces the "strong presumption" approach (either in relation to 3 or to 4 sq. m) concerns the very meaning of this term. As far as I understand it, such a presumption is neither a "simple" nor an unrebuttable one. This means not only that the burden of proof lies with the Government to rebut the presumption, but also that the respondent State has to present strong evidence counterbalancing the extreme lack of space in the specific circumstances of the case and in relation to the particular applicant. Moreover, there should be a solid factual basis in respect of the main relevant elements.

ii. A "strong presumption" needs a solid factual basis to be rebutted

10. In my view, such a basis is present when: (a) the applicant does not dispute (all or some of) the relevant facts – including the space allocated to him or her and the periods during which he or she was afforded less than the minimum required (be it 3 or 4 sq. m) – or (b) the facts submitted by the Government have been established beyond reasonable doubt by an independent and impartial national tribunal or other competent authority, such as the Ombudsman, or an international expert body, and especially the CPT. If the relevant facts are persistently contested by the applicant and there is no independent evaluation of the situation, it seems questionable to depart from the presumption. In other words, when the word of the applicant is set against the word of the State, unless the former is visibly unsubstantiated or contradictory, the presumption should remain.

iii. A "strong presumption" needs strong counterbalancing factors to be rebutted

11. The present judgment reaffirms the relevant case-law of the Court to the effect that when the space allocated to the detainee is slightly above the minimum required – "in the range of three to four square metres per inmate" – a violation of Article 3 will be found only "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 heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements" (see paragraph 57, with further references). As is clear from this wording, all the above aspects are seen as a bare minimum when the space afforded to the applicant is *above* the necessary 3 (or 4) sq. m. If such elementary conditions are not satisfied, there can be a violation of Article 3 even if the space allocated to the applicant is sufficient.

12. The question is what happens when the space is *below* the required standard. Is the presence of the same aspects sufficient to rebut the "strong

presumption" of incompatibility with Article 3? Or does the State need to rely on further counterbalancing factors? While it is true that the assessment of the threshold of Article 3 is relative, I believe that at least adequate food, as well as a programme of activities, including work and vocational opportunities – as recommended to Croatia by the CPT in its latest report (cited in paragraph 35 of the judgment) – should also be required in order for the Court to accept that the "strong presumption" has been rebutted. Furthermore, the elements relied on by the Government should be relevant for the applicant and not merely abstract opportunities or possibilities.

iv. A lack of personal space should not be flagrant or protracted in time

13. The judgment refers to previous case-law of the Court to the effect that the "strong presumption" of a violation of Article 3 can "hardly" be rebutted "in the context of flagrant lack of personal space" (see paragraph 56, with further references). Nevertheless, the word "hardly" does not figure in at least some of the judgments quoted in paragraph 56 of the present judgment (see, for instance, *Logothetis and Others v. Greece*, no. 740/13, § 41, 25 September 2014) and seems questionable to me because it creates uncertainty and leaves the door open to abuses. Let us put it more clearly: if a "strong presumption" has to have a real meaning, a flagrant lack of personal space – that is, significantly below the required minimum – should not be accepted under any circumstances.

14. The judgment further reiterates that the "strong presumption" could possibly be rebutted "in the case of short and occasional minor restrictions of the required personal space" (see paragraph 56, with reference to *Vladimir Belyayev v. Russia*, no. 9967/06, §§ 33-36, 17 October 2013).

v. Application of the above principles in the present case

15. Are all the above elements present in this case? I believe not. First of all, and contrary to the only other case in which the "strong presumption" was rebutted (see *Vladimir Belyayev*, cited above, §§ 32-33), the relevant facts are not established beyond reasonable doubt. Both the space allocated to the applicant and other relevant factors, including the duration of his detention in substandard conditions, were disputed by the applicant and no independent evaluation is available.

16. Even if one assumes that the information provided by the Government in relation to the duration of the applicant's detention in cells where he was allocated less than 3 sq. m is correct, such duration amounts to fifty days in total, including a period of twenty-seven consecutive days (see paragraph 60 of the judgment). In my view, this duration can hardly be described as "short and occasional".

17. Furthermore, as stated in paragraph 66 of the judgment, the Court has taken note of photographs showing the interior of Bjelovar Prison, the recreation yard, the dormitory cells and their sanitary facilities, "which do

not appear to be in an appalling state of repair or cleanliness". Is the lack of "appalling" sanitary and hygiene conditions the appropriate standard for accepting that the "strong presumption" can be rebutted in a given case? I would prefer a positive finding – which apparently was not possible in the present case – to the effect that the sanitary and hygiene conditions were appropriate during the entire duration of detention.

18. There are (only) two factual elements which seem not to be disputed between the parties. The first concerns the Government's submission that the applicant was allowed three hours a day, between 4 p.m. and 7 p.m., to move freely outside his cell. This means that the applicant was confined in his cell for the rest of the day – that is, for twenty-one hours. Is this sufficient to rebut the "strong presumption"? One should note, in this regard, that in a number of reports the CPT has criticised States for keeping detainees confined in their cells for more than twenty hours a day (see for instance the latest report on Croatia, cited above, § 39, in relation to remand prisoners at Zagreb and Sisak County Prisons).

19. The second factual element which seems not to be disputed is that the applicant was unable to engage in prison work. However, the majority have found that "this cannot in the present case raise an issue under Article 3 of the Convention" (see paragraph 67 of the judgment). I respectfully disagree with this proposition. As the CPT has (repeatedly) emphasised in general terms:

> "... a satisfactory programme of activities (such as work, vocational training, education, sport or recreation/association) is of crucial importance to the well-being of prisoners. This is the case for both sentenced prisoners and inmates awaiting trial. The objective should be to ensure that remand prisoners are able to spend a reasonable part of the day outside their cells, engaged in purposeful activities of a varied nature. Regimes for sentenced prisoners should be even more favourable with a view to preparing them for reintegration into the community" (see, for instance, report on Croatia, cited above, § 40).

20. The above findings are even more crucial in cases, such the present one, where the Court examines whether there are sufficient counterbalancing factors to rebut the "strong presumption" of a violation of Article 3 because of the extreme lack of space in prison cells. It is precisely in such situations that work and other activities outside the overcrowded spaces become particularly important. It is for this reason that in *Samaras and Others v. Greece*, for instance, the Court – while finding a violation of Article 3, especially because of overcrowding – took into consideration the fact that some of the applicants were working outside their cells for part of the day in determining the appropriate amount to award by way of just satisfaction under Article 41 of the Convention (*Samaras and Others v. Greece*, § 71, 28 February 2012; see also *Tzamalis and Others v. Greece*, § 49, 4 December 2012).

Conclusion

21. On the basis of all the above considerations, it is my conclusion that, even if one accepts the "strong presumption" approach in relation to a minimum of 3 sq. m of space per detainee, there are no sufficient counterbalancing factors in the present case to rebut such a presumption. More generally, however, given the different approaches outlined above in respect of the minimum space to be allocated to detainees, as well as the lack of a clear methodology for the application of the "strong presumption" criterion, the Court's case-law may need to be further reflected upon so as to ensure the necessary consistency.