XXXIII POLISH YEARBOOK OF INTERNATIONAL LAW
2013
DOI 10.7420/pyil2013m
PL ISSN 0554-498X

# Introduction to the Answers to the questions for the Grand Chamber hearing in the case of *Janowiec and Others v. Russia* (joint cases nos. 55508/07 and 29520/09) Strasbourg, 13 February 2013

On 13 February 2013 the Grand Chamber of the European Court of Human Rights held a public hearing on the "Katyń complaint", which was set against the background of the mass-killing of almost twenty-two thousand Polish citizens in 1940 on order of the highest Soviet authorities. The case was referred to the Grand Chamber at the request of the applicants. In the first Katyń judgment, a chamber of seven judges held (16 April 2012) that:

a) it could not take cognizance of the complaint under Article 2 (right to life in its procedural limb, i.e. the obligation to conduct an effective investigation) – by four votes to three;
b) there was a violation of Article 3 as the reactions of Russian authorities amounted to denigrating and inhuman treatment of some of the applicants – by five votes to two;
c) there was a violation of Article 38 because Russia did not co-operate with the Court.

Prior to the public hearing before the Grand Chamber, the parties to the case were sent questions to answer. Below we publish the legal observations submitted on behalf of the applicants. They were recapitulated at the hearing (each party was allotted 30 minutes).

These legal observations were prepared by Professor Ireneusz C. Kamiński, the principal lawyer for the applicants. His article on the Grand Chamber judgment is also published in this issue of the *Polish Yearbook of International Law*.

# ANSWERS TO THE QUESTIONS

for the Grand Chamber hearing in the case of *Janowiec and Others v. Russia* (joint cases nos. 55508/07 and 29520/09) Strasbourg, 13 February 2013

Legal representatives for the applicants: Ireneusz C. Kamiński, Roman Karpinskiy, Roman Nowosielski, Bartłomiej Sochański, Anna Stavitskaya

Article 2 of the Convention

1. ***Does the Court have jurisdiction to assess the respondent State's compliance with the procedural obligation arising out of Article 2 of the Convention relating to an investigation into deaths that occurred before the entry into force of the Convention on 3 September 1953?***
   ***The parties are invited in particular to comment on:***
   (a) ***Whether or not the Court's jurisdiction can be founded on the last subparagraph of paragraph 163 in the Šilih v. Slovenia judgment ([GC], no. 71463/01, 9 April 2009) and, in this connection, whether or not the mass murder of Polish prisoners can be characterised as a „war crime"?***

A. Court's competence *ratione temporis*

1.1. The applicants' counsels acknowledge that the Katyn massacre (mass killings) committed in 1940 is an act laying outside the temporal reach of the Convention and the Court has no competence to deal with the substantive aspect of Article 2. They are, however, of the opinion that the Court is competent *ratione temporis* to examine whether Russia observed its procedural obligation under Article 2 to carry out an effective investigation on the Katyn massacre (procedural aspect of Article 2). The procedural obligation under Article 2 has been consistently examined by the Court as a separate (detached) and autonomous duty capable of binding the State even when the death occurred before the "critical date" (ratification of the Convention).

1.2. As, however, the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths preceding the critical date must not be open-ended, the Court has identified a group of rules on that issue in its Grand Chamber judgment in *Šilih v. Slovenia* (judgment of 6 April 2009, appl. no. 71463/01). In that judgment the Court held that: "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.

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."

1.3. The applicants' counsels referred in their application only to acts and omissions that occurred in Russian Katyn investigation no. 159 after the Convention had been ratified by the Russian Federation, i.e. after 5 May 1998. They also consistently claimed (application and subsequent submissions to the Court) that the genuine connection necessary to establish the temporal competence of the Court should be based first of all on the need to ensure the effective protection of the guarantees and the underlying values of the Convention (last sentence of paragraph 163 of the *Šilih* judgment).

1.4. Before the *Janowiec* judgment of 16 April 2012 the expression "the underlying values of the Convention" had been 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.

1.5. In *Lehideux and Isorni v. France [GC]* the Court held that "[t]here is no doubt that, like any other remark directed against the Convention's underlying values […] the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10" (appl. no. 24662/94, judg. of 23 September 1998, RJD 1998-VII, § 53). In this judgement the Court referred to the case of *Jersild v. Denmark [GC]*, where insulting racially motivated speech was deemed not to enjoy the protection of the Convention (appl. no. 15890/89, judg. of 23 September 1994, Series A no. 298, § 35; in this sense also e.g. *Glimmerveen and Hagenbeek v. the Netherlands*, appl. nos. 8348/78 and 8406/78, dec. of 11 October 1979, DR 18, p. 187; and *Kühnen v. Germany*, appl. no. 12194/86, dec. of 12 May 1988 DR 56, p. 205).
In the subsequent decision of *Garaudy v. France* the Court was confronted with a revisionist book that denied the reality of the Holocaust (appl. no. 65831/01, dec. of 24 June 2003, ECHR 2003-IX). The Court declared that "[d]enying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to

public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. […] The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace."

This line of reasoning was repeated in *Witzch v. Germany*, where statements denying Hitler's and the National Socialists' responsibility in the extermination of the Jews were described as showing "disdain towards the victims of the Holocaust" and running "counter to the text and the spirit of the Convention" (appl. no. 7485/03, dec. of 13 December 2005).

In *Orban and Others v. France* the Court noted that "statements pursuing the unequivocal aim of justifying war crimes such as torture or summary executions […] amounted to deflecting Article 10 from its real purpose" (appl. no. 20985/05, judg. of 15 January 2005, § 35).[1]

1.6. Since speech denying the reality of crimes of international law was deemed to contravene the underlying values of the Convention, the same rationale should apply *a fortiori* 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, 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.

**Conclusion: Crimes of international law radically and drastically contravene the underlying values of the Convention. Therefore the obligation to conduct an effective investigation when the death preceded the ratification of the Convention by the respondent State may be justified by need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.**

B. Katyn massacre as a crime of international law

1.7. The Katyn massacre was committed in 1940. In total, at least 21,857 people were killed. The majority of the individuals executed, i.e. 14,552, among them the applicants' relatives, were kept before the killing in three prisoner-of-war camps.

1.8. When the war started in September 1939, its participants had a duty to abide by the rules of military law (humanitarian law). At that time the basic precepts of international humanitarian law were contained in the IV Hague Convention respecting the Laws and Customs of War on Land (and especially its annex:

[1] Original version: "des propos ayant sans équivoque pour but de justifier des crimes de guerre tels que la torture ou des exécutions sommaires sont pareillement caractéristiques d'un détournement de l'article 10 de sa vocation".

Regulations concerning the Laws and Customs of War on Land) of 18 October 1907, and in the Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929.

1.9. The provisions of the Hague and Geneva Conventions set forth fundamental and universal principles regarding the treatment of prisoners of war. Under these principles prisoners of war remained under the power of the hostile State (government), and not that of the individuals and formations who had captured them. Prisoners of war were to be treated humanely at all times and especially, as stated in Article 2 of the Geneva Convention, protected against "acts of violence, from insults and from public curiosity. Measures of reprisal against them [were] forbidden". Prisoners of war were entitled to respect of their persons and honour (Article 3). Also Article 4 of the Hague Rules of Land Warfare stated that "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 […]".

1.10. The provisions of the two Conventions also regulated the conditions under which prisoners of war were to be held and the possibility of applying penal sanctions against them. Regarding the latter issue, it was generally believed that prisoners of war were subject to the regulations and orders that applied to the army of the country under whose authority they were held (Article 8 of the Hague Convention, Article 45 of the Geneva Convention). Nevertheless, in the application of disciplinary measures, corporal punishment and cruelty in any form was forbidden. Collective punishment for the deeds of an individual was also forbidden (Article 46 of the Geneva Convention).

1.11. Special protection was accorded to the rights of prisoners of war in court proceedings, whereby they were entitled to defence and to the presence of representatives of the caretaker powers in their proceedings. They also had a guaranteed right of appeal against their sentences at the same level as the members of the armed forces of the country in which they were detained (Chapter III of the Geneva Convention).

1.12. Although the two Conventions do not contain a rule that expressly prohibits killings of prisoners of war kept in detention centres, it belongs to the very fundamentals of legal argumentation that from the prohibitions of cruel treatment and of killing in direct post-combat situations also ensued the prohibition of killing those already held in prisoner-of-war camps (*a fortiori* reasoning). Moreover, the preamble to the IV Hague Convention provides that in cases not included in the Regulation "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."

1.13. The soldiers captured by the Red Army in 1939 were entitled to prisoner-of-war status, and therefore to the full protection reserved for prisoners of war. In

Russian too these soldiers were termed "prisoners of war" (военнопленные) and the Soviet institution set up for the management of detention centres was the Administration for Prisoners' of War and Internees' Affairs (Главное управление по делам военнопленных и интернированных).

1.14. In 1939, the Republic of Poland was party to the two Conventions. However, the fact that the USSR was party neither to the IV Hague Convention (and to the Regulations appended thereto) nor to the Geneva Convention did not release that country from the duty to respect the universally binding principles of international customary law, which existed side by side with treaty obligations.

1.15. The legal status of norms contained in the IV Hague and Geneva Convention was addressed during the post-war trials. In 1946 the Nuremberg International Military Tribunal stated (*Goering and Others Trial*) with regard to the Hague Convention of 1907: "The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."[2]

In another part of its judgement the Nuremberg Tribunal stated that: "Article 6(b) of the Charter provides that 'ill-treatment […] of civilian population of or in occupied territory […] killing of hostages […] wanton destruction of cities, towns or villages' shall be a war crime. In the main these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention".[3]

The opinion of the International Military Tribunal was subsequently substantially adopted by the United States Military Tribunal in the *High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*[4] and the *Krupp Trial*.[5]

1.16. As far as the Geneva Convention is concerned, in the *High Command Trial* the United States Military Tribunal, while reconstructing the position of the International Military Tribunal in the *Goering and Others Case*, stated that the Geneva Convention "was not binding between Germany and Russia as a contractual agreement, but that the general principles of International Law

[2] The Nuremberg International Military Tribunal judgement (*Goering and Others Trial*), published in: *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. XXII, p. 497.

[3] *Ibidem*, p. 475.

[4] *Law Reports of Trials of War Criminals*, London 1949, vol. XII.

[5] *Ibidem*, vol. X, p. 133.

as outlined in those Conventions were applicable. In other words, it would appear that the International Military Tribunal in the case above cited [Goering and Others], followed the same lines of thought with regards to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of International Law as accepted by the civilised nations of the world, and this Tribunal adopts this viewpoint" (p. 88).

The Tribunal continued that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilised nations and binding […] These concern the treatment of prisoners of war […]" (p. 89).

Subsequently, while enumerating which provisions (or their parts) should be cited "in this category", the Tribunal pointed, among others, to Article 4 of the Hague Rules of Land Warfare ("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 […]") and Article 2 of the Geneva Convention ("They [prisoners of war] must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity […]") (pp. 89-91).

1.17. A similar position to that of the Nuremberg International Military Tribunal was adopted by the International Military Tribunal for the Far East (Tokyo Tribunal) when it stated that "the [IV Hague] Convention remains good evidence of the customary law of nations."[6]

1.18. The legal characterisation under international law of the Hague Regulations, as applied at the post-war trials, was followed by this Court in the seminal Grand Chamber judgement of *Kononov v. Latvia* (appl. no. 26376/04, judg. of 17 May 2010). The Court stated that the Hague Regulations were, although not ratified by the Soviet Union or Latvia, binding on them, as these rules "were solidly part of international law by 1939" (para. 200).

1.19. In the course of the Nuremberg Trial the Soviet prosecutors sought to charge the German forces with the Katyn massacre. The Katyn massacre was mentioned in the indictment as an instance of a war crime:

"Indictment: Count Three – War Crimes

(Charter, Article 6, especially 6 (b))

[…]

(C) MURDER AND ILL-TREATMENT OF PRISONERS OF WAR, AND OF OTHER MEMBERS OF THE ARMED FORCES OF THE COUNTRIES WITH WHOM GERMANY WAS AT WAR, AND OF PERSONS ON THE HIGH SEAS

[…]

[6] "Digest of Public International Law Cases" 1948, vol. 15, p. 366.

In September 1941, 11,000 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk."[7]

During the proceedings before the International Military Tribunal General R.A. Rudenko, Chief Prosecutor for the USSR, referred to the Katyn massacre as "the mass shooting of Polish officers by the Fascist criminals in Katyn Forest", "criminal activity"[8], "mass shooting of Poles", "a link in the chain of many bestial crimes perpetrated by the Hitlerites",[9] "atrocities at Katyn".[10]

Eventually, the charge related to the Katyn massacre, as brought against the Germans accused at Nuremberg, was dismissed by US and British judges for lack of evidence.

1.20. The classification of the Katyn massacre as a war crime, as made by the Nuremberg Tribunal, must be treated in objective terms and is not dependent upon who actually committed the atrocity.

1.21. The Charter of the International Military Tribunal defines war crimes in its Article 6 (b) as, among others, acts consisting in murder or ill-treatment of prisoners of war.

1.22. Examining evidence on charges related to war crimes committed against prisoners of war, the International Military Tribunal at Nuremberg pointed to the executions of:

- members of Allied 'commando' units who, following a directive issued on 18 October 1942 by Adolf Hitler, were to be "slaughtered to the last man", even if they attempted to surrender;
- escaped officers and non-commissioned-officers who, upon recapture, were to be sent, as ordered by the so-called 'Bullet decree' issued in March 1944, to the Mauthausen camp to be shot there;
- 50 officers of the British Royal Force, who escaped from the POW camp at Sagan, but on recapture were shot on the direct orders of Adolf Hitler;
- 'Red commissars' of the Soviet Army, as they were considered by the German forces as not benefiting from the status of prisoners of war;
- those Soviet prisoners of war who, following the Gestapo order of 17 July 1941, were identified as important functionaries of the Soviet State, Jews, political agitators and fanatical communists.[11]

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[7] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. I, pp. 42-54.

[8] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1948, vol. XV, p. 289. In full: "the Soviet Prosecution have several times expressed their view respecting the application of Defense Counsel to call witnesses with regard to the mass shooting of Polish officers by the Fascist criminals in Katyn Forest. Our position is that this episode of criminal activity on the part of the Hitlerites has been fully established by the evidence presented by the Soviet Prosecution."

[9] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1948, vol. XV, p. 290.

[10] *Ibidem*, Nuremberg 1947, vol. IX, p. 28.

[11] *Ibidem*, vol. XXII, pp. 471-475.

1.23. War crimes that were committed against prisoners of war and consisted in their executions or killing were also the subject matter of other post-war trials. Besides the main Nuremberg trial, this kind of war crimes occurred in particular in the *German High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*,[12] before the United States Military Tribunal at Nuremberg (30 December 1947–28 October 1948).

The charges against the accused referred to:

- "Commando" order, and the following war crimes:
  a) on or about 7 July 1944 near Poitiers in France, troops of the LXXX Corps of the 18th Army, under Army Group G, executed 1 American prisoner of war and 30 British prisoners of war;
  b) on or about 22 May 1944 on the island of Alimnia near Greece an English soldier and a Greek sailor were executed;
  c) on or about 16 April1944 a British prisoner of war was turned over by Stalag 7a to the SD for execution;
  d) on or about 10 December 1942· in or near Bordeaux, France, members of the German naval forces executed 2 uniformed British soldiers;
  e) on or about 20 November 1942 near Stavanger, Norway, members of the German armed forces executed 17 uniformed British soldiers;
  f) on or about 22 March 1944 near La Spezia, Italy, members' of the German armed forces executed 15 uniformed US·soldiers;
  g) in January 1945 in the Mauthausen Concentration Camp, Austria, from 12 to 15 American prisoners of war, comprising an American military mission, were executed.
- Eastern Front, and the following war crimes:
  a) on or about 28 July 1941 in the sector of Zwiahel in the USSR troops within the Rear Area of Army Group South, killed 73 surrendered Soviet prisoners of war as "guerrillas";
  b) on or about 25 August 1941, in the USSR, troops of the 18th Army under Army Group North killed 35 wounded prisoners of war;
  c) on or about 9 September 1941 in Djedkowow in the USSR, troops of Panzer Group 3 killed 4 Soviet prisoners of war;
  d) on or about 13 September 1941, troops of the 213th Security Division of the Rear Area Army Group South, executed 13 escaped and recaptured Soviet prisoners of war;
  e) on or about 15 October 1941 in the area of the 24th Infantry Division, more than 1,000 Soviet prisoners of war were shot to death because they were unable to march, or died from exhaustion;
  f) on 16 October 1941 in Nikolayev, troops of the 11th Army delivered 75 Jewish prisoners of war to the SD for execution;

[12] *Law Reports of Trials of War Criminals*, vol. XII.

g) on or about 22 October 1941, 20 Soviet prisoners of war were executed at concentration camp "Gross Rosen"; on or about 15 October 1941, 21 Soviet prisoners of war were executed at Dachau; on or about 22 October 1941, 40 Soviet prisoners of war were executed at Dachau; on or about 8 November 1941, 99 Soviet prisoners, of war were executed at Dachau; on or about 12 November 1941, 135 Soviet prisoners of war were executed at Dachau; between 1 September 1941 and 23 January 1942, 1,082 Soviet prisoners of war were selected by the Gestapo at Regensburg for execution and executed

h) in the month of September 1942 in the rear area of the 2nd Army, 384 prisoners of war died or were shot and 42 others were turned over to the SD for execution;

i) in the period from 1 January 1942 to 6 March 1942 in the rear area of the 11th Army, 2,366 prisoners of war were killed or died of exhaustion, neglect and disease, and 317 prisoners of war were turned over to the SD for execution;

j) from 14 January 1942 to 29 September 1942 in the rear area of Army Group North, 200 captured Soviet prisoners of war were executed;

k) in July 1943 in the rear area of the 4th Panzer Army, 24 prisoners of war were turned over to the SD for execution, and in August 1943, 39 prisoners of war were turned over to the SD for execution;

l) in January 1945 a French prisoner of war, the General Mesney, then under the control of the German Prisoner of War Administration, was murdered, and thereafter false reports of the cause and nature of his death were issued.

• The "Commissar" Order:

a) from 21 June 1941 to about 8 July 1941, troops of the XXXXI Corps in Panzer Group 4 under Army Group North killed 97 "political commissars";

b) from 21 June 1941 to about 19 July 1941, troops of Panzer Group 4, under Army Group North, killed 172 "political commissars";

c) from 21 June 1941 to about 1 August 1941, troops of Panzer Group 3 killed 170 "political commissars";

d) on or about 1 October 1941, troops of the Rear Area of the 11th Army, killed 1 "political commissar";

e) on or about 4 October 1941, troops of the 454th Security Division, of the Rear Area of Army Group South, killed 1 "political commissar";

f) from about 18 October 1941 to 26 October 1941, in the operational area of the XXVIII Corps in the USSR, troops of the 18th Army, under Army Group North, killed 17 "political commissars";

g) on 29 May: 1942, in the operational area of the XXXXIV Corps. troops of the 17th Army, killed 2 "political commissars".

1.24. The other most important post-war cases on war crimes were:

- The case of Anton Dostler, adjudicated by the United States Military Commission (Rome, 8-12 October 1945). Dostler was accused of having ordered the shooting of fifteen American prisoners of war. Two officers and 13 men of a special reconnaissance battalion disembarked from some United States Navy boats and landed on the Italian coast about 250 miles behind the front-line. The 15 members of the United States Army were on a military mission, which was to demolish a railroad tunnel on. After having been captured and interrogated, they were summarily executed on an order of General Dostler (*Law Reports of Trials of War Criminals*, vol. I, p. 22 and subseq.).
- The Almelo Trial (trial of Otto Sandrock and three others), before British Military Court for the Trial of War Criminals (held at the Court House, Almelo, Holland, 24-26 November 1945). The four accused individuals were charged with committing a war crime that consisted in killing of a British prisoner of war who was living in hiding (*Law Reports of Trials of War Criminals*, vol. I, p. 35 and subseq.).
- The Jaluit Atoll Case (trial of Rear-Admiral Nisuke Masuda and four others of the Imperial Japanese Navy), before the United States Military Commission (United States–Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945). Killing of three America unarmed airmen who were captured and held in custody (*Law Reports of Trials of War Criminals*, vol. I, p. 71 and subseq.).
- The Dreierwalde Case (trial of Karl Amberger), before British Military Court (Wuppertal, 11-14 March 1946). Shooting five allied prisoners of war, allegedly on their attempts to escape, when on the way, under a convoy, to a railway station (*Law Reports of Trials of War Criminals*, vol. I, p. 81 and subseq.).
- The Essen Lynching Case (trial of Erich Heyer and six others, before British Military Court for the Trial of War Criminals (Essen, 18-19 and 21-22 December 1945). Lynching by civilians of three airmen when they were escorted to an interrogation centre. Erich Heyer, who was the commanding officer, gave order to the escort not to interfere if civilians should molest the prisoners of war (*Law Reports of Trials of War Criminals*, vol. I, p. 88 and subseq.).
- Trial of Albert Bury and Wilhelm Hafner, before the United States Military Commission (Freising, Germany, 15 July 1945). Killing of an American airman (*Law Reports of Trials of War Criminals*, vol. III, p. 62 and subseq.).
- The case of Aoki Toshio, by British Military Court (Singapore, 11 February 1946). Toshio was charged with „committing a war crime in that he at Sonkurai Camp in the month of November 1943 in violation of the laws and usages of war by forcing some three hundred British prisoners of war at that time in his custody the majority of whom were sick and injured to enter

a train containing no sufficient or suitable accommodation and by allowing Korean soldiers under his command to beat, kick and otherwise maltreat the prisoners, causing the death of seven of the prisoners and further injured the health of the remainder".

- The trial of Major Karl Rauer and six others before British Military Court (Wuppertal, Germany, 18 February 1946). Rauer and co-accused were charged with committing war crimes in that they were "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on 22, 24 and 25 March, 1945 (*Law Reports of Trials of War Criminals*, vol. IV, p. 113 and subseq.).
- The trial of Karl Buck and ten others before British Military Court (Wuppertal, Germany, 6-10 May 1946) The accused were charged with committing a war crime, in that they, at Rotenfels Security Camp, Gaggenau, Germany, on 25 November, 1944, in violation of the laws and usages of war, were concerned in the killing of six British prisoners of war, all of No. 2 Special Air Service Regiment, four American prisoners of war, and four French Nationals (*Law Reports of Trials of War Criminals*, vol. V, p. 39 and subseq.).
- The trial of Karl Adam Golkel and thirteen others before British Military Court (Wuppertal, Germany, 15-21 May 1946). The accused were charged with committing a war crime in that they at La Grande Fosse, France, on 15 October 1944, in violation of the laws and usages of war, were concerned in the killing of eight named members of No. 2 Special Air Service Regiment, a British unit, when prisoners of war (*Law Reports of Trials of War Criminals*, vol. V, p. 45 and subseq.).
- The trial of Lieutenant General Harukei Isayama and seven others before the United States Military Commission (Shanghai, 1-25 July 1946). The accused were charged with committing a war crime in that they did each "at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American prisoners of war, by permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war" (*Law Reports of Trials of War Criminals*, vol. V, p. 60 and subseq.).
- The trial of Gerhard Friedrich Ernst Flesch, SS OBE Sturmbannführer, Oberregierungsrat before Frostating Lagmannsrett (November–December 1946) and the Supreme Court of Norway (February 1948). The accused was charged with having committed war crimes *inter alia* in that In August-September 1944, he gave orders for the hanging of 15 Russian prisoners of war and supervised himself the execution (*Law Reports of Trials of War Criminals*, vol. VI, p. 111 and subseq.).
- The trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess before the Supreme National Tribunal of Poland (11-29 March 1947). The accused

was the Commandant of the Auschwitz Camp. He was charged with committing a war crimes and crimes against humanity in that from 1 May 1940 till the end of October 1943, as Commandant of the Auschwitz concentration camp set up by him, and thereafter from December 1943, till May 1945, as Head of the D.l. Department of the SS Central Economic and Administrative Office, as well as in June, July and August 1944, as commander of the SS garrison at Auschwitz he *inter alia* acting either himself or through the subordinate camp personnel deliberately deprived of life about 12,000 Soviet prisoners of war (*Law Reports of Trials of War Criminals*, vol. VII, p. 11 and subseq.)

- The trial of Karl Bauer, Ernst Schrameck and Herbert Falten, adjudicated by Permanent Military Tribunal (Dijon, 18 October 1945). The accused were charged with complicity in murder in that, by abusing authority and powers, they had provoked murder in reprisals of three soldiers of the F.F.I. captured as prisoners of war *(Law Reports of Trials of War Criminals*, vol. VIII, p. 28 and subseq.).
- The Dachau concentration camp trial. The trial of Martin Gottfried Weiss and thirty nine others, adjudicated by General Military Government Court of The United States Zone (Dachau, 15 November-13 December 1945). The accused were charged of cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities of prisoners whom app. 10 per cent were prisoners of war. In spring 1942, 6,000-8,000 Russian prisoners of war were killed. Around September 1944, 90 Russian officers were hanged in the camp (*Law Reports of Trials of War Criminals*, vol. XI, p. 17 and subseq.).
- The trial of Generaloberst Nickolaus von Falkenhorst, adjudicated by British Military Court (Brunswick, 29 July – 2 August 1946). He was charged with 9 charges, among them that he was responsible as Commander-in-Chief of Armed Forces, Norway, for the handing over by forces under his command, to the Security Service of, in total, 41 British prisoners of war of different ranks and 7 Norwegian prisoners of war, with the result that said prisoners were killed (*Law Reports of Trials of War Criminals*, vol. XI, p. 30 and subseq.).
- The Stalag Luft III Case. The trial of Max Wielen and 17 others, adjudicated by British Military Court (Hamburg, 1 July-3 September 1947). All the accused were charged with committing a war crime in that they were concerned in the killing in violation of the laws and usages of war of prisoners of war who had escaped from Stalag Luft III (*Law Reports of Trials of War Criminals*, vol. XI, p. 43 and subseq.).
- The trial of Lieutenant-General Baba Masao, adjudicated by Australian Military Court (Rabaul, 28 May-2 June 1947). The accused was charged with failing to discharge his duty as a commander to control the members of his

command whereby certain of members of his command murdered a number of prisoners of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 69 and subseq.).

- The trial of Johannes Oenning and Emil Nix, adjudicated by British Military Court (Borken, Germany, 21-22 December 1945). Oenning and Nix were accused of killing of a named Royal Air Force Officer, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 87 and subseq.).
- The trial of Hans Renoth and three others, adjudicated by British Military Court (Elten, Germany, 8-10 January 1946). All the accused were charged with and found guilty of killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 89 and subseq.).
- The trial of Willi Mackensen, adjudicated by British Military Court (Hannover, 28 January 1946). He was accused of, that as a result of his ill-treatment of prisoners of war, at least 30 prisoners of war died (*Law Reports of Trials of War Criminals*, vol. XI, p. 94 and subseq.).
- The trial of Eberhard Schoengrath and six others, adjudicated by British Military Court (Burgsteinfurt, Germany, 7-11 February 1946). They were charged with the killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 96 and subseq.).
- The trial of Ulrich Greifelt and others, adjudicated by United States Military Tribunal (Nuremberg, 10 October 1947 – 10 March 1948). There were three connected trials.
  a) In the trial of Hans Seibold and two others (5-7 March 1947) the defendants were implicated in the killing of a member of the United States Army, who was surrendered and unarmed prisoner of war in the custody of the then German Reich.
  b) In the trial held from 10 January to 21 March 1947, there were 23 accused with Jurgen Stroop at their head. They were implicated in the ill-treatment, including death, beatings, and torture, of members of armed forces then at war with the then German Reich, who were surrendered and unarmed prisoners of war in the custody of the then Germany Reich (*Law Reports of Trials of War Criminals*, vol. XIII, p. 14 and subseq.).
- United States Military Commission at the Mariana Islands (2-15 August 1946) tried and convicted Tachibana Yochio, a Lieutenant-General in the Japanese Army and 13 others, of murdering 8 prisoners of war.
- Australian Military Court at Rabaul (2 April 1946) sentenced Tomiyasu Tisato, a First Lieutenant in the Japanese Army, after finding him guilty of the murder of an unknown Indian prisoner of war (*Law Reports of Trials of War Criminals*, vol. XIII, p. 164 and subseq.).
- The trial of Takashi Sakai, adjudicated by Chinese War Crimes Military Tribunal of the Ministry of National Defence (Nanking, 29 August 1946). On 17 and 18 December 1941, in Hongkong, thirty prisoners of war were

massacred and twenty four more prisoners were killed at West Point Fortress. Between 24th and 26th December 1941, sixty to seventy wounded prisoners of war were killed (*Law Reports of Trials of War Criminals*, vol. XIV, p. 15 and subseq.).

1.25. A comparison of the post-war trials on executions/killings of prisoners of war with the Katyn massacre reveals a certain striking and differing element. Post-war trials dealt with crimes, however heinous they were, which were either committed in a direct post-combat context or concerned certain groups of prisoners of war which were considered, for different reasons, as stripped of the benefit of prisoner-of-war status (members of 'commando' units or military missions, escaped POWs, 'political commissars', 'terror flyers'). Such particular small groups of military personnel were selected to be killed, in violation of international humanitarian law, from the ranks of all prisoners of war. By contrast, in the case of the Katyn massacre almost all prisoners of war were designated to be killed (14,552) with only a tiny group of 395 individuals chosen to survive. In the context of the Second World War this very feature makes the Katyn massacre unique and exceptional as a war crime perpetrated against prisoners of war.

1.26. As a crime of international law, the Katyn massacre was imprescriptible at the time of its commission. The applicants' counsels rely in this respect on the Court's considerations in *Kononov v. Latvia*. First, the Court declared that in order to adequately qualify under law an act committed in 1944 (and to determine the ensuing legal consequences) the national prosecution authorities and courts were required to make reference to relevant international law, not only as regards the definition of the act, but also as regards the determination of any applicable limitation period (para. 230). Then the Court held that in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes, and neither did developments in international law since 1944 impose any limitation period with respect to war crimes (paras. 231-232).

1.27. In light of the above arguments, the Katyn massacre was clearly defined, at the time of its commission, as an imprescriptible crime of international law.

1.28. While they differed on other legal points, all the judges sitting as a Chamber in the Janowiec case agreed that the Katyn massacre was a war crime. The Chamber accepted that "the mass murder of Polish prisoners […] had the features of a war crime" (para. 149). Judges Anatoly Kovler and Ganna Yudkivskaya stated in their joint concurrent opinion that "the Katyn massacre was a particularly horrific war crime". The three dissenting judges (Dean Spielmann, Mark Villiger and Angelika Nußberger) held that "[t]he killing was a 'war crime'. There is no doubt about that" (para. 6).

1.29. It should be mentioned that the Katyn massacre was classified as having the features jointly of war crime, crime against humanity and genocide by the Russian Commission of Experts (in its report of 2 August 1993 prepared within the framework of investigation no. 159) and by the Polish Institute of

National Remembrance (decision of 30 November 2004 to commence investigation into the Katyn crime). Furthermore, political institutions and bodies in their resolutions called the Katyn massacre "a war crime having the character of genocide": resolution of Polish Parliament of 23 September 2009 and statement of the Delegation to the EU–Russia Parliamentary Co-operation Committee, European Parliament, dated 10 May 2010.

1.30. The qualification of the Katyn massacre as genocide becomes particularly justified when this massacre is treated as the most tragic element of the Soviet policy directed against the Polish population (specifically its elites) after the aggression in September 1939. As already pointed out in the application (point 14.5) there were four waves of forced deportations to remote sections of the Soviet Union. The total number of those subject to these deportations is, relying only on Soviet data, around 330,000-340,000. Another relevant factor is that already in 1937-1938 at least 111,091 Poles (relying again solely on Soviet data) living in the Soviet Union were executed during the so-called Polish operation conducted by the NKVD. This operation is documented in several books by the Russian historian Nikolay Ivanov (especially in *The First Punished Nation*, published in 1991). Worth mentioning are also: N.V. Petrov, A.B. Roginskiy, *The 'Polish Operation' of the NKVD*, *1937-38*, [in:] B. McLoughlin, K. McDermott (eds.), *Stalin's Terror*, Basingstoke, Palgrave Macmillan, London: 2003 [first published in Russian in 1997]; R. Gellately, B. Kiernan, *The Specter of Genocide: Mass murder in historical perspective*, Cambridge University Press, Cambridge: 2003, especially *Polish operation*, p. 233 and subseq.), T. Snyder, *Bloodlands: Europe Between Hitler and Stalin*, Basic Books, New York: 2010.

**Conclusion: The Katyn massacre constituted a violation of the prohibitions contained in the IV Hague Convention of 1907 and Geneva Convention of 1929. These prohibitions were recognised, as evidenced by post-war trials, as corresponding by 1939 to the relevant universally binding customary rules of humanitarian law. The Katyn massacre was also classified as a war crime in the indictment to the Nuremberg trial of the main war criminals before the International Military Tribunal. This legal qualification was never questioned, but fully endorsed at the Nuremberg trial by representatives of the Soviet Union, which was the legal predecessor of the Russian Federation. Furthermore the abundant case law from the post-war trials of war criminals demonstrates convincingly and unequivocally that executions of prisoners of war constituted and were treated as war crimes by the international community. Lastly, the Katyn massacre as a crime of international law was imprescriptible at the time of its commission, as it is today. The Katyn massacre may also be treated as a genocide case when analysed in the broader context of the Soviet policy directed against the Polish population (the so-called Polish operation in 1937-1938 and four forced deportations in 1939-1941).**

C. The genuine connection requirement

1.31. In the *Šilih* judgment the Court ascertained that "in certain circumstances the [genuine] 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" (para. 163 *in fine*) – [henceforth we will refer to this construct as either "the underlying values principle" or "the *Šilih* principle".

1.32. In the judgment of *Janowiec and Others v. Russia* the Court referred for the first time, while examining whether the case under consideration falls within the temporal jurisdiction of the Court, to "the underlying values principle". The Chamber asserted that the mass murder of Polish prisoners by the Soviet secret police "had the features of a war crime" which was imprescriptible (para. 140). As such, the Katyn massacre constituted a negation of the very foundation of the Convention and was contrary to the guarantees and the underlying values of the Convention.

1.33. In applying the "the underlying values principle" the Chamber identified two elements that must jointly occur. First, the triggering event (death preceding the ratification) must be of a larger dimension than an ordinary criminal offence. Second, there must be sufficiently important new material that casts new light on the offence and comes into the public domain in the post-ratification period.

1.34. The new element requirement, which significantly restricts the original *Šilih* test based on the effective protection of the guarantees and the underlying values of the Convention, is a novelty introduced by the *Janowiec* judgment. Although this requirement draws on the *Brecknell v. United Kingdom* judgment, it has been applied in *Janowiec* in the specific context of mass scale human rights violations that constitute serious crimes under international law and raise the particular issue of whether the Court is competent to hear the case on the merits due to the specific rationale as enunciated in the *Šilih* principle.

1.35. The Chamber's restrictive reconstruction of the *Šilih* test (introduction of the new information requirement) was contested in the joint dissenting opinion of judges Dean Spielmann, Mark Villiger and Angelika Nußberger. The applicants' counsels agree with that criticism.

1.36. Without determining here whether the *Šilih* principle applies to all crimes of international law or only to some of them, the applicants' counsels are of the opinion that there exist certain instances of acts violating the very foundation of the Convention system and its underlying values whose scale, magnitude and gravity should make the Court competent *ratione temporis* without the new information requirement (provided that all other *rationes* are met).

1.37. Murderous crimes of international law can be committed by "private individuals" or "occasionally" by State functionaries, but sometimes they are also perpetrated as part of a State policy, deliberately planned and realised on the orders of the highest State authorities. It is with regard to this final category

of international crimes that the interrelationship between the procedural obligation of effective investigation and the real and effective protection of the Convention values becomes particularly pertinent.

In other words, if we were to reconstruct a *continuum* of crimes of international law it would starts with crimes committed by private individuals, followed by crimes 'occasionally' committed by State functionaries, and on the extreme edge of this *continuum* would be located crimes that involve States in the strongest possible way: these are mass-scale crimes orchestrated and carried out on the orders of the highest State authorities, such as the Holocaust and the Katyn massacre.

1.38. The applicants' counsels are of the opinion that the last sentence of paragraph 163 of the *Šilih* judgment should be applied in a manner that have regard to the character of acts (i.e. their scale, magnitude and gravity as well as involvement of the State) contravening the guarantees and the underlying values of the Convention. In the alternative, the Convention values clause from the *Šilih* judgment might be understood as applicable, but without the restrictive new information requirement, only to the most serious instances of crimes of international law. This reading seems to have been suggested in the joint dissenting opinion of judges Dean Spielmann, Mark Villiger and Angelika Nußberger.

1.39. The position advocated by the applicants' counsels (differentiated application of the Convention values clause from the *Šilih* judgment) corresponds to the approach of the Inter-American Court of Human Rights which has identified, in the context of human rights violations, a number of aggravating circumstances, leading even subsequently to the concept of aggravated State responsibility applied by the Inter-American Court. Such aggravating circumstances occur when serious human rights violations are perpetrated in pursuance of planned State policies.

Worth stressing is also that the construct of aggravated State responsibility sits closely to another legal notion – that of a State crime. State crime is defined as „a grave violation of peremptory international law (*jus cogens*). State crime becomes even more evident to the extent that it is established by the State's intention (act or omission) or tolerance, acquiescence, negligence or omission in relation to grave violations of human rights and international humanitarian law perpetrated by its agents, even in the name of a State policy" (concurring opinion of Antônio A. Cançado Trindade, para. 35 in the case of *Plan de Sánchez Massacre v. Guatemala*, judgment of 29 April 2004 [merits]). To give another quotation: "Crimes of State take shape, in brief, as especially grave violations of international law entailing an aggravated responsibility (with aggravating circumstances, thus evoking a category of criminal law); the gravity of the violation directly affects the fundamental values of the international community as a whole" (concurring opinion of Antônio A. Cançado

Trindade, para. 28 in the case of *Myrna Mack Chang v. Guatemala*, judgment of 25 November 2003 [merits, reparations and costs]).

1.40. Both concepts of aggravating circumstances and aggravated State responsibility were applied by the Inter-American Court of Human Rights in its case law dealing with State-organised (or supported) massacres, killings and "enforced disappearances", e.g. *Plan de Sánchez Massacre v. Guatemala*, judgment of 29 April 2004 [merits], par. 51; *Gómez-Paquiyauri Brothers v. Peru*, judgment of 8 July 2004 [merits, reparations and costs], para. 76; *Goiburú et al. v. Paraguay* (Operation Condor Case), judgment of 22 September 2006, paras. 86-92; *Myrna Mack Chang v. Guatemala*, judgment of 25 November 2003 [merits, reparations and costs], para. 114; *La Cantuta v. Peru*, judgment of 29 November 2006 [merits, reparations and costs], paras. 115-116; *Serrano-Cruz Sisters v. El Salvador*, judgment of 23 November 2004 [preliminary objections], para. 100; *Molina Theissen v. Guatemala*, judgment of 3 July 2004 [reparations], para. 41. See also the concurring opinions of judge Antônio A. Cançado Trindade appended to these judgements, esp. paras. 24-36 of his concurring opinion in the case of *Plan de Sánchez Massacre v. Guatemala*).

1.41. Although the concepts of aggravating circumstances and aggravated State responsibility were essentially applied by the Inter-American Court of Human Rights with regard to the substantive acts (killings), they were also used in the context of procedural obligations to investigate. Thus, in the case of *Myrna Mack Chang v. Guatemala* the Inter-American Court held that: "since then and still today, there have not been effective judicial mechanisms to investigate the human rights violations nor to punish those responsible, all of which gives rise to an aggravated international responsibility of the respondent State" (para. 139). In the same sense see: *Goiburú et al. v. Paraguay*, quoted above; *"Mapiripán Massacre" v. Colombia*, judgment of 15 September 2005 [merits, reparations, and costs], para. 295.

1.42. The applicants' counsels are aware that in all quoted cases the Inter-American Court was competent to deal with both substantive and procedural obligations relating to the right to life. Therefore the constructs of aggravating circumstances and aggravated State responsibility were referred to by the Inter-American Court especially to determine the question of reparation. However, the applicants' counsels consider that these two constructs may become highly relevant, along with the notion of State crimes, to the interpretation of the clause of Convention values from the *Šilih* judgment.

1.43. Also worth stressing is that in those cases where the Inter-American Court was not competent *ratione temporis* to deal with killings perpetrated by State units or agents, the Court found itself competent to verify if the investigation was effective without referring to any pre-requirements, as e.g. a new element test. See e.g. *Blake v. Guatemala* [preliminary objections], judgment of 2 July 1996, paras. 39 and 40; *Radilla Pacheco v. México* [preliminary objections,

merits, reparations and costs], judgment of 23 November 2009, par. 23; *Ibsen Cárdenas and Ibsen Peña v. Bolivia* [merits, reparations and costs], judgment of 1September 2010, para. 21]; *Serrano-Cruz Sisters v. El Salvador*, judgment of 23 November 2004 [preliminary objections], para. 68; *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], judgment of 24 November 2010, paras. 17-18. Although in its earlier case law the Inter-American Court preferred to combine the obligation to conduct an efficient investigation on killings and enforced disappearances with Article 8 (right to fair trial) and 25 (right to judicial protection) it recently analyses this obligation also under Article 4 (right to life).

1.44. Turning back to the European Convention, two additional factors may corroborate that the Court is competent to adjudicate on the procedural obligations. First, the Council of Europe and the Convention came into being as democratic political and legal alternatives to the two totalitarian regimes, Nazism and Stalinism, which were responsible for horrific mass-scale violations of human dignity. The vision of the founders of the Council of Europe and the Convention was directed towards a system that clearly defines what is just and what unjust. This intention clearly transpires from the *Travaux préparatoires* to the Convention. To give only one example:

"while I was in the Gestapo prisons, while one of my brothers was at Dachau and one of my brothers-in-law was dying at Mauthausen, my father […] was interned at Buchenwand. He told me that on the monumental gate of the camp was this outrageous inscription: 'Just or unjust, the Fatherland'.

I think that from our First Session we can unanimously proclaim that in Europe there will henceforth only be just fatherlands.

I think we can now unanimously confront 'reasons of State' with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded – the sovereignty of justice and law." Speech of Pierre-Henri Teitgen (*Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, The Hague: 1975-1985, vol. I, pp. 48-49).

1.45. The Katyn massacre was committed by a totalitarian regime whose aims and values radically and drastically contradicted those of the Convention. It therefore becomes mandatory, if the Convention values are to be protected in the real and effective manner, that the political successors of the totalitarian States, currently Contracting Parties to the Convention, should conduct an effective investigation into the totalitarian crimes.

1.46. Second, an effective investigation into the Katyn massacre is a prerequisite for the rehabilitation of the murdered persons as victims of political repression. To date, those persons killed are considered, in legal terms, as sentenced and executed in conformity with Soviet legislation.

It is also worth noting the social consequences of the lack of efficient investigation. The fact that the Katyn massacre was committed by the Soviet Union

is broadly denied in Russia, even by members of the Russian Parliament. In a public opinion poll conducted in Russia in 2010 as many as 53 percent of the respondents did not know who committed the Katyn massacre, 28 percent attributed it to the Germans and only 19 percent pointed to the Soviet Union.

Another illustration of the indirect adverse consequences of the lack of efficient investigation is that some Russian towns continue today to bear the names of members of the Politburo of the Communist Party who on 5 March 1940 made the decision to shoot almost 22,000 Polish citizens. Among these towns is Kaliningrad, capital of the region adjacent to the Polish-Russian border.

In the "Operation Condor Case" the Inter-American Court of Human Rights held "the gravity of the facts cannot be separated from the context in which they occurred and it is this Court's duty to emphasize this, for the purpose of preserving the historical memory and the imperative need to ensure that such facts are never repeated" (*Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, para. 93).

1.47. Furthermore, the applicants' counsels are of the opinion that even under the new element (material) test as suggested and applied by the Chamber's majority, the Court may be competent *ratione temporis* to examine whether the procedural obligation of the respondent State has been fulfilled. This test, requiring that there should be sufficiently important new material casting new light on the offence and coming into the public domain in the post-ratification period, draws on the experience of a normally and properly conducted investigation. In such an investigation new evidence and materials are added to and accumulated or confronted with the previous ones in an effort to explain the circumstances of a given death (or deaths). If no relevant material of sufficiently important value becomes known after the "critical date" it can be assumed that there is no element capable of providing a bridge between the death and the ratification. But there may also exist some specific cases in which the State does not take any steps in order to collect or identify the relevant sufficiently important materials (in particular when it is known or highly probable where such materials are to be found or who may testify as a witness). Another specific, although rare, situation is a sudden change in the course of proceedings (investigation) which disregards or denies the previous results and findings of that investigation.

1.48. If the new element (material) test is limited to instances of new sufficiently important evidence becoming known in the post-ratification period, the Court will be competent to deal only with cases in which it is alleged that the respondent State does not attach the necessary weight to such new evidence. Outside the jurisdiction of the Court would remain, however, cases where the State abstains from collecting such evidence, explicitly disregarding or neglecting – in the post-ratification period – the existing information

sources ("abstention/inaction cases"), or where the State adopts (also in the post-ratification period) the conclusions that starkly contradict the findings in the previous stages of the investigation and even the common knowledge and historically established facts ("perversion cases"). The two latter categories of cases constitute more serious instances of non-fulfilment of procedural obligations than the previous ones. Furthermore, the exclusion of these two categories of cases from the scrutiny of the Court would encourage States not to take activities or measures leading to the disclosure of new materials and evidence ("abstention/inaction cases") or would leave unanswered by the Court acts constituting (after the "critical date") denials of the elementary requirements of procedural justice.

1.49. The applicants' counsels are of the opinion that the new element test should not be construed restrictively as relating only to new sufficiently important pieces of evidence, but should be understood more broadly as a new sufficiently important (procedural) fact. The latter interpretation seems to have been adopted by the three dissenting judges when they contemplated, alternatively to their special-circumstances approach, the new element test as a basis for the Court jurisdiction (especially points 10 and 12). Although decisions closing the investigation are not as such new material for the investigation, they may constitute a new important fact relevant in the context of Article 2 of the Convention, especially when they mark a sudden change in the investigation.

**Conclusion: In the case of mass-scale crimes of international law prepared and perpetrated by a State, such as the Holocaust and the Katyn massacre, which to an extreme degree contravene the guarantees and the underlying values of the Convention, the Court should be competent ratione temporis to hear the case without any additional requirements, as e.g. new element test. This position is supported by the established case law of the Inter-American Court of Human Rights (especially massacre cases). But even under the new element test the European Court of Human Rights would become competent ratione temporis if the required new element was not limited to new evidence emerging in the post-ratification period but was understood broadly and adequately as a new sufficiently important (procedural) fact.**

D. On whether there is a difference, in legal terms, between situations in which a material act (death) occurred before and after the date on which the European Convention came into legal force (3 September 1953)

1.50. In their submissions the Russian government call on the Court to distinguish two situations: when an act of killing happened before the Convention ratification by a State but after the Convention entered into force, and when such an act occurred before 3 September 1953. It is alleged that in the first situation a violation of the Convention in its substantive aspect is beyond the temporal

jurisdiction of the Court whereas in the second situation it does not exist at all (para. 8 of the written submissions dated 30 November 2012).

1.51. The applicants' counsels do not agree with this allegation. Legal rule protecting human life and prohibiting killings is not an invention of the European Convention but a universal moral and legal precept that long preceded the Convention's enactment. Implicit in this prohibition is a procedural obligation to investigate when killings occur.

1.52. But first of all, the applicants' counsels wish to rely on decisions of international bodies that dealt with the legal topic raised on the instant proceedings by the Russian government.

1.53. The Inter-American Court of Human Rights was confronted in *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010), with a case of around 70 members and supporters of the Communist Party of Brazil executed between 1972-1975 during a series of operations conducted by the Brazilian army. The Inter-American Convention Human Rights came into force on 18 July 1978. Brazil recognised the contentious jurisdiction of the Inter-American Court on 10 December 1998. When Brazil raised a *ratione temporis* objection, the Court accepted it in relation to the substantive act (killings) but rejected it as far as there were some continuing obligations, among them an obligation to investigate under Article 4 (right to life) – par. 16-18. See also *Almonacid-Arellano and Others v. Chile* [preliminary objections, merits, reparations and costs], Judgment of 26 September 2006, paras. 46-50. This case concerned a killing by State agents that took place on 17 September 1973.

1.54. In the same vein the appellate bodies of the World Trade Organisation dismissed *ratione temporis* objections based on allegations that the treaty in question was applied retroactively due to the fact the contested measures had preceded the date that the treaty entered into legal force.

1.55. Thus in the so called *Banana (III)* case (*European Communities – regime for the importation, sale and distribution of bananas*; WT/DS27/AB/R; decision/report of 9 September 1997) it was held (footnotes omitted):

"235. The European Communities also raises the question whether the Panel erred in giving retroactive effect to Articles II and XVII of the GATS [General Agreement on Trade in Services – I.C. Kamiński], contrary to the principle stated in Article 28 of the Vienna Convention. Article 28 states the general principle of international law that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to … any situation which ceased to exist before the date of entry into force of the treaty …". The Panel stated in its finding on this issue that:

'… the scope of our legal examination includes only actions which the EC took or continued to take, or measures that remained in force or continued to be applied by the EC, and thus did not cease to exist after the entry into

force of the GATS. Likewise, any finding of consistency or inconsistency with the requirements of Articles II and XVII of GATS would be made with respect to the period after the entry into force of the GATS. [Panel Report, para. 7.308]'

The Panel stated, further, in a footnote to this finding, that 'the EC measures at issue may be considered as continuing measures, which in some cases were enacted before the entry into force of the GATS but which did not cease to exist after that date (the opposite of the situation envisaged in Article 28)'. […]

237. It is […] evident from the terms of its finding that the Panel concluded, as a matter of fact, that the de facto discrimination did continue to exist after the entry into force of the GATS. This factual finding is beyond review by the Appellate Body. Thus, we do not reverse or modify the Panel's conclusion in paragraph 7.308 of the Panel Reports."

Similarly in the case of *Canada – term of patent protection* (WT/DS170/AB/R; decision/report of 18 September 2000) it was stated that:

"70. […] A treaty applies to existing rights, even when those rights result from 'acts which occurred' [in the wording of Article 70.1 of the TRIPS Agreement – Agreement on Trade-Related Aspects of Intellectual Property Rights – I.C. Kamiński] before the treaty entered into force. […]

72. Article 28 of the Vienna Convention covers not only any 'act', but also any 'fact' or 'situation which ceased to exist'. Article 28 establishes that, in the absence of a contrary intention, treaty provisions do not apply to 'any situation which ceased to exist' before the treaty's entry into force for a party to the treaty. Logically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations do apply to any 'situation' which has not ceased to exist — that is, to any situation that arose in the past, but continues to exist under the new treaty. Indeed, the very use of the word 'situation' suggests something that subsists and continues over time; it would, therefore, include 'subject matter existing […] and which is protected', such as Old Act […] patents at issue in this dispute, even though those patents, and the rights conferred by those patents, arose from 'acts which occurred' before the date of application of the TRIPS Agreement for Canada."

1.56. Highly relevant for the instant case is also the decision (view) of the United Nations Human Rights Committee following the communication of *Norma Yurich v. Chile* (no. 1078/2002, 2 November 2005, U.N. Doc. CCPR/C/85/D/1078/2002 (2005). The case was related to an enforced disappearance in October 1974. The International Covenant on Civil and Political Rights entered into force on 23 March 1976 (same as in Chile), and Chile accepted the Optional Protocol on 28 August 1992. In its decision the Committee found the communication inadmissible *ratione temporis* having regard to a declaration the government made upon the ratification of the Covenant. This

declaration stipulated that "[i]n recognising the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990 (underlined by I.C. Kamiński)."

There are good reasons to hold that States are precluded from making these kinds of declarations in respect to human rights international law treaties[13], but taken at face value, this declaration and the Committee's accepting reaction to it demonstrates that there exists a legal instrument for States wishing to limit, in temporal terms, the application of a given treaty. The Russian Federation has not made an analogous declaration or reservation when ratifying the European Convention.

1.57. Article 28 of the Vienna Convention on the Law of Treaties (VCLT), which codifies a well-established principle of international law, stipulates that "[u]nless 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."

1.58. But *a contratrio* a treaty applies to a situation that does not cease to exist but persists after entry into force of this treaty. This position is confirmed by the drafting history of the VCLT. In paragraph 3 of its commentary to Article 28 (which was then Article 34, the International Law Commission stated: "If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date."[14]

Article 28 was adopted by 97 votes to none, with 1 abstention.

1.59. Unless otherwise stated in the treaty, its provisions apply to situations that do not cease to exist after the treaty's entry into force. Thus a State-party wishing to exclude the application of the treaty to such situations must do it by means of an express reservation. This position is mirrored in the case law of the Permanent Court of International Justice and International Court of Justice.

In *Mavrommatis Palestine Concessions* (judgment of 30 August 1924, Series B no. 3) the PCIJ held that:

"90. […] The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its

[13] As did five members of the Committee in their joint dissenting opinion appended to the Committee's view in that case.

[14] *Draft Articles on the Law of Treaties with commentaries*, "Yearbook of the International Law Commission" 1966, vol. II, p. 212.

establishment. […] The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above."

Referring to a French government reservation expressing the *ratione temporis* limitation, the PCIJ stated in *Phosphates in Morocco* (Judgment of 14 June 1938, Series A/B no. 74) that:

"30. Not only are the terms [of the French declaration – I.C. Kamiński] expressing the limitation ratione temporis clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise."

Lastly, the ICJ in *Case Concerning Application of the Genocide Convention* [preliminary objections] (judgment of 11 July 1996, ICJ Reports 1996) deemed that:

"34. […] Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention – and in particular Article IX – does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction ratione temporis, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina […]"

1.60. The above mentioned rule is accepted by the doctrine of international law. We quote only two eminent international lawyers. Paul Tavernier, a professor of Université Paris XI–Sud and director of the Centre de recherches et d'études sur les droits de l'Homme et le droit humanitaire (CREDHO) wrote that "une limitation ratione temporis devra être expressément prévue dans l'acte attributive de compétence et elle sera interprétée restrictivement" (*Recherches sur l'application dans le temps des actes et des règles en droit international public. Problèmes de droit intertemporel ou de droit transitoire*, LGDJ, Paris: 1970,

p. 217–18). Rosalyn Higgins, a judge and a former President of the International Court of Justice, held that "The broad position of the Court – and its predecessor the Permanent Court of International Justice – has been that acceptance of the jurisdiction of the Court does have retrospective effect […] unless this is specifically excluded by a reservation to the general acceptance of jurisdiction" (*Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, vol. II, OUP, Oxford: 2009, p. 876).

1.61. Furthermore, the applicants' counsels respectfully draw the attention of the Court to the case law of the Permanent Court of International Justice and the International Court of Justice relating to the distinction between the situations or facts which constitute a source of the rights claimed by a party of the proceedings and a source of the dispute.

In *Jurisdictional Immunities of the State. Germany v. Italy* (order of 20 July 2010) the ICJ stated:

"the facts and situations [the Court – I.C. Kamiński] must take into consideration are those with regard to which the dispute has arisen or, in other words, only those which must be considered as being the source of the dispute, those which are its 'real cause' rather than those which are the source of the claimed rights".

In *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 4 April 1939, PCIJ Rep. Series A/B No. 77), the PCIJ held that

"87. […] The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute. No such relation exists between the present dispute and the awards of the Mixed Arbitral Tribunal. The latter constitute the source of the rights […] It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute."

1.62. The Permanent Court of International Justice and the International Court of Justice confirmed that whereas the source of the dispute must relate to situations or facts subsequent to the ratification, the rights of a party to the dispute may originate in the pre-ratification period. Thus the PCIJ held in *Phosphates in Morocco* that "[s]ituations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose". In Right of Passage over Indian Territory, Portugal v. India (judgment of 12 April 1960, ICJ Reports 1960) the same court stated that "[t]he Permanent Court thus drew a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute. Only the latter are to be taken into account for the purpose of applying the Declaration

accepting the jurisdiction of the Court" (p. 33/35). In *Electricity Company of Sofia and Bulgaria* the PCIJ considered that "a situation of fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula" (para. 87). Summarising the approach of the PCIJ in that case the ICJ said that "[i]n the Electricity Company case, Bulgaria argued that the awards of the Belgo-Bulgarian Mixed Arbitral Tribunal, which predated the critical date, had to be treated as the 'situations' that gave rise to the dispute. The Permanent Court of International Justice rejected this argument and held that, while these awards constituted the source of the rights claimed by Belgium, they were not the source of the dispute" (*Certain Property, Liechtenstein v. Germany* [preliminary objections, judgment], Judgment of 10 February 2005, ICJ Reports 2005, para. 41).

1.63. In the instant case the dispute is not about the killings that occurred before the critical date but about the subsequent failure of the State to effectively investigate these killings. The killings constitute the source of the right claimed by the applicants, i.e. the right to have the killings investigated by the State in a proper and effective manner. Had it not been for the killings, the procedural obligation to investigate would not have arisen. Only in this sense is the dispute related to the pre-accession facts. But the source of the dispute, i.e. the non-fulfilment of the procedural obligation, is located already in the post-ratification period.

**Conclusion: the fact that a given death precedes the date on which a certain international instrument entered into legal force does not impede an international organ to verify whether an efficient investigation of these deaths was carried out. The autonomous and continuing obligation to investigate is activated by the death/killing (source of the procedural right), but the non-fulfilment of the procedural obligation (source of the dispute) is located in the post-ratification period. The jurisdiction of controlling international bodies may be limited by means of a State declaration stipulating that that State accepts the jurisdiction in question only in respect to situations beginning after the ratification date or another date. The legal position advanced by the applicants' counsels is supported by the case law of the Inter-American Court on Human Rights, the United Nations Human Rights Committee, the appellate bodies of the World Trade Organisation, as well as the Permanent Court of International Justice and the International Court of Justice.**

E. The alleged lack of competence *ratione materiae*

1.64. The Russian government hold that the Court is not competent *ratione materiae* to assess the Katyn massacre ("Katyn events" as the crime is called) as it is a matter of international humanitarian law laying beyond the reach of the

Convention. It is stated that the Chamber assessment was contrary to Article 19 of the Convention (part 3.2 of written submissions dated 30 November 2012).

1.65. The strict separation of international humanitarian law and international human rights law cannot be upheld. First, the Vienna Convention on the Law of Treaties stipulates in Article 31 (3) (c) that a treaty is to be interpreted with due regard to "any relevant rules of international law applicable in the relations between the parties".

1.66. Second, a number of international courts confirmed that international humanitarian law and international human rights are not separate sets of rules but are complementary. The International Court of Justice stated in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996, ICJ Reports 1996) that:

"25. […] the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

This position was followed in the ICJ's subsequent decisions: advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004] ICJ Reports, par. 106); Judgment in *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda* (19 December 2005, ICJ Reports 2005, para. 216; order in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (15 October 2008, ICJ Reports 2005, para. 112).

1.67. A *ratione materiae* objection of the kind submitted in the instant case by the Russian government was also raised by the respondent State in the case of *Serano-Cruz Sisters v. El Salvador* [preliminary question] before the Inter-American Court of Human Rights (judgment of 23 November 2004). The Court stated that:

"111. […] [the Court – I.C. Kamiński] must refer to the complementarity between international human rights law and international humanitarian law and the applicability of the former in times of peace and during armed conflict, and also repeat that this Court is empowered to interpret the norms of the American Convention in light of other international treaties.

112. Regarding the complementarity of international human rights law and international humanitarian law, the Court considers it should emphasize that all persons, during internal or international armed conflict, are protected by the provisions of international human rights law, such as the American Convention, and by the specific provisions of international humanitarian law. Consequently, there is a convergence of international norms protecting those who are in such situations. In this regard, the Court stresses that the specificity of the provisions of international humanitarian law that protect individuals subject to a situation of armed conflict do not prevent the convergence and application of the provisions of international human rights law embodied in the American Convention and other international treaties."

The Court then concluded that:

"119. […] it has the authority to interpret the provisions of the American Convention in light of other international treaties […] [and – I.C. Kamiński] to use the provisions of international humanitarian law […] to give content and scope to the provisions of the American Convention."

In numerous cases the Inter-American Court of Human Rights found violations of the Inter-American Convention of Human Rights when State actions occurred in the context of non-international armed conflicts (e.g. *Molina Theissen v. Guatemala* [reparations], Judgment of 3 July 2004, par. 15 and 41; *Molina Theissen v. Guatemala*, Judgment of 4 May 2004, para. 40; *Bámaca Velásquez v. Guatemala* [reparations], Judgment of 22 February 2002, para. 85; *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, paras. 143, 174, 207, 213 and 214).

1.68. The European Court of Human Rights perceives international humanitarian law and international human rights as complementary areas of law. This Court referred to international humanitarian law to provide interpretation of the Convention provisions. To give only a few examples, in *Varnava and Others v. Turkey* (GC judgment of 18 September 2009, appl. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) the Court stated that:

"185. […] Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict."

In *Jedda v. United Kingdom* (GC judgment of 7 July 2011, appl. no. 27021/08) the Court was looking into international humanitarian law to ascertain if specific rules of international law existed, which allowed States to use indefinite detention without trial (para. 107).

In several Chechen cases the Court applied the Convention in the context of non-international armed conflict: see: *Isayeva v. Russia* (Judgment of 24 February 2005, appl. no. 57950/00; *Khatsiyeva v. Russia* (judgment of 17 January

2008, appl. no. 5108/02; *Mezhidow v. Russia* (Judgment of 25 September 2008, appl. no. 67326/01).

1.69. Third, the inseparability of international human rights law from international humanitarian law is clearly evidenced by the insertion into human rights treaties of special provisions allowing State-Parties to derogate from human rights obligations in time of war or other public emergency. Such derogations are allowed only "to the extent strictly required by the exigencies of the situation" and must not be inconsistent with other obligations under international law (Article 15 of the Convention). Article 27 of the Inter-American Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights are written in the same vein.

**Conclusion: the relevant case law of several international courts clearly demonstrates that international humanitarian law and international human rights are not treated as separate sets of rules, but rather are complementary. When humanitarian law is applicable, rules of this law are used to establish the scope and content of the rights and freedoms protected under human rights treaties.**

F. The alleged lack of obligation under international law to investigate the Katyn massacre

1.70. The Russian government alleges that there is no obligation under international law to investigate the Katyn massacre (part 4.2 of written submissions dated 30 November 2012). It is of the opinion that until 1945 international law did not contain any universally binding rules on the definition of war crime, personal responsibility for them, respective punishment and the statutory limitations for bringing to liability for war crimes. It also argues that even if hypothetically the investigation into the Katyn massacre had been initiated under the criminal law provisions currently in force in Russia, it would have been futile as it would have been terminated due to the death of the suspects.

1.71. The applicants' counsels disagree. First, the requirement to conduct an effective investigation into instances of killings or enforced disappearances is not made conditional upon the possibility of bringing the alleged suspects to criminal responsibility. The parameters of effective investigations are much broader and they encompass, among other obligations, also an obligation to determine and reveal the circumstances of tragic events. This aspect of the obligation to hold an effective investigation has been especially stressed in the case law of the Inter-American Court of Human Rights, which was confronted with numerous massacres committed by State agents. Thus in *Velásquez Rodriguez v. Honduras* (Judgment of 29 July 1988) the Court deemed that "even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains" (para. 181).

1.72. Also in the case law of the European Court on Human Rights the establishment of the truth is considered an inherent aim of the investigation relating to violations of the rights protected under Article 2 and 3. A right to truth for victims and society at large has been recognised by the Court as an element of the duty to investigate. *See* e.g. *Association of "21 December 1989" and Others v. Romania* (appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011, paras. 141, 144 and 194; *El-Masri v. the former Yugoslav Republic of Macedonia* (GC judgment of 13 December 2012, appl. no. 39630/09, para. 191).

1.73. A right to truth is of particular and preponderant importance in cases of gross human rights violations. The UN Human Rights Council in their Resolutions 9/11 and 12/12: Right to the Truth (of 24 September 2008 and 12 October 2009 respectively) referred to "the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations". In the same vein, the Inter-American Court of Human Rights stated in *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010, while summarising the position of this Court, that "all persons, including the next of kin of the victims of gross human rights violations, have the right to know the truth. As a consequence, the next of kin of the victims and society must be informed of all that occurred in regard to said violations" (para. 201). See also e.g. *Case of 19 Tradesmen v. Colombia* [merits, reparations and costs], Judgment of 5 July 2004, para. 261; *Carpio Nicolle and Others v. Guatemala* [merits, reparations and costs], judgment of 22 November 2004, para. 128; *Myrna Mack Chang v. Guatemala* [merits, reparations and costs], Judgment of 25 November 2003, para. 274.

1.74. In Poland, the National Remembrance Institute conducts numerous investigations into Nazi, Soviet and communist crimes (as many as 317 such investigations were pending as of 2010). Only when the facts of a particular event have been duly investigated and established is a given investigation finished by a decision either to prosecute or to discontinue the proceedings due to formal obstacles, as e.g. death of those responsible. The same practice is known in other countries, e.g. in Germany. Such investigations are not an expression of a goodwill gesture but rather fulfil the legal obligation to investigate – one that exists under national and international law, as well as under the European Convention.

1.75. Second, as far as the obligation to prosecute is concerned the applicants' counsels wish to repeat that as evidenced by the post-war trials the features of the war crime consisting in killings of prisoners-of-war have been clearly determined (or defined) by universally binding rules of humanitarian law that existed already before the war started in 1939. Thus, there is no violation of the *nullum crimen sine lege* principle due to the alleged vagueness of the law as

suggested by the Russian government. The post-war trials also unequivocally confirm that international law, as it existed in 1939, made not only States but also individuals responsible for war crimes. Thus the International Military Tribunal stated in its main judgment (*Goering and Others Trial*) that "international law imposes duties and liabilities upon individuals as well as upon States has long been recognized." It then continued: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."[15]

The principle of individual criminal responsibility for war crimes is a long-standing rule of customary international law already recognized in the Lieber Code of 24 April 1863 (Art. 44 and 47) and the Oxford Manual of 9 September 1880 (Art. 48) and repeated in many treaties of international humanitarian law since then.

1.76. In light of the above, it cannot be accepted, as submitted by the Russian government, that the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, prepared in 1950 by the International Law Commission of the United Nations, were the first universally binding international law instrument that recognised personal responsibility for war crimes. Furthermore, the documents from the drafting history of these Principles expressly confirms that the task of the Commission was "merely to formulate" the Principles as they already existed and had been "affirmed" by the UN General Assembly resolution 95(I) of 11 December 1946.[16]

1.77. Third, the applicants' counsels agree with the Court's position in the *Kononov* case that at the time of Second World War no limitation period was fixed by international law with regards to the prosecution of war crimes, and neither did developments in international law after that war impose any limitation period with respect to war crimes (paras. 231-232). Furthermore, the Convention on the Non-Applicability of Statutory Limitation on War Crimes and Crimes against Humanity, enacted in New York in 1968, stipulated that no statutory limitation applies "irrespective of the date of their commission" to the crimes the Convention refers to. As the killing of innocent prisoners-of-war was in 1939 precisely defined as a war crime, both in terms of its content and the personal liability of individuals, the application of the 1968 Conven-

[15] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg: 1947, vol. I, p. 223. *See also* e.g. *High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*, *Law Reports of Trials of War Criminals*, vol. XII, p. 60-61.

[16] This conclusion was set forth already in paragraph 26 of the report of the Commission on its first session (approved by the General Assembly in 1949), then in the report of the special *rapporteur*, to be repeated in the final document submitted by the Commission. See: *Formulation of Nurnberg Principles*, „Yearbook of the International Law Commission" 1950, vol. II, p. 189, para. 36; and *Report of the International Law Commission to the General Assembly*, *ibidem*, p. 374, para. 96.

tion, which the Soviet Union, being the legal predecessor of the Russian Federation, ratified, would not amount whatsoever to a violation of the principle of *nullum crimen sine lege*.

**Conclusion: killing innocent prisoners-of-war was in 1939 precisely defined as a war crime both in terms of its content and the personal liability of individuals. That crime is not subject to any statute of limitation. But even when there exist obstacles that hinder bringing those responsible to criminal justice, the State is still under the obligation to conduct an effective investigation in cases of gross human rights violations. This obligation is co-related with "a right to truth" belonging both to relatives of victims and the society at large.**

G. Other legal issues raised in the instant case

1.78. Lastly, the Russian government questions the Court's competence *ratione temporis* by relying on several pre-*Šilih* inadmissibility decisions (part 4.4 of written submissions dated 30 November 2012).

1.79. The Russian government entirely ignores the coherent post-*Šilih* case law in which the Court found itself competent to adjudicate on the procedural obligation under Article 2 in cases concerning deaths or killings that had occurred before the "critical date". To date, the Court has unanimously applied its position adopted in *Šilih* in 21 subsequent judgments (with many admissibility decisions). These judgments are: *Agache and Others v. Romania* (appl. no. 2712/02, judg. of 20 October 2009); *Trufin v. Romania* (appl. no. 3990/04, judg. of 20 October 2009); *Velcea and Mazăre v. Romania* (appl. no. 64301/01, judg. of 1 December 2009); *Şandru v. Romania* (appl. no. 22465/03, judg. of 8 December 2009), *Tuna and Tuna v. Turkey* (appl. no. 22339/03, judg. of 19 January 2010), *Floarea Pop v. Romania* (appl. no. 63101/00, judg. of 6 April 2010). *Lăpuşan and Others v. Romania*, appl. nos. 29007/06, 30552/06, 31323/06, 31920/06, 34485/06, 38960/06, 38996/06, 39027/06 and 39067/06, judg. of 8 March 2011; *Association of "21 December 1989" and Others v. Romania*, appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011; *Jularić v. Croatia*, appl. no. 20106/06, judg. of 20 January 2011; *Lyobov Efimesto v. Ukraine*, appl. no. 75726/01, judg. of 25 November 2010; *Palić v. Bosnia and Herzegovina*, appl. no. 4704/04, judg. of 15 February 2011; *Merkulova v. Ukraine*, appl. no. 21454/04, judg. of 3 March 2011; *Pastor and Ţiclete v. Romania*, appl. nos. 30911/06 and 40967/06, judg. of 19 April 2011; *Tashukhadzhiyev v. Russia*, appl. no. 33251/04, judg. of 25 October 2011; *Paçacı and Others v. Turkey*, appl. no. 33251/04, judg. of 8 November 2011; *Crăiniceanu and Frumuşanu v. Rumania*, appl. no. 12442/04, judg. of 24 April 2012; *Mladenović v. Serbia*, appl. no. 1099/08, judg. of 22 May 2012; *Dimovi v. Bulgaria*, appl. no. 52744/07, judg. of 6 November 2012; *Anca Mocanu and Others v. Romania*, appl. nos. 10865/09, 45886/07 and

32431/08, judg. of 13 November 2012; *Bajić v. Croatia*, appl. no. 41108/10, judg. of 13 November 2012; *Kudra v. Croatia*, appl. no. 13904/07, judg. of 18 December 2012.

1.80. Furthermore, already in the *Varnava* judgment, when the Turkish Government referred to the *Moldovan* and *Rostaş* as well as *Kholodovy* cases, on which the Russian Government strongly rely in the instant case, the Grand Chamber stated, that the Grand Chamber in *Šilih* had "reviewed the jurisprudence on the question" and as a result the quoted decisions "are not of any assistance" (paras. 138-139).

**Conclusion: while questioning the Court's competence ratione temporis, the Russian Government have relied only on several pre-Šilih inadmissibility decisions and ignore altogether the coherent unanimous post-Šilih case law.**

(b) ***In the alternative, whether or not a procedural obligation under Article 2 of the Convention can be said to have arisen by reason of any events that took place in the post-ratification period?***

1.81. The Chamber judgment in *Janowiec* established the new element (material) test to identify whether a fresh investigative obligation arises under Article 2 even when the killing in question constitutes a mass-scale crime under international law contrary to "the underlying values of the Convention". Actually, however, the approach based on that test was shared only by two judges (Mr. Karel Jungwiert and Boštjan M. Zupančič) as the two other judges of the narrow majority (Mr. Anatoly Kovler and Ms. Ganna Yudkivska) adhered to the "political goodwill gesture" approach (joint concurrent opinion appended to the judgment).

1.82. The applicants' counsels share the view of the dissenting judges (Dean Spielmann, Mark Villiger and Angelika Nußberger) that the Chamber judgment has restricted the original position of the Court as expressed in the GC *Šilih* judgment (last subparagraph of paragraph 163). But even under the new element (material) test as suggested and applied by the Chamber's majority, the Court may be competent *ratione temporis* to examine whether the procedural obligation of the respondent State has been fulfilled.

1.83. First, at earlier stages of the Russian Katyn investigation the execution of Polish POWs by NKVD squads was not doubted and that position corresponded with historically established facts, whereas later the relevant Russian institutions started repeating that the fate of those prisoners was unknown. On 21 April 1998 the Chief Military Prosecutor's Office of the Russian Federation confirmed in its written answer to Mrs. Ojcumiła Wołk and Witomiła Wołk-Jezierska that Wincenty Wołk, son of Wacław, born 12 May 1909, had been kept as a POW in the special NKVD camp at Kozelsk, and had been shot dead along with others in spring 1940. However, in its responses to further requests filed in 2006 and 2008 by Mrs. Witomiła Wołk-Jezierska, the Chief

Military Prosecutor's Office stated that the whereabouts of Wincenty Wołk remained unknown. This position was then upheld by the Russian courts.

1.84. As the facts established before and after 5 May 1998 differ so profoundly therefore some important, indeed illuminating evidence must have been discovered after the critical date or even a significant part of the procedural steps in the Katyn criminal proceedings must have taken place after the critical date. There was a dramatic change in the investigation. If that change is to be presumed reasonable and justified it must have been accompanied by significant investigation activities and backed up by a solid evidentiary material. Yet, very puzzlingly, the Respondent Party alleges that only "an insignificant number of investigation activities, carried out at the end of the 1990s and after the year 2000, did not lead to any considerable advance and change in the investigation" (para. 32 of the Memorandum dated 19 March 2010).

1.85. It must be also stressed that due to the secrecy clause still imposed on a significant part of the Russian Katyn investigation files (now 35 volumes) it is impossible to determine precisely how many and which legal steps took place before and after the "critical date".

1.86. Second, to the extent that we could become familiar with the case file of the Russian Katyn investigation no 159 (after the Russian authorities handed over some volumes of the case file to the Polish side), we are convinced that new elements capable of imposing a fresh obligation to investigate under Article 2 exist. As late as 2002 the Ukrainian authorities handed over to the Russian side numerous pieces of evidence, the most important of which was a copy of the so-called Ukrainian Katyn list with 3435 names of the Katyn massacre victims held in the prisons of Western Ukraine. This material was included into the case file as recently as 2 August 2004, hence only forty days before the investigation was discontinued.

1.87. In its recent letter of 17 January 2013 the Russian government held that the ruling of 2 August 2004 "contains a manifestly unsubstantiated conclusion about the fact that those documents concern an execution of 3435 Polish citizens in the spring of 1940 in the territory of the Ukrainian Soviet Socialist Republic" (par. 5). They continued that the so-called 'Ukrainian list', forwarded by the Ukrainian authorities to the Russian Chief Military Prosecutor's Office in 2002 was not a list of executed persons or a prisoners' dispatch list (para. 6).

1.88. The "Ukrainian list", which contains names of persons whose personal files were forwarded on 24 November 1940 by the Ukrainian NKVD to the Soviet NKVD, is recognised by historians as referring to the names of prisoners from the prisons in Western Ukraine who were executed following the Politburo decision of 5 March 1940. After the executions the personal files of the executed prisoners were transferred to the central NKVD archives.

1.89. The Shelepin's of 3 March 1959 specifies that besides the three execution sites (for Kozelsk, Starobelsk and Ostashkov prisoners-of-war) "7,305 persons were shot in other camps and prisons in western Ukraine and Belarus". Historians

agree that the "Ukrainian list" is composed of the names of persons executed in western Ukraine. The "Belarus list" with the remaining 3870 names is missing until now.

1.90. With regards to the Russian government's statement that the ruling of 2 August 2004 was unsubstantiated, it must be stressed that a competent investigative organ made this ruling. It is therefore puzzling which authority and on which legal grounds "excludes" or "disqualifies" the material in question from the file when the case is closed.

1.91. The applicants' counsels hold that both the "Ukrainian list" and the 13 volumes of documents presented by the Ukrainian authorities in 2002 are new important evidence relevant for Russian investigation no. 159 and pertinent to the elucidation of the Katyn massacre.

1.92. Third, as already argued above (1.48-1.49), the new element test should not be construed restrictively as relating only to new sufficiently important pieces of evidence, but should be understood more broadly as a new sufficiently important (procedural) fact. The proposed interpretation would adequately address those cases which are not comprised by the new evidence test but which actually constitute more serious instances of non-fulfilment of procedural obligations than omissions of new evidence. These are "abstention/inaction cases", when the existing information sources are explicitly disregarded or neglected – in the post-ratification period, and "perversion cases", where the State adopts (also in the post-ratification period) the conclusions that starkly contradict the findings in the previous stages of the investigation and even the common knowledge and historically established facts.

1.93. The applicants' counsels also respectfully draw the attention of the Court to two adverse implications of the new element test if understood restrictively as new evidence. In order to evade the scrutiny of this Court's national authorities it will be encouraged not to conduct evidentiary proceedings. And even more, access to archives may be closed or seriously hindered to prevent new material from becoming known. These dangers are particularly real in the post-totalitarian States.

1.94. The Russian Katyn investigation must be qualified as a "perversion case". What started in 1990 as a real and public investigation into the mass-scale tragedy covered up by several decades of lies resulted in total secrecy in 2004. Then the Russian courts adopted the view, in sheer denial of the very basic facts, that the applicants' relatives had "disappeared" after having been placed "at the disposal" of the Soviet security organs.

**Conclusion: if the Grand Chamber accepted the new element test it should not restrict it to new evidence but rather give this test a broader meaning that would accommodate also "inaction/omission cases" and "perversion cases". It is also submitted that there exist materials, which include new evidence surfacing in the post-ratification period.**

2. ***Assuming that the Court has jurisdiction to examine the case from the standpoint of the procedural obligation under Article 2, did the Russian State discharge its duty to carry out an effective investigation in the post-ratification period?***
   (a) ***In particular, was the applicants' right to participate effectively in the investigation adequately secured?***

2.1. The applicants' counsels are fully aware that due to the nature of the investigation on the Katyn massacre committed so long ago as in 1940 and followed by a few decades of hiding the truth and the destruction of evidence, not all the guarantees under the procedural limb of Article 2 may be relevant and secured. Nevertheless, some basic requirements under Article 2 must be met by the investigation to be considered effective.

2.2. Article 2 requires States to conduct an effective investigation in all cases of violent death or allegations that this may have occurred. This duty consists in taking all reasonable steps capable of establishing the circumstances of the death in question, identifying those who were responsible for it and bringing the perpetrators to justice. This is not an obligation of result, but one of means.

The investigation must be transparent to the public, but especially to close relatives of the victim. In all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (e.g. *Hugh Jordan v. the United Kingdom*, appl. no. 24746/94, judg. of. 4 May 2001, para. 109. Therefore the Court found violations of Article 2, e.g. when the family of the victim had no access to the investigation and court documents (*Ögur v. Turkey [GC]*, appl. no. 21954/93, judg. of 20 May 1999, ECHR 1999-III, para. 92) and when the father of the victim was not informed of the decisions not to prosecute (*Güleç v. Turkey*, appl. no. 21593/93, judg. of 27 July 1998, Reports 1998-IV, para. 92).

The obligation to carry out an effective investigation becomes especially pertinent when State functionaries are or may be implicated in the death (e.g. *McCann and Others v. the United Kingdom*, para. 161; *Kaya v. Turkey*, judg. of 19 February 1998, para. 105; *Ilhan v. Turkey* [GC] appl. no. 22277/93, para. 63; *McKerr v. the United Kingdom*, appl. no. 28883/95, para. 121).

2.3. Russian investigation no. 159 does not meet the basic requirements of Article 2. In the proceedings it has not been established whether in 1940 there were any executions of Polish citizens. Responding to the questions formulated by the Court in the document communicating the application, the Russian government stated that, of those who had been detained in the Ostashkov, Starobelsk and Kozelsk camps, 1,803 had "perished", whereas the fate of the others was not known. Only 22 persons were identified during the 1991 exhumation works, none of whom was a relative of the applicants.

2.4. The Russian authorities did not provide any explanation as to the difference between the number of persons killed in Shelepin's note (21,857) and the much lower number of those called "perished" persons (1,803).

2.5. Actually, however, the Russian authorities have not provided any single name of the persons murdered. Illustrative of the Russian authorities' approach is the case of the two persons who were among the 22 bodies identified during the excavation work at Mednoye in 1991. These were Mr. Lucjan Rajchert and Mr. Wacław Słabolepszy. In 2006 the Memorial Association lodged an application for rehabilitation of the 16 POWs held in the special NKVD camps, among them Mr. Lucjan Rajchert and Mr. Wacław Słabolepszy. Despite the identification of these two POWs the Chief Military Prosecutor's Office rejected the rehabilitation request. This decision was confirmed by Khamovniki Circuit Court. When confronted with the results of the Russian exhumation, Judge Igor Kananovitch stated at a court hearing that a bullet hole in the skull proved only that a firearm had been used against a certain person, but not that this person had been shot dead by State functionaries and, all the more, that he was a victim of political repression (the judgements of Khamovniki Circuit Court were attached to the submissions of applicants' counsels of 12 October 2010).

2.6. In its submissions to the Court the Russian Government stated that the Russian authorities had not in any way been obliged to institute and carry out any investigation into the Katyn massacre. This position may justify why, at a certain point, when the authorities started to consider, for whatever reasons, the investigation as "mistakenly" initiated, the investigation was no longer conducted properly. It must be stressed, however, that during the first period the investigation was carried out with the full co-operation of Polish specialists and the prosecutor in charge of it intended to classify the Katyn massacre as a war crime, crime against humanity and genocide (motion of Anatoly Yablokov of 13 June 1994 and the legal opinion of the Russian Commission of Experts on the Katyn Case of 2 August 1993).

2.7. As regards the evidence collected, the Russian authorities did not conduct full-scale excavations at all burial sites. Originally, however, the excavations were to be performed not to assess the number of victims, but only to confirm that Polish citizens had been buried in certain locations. In terms of the number of victims and their names, other evidence was considered pertinent and credible. When, however, the excavation works became crucial for determining the number of victims and their identities, they should have been carried out on a full scale with the aim of identification of the bodies.

2.8. The applicants were not given the status of injured party in the investigation. As a result, they could not participate in the proceedings, present documents and evidence, or submit motions. Their participation became especially pertinent when the Russian authorities began to have doubts as to the number of victims and the fate of those whose names were on the NKVD dispatching lists.

2.9. Deprivation of opportunities to participate in the investigation was particularly detrimental to the applicants' rights as the Russian authorities consistently assured that the investigation was coming to its end without anything suggesting a sudden and dramatic change in the conclusions of the proceedings.

2.10. Irrespective of whether the Russian authorities considered the applicants' relatives as dead or disappeared, the applicants should have access to the case file, as their own legal interests were involved in the proceedings, e.g. knowing the circumstances of the death (or disappearance) of their close relatives and the decision-making process that led to this death (or disappearance).

2.11. In view of the foregoing, investigation no. 159 may not be considered transparent to the applicants.

2.12. The requirement of transparency also applies to the public at large. This requirement should be of particular importance in cases of serious human rights violations, especially those committed by totalitarian regimes in the furtherance of aims contrary to values of the Council of Europe and the Convention. Investigation no. 159 concerned a mass-scale crime of international law perpetrated by the Stalinist regime. There therefore existed, and continues to exist, an important public interest in terms of knowing what circumstances of the Katyn massacre have been established by the prosecutor's office.

2.13. The Russian authorities rely on State security grounds as justification for the secrecy of the case file. There are several reasons for which this argument may not be accepted. Firstly, in a democratic society the public interest in uncovering the mass-scale crimes of totalitarian regimes is so preponderant that hardly may any true and real interest of the State, which pretends to be democratic and follows democratic values, be invoked to justify the secrecy of the investigation files. It is therefore unimaginable that, for example, the democratic Germany might claim security reasons for classifying files concerning Nazi crimes. If a State of the Convention relies on fundamental State interests in the context of crimes committed by its totalitarian predecessor it may be justly perceived as equal to suggesting the continuity between the regimes, and even as an act of approval of the atrocities. Secondly, societies that lived under totalitarian regimes, if these societies are to transform themselves into democratic ones, need knowledge about the atrocities of such regimes. This knowledge is part and parcel of civic and democratic education. Thirdly, the time factor must be taken into account. The applicants' counsels are ready to accept that even in the case of crimes of international law State interests may exceptionally be invoked. Nevertheless such exceptions must be very rigorously and narrowly interpreted, and may justify the classification of only particular sensitive documents relating to military and diplomatic matters. Over time, this exceptional justification ceases to exist.

2.14. The Russian authorities claimed that one of the major obstacles to the investigation into the Katyn massacre was the destruction of the prisoners' personal files. The applicants' counsels have serious doubts as to the indispensability of this material for the success of the investigation. However, in this context let us recall – although it is not a strictly legal argument – the words of Mikhail Bulgakov, the great Russian writer: "archives don't burn". The allegation that

the personal files of prisoners were destroyed has never been substantiated. Reasons therefore exist for doubting the assertion of the Russian authorities. Firstly, the authorities have never shown the routine protocols of destruction of files. Secondly, in the 1990s, when Russian-Polish co-operation with regard to the Katyn massacre was proceeding smoothly, the Russian partners assured their Polish colleagues, albeit unofficially, that the files of Polish prisoners of war – not only those killed in 1940 but all of them – still existed and were divided into four different categories.

2.15. Lastly, effective investigation must be directed, by the use of all available measures, towards the identification of perpetrators and bringing them to justice. As the case file is secret, we do not know who has been declared responsible for the Katyn massacre and on which grounds. However, we know that the Katyn massacre was classified as an abuse of power. This classification entirely disregards the precepts of international law, which in 1940 already treated killing of prisoners of war as a war crime. Moreover, at the time when it was committed this crime was not subject to statute of limitation (we refer in this context to the findings of the Court in the *Kononov* judgement, para. 230).

2.16. If the Katyn massacre had been given the adequate legal classification, i.e. being declared an imprescriptible crime of international law, the Russian authorities should have pursued a criminal prosecution of the key organisers and perpetrators as long as they live. In this context it is worth mentioning that in the 1990s still alive were such persons as Lazar Kaganovitch, member of the Soviet Politburo, who on 5 March 1940 made the decision to execute Polish citizens, and Piotr Soprunienko, in 1940 head of the Administration for Prisoners of War and Internees Affairs.

2.17. The applicants' counsels draw the attention of the Court also to the joint dissenting opinion of judges Dean Spielmann, Mark Villiger and Angelika Nußberger. These judges were of the opinion that the Chamber should have first concluded that it was competent *ratione temporis* to decide on the allegations relating to the procedural limb of Article 2 and then it should have found for the following reasons a violation of Article 2 (points 11-12):

- applicants' right to participate effectively in the investigation was not secured: the applicants were denied victim status and access to the case file;
- the classification of the most important parts of the case file citing national security considerations appears arbitrary;
- the decision to classify the materials of the investigation 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 national-security considerations;

- the applicants further faced a 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;
- 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.

The three dissenting judges concluded that "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." (point 13 *in fine*).

The applicants' counsels fully agree with the position adopted by the dissenting judges.

**Conclusion: Russian investigation no. 159 did not meet the very basic requirements for being declared effective. The applicants were not given injured party status, their rights to participate in the investigation were not safeguarded properly, and – a fact which became particularly important when the Russian authorities reversed the original version of the tragic events – evidence was not collected from the applicants, basic evidentiary measures (e.g. excavation works) were not undertaken, and the adequate legal classification was not given to the Katyn massacre.**

(b) ***In rendering the decision on classification of the file materials, was due weight given to the public interest in uncovering the circumstances surrounding the massacre of Polish prisoners-of-war and the applicants' private interest in finding out the fate of their relatives?***

2.18. With regards to the decision on the classification of the file materials, the applicants' counsels stress that this decision relates to the investigation on a mass-scale imprescriptible crime of international law, committed more than 70 years ago by the Soviet totalitarian regime whose aims and practice radically contradicted the Convention's values. The Russian Federation declares that it intends to be a democratic state founded on respect for human rights. Classification of the case file does not correspond with such intentions. Furthermore, the decision in question does not concern a single document but applies to 35 volumes of case files.

2.19. The applicants' counsels do not find it reasonable to entertain what national security interests might have justified the decision taken by the Russian authorities. Instead they wish to refer – to assess the Russian decision – to the relevant legal standards established by international law and in the case law of international judicial institutions.

2.20. The Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity ("Updated Principles on Impunity"), adopted by the UN Commission on Human Rights in 2005 (Resolution 2005/81), affirms that the "[f]ull and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations." The same document declares that the right to the truth is inalienable for "[e]very people" (Principle 2). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UN General Assembly Resolution 60/147 of 16 December 2005, provide that one of the modalities of reparation for gross human rights violations is the "[v]erification of the facts and full and public disclosure of the truth" (Principle 22(b)).

2.21. The right to truth was first recognized as a right of victims and their relatives to know the fate and whereabouts of missing or disappeared persons. But it is now widely accepted that this right extends beyond forced disappearances and includes a State obligation to shed light on all gross human rights violations or serious violations of international humanitarian law, including extra-judicial executions and torture. Examples of this principle or standard are provided by numerous institutions, see e.g. the Inter-American Court on Human Rights (*Moiwana Community v. Suriname* [merits, reparations and costs], judgment of 15 June 2005, para. 204), UN Human Rights Committee (Concluding Observations on Guatemala, 3 April 3 1996, CCPR/C/79/add.63, para. 25), UN Human Rights Council (Resolution 9/11) and Office of the UN High Commissioner of Human Rights (Study on the Right to Truth, 8 February 2006).

2.22. Legal instruments, both domestic and international, also include provisions preventing the classification and requiring the disclosure of information relating to human rights violations. For example, Article 44 of the Model Inter-American Law on Access to Public Information stipulates that the exceptions to the right of access "do not apply in cases of serious violations of human rights or crimes against humanity" (adopted in 201 by the Organization of American States, General Assembly Resolution no. 2607). Also worth mentioning is that the Inter-American Court on Human Rights stated expressly in *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003 [merits, reparations and costs], par. 180) that in the context of human rights violations restrictions on information cannot include classification on the grounds of national security.

2.23. As regards to victims' relatives, the Inter-American Court on Human Rights consistently held that the right to truth (understood, among others, as an entitlement to know the fate or whereabouts of those killed or disappeared as well as their burial sites) is essential to ending or preventing the mental suf-

fering of the relatives of victims of forced disappearances or secret executions (e.g. *Trujillo Oroza v. Bolivia* [reparations and costs], judgment of 27 February 2002, paras. 114-115) In the same vein, the UN Human Rights Committee held the decision/views in *Almeida de Quinteros v. Uruguay* (communication no. 107/1981, views of July 21, 1983 para. 14).

2.24. The Inter-American Commission on Human Rights emphasised that the particular importance of State compliance with the right to truth exists in those cases in which legal or historical developments had made the prosecution, or even identification, of the intellectual and material perpetrators of grave human rights abuses difficult or impossible (e.g. *Lucio Parada Cea and Others v. El Salvador*, report of 27 January 1999).

2.25. In light of the relevant human rights law standards it becomes evident that the Russian authorities classification decision not only did not give due weight to the individual and pubic interest in uncovering the circumstances of the Katyn massacre but also cannot find any justification.

2.26. The applicants' counsels respectfully submit that the instant case offers the Court a special opportunity to declare that under Article 2 of the Convention, read in conjunction with Article 1, there exists the right to truth when human rights have been grossly violated by State agents. In other words, disclosing information on human rights violations is a corollary of the general State duty, under Article 1, to secure the exercise of the Convention rights and freedoms, including by taking measures to prevent their violation.

**Conclusion: while classifying the file materials, the Russian authorities did not give due weight to both private and public interests in finding out by the applicants the fate of their relatives and in uncovering by the public the circumstances of the massacre of the Polish prisoners-of-war (right to truth). More, in light of the relevant law and practice there existed no justification for the decision on classification when the investigation concerned an imprescriptible crime of international law.**

Article 3 of the Convention

3. ***What is the scope of the State's obligation under Article 3 of the Convention in relation to the quest for information by the relatives of missing persons?***

3.1. The applicants' counsels agree with the position expressed in the Chamber judgment that the obligation under Article 3 is distinct from the obligation flowing from Article 2. That latter provision requires the State to take specific legal actions capable of clarifying circumstances of tragic events and leading to identification and punishment of those responsible. On the other hand, Article 3 is of a more general humanitarian nature as it enjoins the authorities to react to the plight of the relatives of the dead or disappeared person in a humane and compassionate manner. The scope of the Court's analysis under Article 3 is not confined to any specific manifestation of the authorities' attitudes, particular

incidents or procedural acts but the Court gives a global assessment of the way the State reacted or responded to the applicants' enquiries (para. 152 of Chamber judgment). Article 3 requires the State "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" (para. 163). The Court may also have regard to the facts prior to ratification inasmuch as they may be relevant for the facts occurring after that date (*Broniowski v. Poland* [GC], appl. no. 31443/96, decision of 19 December 2002, para. 74; *Hokkanen v. Finland*, appl. no. 19823/92, judgment of 23 September 1994, para. 53). It means that the acts complained about under Article 3 may be given special weight when they are a prolongation of a State pre-ratification policy or when there is some degree of similarity between such acts and the previous attitude of the State (or its legal predecessor).

3.2. In numerous cases the Court found violations of Article 3 when the authorities of the Respondent State had failed 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, might be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the fate of the missing person (e.g., *Varnava and Others v. Turkey*, appl. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, para. 200; *Osmanoğlu v. Turkey*, appl. no. 48804/99, Judgment of 24 January 2008, para. 96; *Bazorkina v. Russia*, appl. no. 69481/01, Judgment of 27 July 2006, para. 139; *Imakayeva v. Russia*, appl. no. 7615/02, Judgment of 9 November 2006, para. 164; *Gongadze v. Ukraine*, appl. no. 34056/02, Judgment of 8 November 2005, ECHR 2005-XI, para. 184; *Taniş and Others v. Turkey*, appl. no. 65899/01, Judgment of 2 August 2005, ECHR 2005-VIII, para. 219; *Orhan v. Turkey*, appl. no. 25656/94, Judgment of 18 June 2002, para. 358; *Çakıcı v. Turkey* [GC], appl. no. 23657/94, Judgment of 8 July 1999, ECHR 1999-IV, para. 98; *Timurtaş v. Turkey*, appl. no. 23531/94, Judgment of 13 June 2000, ECHR 2000-VI, para. 95).

3.3. This position of the Court corresponds with the established case law of the Inter-American Court on Human Rights. Below only a few references are given. It stated in *Blanco-Romero and Others v. Venezuela* [merits, reparations and costs] (judgment of 28 November 2005) that:

"59. As regards the violation of Article 5 of the American Convention to the detriment of the victims' next of kin, the Court has held that in cases that involve the forced disappearance of persons, the violation of the right to psychological and moral integrity of the victim's next of kin is, precisely, a direct consequence of the disappearance, which causes them, by the fact itself, serious suffering that is further aggravated by the state authorities' continued refusal to provide information on the victim's whereabouts or to open an effective investigation to find the truth."

It held in *Gómez-Palomino v. Peru* [merits, reparations and costs], (Judgment of 22 November 2005) that:

"61. In cases involving the forced disappearance of persons, the Court has stated that the violation of the mental and moral integrity of the next of kin is, precisely, a direct consequence of such forced disappearance,[17] which inflicts upon them great suffering, compounded by the constant refusal of State authorities to provide information about the victim's whereabouts or to conduct an effective investigation into the facts of the case."

In *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010, the Court, referring to its previous case law and summarising it, deemed:

"239. […] [T]he violation to the right to personal integrity of the next of kin of the victims can be confirmed given the impact that the enforced disappearance of their loved ones has generated for them and for their family nucleus, the failure to ascertain the circumstances of their death, the lack of knowledge regarding their final whereabouts, and the impossibility of properly burying the bodily remains. […]

240. In this regard, the Court recalls that, pursuant to its jurisprudence, the deprivation of access to the truth of the facts of the location of a disappeared person constitutes a form of cruel and inhumane treatment for close relatives.[18] Likewise, the Court has established that ascertaining the final whereabouts of the disappeared victim will permit the next of kin to heal from the anguish and suffering caused by uncertainty of the location of their disappeared family member.[19]

241. Moreover, the Court considered that the violation of the right to integrity of the next of kin is also due to the lack of effective investigations to ascertain the facts, the lack of initiatives to punish those responsible, the lack of information regarding the facts, and in general, in regard to the impunity that remains in the case, which has generated feelings of frustration, impotence, and anguish. In particular, in cases that involve enforced disappearances of persons, it is possible to understand that the violation of the right to psychological and moral integrity of the next of kin of the victims is a direct consequence of this phenomenon that causes severe suffering, which tends to increase, among other factors, given the constant failure of the State authorities to offer information

[17] With further references to *Case of 19 Tradesmen v. Colombia* [merits, reparations and costs], Judgment of 5 July 2004, para. 211; *Bámaca-Velásquez v. Guatemala* [merits], Judgment of 25 November 2000, para. 160; *Case of Blake v. Guatemala* [merits], Judgment of 24 January 1998, para. 114.

[18] With further references to *Trujillo Oroza v. Bolivia* [reparations and costs], Judgment of 27 February 2002, para. 114; *Chitay Nech and Others v. Guatemala* [merits, reparations, and costs], Judgment of 25 May 2010, para. 221; *Ibsen Cárdenas and Ibsen Peña v. Bolivia* [merits, reparations, and costs], Judgment of 1 September 2010, para. 130.

[19] With further references to *Ticona Estrada and Others v. Bolivia* [merits, reparations and costs], Judgment of 27 November 2008, para. 155; *Chitay Nech and Others v. Guatemala*, para. 222.

regarding the whereabouts of the victims or to initiate an effective investigation in order to ascertain information on what occurred.[20]

242. The Court finds that the uncertainty and lack of information from the State about what occurred, which remains to date in a large sense, has been a source of suffering and anguish, and of a feeling of insecurity, frustration, and helplessness for the next of kin, given the failure of the public authorities to investigate the facts.[21] Similarly, the Court noted that before the enforced disappearance of persons, the State has the obligation to guarantee the right to personal integrity of the next of kin also by means of effective investigations. These effects, fully encompassed in the complexity of enforced disappearances, remain in existence while the verified factors of impunity persist.[22]"

3.4. Also the UN Committee of Human Rights consistently held that anguish and distress experienced by direct relatives of the disappeared person, in itself, and – all the more – when combined with the failure of a State party to investigate and clarify the circumstances, result in violations of Article 7 of the International Covenant on Civil and Political Rights. Thus, in *Abubakar Amirov (on his own behalf and on behalf of his deceased wife, Aïzan Amirova) v. Russian Federation* (communication no. 1447/2006, decision/views of 2 April 2009), the Committee stated that

"11.7. […] [T]he Committee recalls its jurisprudence according to which the close family of victims of enforced disappearance may also be victims of a violation of the prohibition of ill-treatment under article 7. This is because of the unique nature of the anxiety, anguish and uncertainty for those to the direct victim. That is the inexorable consequence of an enforced disappearance. Without wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor […]"

3.5. The European Court is competent to assess the State authorities' compliance with Article 3 obligations even when the original taking of life escapes its scrutiny. In the same vein, the UN Human Rights Committee decided in the case of *Mariam Sankara and Others v. Burkina Faso* (communication no. 1159/2003, decision/view of 28 March 2006) that the State reactions to the death of the applicants' relative constituted a violation of Article 7 of the International Cov-

[20] With further references to *Blake v. Guatemala* [merits], para. 114; *Chitay Nech and Others v. Guatemala*, para. 220; *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, para. 126.

[21] With further references to *Blake v. Guatemala* [merits], para. 114; *Heliodoro Portugal v. Panamá* [preliminary objections, merits, reparations, and costs], Judgment of 12 August 2008, para. 174; *Kawas Fernández v. Honduras* [merits, reparations and costs], Judgment of 3 April 2009, para. 139.

[22] With further references to *Goiburú and Others v. Paraguay* [merits, reparations and costs], Judgment of 22 September 2006, para. 103; *Radilla Pacheco v. México* [preliminary objections, merits, reparations and costs], Judgment of 23 November 2009, para. 172; *Chitay Nech v. Guatemala*, para. 226.

enant on Civil and Political Rights even when the death itself occurred outside the temporal reach of the Convention. In this context the applicants' counsels wish to draw the attention of the Court to the fact that already the refusal of the authorities to conduct an investigation into the death amounted to a violation of Article 7 (para. 12.2).

**Conclusion: both the established case of the Court and that of other international organs confirm the prohibition of inhuman and degrading treatment while also imposing on the States an positive obligation to adopt a humane and compassionate approach to the relatives of the deceased or disappeared person and to assist the relatives in obtaining information and uncovering relevant facts, i.e. relating to the circumstances of the tragic events and the location of the burial sites.**

4. ***Can the proximity of family ties be a factor justifying a distinction between two groups of applicants (the reference is made to paragraphs 153-154 of the Chamber judgment)?***

4.1. In paragraphs 153-154 the Chamber divided the applicants into two distinct groups, relying on the following "Chechen cases": *Taymuskhanovy v. Russia* (judgment of 16 December 2010, appl. no. 11528/07, para. 122) and *Musikhanova and Others v. Russia* (Judgment of 4 December 2008, appl. no. 27243/03, para. 81). The first group was composed of the widows and those children who "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". The second group encompassed two applicants who are the children of the Katyn victims but "were born after the precipitated departure of their fathers to war and never had personal contact with them" (Mrs. Wołk–Jezierska and Mrs. Krzyszkowiak) as well as three other applicants whom the Court considered "more distant relatives" (grandchildren and a nephew). Only those belonging to the first group were granted the status of victim under Article 3.

4.2. As regards Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak, the applicants' counsels are neither convinced by the distinction made by the Chamber nor found it to correspond with the case law referred to by the Chamber. First, the complaint under Article 3 relates to the manner in which the applicants were treated by the Russian authorities in the 1990s and the first decade of the 21st century. There exist no reasons to make the mental anguish and stress experienced in this context by the children of the Katyn victims dependent on whether they had a chance to meet their fathers or not.

In its analysis of whether there was a violation of Article 3 with regard to the first group of the applicants (10 people) the Chamber referred to the circumstances prevailing in post-war communist Poland, the People's Republic of Poland (para. 156) and then to the events after the Soviet authorities acknowledged

the Soviet Union had committed the Katyn massacre and Russian Katyn investigation no. 159 could started (paras. 157 and subseq.). All these circumstances and events affected Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak in the same manner as they did in the case of the victims' children belonging to the first group.

4.3. Furthermore, one can what is the age limit appropriate for building an emotional relationship with one's father to fall within the ambit of Article 3? One year, two years or three years, as in the case of Mrs. Irena Erchard?

4.4. Second, it may be argued, in opposition to the approach of the Chamber, that there are good reasons to allege that especially those who do not remember their fathers or did not have the opportunity to have any personal contact with them become, psychologically, more sensitive to the tragic fate of their fathers.

4.5. Third, in the judgment of *Taymuskhanovy v. Russia* the Court, while denying victim status to young children of the "disappeared person", referred to the fact that these children had not in any manner participated in the search for their father, and their anguish, resulting from the fact of being raised without a father, was not distinct from the inevitable emotional distress the disappearance entailed. The situation of Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak must be distinguished from that in the case of *Taymuskhanovy*. Both applicants in the instant case actively participated in the proceedings and their complaint under Article 3 concern allegations not relating to their childhood but to the actions and reactions of the Russian authorities after 5 May 1998.

4.6. As regards the three other people belonging to the second group, the applicants' counsels wish to submit that these people, unlike the applicants in the *Musikhanova and Others* case, were actively involved in a range of legal steps as well as other activities relating to the commemoration of their killed relatives.

4.7. First of all, however, the applicants' counsels wish to submit that the test applied by the chamber is too narrow as it is limited only to one factor, i.e. family relationship, and as such does not take into account other circumstances relevant for determining whether a given person may be treated, in the particular circumstances of the case under consideration, as a victim under Article 3. Instead of the simple one-factor test a more adequate contextually sensitive and inclusive test should be used by the Court.

4.8. Without undermining the role of the family relationship/bond test (which should be the first step in determining that victim status has been sufficiently established), the applicants' counsels are of the opinion that the adequate test should also refer to the behaviour of the applicant. In other words, if personal involvement of a (more distant) relative indicates that he/she is attached to the killed/disappeared person such a relative should be afforded victim status under Article 3. Although in its case law (including the two Chechen cases previously quoted) the Court had identified a group of such connecting factors, it did not make use of them in the *Janowiec* judgment.

4.9. Mrs. Wołk-Jezierska is the author of several books dedicated to her father and the Katyn massacre (*Kulisy Zbrodni Katynskiej* [The Inner History of the Katyn Massacre], Nortom, Wrocław: 2005, 312 p.; *Wołyńska i Mazowiecka Szkoła Podchorążych Rezerwy Artylerii* [Volyn and Mazowiecki Artillery Reserve Officer Cadet School], Nortom, Wrocław: 2010, 296 p.; story *Portret wyobraźni* [Portrait of Imagination], awarded in the competition "Mój ojciec" [My Father]; story *Codina*, awarded in the competition "Moje wojenne dzieciństwo" [My wartime childhood]), among them a poetry volume which is a kind of intimate conversation with her late father (*Przychodzisz, gdy myślę Katyn* [You Come when I Think Katyn], Nortom, Wrocław: 2007, 66 p.). She has written numerous articles (in Poland and in the Polish-language press abroad, e.g. in the USA, Canada, Argentina) and initiated a number of activities related to the commemoration of her father and other Katyn victims (for example, planting oaks for the Katyn victims; building the Katyn Pantheon; placing commemorative plaques, naming schools after the Katyn victims, and more). In 1989 she co-founded the Federation of Katyn Families, and in 1993-1996 held the position of secretary in this association. She was a co-founder of the Katyn National Memory Committee, which in 2002 addressed President Putin with a request to declare null the decision of 5 March 1940 on the execution of Polish citizens. As an artist by profession she prepared several items, e.g. a banner of the Warsaw Katyn Family, part of the Federation of Katyn Families.

In 2007 Mrs. Wołk-Jezierska was awarded the "Pro Memoria Medal" and the "Silver Medal of National Memory Sites Guardian" (Srebrny Medal Opiekuna Miejsc Pamięci Narodowej) for her life-long contribution to discovering the truth about the Katyn massacre. She also received the Medal "Overcome Evil with Good" ("Zło Dobrem Zwyciężaj"), granted by the National Remembrance Committee of Rev. Jerzy Popiełuszko (Ogólnopolski Komitet Pamięci ks. Jerzego Popiełuszki) – the priest killed in 1984 by the communist secret police.

4.10. Mrs. Krzyszkowiak set up a publishing house in order to publish materials (booklets in several languages to be distributed free of charge to visitors of the Katyn Museum, Division of the Polish Military Museum in Warsaw) and books on the Katyn massacre (several titles already printed). It is a non-profit activity, financed by profits from other business activities. In 1989 she was one of the founders of the Federation of the Katyn Families (the biggest association of Katyn relatives, with several thousand members), even serving as its president (1993-1996). Active in the Police Katyn Family Association and the Polish Katyn Foundation. She co-initiated the erection of the Katyn Sanctuary in the Holy Cross Church in Warsaw. She participated in various initiatives related to the commemoration of the Katyn massacre victims. For all her achievements and initiatives she received the Medal "Overcome Evil

with Good" ("Zło Dobrem Zwyciężaj"), granted by the National Remembrance Committee of Rev. Jerzy Popiełuszko (Ogólnopolski Komitet Pamięci ks. Jerzego Popiełuszki) and "Pro Memoria Medal" given by the State Office for the Affairs of the Veterans and the Persecuted.

4.11. Mrs. Rodowicz, an artist by profession, created several works dedicated to the Katyn massacre and wrote a book about her grandfather killed in the Katyn forest (*Wanduś córeczko* [Wanduś, My Daughter], Tepis, Warszawa: 1996, 327 p.). She made a mosaic "St. John the Baptist" for a church in Warsaw, which was dedicated to her grandfather. In 1996 she co-initiated the Katyn Sanctuary at the Saint Cross Church in Warsaw. As an artist she has designed the cover of the Mieczysław Welzandt's book *Epitafium Starobielskie* (Starobielsk Epitaph); the author was a prisoner of one of the Soviet camps for POWs and survived (one of very few) the Katyn massacre. In 1998 she arranged a Katyn exhibition and the promotion of Welzand's book in Warsaw. She was the author of the covers for "Piłsudczyk" magazine on the Katyn massacre as well as the cover of Witomiła Wołk-Jezierska's books. Author of various education materials on Katyn history for Polish schools and of the logo for the National Katyn Memorial Committee Currently she has been participating in an initiative commemorating all victims of the Katyn massacre by planting almost 22,000 oaks in different parts of Poland.

4.12. Mr. Romanowski, though the youngest among the applicants, is the oldest relative of Katyn victim Mr. Żołędziowski, who died childless. The task of honouring his killed uncle was „inherited" from his late mother. Mr. Romanowski is an active participant in initiatives related to the commemoration of the Katyn massacre and its victims

4.13. All the applicants from the group of Wołk-Jezierska in the 1990s took on the initiative, pursued until today, to bring the remains of the executed victims to Poland.

4.14. The applicants' counsels also wish to draw the attention of the Court to the fact that Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak were the only two applicants who were present at both the public hearing on 6 October 2011 and the delivery of the judgment on 16 April 2012. Also this fact demonstrates their strong and persistent involvement in the case.

4.15. Until the Katyn massacre finds a solution satisfying the victims' relatives, it will remain an unhealed bleeding wound, and the "Katyn issue" will be handed down from one generation to another. Therefore, the oldest living relatives are the applicants in this case, replacing their relatives who have passed away. The applicants' counsels ask the Court to take into account this specific feature of the case also in the context of Article 3. Until now the Court has not been confronted with a case in which the legal investigation could, due to the previously prevailing political reasons, be started only several decades after the tragic events.

4.16. The legal position advanced by the applicants' counsels (a need for a multi-factor test, instead of the simple test based on date of birth, to ascertain the victim status under Article 3) finds support in the case law of international adjudicating bodies.

4.17. Summarising its jurisprudence on the criteria to be used for ascertaining whether a family member or relative is to be considered as a victim under Article 5, the Inter-American Convention the Inter-American Court held in *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010, as follows:

"235. […] It [the Court – I.C. Kamiński] can presume a harm to the right to mental and moral integrity of direct family members of victims of certain violations of human rights by applying a presumption iuris tantum regarding mothers and fathers, daughters and sons, husbands and wives, and permanent companions (hereinafter "direct family members"). […] Regarding those people whom the Tribunal will not presume a harm to personal integrity for not being a direct family member, the Court will assess, for example, if there is a particularly close connection between said persons and the victims of the case that would allow for the determination of harm to their personal integrity, and as such, a violation of Article 5 of the Convention. This Court may also evaluate if the alleged victims have involved themselves in the search for justice in the specific case, or if they have endured suffering as a consequence of the facts of the case or because of the subsequent actions or omissions of the State authorities in light of the facts."

4.18. The Inter-American Court then identified a group of factors to be taken into account when deciding whether a particular non-direct family member can be considered a victim of inhuman treatment. It must be stressed that already one of these factors is sufficient to lead to a positive conclusion.

These factors are:

"238 […] a) among them [non-direct family members – I.C. Kamiński] and the disappeared victims there was a close connection, and in some cases, together with their parents and other siblings, they formed a single nuclear family;

b) they have involved themselves in several actions such as the search for justice or information regarding the whereabouts via individual actions or via the formation of different groups, which participated in investigation expeditions to the place where the facts occurred, or in the filing of proceedings before the domestic or international jurisdiction;

c) the disappearance of their siblings has caused physical and emotional scars;

d) the facts have affected their social relations, in addition to having caused a breakdown in the family dynamic;

e) the harm they have lived has increased given the State's omission regarding the lack of information and investigation and the denial of access to State archives, and

f) the lack of determination of the whereabouts of their siblings has kept alive the hope of finding them, or the inability to identify their bodily remains has prevented them and their family members from providing a proper burial, disturbing their healing process and perpetrating suffering and uncertainty."

4.19. We wish to respectfully recall that the enforced disappearances and killings that gave rise to the *Gomes Lund* case had occurred before the Inter-American Convention entered into force.

4.20. Also the UN Committee on Human Rights did not make any distinction between the close family members, in the context of grievances under Article 7 of the Covenant, when the indirect victims were adult persons.

4.21. At last, the applicants' counsels draw also the attention of the Court to the data presented in the *amici curiae* briefs of the third party intervenors.

**Conclusion: there is no justification for the distinction the Chamber made between the two groups of applicants. The proximity of family ties, understood as the possibility of building personal relations (or perhaps only memory) with the deceased person, is a relevant factor only in cases of children being the applicants or co-applicants. In cases of adult persons another test is needed. Adult direct relatives should be presumed (unless the opposite is demonstrated by the Respondent State) as victims of grievances formulated under Article 3. For non-direct family members a multi-factor test, suitable to demonstrate involvement in the case, is desirable. The approach advanced by the applicants' counsels refers to the standard elaborated and applied by international institutions, most forwardly by the Inter-American Court on Human Rights. All the applicants in this case are either adult direct relatives of the killed persons or indirect relatives who demonstrated their deep, strong and continuous personal involvement through numerous actions (commemorative and legal) relating to the fate of their killed family member.**

5. ***Did the Russian authorities subject some or all of the applicants to a form of degrading treatment in breach of Article 3 of the Convention in connection with their attempts to obtain information about the fate of their relatives?***

5.1. The Court emphasised in its case law that the essence of violations of Article 3 does not so much lie in the fact of the "disappearance" or killing of the family member (in "inherent" emotional suffering concomitant with killing or disappearance) but rather concerns the authorities' reactions and attitudes to this situation when it is brought to their attention (e.g. *Çakıcı*, par. 98).

5.2. It sometimes happens that 'disappeared persons' become 'dead persons' when the bodies of those who disappeared are found. The peculiarity of the Katyn case is that the sequence of 'first disappeared, then dead' is reversed. Those who were 'dead' became the 'disappeared'.

5.3. When in the 1990s Mrs. Wołk and her daughter Mrs. Wołk–Jezierska enquired of the Russian Chief Military Prosecutor's Office about the rehabilitation of their

husband and father they were informed that Lieutenant Wołk had been executed by the NKVD and his rehabilitation would be decided when investigation no. 159 was finished. The Russian authorities did not question the fact that Mr. Wołk had been executed in 1940 and that this had taken place during the Katyn massacre.

5.4. In reply to the requests lodged twice (2005 and 2007) by the applicants after investigation no. 159 was discontinued, the Chief Military Prosecutor's Office also confirmed that the death penalty had been carried out on the applicants' relatives.

5.5. In response to the request filed in 2008 by Mrs. Anna Stavitskaya, the Russian advocate for the applicants, the Chief Military Prosecutor's Office stated, among the reasons for rejecting the rehabilitation request, that the applicants' relatives had not been identified in the course of investigation no. 159.

5.6. In the course of the subsequent court proceedings the Moscow Circuit Military Court stated in its judgement of 14 October 2008 (upheld by the Military Division of the Supreme Court on 29 January 2009) that it had not been established what had happened to the applicants' relatives who in 1940 were held in the special POW camps at Kozelsk, Starobelsk and Ostashkov, after they had left those camps and been handed over "to the disposal" of the regional NKVD commissions. Although the transfer of prisoners of war had taken place in pursuance of the decision of the Politburo of the Communist Party to exterminate Polish prisoners and those people had been delivered to the locations where executions were carried out, their fate was declared unknown.

5.7. Such statements, enunciated in sheer denial of the very basic facts and the previous assertions of Chief Military Prosecutor's Office, must be considered as inflicting grave moral pain, anguish and stress on the applicants. By way of comparison, bearing in mind the established legal and historical standards, one could not even imagine that a post-war German public institution might state to a group of relatives of Holocaust victims that such victims must be considered unaccounted-for as their fate could be traced only to the dead-end track of Birkenau. As a result, the competent State authorities are unable to unearth what may subsequently have happened to that group at Auschwitz, insofar as there exist no documents on their whereabouts (or because the documents have been destroyed by the Nazi authorities). Such a statement would clearly amount to an act of degrading and inhuman treatment.

The applicants' counsels are clearly mindful of the differences between the Holocaust and the Katyn massacre. It is important to point out, however, that the destiny of those reaching the dead-end track of Birkenau and that of Gniezdovo (adjacent to Katyn) was equally tragic, with only one exception in the latter case (professor Stanisław Swianiewicz who was transferred at Gniazdovo to the Lubianka Prison for investigation). As the tragic events of the Holocaust and the Katyn massacre are well established, any statement of State authorities denying the reality of these two atrocities must bring about extreme distress, anguish and emotional suffering to relatives of the victims.

5.8. In response to the requests for rehabilitation the applicants were informed that the Chief Military Prosecution Office was unable to establish – as the personal files of prisoners had allegedly been destroyed – "which provision of the Penal Code formed the legal basis for calling the prisoner to account".

5.9. The motives given by the Chief Military Prosecutor's Office to support its decisions, which were upheld by the courts, demonstrate that the Chief Military Prosecution Office assumed that in the case of the victims of the Katyn massacre, who had been murdered in violation of the elementary rules of international humanitarian law and following a special extra-judicial procedure contrary even to Soviet legislation, there might have existed due reasons for the execution. This is tantamount to an allegation that the victims were criminals who deserved capital punishment.

5.10. The applicants' counsels would also like to respectfully draw the Court's attention to certain facts occurring in the proceedings for rehabilitation. Firstly, the Moscow Circuit Court in its judgement of 16 May 2008 stated – while dismissing an appeal against the decision on rehabilitation – that the only persons entitled to institute the appeal action were the victims of the repression themselves, i.e. the executed Polish officers. Secondly, in his submissions before the Moscow Circuit Court of Khamovniki Prosecutor Blizyeyev, acting on behalf of the Chief Military Prosecutor's Office, argued that even if "hypothetically" the Polish officers "may have been killed" by organs of the Soviet state, there existed "due reasons" for the repression, as "some" Polish officers were "spies, terrorists and saboteurs" and the Polish pre-war army "had been trained to fight against the Soviet Union" (court sitting on 24 October 2008).

5.11. There is abundant evidence allowing reconstruction of the circumstances of the Katyn massacre and confirming the death of the applicants' close relatives. The names of the ten prisoners of war have been inscribed on the memorials erected in the burial places. The bodies of the three prisoners of war killed in Katyn – Mr. Wołk, Mr. Rodowicz and Mr. Mielecki – were identified during the excavations in 1943. Despite all that evidence, the applicants heard in 2008 that their relatives had "disappeared" in the spring of 1940. They also heard that if they were executed in 1940 there may have existed "due reasons" for the killing of the POWs.

5.12. The hypothesis of 'disappearance' evoked by the Russian authorities must also bring about anguish and pain to the applicants because it resembles a well-known statement made by Joseph Stalin during a meeting on 3 December 1941 with Władysław Sikorski, Polish Prime Minister of the Government-in-Exile. When asked about the fate of Polish soldiers held by the Soviets in the camps for POWs, Stalin answered that those still unaccounted-for "could have fled to Manchuria" (minutes of talks conducted in the Kremlin on 2 December 1941).

5.13. The anguish, pain and moral suffering of the applicants cannot be classified as simply and inherently accompanying the killings themselves. It resulted from the treatment the applicants experienced from the Russian authorities when the applicants lodged their legal requests. Another factor relevant in the context of Article 3 is the age of the applicants and the fact that for most of the persons executed were fathers whom they do not remember or never had the chance to see.

5.14. In its judgment the Chamber stated that "is struck by the apparent reluctance of the Russian authorities to recognise the reality of the Katyn massacre" and that the approach chosen by the Russian authorities "demonstrated a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katyn massacre" (para. 159). In another part of the judgment the Chamber held that this approach denied the reality of summary executions and therefore was „contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering" (para. 166). Furthermore, the Chamber found 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" (para. 160).

5.15. The applicants' counsels fully agree with this description.

**Conclusions: the treatment of the applicants was degrading and inhuman, and amounted to a violation of Article 3. Their anguish and suffering clearly went beyond the emotional distress normally accompanying the killing of a close relative. The source of this anguish and suffering was the way the Russian authorities reacted to the applicants' enquiries about the fate of their close relatives.**

Article 38 of the Convention

6. ***As regards the Russian Government's refusal to furnish a copy of the decision of 21 September 2004 which was repeatedly requested by the Court, was their reference to the provisions of national law preventing confidential information from being communicated to international organisations compatible with their obligations under Article 38 of the Convention, read in the light of Article 27 of the 1969 Vienna Convention on the Law of Treaties („A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty")? Moreover, was the classification of this document compatible with the requirements of the Russian law, notably section 7 of the State Secrets Act, which expressly precluded any information about violations of human rights by State officials from being classified?***

6.1. The rule expressed in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) is broadly considered as a reflection of the longstanding principle of customary international law (M. Villiger, *Commentary on the 1969*

*Vienna Convention on the Law of Treaties*, Brill, Leiden: 2009, p. 375 and further references). In accordance with this principle no internal rule, even of constitutional rank, can be invoked as an excuse for the non-observance of international law. Article 27 VCTL applies only to contractual international obligations and is narrower than the customary principle of precedence of all binding norms of international law over any rule of domestic legal order.

6.2. The principle that, in international terms, the provisions of domestic law may not prevail over international obligations, goes back to the *Alabama Claims Arbitration* of 1872. In the arbitration proceedings that followed the use of a British shipyard by the American Confederates to transform a commercial vessel into a warship that subsequently sank a number of Union vessels, it was ruled that "the government of Her Britannic Majesty cannot justify itself for a failure in due diligence of the plea of insufficiency of the legal means of action which it possessed […] It is plain that to satisfy the exigency of due diligence, and to escape liability, a neutral government must take care […] that its municipal law shall prohibit acts contravening neutrality" (J.B. Moore, *International Arbitration*, New York 1898, vol. 1, p. 653).

6.3. The predominant position of international law *vis-à-vis* domestic legislation was declared in several rulings of the Permanent Court of International Justice (PCIJ).

- In the *Treatment of Polish Nationals* case the PCIJ denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the grounds that:
  "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted […] [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals and other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig.
  The application of the Danzig Constitution may […] result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law […] However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City."[23]
- *Greco-Bulgarian "Communities"* Case:

[23] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, Series A/B, No. 44, pp. 24-25.

"it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty";[24]

- *Free Zones of Upper Savoy and the District of Gex* Case:
  "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations";[25]
- *Exchange of Greek and Turkish Populations* Case:
  "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken. […] the contracting Parties are obliged to bring their legislation into harmony with the Convention [of Lausanne of 30 January 1923], that that instrument must be construed as implicitly referring to national legislation in so far as that is not contrary to the Convention";[26]
- *Jurisdiction of the Courts of Danzig* Case;[27]
- In the *Wimbledon* case the PCIJ held that conformity with internal law does not preclude State conduct being characterised as wrongful under international law:
  "a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. […] under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the Wimbledon through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article."[28]

6.4. In the post-war period the International Court of Justice referred and applied the same principle in a number of cases:

- *Applicability of the Obligation to Arbitrate* Case (Case of the PLO Mission);
  "It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law";[29]
- In the same sense: *Fisheries* (Judgement, ICJ Reports 1951, p. 132); *Nottebohm* (Preliminary Objection, Judgement, ICJ Reports 1953, p. 123); *Application of the Convention of 1902 Governing the Guardianship of Infants* (Judgement, ICJ Reports 1958, p. 67); also: *Reparation for Injuries* case (*Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Reports 1949, p. 184) and *Elettronica Sicula S.p.A.* case

[24] Greco-Bulgarian "Communities", Advisory Opinion, 1930, Series B, No. 17, p. 32.

[25] Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, Series A, No. 24, p. 12; and Judgment, 1932, Series A/B, No. 46, p. 167.

[26] Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, Series B, No. 10, pp. 20-21.

[27] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, Series B, No. 15, pp. 26–27.

[28] S.S. "Wimbledon", 1923, Series A, No. 1, pp. 29-30.

[29] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, para. 57.

(*Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgement, ICJ Reports 1989, para. 73);

- In the *LaGrand* Case the ECJ held that the US constitutional procedural rule of 'procedural default' may not prevail over the obligations incumbent under Article 36 of the Vienna Convention on Consular Relations;[30] this reasoning was then followed in the *Avena and Other Mexican Nationals* case.[31]

6.5. The principle that internal law may not prevail over international law and domestic provisions may not serve as an excuse for evading international obligations was introduced in the Draft Declaration on Rights and Duties of States prepared by the International Law Commission (1949), "Yearbook of the International Law Commission" 1949, pp. 286-290; the Declaration was prepared in conformity with resolution 178 (II) of the General Assembly (21 November 1947). Article 13 of the Draft Declaration provided that

"Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

Article 13 of the Draft Declaration made the principle in question closely related to another fundamental principle of international law: that of acting in good faith and respecting obligations *(pacta sunt servanda)*.

6.6. The drafting history of Article 27 VCLT shows that it resulted from an amendment proposed by the Pakistani delegation to draft Article 23 on *pacta sunt servanda* and was modelled on Article 13 of the Draft Declaration. Among the States which decidedly supported the amendment was the USSR. After the amendment draft Article 23 provided that:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith, and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty."

The proposal was accepted on first reading by 55 votes in favour, none against, 30 abstentions (*Vienna Conference: First Session*, p. 158).

6.7. Article 27 was adopted by 73 votes in favour, 2 against, 24 abstentions (*Vienna Conference: Second Session*, p. 54). Only two States – Venezuela and Iran – expressed their opposition, suggesting the primacy of their constitutional law over treaties.

6.8. Only two States – Guatemala and Costa Rica – formulated reservations to Article 27, claiming the primacy of their constitutions. Subsequently several States raised objections to these reservations.

6.9. Article 27 or – more generally – the prohibition to invoke domestic law as an excuse for evading international obligations was referred to and applied in the practice of various international bodies and institutions.

[30] LaGrand Case (Germany v. USA), ICJ Reports 2001, para. 90-91.

[31] Avena and Other Mexican Nationals (Mexico v. USA), ICJ Reports 2004, para. 112.

6.10. Human Rights Committee:

- *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):

  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'. Although Article 2, Paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of Article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

6.11. Committee on Economic, Social and Cultural Rights

- *General Comment No. 9, The Domestic Application of the Covenant*, adopted on December 1998, E/C.12/1998/24:

  3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations.

6.12. International Criminal Tribunal for the former Yugoslavia

- *Prosecutor v. Blaškić* (IT 95-14-T), decision of 3 April 1996 made by President Antonio Cassese (Application to vary conditions of detention), (paras. 8-11), ILR 1998, vol. 108, p. 69

  "all States have been under an unquestionable obligation to enact any implementing legislation necessary to permit them to execute warrants and requests of the Tribunal."

- *Prosecutor v. Slobodan Milošević*, Decision on preliminary motions, 8 November 2001, para. 47

"47. Article 27 of the Vienna Convention on the Law of Treaties is also relevant. It provides: a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Statute of the International Tribunal is interpreted as a treaty. The Federal Republic of Yugoslavia has an obligation under the Statute to comply with the request to arrest and transfer the accused and, therefore, cannot rely on its internal law, namely the division of power as between the federal government and its States as a justification for failure to comply."

6.13. Committee Against Torture

- Communication No. 181/2001: Senegal, 19 May 2006

"9.8 The Committee considers that the State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with […] obligations under the Convention."

6.14. Inter-American Court on Human Rights:

- Advisory Opinion OC-14/94 of 9 December 1994 on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), requested by the Inter-American Commission on Human Rights [116 ILR 320]. It was stated that:

"35. International obligations and the responsibilities arising from the breach thereof are another matter. Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions […]. These rules have also been codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties."

- Resolution of 17 November 1999 on the compliance by the State of Peru with the judgement on the Court's ruling on the merits of the case *Castillo Petruzzi and Others v. Peru*, points 3-5.

6.15. The African Commission on Human and Peoples' Rights:

- Communication 313/05 – *Kenneth Good v. Republic of Botswana*, 47th Ordinary Session, held from 12-26 May 2010, the Commission stated:

"139. The Respondent State further contends that for the legislative, executive and judicial organs of a State Party, a treaty is infrequently assessed in the hierarchy of legal norms applicable in the domestic legal order and as a consequence, treaties are sometimes deemed inapplicable if they conflict with the constitutional provisions of a state. Thus, in Botswana, treaties do not confer enforceable rights on individuals until passed into law by Parliament. However, they may be used as an aid to construction of laws including the Constitution.

239. It is also a well established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations."

- In Communication 211/98, *Legal Resource Foundation v. Zambia*, 29th Ordinary Session, held from 23 April to 7 May 2001; the Commission reiterated that

"international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on State Parties" (para. 60).

6.16. The principle in question was also applied by numerous arbitration tribunals.

- *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) *(Great Britain* v. *Costa Rica)*, *ibid.*, p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1098 ("it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 289 (1956) *(*"one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation"); and *Flegenheimer Case*, *ibid.*, p. 360 (1958);
- International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States; *Enron Corporation and Ponderosa Assets LP v. Argentina* (ICSID Case No. ARB/01/3), 22 May 2007

208. It must be noted also that the very legal system of the Argentine Republic, like many modern systems, provides for a prominent role of treaties under both Articles 27 and 31 of the Constitution. Treaties are constitutionally recognised among the sources considered "the supreme law of the Nation". It follows that in case of conflict between a treaty rule and an inconsistent rule of domestic law, the former will prevail. This is not just the consequence of the Constitution so providing, but also the solution dictated by Article 27 of the Vienna Convention on the Law of Treaties in that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

6.17. Restatement (Third) of the Foreign Relations Law of the United States para. 111 cmt. a (1987)

"[F]ailure of the United States to carry out an obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law."

6.18. Article 27 VCLT corresponds to Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, which provides that:

"The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law".

6.19. The position of international courts summarised above is accepted by the doctrine of international law. E.g. in P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, New York: 1997, 7th ed.), it is stated that: "the general rule of international law is that a State cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international law. […] This is particularly true when […] a treaty or other rule of international law imposes an obligation on States to enact a particular rule as part of their municipal law. A similar rule can be found in Article 27 […] in other words, all that international law says is that States cannot invoke their internal law and procedures as a justification for not complying with their international obligations. States are required to perform their international obligations in good faith, but they are not at liberty to decide on the modalities of such performance within their domestic legal systems. Similarly, there is a general duty for States to bring their domestic law into conformity with obligations under international law" (p. 64).

6.20. Question no. 6 of this Court relates specifically to the refusal of the Russian Government to submit a copy of the decision of 21 September 2004. At the outset it should be stressed that the Respondent Government relies on its ordinary legislation provisions but not on any constitutional rule (a fact which motivated the government of Venezuela and those of Guatemala and Costa Rica to respectively vote against Article 27 and formulate reservations to it).

6.21. State secret privilege is defined as "a long-standing evidentiary privilege that permits governments to resist discovery of evidence if disclosure reasonably could be seen as threat to military or diplomatic interest of nation" (H.C. Black, *Black's Law Dictionary*, West, St. Paul: 1990, 6th ed., p. 1409). Therefore, the refusal must have two features: it must be related to military or diplomatic interests (but not to all security concerns as such) and additionally must be reasonable.

6.22. On several occasions international tribunals were confronted with refusals to submit the requested documents.

6.23. In *Godínez Cruz v. Honduras*, the Inter-American Court of Human Rights requested that the government of Honduras produce evidence concerning the structure of a certain unit of the national armed forces. The government averred that the evidence sought was closely related to the security of the State. Nevertheless, the government did not refuse to produce the evidence and was permitted by the Court, upon request, to present the testimony in a closed session due to "strict security reasons of the State of Honduras" (judg. of 20 January 1989, Ser. C No. 5, paras. 33-35).

6.24. In 1972, in the *Ballo* case before the Administrative Tribunal of the International Labour Organisation UNESCO, as respondent organisation, declined to make some files available to the Tribunal. UNESCO held that the requested documents were either confidential or not relevant to Mr. Ballo's situation. However, when the Tribunal repeated its request the files were submitted by UNESCO and inspected *in camera*. Noting subsequently that the documents were indeed of a confidential character, the Tribunal decided not to communicate them to the complainant and merely informed him of the tentative conclusions which it had drawn from them (ILO Administrative Tribunal, *Ballo v. UNESCO*, judg. No. 191, 15 May 1972, International Labour Office, Official Bulletin, vol. LV, Nos. 2, 3 and 4, 1972, p. 227).
Other cases of this kind, decided in an analogous way by the Administrative Tribunal of the International Labour Organisation, are *Molina*, Judgement No. 440 [1980] (WHO) and *Alikhan*, ILO AT Judgement No. 556 [1983] (ILO).

6.25. The issue of access to confidential information also arose in the so-called *Sabotage* cases in the 1930s (concerning two destructive acts of sabotage committed by German agents during the period of American neutrality in 1916 and 1917), brought before the United States–German Mixed Claims Commission. When the German legal agent requested the inspection of certain files of the United States Department of Justice, the Umpire dismissed the request. Before taking this decision, however, the Umpire had visited the United States Attorney-General and examined the files on his own. Having inspected the files, he was satisfied that they actually contained information pertinent to the State's security.

6.26. On the other hand, the International Court of Justice in the *Corfu Channel* case did not draw any negative inference when the United Kingdom refused to submit the requested evidence, which it considered related to naval secrecy (judgement of 9 April 1949, ICJ Reports 1949, p. 32).

6.27. The objection founded on the *Corfu* judgement was raised by Croatia in the *Prosecutor v. Tihomir Blaškić* case before the International Criminal Tribunal for the Former Yugoslavia. When the Tribunal issued *subpoenae duces tecum*, requesting, among others, some documents and evidence of a military character, the Government of Croatia challenged this decision by referring to the protection of its national security. Croatia alleged that determination of whether national security interests are involved should be left solely to the State concerned.

6.28. The Tribunal dismissed these allegations first as a chamber (Decision of 18 July 1997 on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*) and then as an appeals chamber (Judgement of 29 October 1997 on the request of the Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997).

6.29. The Tribunal's rulings were based on three principal grounds. Firstly, reliance on the *Corfu* case was considered inappropriate. Article 49 of the Statute of the International Court of Justice is couched in non-mandatory terms,[32] whereas Article 29 of the Statute of the International Criminal Tribunal for the Former Yugoslavia is worded in strong mandatory language (par. 62 AC). Secondly, the Statute and the Rules of the Yugoslavia Tribunal do not envisage any exceptions to the obligation of States to co-operate with the Tribunal (para. 112 Ch, para. 63 AC). Thirdly, a blanket right of States to withhold, for security reasons, documents necessary for proceedings might jeopardise the very function of the Tribunal (par. 147 Ch, para. 65 AC).

6.30. At the same time the Tribunal stressed that the validity of State security concerns can be scrutinised by procedural arrangements, such as *in camera* proceedings and various modalities related to communicating and recording of documents considered sensitive.

6.31. The applicants' counsels respectfully submit that the reasons enunciated by the Yugoslavia Tribunal apply, *mutatis mutandis*, to this Court. Article 38 of the Convention is worded in mandatory language, does not provide for any exceptions, and a blanket right of States may endanger the very function of the Court. Simultaneously, security concerns of States can be assessed and secured by application of Rule 33 of Rules of the Court and other specific arrangements the Court might find proper.

6.32. In the later case of *Prosecutor v. Dario Kordić and Mario Čerkez* the Yugoslavia Tribunal held that the question of the relevance of the requested documents for the proceedings falls into the full discretion of the Tribunal and cannot be challenged by States. The Tribunal declared that:
"it falls squarely within the discretion of the Trial Chamber to determine whether the documents sought are relevant to the trial. Furthermore, the State from whom the documents are requested does not have locus standi to challenge their relevance" (Decision of 9 September 1999 on the Request of the Republic of Croatia for Review of a Binding Order, para. 40).

6.33. The classification of the decision of 21 September 2004 is also incompatible with section 7 of the State Secrets Act that expressly precludes any information on human rights violations by State officials from being classified. The Katyn massacre was a mass scale violation of the right to life perpetrated on the orders of the highest authorities of the Soviet Union.

6.34. Relying on section 7 of the State Secrets Act, in 2008 Memorial, a Russian human-rights non-governmental organisation, initiated proceedings to declassify the decision of 21 September 2004. As the subsequent court sittings were held *in camera* and a copy of the final decision was not made available to the Euro-

[32] Article 49: "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."

pean Court, it is not known how the Moscow City Court had addressed the Memorial's allegations and how it found no contradiction between the classification decision and the exclusions provided for in the State Secrets Act.

6.35. On the basis of the above arguments and referred case law, the Russian Government's refusal to furnish a copy of the decision of 21 September 2004 constituted a violation of Article 38 of the European Convention, read in the light of Article 27 VCLT.

6.36. The applicants' counsels agree with the Chamber decision made in the instant case (judgment of 16 April 2012). The Court has absolute discretion to determine what evidence is needed for the examination of the case. Refusal to co-operate with the Court may lead to a violation of Article 38 even when the Court does not find any violation of the material provisions of the Convention or becomes prevented, for whatever reasons, from hearing the case on merits. There is therefore nothing surprising or illogical that the Court starts examination of the case, as it did in other cases, from allegations regarding Article 38.

**Conclusion: the applicants' counsels respectfully submit that in the light of the case law of various international tribunals and bodies, as well as the case law of this Court, the refusal of the Russian Government constituted a violation of Article 38 of the Convention as read in the light of Article 27 VCLT.**

**Miscellaneous issues**

7.1. Since, for several cumulatively applicable reasons, the effective investigation into the Katyn massacre is necessary to ensure the real and effective protection of the Convention values, the applicants' counsels respectfully invite the Court to make use of Article 46 of the Convention. In exceptional cases – as this case is exceptional – the Court indicated the type of measure that might, and sometimes should, be taken in order to put an end to the situation it found to exist (e.g. *Abuyeva and Others v. Russia*, appl. no. *27065/05*, judg. of 2 December 2010). The applicants' counsels would wish to rely in particular on the judgement in the case of *Association of "21 December 1989" and Others v. Romania* (appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011). In this judgement the Court declared that:

"l'État défendeur doit mettre un terme à la situation constatée en l'espèce, jugée par elle contraire à la Convention, relevant du droit des nombreuses personnes touchées, comme les requérants individuels, à une enquête effective, qui ne s'achève pas par l'effet de la prescription de la responsabilité pénale, compte tenu également de l'importance pour la société roumaine de savoir la vérité sur les événements de décembre 1989. L'État défendeur doit donc offrir un redressement approprié afin de respecter les exigences de l'article 46 de la Convention, en tenant compte des principes énoncés par la jurisprudence de la Cour" (para. 194).

["The respondent State is to end the situation found in this case, considered by the Court as contrary to the Convention and concerning the rights of many persons affected, as individual applicants, to an effective investigation, which does not end as a result of prescription of criminal responsibility, also taking into account the importance for Romanian society of knowing the truth about the events of December 1989. The respondent State must provide an appropriate remedy to meet the requirements of Article 46 of the Convention, taking into account the principles expressed in the case law of the Court."]

7.2. In the background of the Romanian case were the tragic events that preceded the fall of the Ceausescu regime. The Court held that the effective investigation of the events was necessary because of two principal reasons. Firstly, the persons killed were "many", and it meant several hundred. Secondly, the Court stressed the interest of Romanian society in knowing the truth about the events. This rationale applies all the more to the Katyn massacre, which was an imprescriptible crime under international law and in which 21,857 persons were murdered.

7.3. The applicants counsels also draw the attention of the Court to the practice of the Inter-American Court on Human Rights which consists in indicating, especially in cases of gross human rights abuses, what legal steps should be domestically taken to implement the judgment and to eliminate the consequences of the established violation. We are mindful of the differences between the Inter-American Convention of Human Right and the European Convention of Human Right (under Article 63 of the Inter-American Convention the Inter-American Court is expressly given the right to specify post-judgment remedies). Nevertheless we invite this Court, with all respect deserved, to make use of Article 41 of the Convention. Practice Direction on Claims for Just Satisfaction (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007) specifies in paragraph 23 that "in extremely rare cases the Court can consider a consequential order aimed at putting an end or remedying the violation in question". As this case is exceptional, we ask the Court to avail itself of this opportunity.

Prepared by:
Professor Dr Hab. Ireneusz C. Kamiński
Institute of Legal Studies
Polish Academy of Sciences
Chair of Public International Law and EU Law
address for correspondence:
ul. Kordiana 56/97
30-653 Kraków
Poland
Kraków/Strasbourg, 13 February 2013