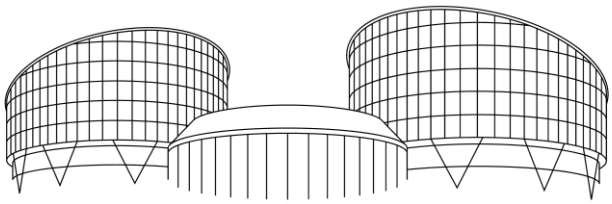

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF JANOWIEC AND OTHERS v. RUSSIA

(Applications nos. 55508/07 and 29520/09)

JUDGMENT

STRASBOURG

21 October 2013

In the case of Janowiec and Others v. Russia,

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

Josep Casadevall, *President*,
Guido Raimondi,
Ineta Ziemele,
Isabelle Berro-Lefèvre,
Corneliu Bîrsan,
Peer Lorenzen,
Alvina Gyulumyan,
Khanlar Hajiyev,
Dragoljub Popović,
Luis López Guerra,
Kristina Pardalos,
Vincent A. De Gaetano,
Julia Laffranque,
Helen Keller,
Helena Jäderblom,
Krzysztof Wojtyczek,
Dmitry Dedov, *judges*,
and Erik Fribergh, *Registrar*,

Having deliberated in private on 13 February and 5 September 2013,

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

PROCEDURE

1. The case originated in two applications (nos. 55508/07 and 29520/09) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by fifteen Polish nationals ("the applicants"), on 19 November 2007 and 24 May 2009 respectively.

2. The applicants' names are listed in paragraphs 25 to 37 below. They live in Poland and in the United States of America. The applicants Mr Janowiec and Mr Trybowski were represented before the Court by Mr J. Szewczyk, a Polish lawyer practising in Warsaw. The other applicants were represented by Professor I. Kamiński from the Institute of Legal Studies, and by Mr R. Nowosielski and Mr B. Sochański, Polish lawyers practising in Gdańsk and Szczecin respectively, as well as by Mr R. Karpinskiy and Ms A. Stavitskaya, Russian lawyers practising in Moscow.

3. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

4. The Polish Government, who intervened in the case in accordance with Article 36 § 1 of the Convention, were initially represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs, and subsequently by their co-Agent, Ms A. Mężykowska.

5. The applications were allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 7 October 2008 and 24 November 2009 the President of the Section decided to give notice of the applications to the Russian and Polish Governments. It was also decided to grant priority to the applications under Rule 41 of the Rules of Court.

6. By a decision of 5 July 2011, the Court joined the applications. It further decided to join to the merits the Government's objection as to the Court's jurisdiction *ratione temporis* in respect of the complaint under the procedural limb of Article 2 of the Convention, and declared the applications partially admissible.

7. On 16 April 2012 a Chamber of the Fifth Section composed of Dean Spielmann, President, Karel Jungwiert, Boštjan M. Zupančič, Anatoly Kovler, Mark Villiger, Ganna Yudkivska and Angelika Nußberger, judges, delivered its judgment. It found, by four votes to three, that it was unable to take cognisance of the merits of the complaint under Article 2 of the Convention; by five votes to two, that there had been a violation of Article 3 of the Convention in respect of ten applicants; and, unanimously, that there had been no violation of that provision in respect of the other applicants. It also found, by four votes to three, that the respondent Government had failed to comply with their obligations under Article 38 of the Convention.

8. On 5 July 2012 the applicants requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73. On 24 September 2012 a panel of the Grand Chamber granted the request.

9. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

10. The applicants and the Government each filed a memorial before the Grand Chamber.

11. Subsequently, the President of the Grand Chamber granted leave to the following organisations to submit written comments as third parties under Article 36 § 2 of the Convention: Open Society Justice Initiative, Amnesty International and the Public International Law and Policy Group. A group of three non-governmental organisations – Memorial, the European Human Rights Advocacy Centre and the Transitional Justice Network – were also granted leave to make a joint written submission as third parties.

12. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 February 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*
Mr G. MATYUSHKIN, *Agent*,
Mr N. MIKHAYLOV,
Mr P. SMIRNOV, *Advisers*;

(b) *for the applicants*
Mr J. SZEWCZYK,
Mr I. KAMIŃSKI,
Mr B. SOCHAŃSKI, *Counsel*;

(c) *for the Polish Government*
Mr M. SZPUNAR, *Deputy Minister of Foreign Affairs*,
Ms A. MĘŻYKOWSKA, *Co-Agent*,
Mr W. SCHABAS, *Adviser*.

The Court heard addresses by Mr Szewczyk, Mr Kamiński and Mr Sochański for the applicants, Mr Matyushkin for the respondent Government and Ms Mężykowska for the Polish Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The facts of the case, as submitted or undisputed by the parties, may be summarised as follows.

A. Background

14. On 23 August 1939 the Foreign Ministers of the Soviet Union and Nazi Germany signed a non-aggression treaty (known as "the Molotov-Ribbentrop Pact") which included an additional secret protocol whereby the parties agreed on "the question of the boundary of their respective spheres of influence in Eastern Europe". In particular, they concluded as follows:

> "2. In the event of a territorial and political rearrangement of the areas belonging to the Polish State, the spheres of influence of Germany and the USSR [Union of Soviet Socialist Republics] shall be bounded approximately by the line of the rivers Narew, Vistula, and San."

15. On 1 September 1939 Germany invaded Poland, starting the Second World War. On 17 September 1939 the Soviet Red Army marched into Polish territory, allegedly acting to protect the Ukrainians and Belorussians living in the eastern part of Poland because the Polish State had collapsed under the German attack and could no longer guarantee the security of its own citizens. The Polish army did not offer military resistance. The USSR annexed the territory newly under its control and in November 1939 declared that the 13.5 million Polish citizens who lived there were henceforth Soviet citizens.

16. In the wake of the Red Army's advance around 250,000 Polish soldiers, border guards, police officers, prison guards, State officials and other functionaries were detained. After they had been disarmed, some of them were set free; the others were sent to special prison camps established by the People's Commissariat for Internal Affairs ((NKVD), a predecessor of the State Security Committee (KGB)) in Kozelsk, Ostashkov and Starobelsk. On 9 October 1939 it was decided that the Polish officer corps should be billeted at the camps in Kozelsk and Starobelsk and the remaining functionaries, including the police officers and prison guards, in Ostashkov.

17. In early March 1940 Lavrentiy Beria, Head of the NKVD, submitted to Joseph Stalin, Secretary General of the USSR Communist Party, a proposal to approve the shooting of Polish prisoners of war on the ground that they were all "enemies of the Soviet authorities filled with hatred for the Soviet system of government" who were "attempting to continue their c[ounter]-r[evolutionary] work" and "conducting anti-Soviet agitation". The proposal specified that the prisoner-of-war camps accommodated 14,736 former military and police officers, of whom more than 97 per cent were Polish by nationality, and that a further 10,685 Poles were being held in the prisons of the western districts of Ukraine and Belorussia.

18. On 5 March 1940 the Politburo of the Central Committee of the USSR Communist Party considered the proposal and decided as follows:

> "I. Instructs the NKVD USSR as follows:
>
> (1) the cases of the 14,700 persons remaining in the prisoner-of-war camps (former Polish army officers, government officials, landowners, policemen, intelligence agents, military policemen, settlers and prison guards),
>
> (2) and the cases of the persons arrested and remaining in prisons in the western districts of Ukraine and Belorussia, numbering 11,000 (members of various counter-revolutionary espionage and sabotage organisations, former landowners, factory owners, former Polish army officers, government officials and fugitives), are to be considered in a special procedure, with the sentence of capital punishment – [execution by] shooting – being imposed.
>
> II. The cases are to be considered without the detainees being summoned or the charges being disclosed, and without any statements concerning the conclusion of the investigation or the bills of indictment being issued to them, in the following manner:

(a) the persons remaining in the prisoner-of-war camps: on the basis of information provided by the Directorate of Prisoner-of-War Affairs, NKVD USSR,

(b) the persons arrested: on the basis of information provided by the NKVD of the Ukrainian SSR and the NKVD of the Belorussian SSR."

The decision was signed by Joseph Stalin, Kliment Voroshilov, Anastas Mikoyan, Vyacheslav Molotov, Mikhail Kalinin and Lazar Kaganovich.

19. The killings took place in April and May 1940. Prisoners from the Kozelsk camp were killed at a site near Smolensk known as the Katyn Forest; those from the Starobelsk camp were shot in the Kharkov NKVD prison and their bodies were buried near the village of Pyatikhatki; the police officers from Ostashkov were killed in the Kalinin (now Tver) NKVD prison and buried in Mednoye. The circumstances of the execution of the prisoners from the prisons in western Ukraine and Belorussia remain unknown to this day.

20. In 1942 and 1943, first Polish railroad workers and then the German army discovered mass burials near the Katyn Forest. An international commission consisting of twelve forensic experts and their support staff from Belgium, Bulgaria, Croatia, Denmark, Finland, France, Hungary, Italy, the Netherlands, Romania, Slovakia and Sweden was set up. It conducted the exhumation works from April to June 1943. The remains of 4,243 Polish officers were excavated, of whom 2,730 were identified. The commission concluded that the Soviet authorities had been responsible for the massacre.

21. The Soviet authorities responded by putting the blame on the Germans who had allegedly – according to Moscow – taken control of the Polish prisoners and murdered them in the summer of 1941. Following the liberation of the Smolensk district by the Red Army in September 1943, the NKVD set up the Extraordinary State Commission chaired by Nicolay Burdenko, which purported to collect evidence of German responsibility for the killing of the Polish officers. In its communiqué of 22 January 1944 the Commission announced that the Polish prisoners had been executed by the Germans in the autumn of 1941.

22. In the course of the trial of German war criminals before the International Military Tribunal, the Katyn killings were mentioned in the indictment as an instance of a war crime (Indictment: Count Three – War Crimes, Section C (2)). On 13 February 1946 the Deputy Chief Prosecutor for the USSR, Colonel Y.V. Pokrovsky, charged the defendants with the execution of 11,000 Polish prisoners of war in the autumn of 1941, relying on the Extraordinary State Commission's report (Trial of the Major War Criminals before the International Military Tribunal, vol. VII, pp. 425-27). Despite the objections by Soviet prosecutors to the taking of oral evidence, the Tribunal heard evidence on 1 and 2 July 1946 from three witnesses for the prosecution and three witnesses for the defence (Vol. XVII, pp. 270-371). At the conclusion of the trial, no mention of the Katyn

killings was made either in the text of the judgment of the International Military Tribunal or in the dissenting opinion of the Soviet judge.

23. On 3 March 1959 Aleksandr Shelepin, Chairman of the KGB, proposed to Nikita Khrushchev, Secretary General of the USSR Communist Party, that the documents on the execution of Polish prisoners of war be destroyed:

> "Since 1940, records and other materials regarding prisoners and interned officers, policemen, gendarmes, [military] settlers, landowners and other persons from the former bourgeois Poland who were shot that same year, have been kept by the Committee of State Security of the Council of Ministers, USSR. On the basis of decisions taken by the Soviet NKVD's special *troika*, a total of 21,857 persons were shot, 4,421 of them in Katyn Forest (Smolenskiy district), 3,820 in the Starobelsk camp near Kharkov, 6,311 in the Ostashkov camp (Kalininskiy district) and 7,305 in other camps and prisons in western Ukraine and Belorussia.
>
> The entire operation to liquidate the above-mentioned individuals was carried out on the basis of a decision by the Central Committee of the Communist Party of the USSR dated 5 March 1940... Since the time the above-mentioned operation was carried out, that is, since 1940, no information has been released to anybody relating to the case, and all of the 21,857 files have been stored in a sealed location.
>
> None of these files are of any operational or historical value to Soviet organs. It is also highly doubtful whether they could be of any real value to our Polish friends. On the contrary, an unforeseen incident could lead to the operation being revealed, with all the undesirable consequences that would entail for our country, especially since, as regards the persons shot in the Katyn Forest, the official version was confirmed by an investigation carried out on the initiative of the Soviet authorities in 1944...
>
> On the basis of the above, it seems opportune to destroy all the records concerning the persons shot in 1940 in the above-mentioned operation ... [T]he reports of the meetings of the NKVD USSR *troika* sentencing those persons to be shot, and also the documents on execution of that decision, could be preserved."

24. The remaining documents were put in a special file, known as "package no. 1", to which only the Secretary General of the USSR Communist Party had the right of access. On 28 April 2010 its contents were officially made public on the website of the Russian State Archives Service. The file contained the following historical documents: Beria's proposal of 5 March 1940, the Politburo's decision of the same date, the pages removed from the minutes of the Politburo's meeting and Shelepin's note of 3 March 1959.

B. The applicants and their relationship to the victims

1. The applicants in case no. 55508/07

25. The first applicant, Mr Jerzy-Roman Janowiec, was born in 1929. He is the son of Mr Andrzej Janowiec, born in 1890, who was a lieutenant in the Polish army before the Second World War.

26. The second applicant, Mr Antoni-Stanisław Trybowski, was born in 1940. He is the grandson of Mr Antoni Nawratil, born in 1883, a lieutenant-colonel in the Polish army.

27. Both Mr Andrzej Janowiec and Mr Antoni Nawratil were taken prisoner of war during the Soviet invasion of Poland in September 1939 and sent to the Starobelsk camp in the USSR. Among the prisoners in the camp, Mr Janowiec was listed as prisoner no. 3914 and Mr Nawratil as prisoner no. 2407. They were subsequently transferred to a prison in Kharkov and executed in April 1940.

2. The applicants in case no. 29520/09

28. The first and second applicants, Ms Witomiła Wołk-Jezierska and Ms Ojcumiła Wołk, were born respectively in 1940 and 1917. They are the daughter and wife of Mr Wincenty Wołk, born in 1909, who was a lieutenant in a heavy artillery unit of the Polish army before the Second World War. He was taken prisoner of war by the Red Army on the night of 19 September 1939 and held in Kozelsk special camp (listed in position 3 on NKVD dispatching list 052/3 of April 1940). He was killed on 30 April 1940 and buried in Katyn. His body was identified during the 1943 exhumation (no. 2564).

29. The third applicant, Ms Wanda Rodowicz, was born in 1938. She is the granddaughter of Mr Stanisław Rodowicz, born in 1883, who was a reserve officer in the Polish army. He was taken prisoner of war by the Red Army at the Hungarian border on around 20 September 1939 and held in Kozelsk special camp (listed in position 94 on list 017/2). He was killed and buried in Katyn. His body was identified during the 1943 exhumation (no. 970).

30. The fourth applicant, Ms Halina Michalska, was born in 1929 and died in 2012. She was the daughter of Mr Stanisław Uziembło, born in 1889. An officer of the Polish army, Mr Uziembło was taken prisoner of war by the Soviets near Białystok, Poland, and detained in the special NKVD camp at Starobelsk (position 3400). He was presumed killed in Kharkov and buried at Pyatikhatki near Kharkov (now in Ukraine).

31. The fifth applicant, Mr Artur Tomaszewski, was born in 1933. He is the son of Mr Szymon Tomaszewski, born in 1900. The fifth applicant's father, commander of the police station at the Polish-Soviet border in Kobylia, was arrested there by Soviet troops and taken to the special NKVD camp at Ostashkov (position 5 on list 045/3). He was killed in Tver and buried in Mednoye.

32. The sixth applicant, Mr Jerzy Lech Wielebnowski, was born in 1930. His father, Mr Aleksander Wielebnowski, born in 1897, was a police officer working in Luck in eastern Poland. In October 1939 he was arrested by Soviet troops and placed in the Ostashkov camp (position 10 on list 033/2). He was killed in Tver and buried in Mednoye.

33. The seventh applicant, Mr Gustaw Erchard, was born in 1935. His father, Mr Stefan Erchard, born in 1900, was the headmaster of a primary school in Rudka, Poland. He was arrested by the Soviets and detained at the Starobelsk camp (position 3869). He was presumed killed in Kharkov and buried in Pyatikhatki.

34. The eighth and ninth applicants, Mr Jerzy Karol Malewicz and Mr Krzysztof Jan Malewicz, born in 1928 and 1931 respectively, are the sons of Mr Stanisław August Malewicz. The ninth applicant died in 2011. Their father was born in 1889 and served as a doctor in the Polish army. He was taken prisoner of war at Równe, Poland, and held at the Starobelsk camp (position 2219). He was presumed killed in Kharkov and buried in Pyatikhatki.

35. The tenth and eleventh applicants, Ms Krystyna Krzyszkowiak and Ms Irena Erchard, born in 1940 and 1936 respectively, are the daughters of Mr Michał Adamczyk. Born in 1903, he was the commander of Sarnaki police station. He was arrested by the Soviets, detained at the Ostashkov camp (position 5 on list 037/2), killed in Tver and buried in Mednoye.

36. The twelfth applicant, Ms Krystyna Mieszczankowska, born in 1930, is the daughter of Mr Stanisław Mielecki. Her father, a Polish officer, was born in 1895 and was held at the Kozelsk camp after his arrest by Soviet troops. He was killed and buried in Katyn; his body was identified during the 1943 exhumation.

37. The thirteenth applicant, Mr Krzysztof Romanowski, born in 1953, is the nephew of Mr Ryszard Żołędziowski. Mr Żołędziowski, born in 1887, was held at the Starobelsk camp (position 1151) and was presumed killed in Kharkov and buried in Pyatikhatki. A list of Starobelsk prisoners which included his name was retrieved from the coat pocket of a Polish officer whose remains, with gunshot wounds to the head, were excavated during a joint Polish-Russian exhumation near Kharkov in 1991.

C. Investigations in criminal case no. 159

38. On 13 April 1990, during a visit by Polish President Wojciech Jaruzelski to Moscow, the President of the USSR, Mikhail Gorbachev, handed over to him the documents concerning the Katyn massacre. The official news agency of the USSR published a communiqué which affirmed, on the basis of newly disclosed archive materials, that "Beria, Merkulov and their subordinates bore direct responsibility for the crime committed in the Katyn Forest".

39. On 22 March 1990 the Kharkov regional prosecutor's office opened a criminal investigation into the origin of mass graves found in the city's Lesopark district. On 6 June 1990 the Kalinin (Tver) prosecutor's office instituted a criminal case into "the disappearance" (*исчезновение*) in May 1940 of the Polish prisoners of war who had been held in the NKVD

camp in Ostashkov. On 27 September 1990 the Chief Military Prosecutor's Office of the USSR took over the Kharkov investigation under the number 159 and assigned it to a group of military prosecutors.

40. In the summer and autumn of 1991, Polish and Russian specialists carried out exhumations of corpses at the mass burial sites in Kharkov, Mednoye and Katyn. They also reviewed the archive documents relating to the Katyn massacre, interviewed at least forty witnesses and commissioned forensic examinations.

41. On 14 October 1992 the Russian President Boris Yeltsin revealed that the Polish officers had been sentenced to death by Stalin and the Politburo of the USSR Communist Party. The director of the Russian State Archives transferred to the Polish authorities a number of documents, including the decision of 5 March 1940. During an official visit to Poland on 25 August 1993, President Yeltsin paid tribute to the victims in front of the Katyn Cross in Warsaw.

42. In late May 1995 prosecutors from Belarus, Poland, Russia and Ukraine held a working meeting in Warsaw during which they reviewed the progress of the investigation in case no. 159. The participants agreed that the Russian prosecutors would ask their Belarusian and Ukrainian counterparts for legal assistance to determine the circumstances of the execution of 7,305 Polish citizens in 1940.

43. On 13 May 1997 the Belarusian authorities informed their Russian counterparts that they had not been able to uncover any documents relating to the execution of Polish prisoners of war in 1940. In 2002 the Ukrainian authorities produced documents concerning the transfer of Polish prisoners from the Starobelsk camp to the NKVD prison in the Kharkov region.

44. In 2001, 2002 and 2004 the President of the Polish Institute for National Remembrance ("the INR") repeatedly but unsuccessfully contacted the Russian Chief Military Prosecutor's Office with a view to obtaining access to the investigation files.

45. On 21 September 2004 the Chief Military Prosecutor's Office decided to discontinue criminal case no. 159, apparently on the ground that the persons allegedly responsible for the crime had already died. On 22 December 2004 the Inter-Agency Commission for the Protection of State Secrets classified thirty-six volumes of the case file – out of a total of 183 volumes – as "top secret" and a further eight volumes as "for internal use only". The decision to discontinue the investigation was given "top secret" classification and its existence was only revealed on 11 March 2005 at a press conference given by the Chief Military Prosecutor.

46. Further to a request from the Court for a copy of the decision of 21 September 2004, the Russian Government refused to produce it, citing its secret classification. It transpired from the Government's submissions that the investigation had been discontinued on the basis of Article 24 § 4 (1) of the Code of Criminal Procedure, on account of the suspects' death.

47. From 9 to 21 October 2005 three prosecutors from the INR conducting the investigation into the Katyn massacre and the chief specialist of the Central Commission for the Prosecution of Crimes against the Polish Nation visited Moscow at the invitation of the Chief Military Prosecutor's Office. They examined the sixty-seven volumes of case no. 159 which were not classified, but were not allowed to make any copies.

48. On 8 May 2010 the Russian President Dmitry Medvedev provided the Speaker of the Polish Parliament with sixty-seven volumes of the Katyn investigation files. In total, according to the information submitted by the Polish Government, the Russian authorities handed over to them certified copies of 148 volumes, containing approximately 45,000 pages.

D. Proceedings in application no. 55508/07

49. In 2003, Mr Szewczyk – a Polish lawyer retained by the first applicant (Mr Janowiec) and by the mother of the second applicant (Mr Trybowski) – applied to the Prosecutor General of the Russian Federation with a request to be provided with documents concerning Mr Andrzej Janowiec, Mr Antoni Nawratil and a third person.

50. On 23 June 2003 the Prosecutor General's Office replied to the lawyer, informing him that the Chief Military Prosecutor's Office was investigating a criminal case concerning the execution of Polish officers in 1940. In 1991 the investigation had recovered some 200 bodies in the Kharkov, Tver and Smolensk regions and identified some of them, including Mr Nawratil and Mr Janowiec. Their names had also been found on the list of prisoners in the Starobelsk camp. Any further documents concerning them had been destroyed previously.

51. On 4 December 2004 Mr Szewczyk formally requested the Chief Military Prosecutor's Office to recognise the rights of Mr Janowiec and Mr Trybowski as relatives of the executed Polish officers and to provide them with copies of the procedural documents and also of personal documents relating to Mr Antoni Nawratil and Mr Andrzej Janowiec.

52. On 10 February 2005 the Chief Military Prosecutor's Office replied that Mr Antoni Nawratil and Mr Andrzej Janowiec were listed among the prisoners from the Starobelsk camp who had been executed in 1940 by the NKVD and buried near Kharkov. No further materials concerning those individuals were available. Copies of the procedural documents could only be given to officially recognised victims or their representatives.

53. Subsequently the applicants Mr Janowiec and Mr Trybowski retained the services of a Russian lawyer, Mr Bushuev, who asked the Chief Military Prosecutor's Office for permission to study the case file. On 7 November 2006 the Chief Military Prosecutor's Office informed him that he would not be allowed to access the file because his clients had not been formally recognised as victims in the case.

54. The lawyer lodged a judicial appeal against the Chief Military Prosecutor's Office's refusals of 10 February 2005 and 7 November 2006. He submitted, in particular, that the status as victim of a criminal offence should be determined by reference to the factual circumstances, such as whether or not the individual concerned had sustained damage as a result of the offence. From that perspective, the investigator's decision to recognise someone as a victim should be viewed as a formal acknowledgement of such factual circumstances. The lawyer sought to have the applicants Mr Janowiec and Mr Trybowski recognised as victims and to be granted access to the case file.

55. On 18 April 2007 the Military Court of the Moscow Command rejected the complaint. It noted that, although Mr Antoni Nawratil and Mr Andrzej Janowiec had been listed among the prisoners in the Starobelsk camp, their remains had not been among those identified by the investigation. Accordingly, in the Military Court's view, there were no legal grounds to assume that they had died as a result of the offence in question. As to the materials in the case file, the Military Court observed that the decision to discontinue the criminal proceedings dated 21 September 2004 had been declared a State secret and, for that reason, foreign nationals could not have access to it.

56. On 24 May 2007 the Supreme Court of the Russian Federation upheld that judgment on appeal, reproducing verbatim the reasoning of the Military Court.

E. Proceedings in application no. 29520/09

57. On 20 August 2008 a team of lawyers acting for the applicants lodged a judicial appeal against the prosecutor's decision of 21 September 2004. They submitted that the applicants' relatives had been among the imprisoned Polish officers whose execution had been ordered by the Politburo of the USSR Communist Party on 5 March 1940. However, the applicants had not been granted victim status in case no. 159 and could not file motions or petitions, have access to the file materials or receive copies of the decisions. The lawyers also claimed that the investigation had not been effective because no attempt had been made to take biological samples from the applicants in order to identify the exhumed human remains.

58. On 14 October 2008 the Military Court of the Moscow Command dismissed the appeal. It found that in 1943 the International Commission and the Technical Commission of the Polish Red Cross had excavated the remains and then reburied them, without identifying the bodies or counting them. A subsequent excavation in 1991 had only identified twenty-two persons and the applicants' relatives had not been among those identified. The Military Court acknowledged that the names of the applicants' relatives had been included in the NKVD lists for the Ostashkov, Starobelsk and

Kozelsk camps; however, "the 'Katyn' investigation ... did not establish the fate of the said individuals". As their bodies had not been identified, there was no proof that the applicants' relatives had lost their lives as a result of the crime of abuse of power (Article 193-17 of the 1926 Soviet Criminal Code) referred to in the decision of 21 September 2004. Accordingly, there was no basis for granting victim status to the applicants under Article 42 of the Code of Criminal Procedure. Moreover, classified materials could not be made accessible to "representatives of foreign States".

59. The lawyers submitted a statement of appeal in which they alleged that the lack of information about the fate of the applicants' relatives had been the result of an ineffective investigation. The twenty-two persons had been identified only on the basis of the military identification tags found at the burial places and the investigators had not undertaken any measures or commissioned any forensic examinations to identify the exhumed remains. Furthermore, it was a publicly known fact that the 1943 excavation had uncovered the remains of 4,243 people, of whom 2,730 individuals had been identified. Among those identified were three persons whose relatives had been complainants in the proceedings. The granting of victim status to the complainants would have allowed the identification of the remains with the use of genetic methods. Finally, the lawyers stressed that the Katyn criminal case file did not contain any information supporting the conclusion that any of the Polish officers taken from the NKVD camps had survived or died of natural causes.

60. On 29 January 2009 the Supreme Court of the Russian Federation upheld the judgment of 14 October 2008 in its entirety. It repeated verbatim extensive passages of the findings of the Moscow Military Court, but also added that the decision of 21 September 2004 could not be quashed because the prescription period had expired and because the proceedings in respect of certain suspects had been discontinued on "rehabilitation grounds".

F. Proceedings for declassification of the decision of 21 September 2004

61. On 26 March 2008 Memorial, a Russian non-governmental human rights organisation, lodged an application with the Chief Military Prosecutor's Office seeking to have the decision of 21 September 2004 declassified. In its answer dated 22 April 2008, the prosecutor's office informed Memorial that it was not competent to set aside the classified status, which had been approved on 22 December 2004 by the Inter-Agency Commission for the Protection of State Secrets ("the Commission").

62. On 12 March 2009 Memorial applied to the Commission for declassification of the decision of 21 September 2004, claiming that the classification of the materials of the Katyn investigation was morally and legally unacceptable and that it had also been in breach of section 7 of the

State Secrets Act, which precluded classification of any information about violations of human rights. By a letter of 27 August 2009, the Commission replied to Memorial that their application had been examined and rejected, but did not provide further details.

63. Memorial challenged the Commission's refusal before the Moscow City Court. At a hearing on 13 July 2010 the court read out the Commission's letter of 25 June 2010 addressed to the presiding judge. The letter stated that the Commission had not made any decision on 22 December 2004 to classify the decision of the Chief Military Prosecutor's Office of 21 September 2004.

64. Following an in camera hearing, the Moscow City Court rejected Memorial's application for declassification on 2 November 2010, finding in particular as follows:

> "The court has established that on 21 September 2004 the Chief Military Prosecutor's Office issued a decision terminating the criminal investigation which had been instituted on 22 March 1990 by the Kharkov regional prosecutor's office of the Ukrainian SSR [Soviet Socialist Republic] in connection with the discovery of the remains of Polish nationals in the wooded zone of Kharkov ...
>
> The investigation characterised the actions of a number of named high-ranking officials of the USSR as an abuse of power with particularly aggravating circumstances under Article 193-17 (b) of the RSFSR [Russian Soviet Federated Socialist Republic] Criminal Code. The criminal case in respect of those officials was terminated on the basis of Article 24 § 1 (4) of the Russian Code of Criminal Procedure (on account of the guilty persons' deaths). The case in respect of the others was terminated on the basis of Article 24 § 1 (2) (there was no criminal offence).
>
> The Chief Military Prosecutor's Office sent the draft decision on termination of the criminal proceedings to the Federal Security Service for an expert opinion as to whether or not it contained any confidential or secret information within the meaning of section 9 of the State Secrets Act, since the Federal Security Service had the right to dispose as it saw fit of the information reproduced in the Chief Military Prosecutor's decision.
>
> A commission of experts from the Federal Security Service found that the Chief Military Prosecutor's draft decision included information which had not been declassified. In addition, the commission pointed out that the draft decision contained information to which access was restricted ...
>
> On 21 September 2004 an official from the Chief Military Prosecutor's Office issued the decision discontinuing criminal investigation no. 159. In the light of the above-mentioned findings by the Federal Security Service and on the basis of section 5 § 4 (2, 3) and section 8 of the State Secrets Act and point 80 of Presidential Decree no. 1203 of 30 November 1995, the document was given top secret classification ... Accordingly, there are no legal grounds for granting Memorial's request that the Chief Military Prosecutor's resolution classifying the decision of 21 September 2004 be declared unlawful and unjustified ...
>
> In so far as the complainant argued that information concerning violations of the law by State authorities or officials may not be declared a State secret or classified in accordance with section 7 of the State Secrets Act, this argument is without merit because the Chief Military Prosecutor's decision of 21 September 2004 contained

information in the field of intelligence, counterintelligence and operational and search activities which, pursuant to section 4 of the State Secrets Act, constituted a State secret ..."

65. On 26 January 2011 the Supreme Court of the Russian Federation rejected the appeal lodged by Memorial against the City Court's judgment.

G. Proceedings for the "rehabilitation" of the applicants' relatives

66. Most of the applicants applied repeatedly to different Russian authorities, first and foremost the Chief Military Prosecutor's Office, for information on the Katyn criminal investigation and for the "rehabilitation" of their relatives in accordance with the provisions of the 1991 Rehabilitation Act (see paragraph 86 below).

67. By a letter of 21 April 1998 sent in response to a rehabilitation request by Ms Ojcumiła Wołk, the Chief Military Prosecutor's Office confirmed that her husband, Mr Wincenty Wołk, had been held as a prisoner of war in the Kozelsk camp and had then been executed, along with other prisoners, in the spring of 1940. The letter stated that her application for rehabilitation would be considered only after the conclusion of the criminal investigation.

68. Following the discontinuation of the investigation in case no. 159, Ms Witomiła Wołk-Jezierska asked the Chief Military Prosecutor's Office on 25 October 2005 for a copy of the decision discontinuing the investigation. By a letter of 23 November 2005, the prosecutor's office refused to provide it, citing the decision's top secret classification. On 8 December 2005 the Polish Embassy in Moscow asked the prosecutor's office for an explanation concerning the rehabilitation of Mr Wołk. In a letter of 18 January 2006 the prosecutor's office expressed the view that there was no legal basis for the rehabilitation of Mr Wołk or the other Polish citizens because the investigation had not determined which provision of the 1926 Criminal Code had been the basis for the repression to which they had been subjected. A similarly worded letter of 12 February 2007 refused a further request to the same effect by Ms Wołk.

69. On 13 March 2008 the Chief Military Prosecutor's Office rejected a request for rehabilitation submitted by counsel on behalf of all the applicants. The prosecutor stated that it was not possible to determine the legal basis for the repression to which Polish citizens had been subjected in 1940. Despite the existence of some documents stating that the applicants' relatives had been transferred from the NKVD camps at Ostakhkov, Kozelsk and Starobelsk to Kalinin, Smolensk and Kharkov, the joint efforts by Belarusian, Polish, Russian and Ukrainian investigators had not uncovered any criminal files or other documents relating to their prosecution in 1940. In the absence of such files it was not possible to decide whether the Rehabilitation Act would be applicable. Furthermore,

the prosecutor stated that the remains of the applicants' relatives had not been discovered among the human remains found during the exhumation works.

70. Counsel lodged a judicial appeal against the prosecutor's refusal.

71. On 24 October 2008 the Khamovnicheskiy District Court of Moscow dismissed the appeal. While the court confirmed that the names of the applicants' relatives had featured on the NKVD lists of prisoners, it pointed out that only twenty bodies had been identified as a result of the exhumations conducted in the context of case no. 159 and that the applicants' relatives had not been among those identified. The court further found that there was no reason to assume that the ten Polish prisoners of war (the applicants' relatives) had actually been killed, and that Russian lawyers had no legal interest in the rehabilitation of Polish citizens.

72. On 25 November 2008 the Moscow City Court rejected, in summary fashion, an appeal against the District Court's judgment.

H. Statement by the Russian Duma on the Katyn tragedy

73. On 26 November 2010 the State Duma, the lower chamber of the Russian Parliament, adopted a statement entitled "On the Katyn tragedy and its victims" which read, in particular, as follows:

> "Seventy years ago, thousands of Polish citizens held in the prisoner-of-war camps of the NKVD of the USSR and in prisons in the western regions of the Ukrainian SSR and Belorussian SSR were shot dead.
>
> The official Soviet propaganda attributed responsibility for this atrocity, which has been given the collective name of the Katyn tragedy, to Nazi criminals ... In the early 1990s our country made great strides towards the establishment of the truth about the Katyn tragedy. It was recognised that the mass extermination of Polish citizens on USSR territory during the Second World War had been an arbitrary act by the totalitarian State ...
>
> The published materials that have been kept for many years in secret archives not only demonstrate the scale of this terrible tragedy but also attest to the fact that the Katyn crime was carried out on the direct orders of Stalin and other Soviet leaders ...
>
> Copies of many documents which had been kept in the closed archives of the Politburo of the Communist Party of the Soviet Union have already been handed over to the Polish side. The members of the State Duma believe that this work must be carried on. It is necessary to continue studying the archives, verifying the lists of victims, restoring the good names of those who perished in Katyn and other places, and uncovering the circumstances of the tragedy ..."

II. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Hague Convention IV

74. The Hague Convention (IV) respecting the Laws and Customs of War on Land of 18 October 1907 ("the 1907 Hague Convention (IV)"), and in particular its annex, Regulations concerning the Laws and Customs of War on Land, provides as follows:

> "Art. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.
>
> They must be humanely treated.
>
> ...
>
> Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden
>
> ...
>
> (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
>
> (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
>
> ...
>
> Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

B. Geneva Convention

75. The Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929 ("the Geneva Convention of 1929") provided as follows:

> "Art. 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.
>
> They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.
>
> Measures of reprisal against them are forbidden.
>
> ...
>
> Art. 61. No prisoner of war shall be sentenced without being given the opportunity to defend himself.
>
> No prisoner shall be compelled to admit that he is guilty of the offence of which he is accused.
>
> ...

Art. 63. A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

C. Charter of the International Military Tribunal

76. Article 6 of the Charter (Statute) of the International Military Tribunal (Nuremberg Tribunal) set up in pursuance of the agreement signed on 8 August 1945 by the governments of the United States of America, France, the United Kingdom and the USSR, contained the following definition of crimes:

"...

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **crimes against peace**: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **war crimes**: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **crimes against humanity**: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

..."

77. The definition was subsequently codified as Principle VI in the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, formulated by the International Law Commission in 1950 under United Nations General Assembly Resolution 177 (II) and affirmed by the General Assembly.

D. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

78. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (26 November 1968), to which the Russian Federation is a party, provides in particular as follows:

Article I

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations ...

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations ..."

Article IV

"The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished."

E. Vienna Convention on the law of treaties

79. The Vienna Convention on the law of treaties (23 May 1969), to which the Russian Federation is a party, provides as follows:

Article 26
Pacta sunt servanda

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

Article 27
Internal law and observance of treaties

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ..."

Article 28
Non-retroactivity of treaties

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

F. International Covenant on Civil and Political Rights

80. Article 7 of the International Covenant on Civil and Political Rights ("the Covenant"), to which the Russian Federation is a party, reads as follows:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

81. The United Nations Human Rights Committee's General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004 (2,187th meeting), reads as follows:

"4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. ..."

82. At its meeting on 3 April 2003 the Human Rights Committee established under Article 28 of the Covenant expressed the following views after consideration of Communication No. 886/1999, submitted on behalf of Ms Natalia Schedko and Mr Anton Bondarenko against Belarus:

"10.2 The Committee notes that the author's claim that her family was informed of neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegation. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant."

83. At its meeting on 28 March 2006 the Human Rights Committee expressed the following views after consideration of Communication No. 1159/2003, submitted on behalf of Mariam, Philippe, Auguste and Thomas Sankara against Burkina Faso:

"6.2 The Committee noted the State party's arguments concerning the inadmissibility of the communication *ratione temporis*. Having also noted the authors' arguments, the Committee considered that a distinction should be drawn between the complaint relating to Mr. Thomas Sankara and the complaint concerning Ms. Sankara and her children. The Committee considered that the death of Thomas Sankara, which

may have involved violations of several articles of the Covenant, occurred on 15 October 1987, hence before the Covenant and the Optional Protocol entered into force for Burkina Faso. This part of the communication was therefore inadmissible *ratione temporis*. Thomas Sankara's death certificate of 17 January 1988, stating that he died of natural causes – contrary to the facts, which are public knowledge and confirmed by the State party ... – and the authorities' failure to correct the certificate during the period since that time must be considered in the light of their continuing effect on Ms. Sankara and her children.

...

12.2 Concerning the alleged violation of article 7, the Committee understands the anguish and psychological pressure which Ms. Sankara and her sons, the family of a man killed in disputed circumstances, have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara, or the precise location where his remains were officially buried. Thomas Sankara's family have the right to know the circumstances of his death, and the Committee points out that any complaint relating to acts prohibited under article 7 of the Covenant must be investigated rapidly and impartially by the competent authorities. In addition, the Committee notes, as it did during its deliberations on admissibility, the failure to correct Thomas Sankara's death certificate of 17 January 1988, which records a natural death contrary to the publicly known facts, which have been confirmed by the State party. The Committee considers that the refusal to conduct an investigation into the death of Thomas Sankara, the lack of official recognition of his place of burial and the failure to correct the death certificate constitute inhuman treatment of Ms. Sankara and her sons, in breach of article 7 of the Covenant."

III. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure of the Russian Federation (Law no. 174-FZ of 18 December 2001)

84. Article 24 § 1 sets out the following grounds for discontinuation of criminal proceedings:

"(1) there was no criminal offence;

(2) the acts did not constitute a criminal offence;

...

(4) the suspect or the defendant died, except in cases in which the criminal proceedings need to be continued for the rehabilitation of the deceased."

85. Article 42 defines a "victim" as an individual who has sustained physical, pecuniary or non-pecuniary damage as the result of a crime. The decision to recognise the individual as a "victim" must be made by the examiner, investigator, prosecutor or court.

B. Rehabilitation Act (Law no. 1761-I of 18 October 1991)

86. According to the preamble, the purpose of the Rehabilitation Act is the "rehabilitation" of all victims of political repression who were prosecuted on the territory of the Russian Federation after 7 November 1917, the term "rehabilitation" being understood as "the restoration of their civil rights, the removal of any other adverse consequences of the arbitrary actions and the payment of compensation in respect of pecuniary damage".

87. Section 1 defines "political repression" as various measures of restraint, including deprivation of life or liberty, imposed by the State for political motives, as well as any other restriction on the rights or freedoms of those individuals who were recognised as being socially dangerous to the State or political regime on account of their class or social origin, ethnicity or religion.

88. Section 2 extended the application of the Rehabilitation Act to all Russian nationals, former USSR nationals, foreign nationals and stateless persons who were subjected to political repression in the territory of the Russian Federation after 7 November 1917.

89. Section 3 establishes the categories of persons who are eligible for "rehabilitation". Point (b) concerns individuals who were subjected to criminal repression on the basis of decisions by the All-Russian Extraordinary Commission (Vecheka, *ВЧК*), the Chief Political Directorate (GPU, *ГПУ*), the People's Commissariat for Internal Affairs (NKVD, *НКВД*), the Ministry of State Security (MGB, *МГБ*), prosecutors and their collegiate bodies, "special commissions", the *troika* and other authorities with judicial functions.

C. Classification and declassification of State secrets in Russia

90. According to its preamble, the State Secrets Act (Law no. 5485-I of 21 July 1993) governs the procedure for the identification of State secrets, the classification and declassification of information and the protection of information in the interests of the national security of the Russian Federation.

91. Section 5 contains a list of categories of information that constitute a State secret. It includes, in particular, the following:

> "(4) information in the field of intelligence, counterintelligence and operational and search activities, as well as in the field of counter-terrorism:
>
> – concerning resources, means, sources, methods, plans and outcomes of intelligence, counterintelligence and operational and search activities and the financing thereof ...
>
> – concerning persons who cooperated or are cooperating on a confidential basis with the authorities in charge of intelligence, counterintelligence and operational and search activities."

92. Section 7 contains a list of information which may not be declared a State secret or classified. It covers, in particular, the following information:

> "– concerning violations of human rights and freedoms of individuals and citizens ...
>
> – concerning breaches of the law committed by State authorities or officials."

93. Section 13 governs the procedure for declassifying the information. It also provides as follows:

> "The period, during which the State secrets shall remain classified, may not exceed thirty years. In exceptional cases, the Inter-Agency Commission on the Protection of State Secrets may extend this period."

94. On 2 August 1997 the government adopted Regulation no. 973 on preparing State secret information for transfer to foreign States and international organisations. It provides that a decision on transferring such information may be made by the Russian government on the basis of a report prepared by the Inter-Agency Commission on the Protection of State Secrets (§ 3). The recipient party must undertake to protect the classified information by entering into an international treaty establishing, among other matters, the procedure for transferring information, a confidentiality clause and a dispute resolution procedure (§ 4).

D. Criminal Code of the Russian Federation (Law no. 63-FZ of 13 June 1996)

95. Chapter 34 contains a list of crimes against the peace and security of humankind. Article 356 prohibits in particular "cruel treatment of prisoners of war or civilians", an offence punishable by up to twenty years' imprisonment.

96. Article 78 § 5 stipulates that the offences defined in Articles 353 (War), 356 (Prohibited means of warfare), 357 (Genocide) and 358 (Ecocide) are imprescriptible.

THE LAW

I. WHETHER THE RELATIVES OF THE DECEASED APPLICANTS HAVE STANDING BEFORE THE COURT

97. Following the death of the applicant Mr Krzysztof Jan Malewicz on 7 July 2011, his son, Mr Piotr Malewicz, informed the Court of his wish to pursue in his stead the grievances he had raised.

98. The Chamber reiterated that in cases where an applicant had died in the course of the proceedings, the Court had previously taken into account

the statements of the applicant's heirs or close family members expressing the wish to pursue the proceedings before it (see *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX, and *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999-VI). The Chamber therefore accepted that Mr Piotr Malewicz could pursue the application in so far as it had been lodged by his late father.

99. The applicant Ms Halina Michalska died on 28 November 2012. By a letter of 30 January 2013, her son, Mr Kazimierz Raczyński, expressed his intention to pursue the proceedings in her stead.

100. The Grand Chamber is satisfied that both Mr Piotr Malewicz and Mr Kazimierz Raczyński are the next of kin of the deceased applicants. It further notes that the Chamber's acceptance of Mr Piotr Malewicz's standing before the Court has not been disputed by any of the parties. The Grand Chamber therefore sees no reason to reach a different conclusion, either in respect of Mr Piotr Malewicz or, by analogy, in respect of Mr Kazimierz Raczyński.

101. Accordingly, the Court accepts that Mr Piotr Malewicz and Mr Kazimierz Raczyński may pursue the application in so far as it was lodged by the late Mr Krzysztof Jan Malewicz and the late Ms Halina Michalska respectively.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

102. The applicants complained that the Russian authorities had not discharged their obligations under the procedural limb of Article 2 of the Convention, which required them to conduct an adequate and effective investigation into the deaths of their relatives. Article 2 provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The Chamber judgment

103. Recalling that in its admissibility decision of 5 July 2011 the Court had joined the Government's objection as to its temporal competence in respect of the procedural limb of Article 2 to the merits of the case, the

Chamber examined at the outset whether that objection was to be upheld or rejected. To that end, it reviewed the applicable case-law of the Court and the principles governing the temporal limits of States' procedural obligations as they had been formulated in the *Šilih v. Slovenia* judgment ([GC], no. 71463/01, §§ 160-63, 9 April 2009) and applied in a series of cases against Romania, Ukraine and Croatia.

104. On the first test – the existence of a "genuine connection" required under the first sentence of paragraph 163 of the above-cited *Šilih* judgment, the Chamber held that the "genuine connection" standard would be satisfied only if the lapse of time between the triggering event and the ratification date remained reasonably short. In addition, it pointed out that a significant proportion of the investigative steps required for ensuring compliance with the procedural obligation under Article 2 must have been carried out after the ratification date. In the Chamber's assessment, neither condition had been met in the instant case, in which the time lapse between the deaths (1940) and the ratification date (5 May 1998) was excessively long, too long in absolute terms to satisfy the "genuine connection" standard. Likewise, the Chamber was unable to find any indication in the file or in the parties' submissions that any procedural steps had been taken in the post-ratification period that would have been comparable in their significance to those carried out before the ratification date.

105. The Chamber then went on to examine whether the circumstances of the case were such as to justify the finding that the connection between the triggering event and the ratification date was based on "the need to ensure the effective protection of the guarantees and the underlying values of the Convention" (see paragraph 139 of the Chamber judgment), as indicated in the last sentence of paragraph 163 of the above-cited *Šilih* judgment. As this was the first case in which the Court had been called upon to give an interpretation of that clause, the Chamber – drawing inspiration from the *Brecknell* judgment (see *Brecknell v. the United Kingdom*, no. 32457/04, 27 November 2007) – construed it in the following manner.

> "139. ... Far from being fortuitous, the reference of the underlying values of the Convention indicates that, for such connection to be established, the event in question must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as, for instance, war crimes or crimes against humanity. Although such crimes are not subject to a statutory limitation by virtue of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity ..., it does not mean that the States have an unceasing duty to investigate them. Nevertheless, the procedural obligation may be revived if information purportedly casting new light on the circumstances of such crimes comes into the public domain after the critical date. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further ... Should new

material come to light in the post-ratification period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have temporal jurisdiction to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law." (references omitted)

106. Applying those requirements to the case at hand, the Chamber found that the mass murder of Polish prisoners by the Soviet secret police had the features of a war crime, but that, in the period after 5 May 1998, no piece of evidence of a character or substance which could revive a procedural obligation of investigation or raise new or wider issues had been produced or uncovered. It concluded accordingly that there were no elements capable of providing a bridge from the distant past into the recent post-ratification period and that the special circumstances justifying a connection between the deaths and ratification had not been shown to exist.

107. In the light of those considerations, the Chamber found that the Court had no competence *ratione temporis* to take cognisance of the merits of the complaint under Article 2 of the Convention.

B. The parties' submissions

1. The Russian Government

108. The Government submitted that a legal distinction should be drawn between two situations: one in which a violation of the Convention occurred during a period falling outside the Court's temporal jurisdiction, and a second in which a violation of the Convention "did not legally exist at all" because at the material time the Convention had not existed. In their view, this distinction was crucial, as only a "legally existing" violation of Article 2 in its substantive aspect – which might nevertheless have taken place outside the Court's temporal jurisdiction – could trigger the State's procedural obligations under Article 2 of the Convention taken in conjunction with Article 1. In the cases previously examined by the Court, the events that triggered the duty to investigate had occurred after the adoption of the Convention. In the instant case the alleged violation of Article 2 under its substantive limb not only fell outside the Court's temporal jurisdiction but also had not existed *de jure*, since the "Katyn events" had preceded the adoption of the Convention on 4 November 1950 by ten years and its ratification by Russia on 5 May 1998 by fifty-eight years. In the Government's view, this precluded the Court from examining Russia's compliance with its procedural obligations. Furthermore, the Government asserted that the Court had no competence *ratione materiae* to characterise the Katyn massacre as a "war crime" from the standpoint of international humanitarian law.

109. The Government submitted that no obligation to investigate the "Katyn events" could be said to have arisen, whether as a matter of

domestic law or international humanitarian law or under the Convention. At the domestic level, an investigation had been conducted into a criminal offence punishable under Article 193-17 (b) of the 1926 Criminal Code of the RSFSR (abuse of power causing grave consequences, committed under aggravating circumstances) which had a limitation period of ten years. The contemporary Russian Code of Criminal Procedure required that the proceedings be discontinued upon the expiry of the limitation period. In addition, the officers of the NKVD of the USSR had died before the criminal investigation had been opened. As a matter of domestic criminal procedure, their death was a separate legal ground precluding criminal proceedings from being instituted against them or pursued. In international law, the death of suspects or defendants was also a universally recognised ground for refusing to institute or for discontinuing criminal proceedings (here the Government referred to *Prosecutor v. Norman, Fofana and Kondewa*, The Special Court for Sierra Leone, Trial Chamber decision of 21 May 2007, Case no. SCSL-04-14-T-776, and *Prosecutor v. Slobodan Milošević*, International Criminal Tribunal for the former Yugoslavia, Case no. IT-02-54-T, Order Terminating the Proceedings, 14 March 2006). For the Government, it was clear that the investigation of criminal case no. 159 had been carried on "in breach of the criminal procedure requirements, for political reasons, as a goodwill gesture to the Polish authorities".

110. From the standpoint of international humanitarian law the Government considered that, at least until 1945, there had existed no universally binding provision of international law on the definition of war crimes or crimes against humanity or on the attribution of responsibility and the prosecution of such crimes. Since the International Military Tribunal was an *ad hoc* tribunal, the provisions of its Charter, including the definitions of crimes contained therein, were limited to the proceedings before it against the major war criminals belonging to the European Axis powers. The Government concluded that international law, as it existed in 1940, did not provide a sufficient basis for characterising the "Katyn events" as a war crime, a crime against humanity or genocide unless they were attributable to the major war criminals of the European Axis and fell within the jurisdiction of the Nuremberg Tribunal. Nevertheless, at the request of the Polish authorities, the Russian investigators had examined the "version of genocide" and determined that no such crime had been committed because the suspects had had purely criminal motives rather than an intent to destroy, in whole or in part, a national, ethnic, racial or religious group (according to the definition in Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948).

111. As to the procedural obligation to investigate under the Convention, the Government reiterated firstly that the investigation in criminal case no. 159 had been conducted for political reasons, as a goodwill gesture, and

could not therefore be assessed from the standpoint of the procedural requirements of Article 2. Secondly, in the opinion of the Government, only those events that took place after the adoption of the Convention could trigger any procedural obligation. Thirdly, the Russian authorities could not reasonably be expected to carry out an effective investigation some fifty-eight years after the events when the witnesses had already died and the crucial documents had been destroyed. In the alternative, the Government pleaded that "the Convention impose[d] no specific obligation ... to provide redress for wrongs or damage caused prior to ... ratification" (here they referred to *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX). In other words, when the Court was prevented *ratione temporis* from examining the circumstances of a death, it could not establish whether or not it gave rise to a procedural obligation under Article 2 (here they referred to *Kholodovy v. Russia* (dec.), no. 30651/05, 14 September 2006, and *Moldovan and Others and Rostaş and Others v. Romania* (dec.), nos. 41138/98 and 64320/01, 13 March 2001).

112. As to the detachability of the procedural obligation, the Russian Government pointed out that not every death would trigger the procedural obligation and that the Court had to examine at the outset whether the circumstances of the death were such as to bring the obligation into play. However, where the death had occurred before the ratification date, the Court would have no temporal jurisdiction to perform such an analysis. Furthermore, the detachability principle had to be subject to certain limitations if an unforeseeable extension of the Court's jurisdiction and the Convention's outreach were to be avoided. Firstly, the lapse of time had to be reasonably short, which it was not in the present case. Secondly, a significant portion of the investigative steps had to have been carried out after the ratification date. This criterion was likewise not fulfilled in the instant case. Finally, where the need to ensure the real and effective protection of the underlying values of the Convention was concerned, the Government agreed that the event in question had to be of a larger dimension than an ordinary criminal offence. However, as far as the "Katyn events" were concerned, the Court had no jurisdiction, either *ratione temporis* or *ratione materiae*, to assess them from the standpoint of international humanitarian law.

113. The Government emphasised that all the most significant procedural steps in the Katyn investigation had been carried out in the period between 1990 and 1995 and that no relevant "new material" had emerged after 5 May 1998. Contrary to the Polish Government's allegation, the decision on the classification of certain materials could not be seen as "new material" capable of (re-)triggering the procedural obligation under Article 2. Neither could the alleged discovery of the Ukrainian list in 2002, which amounted only to a request for clarification by the Ukrainian authorities.

2. The applicants

114. The applicants acknowledged that the Katyn massacre committed in 1940 was an act falling outside the temporal reach of the Convention, and that the Court had no competence *ratione temporis* to deal with the substantive aspect of Article 2. Nevertheless, in their view, the Court should have temporal jurisdiction to examine whether Russia had observed its procedural obligation under Article 2, which was a separate and autonomous duty capable of binding the State even when the deaths in question had occurred before the ratification date.

115. The applicants considered that the genuine connection necessary to establish the Court's temporal competence should be based first of all on the "need to ensure that the guarantees and the underlying values of the Convention [were] protected in a real and effective manner" (the applicants referred to *Šilih*, cited above, § 163 *in fine*). The expression "the underlying values of the Convention" had previously been invoked by the Court in finding that particular instances of hate speech, such as speech denying the Holocaust or justifying war crimes, were incompatible with the values of the Convention (here they referred to *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003−IX; *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005; and *Orban and Others v. France*, no. 20985/05, § 35, 15 January 2009). Since speech denying the reality of crimes under international law was deemed to contravene the underlying values of the Convention, the same rationale should apply *a fortiori* to the acts themselves, which undermined the very meaning of justice and peace, the fundamental values of the Convention as expressed in its Preamble. In the applicants' submission, the mention of the underlying values in paragraph 163 of the *Šilih* judgment indicated that there existed some instances of acts violating the very foundation of the Convention system whose nature, magnitude and gravity should give the Court jurisdiction *ratione temporis* to examine the State's obligation to conduct an effective investigation.

116. The applicants maintained that the Katyn massacre was a crime under international law. The Polish soldiers captured by the Red Army had been entitled to the full protection guaranteed to prisoners of war, including the protection against acts of violence and cruelty afforded by the provisions of the 1907 Hague Convention (IV) and the Geneva Convention of 1929. The murder of Polish prisoners of war in 1940 had been an unlawful act which violated Articles 4, 23 (c) and 50 of the 1907 Hague Convention (IV) and Articles 2, 46, 61 and 63 of the Geneva Convention of 1929. Even though the USSR had not been a party to either Convention, it had a duty to respect the universally binding principles of international customary law, which had merely been codified in those Conventions. That such an obligation was recognised as legally binding by the USSR was clearly evidenced by the fact that, at the Nuremberg trial, the Soviet prosecutor had

attempted to charge the Nazi leaders with the murder of Polish prisoners of war. The extermination of Polish prisoners of war was a war crime within the meaning of Article 6 (b) of the Nuremberg Charter and the shooting of civilians amounted to a crime against humanity as defined in Article 6 (c) of the Nuremberg Charter. The Nuremberg Tribunal's classification of the Katyn massacre as a war crime had to be viewed in objective terms and was not dependent upon who had actually committed the atrocity. Moreover, the execution of prisoners of war constituted and was treated as a war crime by the international community, a fact convincingly demonstrated by the abundant case-law from the post-war trials of war criminals. As a crime under international law, the Katyn massacre had been imprescriptible at the time of its commission, as it was today, and the concomitant duty to investigate it survived to this day.

117. The applicants further referred to two factors which corroborated the argument regarding the Court's competence to adjudicate on Russia's compliance with the procedural obligation under Article 2. Firstly, the Council of Europe and the Convention had come into being as democratic political and legal alternatives to the violations of human dignity committed on a massive scale by two totalitarian regimes, namely Nazism and Stalinism. The Katyn massacre had been carried out by a totalitarian regime whose aims and values radically contradicted those of the Convention. If the Convention was to be protected in a real and effective manner, the current Contracting Parties had to conduct effective investigations into totalitarian crimes. Secondly, an effective investigation into the Katyn massacre was a prerequisite for the "rehabilitation" of the murdered persons as victims of political repression and to increase public awareness of totalitarian crimes.

118. The applicants further considered that, even under the "new material test" which had been developed and applied in the Chamber judgment, the Court could be competent to examine Russia's compliance with the procedural obligation under Article 2, assuming that the required new element was not limited to important new evidence becoming known in the post-ratification period but also included new and sufficiently important procedural facts. This test should also encompass cases where the domestic authorities had failed to collect new evidence or where they had adopted conclusions that starkly contradicted previous findings or historical facts. Although a decision to close the investigation was not as such new material for the investigation, it could constitute a new procedural development of relevance in the context of Article 2 of the Convention, especially since it marked a sudden change in the investigation. Moreover, when a significant portion of the investigation file became classified and the same status was given to the final decision in the investigation, there existed good reasons to presume that the sudden and radical change in the investigation must have resulted from relevant new findings.

119. Turning to the merits of the Article 2 complaint, the applicants submitted that the Russian investigation had not met the basic requirements of that provision. The Russian authorities had not accounted for the difference between the number of persons killed (21,857) and the much lower number of those referred to as "perished" (1,803). They had not conducted full-scale excavations at all the burial sites. The applicants had been refused the status of injured parties in the proceedings and the investigation had lacked transparency on that account. Lastly, the investigation had not been geared towards identifying the perpetrators and bringing them to justice. The applicants cited the names of two high-ranking Soviet functionaries who had been implicated in the Katyn massacre and who were still alive in the 1990s.

3. The Polish Government

120. The Polish Government submitted that the interpretation of the "special-circumstances clause" in the last sentence of paragraph 163 of the *Šilih* judgment should take into account the special nature of the acts committed, which were war crimes under international law. In addition, the Court should have regard to the following factors: (a) the investigation into the Katyn massacre had been impossible for political reasons before 1990; (b) the investigation had been pursued for six years after Russia's ratification of the Convention; (c) there was a substantial number of individuals with a legitimate interest in finding out the circumstances of the massacre; and (d) there were still ample opportunities to carry on the investigation.

121. The Polish Government further submitted that between 1998 and 2004 the Russian prosecuting authorities, in the framework of the Katyn investigation, had carried out a number of procedural acts which had produced new pieces of evidence that could arguably "revive" the procedural obligation under Article 2. Those included: (a) exchanges of correspondence in 2002 between Russian and Ukrainian prosecutors on the subject of the Katyn crime; (b) the sending of more than 3,000 requests for information to the Russian personal data centres concerning the fate of Polish citizens whose names featured on the "Ukrainian Katyn list"; (c) Polish-Russian bilateral consultations; (d) the lodging of more than ninety requests from the relatives of the Katyn victims; (e) the commissioning of two expert opinions on the legal characterisation of the Katyn massacre; and (f) the decision on the classification of the case-file materials.

122. Turning to the merits of the Article 2 complaint, the Polish Government contended that the Katyn investigation had been ineffective. On the one hand the Russian prosecutors had confirmed the execution of the applicants' relatives in 1940, but on the other hand the Russian military courts had declared them to be missing persons. The Russian authorities had

not taken evidence from the applicants or made any efforts to carry out forensic examinations or to uncover documents. They had made an incorrect assessment of the evidence that the Polish side had handed over to them and had wrongly characterised the Katyn massacre as an abuse of power. The applicants had been denied the right to participate in the investigation and had not been granted the procedural status of injured parties. Finally, by classifying a significant part of the case file, the Russian authorities had failed to strike a fair balance between the public interest in uncovering the crimes of the totalitarian past and the private interest of the applicants in establishing the circumstances of their relatives' death.

4. Third parties

(a) Open Society Justice Initiative

123. Open Society Justice Initiative submitted that States had an obligation, under the Convention and customary international law, to investigate war crimes and crimes against humanity for as long as it was practically feasible. This obligation was implicit in the prohibition on applying statutory limitations to such crimes and it was not subject to any temporal qualification. Admittedly, the conduct of effective investigations became more challenging with the passing of time; however, the existing practice of national and international courts to assert jurisdiction over past violations indicated that successful prosecutions were possible even many decades after the underlying facts. The third party referred to the Court's judgments in *Brecknell*, cited above, and *Varnava and Others v. Turkey* ([GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009) and to the jurisprudence of the Inter-American Court of Human Rights (IACtHR) in the cases of *Heliodoro Portugal v. Panama* ((preliminary objections, merits, reparations and costs), judgment of 12 August 2008, Series C No. 186), and *Gomes Lund et al. ("Guerrilha do Araguaira") v. Brazil* ((preliminary objections, merits, reparations and costs), judgment of 24 November 2010, Series C No. 219). The third party asserted that an effective investigation into Second World War crimes was still possible after 1998. They cited examples of investigations into Nazi-era crimes undertaken in Germany, Hungary, Italy and Poland, some of which had resulted in successful prosecutions despite the age of the defendants. Furthermore, in 2012 a British court had allowed a civil action for damages to proceed against the British government in connection with alleged acts of torture during the Kenyan uprising which took place between 1952 and 1961.

124. The third party also submitted that the right to truth, seen in its individual dimension, presupposed access to the results of investigations, as well as to archived and open investigative files. Such disclosure was essential to prevent violations, fight immunity and maintain public faith in

the rule of law (here they referred to *Kelly and Others v. the United Kingdom*, no. 30054/96, § 118, 4 May 2001). Where the right to truth was concerned, classification of information relating to human rights violations was permissible only in exceptional circumstances upon demonstration of a compelling State interest, pursuant to an independent judicial review and for a limited time-period, provided that less restrictive alternatives were not available. The third party produced the findings of a study into right-to-information laws in ninety-three States, from which it appeared that forty-four of them explicitly required information to be released where the public interest in disclosure outweighed any interest in secrecy. The objective reconstruction of the truth about past abuses was essential to enable nations to learn from their history and take measures to prevent future atrocities (United Nations Commission on Human Rights, Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principles 2 and 3).

(b) Amnesty International

125. Amnesty International submitted that the obligation to investigate war crimes and crimes against humanity extended to such crimes committed prior to the drafting and entry into force of the Convention. The murder and ill-treatment of prisoners of war and civilians had been prohibited under customary international law in 1939, and States had had an obligation to investigate and prosecute war crimes well before 1939, with no statutory limitation (here they referred to *Kononov v. Latvia* [GC], no. 36376/04, §§ 186 and 232, ECHR 2010, and to the judgments of the IACtHR in *Velásquez Rodríguez v. Honduras* (merits), judgment of 29 July 1988, § 174, Series C No. 4, and *Gomes Lund et al.*, cited above, § 108). The third party emphasised that the IACtHR had repeatedly found violations of the obligation to investigate, prosecute and punish acts that took place before the ratification of the American Convention on Human Rights by the respondent State (here they cited the *Gomes Lund et al.* judgment (cited above), and also *Almonacid Arellano v. Chile* ((preliminary objections, merits, reparations and costs), judgment of 26 September 2006, § 151, Series C No. 154). They pointed out that the passage of time did not alter the State's obligation to conduct an investigation or to provide suitable, effective remedies to victims. The right of victims to effective access to justice included the right to be heard and the right to full reparation, which comprised the following elements: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (reference was made to the IACtHR's findings in *Gomes Lund et al.*, §§ 261-62, 277 and 297). Finally, the third party submitted, again by reference to the *Gomes Lund et al.* judgment (§§ 241-42), that the failure to conduct an effective investigation adversely impacted the right of family members to be treated humanely.

(c) Memorial (Moscow), the European Human Rights Advocacy Centre (London) and Transitional Justice Network (Essex)

126. The three organisations submitted that the United Nations General Assembly, the Inter-American Human Rights System and international treaty law contained an obligation to investigate and prosecute war crimes, with the objective of providing an accurate and transparent account of violations to victims, their families, the wider society and the international community. The right of families to know the fate of their missing or dead relatives was a free-standing component of the duty to investigate which was a codified norm of customary international law (here they referred in particular to Rule 117 in *Customary International Humanitarian Law*, Volume I: Rules, International Committee of the Red Cross, 2005, and to the case-law of the IACtHR). They further provided a description of various State practices involving the establishment of truth commissions or similar investigative bodies in response to the commission of international crimes, including detailed information on the mandates and functions of those commissions.

C. The Court's assessment

127. The Government raised a preliminary objection relating to the Court's competence *ratione temporis* to deal with the merits of the applicants' complaint under the procedural limb of Article 2 of the Convention. Accordingly, the Court has to examine at the outset whether this objection should be upheld.

1. General principles

128. The Court reiterates that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party ("the critical date"). This is an established principle in the Court's case-law based on the general rule of international law embodied in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969 (see *Varnava and Others*, cited above, § 130; *Šilih*, cited above, § 140; and *Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III).

129. Where an act, omission or decision alleged to have violated the Convention occurred prior to its entry into force but the proceedings to obtain redress for that act were instituted or continued after its entry into force, these proceedings cannot be regarded as part of the facts which constitute the alleged violation and do not bring the case within the Court's temporal jurisdiction (see *Varnava and Others*, § 130, and *Blečić*, §§ 77-79, both cited above).

130. While it is true that from the critical date onwards all of the State's acts and omissions must conform to the Convention, the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX). Thus, in order to establish the Court's temporal jurisdiction it is essential to identify, in each specific case, the exact time of the alleged interference. In doing so, the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (see *Varnava and Others*, § 131, and *Blečić*, §§ 72 and 81-82, both cited above).

131. The Court has dealt with a number of cases where the facts concerning the substantive aspect of Article 2 or 3 fell outside the Court's temporal competence, while the facts concerning the related procedural aspect, that is the subsequent proceedings, fell at least partly within the Court's competence (for a summary of the case-law, see *Šilih*, cited above, §§ 148-52).

132. The Court concluded that the procedural obligation to carry out an effective investigation under Article 2 had evolved into a separate and autonomous duty. Although it is triggered by the facts concerning the substantive aspect of Article 2, it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date (see *Varnava and Others*, § 138, and *Šilih*, § 159, both cited above).

133. However, having regard to the principle of legal certainty, the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occurred before the critical date is not open-ended (see *Šilih*, § 161, cited above). In *Šilih*, the Court defined the limits of its temporal jurisdiction in the following manner:

> "162. Firstly, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.
>
> 163. Secondly, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.
>
> Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date.
>
> However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner."

134. In the above-cited *Varnava* judgment, the Court clarified the important distinction to be drawn between the obligation to investigate a

suspicious death and the obligation to investigate a suspicious disappearance:

> "148. ... A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred ... This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation ... This is so, even where death may, eventually, be presumed."

135. The Court further emphasised that the requirement of proximity of the death and investigative steps to the date of entry into force of the Convention in respect of the respondent State – as stated in *Šilih* (cited above) – applied only in the context of killings or suspicious deaths, where the anchoring factual element, the loss of life of the victim, was known for a certainty, even if the exact cause or ultimate responsibility was not. In such cases, the procedural obligation was not of a continuing nature (see *Varnava and Others*, cited above, § 149).

2. Recent case-law

136. Following the above-cited *Šilih* judgment, the principles governing the Court's temporal jurisdiction with regard to the "detachable" obligation to investigate the death of an individual, flowing from Article 2 of the Convention, were applied in a large number of cases.

137. The single largest group of such cases constituted the complaints lodged against Romania in connection with the allegedly ineffective investigation into the deaths of protesters during the Romanian revolution in December 1989, in which the Court found that it had jurisdiction on account of the fact that on the date of entry into force of the Convention in respect of Romania the proceedings were still pending before the prosecutor's office (see *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, 24 May 2011; *Pastor and Ţiclete v. Romania*, nos. 30911/06 and 40967/06, 19 April 2011; *Lăpuşan and Others v. Romania*, nos. 29007/06, 30552/06, 31323/06, 31920/06, 34485/06, 38960/06, 38996/06, 39027/06 and 39067/06, 8 March 2011; *Şandru and Others v. Romania*, no. 22465/03, 8 December 2009; and *Agache and Others v. Romania*, no. 2712/02, 20 October 2009). Similar findings were made in two subsequent cases which concerned violent incidents that took place in June 1990 (see *Mocanu and Others v. Romania*, nos. 10865/09, 45886/07 and 32431/08, 13 November 2012) and in September 1991 (see *Crăiniceanu and Frumuşanu v. Romania*, no. 12442/04, 24 April 2012).

138. With the exception of the case of *Tuna v. Turkey* (no. 22339/03, §§ 57-63, 19 January 2010), which originated in a death in police custody occurring approximately seven years before the recognition by Turkey of the right of individual petition, in other recent cases the death in question was not alleged to have been the consequence of any actions by State agents and preceded the date of entry into force by one to four years, with a significant portion of the proceedings having been conducted after that date (see *Kudra v. Croatia*, no. 13904/07, §§ 110-12, 18 December 2012 – four years, accidental death because of negligence by a private company; *Igor Shevchenko v. Ukraine*, no. 22737/04, §§ 45-48, 12 January 2012 – three years, traffic accident; *Bajić v. Croatia*, no. 41108/10, § 62, 13 November 2012 – four years, medical negligence; *Dimovi v. Bulgaria*, no. 52744/07, §§ 36-45, 6 November 2012 – three years, death by fire; *Velcea and Mazăre v. Romania*, no. 64301/01, §§ 85-88, 1 December 2009 – one year, family dispute; *Trufin v. Romania*, no. 3990/04, §§ 32-34, 20 October 2009 – two years, murder; and *Lyubov Efimenko v. Ukraine*, no. 75726/01, § 65, 25 November 2010 – four years, robbery and murder). In two cases the fact that the applicants' relatives had lost their lives at the hands of insurgents or paramilitary formations seven and six years respectively before the critical date did not prevent the Court from taking cognisance of the merits of the complaint under the procedural limb of Article 2 (see *Paçacı and Others v. Turkey*, no. 3064/07, §§ 64-66, 8 November 2011, and *Jularić v. Croatia*, no. 20106/06, §§ 38 and 45-46, 20 January 2011). Nor was the thirteen-year period separating the death of the applicant's son in a brawl and the entry into force of the Convention in respect of Serbia seen as outweighing the importance of the procedural acts that were accomplished after the critical date (see *Mladenović v. Serbia*, no. 1099/08, §§ 38-40, 22 May 2012).

139. The Court also examined a number of cases in which the applicant had allegedly been subjected to treatment of the kind prohibited by Article 3 of the Convention at some point in time before the critical date. The Court found that it had jurisdiction to examine the respondent State's compliance – in the post entry into force period – with the procedural limb of Article 3 which required it to conduct an effective investigation into police brutality (see *Yatsenko v. Ukraine*, no. 75345/01, § 40, 16 February 2012, and *Stanimirović v. Serbia*, no. 26088/06, §§ 28-29, 18 October 2011), rape (see *P.M. v. Bulgaria*, no. 49669/07, § 58, 24 January 2012) and ill-treatment inflicted by a private individual (see *Otašević v. Serbia*, no. 32198/07, 5 February 2013).

3. Clarification of the Šilih *criteria*

140. Notwithstanding a constantly growing number of judgments in which the Court has determined its competence *ratione temporis* by reference to the criteria adopted in *Šilih* (cited above), their application in

practice has sometimes given rise to uncertainty, which is why further clarification is desirable.

141. The criteria laid down in paragraphs 162 and 163 of the *Šilih* judgment (cited above) can be summarised in the following manner. Firstly, where the death occurred before the critical date, the Court's temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date. Secondly, the procedural obligation will come into effect only if there was a "genuine connection" between the death as the triggering event and the entry into force of the Convention. Thirdly, a connection which is not "genuine" may nonetheless be sufficient to establish the Court's jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way. The Court will examine each of these elements in turn.

(a) Procedural acts and omissions in the post entry into force period

142. The Court reiterates at the outset that the procedural obligation to investigate under Article 2 is not a procedure of redress in respect of an alleged violation of the right to life that may have occurred before the critical date. The alleged violation of the procedural obligation consists in the lack of an effective investigation; the procedural obligation has its own distinct scope of application and operates independently from the substantive limb of Article 2 (see *Varnava and Others*, § 136, and *Šilih*, § 159, both cited above). Accordingly, the Court's temporal jurisdiction extends to those procedural acts and omissions which took place or ought to have taken place in the period after the entry into force of the Convention in respect of the respondent Government.

143. The Court further considers that the reference to "procedural acts" must be understood in the sense inherent in the procedural obligation under Article 2 or, as the case may be, Article 3 of the Convention, namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV, and *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324). This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth.

144. The mention of "omissions" refers to a situation where no investigation or only insignificant procedural steps have been carried out but where it is alleged that an effective investigation ought to have taken place. Such an obligation on the part of the authorities to take investigative measures may be triggered when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible

(see *Gutiérrez Dorado and Dorado Ortiz v. Spain* (dec.), no. 30141/09, §§ 39-41, 27 March 2012; *Çakir v. Cyprus* (dec.), no. 7864/06, 29 April 2010; and *Brecknell* cited above, §§ 66-72). Should new material emerge in the post entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law. However, if the triggering event lies outside the Court's jurisdiction *ratione temporis*, the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the "genuine connection" test or the "Convention values" test, discussed below, has been met.

(b) The "genuine connection" test

145. The first sentence of paragraph 163 of the above-cited *Šilih* judgment posits that the existence of a "genuine connection" between the triggering event and the entry into force of the Convention in respect of the respondent State is a condition *sine qua non* for the procedural obligation under Article 2 of the Convention to come into effect.

146. The Court considers that the time factor is the first and most crucial indicator of the "genuine" nature of the connection. It notes, as it previously did in the Chamber judgment, that the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the "genuine connection" standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years (see, by analogy, *Varnava and Others*, cited above, § 166, and *Er and Others v. Turkey*, no. 23016/04, §§ 59-60, 31 July 2012). Even if, in exceptional circumstances, it may be justified to extend the time-limit further into the past, it should be done on condition that the requirements of the "Convention values" test have been met.

147. The duration of the time period between the triggering event and the critical date is however not decisive, in itself, for determining whether the connection was a "genuine" one. As the second sentence of paragraph 163 of the *Šilih* judgment indicates, the connection will be established if much of the investigation into the death took place or ought to have taken place in the period following the entry into force of the Convention. This includes the conduct of proceedings for determining the cause of the death and holding those responsible to account, as well as the undertaking of a significant proportion of the procedural steps that were decisive for the course of the investigation. This is a corollary of the principle that the Court's jurisdiction extends only to the procedural acts and omissions occurring after the entry into force. If, however, a major part of the proceedings or the most important procedural steps took place before

the entry into force, this may irretrievably undermine the Court's ability to make a global assessment of the effectiveness of the investigation from the standpoint of the procedural requirements of Article 2 of the Convention.

148. Having regard to the above, the Court finds that, for a "genuine connection" to be established, both criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force.

(c) The "Convention values" test

149. The Court further accepts that there may be extraordinary situations which do not satisfy the "genuine connection" standard as outlined above, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection. The last sentence of paragraph 163 of the *Šilih* judgment does not exclude such an eventuality, which would operate as an exception to the general rule of the "genuine connection" test. In all the cases outlined above the Court accepted the existence of a "genuine connection" as the lapse of time between the death and the critical date was reasonably short and a considerable part of the proceedings had taken place after the critical date. Against this background, the present case is the first one which may arguably fall into this other, exceptional, category. Accordingly, the Court must clarify the criteria for the application of the "Convention values" test.

150. Like the Chamber, the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.

151. The heinous nature and gravity of such crimes prompted the Contracting Parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order. The Court nonetheless considers that the "Convention values" clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty. Hence, a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predate the Convention. Although the Court is sensitive to the

argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the possibility of prosecuting an individual for a serious crime under international law where circumstances allow it, and being obliged to do so by the Convention.

4. Application of the above principles to the present case

152. Turning to the undisputed facts of the present case, the Court notes that the applicants' relatives were servicemen in the Polish army who had been taken prisoner in the wake of the Soviet invasion of the territory of eastern Poland in September 1939. During the following months they were detained in the NKVD camps in the western part of the USSR, in Kozelsk, Ostashkov and Starobelsk.

153. On 5 March 1940, acting on the proposal of the Head of the NKVD, the members of the Politburo of the Central Committee of the Communist Party of the USSR approved the extrajudicial execution of Polish prisoners of war, which was to be carried out by NKVD officers. The prisoners were killed and buried in mass graves on various dates in April and May 1940. The lists of prisoners to be executed were drawn up on the basis of the NKVD "dispatch lists", on which the names of the applicants' family members were mentioned among others.

154. Three of the applicants' family members were identified during the exhumation in 1943; the remains of the others have not been recovered or identified. The Court reiterates that it has on many occasions made findings of fact to the effect that a missing person can be presumed dead. Generally, this finding of fact has been reached in response to claims made by the respondent Government that the person is still alive or has not been shown to have died at the hands of State agents. This presumption of death is not automatic and is only reached on examination of the circumstances of the case, in which the lapse of time since the person was seen alive or heard from is a relevant element (see *Aslakhanova and Others v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, § 100, 18 December 2012; *Varnava and Others*, cited above, § 143; and *Vagapova and Zubirayev v. Russia*, no. 21080/05, §§ 85-86, 26 February 2009). The Court has applied a presumption of death in the absence of any reliable news about the disappeared persons for periods ranging from four and a half years (see *Imakayeva v. Russia*, no. 7615/02, § 155, 9 November 2006) to over ten years (see *Aslakhanova and Others*, cited above, §§ 103-15).

155. It is undisputed – and the NKVD's "dispatch lists" furnish documentary evidence to that effect – that in late 1939 and early 1940 the applicants' family members were in custody in Soviet territory and under the full and exclusive control of the Soviet authorities. The Politburo's decision of 5 March 1940 stipulated that all Polish prisoners of war being held in the NKVD camps, without exception, were liable to extrajudicial

execution, which was carried out by the Soviet secret police in the following months. Mass burials of prisoners wearing Polish uniforms were uncovered in the Katyn Forest as early as 1943, following the German takeover of the territory. A note written in 1959 by the Head of the KGB, a successor to the NKVD, acknowledged that a total of more than twenty-one thousand Polish prisoners had been shot by NKVD officials. The families stopped receiving correspondence from the prisoners in 1940 and have not received any news from them ever since, that is, for more than seventy years.

156. Having regard to these factual elements, the Court concludes that the applicants' family members who were taken prisoner in 1939 must be presumed to have been executed by the Soviet authorities in 1940.

157. The Russian Federation ratified the Convention on 5 May 1998, that is, fifty-eight years after the execution of the applicants' relatives. The Grand Chamber endorses the Chamber's finding that the period of time between the death and the critical date is not only many times longer than those which triggered the coming into effect of the procedural obligation under Article 2 in all previous cases, but also too long in absolute terms for a genuine connection to be established between the death of the applicants' relatives and the entry into force of the Convention in respect of Russia.

158. The investigation into the origin of the mass burials started in 1990 and was formally terminated in September 2004. Even though the Russian Government argued that the initial decision to institute the proceedings had been unlawful, those proceedings were, at least in theory, capable of leading to the identification and punishment of those responsible. Accordingly, they fell within the scope of "procedural acts and omissions" for the purposes of Article 2 of the Convention.

159. In the early 1990s a significant number of procedural steps were undertaken by the Soviet and subsequently the Russian authorities. Corpses were excavated at the mass burial sites in Kharkov, Mednoye and Katyn in 1991 and the investigators commissioned forensic studies and arranged interviews with potential witnesses to the killings. Official visits and coordination meetings were held between the Russian, Polish, Ukrainian and Belarusian authorities. However, all these steps took place before the critical date. As regards the post entry into force period, it is impossible, on the basis of the information available in the case file and in the parties' submissions, to identify any real investigative steps after 5 May 1998. The Court is unable to accept that a re-evaluation of the evidence, a departure from previous findings or a decision regarding the classification of the investigation materials could be said to have amounted to the "significant proportion of the procedural steps" which is required for establishing a "genuine connection" for the purposes of Article 2 of the Convention. Nor has any relevant piece of evidence or substantive item of information come to light in the period since the critical date. That being so, the Court

concludes that neither criterion for establishing the existence of a "genuine connection" has been fulfilled.

160. Finally, it remains to be determined whether there were exceptional circumstances in the instant case which could justify derogating from the "genuine connection" requirement by applying the Convention values standard. As the Court has established, the events that might have triggered the obligation to investigate under Article 2 took place in early 1940, that is, more than ten years before the Convention came into existence. The Court therefore upholds the Chamber's finding that there were no elements capable of providing a bridge from the distant past into the recent post entry into force period.

161. Having regard to the above considerations, the Court upholds the Government's objection *ratione temporis* and finds that it has no competence to examine the complaint under Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

162. The applicants complained that the prolonged denial of historical fact and the withholding of information about the fate of their relatives, together with the dismissive and contradictory replies by the Russian authorities to their requests for information, amounted to inhuman or degrading treatment in breach of Article 3 of the Convention, which provides as follows:

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

A. The Chamber judgment

163. The Chamber distinguished between two groups of applicants on the basis of the proximity of the family ties that linked them to the victims of the Katyn massacre. It accepted that there existed "a strong family bond" in the case of the widow and the nine children who had been born before 1940, and that that group could claim to be victims of the alleged violation of Article 3. On the other hand, the mental anguish of the other five applicants, who had been born in 1940 or later or were more distant relatives of the Katyn victims, was not such as to fall within the ambit of Article 3 of the Convention.

164. The Chamber went on to examine the situation of the first group of applicants over different periods of time. During the Second World War they had "remained in a state of uncertainty as to the fate" of their loved ones; after the war they "could still nurture hope that at least some of the Polish prisoners could have survived, either in more remote Soviet camps or by escaping and going into hiding". Throughout the lifetime of USSR-controlled socialist Poland, the applicants "were not allowed, for

political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish communist authorities". Even after the public acknowledgement of the Katyn massacre by the Soviet and Russian authorities, the applicants must have "suffered frustration on account of an apparent lack of progress in the investigation".

165. In the post entry into force period the applicants were denied access to the materials of the investigation or excluded from the proceedings on account of their foreign nationality. The Chamber was particularly struck "by the apparent reluctance of the Russian authorities to recognise the reality of the Katyn massacre". While acknowledging that the applicants' relatives had been detained as prisoners in the NKVD camps, the Russian military courts consistently avoided any mention of their subsequent execution, citing a lack of evidence to that effect from the Katyn investigation. The Chamber qualified that approach as "a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katyn massacre". As regards the rehabilitation proceedings, the Chamber considered that "a denial of the reality of the mass murder reinforced by the implied proposition that Polish prisoners may have had a criminal charge to answer and had been duly sentenced to capital punishment demonstrated [an] attitude *vis-à-vis* the applicants that was not just opprobrious but also lacking in humanity".

166. The Chamber acknowledged that the amount of time that had passed since the applicants had been parted from their relatives was significantly longer in the present case than it was in others, and that the applicants no longer suffered the agony of not knowing whether their family members were dead or alive. Nonetheless, referring to the jurisprudence of the United Nations Human Rights Committee on the analogous Article 7 of the International Covenant on Civil and Political Rights, the Chamber found that the authorities' obligation under Article 3 could not be reduced to a mere acknowledgment of the fact of death but also required that they account for the circumstances of the death and the location of the grave. In the instant case the Russian authorities had not provided the applicants with any official information about the circumstances surrounding the death of their relatives or made any earnest attempts to locate their burial sites. The Chamber found a violation of Article 3.

B. The parties' submissions

1. The Russian Government

167. The Government submitted at the outset that, for an issue under Article 3 to arise in respect of the relatives of the persons killed or missing, two elements must be shown to exist: (i) the applicants must have endured a period of uncertainty as to the fate of their relatives; and (ii) the actions by

the authorities must have aggravated their suffering during that period (here they referred to *Luluyev and Others v. Russia*, no. 69480/01, §§ 114-15, ECHR 2006-XIII).

168. On the first element, the state of uncertainty, the Government observed that, although the fate of the applicants' relatives could not be established with the certainty required for the purposes of criminal or "rehabilitation" proceedings, it was not reasonable to expect that they would still have been alive by 5 May 1998, taking into account their dates of birth and the absence of any news from them since World War II. In the absence of the first element, the Russian Government considered that no separate issues could arise under Article 3 beyond those already examined under Article 2 (here they referred to *Esmukhambetov and Others v. Russia*, no. 23445/03, § 189, 29 March 2011; *Velkhiyev and Others v. Russia*, no. 34085/06, § 137, 5 July 2011; *Sambiyev and Pokayeva v. Russia*, no. 38693/04, §§ 74-75, 22 January 2009; and *Tangiyeva v. Russia*, no. 57935/00, § 104, 29 November 2007).

169. The Government further noted the absence of "special factors" which could have given the applicants' sufferings "a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of serious violations of human rights" (here they quoted *Gongadze v. Ukraine*, no. 34056/02, § 184, ECHR 2005-XI, and *Orhan v. Turkey*, no. 25656/94, §§ 357-58, 18 June 2002). As to the first "special factor", "the proximity of the family ties", five of the applicants had been born after the arrest of their relatives and the Chamber did not find a violation of Article 3 in respect of those applicants. The second "special factor", "the extent to which the family member witnessed the events in question", was absent, since none of them had seen the events which had led to the death of their relatives. The third criterion, "the involvement of the family members in the attempts to obtain information about the disappeared person", was not fulfilled, as the applicants did not take part in the Katyn investigation and did not lodge motions or give testimony. Although the proceedings had been widely covered in the Russian and Polish media for more than fourteen years, it was not until after the discontinuation of the investigation that two applicants had asked to be granted formal procedural status (here the Government referred, by contrast, to *Musikhanova and Others v. Russia*, no. 27243/03, §§ 81-82, 4 December 2008).

170. As to the Russian authorities' response to the applicants' enquiries, which was the fourth "special factor", the Government maintained, firstly, that the alleged impact of their actions or inaction must have been significantly diminished on account of the period of fifty-eight years that separated the "Katyn events" from the date of Russia's ratification of the Convention and also on account of the fact that the applicants were no longer in a state of uncertainty as to the fate of their relatives. The

Government argued that the actions of the domestic authorities had been justified, pointing out firstly that the "rehabilitation" of the Polish prisoners had been impossible in the absence of any information about the charges that had been levelled against them. Secondly, the authorities had been under no legal obligation to locate the applicants or to grant them victim status, since there had been insufficient evidence to establish a causal connection between the "Katyn events" and the death of the applicants' relatives to the standard of proof required in criminal proceedings. Thirdly, the prosecutors' letters addressed to the applicants had contained "incorrect conclusions" and the "inconsistencies" had eventually been elucidated by the Russian courts, which had carried out a proper assessment of the documents, with the participation of the applicants' representatives.

171. The Government disagreed with the Chamber's finding that the Russian courts had denied the reality of the Katyn massacre; in their view, the courts had "merely pointed out the lack of sufficient evidence for establishing the circumstances of the death of the applicants' relatives" to the criminal standard of proof. The Government also disputed that the domestic authorities had been under an obligation to account for the fate of the missing persons and to search for their burial sites, since the relatives of the applicants were not "missing persons" and since no such obligation flowed from domestic law, international humanitarian law or the Convention. Finally, they claimed that they had had no intention of distorting historical facts or subjecting the applicants to any form of degrading treatment.

2. The applicants

172. The applicants agreed with the position expressed in the Chamber judgment whereby the obligation under Article 3 was distinct from the obligation flowing from Article 2 in that the latter provision required the State to take specific legal action, whereas the former was of a more general humanitarian nature. They maintained that the Court should be able to have regard to the facts prior to entry into force of the Convention inasmuch as they could be relevant for the facts occurring after that date (they referred to *Broniowski v. Poland* (dec.) [GC], no. 31443/96, § 74, ECHR 2002-X, and *Hokkanen v. Finland*, 23 September 1994, § 53, Series A no. 299-A). In addition, the Court should be competent to assess the State authorities' compliance with Article 3 obligations even when the original taking of life escaped its scrutiny *ratione temporis* (here they drew a parallel with the United Nations Human Rights Committee's decision of 28 March 2006 in the case of *Mariam Sankara et al. v. Burkina Faso*, Communication No. 1159/2003).

173. The applicants disagreed with the Chamber's decision dividing them into two distinct groups based on the proximity of their family ties. They submitted that the situation in post-war socialist Poland and the events

following the Soviet acknowledgement of the Katyn massacre had affected all the applicants in equal measure. They argued, in contrast to the Chamber's approach, that those who did not remember their fathers or had been denied an opportunity to have any personal contact with them were more sensitive to the tragic fate of their parents. Furthermore, the applicants in the second group – in respect of which no violation of Article 3 was found – had been actively involved in a range of legal steps as well as other activities relating to the commemoration of their relatives who had been killed: Ms Wołk-Jezierska had written a number of books on the Katyn massacre, Ms Krzyszkowiak had set up a publishing house printing Katyn-related materials, Ms Rodowicz had created several artistic works dedicated to the Katyn massacre and Mr Romanowski, the youngest among the applicants, had "inherited" from his late mother the task of honouring the memory of his uncle who had been killed. Referring to the case-law of the Inter-American Court of Human Rights, the applicants submitted that all of them were victims of the grievances formulated under Article 3, either as adult direct relatives of the persons who had been killed, or as indirect relatives who had demonstrated their strong and continuous personal involvement through numerous actions relating to the fate of their family members who had been killed.

174. As to the treatment of their enquiries by the Russian authorities, the applicants pointed out that in previous cases before the Court it had sometimes happened that "disappeared persons" became "dead persons" when their bodies had been found. In the Katyn case, the sequence was reversed: those who were "dead" had become "disappeared" in the eyes of the Russian authorities. That reversal represented a sheer denial of historical facts and inflicted severe pain, anguish and stress on the applicants. It was tantamount to informing a group of relatives of Holocaust victims that the victims must be considered unaccounted for as their fate could only be traced to the dead-end track of a concentration camp because the documents had been destroyed by the Nazi authorities. Moreover, in so far as the military prosecutors had claimed that they were unable to establish "which provision of the Penal Code formed the legal basis for calling the [Polish] prisoner[s] to account", this was essentially an allegation that the victims might have been criminals who had been duly sentenced to capital punishment. Furthermore, in the rehabilitation proceedings before the Moscow Court, the prosecutor had argued that there existed "due reasons" for the repression, as some Polish officers had been "spies, terrorists and saboteurs" and as the Polish pre-war army "had been trained to fight against the Soviet Union". The applicants emphasised that their moral suffering could not be classified as inherently accompanying the killings themselves but resulted from the treatment they had experienced at the hands of the Russian authorities.

3. The Polish Government

175. The Polish Government maintained that the Russian authorities had subjected the applicants to inhuman and degrading treatment. They pointed out that the persons who had been taken prisoner, held in custody and eventually murdered by the Soviet authorities were the applicants' next of kin. Over a period of many years, for political reasons, the Soviet authorities had denied access to any official information about the fate of persons taken prisoner in late 1939. After an investigation had been instituted in 1990, the applicants had unsuccessfully attempted to gain access to the investigation materials for the purpose of obtaining the legal rehabilitation of their relatives. The lack of access and the contradictory information the applicants had received, had instilled in them a feeling of constant uncertainty and stress and made them totally dependent on the actions of the Russian authorities aimed at humiliating them. This amounted to treatment in breach of Article 3 of the Convention.

4. The third-party's submissions

176. The Public International Law and Policy Group provided an overview of the Court's case-law concerning the nature and strength of family relationships required for an applicant family member to be considered a victim of violations of Article 3. In their view, that case-law indicated that the Court was increasingly concerned with the actions of applicant family members and the role played by the State after requests for information had been made. The third party further submitted that the approach to recognition of victim status based on the involvement of the family member in the attempts to obtain information about the disappeared individual, and the way in which the authorities dealt with those attempts, was in line with the standards applied by other international judicial institutions, including the Inter-American Court of Human Rights (here they cited *Garrido and Baigorria v. Argentina* (reparations and costs), judgment of 27 August 1998, Series C No. 39, and *Blake v. Guatemala* (merits), judgment of 24 January 1998, Series C No. 36) and the Extraordinary Chambers in the Courts of Cambodia.

C. The Court's assessment

1. The general principles

177. The Court has always been sensitive in its case-law to the profound psychological impact of a serious human rights violation on the victim's family members who are applicants before the Court. However, in order for a separate violation of Article 3 of the Convention to be found in respect of the victim's relatives, there should be special factors in place giving their suffering a dimension and character distinct from the emotional distress

inevitably stemming from the aforementioned violation itself. The relevant factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question and the involvement of the applicants in the attempts to obtain information about the fate of their relatives.

178. In this connection, the Court reiterates that a family member of a "disappeared person" can claim to be the victim of treatment contrary to Article 3 in cases where the disappearance was followed by a long period of uncertainty until the body of the missing person was discovered. The essence of the issue under Article 3 in this type of case lies not so much in a serious violation of the missing person's human rights but rather in the authorities' dismissive reactions and attitudes in respect of that situation when it was brought to their attention. The finding of a violation on this ground is not limited to cases where the respondent State is to be held responsible for the disappearance. It can also result from the failure of the authorities to respond to the quest for information by the relatives or from the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, where this attitude may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the fate of the missing person (see, in particular, *Açış v. Turkey*, no. 7050/05, §§ 36 and 51-54, 1 February 2011; *Varnava and Others*, cited above, § 200; *Osmanoğlu v. Turkey*, no. 48804/99, § 96, 24 January 2008; *Luluyev and Others*, cited above, § 114; *Bazorkina v. Russia*, no. 69481/01, § 139, 27 July 2006; *Gongadze*, cited above, § 184; *Taniş and Others v. Turkey*, no. 65899/01, § 219, ECHR 2005–VIII; *Orhan*, cited above, §358; and *Çakıcı v. Turkey* [GC], no. 23657/94, § 98, ECHR 1999-IV).

179. The Court adopted a restrictive approach in situations where the person was taken into custody but later found dead following a relatively short period of uncertainty as to his fate (see *Tanlı v. Turkey*, no. 26129/95, § 159, ECHR 2001-III, and *Bitiyeva and Others v. Russia*, no. 36156/04, § 106, 23 April 2009). In a series of Chechen cases in which the applicants had not witnessed the killing of their relatives but had found out about their deaths only on discovery of their bodies, the Court considered that no separate finding of a violation of Article 3 was necessary, given that it had already found a violation of Article 2 of the Convention in its substantive and procedural aspects (see *Velkhiyev and Others*, § 137; *Sambiyev and Pokayeva*, §§ 74-75; and *Tangiyeva*, § 104, all cited above).

180. Furthermore, in cases concerning persons who were killed by the authorities in violation of Article 2, the Court has held that the application of Article 3 is usually not extended to the relatives on account of the instantaneous nature of the incident causing the death in question (see *Damayev v. Russia*, no. 36150/04, § 97, 29 May 2012; *Yasin Ateş v. Turkey*, no. 30949/96, § 135, 31 May 2005; *Udayeva and Yusupova v. Russia*, no. 36542/05, § 82, 21 December 2010; *Khashuyeva v. Russia*,

no. 25553/07, § 154, 19 July 2011; and *Inderbiyeva v. Russia*, no. 56765/08, § 110, 27 March 2012).

181. Nevertheless, the Court has considered a separate finding of a violation of Article 3 to be justified in situations of confirmed death where the applicants were direct witnesses to the suffering of their family members (see *Salakhov and Islyamova v. Ukraine*, no. 28005/08, § 204, 14 March 2013, where the applicant witnessed the slow death of her son who was in detention, without being able to help him; *Esmukhambetov and Others*, cited above, § 190, where a violation of Article 3 was found in respect of an applicant who had witnessed the killing of his entire family, but no violation was found in respect of other applicants who had only later found out about the killings; *Khadzhialiyev and Others v. Russia*, no. 3013/04, § 121, 6 November 2008, where the applicants were unable to bury the dismembered and decapitated bodies of their children in a proper manner; *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, § 169, 26 July 2007, where the applicant was a witness to the extrajudicial execution of several of his relatives and neighbours; and *Akkum and Others v. Turkey*, no. 21894/93, §§ 258-59, ECHR 2005-II, where the applicant was presented with the mutilated body of his son).

2. Application of the above principles to the present case

182. The Court observes that the situation which is at the heart of the complaint under Article 3 initially presented the features of a "disappearance" case. The family members of the applicants had been taken prisoner by the Soviet occupation forces and had been detained in Soviet camps. There is evidence that exchanges of correspondence between the Polish prisoners and their families continued until the spring of 1940, so the families must have been aware that their relatives were alive. After the letters from them stopped coming to Poland, their relatives remained for many years in a state of uncertainty as to the fate that had befallen them.

183. In 1943, following the discovery of mass graves near the Katyn Forest, partial exhumation and identification of the remains was carried out. However, only three of the applicants' relatives – Mr Wołk, Mr Rodowicz and Mr Mielecki – were identified at that time. The Soviet authorities denied that they had executed the Polish prisoners of war and, without access to the Politburo or NKVD files, it was not possible to ascertain the fate of those prisoners whose bodies had not been identified. No further attempts at identifying the victims of the Katyn massacre were made during the Cold War, since the Soviet version of Nazi-orchestrated killings was imposed as the official one in the People's Republic of Poland for the entire duration of the existence of the Socialist regime, that is, until 1989.

184. In 1990 the USSR officially acknowledged the responsibility of the Soviet leadership for the killing of Polish prisoners of war. In the following years, the surviving documents relating to the massacre were made public

and the investigators carried out further partial exhumations at several burial sites. A round of consultations was held between Polish, Russian, Ukrainian and Belarusian prosecutors.

185. By the time the Convention was ratified by the Russian Federation on 5 May 1998, more than fifty-eight years had passed since the execution of the Polish prisoners of war. Having regard to the long lapse of time, to the material that came to light in the intervening period and to the efforts that were deployed by various parties to elucidate the circumstances of the Katyn massacre, the Court finds that, as regards the period after the critical date, the applicants cannot be said to have been in a state of uncertainty as to the fate of their relatives who had been taken prisoner by the Soviet army in 1939. It necessarily follows that what could initially have been a "disappearance" case must be considered to be a "confirmed death" case. The applicants acquiesced in that assessment of the present case (see, in particular, paragraph 116 above and also paragraph 119 of the Chamber judgment). This finding is undisturbed by the pronouncements of the Russian courts in various domestic proceedings which appeared to withhold explicit acknowledgment of the fact that the applicants' relatives had been killed in the Soviet camps.

186. The Court does not question the profound grief and distress that the applicants have experienced as a consequence of the extrajudicial execution of their family members. However, it reiterates that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart from its own precedents without compelling reason (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 50, 29 June 2012). The Court's case-law, as outlined above, has accepted that the suffering of family members of a "disappeared person" who have to go through a long period of alternating hope and despair may justify finding a separate violation of Article 3 on account of the particularly callous attitude of the domestic authorities to their quest for information. As regards the instant case, the Court's jurisdiction extends only to the period starting on 5 May 1998, the date of entry into force of the Convention in respect of Russia. The Court has found above that as from that date, no lingering uncertainty as to the fate of the Polish prisoners of war could be said to have remained. Even though not all of the bodies have been recovered, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact. The magnitude of the crime committed in 1940 by the Soviet authorities is a powerful emotional factor, yet, from a purely legal point of view, the Court cannot accept it as a compelling reason for departing from its case-law on the status of the family members of "disappeared persons" as victims of a violation of Article 3 and conferring that status on the applicants, for whom the death of their relatives was a certainty.

187. The Court further finds no other special circumstances of the kind which have prompted it to find a separate violation of Article 3 in "confirmed death" cases (see the case-law cited in paragraph 181 above).

188. In such circumstances, the Court considers that it cannot be held that the applicants' suffering reached a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of victims of a serious human rights violation.

189. Accordingly, the Court finds no violation of Article 3 of the Convention.

IV. OBSERVANCE OF ARTICLE 38 OF THE CONVENTION BY THE RESPONDENT GOVERNMENT

190. The Court repeatedly requested the respondent Government to produce a copy of the decision of 21 September 2004 by which the investigation into the Katyn massacre had been discontinued (see paragraph 45 above). Confronted with the respondent Government's refusal to submit the requested material, the Court asked the parties to comment on the matter of the respondent Government's observance of their obligation to furnish all necessary facilities for the Court's investigation, flowing from Article 38 of the Convention. That provision reads as follows:

> "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

A. The Chamber judgment

191. The Chamber reiterated that "only the Court [could] decide ... what kind of evidence the parties should produce for due examination of the case" and that "the parties [were] obliged to comply with its evidential requests and instructions". It further noted the absence of a plausible explanation on the part of the respondent Government as to the nature of the security concerns that informed the decision to classify the requested document. It observed that the requested document "related to a historical event, with most of the protagonists being already dead, and it could not have touched upon any current police surveillance operations or activities". On a more general note, the Chamber observed that a public and transparent investigation into the crimes of the previous totalitarian regime could hardly have compromised the national security interests of the contemporary democratic Russian Federation, especially taking into account that the responsibility of the Soviet authorities for that crime has been acknowledged at the highest political level.

B. The parties' submissions

1. The Russian Government

192. The Government submitted at the outset that the classification of thirty-six volumes of the case file and of the decision of 21 September 2004 as "top secret" documents had been lawful because they contained information in the sphere of intelligence, counterintelligence and operational and search activity and because that classification had been "checked and confirmed" by the Federal Security Service and the Inter-Agency Commission for the Protection of State Secrets, as well as by the subsequent decisions of the Moscow City Court and the Supreme Court on an application by Memorial. They claimed that Russian law did not contain an absolute prohibition on communicating sensitive information to international organisations and that the decision of 21 September 2004 had not been disclosed to the Court solely because "the competent domestic bodies [had] not come to [the] conclusion" that it would be possible to do so.

193. The Government maintained that Article 38 of the Convention could not be interpreted in such a way as to require Contracting States to disclose information that was likely to impair their security. They invited the Court to analyse the laws of other member States "which very likely might have foreseen similar rules". The Government referred to the provisions of the European Convention on Mutual Assistance in Criminal Matters and the Agreement between the Russian Federation and the Republic of Poland on Legal Assistance and Legal Relations in Civil and Criminal Cases, which allowed the Contracting State to refuse to execute the request if it was likely to prejudice the sovereignty, security, public order or other essential interests of the country (here they also referred to *Liu v. Russia (no. 2)*, no. 29157/09, § 85, 26 July 2011, and *Chahal v. the United Kingdom*, 15 November 1996, § 138, *Reports of Judgments and Decisions* 1996-V). The Government emphasised that Rule 33 of the Rules of Court did not provide for any sanction for unauthorised disclosure of confidential information which had been entrusted to the Court.

194. The Government claimed that they had provided information on the content of the decision of 21 September 2004 which should be deemed sufficient to discharge their obligation under Article 38. Thus, they had indicated which authority had classified it, what the security considerations had been, what the grounds for discontinuing the proceedings had been and what legal characterisation had been attributed to the alleged offences. The decision in question did not mention the applicants or contain any information about the fate of their relatives or the location of their burial sites.

195. Finally, the Government took issue with what they described as the "unusual logic" of the Chamber judgment. In their view, Article 38 should

have been examined at the end of the judgment, as had been done in previous cases. They emphasised that the obligation under Article 38 was "of a purely procedural nature", and that an alleged breach thereof "could not cause any suffering to the applicants" or "outweigh the gravity of the alleged violations of Article 2 and Article 3". The Government disagreed that the obligation under Article 38 had to be enforced in all circumstances; in their opinion, it was derivative by its nature and conditional on the existence of admissible complaints under other Convention provisions. In the instant case, there was no point in examining the Government's compliance with Article 38, since the Court should find that it lacked jurisdiction to take cognisance of the merits of the complaint under Article 2 of the Convention.

2. The applicants

196. The applicants submitted that a long-standing principle of customary international law established that no internal rule, even of constitutional rank, could be invoked as an excuse for non-observance of international law (they referred to the case-law of the Permanent Court of International Justice and of the International Court of Justice (ICJ)). This principle was codified in Article 27 of the Vienna Convention on the Law of Treaties as an extension of the more general *pacta sunt servanda* principle, and had been frequently invoked in the jurisprudence of international courts and quasi-judicial bodies including the United Nations Human Rights Committee, the International Criminal Tribunal for the former Yugoslavia (ICTY), the Inter-American Court on Human Rights, the African Commission on Human and Peoples' Rights, and arbitration tribunals. When confronted with a State Party's reluctance to submit the requested materials on account of confidentiality concerns, international tribunals held hearings in a closed session (the applicants referred to the IACtHR's judgment in *Godínez Cruz v. Honduras* (merits), judgment of 20 January 1989, Series C No. 5, and the judgment of the Administrative Tribunal of the International Labour Organisation in *Ballo v. UNESCO*, judgment no. 191, 15 May 1972). In the *Corfu Channel* case, the ICJ had not drawn any negative inferences when the United Kingdom refused to submit evidence which it considered to be related to naval secrecy (see *Corfu Channel case*, judgment of 9 April 1949: *ICJ Reports* 1949). However, the ICTY had rejected the Croatian government's reliance on the *Corfu* judgment as justification for their refusal to produce certain documents and evidence of a military character in the *Prosecutor v. Tihomir Blaškić* case, holding, in particular, that a blanket right of States to withhold, for security reasons, documents necessary for proceedings might jeopardise the very function of the Tribunal (Case No. IT-95-14-AR108*bis*, judgment of 29 October 1997). It had added that the validity of State security concerns could be accommodated by procedural arrangements, including in camera

hearings and special procedures for communicating and recording sensitive documents. In the later case of *Prosecutor v. Dario Kordić and Mario Čerkez* (Case No. IT-95-14/2, decision of 9 September 1999), the ICTY had also held that the question of the relevance of the requested material for the proceedings fell within its full discretion and could not be challenged by States. The applicants submitted that the *ratio decidendi* of those cases was applicable, *mutatis mutandis*, to the instant case.

197. The applicants reiterated that the Russian Government had not substantiated their allegations of security concerns and had not explained why a document concerning an atrocity committed by the previous totalitarian regime needed to be classified. The decision to classify it also contradicted the Russian State Secrets Act, section 7 of which precluded the classification of information on human rights violations. The Katyn massacre was a violation of the right to life on a massive scale perpetrated on the orders of the highest authorities of the USSR.

198. The applicants indicated their agreement with the Chamber judgment in so far as it had established a breach of Article 38 of the Convention. They submitted that the Court had absolute discretion to determine what evidence it needed for the examination of the case and that refusal to cooperate with the Court might lead to a violation of Article 38 even where no violation of the substantive Convention right had been established.

3. The Polish Government

199. The Polish Government endorsed the conclusions of the Chamber with regard to the finding of a breach of Article 38 of the Convention. They noted at the outset that the Russian Government had presented contradictory information, even during the proceedings before the Court, as to who had issued the decision to classify the materials and on what date it had been issued. Whereas in their submissions of 19 March 2010 the Russian Government stated that the decision had been made by the Inter-Agency Commission on the Protection of State Secrets, their written submissions of 30 November 2012 indicated that the Chief Military Prosecutor's Office had taken the decision in consultation with the Federal Security Service.

200. The Polish Government believed that the decision to classify the materials of the investigation had been in breach of substantive Russian law. The content of a decision on the discontinuation of criminal proceedings was clearly outlined in the Russian Code of Criminal Procedure and could not include any information classified as a State secret. Even if it did include data on the individuals with respect to whom the proceedings had been conducted, this could not constitute a basis for classifying the entire decision as top secret. Any information on high-ranking USSR officials concerned the period up to 1970 and, accordingly, by the time the decision was issued, the maximum thirty-year classification period established in

section 13 of the State Secrets Act had already elapsed. In addition, in so far as the Russian Government admitted that the actions of the USSR officials had been characterised in law as an abuse of power, this information was explicitly excluded from classification by virtue of section 7 of the State Secrets Act. The Polish Government also emphasised that the Russian Government had not produced a reasoned decision on the classification.

201. Finally, the Polish Government pointed out that the Katyn investigation was not related to the current functions or operations of the special services of the police. Even if part of the materials had been classified by the former regime, there existed no continuing and actual public interest in maintaining that classification.

C. The Court's assessment

1. General principles

202. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications. This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. A failure on a government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (see *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 253-54, ECHR 2004-III; *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI; and *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV).

203. The obligation to furnish the evidence requested by the Court is binding on the respondent Government from the moment such a request has been formulated, whether it be on initial communication of an application to the Government or at a subsequent stage in the proceedings (see *Enukidze and Girgvliani v. Georgia*, no. 25091/07, § 295, 26 April 2011, and *Bekirski v. Bulgaria*, no. 71420/01, §§ 111-13, 2 September 2010). It is a fundamental requirement that the requested material be submitted in its entirety, if the Court has so directed, and that any missing elements be properly accounted for (see *Damir Sibgatullin v. Russia*, no. 1413/05, §§ 65-68, 24 April 2012; *Enukidze and Girgvliani*, cited above, §§ 299-300; and *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, §§ 167 et seq., 1 July 2010). In addition, any material requested must be

produced promptly and, in any event, within the time-limit fixed by the Court, for a substantial and unexplained delay may lead the Court to find the respondent State's explanations unconvincing (see *Damir Sibgatullin*, § 68; *Tahsin Acar*, § 254; and *Enukidze and Girgvliani*, §§ 297 and 301, all cited above).

204. The Court has previously found that the respondent Government failed to comply with the requirements of Article 38 in cases where they did not provide any explanation for the refusal to submit documents that had been requested (see, for instance, *Bekirski*, cited above, § 115; *Tigran Ayrapetyan v. Russia*, no. 75472/01, § 64, 16 September 2010; and *Maslova and Nalbandov v. Russia*, no. 839/02, §§ 128-29, 24 January 2008) or submitted an incomplete or distorted copy while refusing to produce the original document for the Court's inspection (see *Trubnikov v. Russia*, no. 49790/99, §§ 50-57, 5 July 2005).

205. In cases where the Government advanced confidentiality or security considerations as the reason for their failure to produce the material requested, the Court had to satisfy itself that there existed reasonable and solid grounds for treating the documents in question as secret or confidential. Thus, in many cases chiefly concerning disappearances in the Chechen Republic, the Russian Government relied on a provision of the Code of Criminal Procedure which, in their submission, precluded the disclosure of documents from the file of an ongoing investigation. The Court, however, pointed out that the provision in question did not contain an absolute prohibition but rather set out the procedure for, and limits to, such disclosure. It also noted that in many similar cases the Russian Government had submitted the documents requested without mentioning that provision, or had agreed to produce documents from the investigation files even though they had initially invoked that provision (see, among other cases, *Sasita Israilova and Others v. Russia*, no. 35079/04, § 145, 28 October 2010, and *Musikhanova and Others v. Russia*, no. 27243/03, § 107, 4 December 2008).

206. As regards the classification of documents as secret, the Court was not satisfied, in one case, with the respondent Government's explanation according to which regulations relating to the procedure for review of prisoners' correspondence constituted a State secret (see *Davydov and Others*, cited above, § 170) or, in another case, that the domestic law did not lay down a procedure for communicating information classified as a State secret to an international organisation (see *Nolan and K. v. Russia*, no. 2512/04, § 56, 12 February 2009). The Court pointed out that, if there existed legitimate national security concerns, the Government should have edited out the sensitive passages or supplied a summary of the relevant factual grounds (loc. cit.). Finally, when reviewing the nature of the classified information, the Court took into account whether the document was known to anyone outside the secret intelligence services and the highest

State officials. The supposedly highly sensitive nature of information was cast into doubt once it became clear that lay persons, such as counsel for the claimant in a civil case, could take cognisance of the document in question (loc. cit.).

2. Application of the above principles to the present case

207. In giving notice of the two applications at the origin of the instant case to the respondent Government, the Court put a number of questions to the parties and requested the Government to produce a copy of the decision of 21 September 2004 relating to the discontinuation of the proceedings in criminal case no. 159. The Government refused to provide it, citing its top secret classification at domestic level. On 5 July 2011 the Court adopted a partial admissibility decision, invited the parties to submit any additional material which they wished to bring to its attention, and also put a question regarding the Government's compliance with their obligations under Article 38 of the Convention. The Government did not submit a copy of the requested decision. In the proceedings before the Grand Chamber, on 30 November 2012 and 17 January 2013, the Government submitted a number of additional documents which, however, did not include the copy of the decision of 21 September 2004 that had been requested.

208. The Court reiterates that Article 38 of the Convention requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Being master of its own procedure and of its own rules, the Court has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it. Only the Court may decide whether and to what extent the participation of a particular witness would be relevant for its assessment of the facts and what kind of evidence the parties are required to produce for due examination of the case. The parties are obliged to comply with its evidential requests and instructions, provide timely information on any obstacles in complying with them and provide any reasonable or convincing explanations for failure to comply (see *Davydov and Others*, cited above, § 174; *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 77, 5 April 2005; and *Ireland v. the United Kingdom*, 18 January 1978, § 210, Series A no. 25). It is therefore sufficient that the Court regards the evidence contained in the requested decision as necessary for the establishment of the facts in the present case (see *Dedovskiy and Others v. Russia*, no. 7178/03, § 107, 15 May 2008, and also *Akhmadova and Sadulayeva v. Russia*, no. 40464/02, § 137, 10 May 2007).

209. As regards the allegedly derivative nature of the obligation to furnish all necessary facilities for its investigation, flowing from Article 38 of the Convention, the Court reiterates that this obligation is a corollary of the undertaking not to hinder the effective exercise of the right of individual

application under Article 34 of the Convention. Indeed, the effective exercise of this right may be thwarted by a Contracting Party's failure to assist the Court in conducting an examination of all circumstances relating to the case, including in particular by not producing evidence which the Court considers crucial for its task. Both provisions work together to guarantee the efficient conduct of the judicial proceedings and they relate to matters of procedure rather than to the merits of the applicants' grievances under the substantive provisions of the Convention or its Protocols. Although the structure of the Court's judgments traditionally reflects the numbering of the Articles of the Convention, it has also been customary for the Court to examine the Government's compliance with their procedural obligation under Article 38 of the Convention at the outset, especially if negative inferences are to be drawn from the Government's failure to submit the requested evidence (see, among other cases, *Shakhgiriyeva and Others v. Russia*, no. 27251/03, §§ 134-40, 8 January 2009; *Utsayeva and Others v. Russia*, no. 29133/03, §§ 149-53, 29 May 2008; *Zubayrayev v. Russia*, no. 67797/01, §§ 74-77, 10 January 2008; and *Tangiyeva*, cited above, §§ 73-77). The Court also reiterates in this connection that it may establish a failure by the respondent Government to comply with their procedural obligations even in the absence of any admissible complaint about a violation of a substantive Convention right (see *Poleshchuk v. Russia*, no. 60776/00, 7 October 2004). Furthermore, it is not required that the Government's alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition (see *McShane v. the United Kingdom*, no. 43290/98, § 151, 28 May 2002). The Court reaffirms that the Contracting Party's procedural obligations under Articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives.

210. Turning to the justification advanced by the Government for their failure to produce a copy of the requested decision, the Court observes that it focused on the fact that the decision had been lawfully classified at domestic level and that the existing laws and regulations prevented the Government from communicating classified material to international organisations in the absence of guarantees as to its confidentiality.

211. The Court reiterates that it has already found in another case against Russia that a mere reference to the structural deficiency of the domestic law which rendered impossible communication of sensitive documents to international bodies is an insufficient explanation to justify the withholding of information requested by the Court (see *Nolan and K.*, cited above, § 56). It has also previously rejected similar objections from the Russian Government relating to the alleged lack of safeguards in the Court's procedure guaranteeing the confidentiality of documents or imposing

sanctions on foreign nationals for a breach of confidentiality (see *Shakhgiriyeva and Others*, cited above, §§ 136-40). The Court reiterates in this connection that the Convention is an international treaty which, in accordance with the principle of *pacta sunt servanda* codified in Article 26 of the Vienna Convention on the Law of Treaties, is binding on the Contracting Parties and must be performed by them in good faith. Pursuant to Article 27 of the Vienna Convention, the provisions of internal law may not be invoked as justification for a failure by the Contracting State to abide by its treaty obligations. In the context of the obligation flowing from the text of Article 38 of the Convention, this requirement means that the respondent Government may not rely on domestic legal impediments, such as the absence of a special decision by a different agency of the State, to justify a failure to furnish all the facilities necessary for the Court's examination of the case. It has been the Court's constant position that Governments are answerable under the Convention for the acts of any State agency since what is in issue in all cases before the Court is the international responsibility of the State (see *Lukanov v. Bulgaria*, 20 March 1997, § 40, *Reports* 1997-II).

212. Even though in the Grand Chamber proceedings the Government submitted copies of the judgments issued by the domestic courts in the declassification proceedings, these did not make any more apparent the exact nature of the security concerns that informed the decision to classify a portion of the materials in the criminal case file, including the decision of 21 September 2004 requested by the Court. It has become clear that the classification decision was not made by the Chief Military Prosecutor's Office of its own initiative but rather on the basis of the opinion of some officials from the Federal Security Service, which had "the right to dispose as it saw fit of the information reproduced in the Chief Military Prosecutor's decision". It was also stated that the decision of 21 September 2004 contained information "in the field of intelligence, counterintelligence and operational and search activities", without further elaboration (see paragraph 64 above).

213. The Court reiterates that the judgment by the national authorities in any particular case in which national security considerations are involved is one which it is not well equipped to challenge. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. If there was no possibility of challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention (see *Liu*, cited above, §§ 85-87, and *Al-Nashif v. Bulgaria*, no. 50963/99, §§ 123-24, 20 June 2002).

214. In the instant case the Moscow City Court's judgment of 2 November 2010, as endorsed by the Supreme Court, contains no substantive analysis of the reasons for maintaining the classified status of the case materials. It is not even apparent whether the City Court was presented with a copy of the expert report issued by the Federal Security Service. The national courts did not subject to any meaningful scrutiny the executive's assertion that information contained in that decision should be kept secret more than seventy years after the events. They confined the scope of their inquiry to ascertaining that the classification decision had been issued within the administrative competence of the relevant authorities, without carrying out an independent review of whether the conclusion that its declassification constituted a danger to national security had a reasonable basis in fact. The Russian courts did not address in substance Memorial's argument that the decision brought to an end the investigation into a mass murder of unarmed prisoners, that is, one of the most serious violations of human rights committed on orders from the highest-ranking Soviet officials, and that it was not therefore amenable to classification by virtue of section 7 of the State Secrets Act. Finally, they did not perform a balancing exercise between the alleged need to protect the information owned by the Federal Security Service, on the one hand, and the public interest in a transparent investigation into the crimes of the previous totalitarian regime and the private interest of the victims' relatives in uncovering the circumstances of their death, on the other hand. Given the restricted scope of the domestic judicial review of the classification decision, the Court is unable to accept that the submission of a copy of the decision of 21 September 2004, as it had requested, could have affected Russia's national security.

215. The Court emphasises, lastly, that legitimate national security concerns may be accommodated in its proceedings by means of appropriate procedural arrangements, including restricted access to the document in question under Rule 33 of the Rules of Court and, *in extremis*, the holding of a hearing behind closed doors. Although the Russian Government were fully aware of those possibilities, they did not request the application of such measures, even though it is the responsibility of the party requesting confidentiality to make and substantiate such a request.

216. Accordingly, the Court considers that in the present case the respondent State failed to comply with their obligations under Article 38 of the Convention on account of their refusal to submit a copy of the document requested by the Court.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

217. 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

218. The applicants Mr Jerzy Karol Malewicz, Mr Janowiec and Mr Trybowski claimed compensation for the loss of their fathers and grandfather respectively. All the applicants also claimed compensation in respect of non-pecuniary damage in connection with the alleged violations of Articles 2 and 3 of the Convention, leaving the determination of the amount of just satisfaction to the discretion of the Court.

219. The Government disputed their claims.

220. The Court has not found a violation of Article 2 or Article 3 of the Convention as alleged by the applicants. The Russian Government's failure to comply with Article 38 of the Convention was a procedural matter which does not call for an award of just satisfaction to the applicants. Accordingly, the Court rejects the applicants' claims in respect of pecuniary and non-pecuniary damage.

B. Costs and expenses

221. The applicants claimed the following amounts:

(i) 25,024.82 euros (EUR) in legal fees for Mr Szewczyk (exclusive of the legal aid received from the Court);

(ii) EUR 7,000 in legal fees for Mr Karpinskiy and Ms Stavitskaya in the Russian proceedings;

(iii) EUR 7,581 and 1,199.25 Polish złotys for transport and translation costs incurred in the Chamber proceedings;

(iv) EUR 4,129 in transport and accommodation costs relating to the lawyers' and the applicants' preparation for, and participation in, the hearing at which the Chamber judgment was delivered and at the Grand Chamber hearing;

(v) EUR 124 for translation and postal expenses in the Grand Chamber proceedings.

222. In addition, the applicant Mr Jerzy Karol Malewicz claimed 2,219.36 United States dollars for his daughter's and his own travel and accommodation expenses incurred in connection with their attendance at the Chamber hearing.

223. The Government commented that Mr Szewczyk's fees appeared excessive, that the necessity of travel expenses had not been convincingly shown, and that the two Russian lawyers had taken part only in the domestic "rehabilitation" proceedings, which fell outside the scope of the instant case. Moreover, the claim by Russian counsel was not based on any payment rate and was not linked to the amount of work actually performed. The expenses relating to the applicants' presence at the delivery hearing and the Grand Chamber hearing were not necessarily incurred as the applicants had been represented by a team of three lawyers. Finally, by their own admission, Mr Kamiński and Mr Sochański had carried out the legal work on a *pro bono* basis which, in the Government's view, prevented them from claiming any amounts for the preparation of the case.

224. The Court reiterates that it did not find the violations the applicants alleged. It accepts nonetheless that the Russian Government's failure to comply with Article 38 of the Convention generated an additional amount of work for the applicants' representatives, who were required to address that issue in their written and oral submissions. However, it considers that the amounts which were paid to the representatives by way of legal aid were sufficient as to quantum in these circumstances. Accordingly, the Court rejects the claims for costs and expenses.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that Mr Piotr Malewicz and Mr Kazimierz Raczyński have standing to pursue the application in place of the late Mr Krzysztof Jan Malewicz and the late Ms Halina Michalska respectively;

2. *Holds*, by thirteen votes to four, that the Court has no competence to examine the complaint under Article 2 of the Convention;

3. *Holds*, by twelve votes to five, that there has been no violation of Article 3 of the Convention;

4. *Holds*, unanimously, that the respondent State failed to comply with their obligations under Article 38 of the Convention;

5. *Dismisses*, by twelve votes to five, the applicants' claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 October 2013.

Erik Fribergh	Josep Casadevall
Registrar	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) concurring opinion of Judge Gyulumyan;

(b) concurring opinion of Judge Dedov;

(c) partly concurring and partly dissenting opinion of Judge Wojtyczek;

(d) joint partly dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller.

J.C.
E.F

CONCURRING OPINION OF JUDGE GYULUMYAN

Although I do share the opinion of the majority on all points in this case, I nevertheless have certain reservations of a more general character about the Court's approach concerning the "humanitarian clause" and "genuine connection" requirements. In substantiating its position the Court referred to the time factor, having regard to the period of time between the death of the applicants' relatives and the entry into force of the Convention. I do not find this reasoning persuasive. The State's obligation to carry out a thorough investigation is engaged when gross human rights violations (genocide, crimes against humanity and war crimes) are at stake. The mere fact that the crimes in question took place before the Convention came into existence is not decisive. If the investigation is carried out before the ratification of the Convention by the respondent State, it is the complaints as to the quality of the investigation which might fall outside of the Court's competence *ratione temporis*.

I do believe that human rights violations of this kind can be prevented and redressed in the future only by the respondent State's willingness and readiness to confront its past and not to bury its history under layers. In this respect I attach particular importance to the fact that an investigation was carried out and that a significant number of actions were undertaken by the Soviet and subsequently the Russian authorities to acknowledge responsibility for the Katyn massacre and to pay tribute to the victims (see paragraphs 38, 41 and 73).

If the above-mentioned actions had not been undertaken and no investigation had been carried out, that is to say, if there had been an absolute denial of the crime, I would have chosen instead to join in the dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller.

CONCURRING OPINION OF JUDGE DEDOV

Responsibility for acts should be determined in accordance with the law in force. For this purpose the law (the Convention in this case) should not be applied retrospectively. This principle is supported by the judgment, and it applies to all member States. That is why the special status of crimes against humanity cannot override this procedural principle as it relates to different matters. Recognising that the Court lacks jurisdiction *ratione temporis* does not amount to recognising as lawful a situation entailing a breach of a *jus cogens* rule such as the prohibition of war crimes.

In support of the judgment's findings I would stress that the protection afforded by *jus cogens* rules is based on the responsibility of individuals rather than that of the State (starting with the Nuremberg trials, organised to prosecute prominent members of the political, military and economic leadership of Nazi Germany). Even in international conflicts it is important to adhere to this approach and not to blame the State automatically. In particular, the Russian Federation did not exist in 1940 and the Soviet Union was a totalitarian State in which a large number of families suffered under Stalin's regime and millions of people were subjected to killings without a fair trial. The Politburo's order authorised the execution of Polish prisoners of war and of thousands of Soviet citizens at the same time. Indeed, the right approach would be to punish those members of the Politburo but not the State itself, because all the people of that country who were victims cannot at the same time bear responsibility for this crime against humanity.

Furthermore, this crime against humanity was not supported by citizens in silence, nor did they authorise their representatives in Parliament for any purpose, as happens nowadays when it comes to launching a military invasion of another country. In such a case, the State has to be held fully responsible for every life lost due to that invasion. All this suggests that the Convention system and *jus cogens* rules in the global context should effectively serve the modern world rather than history.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK

(Translation)

1. I do not share the view that there has been no violation of Article 3 of the Convention by the respondent State; nor can I subscribe to the majority's argument concerning the issue of the applicability of Article 2 of the Convention.

2. Firstly, it is necessary to emphasise at this point a number of important circumstances for the assessment of this case. Not only did the applicants lose their relatives and were then confronted with official propaganda attributing the crime to the Germans, but also, over many years in the Soviet Union and Poland, any private attempt to conduct research into the truth of the Katyn massacre was punished, as was the dissemination of information gathered on that subject. It is not therefore exact to say that the alleged events occurred more than seventy years ago: on the contrary, various forms of violation of the applicants' fundamental rights characterised the entire period of the communist regime in both countries. It should be added here that, for the victims of a crime or for their relatives, time does not always flow in the same manner in different States. From the perspective of human rights protection, decades in a totalitarian State cannot be compared with the same lapse of time in a democratic State governed by the rule of law. Consequently, the argument concerning the lapse of time, occasionally relied on to justify the termination of legal obligations with regard to human rights (see, for example, paragraph 157 of the judgment), must always be examined in the specific historical context of each country. Moreover, the applicants have described in detail the various acts and omissions of the Russian authorities subsequent to the date of entry into force of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the Russian Federation. In particular, they report the disparaging remarks made against them by certain representatives of the Russian authorities. The Chamber judgment (see *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09, 16 April 2012) established a number of important facts reflecting those authorities' dismissive and disdainful attitude. I note that the Grand Chamber did not consider it necessary to express a position on this matter in its judgment.

3. The Convention is an international treaty, and not a constitution. It is undeniable that, while the international treaties on protection of human rights have certain specific and important features which have an indisputable impact on their application and interpretation, they nonetheless remain subject to the rules of interpretation of treaties, developed under customary international law and codified in the Vienna Convention on the Law of Treaties ("the Vienna Convention"). Indeed, the Court has explicitly

confirmed in a number of cases the applicability of those rules of interpretation, referring to the provisions of the Vienna Convention (see, for example, the judgments in *Golder v. the United Kingdom*, 21 February 1975, Series A no. 18; *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112; and *Saadi v. the United Kingdom* [GC], no. 13229/03, ECHR 2008; and the decision in *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/00, ECHR 2001-XII). Although this latter treaty does not as such apply to the Convention, it remains a point of reference in so far as it codifies the rules of customary treaty law.

Under the general rule of interpretation set out in Article 31 of the Vienna Convention, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Consequently, the Convention must be read in the light of its object and purpose, which is the effective protection of a certain number of fundamental human rights set out therein.

The Convention is undeniably a living instrument, since its application must give constant material effect, through the case-law and in hitherto unconsidered situations, to the general rules. In this respect, it does not differ significantly from the majority of other international treaties. The interpretation of the Convention as a living instrument is subject to the limits set by the rules governing the interpretation of international treaties.

The legitimacy of an international court depends, *inter alia*, on the persuasive force of its decisions. The case examined here raises fundamental questions of interpretation and application of the Convention and of other rules of conventional or customary international law. The Court's decision establishing the interpretation of the Convention in the present case requires the greatest methodological vigilance. An interpretive decision in international law presupposes (a) precise identification and formulation of the applicable rules of interpretation; (b) an account of the provisions to be interpreted and their context (within the meaning of the law of treaties); (c) wording of the conclusion which sets out with sufficient precision the legal rule derived from the international text as interpreted in this manner; and (d) the reasoning for the decision in question, regard being had to the rules of interpretation applied in the case. I regret that the majority has refused to follow such a methodology. In addition, the approach taken seems, in my opinion, to contravene the rules of international law concerning the interpretation and scope of treaties.

4. The paramount question which arises in the present case is the temporal scope of the Convention. In responding, it is first necessary to make a clear distinction between two concepts: the temporal scope of the Convention (in other words, the temporal import of the Convention) and the Court's jurisdiction *ratione temporis*. While the temporal scope of a treaty is a matter of substantive law, the extent of the jurisdiction *ratione temporis*

of an international body is governed by the rules of jurisdiction. Furthermore, it should be pointed out that the temporal scope of the Convention varies according to the High Contracting Parties. In practice, under the rules of the law of treaties, the Convention comes into force with regard to a High Contracting Party on the date of its ratification and creates obligations as of that date.

The jurisdiction *ratione temporis* of an international court does not necessarily coincide with the temporal scope of the treaty which it is called upon to apply. Yet the wording of the reasoning in this judgment does not seem to take account of this scholarly distinction, which may have an important practical significance.

If the alleged violation of the Convention does not fall within the temporal scope of the Convention, the question of the Court's jurisdiction to find such a violation is devoid of purpose. In contrast, the fact that the alleged violation of the Convention falls within the temporal scope of the Convention does not automatically mean that the Court has jurisdiction to examine it. A legal rule defining the scope of the Court's jurisdiction may in fact restrict such jurisdiction in respect of certain violations of the international obligations deriving from the Convention. To illustrate this point, one might refer here to the situation of the States which had made a declaration recognising the competence of the European Commission of Human Rights to examine individual applications, under the legal regime applicable prior to 1 November 1998, that is, prior to the entry into force of Protocol No. 11 to the Convention, restructuring the control machinery established thereby. Such a declaration could recognise the competence of the Commission for matters arising after or based on facts occurring subsequent to the given declaration. Violations of the Convention committed between the date of its entry into force with regard to the State making the declaration and the date of that declaration fall within the temporal scope of application of the Convention but fall outside the scope of the Court's jurisdiction *ratione temporis* (see Article 6 of Protocol No. 11).

In examining any application alleging violations of human rights, before responding to the question of the Court's temporal jurisdiction, it is first necessary to verify whether the alleged facts fall within the temporal scope of the Convention. To do so, it is necessary to set out unequivocally the Convention rule applicable to the High Contracting Party and to define precisely its temporal scope.

5. One of the fundamental principles of international law is that of the non-retroactivity of treaties. This principle of customary international law has been codified in Article 28 of the Vienna Convention, worded as follows:

Article 28: Non-retroactivity of Treaties

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

Where the temporal scope of an international treaty is determined, it is necessary firstly to verify whether the parties intended to accord it retroactive scope. Nothing in the text of the Convention or its additional Protocols suggests that the High Contracting Parties had the intention of giving retroactive effect to the Convention. Nor, in my opinion, does such an intention on the part of the High Contracting Parties appear to derive from other elements of value in interpreting this treaty. On the contrary, it seems that the aims of the Convention were solely prospective: regard being had to Europe's painful past, the issue was that of preventing future violations of human rights.

The concepts of the retroactivity and non-retroactivity of legal rules raise particularly difficult questions, which have been examined both by legal theory and by international law scholarship. I am perfectly aware that it is not easy to define unequivocally the content of the principle of non-retroactivity of treaties. In particular, the characterisation of the events as representing a single situation or a number of different situations may frequently be open to discussion. In addition, the finding of a situation's continued (present) or discontinued (past) nature is often a matter of more or less subjective assessment. In those circumstances, the principle of the non-retroactivity of the Convention must be interpreted and applied with a certain flexibility, taking account of the specific nature and object of this international treaty. At the same time, in spite of the difficulties referred to, the principle of non-retroactivity in treaty law has a sufficiently precise normative content, making it possible, on the one hand, to rule in the instant case, and, on the other, to assess the relevance of the applicability criteria in respect of Article 2 of the Convention proposed by the majority.

It is clear that the Convention provisions do not bind a Party in relation to any act or facts which took place before the date of its entry into force with respect to that Party or any situation which ceased to exist on that date. The Convention, read in the light of the rules of interpretation of international treaties, allows for no exception to this rule. On the other hand, it may be applied to continuing situations which existed at the date of entry into force of the Convention in respect of the State concerned.

It should be added that while Article 32 § 2 of the Convention authorises the Court to rule on the scope of its own jurisdiction, it does not permit it to extend that jurisdiction beyond its scope as defined by the other Convention provisions. In ruling on the basis of Article 32 § 2, the Court is bound by all the other legal rules which define its jurisdiction.

6. The Court has explicitly acknowledged the principle of the non-retroactive nature of the Convention and applied it consistently for many years (see, for example, the decision in *Kadiķis v. Latvia*, no. 47634/99, 29 June 2000, and the judgment in *Blečić v. Croatia* [GC], no. 59532/00, ECHR 2006-III, and the case-law cited in that judgment). As emphasised in the reasoning of the *Blečić* judgment, "the Court, on account of its subsidiary role in safeguarding human rights, must be careful not to reach a result tantamount to compelling the domestic authorities to apply the Convention retroactively" (§ 90 *in fine*).

The judgment in *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009) marked a significant departure from the case-law. The Court held in that judgment:

> "161. ... the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended.
>
> ...
>
> 163. ... there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.
>
> Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account ... – will have been or ought to have been carried out after the critical date.
>
> However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner."

Analysis of this judgment indicates that the State is under an obligation to investigate a death which occurred prior to the date of entry into force of the Convention in its regard (a) where a significant proportion of the procedural steps *were* carried out after the "critical date"; (b) where a significant proportion of the procedural steps *ought to have been* carried out after the "critical date"; or (c) where it is necessary to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner. The State in question may therefore, of its own motion, launch application of the Convention rule requiring that an effective investigation be conducted if it takes investigative measures into events which occurred prior to its ratification of the Convention. The new approach proposed in the above-cited *Šilih* judgment was then confirmed in numerous subsequent judgments.

I share the opinion of those who submit that this approach amounts to imposing retroactive obligations on the High Contracting Parties that they could not have foreseen at the date of ratification of the Convention. I also subscribe here to the highly critical views expressed by Judges Bratza and

Türmen in their dissenting opinion joined to the above-cited *Šilih* judgment. The majority's reasoning in that case is not, in my opinion, substantiated by arguments which would confirm the intention of the High Contracting Parties to give retroactive effect to the Convention. It should also be noted in passing that the practical consequences of the criteria identified in the *Šilih* judgment vary from one State to another, depending on the date of ratification of the Convention, and are of particular import for those States which have recently ratified the Convention. In those circumstances, it would be desirable for the Court to agree to return to its initial interpretation of the principle of the non-retroactivity of the Convention.

7. As Judge Lorenzen quite rightly pointed out in his concurring opinion joined to the above-cited *Šilih* judgment, the criteria established in that judgement are not very clear. The term "genuine connection" between a death and the ratification of the Convention does not appear adequate and may be a source of confusion, in that its linguistic meaning does not reflect the content ascribed to it by the Court. At first sight, one might think that there is a connection between the ratification of a treaty and violations of human rights if that ratification represents a reaction in relation to the human rights violations committed in the past. Furthermore, while the *Šilih* judgment states that Article 2 of the Convention is applicable to a situation in which "the procedural steps required ... *ought to have been* carried out after the critical date", it raises questions as to the nature of the (domestic? international?) legal rule from which this obligation to investigate should arise.

It is important to note that application of the criteria established in the *Šilih* case leads to the conclusion that the alleged violation of the Convention in the instant case falls within the temporal scope of this treaty. Firstly, it should be noted that Russia's ratification of the Convention was precisely a reaction against the massive violations of human rights committed under the communist regime, for example the massacre of Polish prisoners of war, since it was intended to prevent such violations in the future. The existence of a "genuine connection", in the ordinary meaning of these words, is hardly open to dispute. Secondly, under Russian domestic law and the rules of international law applicable in Russia, the Russian authorities were obliged to prosecute the perpetrators of the massacre of Polish prisoners of war. In those circumstances, given that the investigation carried out prior to Russia's ratification of the Convention was incomplete, a significant proportion of the procedural steps *ought to have been* carried out after the "critical date" (one of the criteria in the *Šilih* judgment). In addition, a significant proportion of the investigative measures were indeed carried out after the Convention's entry into force in respect of Russia (an alternative criterion from the *Šilih* judgment). Thirdly, given the gravity of the human rights violations committed, the "genuine connection" here is based, irrespective of the above considerations, on the need to ensure that

the guarantees and the underlying values of the Convention are protected in a real and effective manner.

8. In the instant case, the majority has proposed amending the criteria established in the *Šilih* judgment by limiting the retroactive effect given to the Convention in that judgment. Firstly, they assert that the "genuine connection" between an event and the ratification of the Convention exists if the lapse of time between the two is relatively short. Secondly, they set the maximum period for this lapse of time at ten years. Thirdly, while they accept that the requirements of protection of the Convention values may require acceptance of a longer time-limit, they set the time-limit for retroactive application of the Convention at 4 November 1950. Such an interpretation of the Convention represents a fresh departure from the case-law and does not find sufficient justification in the rules of international law, applicable in this case, on the interpretation of treaties.

9. There is no doubt that at the time when the massacre of the Polish prisoners was committed, sufficiently precise rules of international humanitarian law existed, which prohibited such acts and were binding on the Soviet Union. This massacre amounts to a war crime within the meaning of international law. Moreover, the rules of international law applicable to Russia imposed on it a duty to prosecute the perpetrators of that crime. In this respect, I share the opinion expressed by Judges Ziemele, De Gaetano, Laffranque and Keller in their dissenting opinion, which analyses these questions in detail.

I fully agree that the Convention must be interpreted in the light and in the context of international law as a whole and of international humanitarian law in particular. Such an interpretation does not, however, permit extension of the scope of the Convention as that has been defined by the Convention itself. The Convention does not impose an obligation to investigate or to punish violations of human rights, however serious they might be, which fall outside its temporal or territorial scope. An obligation to punish war crimes, such as those in issue here, may, in contrast, arise under other rules of international law. In any event, the Court does not have jurisdiction to rule on human rights violations which fall within the rules of international humanitarian law but do not fall within the scope of the Convention or the Protocols thereto.

It must be concluded from the arguments set out above that the massacre of the Polish prisoners of war in 1940 falls outside the Convention's temporal scope and that Article 2 of the Convention did not impose an obligation to carry out a criminal investigation into those events.

10. Under the principle of the non-retroactive nature of treaties, the Court has jurisdiction in this case only to examine the acts and omissions of the Russian authorities from the date on which the Convention came into force in respect of Russia.

In accordance with Article 3 of the Convention, any action by the authorities of a High Contracting Party must comply with the prohibition on torture and inhuman or degrading treatment. This obligation protects, *inter alia*, the relatives of victims of various crimes, irrespective of whether or not the Convention imposes an obligation on the authorities to prosecute the perpetrators of the crimes. The relatives of deceased persons are particularly vulnerable to the actions and omissions of the authorities, which, in this context, are obliged to act with all the tact and sensitivity called for in the circumstances.

The applicants considered that the actions and omissions of the Russian authorities after 1998 amounted to a violation of Article 3. The essence of their complaints lies in the latter's dismissive and disdainful attitude. The alleged facts go far beyond the usual consequences of the disappearance or unexplained death of a relative. The alleged violations, by their nature and gravity, are distinct from the complaint under Article 2 and should therefore be examined in detail, separately from the issue of that Article's admissibility, as indeed the Chamber did in its judgment of 16 April 2012.

The United Nations Human Rights Committee has developed an interesting case-law on the basis of Article 7 of the International Covenant on Civil and Political Rights, cited in the present Grand Chamber judgment. This case-law allows for full compliance with the principle of the non-retroactivity of treaties, and the Chamber drew on it in examining the complaint under Article 3 of the Convention. On this point, I am in general agreement with the finding of the Chamber judgment.

It should be added here that, for many years, the applicants experienced a threefold trauma: the suffering caused by the loss of their relatives, the official organised lie and the punishment of any attempt to establish the truth. On the date of Russia's ratification of the Convention, the situation was that those applicants who knew that their relatives had been victims of a war crime were still seeking to obtain more specific information about their fate and the location of their graves. As the Chamber pointed out, the applicants were refused access to documents from the investigation file or the proceedings on the ground of their foreign nationality. The military courts consistently avoided any mention of the victims' execution. In addition, as Judges Spielmann, Villiger and Nußberger pointed out in their dissenting opinion joined to the Chamber judgment, serious allegations of a criminal nature were made against the applicants' relatives. Those three judges were correct in stating that it is hard to disagree with the applicants' argument that such a finding by the Russian courts "appeared to suggest that there might have been good reasons for their relatives' execution, as if they had been common criminals deserving of capital punishment".

In those circumstances, regard being had to the authorities' conduct, taken together with the various facts of the case, there has been a violation of Article 3 of the Convention. In my opinion, the applicants' situation represents a flagrant example of suffering which has "a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to the closest relatives of victims of a war crime".

This conclusion applies to all of the applicants in the instant case. On this last point, I do not share the opinion of the Chamber, which considered it necessary to distinguish between two categories of applicant. In my opinion, all the applicants have demonstrated that they had very close family ties to the victims of the massacre and that they were involved in the attempts to establish the truth regarding that event. In particular, the fact that certain of the applicants had never had personal contact with their fathers does not strike me as a relevant argument. On the contrary, this absence of any contact with one of one's parents usually gives rise to particularly deep suffering.

11. It should be noted that the instant case was referred to the Grand Chamber at the request of the applicants. While the Convention does not set out a prohibition of *reformatio in peius*, the situation is paradoxical, in that a remedy provided for by Article 43 of the Convention and used by the applicants with a view to ensuring protection of human rights has ultimately led to a Grand Chamber judgment which is much less favourable to them than the Chamber judgment.

JOINT PARTLY DISSENTING OPINION OF JUDGES ZIEMELE, DE GAETANO, LAFFRANQUE AND KELLER

1. We agree with the majority's finding that Article 38 of the Convention has been violated. To our great regret, we are unable to follow the majority's opinion concerning the findings under Articles 2 and 3. This case is about an undeniable obligation to investigate and prosecute gross human rights and humanitarian law violations which under international law are not subject to statutory limitations. The mass killings of the Polish prisoners of war by the Soviet authorities are war crimes. It is evident that in this case the Court was called upon to identify the relationship between the Convention and one of the most important obligations in international law. We are therefore convinced that the Court should have either distinguished this case from previous cases on jurisdiction *ratione temporis* or applied the *Šilih* principles differently (see *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009). In particular, this case would have been a perfect opportunity for applying the "humanitarian clause". What follows are the arguments in support of these two positions.

2. We concentrate our reasoning on the question of jurisdiction *ratione temporis* for the application of Article 2. Since, as we will argue below, it is our opinion that the Court should have assumed jurisdiction and found a violation of Article 2, there is no need to distinguish between different groups of victims (as the Chamber did concerning victim status under Article 3 of the Convention in regard to the suffering of the various family members – see paragraphs 153 and 154 of the Chamber judgment (see *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09, 16 April 2012)). In Article 2 cases, the Court recognises not only surviving parents, spouses, children and siblings as victims, but also uncles and aunts, grandchildren and in-laws (see, for example, *Isayeva v. Russia*, no. 57950/00, § 201, 24 February 2005, and *Estamirov and Others v. Russia*, no. 60272/00, § 131, 12 October 2006).

3. The legal basis for all matters of jurisdiction is Article 32 of the Convention. We recall the wording of Article 32 § 2: "In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

I. Difference between *Šilih* and *Janowiec*

4. The case at hand is hardly comparable to the situation in *Šilih* (cited above). *Šilih* concerned a death resulting from medical malpractice, whereas *Janowiec* deals with the massacre of more than twenty-one thousand Polish prisoners of war.

5. We accept that the principles governing the jurisdiction of the Court must be the same for all cases. However, the reasons for declaring a *Šilih* type of situation to be outside of the Court's jurisdiction might change in a

Janowiec type of case. In the former, the argument that an effective investigation might be difficult after a certain period of time is understandable and correct. In the latter, however, the investigation is not essentially dependent on the evidence available but rather on the goodwill of the State concerned. In the former, the evidence is a technical matter which becomes more difficult to collect with the passage of time. In the latter, the ultimate proof is available in the Russian archives notwithstanding that seventy years have passed since the event.

II. Applying the *Šilih* principles to *Janowiec*

6. Even if one based one's reasoning on the principles established in the *Šilih* judgment, the case at hand offers ample opportunity to acknowledge the Court's jurisdiction *ratione temporis* in the specific circumstances of the case.

7. We could agree with the majority's opinion that the *Šilih* principles need some clarification (see paragraphs 140-41 of the judgment). In a situation in which the death in question occurred before the critical date, the Court's jurisdiction is limited to the period after that date for the procedural obligations stemming from Article 2 of the Convention (first principle). In order to establish the Court's jurisdiction *ratione temporis*, the Court requires a "genuine connection" between the death and the entry into force of the Convention in respect of the State concerned (second principle). If there is no genuine connection, the Court can exceptionally assume jurisdiction based on the need to ensure that the guarantees and the underlying values of the Convention are applied and upheld in a real and effective manner (third principle, the so-called humanitarian clause). We disagree, however, with some aspects of the clarification and the concrete application of those principles to the case at hand, where the majority's finding overlooked vital factual and legal elements.

(a) The first Šilih *principle: procedural acts and omissions after the crucial date*

8. Regarding the first principle, the majority defines "procedural acts" in a narrow way, that is, in the sense of "acts undertaken in the framework of criminal, civil or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation", and excludes "other types of inquiries that may be carried out for other purposes, such as establishing a historical truth" (see paragraphs 143 et seq. of the judgment).

9. This distinction is problematic for two reasons. Firstly, the two types of proceedings might very often go hand in hand, and it would be difficult in practice to separate one from the other. Sometimes, one procedural step is a precondition for another. Secondly, in international law there is a clear

trend towards recognising a right to the truth in cases of gross human rights violations (see United Nations Human Rights Committee, *Mariam Sankara et al. v. Burkina Faso*, Communication No. 1159/2003, § 12.2, and *Schedko v. Belarus*, Communication No. 886/1999, § 10.2; see also the 8th recital of the Preamble and Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, in force since 23 December 2010, 40 States Parties). The Court has also recognised such a right via its jurisprudence (see the Chamber judgment in this case, § 163; see also *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 191, ECHR 2012; *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 200-02, ECHR 2009; and *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 144, 24 May 2011).

10. Under Articles 2 and 3 of the Convention, the Court requires a thorough and effective investigation whenever an individual is killed or is presumed to have been killed by State agents (as regards Article 2, see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 163 and 166-67, ECHR 2011, and *Bazorkina v. Russia*, no. 69481/01, §§ 117-19, 27 July 2006; see also *Isayeva v. Russia*, no. 57950/00, 24 February 2005; *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, 24 February 2005; and *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, 24 February 2005), or whenever an arguable claim of a violation of Article 3 is raised (see *El-Masri*, cited above, § 182). For example, in *El-Masri* (cited above, § 182) the Grand Chamber found:

> "[W]here an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with ... Article 1 of the Convention ..., requires by implication that there should be an effective official investigation ... capable of leading to the identification and punishment of those responsible."

As regards Article 2, the Court has stated:

> "[T]he investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident ..." (see *Al-Skeini and Others*, cited above, § 166)

In disappearance cases the Court emphasises:

> "[T]he procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation. This is even so where death may, eventually, be presumed and even if this death had occurred prior to the ratification of the Convention by the respondent State." (see *Tashukhadzhiyev v. Russia*, no. 33251/04, § 76, 25 October 2011)

11. In determining whether the procedural obligation to investigate the killings of Polish prisoners of war falls within the *ratione temporis* jurisdiction of the Court, the majority refers to the relevant principles as recently clarified in three main judgments: *Varnava and Others* (cited above), *Šilih* (cited above), and *Blečić v. Croatia* ([GC], no. 59532/00, ECHR 2006-III – see paragraphs 128-31 of the judgment). It should be pointed out that in *Varnava and Others* the Court dealt with a particular situation of continuing human rights violations in respect of which Turkey had not elucidated the facts. The Court, while referring to its previous case-law, took into consideration the specificities of the case concerned. In fact, it refuted the Government's reliance on *Blečić* and its argument "that complaints concerning such investigations, or lack of them, fell foul of the principle that procedures aimed at redressing violations do not affect the lack of temporal jurisdiction for facts occurring beforehand" (*Varnava and Others*, cited above, § 136). The Court held as follows (ibid., § 136):

> "This argument fails since the procedural obligation to investigate under Article 2 is not a procedure of redress within the meaning of Article 35 § 1. The lack of an effective investigation itself is the heart of the alleged violation. It has its own distinct scope of application which can operate independently from the substantive limb of Article 2, which is concerned with State responsibility for any unlawful death or life-threatening disappearance, as shown by the numerous cases decided by the Court where a procedural violation has been found in the absence of any finding that State agents were responsible for the use of lethal force (see, amongst many examples, *Finucane v. the United Kingdom*, no. 29178/95, ECHR 2003-VIII)."

The Court was very clear in stating that the character of the right claimed has a bearing on its jurisdiction. The Court said that "the continuing nature" of the violations involved "has implications for the *ratione temporis* jurisdiction of the Court" (ibid., § 139). It is our submission that the Court, while having a standard procedure for assessing its *ratione temporis* jurisdiction, which is clearly summed up in the *Blečić* judgment (concerning loss of property as an instantaneous act), must also respond to the nature of the right invoked.

12. Finally, it is recalled that the discovery of new material after the critical date may give rise to a fresh obligation to investigate. We fully subscribe to these principles, which are well established in the Court's case-law.

13. Unfortunately these very same principles have been wrongly applied to the facts of the case in hand (see paragraphs 142-44 of the majority judgment).

Procedural shortcomings

14. Turning to the facts of the case, the Court holds tersely that it is "impossible, on the basis of the information available in the case file and in the parties' submissions, to identify any real investigative steps after 5 May 1998" (see paragraph 159 of the judgment). With this, it is our opinion that

the majority not only overlooks the fact that proceedings continued until the decision of 2004 (see paragraph 45), which was confirmed in 2009 (see paragraph 60), but also fails to give sufficient importance to the significant shortcomings in the investigation into the deaths, to the apparent contradictions between the various proceedings and to the partially arbitrary attitude of the Russian authorities.

15. In 2004, the domestic proceedings resulted in the classification of thirty-six volumes of the relevant files as "top secret"; an additional eight volumes were classified as "for internal use only" (see paragraph 45). Judges Spielmann, Villiger and Nußberger rightly found it to be "inconsistent, and hence shocking" that "what was initially a transparent investigation ended in total secrecy" (see the Chamber judgment, joint partly dissenting opinion of Judges Spielmann, Villiger and Nußberger, paragraph 8). Furthermore, the Russian Government refused to provide the Court with a copy of the decision of the Chief Military Prosecutor's Office of 21 September 2004, in which it decided to discontinue criminal investigation no. 159 into the origin of the mass graves in Kharkov. The decision's secret classification was given as justification for this refusal (see paragraphs 45 et seq. of the judgment). Attempts to achieve the declassification of the decision were unsuccessful (see paragraphs 61 et seq.).

16. The lack of transparency regarding the application for declassification of the decision represents just one of the shortcomings of the domestic proceedings. Further shortcomings regarding the complaint under Article 2 include the failure of the Russian authorities to account for the difference between the number of individuals actually killed and those they considered to have "perished", as well as the lack of transparency regarding the refusal to grant the applicants the status of injured parties. In addition, the declaration by the Russian military courts that the relatives of the applicants were "missing persons" is illogical considering that Russian prosecutors had previously confirmed the execution of those individuals (see paragraph 122). Furthermore, the domestic authorities failed to undertake an investigation "geared towards identifying the perpetrators and bringing them to justice", despite the fact that at least two of the functionaries implicated were alive in the 1990s (see paragraph 119). Lastly, the Russian authorities argued that the domestic proceedings could not be conducted to the standards of the law of criminal procedure because they had been conducted "for political reasons, as a goodwill gesture to the Polish authorities" (see paragraphs 109 and 111). Such an "exemption" of the proceedings from the procedural requirements of Article 2 is arbitrary and untenable. Further evidence of the generally uncooperative attitude of the Russian authorities can be found in the arbitrary denial of rehabilitation of the relatives of the applicants (see paragraphs 86 et seq.). These

shortcomings render the domestic procedure insufficient as regards the requirements of Article 2 of the Convention.

Isolated violation of Article 38

17. In this context, it is important to note that, to the best of our knowledge, this is the first time in the Court's history that an isolated violation of Article 38 has been found. So far, all of the cases in which the Court found that a State had failed to comply with the obligations under Article 38 also concerned another Convention right (mostly Article 2 or 3) which the Court found to have been violated. On the one hand, the present judgment emphasises the autonomous character of the obligation to cooperate. On the other, it raises certain suspicions about the finding concerning Articles 2 and 3. In other instances, where a State's failure to submit information to the Court resulted in a finding of a breach of Article 38, the Court associated that failure with "the drawing of inferences as to the well-foundedness of the applicant's allegations" regarding the other Articles relied upon (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI, and *Bitiyeva and X v. Russia*, nos. 57953/00 and 37392/03, § 122, 21 June 2007).

Discovery of new material

18. Finally, the majority states that the discovery of new material after the critical date may give rise to a fresh obligation to investigate, but – where the triggering event lies outside of the Court's temporal jurisdiction – only if either the "genuine connection" test or the "Convention values" test is met (see paragraph 144). This connection between the triggering of a fresh obligation to investigate and the *Šilih* principles is not as straightforward as the judgment makes it seem. For example, in *Stanimirović v. Serbia* (no. 26088/06, §§ 28 et seq., 18 October 2011) the emergence of significant new evidence seems alternative, and not cumulative, to these principles. The same is true for *Mrdenović v. Croatia* ((dec.), no. 62726/10, 5 June 2012).

19. In this context, it is necessary to mention the events between 1998 and 2004 (see paragraph 121), and in particular the discovery of "the Ukrainian list" in 2002 (see paragraph 113). Furthermore, 2010 was a decisive year in the proceedings, and this for two reasons: firstly, the disclosure of essential historical documents on the website of the Russian State Archives Service on 28 April 2010 manifested a change in the Russian authorities' attitude which gave some hope to the applicants (see paragraph 24); secondly, we consider the fact that the Russian Duma adopted a statement on the Katyn tragedy on 26 November 2010, that is, more than twelve years after the crucial date, as significant. It is unusual for a national parliament to acknowledge responsibility for gross human rights violations. The change in the attitude of Russia is a vital step in the process

of coming to terms with the past. The Duma recognised not only "that the mass extermination of Polish citizens on USSR territory during the Second World War had been an arbitrary act by the totalitarian State" and "that the Katyn crime was carried out on the direct orders of Stalin and other Soviet leaders", but emphasised that work for the establishment of the facts "must be carried on". We consider the Duma's statement as a clear political signal of a new approach by the Russian government, an approach desiring that all the circumstances of the tragedy be uncovered.

(b) The second Šilih *principle: the "genuine connection" test*

20. As to the "genuine connection" between the triggering event and the entry into force of the Convention in respect of the respondent State, the majority's finding emphasises the time element and, by referring to classic cases of disappearance, repeats that the period concerned should not exceed ten years (see paragraph 146). In exceptional circumstances, the majority's finding allows an extension of the time-limit further into the past, but only "on condition that the requirements of the 'Convention values' test have been met" (ibid.).

21. We do not agree with this interpretation of the "genuine connection" test. The exceptional circumstances allowing the extension of the time-limit must be interpreted separately from the third *Šilih* principle. Otherwise, the two conditions would merge together and would not have independent meaning. Furthermore, such an interpretation is clearly incompatible with international law in the case of war crimes, and the Court, in its interpretation of the Convention, must respect international law. For example, in the *travaux préparatoires* to the Convention, in 1950, the Committee of Experts instructed to draw up a draft Convention providing a collective guarantee of human rights and fundamental freedoms made it clear that, in accordance with international law on State responsibility, "[the] jurisprudence of a European Court will never ... introduce any new element or one contrary to existing international law"[1]. The history of the Convention thus shows that it was not designed to function in isolation, but was instead intended to harmonise with international law. This principle is well established in the Court's jurisprudence:

> "In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction pursuant to Article 49 of the Convention (art. 49)." (see *Loizidou v. Turkey* (merits), 18 December 1996, § 43 *Reports of Judgments and Decisions* 1996-VI)

1. Commentary to Article 39 (43) (new) in the *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, 8 vols., The Hague 1975-1985, vol. IV, at 44.

In *Nada v. Switzerland* ([GC], no. 10593/08, § 169, ECHR 2012), the Court elaborated this further by saying:

> "Moreover, the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of 'any relevant rules of international law applicable in the relations between the parties', and in particular the rules concerning the international protection of human rights ..."

22. There is no doubt that the Katyn massacre must be qualified as a war crime (see paragraph 140 of the Chamber judgment, and paragraph 6 of the joint partly dissenting opinion of Judges Spielmann, Villiger and Nußberger in the Chamber judgment)[2]. The Court has recently pointed out:

> "[B]y May 1944 war crimes were defined as acts contrary to the laws and customs of war and that international law had defined the basic principles underlying, and an extensive range of acts constituting, those crimes. States were at least permitted (if not required) to take steps to punish individuals for such crimes, including on the basis of command responsibility. Consequently, during and after the Second World War, international and national tribunals prosecuted soldiers for war crimes committed during the Second World War." (see *Kononov v. Latvia* [GC], no. 36376/04, § 213, ECHR 2010)

This statement by the Court reflects the relevant state of international law already in the 1940s. Since then, the obligation to investigate and prosecute serious violations of international humanitarian law has gained in prominence and detail. The majority view correctly refers to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (see paragraph 151). Article IV of that Convention spells out the obligation concerned as well as the principle that statutory limitations do not apply in relation to the obligation to prosecute those responsible.

23. Also regarding statutory limitations for proceedings concerning war crimes, it is relevant to recall Article 7 § 2 of the Convention. A long-established understanding of the Court based on the *travaux préparatoires* to the Convention has been:

> "[T]he purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws (see *X. v. Belgium*, no. 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241). The Court further notes that the definition of war crimes included in Article 6(b) of the [Charter of the International Military Tribunal (Nuremberg Charter)] was found to be declaratory of international laws and customs of war as understood in 1939 ..." (see *Kononov*, cited above, § 186)

2. See also W.A. Schabas, "Victor's Justice: Selecting 'Situations' at the International Criminal Court", 43 *John Marshall Law Review* 535, at 536.

In other words, the Convention does not prevent laws aimed at punishing war crimes. As noted in the previous paragraph, it also accepts that such an obligation exists under international law. In its decision in *Kolk and Kislyiy v. Estonia* ((dec.), nos. 23052/04 and 24018/04, ECHR 2006-I) the Court noted that no statutory limitation applies to crimes against humanity, irrespective of the date on which they were committed.

24. We would point out that, while the applicants have an undeniable interest in the elucidation of the fate of their family members, it is equally clear that the obligation to investigate and prosecute those responsible for grave human rights and serious humanitarian law violations serves fundamental public interests by allowing a nation to learn from its history and by combating impunity. It has been recognised in a series of international instruments that "there can be no just and lasting reconciliation unless the need for justice is effectively satisfied" and "that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity" (see the United Nations Commission on Human Rights Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1). The right to the truth is "a vital safeguard against the recurrence of violations" and protects the collective memory of the affected people, which is a part of its heritage (ibid.).

25. The argument of the Russian Government (see paragraph 110 of the judgment) that there existed no binding international humanitarian law on the definition of responsibility for war crimes and crimes against humanity is untenable. At the time, customary international law, as codified by the Hague Convention IV of 1907 and the Geneva Convention of 1929, which required in no uncertain terms the humane treatment of prisoners of war, applied to all States concerned.

26. While Russia existed under a different political regime in 1907, it was this very State that had initiated the conferences which resulted in the adoption of the Hague laws: Nicholas II, the Tsar of Russia, had convened the International Peace Conference at the Hague in 1899, which – in a second meeting in 1907 – led to the adoption of the Hague Convention IV[3]. The Russian Empire was one of the original signatories of the Hague Convention and ratified it on 27 November 1909. There is also considerable evidence which speaks in favour of the thesis that the Russian Federation continues the legal personality of the former USSR, having inherited

3. Preamble to the Final Act of the International Peace Conference, The Hague, 29 July 1899, and Final Act of the Second Peace Conference, The Hague, 18 October 1907.

obligations entered into under the Soviet regime[4]. In *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, § 378, ECHR 2004-VII) the Court also noted at the outset that the Russian Federation is the successor State to the USSR under international law. There is no question under international law that, despite the changes of government, Russia has always existed as the same State.

27. However, even according to the rules of State succession, the argument must be made that the USSR was bound by the international obligations of Tsarist Russia. Under public international law, a solid body of literature and practice speaks for an exemption of State obligations under human rights treaties from the *tabula rasa* of treaty obligations on a new State: these obligations do not end with the ratifying State, but are transferred to its successor State(s)[5]. For example, the Human Rights Committee considers:

> "[O]nce the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in Government of the State party, including ... State succession ..."[6]

Moreover, it must be noted that, in 1954, the USSR ratified the Geneva Conventions of 1949[7]. At the Nuremberg trial, the Soviet prosecutor attempted to charge leading Nazis with the Katyn massacre, thereby showing that Russia considered the prohibition of war crimes such as those concerned here to be a binding principle of international law (see paragraph 140 of the Chamber judgment). According to both the rules of State continuity and those of State succession, and plainly in view of the applicable rules of customary law, the Government's submission that they are not bound by the international humanitarian law on war crimes thus violates the principle of *venire contra factum proprium*. In light of the above, we must conclusively find that the massacre of the Polish prisoners

4. See H. Hamant, *Démembrement de l'URSS et problèmes de succession d'États*, Bruylant, 2007, p. 128. Support for this argument can be found in the recognition by the USSR, in 1955, of the obligations under the Hague Convention as incurred by Tsarist Russia (Soviet note to the Netherlands, cited in G.B. Baldwin, "A New Look at the Law of War: Limited War and Field Manual 27-10", 4 *Military Law Review* 1 (1959), pp. 1-38).

5. M.T. Kamminga, "State Succession in Respect of Human Rights Treaties", 7 *European Journal of International Law* 4 (1996) 469-484, pp. 472 et seq.: F. Pocar, "Some Remarks On the Continuity of Human Rights and International Humanitarian Law Treaties," in E. Cannizzaro, *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press: Oxford 2011, pp. 292 et seq.

6. Human Rights Committee, General Comment 26 (61) on the Continuity of Obligations, CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, paragraph 4.

7. Table of Ratifications of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, available at: <http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=365>, accessed 26 August 2013.

of war in 1940 constituted a violation of the prohibition of war crimes and crimes against humanity. Under customary international humanitarian law, States have an obligation "to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects"[8]. There is no time-limit on this obligation, for war crimes and crimes against humanity are imprescriptible[9].

28. Finally, paragraph 148 of the judgment must be read with some caution. We agree that *in principle* both of the criteria mentioned therein must be fulfilled, that is, only a short time should have passed between the death and the entry into force of the Convention for the State concerned, and the major part of the investigation must have been carried out or ought to have been carried out after the entry into force. However, in a situation such as that in the case at hand, where the national authorities denied any connection to or responsibility for the Katyn crimes for over forty years, the mere counting of years leads to an absurd result. In particular, the period of deadlock, in which any procedural steps were completely blocked and the victims did not have the slightest hope of making any progress in finding out who was responsible for the death of their relatives, should not be held against the applicants.

29. The above is sufficient for us to conclude that the Court should have accepted its jurisdiction *ratione temporis* on the basis of the first two *Šilih* principles in this case. However, even if one were to deny the existence of the "genuine connection", we are of the view that this case was perfectly suited for the application of the so-called "humanitarian clause".

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8. J.-M.Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press: Cambridge 2005, Rule 158, p. 607; First Geneva Convention (Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 195 States Parties, in force since 21 October 1950), Art. 49; Second Geneva Convention (Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 195 States Parties, in force since 21 October 1950), Art. 50; Third Geneva Convention (Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 195 States Parties, in force since 21 October 1950), Art. 129; Fourth Geneva Convention (Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 195 States Parties, in force since 21 October 1950), Art. 146; UN General Assembly Resolutions 2583 (XXIV) of 15 December 1969 and 2712 (XXV) of 15 December 1970; United Nations Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by General Assembly Resolution 3074 (XXVIII) of 3 December 1973.

9. Compare the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, United Nations Treaty Series vol. 754, p. 73, in force since 11 November 1970, 54 States Parties.

(c) The third Šilih *principle: the "humanitarian clause"*

30. According to the third *Šilih* principle, a connection might not be qualified as "genuine", but may nonetheless be sufficient to establish the Court's jurisdiction if "it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way" (see paragraph 141 of the judgment).

31. We agree with the circumscription of the "underlying values of the Convention" as applied by the Chamber judgment (see paragraph 119 of that judgment) and repeated by the majority (see paragraph 150 of the present judgment). The "humanitarian clause" allows the Court to acknowledge its jurisdiction in cases of gross human rights violations of a larger dimension than those resulting from ordinary criminal offences, that is, those events falling under the definitions of war crimes, genocide or crimes against humanity contained in the relevant international instruments.

32. However, the Court does not apply the humanitarian clause, arguing that it "cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950" (see paragraph 151). This stand is most problematic for several reasons.

33. Firstly, if the crucial sentence in paragraph 151 of the judgment means what it says, the majority should have stopped the examination at that very point. In other words, the examination of the events after the ratification of the Convention by the respondent State in paragraphs 158 and 159 is superfluous, if not contradictory. Secondly, this interpretation of the "humanitarian clause" closes the Court's door to victims of any gross human rights violation that occurred prior to the existence of the Convention, although it is clearly accepted today that the States concerned carry a continuing procedural obligation to establish the facts, to find the perpetrators and to punish them. Thirdly, the majority's position contradicts a principle well established in the Court's case-law, namely that the Convention shall not be interpreted in splendid isolation, but is to be interpreted taking into account the relevant international law (see *Nada*, cited above, § 169; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §§ 76 and 105, ECHR 2011). In paragraph 151, the Court creates an artificial distinction between the relevant international law and the Convention, finding that the "Convention values" clause is inapplicable to events occurring before the adoption of the Convention in 1950. This distinction was not made in the previous case-law, which had not given the Court the opportunity to consider a case potentially falling under the "Convention values" clause (see paragraph 149). Lastly, it must be noted that the killings committed in 1940 were, also at the time of their commission, in violation of the authorities' obligations under customary international law.

34. We thus agree that "the gravity and magnitude of the war crimes committed in 1940 in Katyn, Kharkov and Tver, coupled with the attitude of the Russian authorities after the entry into force of the Convention, warrant application of the special-circumstances clause in the last sentence of paragraph 163 [of the *Šilih* judgment]" (see Chamber judgment, joint partly dissenting opinion of Judges Spielmann, Villiger and Nußberger, paragraph 4). According to Article 32 § 2 of the Convention (see paragraph 3 above), the Court has the competence to define its own jurisdiction. With this judgment, the Court has missed an opportunity to fulfil this very task and thereby uphold the "Convention values" clause in the *Šilih* principles. In doing so, it has deprived that clause of its humanitarian effect in the case at hand and potentially weakened its effect in the event of its future application. This approach is untenable if the Convention system is to fulfil the role for which it was intended: to provide a Court that would act as a "conscience" for Europe[10].

35. In accordance with its purpose as Europe's conscience, the Convention is intended to guarantee "not rights that are theoretical or illusory but rights that are practical and effective" (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 231, ECHR 2012). The interpretation of the humanitarian clause by the majority contradicts this very aim. We regret the majority's interpretation of the humanitarian clause in the most non-humanitarian way.

III. Conclusion

36. We express our profound disagreement and dissatisfaction with the findings of the majority in this case, a case of most hideous human rights violations, which turn the applicants' long history of justice delayed into a permanent case of justice denied.

10. Statement of Lynn Ungoed-Thomas (United Kingdom) at the first session of the Consultative Assembly of the Council of Europe, Strasbourg, in *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, vol. II, p. 174.