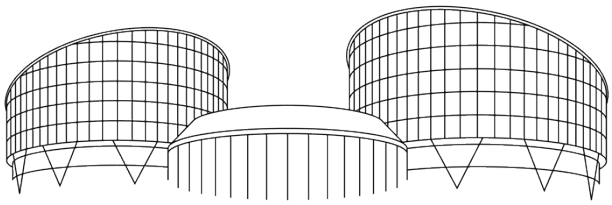

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF JANOWIEC AND OTHERS v. RUSSIA

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

JUDGMENT

STRASBOURG

16 April 2012

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 21/10/2013

This judgment may be subject to editorial revision.

In the case of Janowiec and Others v. Russia,

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

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Anatoly Kovler,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger, *judges,*

and Stephen Phillips, *Deputy Section Registrar,*

Having deliberated in private on 20 March 2012,

Delivers the following judgment, which was adopted on that 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 22 to 34 below. They live in Poland and 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. Mr J. Malewicz was granted leave to present his own case (Rule 36 § 2 *in fine* of the Rules of Court). All the other applicants were represented by Dr I. Kamiński from the Institute of Legal Studies, Mr R. Nowosielski and Mr B. Sochański, Polish lawyers practising respectively in Gdańsk, Szczecin, 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 represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

5. On 7 October 2008 and 24 November 2009 the Court 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. The parties submitted their observations on the admissibility and merits of the applications.

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 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. The parties filed further written observations (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 October 2011 (Rule 59 § 3).

There appeared before the Court:

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

(b) *for the applicants*
Mr I. KAMIŃSKI,
Mr B. SOCHAŃSKI, *Counsel*,
Mr J. SZEWCZYK,
Mr R. NOWOSIELSKI,
Ms A. STAVITSKAYA, *Advisers*;

(c) *for the Polish Government*
Mr J. WOŁĄSIEWICZ, *Agent*,
Ms A. MĘŻYKOWSKA,
Mr C. SWINARSKI, *Advisers*.

The Court heard addresses by Mr Kamiński and Mr Sochański, Mr Matyushkin, Mr Wołąsiewicz and Ms Mężykowska and their replies to questions put by its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. Background

10. On 23 August 1939 the Foreign Ministers of the Nazi Germany and the Soviet Union signed a non-aggression treaty (known as the

Molotov-Ribbentrop Pact) which included an additional secret protocol whereby the parties agreed to settle the map of their "spheres of interests" in the event of a future "territorial and political rearrangement" of the then independent countries of Central and Eastern Europe, including Poland. According to the protocol, the eastern part of Polish territory was "to fall to" the Soviet Union.

11. 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 Belarusians 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 any 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.

12. 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, about half of them were set free; the others were sent to special prison camps established by the NKVD (People's Commissariat for Internal Affairs, a predecessor of the 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.

13. In early March 1940 Mr 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 grounds that they were all "enemies of the Soviet authorities and full of hatred towards the Soviet system". The proposal specified that the prisoner-of-war camps held 14,736 former Polish officers, officials, landowners, police officers, gendarmes, prison guards, settlers and intelligence officers, and that the prisons in the western regions of Ukraine and Belarus accommodated a further 18,632 former Polish citizens who had been arrested.

14. On 5 March 1940 the Politburo of the Central Committee of the USSR Communist Party, the highest governing body of the Soviet Union, took the decision to consider "using a special procedure" and employing "capital punishment – shooting" in the case of 14,700 former Polish officers held in the prisoner-of-war (POW) camps, as well as 11,000 members of various counter-revolutionary and espionage organisations, former landowners, industrialists, officials and refugees held in the prisons of western Ukraine and Belarus. The cases were to be examined "without summoning the detainees and without bringing any charges, with no statement concluding the investigation and no bill of indictment".

Examination was delegated to a three-person panel ("*troika*") composed of NKVD officials, which operated on the basis of lists of detainees compiled by the regional branches of the NKVD. The decision on the execution of the Polish prisoners was signed by all the members of the Politburo, including Stalin, Voroshilov, Mikoyan, Molotov, Kalinin and Kaganovich.

15. 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 Belarus have remained unknown to date.

16. The precise numbers of murdered prisoners were given in a note which Mr Shelepin, Chairman of the State Security Committee (KGB), wrote on 3 March 1959 to Nikita Khrushchev, Secretary General of the USSR Communist Party: "All in all, on the basis of decisions of 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 Belarus".

17. In 1942 and 1943, first Polish railroad workers and then the German Army discovered mass burials near 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 and 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 Soviets had been responsible for the massacre.

18. The Soviet authorities responded by putting the blame on the Germans who – according to Moscow – had in the summer of 1941 allegedly taken control of the Polish prisoners and had murdered them. Following the liberation of the Smolensk district by the Red Army in September 1943, the NKVD set up a special commission chaired by Mr 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.

19. On 14 February 1946, in the course of the trial of German war criminals before the Nuremberg Military Tribunal, the Soviet prosecutor cited the Burdenko commission's report in seeking to charge the German forces with the shooting of up to 11,000 Polish prisoners in the autumn of 1941. The charge was dismissed by the US and British judges for lack of evidence.

20. On 3 March 1959 Mr Shelepin wrote the above-mentioned note to Mr Khrushchev, recommending "the destruction of all the [21,857] records on the persons shot in 1940 in the ... operation... [T]he reports of the meetings of the NKVD USSR *troika* that sentenced those persons to be shot, and also the documents on execution of that decision, could be preserved."

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

B. The applicants and their relationship to the victims

1. Applicants in case no. 55508/07

22. 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.

23. 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.

24. 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. Mr Janowiec was listed as no. 3914 among the prisoners in the camp, and Mr Nawratil as no. 2407. They were subsequently transferred to a prison in Kharkov and executed in April 1940.

2. Applicants in case no. 29520/09

25. 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 in the night of 19 September 1939 and held in Kozelsk special camp (listed in position 3 on NKVD dispatching list 052/3 04.1940). He was killed on 30 April 1940 and buried in Katyn. His body was identified during the 1943 exhumation (no. 2564).

1. http://rusarchives.ru/publication/katyn/spisok.shtml. Last visited on 15 February 2012.

26. 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).

27. The fourth applicant, Ms Halina Michalska, was born in 1929. She is the daughter of Mr Stanisław Uziembło, born in 1889. An officer of the Polish Army, Mr Uziembło was taken POW by the Soviets near Białystok, Poland, and detained in the special NKVD camp at Starobelsk (pos. 3400). He was presumed killed in Kharkov and buried at Pyatikhatki near Kharkov (now Ukraine).

28. 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, a 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.

29. 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.

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

31. The eighth and ninth applicants, Mr Jerzy Karol Malewicz and Mr Krzysztof Jan Malewicz, born respectively in 1928 and 1931, are the children of Mr Stanisław August Malewicz. 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 (pos. 2219). He was presumed killed in Kharkov and buried in Pyatikhatki.

32. The tenth and eleventh applicants, Ms Krystyna Krzyszkowiak and Ms Irena Erchard, born respectively in 1940 and 1936, are the daughters of Mr Michał Adamczyk. Born in 1903, he was the commander of the 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.

33. 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.

34. The thirteenth applicant, Mr Krzysztof Romanowski, born in 1953, is a nephew of Mr Ryszard Żołędziowski. Mr Żołędziowski, born in 1887, was held at the Starobelsk camp (pos. 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

35. On 13 April 1990, during a visit by Polish President Mr Jaruzelski to Moscow, 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 Katyn Forest".

36. On 22 March 1990 a district prosecutor's office in Kharkov opened, on its own initiative, a criminal investigation following the discovery of mass graves of Polish citizens in the city's wooded park. On 6 June 1990 the Kalinin (Tver) prosecutor's office instituted a criminal case into "the disappearance" in May 1940 of the Polish prisoners of war held in the NKVD camp in Ostashkov. On 27 September 1990 the Chief Military Prosecutor's Office joined the two criminal cases under the number 159 and assigned it to a group of military prosecutors.

37. 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 no fewer than forty witnesses and commissioned medical, graphology and other forensic examinations.

38. On 14 October 1992 Russian President 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 handed over 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.

39. 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 in 1940 of 7,305 Polish citizens who had been arrested.

40. 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.

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

42. 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 Interagency 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.

43. 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 secrecy classification. However, it transpired from their submissions that the investigation had been discontinued on the basis of Article 24 § 4 (1) of the Code of Criminal Procedure in connection with the suspects' death.

44. 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.

45. On 8 May 2010 the Russian President conveyed to the Speaker of the Polish Parliament 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 that contained approximately 45,000 pages.

D. Proceedings in application no. 55508/07

46. In 2003, Mr Szewczyk – a Polish lawyer retained by the applicant Mr Janowiec and by the applicant Mr Trybowski's mother – 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.

47. On 23 June 2003 the Prosecutor General's Office replied to counsel 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 two hundred 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 previously destroyed.

48. On 4 December 2004 Mr Szewczyk formally requested the Chief Military Prosecutor's Office to recognise Mr Janowiec's and Mr Trybowski's rights 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.

49. On 10 February 2005 the Chief Military Prosecutor's Office replied that Mr Antoni Nawratil and Mr Andrzej Janowiec were listed among the prisoners of 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 the officially recognised victims or their representatives.

50. Subsequently the applicants Mr Janowiec and Mr Trybowski retained Russian counsel, Mr V. Bushuev. On 9 October 2006 he asked the Chief Military Prosecutor's Office for permission to study the case file.

51. On 7 November 2006 the Chief Military Prosecutor's Office replied to Mr Bushuev that he would not be allowed to access the file because his clients had not been formally recognised as victims in the case.

52. Counsel 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 a 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 formal acknowledgement of such factual circumstances. Counsel sought to have the applicants Mr Janowiec and Mr Trybowski recognised as victims and to be granted access to the case file.

53. 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.

54. 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

55. On 20 August 2008 counsel for the applicants filed 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 and petitions, have access to the file materials or receive copies of the decisions. Counsel 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.

56. 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 22 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".

57. Counsel submitted a statement of appeal in which they pointed out 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 identity tags found at the burial places and the investigators had not undertaken any measures or commissioned any forensic examination 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 claimants in the proceedings. The granting of victim status to the claimants would have allowed the identification of the remains with the use of genetic methods. Finally, counsel 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.

58. 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

59. On 26 March 2008 Memorial, a Russian human-rights non-governmental organisation, lodged an application with the Chief Military Prosecutor's office to declassify the decision of 21 September 2004. 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 Interagency Commission for the Protection of State Secrets ("the Commission").

60. 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 letter of 27 August 2009, the Commission replied to Memorial that their application had been examined and rejected, without providing further details.

61. Memorial challenged the Commission's refusal before the Moscow City Court. At the 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 from 21 September 2004.

62. To ascertain which authority was actually responsible for the classification of the decision of 21 September 2004, the court summoned representatives of the Commission and of the Chief Military Prosecutor's office to the following hearing. That hearing was held *in camera* and the participants were forbidden to reveal any information from the hearing. However, it became publicly known that Memorial requested the City Court to summon representatives of the Federal Security Service.

63. On 2 November 2010 the Moscow City Court rejected, following another *in camera* sitting, Memorial's application to declassify the decision

of 21 September 2004. A copy of the City Court's decision was not made available to the Court.

G. Proceedings for the rehabilitation of the applicants' relatives

64. Most applicants repeatedly applied 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.

65. 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. It was stated that her application for rehabilitation would only be considered after the conclusion of the criminal investigation.

66. Following the discontinuation of the investigation in case no. 159, on 25 October 2005 Ms Witomiła Wołk-Jezierska asked the Chief Military Prosecutor's Office for a copy of the decision on discontinuation of the investigation. By letter of 23 November 2005 the prosecutor's office refused to provide it, citing its 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 their repression. A similarly worded letter of 12 February 2007 refused a further request to the same effect by Ms Wołk.

67. 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 against Polish citizens 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.

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

69. After several rounds of judicial proceedings, 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 counsel had no legal interest in the rehabilitation of Polish citizens.

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

H. Statement by the Russian Duma on the Katyn tragedy

71. 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 Belarusian 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

72. The Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907), to which the Republic of Poland but not the USSR was a party, provided 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

73. The Convention relative to the Treatment of Prisoners of War (Geneva, 27 July 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

74. 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 USA, France, the United Kingdom and the USSR, contained the following definition of crimes in Article 6:

> "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."

75. 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

76. 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

77. 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."

78. The 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 (2187th 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' ..."

F. International Covenant on Civil and Political Rights

79. Article 7 of 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."

80. At its meeting on 3 April 2003 the Human Rights Committee, established under Article 28 of the Covenant, expressed the following views upon 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."

81. At its meeting on 28 March 2006 the Human Rights Committee expressed the following views upon 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 (Law no. 174-FZ of 18 December 2001)

82. Article 24 sets out the grounds for discontinuation of criminal proceedings. Paragraph 1 (4) specifies that the proceedings are to be discontinued, in particular, in the event of the suspect or defendant's death.

83. 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)

84. 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, and restoration of their civil rights. Political repression is defined as any measure of restraint, including a deprivation of life, which was imposed by the State for political motives (section 1). Section 3 describes the categories of persons who are eligible for rehabilitation; section 4 contains the list of criminal offences, such as high treason, espionage, violence against prisoners of war, murder, robbery, war crimes, crimes against humanity, in respect of which no rehabilitation is allowed.

C. Classification of information

85. Section 7 of the State Secrets Act (Law no. 5485-I of 21 July 1993) contains a list of information which may not be declared a State secret or classified. The list includes in particular information about violations of rights and freedoms of individuals and citizens and information on unlawful actions by the State authorities or officials.

86. On 2 August 1997 the Government adopted the Regulation on preparing State secret information for transfer to foreign states and international organisations (no. 973). 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 an obligation to protect the classified information by way of entering into an international treaty which would establish, among other matters, the procedure for transferring information, the confidentiality clause and the dispute resolution procedure (§ 4).

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

87. Chapter 34 contains a list of crimes against 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.

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

THE LAW

I. AS TO THE LEGAL CONSEQUENCES OF THE DEATH OF THE APPLICANT MR KRZYSZTOF JAN MALEWICZ

89. 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.

90. The Court reiterates that in various cases where an applicant has died in the course of the proceedings, it has taken into account the statements of the applicant's heirs or close family members who expressed 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). It therefore accepts that Mr Piotr Malewicz, born in 1975 and

living in Wroclaw, Poland, may pursue the application in so far as it was lodged by his late father.

II. OBSERVANCE OF ARTICLE 38 OF THE CONVENTION

91. Having regard to the Russian Government's consistent refusal to produce, at the Court's request, a copy of the decision of 21 September 2004 by which the investigation into the Katyn massacre had been discontinued (see paragraphs 42 and 43 above), the Court considers it appropriate to start the examination of the case with an analysis of the Russian Government's compliance with their procedural obligation flowing from Article 38 of the Convention to furnish all necessary facilities for the conduct of the Court's investigation. Compliance with this obligation is a condition *sine qua non* for the effective conduct of the proceedings before the Court and it must be enforced irrespective of any findings that will be made in the proceedings and of their eventual outcome.

92. Article 38 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 parties' submissions

1. The Russian Government

93. The Russian Government maintained that their refusal to provide a copy of the decision of 21 September 2004 was founded on the provisions of international and domestic law. Pursuant to the State Secrets Act, the Government Regulation no. 1003 of 22 August 1998 on the procedure of access to State secrets by dual nationals, stateless persons, foreign nationals, emigrants and returning emigrants, and the Government Regulation no. 973 (cited in paragraph 86 above), a decision on transferring classified information to a foreign state or international organisation was to be made by the Government on the basis of a report drafted by the Inter-agency Commission for the Protection of State Secrets and in accordance with the procedure set out in an international treaty. In the instant case there was no Commission report, Government decision or international treaty. As regards their international obligations, the Russian Government referred to the European Convention on Mutual Legal Assistance in Criminal Matters which provided that assistance could be refused "if the requested Party considers that the execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of its country" (Article 2 (b)). A similar provision was contained in Article 17 of the

Russian-Polish bilateral agreement on legal assistance and legal relations in civil and criminal cases. In the Russian Government's opinion, Article 38 of the Convention did not prohibit them from withholding information which could impair State security.

94. The Russian Government submitted that the decision of 21 September 2004 was not the crucial document in the instant case because it did not mention the applicants' names, affect their rights or contain information about the fate of their relatives or the position of their burial sites. Accordingly, its disclosure was not necessary. They also claimed that "many States still [kept] certain documents relating the events of World War II secret, despite the requests for their disclosure" and that the information relating to intelligence, counterintelligence and operational and search activities constituted a State secret within the meaning of the State Secrets Act. The Russian Government asserted that they had discharged their obligations under Article 38 by submitting to the Court the necessary information, including the decisions of the domestic courts and limited information on the contents of the decision of 21 September 2004. Moreover, Russian counsel for the applicants had had access to the documents in the case-file, including the decision of 21 September 2004.

2. The applicants

95. The applicants pointed out at the outset that the submission of a copy of the decision of 21 September 2004 was crucial to the determination by the Court whether the Russian investigation into the Katyn massacre had been effective. In their view, State security considerations did not relieve the Russian Government from their obligation under Article 38 of the Convention to submit a copy of the document. Besides, the Russian Government did not substantiate their allegations of security concerns: they did not ask the Court to restrict the access to the document in question or edit out the potentially sensitive passages and access to the documents was not restricted to the highest State officials because the Russian advocates of the applicants could take cognisance of its contents. Most importantly, the Russian Government did not explain why the document needed to be classified. The decision in question concerned an atrocity that had been committed by a totalitarian regime whose principles contradicted the values of the Convention and making and keeping it secret could not serve to protect the core security interests of a Member State of the Council of Europe and the Convention. Besides, section 7 of the Russian State Secrets Act contained a list of information which could not be declared secret or classified, and that list included information about violations of rights and freedoms and about unlawful action by State authorities or officials.

96. The applicants further pointed to the longstanding principle of customary international law, according to which no internal rule, even of constitutional rank, can be invoked as an excuse for non-observance of

international law (here 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 has been frequently invoked in the jurisdiction of international courts and quasi-judicial bodies, including the 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 arbitrate 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 (see *Godínez Cruz v. Honduras*, IACtHR, judgment of 20 January 1989, and *Ballo v. UNESCO*, ILO Administrative Tribunal, judgment no. 191, 15 May 1972). Admittedly, the ICJ in the *Corfu Channel* case did not draw any negative inference when the United Kingdom refused to submit the evidence which it considered related to naval secrecy (judgment of 9 April 1949). However, the ICTY rejected the Croatian Government's reliance on the *Corfu* judgment as a justification for their refusal to produce some 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 (judgment of 29 October 1997). It added that the validity of State security concerns can be accommodated by procedural arrangements, including *in camera* hearings and special procedures for communicating and recording of sensitive documents. In the later case of *Prosecutor v. Dario Kordić and Mario Čerkez*, the ICTY also held that the questions of the relevance of the requested material for the proceedings fell into its full discretion and could not be challenged by States (decision of 9 September 1999). The applicants submitted that the *ratio decidendi* of those cases was applicable, *mutatis mutandis*, to the instant case.

3. The Polish Government

97. The Polish Government emphasised that the obligation to provide materials under Article 38 of the Convention would not be violated in the event that the refusal to provide them had been convincingly explained. The Russian Government, however, did not put forward a justification for classifying as secret a part of evidence collected during the investigation and the decision to discontinue the investigation of 21 September 2004. The proceedings in question were not related to the current functions or operations of special services or the police. Even if a part of the materials had been classified by the former regime, it could not be assumed that there existed a continuous and actual public interest in maintaining those restrictions. The Russian authorities had recognised the events which

occurred in 1940 as historical, and there was no present interest in keeping the material relating to those 71-year-old events secret. Moreover, the alleged public interest in obscuring the circumstances of the crime perpetrated by a totalitarian regime in the past was placed above the continuous and actual private interest of the applicants whose aim was to learn the fate that had befallen their closest relatives. The Polish Government also invited the Court to consider the context in which the investigation into the Katyn massacre had taken place.

98. The Polish Government averred that the refusal to produce a copy of the decision was in breach of Article 27 of the Vienna Convention. What is more, the obligation to take all necessary measures in order to comply with the Court's request to furnish certain documents flowed not only from international law but also from Article 15 § 4 of the 1993 Russian Constitution which proclaimed the priority of international law over any domestic legal provisions. The European Court has full capacity under Article 38 to address summons for the production of tangible evidence (*subpoenae duces tecum*) or for the appearance to give testimony to State parties to obtain information. The duty to discharge the obligation to co-operate was all the more compelling when the Court instructed, in advance, on the admissible manner of protecting State secrets from disclosure.

B. The Court's assessment

1. General principles

99. The Court reiterates that it is of utmost importance for the effective operation of the system of individual petition instituted by Article 34 that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV, *Velikova v. Bulgaria*, no. 41488/98, § 77, ECHR 2000-VI). 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 applicants' 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 *Medova v. Russia*, no. 25385/04, § 76, 15 January 2009, and *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI).

100. The obligation to furnish the evidence requested by the Court is binding on the respondent Government from the moment such request was formulated, whether it be upon an initial communication of an application to

the Government or at a subsequent stage of the proceedings (see *Enukidze and Girgvliani v. Georgia*, no. 25091/07, § 295, 26 April 2011, and *Bekirski v. Bulgaria*, no. 71420/01, §§ 111-113, 2 September 2010). It is a fundamental requirement that the requested material must be submitted in its entirety, if the Court so requested, and any missing elements must be properly accounted for (see *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, the documents 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 *Enukidze and Girgvliani*, cited above, §§ 297 and 301).

101. The Court found that the respondent Government failed to comply with the requirements of Article 38 in cases where they had not provided any explanation for the refusal to submit requested documents (see, for instance, *Bekirski*, cited above, § 115, and *Tigran Ayrapetyan v. Russia*, no. 75472/01, § 64, 16 September 2010) or had 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). In cases where the Government put forward confidentiality or security considerations as the reason for their failure to produce the requested material, the Court undertook an independent verification whether or not there had actually 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 the provision of the Code of Criminal Procedure which, in their submission, precluded disclosure of the documents from the file of an ongoing investigation. The Court, however, pointed out that the provision in question must have been misconstrued, for it did not contain an absolute prohibition but rather set out the procedure for and limits to such disclosure. It also noted that in many comparable cases the Government had submitted the requested documents without mentioning that provision, or agreed to produce documents from the investigation files even though they had initially invoked that provision (see, for instance, *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).

102. As regards the secrecy classification, the Court was not satisfied with the Government's explanation that regulations relating to the procedure for review of prisoners' correspondence would constitute a State secret (see *Davydov and Others*, cited above, § 170) or 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). If there existed legitimate national security concerns, the Court pointed out that the Government should have

edited out the sensitive passages or supplied a summary of the relevant factual grounds (*ibid.*). 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 and the highest State officials. High sensitivity of information was put into doubt once it became clear that laymen, such as counsel for the party in a civil case, could take cognisance of the document in question (*ibid.*).

2. Application of the principles in the instant case

103. On 10 October 2008 and 27 November 2009 the Court gave notice of applications nos. 55508/07 and 29520/09, respectively, to the Russian Government, put a number of questions to them and requested them to produce a copy of the decision of 21 September 2004 relating to the discontinuation of the proceedings in the Katyn investigation. The Russian Government refused to provide it, citing its secret classification at domestic level. Following its decision of 5 July 2011 as to the joinder of the applicants and partial admissibility of the applications, the Court informed the parties that they would have until 15 September 2011 to submit any additional material which they wished to bring to its attention and also put a question on the Russian Government's compliance with their obligations under Article 38 of the Convention. The Russian Government did not make use of that additional time to submit a copy of the requested decision.

104. In so far as the Russian Government claimed that the requested decision had not been the crucial document in the case and had not been necessary for the conduct of the Court proceedings, the Court reiterates that, being master of its own procedure and of its own rules, it has complete freedom in policing the conduct of its own proceedings, assessing the admissibility and relevance of evidence as well as its probative value. In particular, 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 should produce for due examination of the case. The parties are obliged to comply with its evidential requests and instructions, and provide timely information on any obstacles in complying with them and provide any reasonable or convincing explanations for such a failure (see *Davydov and Others*, cited above, § 174; *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 77, ECHR 2005-II (extracts), and *Ireland v. the United Kingdom*, 18 January 1978, § 210, Series A no. 25). In the light of these considerations, the Court emphasises that it has absolute discretion to determine what evidence it needs for the examination of the case and, accordingly, it finds without merit the Russian Government's argument relating to the allegedly unimportant role of the requested decision in the Court proceedings.

105. The Russian Government advanced the domestic classification of the decision of 21 September 2004 as the secondary justification for their

failure to produce it before the Court. According to them, the domestic laws and regulations prevented them from communicating classified documents to international organisations in the absence of the Inter-agency Commission's report and decision to that effect and an international treaty setting out the procedure and guarantees of confidentiality for such documents.

106. The Court reiterates 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 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 the Contracting State's failure to perform a treaty. 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 their domestic legal impediments to justify a failure to furnish the facilities necessary for the Court's examination of the case. In so far as the Russian Government referred to the absence of a report by the Inter-agency Commission, the Court considers, as did the Human Rights Committee in its General Comment No. 31, that the executive branch which usually represents the State Party internationally may not point to the fact that an action incompatible with the provisions of an international treaty 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 (see paragraph 78 above).

107. It is apposite to recall in this connection 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 of Judgments and Decisions* 1997-II). As the Court has already found in a similar case against Russia, 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 follows that the Russian Government are not entitled to invoke the provisions of their own domestic law to justify their refusal to comply with the Court's request for the production of written evidence.

108. Finally, it is noteworthy that at no point in the proceedings did the Russian Government explain the exact nature of the security concerns which required classification of the decision of 21 September 2004, and even the identity of the authority which made the decision on its classification was far from clear (see the outline of the domestic declassification proceedings in paragraphs 59 to 63 above). The Court, for its part, is unable to discern any legitimate security considerations which could have justified

suppression of information contained in that decision from public scrutiny. It notes that the decision in question concluded the investigation into a mass murder of disarmed prisoners, a war crime committed by the USSR authorities more than seventy years ago, which has been described in the Russian Parliament's declaration of 26 November 2010 as an "atrocity", "terrible tragedy" and "arbitrary act by the totalitarian State". The decision thus related to a historical event, with most of protagonists being already dead, and it could not have touched upon any current police surveillance operations or activities.

109. The Court is not convinced that a public and transparent investigation into the crimes of the previous totalitarian regime could 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. Moreover, the decision to classify the document appears to have been at variance with the requirements of the Russian law, in that section 7 of the State Secrets Act expressly precluded any information about violations of human rights by State officials from being classified. In sum, the Court finds likewise no substantive grounds which could have justified the Russian Government's refusal to produce a copy of the requested decision.

110. Even assuming that the Russian Government had legitimate security considerations for keeping secret the text of the requested decision, those could have been accommodated with appropriate procedural arrangements, including a 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 preferred not to make use of them or seek their application by the Court, which is an additional indication of their reluctance to comply with the Court's request under Article 38 of the Convention.

111. In the light of the above considerations, the Court concludes that the Russian Government breached their obligations under Article 38 of the Convention on account of their failure to submit a copy of the requested document.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

112. The applicants complained that the Russian authorities had not discharged their obligation flowing from the procedural limb of Article 2 of the Convention, which required them to conduct an adequate and effective investigation into the death 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 parties' submissions

1. The Russian Government

113. The Government submitted that a legal distinction ought to be drawn between two situations: in the first case, a violation of the Convention occurred in the period outside the Court's temporal jurisdiction, in the second case a violation of the Convention "did not legally exist at all" because at the material time the Convention had not existed. 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 tragedy 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. Referring to the Court's findings in the *Moldovan* and *Blečić* cases (*Moldovan v. Romania (no. 2)*, nos. 41138/98 and 64320/01, ECHR 2005-VII (extracts), and *Blečić v. Croatia* [GC], no. 59532/00, ECHR 2006-III), the Government stressed that the Convention did not impose on Russia an obligation to investigate the Katyn events because they had been outside the Court's temporal jurisdiction.

114. The Government further distinguished the present case from *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009) and *Varnava and Others v. Turkey* ([GC], nos. 16064/90, 16065/90, etc., ECHR 2009-...). Thus, in *Šilih*, a significant number of the procedural steps had been carried out after the entry into force of the Convention in respect of Slovenia (§§ 163 and 165), but the most important investigative actions in case no. 159 had taken place between 1990 and 1995, before the ratification of the Convention by Russia. Moreover, in *Šilih* the death of the applicants' son occurred just one

year before the ratification of the Convention by Slovenia and the criminal and civil proceedings began after the ratification date, whereas the "Katyn events" had preceded the Russian ratification by 58 years and the Katyn investigation had been initiated in 1990, that is eight years before the ratification date. The Government stressed that in *Varnava* the alleged disappearances had also occurred after the adoption of the Convention and had therefore legally existed, which was a pre-condition for the Court's finding that it had temporal jurisdiction over the investigation. This element distinguished the *Varnava* situation from the instant case concerning events in 1940. Furthermore, the applicants in the instant case must have been aware from the media reports about the on-going investigation since 1990, but it was not until 1998 that they formally requested the Russian authorities to investigate the "disappearance or death" of their relatives.

115. The Government submitted that the Russian authorities had not actually investigated "the circumstances of the death of the applicants' relatives" since criminal case no. 159 had been instituted in connection with the mass graves of unknown Polish citizens discovered near Kharkov. The investigation had established that certain officials of the USSR NKVD had exceeded their official duties and that the so-called "*troika*" had taken extrajudicial decisions in respect of certain prisoners of war. However, owing to the destruction of the records, the investigation had not been able to determine in what circumstances Polish citizens had been taken prisoner and detained in the NKVD camps, what charges had been brought against them and whether their guilt had been proven or who had carried out the executions. The suspects in case no. 159 had died before the proceedings had been instituted; even if they had been alive in 2004, they would have been exempt from criminal liability. Moreover, since the suspects would not be able to participate in the criminal proceedings, those proceedings would not have an adversarial character and their prosecution would run counter to the fairness requirement.

116. In addition, the institution of case no. 159 had been unlawful because the decision of 22 March 1990 did not refer to any specific provisions of the Ukrainian Code of Criminal Procedure and because the maximum prescription period – set at ten years under the RSFSR[1] Criminal Code of 1926 applicable at the time – had already expired. The "Katyn events" had not been recognised by any national or international tribunal as falling into the category of crimes not subject to prescription. The RSFSR Criminal Code of 1926 did not contain a definition of a war crime and Article 22 § 2 of the Rome Statute prohibits criminal law from being extended by analogy. Accordingly, neither Article 78 § 5 of the Criminal Code concerning imprescriptible crimes nor the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968 was applicable. In those circumstances, the

1. RSFSR – Russian Soviet Federative Socialist Republic.

Russian authorities had no legal obligation, under either national or international law, to carry out an investigation in case no. 159.

2. The applicants

117. The applicants acknowledged that the Katyn massacre committed in 1940 was an act outside the temporal reach of the Convention and that the Court had no competence *ratione temporis* to deal with its substantive aspect. However, in their view, the Court could examine the observance by Russia of the applicants' right to obtain an effective investigation under the procedural limb of Article 2.

118. The applicants disagreed with the legal characterisation of the Katyn massacre as an abuse of power by Soviet State officials, an offence which was subject to a three-year prescription period. They submitted that 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 Hague Convention IV of 1907 and the Geneva Convention of 1929 (cited in paragraphs 72 and 73 above). The murder of Polish prisoners of war in 1940 had been an unlawful act which violated Articles 4, 23(c) and 50 of the Hague Convention IV and Articles 2, 46, 61 and 63 of the Geneva Convention. 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. Execution of prisoners of war constituted and was treated as a war crime by the international community, which was convincingly demonstrated by the abundant case-law from the post-war trials of war criminals. The Katyn massacre was also described as "a war crime having the character of genocide" in the resolution of the Polish Parliament of 23 September 2009 and the statement of the Delegation to the EU-Russia Parliamentary Co-operation Committee of 10 May 2010.

119. The applicants considered that the Court was competent to examine the observance by Russia of the procedural aspect of Article 2 because Russia was the legal successor to the USSR and because the obligation to treat prisoners of war and civilians humanely and not to kill them had existed *de jure* at the time of the Katyn massacre and had been binding on the USSR. If the Katyn case were to be treated as a "confirmed death case" – the interpretation favoured by the applicants as being consistent with the

established historical facts – the obligation under Article 2 to carry out an effective investigation into the Katyn massacre should be analysed in the light of the "need to ensure that the guarantees and the underlying values of the Convention are 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 been previously invoked by the Court to find 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 (extracts), and *Orban and Others v. France*, no. 20985/05, § 35, 15 January 2009). Since speech denying the reality of crimes of international law was deemed to contravene the underlying values of the Convention, the same rationale would apply to the acts themselves that undermined the very sense of justice and peace, which are the fundamental values of the Convention, as expressed in its Preamble. Accordingly, in the applicants' submission, the mention of the underlying values in paragraph 163 of the *Šilih* judgment was a justification for the State's obligation to conduct an effective investigation when the death had preceded the ratification of the Convention by the respondent State. In that case the proportion of procedural steps undertaken before or after the "critical date" (the date of ratification) was not relevant for determining the Court's jurisdiction *ratione temporis*. As the mass killings of Polish citizens constituted both a war crime and a crime against humanity, they were to be characterised as contrary to the very foundations of the Convention. In such a case compliance with the procedural limb of Article 2 was to be seen as the only real and effective protection of the Convention's underlying values.

120. Furthermore, the Court was also competent to examine the complaint on account of the fact that a significant part of the procedural steps in the Katyn investigation had taken place after the ratification date on 5 May 1998, since the facts established before and after that date differed profoundly. Whereas at earlier stages of the investigation the execution of Polish prisoners by the NKVD organs had not been doubted – as evident from the prosecutor's letter of 21 April 1998 to Ms Wołk and that of 10 February 2005 to Mr Nawratil and Mr Janowiec – by late 2004 the position of the Russian authorities had changed and the prosecutors and the courts had accepted the disappearance of the Polish prisoners as the only version. Although it was impossible to determine precisely what legal steps had taken place before and after the ratification date, owing to the classified nature of many of the Katyn investigation files, the fact that the crucial decisions to discontinue the investigation and to classify its materials had been made only in September and December 2004, long after the "critical date", was of relevance. The applicants also referred to the Court's judgments in which the deaths under investigation had occurred some time before the ratification date, but the investigation itself had been carried out

after ratification: *Association 21 December 1989 and Others v. Romania*, nos. 33810/07 and 18817/08, 24 May 2011; *Jularić v. Croatia*, no. 20106/06, 20 January 2011; *Lyubov Efimenko v. Ukraine*, no. 75726/01, 25 November 2010; *Şandru and Others v. Romania*, no. 22465/03, 8 December 2009, and *Agache and Others v. Romania*, no. 2712/02, 20 October 2009.

121. Alternatively, the Katyn massacre could be treated as a "disappearance case", although, in the applicants' view, such an interpretation would distort the historical facts and would merely follow the line taken by the Russian courts. If this approach were taken, the Court's case-law concerning disappearance cases, including *Varnava and Others*, cited above, and many "Chechen" cases against Russia and "Kurdish" cases against Turkey, would be applicable. Disappearance constituted a continuing situation and it was therefore irrelevant when the person had disappeared in so far as there were relatives – spouses, children, siblings, parents – who could be considered as indirect victims. Owing to the continuing nature of the violation, the respondent State had an obligation to account for the fate of those who had disappeared and the Court should have temporal jurisdiction over the investigation into the disappearance.

122. The applicants rejected the Russian Government's argument that the investigation in case no. 159 had not concerned the death of their relatives. The case had been instituted in 1990 to investigate the disappearance of Polish officers and the relevant decision had never been declared unlawful by any prosecutorial or judicial body. The investigation had uncovered dispatch records mentioning the applicants' relatives' names and had determined that Polish prisoners had been placed "at the disposal" of the NKVD organs. The witnesses examined during the investigation had confirmed that the Polish prisoners had been shot dead, and had provided the names of NKVD officials who had been their source of information or who had actually executed Polish citizens. The materials in case no. 159 contained no information to suggest that any of the applicants' relatives might have died of natural causes or been set free by the NKVD. The legal characterisation of the Katyn massacre was not dependent on a prior decision of any international or domestic court and, as it constituted an imprescriptible crime under international law, the Russian authorities had an obligation to institute and conduct a criminal investigation into the circumstances of the massacre. The applicants referred to the Court's findings in *Kononov v. Latvia* to the effect that a domestic prosecution for war crimes would have required reference to international law, not only as regards the definition of such crimes, but also as regards the determination of any applicable limitation period (they cited *Kononov v. Latvia* [GC], no. 36376/04, § 230 *in fine*, ECHR 2010-...).

123. On the merits, the applicants considered that the investigation in case no. 159 could not be regarded as effective. Firstly, the Russian

authorities had given contradictory information about the fate of the applicants' relatives, initially confirming their death at the hands of the NKVD squads and subsequently describing them as disappeared persons. Secondly, the Chief Military Prosecutor's Office had disregarded numerous pieces of evidence, including the findings of the 1943 exhumation and the NKVD dispatching lists, and had failed to commission DNA tests comparing genetic samples taken from the interred bodies with samples from living relatives. Thirdly, the applicants had been refused victim status in case no. 159 and the Russian authorities had taken no steps to identify the relatives of the alleged victims. Fourthly, owing to the classified status of the materials, the applicants had been denied access to the documents concerning the fate of their relatives. Lastly, the investigation, which had lasted from 1990 to 2004, had failed to meet the transparency, promptness and reasonable expedition requirements.

3. The Polish Government

124. The Polish Government submitted that there existed a genuine connection between the death of the applicants' relatives and the Convention's entry into force. Firstly, the investigation was instituted only in 1990 because any earlier steps had been impossible for political reasons, namely the direct involvement of the USSR's leaders. Secondly, the investigation had been instituted *proprio motu* on the initiative of Soviet authorities and had been pursued by the Russian authorities six years after the ratification. Thirdly, there existed extensive and conclusive evidence of Katyn massacre being a massive and multiple *delictum iuris gentium* which triggered the application of the last sentence in paragraph 163 of the *Šilih* judgment. The Polish Government insisted that the Katyn massacre presented all the features of a crime of war within the meaning of the customary international law, as it had existed at least since the late nineteenth century, and the Nuremberg Principles and subsequent instruments.

125. The Polish Government acknowledged that the responsibility of a State under the Convention was not unlimited in time but a procedural obligation "binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it" (they quoted from *Šilih*, cited above, § 157, and also referred to *Brecknell v. the United Kingdom*, no. 32457/04, §§ 66-72, 27 November 2007). They also quoted a passage from the *Brecknell* judgment concerning an obligation on States to investigate unlawful killings arising many years after the events because of the obvious public interest in obtaining the prosecution and conviction of perpetrators, particularly in the context of war crimes and crimes against humanity (§ 69). A failure to undertake such an investigation or prosecute perpetrators of the killing would be tantamount to a denial of justice and be

contrary to the public order. In the Polish Government's submission, the application of the Court's case-law relating to the "detachability" of the procedural obligation under Article 2 of the Convention should lead it to the conclusion that the death of the applicants' relatives had been the result of actions by State officials and that the obligation to conduct an investigation was autonomous in character and unconnected with the original interference with the rights of the applicants' relatives resulting in their death.

126. In the Polish Government's view, the investigation fell short of the effectiveness and fairness requirements because the Russian authorities had not made use of the evidence collected by the Polish side in the context of the legal-assistance request of 25 December 1990 by the USSR Chief Prosecutor's Office. It was clear from the Russian Government's submissions that between 1995 and 2004 no efforts had been made to collect evidence independently. The Russian authorities had not examined the applicants residing in Poland or asked their Polish counterparts to examine them. The forensic endeavours of the Russian authorities had been too haphazard to be conducive to a real possibility of establishing a convincing body count.

127. Furthermore, the investigation could not be considered effective because the applicants had been barred from participating in the proceedings and had been denied victim status under Russian law. The applicant Ms Wołk and others had stated their interest in obtaining information about the proceedings as far back as 1998, but had not been given official notification that the investigation in case no. 159 had been discontinued on 21 September 2004. The refusal of victim status had represented a denial of justice and prevented the applicants from accessing the evidence gathered, which contained information on the fate of their relatives. However, according to the settled case-law of the Court, relatives of the victims had to be given the possibility of actively participating in the proceedings, submitting motions for evidence to be taken or influencing the proceedings in other ways (here the Polish Government referred to *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007).

B. The Court's assessment

128. In its admissibility decision of 5 July 2011, the Court joined the Government's objection as to its temporal jurisdiction in respect of the procedural limb of Article 2 of the Convention to the merits of the case. Accordingly, it will examine at the outset whether the objection must be upheld or rejected.

129. 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. This is an established principle in

the Court's case-law (see *Blečić,* cited above, § 70) based on the general rule of international law embodied in Article 28 of the Vienna Convention (see paragraph 77 above).

130. The obligation to carry out an effective investigation into unlawful or suspicious deaths is well-established in the Court's case-law relating to Article 2 of the Convention (for a full statement of principles by the Grand Chamber, see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 110-113, ECHR 2005-VII). While it is normally death in suspicious circumstances that triggers the procedural obligation under Article 2, this obligation binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it (see *Šilih*, cited above, § 157, with further references).

131. The Court has consistently examined the question of procedural obligations under Article 2 separately from the question of compliance with the substantive obligation and, on several occasions, a breach of a procedural obligation has been alleged in the absence of any complaint as to the substantive aspect of this Convention provision (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § § 41-57, ECHR 2002-I; *Byrzykowski v. Poland*, no. 11562/05, §§ 86 and 94-118, 27 June 2006; and *Brecknell*, cited above, § 53). In the Court's case-law, the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty capable of binding the State even when the death took place before the critical date (see *Šilih*, cited above, §§ 159-160).

132. Nevertheless, 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 occur before the critical date is not open-ended.

First, 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.

Second, 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 (see *Šilih*, cited above, §§ 160-163).

133. The Court also notes that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events, since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity (see *Brecknell*, cited above, § 69). Where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably (*loc. cit.*, § 71). The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case, and may well be influenced by the passage of time. Promptness will be likely not to come into play in the same way, since, for example, there may be no urgency as regards the securing of a scene of the crime from contamination or in obtaining witness statements while recollections are sharp. Reasonable expedition will remain a requirement, but what is reasonable is likely to be coloured by the investigative prospects and difficulties which exist at such a late stage (*loc. cit.*, § 72).

134. The Court has examined a number of cases in which the death of an individual occurred before the date of ratification of the Convention by the respondent State but the Court nevertheless had temporal jurisdiction to examine the respondent State's compliance with the procedural obligation flowing from Article 2 of the Convention owing to its "detachable" nature. Thus, in *Šilih*, the death of the applicants' son occurred a little more than a year before the entry into force of the Convention in respect of Slovenia, while, with the exception of the preliminary investigation, all the criminal and civil proceedings were initiated and conducted after that date (see *Šilih*, cited above, § 165). In a series of cases against Romania concerning the investigation into killings of protesters during the Romanian revolution in December 1989, the Court found that it had jurisdiction on account of the fact that on the date of the ratification of the Convention by Romania which happened on 20 June 1994 the proceedings were still pending before the prosecutor's office (see *Association 21 December 1989 and Others*, § 117, *Şandru and Others*, § 58, *Agache and Others*, § 71, all cited above, and *Lăpuşan and Others v. Romania*, nos. 29007/06, etc., § 59, 8 March 2011). Similarly, the fact that all the major events of the investigation occurred after the ratification date was sufficient to establish the Court's temporal jurisdiction, even though the applicant's son had died four years and three months before the entry into force of the Convention in respect of Ukraine (see *Lyubov Efimenko*, cited above, § 65). The Court has also implicitly

rejected the Croatian Government's objection in a case in which the killing of the applicant's husband occurred six years before the ratification, during the Homeland War in Croatia, probably at the hands of members of the occupying forces and on territory outside the control of the Croatian authorities (see *Jularić*, cited above, §§ 38 and 45-46).

135. The first common feature of the above-mentioned cases was a relatively short period of time that passed between the death and the entering in force of the Convention in respect of the respondent State. It was as short as one year in the leading *Šilih* case and six years at the longest in the *Jularić* case. The Court emphasises that the lapse of time between the triggering event and the ratification date must remain reasonably short, if it is to comply with the "genuine connection" standard enunciated in the *Šilih* judgment (see the case-law cited above). The second element threading the above cases together was the fact that a significant proportion of the investigative steps required for ensuring compliance with the procedural obligation under Article 2 of the Convention was carried out after the ratification date. This is a corollary of the principle that the Court's jurisdiction only extends to the procedural acts and omissions occurring after that date. Whenever a major part of the proceedings had taken place before the ratification, this principle would preclude the Court from assessing the efficiency of the investigation in its entirety and from forming a view as to the respondent State's compliance with Article 2.

136. Turning to the established facts in the instant case, the Court notes that the applicants' relatives who had been taken prisoners after the Soviet Red Army had invaded the Polish territory and who had been detained at the Soviet prison camps, were executed on orders of the Politburo of the USSR Communist Party on various dates in April and May 1940. The lists of prisoners for execution were compiled on the basis of the NKVD "dispatch lists" which mentioned, among others, the names of the applicants' relatives. It is true that only three of the applicants' relatives were identified during the 1943 exhumation; the remains of the others have never been found. Nonetheless, in the absence of any evidence, however circumstantial it could be, that they may have somehow escaped the shooting, they must be presumed to have perished in the 1940 hecatomb. In the light of the historical evidence that has gradually come to light to this day, the Court concludes that the present case concerns the death of the applicants' relatives which occurred in 1940.

137. The Russian Federation ratified the Convention on 5 May 1998, that is fifty-eight years after the execution of the applicants' relatives. In the Court's view, the period of time between the death and the ratification 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 it is excessively long in absolute terms to establish any genuine

connection between the death and the entry into force of the Convention in respect of Russia.

138. The Court further notes that a significant proportion of the Katyn investigation in criminal case no. 159 appears to have taken place before the ratification date. The excavation of the corpses at the mass burial sites in Kharkov, Mednoye and Katyn was performed in 1991 and in the same time period the investigators commissioned a number of forensic examinations and organised interviews with more than forty witnesses. In 1992, the Russian State Archives handed over to the Polish authorities the historic documents relating to the Katyn massacre, including the Politburo decision of 5 March 1940. In 1995, a stock-taking meeting was held between the Russian, Polish, Belarusian and Ukrainian prosecutors. That being so, the Court is unable to find any indication in the file or in the parties' submissions that any procedural steps of comparable importance were undertaken in the post-ratification period. It is true that neither the Polish parties nor the Court have at their disposal the entire investigation file in case no. 159, parts of which were given secrecy classification by the Russian authorities. Nonetheless, should there have been any major procedural developments in the case between the ratification date and the discontinuation of the proceedings in 2004, it must have been possible to provide at least a summary description of such developments, without giving specific details. The applicants' conjecture that some important event must have occurred in the post-ratification period which prompted a change of position on the part of the Russian authorities is not sufficient to convince the Court that the proportion of the investigative steps after 1998 significantly outweighed the important investigative and forensic work that was carried out in the early 1990s. It follows that the criterion triggering the coming into effect of the procedural obligation imposed by Article 2 has not been fulfilled.

139. The Court is further called upon to examine whether the circumstances of the instant case were such as to justify the finding that the connection between the triggering event and the ratification could be based on the need to ensure the effective protection of the guarantees and the underlying values of the Convention. 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 (cited in paragraph 76 above), 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 (see *Brecknell*, cited above, §§ 66-72). 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 (see the applicable principles in paragraph 133 above).

140. The Court accepts that the mass murder of Polish prisoners by the Soviet secret police had the features of a war crime. Both the Hague Convention IV of 1907 and the Geneva Convention of 1929 prohibited acts of violence and cruelty against war prisoners and the murder of prisoners of war constituted a "war crime" within the meaning of Article 6 (b) of the Nuremberg Charter of 1945. Although the USSR was not a party to the Hague or Geneva Conventions, the obligation to treat prisoners humanely and abstain from killing them clearly formed part of the international customary law which it had a duty to respect. In its declaration of 26 November 2010, the Russian Parliament recognised that the mass extermination of Polish citizens had been "an arbitrary act by the totalitarian State". It is further noted that war crimes are imprescriptible in accordance with Article I (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, to which Russia is a party. It remains therefore to be seen whether there have been any new elements in the post-ratification period capable of furnishing the connection between the prisoners' death and the ratification and imposing a fresh obligation to investigate under Article 2 of the Convention. In this connection, the Court observes that the documents, on the basis of which the decision to execute the Polish prisoners had been made, were made public by the Russian State Archives in 1992 and that the investigators obtained statements from witnesses as to the manner in which the executions had been carried out. By contrast, 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 has been produced or uncovered. The Court is therefore bound to conclude 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 death and the ratification have not been shown to exist.

141. Lastly, in so far as it can be alleged that the institution of any kind of proceedings in connection with the death of an individual will *ipso facto* be indicative of the applicability of Article 2, the Court reiterates its position, as expressed in the *Brecknell* judgment: if Article 2 does not impose the obligation to pursue an investigation into an incident, the fact that the State chooses to pursue some form of inquiry does not thereby have the effect of imposing Article 2 standards on the proceedings (see *Brecknell*, cited above, § 70). In other words, not every investigation that has been instituted must be conducted in accordance with the procedural requirements of Article 2. A distinction must be drawn between a domestic decision to investigate which could be made on account of political, legal or ethical considerations at national level, and the procedural obligation to investigate which flows from the Convention and engages the international responsibility of the State. It is only the latter, but not the former, that is subject to the Court's scrutiny and in the instant case no such procedural obligation can be said to have arisen.

142. Having regard to the above considerations, the Court upholds the Government's objection as to its competence *ratione temporis* and finds that it is unable to take cognisance of the merits of the complaint under Article 2 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

143. The applicants relied on Article 3 of the Convention, submitting that, owing to a lack of information about the fate of their relatives and the Russian authorities' dismissive approach to their requests for information, they had endured inhuman and degrading treatment in breach of Article 3 of the Convention. Article 3 reads:

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

A. The parties' submissions

1. The Russian Government

144. The Government put forward three arguments. Firstly, they pointed out that the right to rehabilitation fell outside the scope of the proceedings before the Court. Secondly, they stressed that the Chief Military Prosecutor's Office had provided the applicants with all the relevant information about their relatives that was available in criminal case no. 159. Thirdly, they maintained that the mere fact that the Russian authorities' replies to the applicants had been different did not amount to inhuman or degrading treatment and that the Russian authorities had had no intention of

causing suffering to the applicants by providing the information contained in their replies.

145. The Government also contrasted the instant case with the case of *Gongadze v. Ukraine* (no. 34056/02, ECHR 2005-XI). The *Gongadze* case concerned the disappearance of the applicant's husband and for more than five years the applicant received contradictory information from the Ukrainian authorities about the identification of his body which gave her hope that her husband might be alive. As regards the instant case, the Government claimed that the death of the applicants' relatives had not been established and their bodies had not been discovered or identified. The applicants themselves had been neither witnesses or participants to the "events".

2. The applicants

146. The applicants asserted that the sudden reversal of the position of the Russian authorities which had occurred at some point in 2004 and had entailed the transformation of the dead Katyn victims into "disappeared persons" amounted, on its own, to inhuman and degrading treatment, especially when the advanced age of all the applicants but one was taken into account. An additional element contributing to the applicants' suffering had been the authorities' unjustified denial of access to the documents in case no. 159 which could shed light on the fate of their relatives, both at the domestic level and in the proceedings before the Court (here they referred to the Court's findings to the same effect in the case of *Imakayeva v. Russia*, no. 7615/02, § 165, ECHR 2006-XIII (extracts)).

147. The applicants' expectations and hopes of having the circumstances of the Katyn massacre elucidated had been further dashed by the Russian courts' decisions declaring that it had not been established what had happened to their relatives after they had been placed "at the disposal" of the NKVD. Those findings represented a sheer denial of the basic historical facts and were 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.

148. The applicants believed that the reaction of the Russian institutions to their requests for the rehabilitation of their relatives also contained elements of degrading treatment. The Chief Military Prosecutor's Office and the Moscow courts had refused their requests, claiming that it was impossible to determine the specific legal provisions governing the execution of Polish prisoners of war. Reliance on such grounds implied and even suggested that there might have been good reasons for the executions and that the victims might have been criminals who deserved capital punishment. This was to be considered highly offensive and degrading to the applicants.

3. The Polish Government

149. The Polish Government pointed out that the persons who had been taken prisoner, held and eventually murdered by the Soviet authorities were the next-of-kin of the applicants. 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.

B. The Court's assessment

150. The applicants claimed that a prolonged denial of information about the fate of their relatives, taken together with dismissive and contradictory replies by the Russian authorities in respect to their requests for information and the Russian courts' insistence of the version of "disappearance" in defiance of the established historic facts, amounted to inhuman or degrading treatment with the meaning of Article 3. The Court recalls that Article 3 has previously been relied on in a number of cases in which the applicants complained that they had suffered inhuman and degrading treatment on the part of the domestic authorities in the context of the death or disappearance of their next of kin.

151. The essence of the issue under Article 3 is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention. 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, the involvement of the family member in the attempts to obtain information about the disappeared person. The Court emphasises that the finding of such a violation is not limited to cases where the respondent State has been held responsible for the disappearance but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the fate of the missing person (see, amongst many authorities, *Varnava and Others*, cited above, § 200; *Osmanoğlu v. Turkey*, no. 48804/99, § 96, 24 January 2008; *Bazorkina v. Russia*, no. 69481/01, § 139, 27 July 2006; *Imakayeva*, § 164, and *Gongadze*, § 184, both cited above; *Taniş and Others v. Turkey*, no. 65899/01, § 219, ECHR 2005–VIII;

Orhan v. Turkey, no. 25656/94, § 358, 18 June 2002, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 98, ECHR 1999-IV).

152. The Court observes at the outset that the authorities' obligation under Article 3 is distinct from the obligation flowing from Article 2 of the Convention both on points of substance, and in its temporal outreach. There is a degree of similarity between the two obligations in that both are not an obligation of result, but one of means. However, whereas the procedural obligation under Article 2 requires the authorities to take specific legal action capable of leading to identification and punishment of those responsible, the obligation imposed by Article 3 is a more general humanitarian nature, for it enjoins the authorities to react to the plight of the relatives of the dead or disappeared individual in a humane and compassionate way. The authorities have a duty to comply with the requirements of Article 3 irrespective of whether they were responsible for the original act of death or disappearance (see *Açış v. Turkey*, no. 7050/05, §§ 36 and 51-54, 1 February 2011, in which the applicants' husband and father was abducted by the separatist movement). It follows that the Court may assess the authorities' compliance with this provision even in cases where the original taking of life escapes its scrutiny because of a procedural bar such as, for instance, the scope of its temporal jurisdiction (compare with the Human Rights Committee's views on the admissibility of a similar complaint in *Mariam Sankara et al. v. Burkina Faso*, No. 1159/2003, 28 March 2006, cited in paragraph 81 above). Further, the scope of the Court's analysis under Article 3 is not confined to any specific manifestation of the authorities' attitudes, isolated incidents or procedural acts; on the contrary, the Court gives a global and continuous assessment of the way in which the authorities of the respondent State responded to the applicants' enquiries as long as the final decision was made within six months before the introduction of the complaint (see *Açış*, cited above, § 45). In the instant case the most recent decisions being those issued by the Supreme Court of the Russian Federation on 24 May 2007 (in application no. 55508/07) and on 29 January 2009 (in application no. 29520/09), the Court may examine the Russian authorities' reactions and attitudes from the moment of the ratification and until the above date.

153. As regards the proximity of the family ties between the applicants and the victims of the Katyn massacre, it is noted that a majority of the applicants have been the closest relatives of Polish officers or State officials who were had taken Soviet prisoners in 1939 and killed in 1940: Ms Wołk is the widow, and Mr Janowiec, Ms Michalska, Mr Tomaszewski, Mr Wielebnowski, Mr Gustaw Erchard, Ms Irena Erchard, Mr Jerzy Karol Malewicz, the late Mr Krzysztof Jan Malewicz who died in the course of the proceedings before the Court, and Ms Mieszczankowska are children, of executed Polish men. The children had been born at least a few years before the outbreak of the Second World War and were in their formative years

when their fathers went missing. It must therefore be accepted that there existed a strong family bond between those applicants and their fathers or, in case of Ms Wołk, husband, and that all the above applicants may claim to be victims of the alleged violation of Article 3 (see *Açış*, cited above, § 53, and *Luluyev and Others v. Russia*, no. 69480/01, § 112, ECHR 2006-XIII (extracts)).

154. The situation is different with regard to the other five applicants. Two of them, Ms Wołk-Jezierska and Ms Krzyszkowiak, are the children of the victims of the Katyn massacre but they were born after the precipitated departure of their fathers to war and have never had a personal contact with them. Of the other three applicants who were twice removed from the Katyn victims, only Ms Rodowicz may have had an opportunity to seeing her grandfather before he perished in the NKVD camps, whereas Mr Trybowski and Mr Romanowski were born in 1940 and 1953 and had never known their respective grandfather and uncle. While accepting that the fact of being raised without their father must have been a source of continuing distress for Ms Wołk-Jezierska and Ms Krzyszkowiak, the Court considers that the mental anguish which those five applicants experienced on account of the disappearance of their fathers or more distant relatives was not such as to fall within the ambit of Article 3 of the Convention (see *Taymuskhanovy v. Russia*, no. 11528/07, § 122, 16 December 2010, and *Musikhanova and Others v. Russia*, no. 27243/03, § 81, 4 December 2008). In these circumstances, the Court will continue its examination of the alleged violation of Article 3 only in respect of the first group of applicants.

155. As in other cases concerning disappearances of family members, the widow and nine children who are now applicants before the Court were not eyewitnesses to the death of their loved ones and remained for a long time in a state of uncertainty as to the fate that had befallen them. There is evidence that sporadic exchange of correspondence between the Polish prisoners and their families was maintained until at least the spring 1940, so the families must have been aware that their husbands and fathers were alive and held as prisoners in Soviet camps. It was not until 1943 that the German Army uncovered mass burials near Katyn forest and carried out partial exhumation and identification of the remains. The Soviet authorities denied that they had executed the Polish prisoners-of-war and, without access to the NKVD files, it was not possible to ascertain the fate of those prisoners whose bodies had not been identified, including the relatives of the applicants in the instant case.

156. The end of the Second World War did not bring peace of mind to the applicants who 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. As Poland fell into the Soviet zone of influence, the Soviet version of Nazi-orchestrated killings had been imposed as the official one in the People's Republic of Poland for the entire duration

of its existence, that is until 1989. With the passage of time, the applicants' hope to re-unite with their disappeared relatives must have waned; however, as the realisation of their certain death was settling in, the desire for elucidating the circumstances surrounding their end of life must have been growing. The Court appreciates that the applicants suffered a double trauma: not only had their relatives perished in the war but they 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 for more than fifty years.

157. Following the public acknowledgment of the fact that the Polish prisoners had been executed by the Soviet authorities and the institution of criminal proceedings, the applicants could have reasonably expected a genuine intention on the part of the Russian authorities to shed light on the circumstances of the Katyn massacre. However, by the time of ratification of the Convention by Russia in 1998, the investigation had not yielded any tangible results and had virtually stalled. The applicants have thus lived through a long period of uncertainty about the fate of their loved ones, followed by the Soviet-time epoch of deceit and distortion of historical facts, and then suffered frustration on account of an apparent lack of progress in the investigation. It is against this background that the Court will examine whether the Russian authorities' responses to the applicants' enquiries amounted to inhuman treatment in breach Article 3 of the Convention.

158. The Court observes at the outset that at no point in the investigation have the applicants been given access to its materials or otherwise involved in the proceedings. Whenever they made independent enquiries, those elicited only short replies from the Russian Chief Military Prosecutor's Office in which they were initially informed that an investigation was ongoing or, at a later stage, that they would not have access to the investigation files because they had not formally been recognised as the injured parties. The requests for information submitted through diplomatic channels or through the Polish Institute for National Remembrance have been likewise unsuccessful. After the decision to discontinue the investigation had been made, shortly thereafter it was classified and its existence was only revealed at a press-conference. The applicants or the Polish authorities or members of the Institute for National Remembrance had never been officially informed of the outcome of the investigation (compare *Orhan*, cited above, § 359; see also *Luluyev and Others*, cited above, § 117). What is more, they were expressly banned from taking cognisance of the contents of that decision on account of their foreign nationality.

159. The Court is struck by the apparent reluctance of the Russian authorities to recognise the reality of the Katyn massacre, to which the applicants' relatives had fallen victims. Admittedly, the Russian Chief

Military Prosecutor's Office conceded on a number of occasions that the applicants' relatives had been executed in 1940 by the NKVD of the USSR (see the letters of 21 April 1998, 23 June 2003 and 10 February 2005 concerning Mr Wołk, Mr Nawratil and Mr Janowiec). However, in their initial observations on the admissibility and merits of application no. 55508/07, the Russian Government sought to discredit the information contained in the letter of 23 June 2003, claiming that the "conclusions had been made before the end of the investigation and were not confirmed later". Further, 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 (see the Military Courts' judgments of 18 April 2007 and 14 October 2008). The judgments were upheld on appeal in a summary fashion by the military bench of the highest court in the country, the Supreme Court of the Russian Federation (see the judgments of 24 May 2007 and 29 January 2009). The Court considers that the approach chosen by the Russian military courts which consisted in maintaining, to the applicants' face and contrary to the established historic facts, that the applicants' relatives had somehow vanished in the Soviet camps, demonstrated a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katyn massacre (compare *Timurtaş*, cited above, § 97).

160. The Court further reiterates that from the standpoint of Article 3 it may examine the authorities' reactions and attitudes to the applicants' enquiries in their entirety and rejects the Government's argument that it should disregard the rehabilitation proceedings. In those proceedings which followed on after the discontinuation of the investigation, the Russian prosecutors consistently rejected the applicants' requests for rehabilitation of their relatives, claiming that, owing to the disappearance of relevant files, it was not possible to determine the specific legal basis for the repression against Polish prisoners (see the Chief Military Prosecutor's letters of 18 January 2006, 12 February 2007 and 13 March 2008). The courts examining the applicants' appeals against the prosecutor's refusals reiterated, yet again, that there was no reason to assume that the Polish prisoners had actually been killed (see the judgment of 24 October 2008, upheld on appeal on 25 November 2008). These findings made in the rehabilitation proceedings not only distorted the established historical facts but also were mutually exclusive, for it could not be reasonably maintained at the same time that the Polish prisoners had been the victims of the repression, albeit on an unclear legal basis, and that they had not been murdered at all. In addition, the prosecutors' reference to the missing criminal files in respect of Polish prisoners was in stark contradiction to the explicit terms of the Poliburo's decision of 5 March 1940, according to which the cases of Polish prisoners were to be decided "without bringing

any charges, with no statement concluding the investigation and no bill of indictment". In sum, the Court finds it hard to disagree with the applicants' argument 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 the attitude vis-à-vis the applicants that was not just opprobrious but also lacking in humanity.

161. On 26 November 2010 the Russian Duma adopted a statement on the Katyn tragedy and its victims, in which it recognised that the Polish prisoners-of-war had been shot dead and that their death on the USSR territory had been "an arbitrary act by the totalitarian State". It also considered 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". However, the declaration did not lead to a re-opening of the investigation, declassification of its materials, including the decision on its discontinuation, or any attempts on the part of the Russian authorities to establish direct contacts with the victims of the Katyn massacre and involve them into the elucidation of its circumstances. Being a mere political declaration without any visible follow-up, it did little to alleviate the feeling of frustration, since the previously made allegations that the applicants' relatives might have been criminally responsible, were not explicitly dismissed. The Court is struck by the Russian authorities' continued complacency in the face of the applicants' anguish and distress, especially as they are becoming more and more fragile by virtue of their age.

162. The Court acknowledges that the amount of time that has passed since the applicants parted with their relatives is significantly larger in the present case than it was in others, in which a violation of Article 3 was found on account of the authorities' callous attitude to the relatives' attempts to find out about the fate of missing persons. Moreover, it cannot be said that the applicants are still suffering the agony of not knowing whether their family member is dead of alive: there is no doubt, and it is an established historic fact, that the applicants' relatives were executed in 1940 by the Soviet NKVD. Nevertheless, the authorities' obligation to account for the fate of the missing person cannot be reduced to a mere acknowledgment of the fact of death, and even if it were, the Court has seen above ample evidence that such acknowledgment was more often than not withheld by the Russian authorities.

163. The scope of the State's obligation under Article 3 is significantly larger than an acknowledgement of the fact of death. Even though the State is not legally responsible for the death or disappearance, Article 3 requires it to exhibit a compassionate and respectful approach to the anxiety of the relatives of the deceased or disappeared person and to assist the relatives in obtaining information and uncovering relevant facts. The silence of the

authorities of the respondent State in face of the real concerns of the relatives may only be categorised as inhuman treatment (see *Varnava and Others*, cited above, § 201). The Court notes that the United Nations Human Rights Committee repeatedly found a violation of Article 7 of the International Covenant on Civil and Political Rights on account of the anguish and psychological pressure experienced by the family of the killed individuals who did not know how their relative had died or were denied information about the precise burial location (see *Mariam Sankara et al. v. Burkina Faso*, No. 1159/2003, 28 March 2006, and *Schedko v. Belarus*, No. 886/1999, 3 April 2003, cited in paragraphs 80 and 81 above). The Court considers that the same requirements on the respondent State to account for the circumstances of the death and the location of the grave are contained in Article 3 of the Convention, which is substantially similar in its wording to Article 7 of the Covenant (cited in paragraph 79 above).

164. In conclusion, the applicants suffered a long ordeal during the entire post-war Communist era in which political factors put insurmountable obstacles to their quest for information. The institution of Katyn proceedings gave them a spark of hope in the early 1990s but it was gradually extinguished, in the post-ratification period, when the applicants were confronted with the attitude of official denial and indifference in face of their acute anxiety to know the circumstances of the death of their close family members and their burial sites. They were excluded from the proceedings on the pretence of their foreign nationality and barred from studying the materials that had been collected. They received curt and uninformative replies from Russian authorities and the findings that had been made in the judicial proceedings were not only contradictory and ambiguous but also contrary to the historic facts which, nonetheless, were officially acknowledged at the highest political level. The Russian authorities did not provide 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.

165. Furthermore, the Court reiterates its constant position that a denial of crimes against humanity, such as the Holocaust, runs counter to the fundamental values of the Convention and of democracy, namely justice and peace (see *Lehideux and Isorni v. France*, 23 September 1998, § 53, Reports 1998-VII, and *Garaudy* (dec.), cited above), and that the same is true of statements pursuing the aim of justifying war crimes such as torture or summary executions (see *Orban and Others*, cited above, § 35). By acknowledging that the applicants' relatives had been held prisoners in the Soviet camps but declaring that their subsequent fate could not be elucidated, the Russian courts denied the reality of summary executions that had been carried out in the Katyn forest and at other mass murder sites. The Court considers that such approach chosen by the Russian authorities has

been contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering.

166. In sum, the Court finds that the applicants were left to bear the brunt of the efforts to uncover any facts relating to the manner in which their relatives died, whereas the Russian authorities demonstrated a flagrant, continuous and callous disregard for their concerns and anxieties. The Court therefore considers that the manner in which the applicants' enquiries have been dealt with by the Russian authorities has attained the minimum level of severity to be considered inhuman treatment within the meaning of Article 3 of the Convention.

167. It follows that there has been a violation of Article 3 of the Convention in respect of the applicants Ms Wołk, Mr Janowiec, Ms Michalska, Mr Tomaszewski, Mr Wielebnowski, Mr Gustaw Erchard, Ms Irena Erchard, Mr Jerzy Karol Malewicz, the late Mr Krzysztof Jan Malewicz, and Ms Mieszczankowska, and that there has been no violation of this provision in respect of the other five applicants.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

168. 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

169. The applicants Mr Janowiec and Mr Trybowski claimed 50,000 euros (EUR) each in respect of non-pecuniary damage for the loss of their father and grandfather, respectively.

170. The applicant Mr Jerzy Malewicz claimed EUR 1,048,800 in respect of pecuniary damage which represented a loss of income of his late father over a nineteen-year period and the interest on that amount. He further claimed double that amount in respect of non-pecuniary damage.

171. The other applicants left the determination of the amount of just satisfaction to the discretion of the Court.

172. The Government pointed out that the claims by Mr Janowiec, Mr Trybowski and Mr Jerzy Malewicz related to the death of their relatives. The complaint in this regard was declared inadmissible as falling outside the Court's jurisdiction *ratione temporis*. As to the claims by the other applicants, the Government stressed that they had initially claimed a symbolic compensation of one euro each and that they had not given a convincing explanation for a subsequent change in their position. Furthermore, they had not been direct or indirect participants in, or

witnesses to, the Katyn massacre and some of them were only born in 1940 or after the Second World War.

173. The Court reiterates that it has found a violation of Article 3 in respect of the applicants Mr Gustaw Erchard, Ms Irena Erchard, Mr Janowiec, Mr Jerzy Karol Malewicz, the late Mr Krzysztof Jan Malewicz, Ms Mieszczankowska, Ms Michalska, Mr Tomaszewski, Mr Wielebnowski, and Ms Wołk. It accepts that they must have suffered anxiety and frustration on account of the Russian authorities' flagrant, continuous and callous disregard for their enquiries. However, in the exceptional circumstances of the present case, it considers that the finding of a violation would constitute sufficient just satisfaction.

174. In so far as some applicants claimed compensation in respect of pecuniary and non-pecuniary damage in connection with the death of their father or grandfather, the Court notes that the complaint about their killing in 1940 falls outside the scope of the instant case (see § 101 of the admissibility decision of 5 July 2011). Accordingly, it rejects this part of the claims.

B. Costs and expenses

175. The applicants claimed EUR 25,024.82 in legal fees of Mr Szewczyk (exclusive of legal aid received from the Court), EUR 7,000 in legal fees of Mr Karpinskiy and Ms Stavitskaya, and EUR 7,581 and 1,199.25 Polish złotys for transport and translation costs. In addition, the applicant Mr Jerzy Karol Malewicz claimed 2,219.36 US dollars for his daughter's and his own travel and accommodation expenses incurred in connection with their presence at the hearing before the Court.

176. The Government commented that Mr Szewczyk's fees appeared excessive, that the necessity of travel expenses had not been convincingly shown, and that two Russian counsel had only taken part 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. Finally, the Government pointed out that Mr Szewczyk and Mr Kamiński had been granted legal aid for their appearance before the Court.

177. Under the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. On the basis of the materials in the file, the Court is not satisfied that Mr Karpinskiy or Ms Stavitskaya carried out any substantive work on the case. The Court also finds the legal fees claimed by Mr Szewczyk excessive. Having regard to those elements and the above criteria, the Court considers it reasonable to award the applicants jointly EUR 5,000 in respect of Mr Szewczyk's fees, translation and travel

expenses, plus any tax that may be chargeable to them, and EUR 1,500 in respect of the applicant Mr Jerzy Malewicz's travel and accommodation expenses, plus any tax that may be chargeable to him.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Accepts* unanimously that Mr Piotr Malewicz may pursue the application in lieu of his late father Mr Krzysztof Jan Malewicz;

2. *Holds*, by four votes to three, that the respondent State failed to comply with their obligations under Article 38 of the Convention;

3. *Holds*, by four votes to three, that it is unable to take cognisance of the merits of the complaint under Article 2 of the Convention;

4. *Holds*, by five votes to two, that there has been a violation of Article 3 of the Convention in respect of the applicants Mr Gustaw Erchard, Ms Irena Erchard, Mr Janowiec, Mr Jerzy Karol Malewicz, the late Mr Krzysztof Jan Malewicz, Ms Mieszczankowska, Ms Michalska, Mr Tomaszewski, Mr Wielebnowski, and Ms Wołk;

5. *Holds* unanimously that there has been no violation of Article 3 of the Convention in respect of the applicants Ms Krzyszkowiak, Mr Romanowski, Ms Rodowicz, Mr Trybowski and Ms Wołk-Jezierska;

6. *Holds* unanimously
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) the applicants jointly EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to them;
      (ii) the applicant Mr Jerzy Karol Malewicz EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, to be converted into US dollars at the rate applicable on the date of settlement, plus any tax that may be chargeable to him;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 April 2012.

Stephen Phillips	Dean Spielmann
Deputy 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) joint concurring opinion of Judges Kovler and Yudkivska;
(b) partly dissenting opinion of Judge Kovler, joined by Judges Jungwiert and Zupančič;
(c) joint partly dissenting opinion of Judges Spielmann, Villiger and Nußberger;
(d) joint partly dissenting opinion of Judges Jungwiert and Kovler.

D.S.
J.S.P.

JOINT CONCURRING OPINION OF JUDGES KOVLER AND YUDKIVSKA

We voted with the majority in finding that the Court does not have jurisdiction *ratione temporis* to examine the applicants' complaint under Article 2 of the Convention. However, we cannot fully subscribe to the reasoning in the judgment and the proposed application of the *Šilih* principles to the present case.

A preliminary remark should be made. As the majority, we consider that the Katyn massacre was a particularly horrific war crime committed by the Soviet totalitarian regime, and we agree with our dissenting colleagues that "[t]his was clearly one of the war atrocities that the drafters of the Convention sought to prevent from ever happening in the future". On the other hand, we believe that the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted "as part of the process of *reconstructing* western Europe in the aftermath of the Second World War"[1], and not with the intention of delving into that black chapter.

In fact, this is the very first case in which the Court has dealt with procedural obligations under Article 2 arising out of an event which happened not only before ratification of the Convention by the respondent State but before the Convention was even drafted. We can hardly see how the Russian authorities could have an obligation to conduct an investigation into the circumstances of the Katyn massacre after 5 May 1998, the date of ratification of the Convention, or how it can be assumed that they were aware of the possible consequences of ratifying the Convention with regard to the said investigation.

The investigation that started in 1990 was a goodwill gesture on the part of the Russian Federation. As mentioned in paragraph 141 of the judgment, a domestic decision to investigate, which could be made on account of political or ethical considerations, should be distinguished from the procedural obligation under the Convention to investigate, and "only the latter, and not the former ... is subject to the Court's scrutiny". We agree with this approach and we find it to be central to the conclusion that the complaint under Article 2 falls outside the Court's jurisdiction *ratione temporis*.

Indeed, the majority reached that conclusion for a different reason. Having applied the *Šilih* test, according to which, for the procedural obligations imposed by Article 2 to come into effect, there must exist a *genuine connection* between the death and the entry into force of the

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[1] Steven Greer, *The European Convention on Human Rights – Achievements, Problems, and Prospects*, Cambridge University Press (2006), pp. 365, p.1 (emphasis added).

Convention in respect of the respondent State, and thus a significant proportion of the procedural steps must have been carried out after the critical date (see paragraph 132 of the judgment), it found in paragraph 138 that "a significant proportion of the Katyn investigation ... appears to have taken place before the ratification date", in particular between 1991 and 1995. For this reason "the criterion triggering the coming into effect of the procedural obligation imposed by Article 2 has not been fulfilled". It follows logically from this passage that had the Russian Federation ratified the Convention, for example, seven years earlier in 1991, the "genuine connection" test would have been satisfied.

With due respect, we disagree with this approach. It is true that "there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity" (see *Brecknell v. the United Kingdom*, no. 32457/04, § 69, 27 November 2007). It is also established that the procedural obligation "binds the State throughout the period in which the authorities *can reasonably be expected* to take measures *with an aim to elucidate the circumstances of death and establish responsibility for it*" (see *Šilih v. Slovenia* [GC], no. 71463/01, § 157, 9 April 2009, emphasis added). Thus, according to the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions[1], "*the purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death*".

Could the Russian authorities be reasonably expected to establish all the circumstances of the Katyn atrocity and to call the perpetrators to account fifty years after the event and thirty years after the main evidence was destroyed (see paragraph 20), when the majority of the perpetrators and witnesses were already dead? In our view, the answer is in the negative, as any such investigation would have been *a priori* ineffective and the procedural guarantees of Article 2 should not be extended to it. It is also hard to imagine any possible new evidence or information that might appear fifty years later "capable of furnishing the connection between the prisoners' death and the ratification and imposing a fresh obligation to investigate under Article 2" (see paragraph 140).

A similar conclusion was reached in the case of *Çakir and Others v. Cyprus* (dec.) (no. 7864/06, 29 April 2010), where, applying the *Šilih* principles to the investigation into killings that occurred more than fourteen years before the right of individual petition in respect of Cyprus took effect, the Court noted that "the request for information [about the results of the

[1] Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

investigation] ..., made over thirty years after the killings, does not constitute a new plausible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrators such as to revive the authorities' procedural obligation to investigate the applicants' relatives' deaths and to bring the procedural obligations under Article 2 within the temporal jurisdiction of the Court."

Like our learned colleague Judge Lorenzen we believe that "there must be a *clear temporal connection* between on the one hand the substantive event – death, ill-treatment etc. – and the procedural obligation to carry out an investigation and, on the other, the entry into force of the Convention in respect of the respondent State"[1]. All the cases in which the Court has found that it had jurisdiction *ratione temporis* to examine the case under the procedural limb of Article 2 although the death of an individual had occurred before the ratification of the Convention have, in addition to the common features mentioned in paragraph 135, one more significant factor which distinguishes them from the present case: the investigation into the circumstances of the death in question started immediately, and thus many items of evidence were preserved for further investigative steps. In a situation where there has been no investigation into the crime for fifty years, we fail to see any possibility of fulfilling the requirements of an effective investigation, namely to elucidate the circumstances of death and establish responsibility for it.

It is true that "the Court has elaborated extensive guidelines on the needs of effective investigations, encompassing diverse components from the scope of autopsies to the *involvement of the victims' families*"[2]; however, in the absence of any possibility of achieving the above aim of an effective investigation, separate examination of the applicants' involvement in the proceedings would appear to be an artificial fragmentation of the State's procedural obligations.

To the extent that the applicants' complaint under Article 2 concerns the suffering they underwent owing to their exclusion from the proceedings and the denial of information, this complaint was examined by the Court under Article 3 of the Convention[3].

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[1] See the concurring opinion of Judge Lorenzen in the case of *Šilih v. Slovenia* (emphasis added).

[2] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004), pp. 239, p. 41 (emphasis added).

[3] Judge Kovler voted against finding a violation of Article 3 for the reasons expressed in the joint dissenting opinion of judges Jungwiert and Kovler.

PARTLY DISSENTING OPINION OF JUDGE KOVLER JOINED BY JUDGES JUNGWIERT AND ZUPANČIČ

We cannot follow the unusual logic behind the methodology employed in the present judgment in finding, first of all, a violation of Article 38 of the Convention, as the Court did, for example, in the *Nolan* case (see *Nolan and K. v. Russia*, no. 2512/04, 12 February 2009). In the present case the Court states that "[c]ompliance with this obligation is a condition *sine qua non* for the effective conduct of the proceedings before the Court and it must be enforced irrespective of any findings that will be made in the proceedings and of their eventual outcome" (see paragraph 91 of the judgment). Even assuming that the Court, especially in the initial stages of the proceedings, had an interest in requesting a copy of the decision of 21 September 2004 by which the investigation into the Katyn massacre was discontinued, the fact that the Court decided that it was unable to take cognisance of the merits of the complaint under the procedural limb of Article 2 of the Convention greatly reduced the initial importance of that interest, and the Court could have concluded that no separate issue arose.

As to the merits, we would observe that in its Grand Chamber judgment in *Stoll v. Switzerland* the Court accepted the necessity of a certain "discretion" in relation to some confidential official documents of the member States (see *Stoll v. Switzerland* [GC], no. 69698/01, § 136, ECHR 2007-V) and the need to preserve it. We also take note that the applicants' Russian counsel had access to the classified documents in the case file of criminal case no. 159, including the decision of 21 September 2004, and that the arguments set forth in that document had been examined by the domestic courts, which had found that it provided sufficient justification for the decision to discontinue criminal case no. 159. We would also recall the Court's statement in another Russian case, according to which: "Mindful of its subsidiary role and the wide margin of appreciation open to the States in matters of national security, it accepts that it is for each Government, as the guardian of their people's safety, to make their own assessment on the basis of the facts known to them. Significant weight must, therefore, attach to the judgment of the domestic authorities, and especially of the national courts, who are better placed to assess the evidence relating to the existence of a national security threat" (see *Liu v. Russia (no. 2)*, no. 29157/09, 26 July 2011, § 85).

We do not want to speculate about the content of the said document (perhaps the names of the infiltrated agents or those of the perpetrators of the massacre?). We simply take note of the observation of the Polish Government (paragraph 96), who emphasised that the obligation to provide materials under Article 38 of the Convention would not be violated if the refusal to provide them was convincingly explained. This raises the question

of the evaluation of the cogency of this explanation, which is a matter of value judgment...

JOINT PARTLY DISSENTING OPINION OF JUDGES SPIELMANN, VILLIGER AND NUSSBERGER

1. This case raises important questions affecting the application of the Convention as well as serious issues of general importance in respect of Article 2 (procedural limb). Nevertheless, we are in no doubt that the Court is able to take cognisance of the merits of the complaint under Article 2 and that this Article has been violated.

2. As regards the procedural limb of Article 2, the difficulty as to the interpretation and application of the Convention concerns the jurisdiction *ratione temporis* of the Court and in particular the interpretation of the somewhat "mysterious" paragraph 163 of the judgment in *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009).[1] *Šilih v. Slovenia* was the first judgment in which the detachability and autonomous role of the procedural obligation under Article 2 were examined. The Grand Chamber held:

> "161. ... 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 occur before the critical date is not open-ended.
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> 162. First, 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.

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[1] Judge Zagrebelsky, in his concurring opinion, joined by Judges Rozakis, Cabral Barreto, Spielmann and Sajó, described the "vague wording" (sic!) of the said paragraph in the following way:

> "In my view, the introduction (for which there was no need in the present case) of the notion of 'limits' on the 'detachability' of the procedural obligation from the substantive obligation under Article 2 weakens the reasoning of the Court and makes the application of the legal principle established by the Grand Chamber difficult, debatable and unforeseeable. This is particularly true and troublesome in the light of the vague wording used in paragraph 163 to define the 'limits' in question. The Court will be forced to carry out complex and questionable assessments on a case-by-case basis that will be difficult to dissociate from the merits of the case. The impact this is likely to have on 'legal certainty' (which the Court has rightly referred to) is, I would venture, both obvious and harmful."

In a recent judgment of the UK Supreme Court (18 May 2011), Lord Phillips said the following:

> "49. The meaning of each of the three sentences of para 163 is far from clear. The concept of a 'connection' between a death and the entry into force of the Convention for the state in question is not an easy one if, as seems to be the case, this connection is more than purely temporal. The final sentence of the paragraph is totally Delphic and would seem designed to prevent the closing of the door on some unforeseen type of connection. I shall say no more about it." (*In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)*) [2011] UKSC 20.

> 163. Second, 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 (*Vo*, cited above, § 89) – 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."

3. In our view, applying *Šilih v. Slovenia* to the facts of this case and interpreting the last sentence of paragraph 163 in a way which is consistent with the Grand Chamber's decision to base a genuine connection "on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner" leads us to the conclusion that the case falls within the temporal jurisdiction of the Court and that there has been a procedural violation of Article 2. Drawing inspiration from *Brecknell v. the United Kingdom* (no. 32457/04, 27 November 2007), and qualifying the "genuine connection" test identified in *Šilih*, the majority reads the final sentence of paragraph 163 as comprising two elements. First, and in compliance with the "genuine connection test", the reference to "underlying values of the Convention" must be understood in the sense that the triggering event must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention as is the case, for instance, with a war crime or a crime against humanity. Second, and restricting this test, there must be sufficiently important material casting new light on that offence and coming into the public domain in the post-ratification period (as regards this second element, see paragraph 10 below).

4. In our view, the gravity and magnitude of the war crimes committed in 1940 in Katyń, 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.

5. We would recall that this case has its origins in the killing of more than 20,000 prisoners of war who were murdered by State agents without any judicial process and buried in mass graves. This was clearly one of the war atrocities that the drafters of the Convention sought to prevent from ever happening in the future. It was obviously an act contrary to the underlying values of the Convention. In *Šilih*, the Court included the last sentence of paragraph 163 precisely to catch exceptional cases like the one

at hand[1] and to distinguish this case from cases concerning events that happened so long ago that any investigation would be impossible to carry out and hence pointless.[2]

6. The killing was a "war crime". There is no doubt about that. The massacres were committed in the aftermath of the Molotov-Ribbentrop Pact (the Treaty of Non-Aggression of 1939 and its infamous secret Protocol), which is an undisputed historical fact. Under this illegal agreement, the Soviet forces committed the crime of aggression against, *inter alia*, Poland, which resulted, after partition, in illegal occupation of this independent State.

It appears that the Russian authorities characterised the Katyń massacre[3] as an "abuse of power." Since the text of the decision is not available, it is not clear whether it was an abuse of power on the part of the Politburo leaders or the actual executioners. However, this characterisation does not appear convincing: both the Hague Convention IV of 1907 and the Geneva Convention relative to the Treatment of Prisoners of War of 1929 prohibited acts of violence and cruelty against war prisoners, and the murder of prisoners of war constituted a "war crime" within the meaning of Article 6 (b) of the Nuremberg Charter of 1945. Although the USSR was not a party to the Hague or Geneva Conventions, the obligation to treat prisoners humanely and abstain from killing them clearly formed part of international customary law subsequently laid down in the Nuremberg Charter, which it had a duty to respect. That such an obligation was recognised as legally binding by the USSR was confirmed by the fact that the Soviet prosecutor attempted to charge the Nazi leaders with the Katyń killings during the Nuremberg trial. The Katyń massacre, as a "war crime", is not subject to statutory limitation, in accordance with both Russian domestic law and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

7. Seen in the light of the last sentence in paragraph 163 of the *Šilih* judgment, the existence of an act contrary to the underlying values of the Convention which constituted a war crime not subject to a statutory limitation is, as long as investigation is still possible, sufficient in our view

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[1] In this respect, we are not convinced by Lord Philipps' statement that the sentence was included "to prevent the closing of the door on some *unforeseen* type of connection." (emphasis added). See above (*In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)*) [2011] UKSC 20, at para [49].

[2] Compare Judge Zagrebelsky, joined by Judges Rozakis, Cabral Barreto, Spielmann and Sajó: "In any event, if the criminal law is no longer applicable owing to the expiration of the limitation period or if an investigation would be pointless because of the disappearance of evidence and witnesses, there will be no justification for imposing the obligation."

[3] In fact, the massacres were committed on three different sites: Katyń, near Smolensk, Kharkov (now Ukraine) and Tver.

to establish the Court's temporal jurisdiction over the investigation into this act, especially in circumstances where a substantial part of the investigation was conducted in the post-ratification period.

8. In the case at hand, the underlying values of the Convention are also affected by the rather strange and inconsistent attitude of the Russian authorities in taking, after the entry into force of the Convention, both positive and negative procedural decisions. Suffice it to mention that in December 2004, that is, some fourteen years after the archives had been opened, the Interagency Commission for the Protection of State Secrets classified thirty-six volumes of the case file as "top secret". What is so inconsistent, and hence shocking, is the fact that what was initially a transparent investigation ended in total secrecy. The Russian Government refused to produce the decision of 21 September 2004, a circumstance which has been found to be in breach of Article 38 of the Convention. On the other hand, as late as 2003, the Prosecutor General's Office was still in dialogue with counsel for the applicants, confirming the existence of the criminal investigation, and in early 2005 the Chief Military Prosecutor's Office replied that Mr Nawratil and Mr Janowiec were listed among the prisoners who had been executed in 1940 by the NKVD and buried near Kharkov. However, no further material was made available and no further information transpired. To sum up, the inconsistent, changing and strange attitude of the Russian Government after the entry into force of the Convention is a highly relevant reason to treat this case as an exceptional case covered by the last sentence of paragraph 163 of the *Šilih* judgment.

9. It is also clear from the text of the Russian judgments that the Russian courts adopted the view that the applicants' relatives had simply "disappeared" after having been placed "at the disposal" of the Soviet secret police. At the same time, grave allegations of a criminal nature had been made against the applicants' relatives. These allegations even triggered a request for rehabilitation, rejected by the authorities in 2008. The *volte face* of the authorities concerning the events, coupled with their inconsistent attitude, is in itself problematic and constitutes another specific procedural ground for declaring Article 2 of the Convention applicable in its procedural limb.

10. But even if we were to adopt the logic of the majority qualifying the "genuine connection test" by introducing a second element (that is, sufficiently important material casting new light on the offence and coming into the public domain in the post-ratification period: see paragraph 3 above), we would still be satisfied that the Court has jurisdiction to examine the complaint. Indeed, both the decision of 21 September 2004 to discontinue the investigation and the decision to classify the case file

amounted to major developments in the investigation. Although these procedural decisions as such do not constitute "new material" for the investigation, the sudden classification of the case file as secret after it had been at least partly open for several years cannot but be interpreted as a strong indication of new and relevant – although hidden – findings. Therefore, these procedural decisions could be interpreted as indicating new material coming to light in the post-ratification period. In these circumstances, we strongly believe that the Court has jurisdiction to examine the Russian authorities' compliance with the procedural obligation under Article 2 in the post-ratification period.

11. Turning to the merits of the complaint under the procedural limb of Article 2, we are aware that in view of the nature of the investigation at issue, not all the guarantees under the procedural limb of Article 2 may be relevant. However we have little doubt that there has been a violation of this provision on account of the applicants' exclusion from the proceedings. Their right to participate effectively in the investigation was not secured: the applicants were denied victim status and access to the case file because foreign nationals could not access classified material. Moreover, the classification of the most important parts of the case file citing national security considerations appears arbitrary in the light of the fact that, according to the Russian Government's own words, the individuals who could be – at least in theory – held responsible for the massacre had already died. The decision to classify the materials of the investigation also sits ill with the Russian Government's consistent position that the crime was committed by the totalitarian regime of a different State, the Soviet Union, more than sixty years ago. In these circumstances, the public interest in uncovering the crimes of the totalitarian past should have coincided with the applicants' private interest in finding out the fate of their relatives, and outweighed any outstanding national-security considerations. In the case at hand, the applicants were simply excluded from the investigation.

12. The applicants further claimed that the prolonged denial of information about the fate of their relatives, taken together with the curt and mutually contradictory replies by the Russian authorities and the denial of the established historical facts, disclosed a serious problem under the Convention. In our view, this claim is particularly relevant as regards the procedural aspect of Article 2. It is against this background that we must view the suffering of the victims' relatives when they were denied victim status in the proceedings on the basis that it was not proven that their relatives were among those killed although their names figured on the "death lists". That suffering, rightly examined by the judgment as a separate issue under Article 3 of the Convention, was aggravated by the refusal to grant rehabilitation on the ground that it was not known on what legal basis

the applicants' relatives had been condemned to death and executed; this amounted to an allegation that they might indeed have committed criminal acts. Moreover, the Russian authorities adopted the version of the "disappearance" of the applicants' relatives as the official one and refused the applicants any access to the case materials on spurious national-security grounds. The Russian courts rejected all applications for rehabilitation, claiming that it was impossible to determine the specific legal provision forming the basis for the execution of the Polish prisoners of war. It is hard to disagree with the applicants' argument that such a finding 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. By making such allegations, the Russian authorities not only did not comply with the positive obligation arising out of Article 2, but turned the positive obligation into its opposite. In other words, the procedural violation stems not just from culpable inaction, but from a positive intention not to comply with Convention standards.

13. In view of the long period of uncertainty and frustration suffered by the applicants and the not merely contradictory but indeed incomprehensible approach of the Russian authorities, this case has to be considered as truly exceptional.

14. For these reasons, we are of the opinion that Article 2 of the Convention has been violated.

JOINT PARTLY DISSENTING OPINION OF JUDGES JUNGWIERT AND KOVLER

We cannot share the Court's conclusion that there has been a violation of Article 3 of the Convention in respect of the applicants mentioned in point 4 of the operative part. The applicants submitted that, owing to a lack of information about the fate of their relatives and the Russian authorities' "dismissive approach" to their requests for information, they had endured inhuman and degrading treatment.

We are surprised that in this particular case the Court observes that the authorities' obligation under Article 3 is distinct from the obligation resulting from Article 2 of the Convention "both on points of substance, and in its temporal outreach" and that "the obligation imposed by Article 3 is of a more general humanitarian nature" (see paragraph 152 of the judgment). On this occasion we would point out that in a number of cases the Court has found that the relatives of a "disappeared person" were themselves victims of a violation of Article 3 of the Convention. Those findings were based on the state of uncertainty the relatives had had to endure owing to their inability to find out the fate of their next-of-kin (see, among other cases, *Orhan v. Turkey*, no. 25656/94, § 324, 18 June 2002). In the present case the Court itself did not accept the "disappeared persons" version, thereby applying a strict criterion under Article 2, treating the deaths as an instantaneous act. With regard to the Article 3 issue, the Court has previously concluded that "no separate issues arise under this Convention provision beyond those already examined under Article 2 of the Convention" (see *Tangiyeva v. Russia,* no. 57935/00, § 104, 29 November 2007; *Sambiyev and Pokayeva v. Russia,* no. 38693/04, §§ 74-75, 22 January 2009; and *Velkhiev and Others v. Russia,* no. 34085/06; § 138, 5 July 2011).

We would also point out that in some "Chechen" cases, despite finding a violation of the procedural limb of Article 2 of the Convention, the Court said that it was not persuaded that the investigating authorities' conduct, albeit negligent to the extent that it had breached Article 2 in its procedural aspect, could in itself have caused the applicant mental distress in excess of the minimum level of severity which is necessary in order to consider treatment as falling within the scope of Article 3 (see *Khumaydov and Khumaydov v. Russia,* no. 13862/05, §§ 130-131, 28 May 2009, and *Zakriyeva and Others v. Russia*, no. 20583/04, §§ 97-98, 8 January 2009).

While we do not doubt that the death of their relatives caused the applicants profound suffering, we nevertheless find no basis in the Court's case-law for finding a separate violation of Article 3 of the Convention, especially in the particular context – the time factor – of the present case. Consequently, we will not explore further the other reasons for the Court's conclusions on this issue.