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COMMENTS ON *JANOWIEC AND OTHERS V. RUSSIA*

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THE KATYŃ MASSACRE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: A PERSONAL ACCOUNT

1. HISTORICAL BACKGROUND

In the spring of 1940, the Soviet People's Commissariat for Internal Affairs (NKVD) executed almost 22,000 Polish citizens held as both prisoners-of-war (POWs) and taken prisoner on other grounds after the Soviet Union had marched in September 1939 into the eastern provinces of pre-war Poland following the conclusion of the Molotov-Ribbentrop pact signed between the Soviet Union and Nazi Germany. The shootings followed a decision taken on 5 March 1940 by the Politburo of the Soviet Union's Communist Party, the highest organ of the Soviet Union. A proposal to approve the executions was submitted by Lavrentiy Beria, head of the NKVD. He specified that Polish prisoners were "enemies of the Soviet authorities and full of hatred towards the Soviet system".

These mass killings of Polish citizens are commonly known as the Katyń massacre, named after the forest near Smolensk where the graves of some of the victims were discovered and excavated by Germans in 1943. In fact, the Katyń forest was only one of the execution and burial sites. Bodies of 4,421 prisoners-of-war from the Kozelsk POW camp are buried there. Prisoners-of-war from the Starobelsk (3,820) and Ostashkov camps (6,311) are buried in Pyatikhatki (near Kharkiv) and Mednoye (near Tver) respectively. The circumstances of the executions of the prisoners

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from the prisons of western Ukraine and Belarus (7,305) remain unknown to date.[1]

The precise numbers of murdered prisoners were given in a note which Alexander Shelepin, Chairman of the State Security Committee (KGB), wrote on 3 March 1959 to Nikita Khrushchev, Secretary General of the USSR Communist Party. It specified that a total of 21,857 people had been executed in 1940. Shelepin also recommended the destruction of all personal records of the persons shot by the NKVD.[2] The remaining documents were to be put into a special file, known as "Package Number One", and sealed. In Soviet times, this package was one of the strictest secrets of the USSR and only the Secretary General of the USSR Communist Party had the right of access to the file.

The Politburo's decision to execute Polish citizens was also accompanied by a mass deportation of the families of the prisoners to remote regions of the Soviet Union. About 59,000 people were deported, a significant percentage of them being children.[3]

Following excavations of the graves in the Katyń Forest in 1943, the Soviet authorities put the blame for the massacre on the Germans. In the course of the trial of German war criminals before the Nuremberg International Military Tribunal, the Soviet prosecutor even attempted to charge the German forces with the shooting of "up to 11,000 Polish prisoners in the autumn of 1941 at Katyń". The tribunal did not refer to this charge in its judgement.[4]

Only on 13 April 1990 did the Soviet Union affirm (a communiqué of the TASS official news agency) that the murders had been perpetrated by the NKVD. Several sets of criminal cases were subsequently commenced, which eventually became investigation no. 159 conducted by the Chief Military Prosecutor's Office in Moscow. In 1992 the contents of "Package Number One" were made public, and the following year cop-

[1] There are dozens of books in English on the Katyń massacre, e.g. J.K. Zawodny, *Death in the Forest: The Story of the Katyń Forest Massacre*, University of Notre Dame Press, Notre Dame: 1962 (several editions); A. Paul, *Katyń: The Untold Story of Stalin's Polish Massacre*, C. Scribner's Sons, New York: 1991; A.M. Cienciala, W. Materski, N.S. Lebedeva (eds.), *Katyń: A Crime Without Punishment*, Yale University Press, New Haven: 2008; L. FitzGibbon, *Katyń Forest Massacre*, Anna Livia Books, New York: 1975; J.H. Lauck, *Katyń Killings: In the Record*, Kingston Press, Clifton: 1988; *The Katyń Forest Massacre: Hearings before the Select Committee to Conduct an Investigation of the Facts, Evidence and Circumstances of the Katyń Forest Massacre*, U.S. Govt. Print. Off. 1952.

[2] However, no documents (such as e.g. commonly used destruction protocols) confirm that the destruction of such records has actually been performed.

[3] A directive on the deportation was issued by Lavrentiy Beria on 7 March 1940, two days after the Politburo's decision on the executions. During the Soviet occupation of eastern Poland there were four waves of forced deportations. Relying only on Soviet data, about 330,000-340,000 were deported.

[4] *See* the indictment published at *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. I, pp. 42-54. In the course of the proceedings before the IMT Mr. R.A. Rudenko, Chief Prosecutor for the USSR, referred to the to the Katyń massacre as "the mass shooting of Polish officers by the Fascist criminals in Katyń Forest", "criminal activity" (vol. XV, p. 289), "mass shooting of Poles", "a link in the chain of many bestial crimes perpetrated by the Hitlerites" (vol. XV, p. 290), "atrocities at Katyń" (vol. IX, p. 28).

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ies of the documents were handed over to the Polish side (including Beria's motion of 5 March 1940, the Politburo's decision of the same date, the pages removed from the minutes of the Politburo's meeting, and Shelepin's notes from 3 March 1959).[5]

On 13 June 1994, Anatoly Yablokov, head of the prosecutors conducting the Katyń investigation, filed a motion for a decision to discontinue the investigation due to the deaths of those persons responsible for the crime. He proposed that Stalin and the other members of the Politburo be considered guilty of the Katyń massacre on the basis of Articles 6a and 6b of the Charter of the Nuremberg International Military Tribunal, (i.e. guilty of crimes against peace, against humanity, and war crimes), as well as the crime of genocide aimed at Polish citizens. He also argued that those who had carried out illegal orders were subject to harsh penalties (including the death penalty) according to the Criminal Code of the Russian Federation, and that the Katyń massacre was not subject to the statute of limitations. Yablokov's motion was rejected by the Chief Military Prosecutor's Office. Yablokov himself was then dismissed[6] and the Katyń case was assigned to another investigator.

Criminal case no. 159 was eventually closed on 21 September 2004. On 22 December 2004, the Interagency Commission for the Protection of State Secrets classified 36 volumes of the case file – out of a total of 183 volumes – as "top secret" and a further eight volumes as "for internal use only". The decision to discontinue the investigation was given a "top-secret" classification and its existence was only revealed on 11 March 2005 at a press conference given by Mr. A. Savienkov, Chief Military Prosecutor.

2. LEGAL PREPARATIONS FOR THE SUIT AT STRASBOURG

Following the first unofficial news (August 2004) that the Russian investigation on the Katyń massacre was to be closed, I published an article in the Polish daily newspaper *Rzeczpospolita* suggesting that if the information was true, then the relatives of the victims could bring a case against Russia to the European Court of Human Rights (the Court) and rely on several provisions of the European Convention on Human Rights (ECHR or the Convention).[7] After this publication I was contacted by Ms. Witomiła Wołk-Jezierska, daughter of an officer executed at Katyń, who asked me to turn the hypothesis I had written about into reality.

As any application to the Court at Strasbourg must be preceded by legal steps taken at the national level (i.e. the requirement that all available national legal measures be exhausted), we initiated, together with Russian advocates Ms. Anna Stavitskaya and Mr. Roman Karpinskiy from Moscow, two sets of legal proceedings: 1) challenging the

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[5] Key Soviet/Russian documents related to the Katyń massacre are available in English in: Cienciala et al., *supra* note 1.

[6] He currently works as a barrister in Moscow.

[7] The *Rzeczpospolita* daily newspaper has special coloured sections, including a "yellow pages" section focused on legal issues. My article was published on 18-19 September 2004, p. C3.

decision to discontinue Russian case no. 159; and 2) for the rehabilitation of the massacre victims under the statute on rehabilitation of victims of political persecutions (Law no. 1761-I of 18 October 1991). For practical reasons, the number of those represented in the two proceedings was limited to the relatives of 10 POWs.

Our requests were rejected by the Chief Military Prosecutor's Office and the Russian courts. They held that no evidence that the Polish citizens had been executed in 1940 existed. What they could only establish was that some Poles had been kept in POW camps in the spring of 1940, but that they then "had disappeared". As a consequence, the relatives represented in the proceedings did not have the required legal standing since the bodies of their family members had not been identified in the Russian investigation. The Russian organs dismissed all evidence referring to the so-called dispatching lists (containing names of the POWs transported on particular dates "to the disposal of the NKVD") and the results of the German excavation works at the Katyń forest in 1943, when the remains of three people were identified.[8] In the rehabilitation proceedings the Russian courts stated that even if "hypothetically" Polish POWs might have been killed, it was not possible to determine the legal basis for the repression against them. All of these decisions were taken despite the fact that memorials had been erected on the burial sites (with personal commemorative plaques for each victim) and that the Russian authorities had on several occasions paid tribute there to those killed.

My vision of the "Katyń complaint" evolved. The core question was whether it was feasible to rely on Article 2 of the ECHR, which protects the right to life. As the ECHR (signed on 4 November 1950) entered into legal force on 3 September 1953 and was ratified by the Russian Federation only on 5 May 1998, it was clear that it could not apply in its substantive aspect to the killings committed in 1940. But the right to life is not limited only to the prohibition against taking someone's life (unless a few rigorously construed exceptions apply). It also requires Member States to conduct an efficient investigation (the so-called procedural obligation) in all cases of violent (or "suspicious") death. Although the Strasbourg Court treated the procedural obligation as autonomous and detachable from the prohibition against taking someone's life,[9] it was not certain

[8] As already mentioned, in 1943 the Germans discovered only one of the burial sites (Katyń forest). Three soldiers out of the group of 10 were held in Kozelsk POW camp and following the execution were buried in the Katyń forest. The results of the 1943 exhumation, which was conducted with the participation of a group of foreign forensic experts, were published in *Amtliches Material zum Massenmord von Katyń*, Berlin 1943.

[9] Therefore, even though a state (through its functionaries) is not found responsible for a given killing (death), that state can be found in violation of Article 2 if there was no required investigation into the killing. *See* e.g. *Kaya v. Turkey*, Application no. 22729/93, Judgement of 19 February 1998, paras. 74-78 and 86-92; *McKerr v. the United Kingdom*, Application no. 28883/95, Judgement of 4 May 2001, paras. 116-61; *Scavuzzo-Hager and Others v. Switzerland*, Application no. 41773/98, Judgement of 7 February 2006, paras. 53-69 and 80-86; *Ramsahai and Others v. the Netherlands*, Application no. 52391/99, Grand Chamber Judgement of 15 May 2007, paras. 286-89 and 323-57. Sometimes a breach of the procedural obligation under Article 2 has been alleged even in the absence of any complaint as to the substantive aspect of Article 2 (e.g. *Calvelli and Ciglio v. Italy*, Application no. 32967/96, Grand Chamber Judgement of 17 January 2002, paras. 41-57; *Byrzykowski v. Poland*, Application no. 11562/05, Judgement of 27 June 2006, paras. 86 and 94-118; *Brecknell v. the United Kingdom*, Application no. 32457/04, Judgement of 27 November 2007, para. 53.

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if the obligation to investigate under the ECHR could be invoked when a killing (or suspicious death) occurred before the ratification of the Convention by a given state. In this regard, the Strasbourg case law was contradictory and the relevant decisions of the Court yielded different answers.[10]

In the first ruling, in the joint cases of *Moldovan and Others v. Romania* and *Rostaş and Others v. Romania*, decided in 2001, the Court unanimously dismissed the complaint raised under Article 2 because the anti-Roma riots in issue, which left several people dead, had occurred prior to the ratification of the ECHR by Romania.[11] But only two years later in another case against Romania *(Bălăşoiu v. Romania)*, the Court, by a unanimous vote, declared itself competent *ratione temporis* to deal with the procedural limb of the application (lack of an efficient investigation), despite the fact that the alleged act of cruel treatment (prohibited as torture, inhuman or denigrating treatment under Article 3) had taken place before the accession date.[12]

Although the second Romanian case, decided unanimously by the same chamber, might suggest that the Court was willing to correct its initial mistake made in the first decision (in its legal observations the Romanian government expressly referred the Court to its decision in *Moldovan/Rostaş*), it was rather risky to rely on assumptions not confirmed clearly in the ruling. The subsequent decisions of the Court seemed to have demonstrated that this cautious approach was justified. First, in *Voroshilov v. Russia* and *Kholodovy v. Russia*, the Court unanimously found the applications inadmissible as, respectively, an act of torture[13] and a fatal bomb attack[14] had occurred prior to the ratification date. Second, in *Blečić v. Croatia* the Court held, while dealing with the issue of its temporal competence, that it must be determined "in relation of the facts constitutive of the alleged interference".[15] Although that case concerned property matters, the construct of the "facts constitutive of the alleged interference" might suggest that, when applied to cases under Article 2 and 3, that construct would refer to killings and acts of maltreatment. In other words, it might be assumed that only due to a killing (maltreatment) being the core event would an accessory and resulting obligation to investigate that killing (maltreatment) arise. When the killing (maltreatment) happens before the critical ratification date, there is no procedural obligation whatsoever under the ECHR in the post-ratification period. The *Blečić* ruling was not a preliminary decision on admissibil-

[10] All those answers were given in decisions on the admissibility/non-admissibility of a case. They were not judgements on merits.

[11] *Moldovan and Others v. Romania*, appl. no. 41138/98; and *Rostaş and Others v. Romania*, Application no. 64320/98, both decisions of 13 March 2001.

[12] *Bălăşoiu v. Romania*, Application no. 37424/97, decision of 2 September 2003.

[13] *Voroshilov v. Russia*, Application no. 21501/02, decision of 6 December 2005. In the decision the Court stated that if it had not declared the case inadmissible it would have had to verify whether the applicant had made "credible assertions" as the facts which were contested by the government. This might suggest that if the government does not question the facts of the alleged violation occurring in the pre-ratification period, the Court becomes competent to hear the case with respect to the obligation to investigate.

[14] *Kholodovy v. Russia*, Application no. 30651/05, decision of 14 September 2006.

[15] *Blečić v. Croatia*, Application no. 59532/00, Judgement of 8 March 2006, ECHR 2006-III, para. 77.

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ity but a judgment rendered on the merits. Moreover, the case was decided by the most important judicial formation of the Court, reserved for the most important and difficult cases, i.e. the Grand Chamber composed of a group of 17 judges. Although not a right to life case, the *Blečić* judgment had to be treated as an important precedent.

Following these developments it became all the more reasonable to shift the gist of the "Katyń complaint" towards an ECHR provision other than Article 2 protecting the right to life. Our choice went to Article 8, on the right to private and family life. First, it could be argued that the close relatives of the killed (disappeared) persons were entitled to know the circumstances of their deaths and the burial places. Accordingly, the relatives must be given access to the legal proceedings on the killing(s) as well as to the results thereof. Such knowledge was also needed for the success of the rehabilitation procedure instituted in Russia ('good name' being one of the facets of private life under Article 8). Second, the Strasbourg Court seemed willing to broadly use Article 8 entitlements in different factual contexts. Third, an important hint could be drawn from the *Moldovan/Rostaş* decision. While dismissing the allegations raised under Article 2 as temporally inadmissible, the Court had given the applicants satisfaction in a subsequent judgment, finding that there were violations of Articles 3 and 8 of the ECHR.[16] This illustrated that the Court was open to providing some redress to the victims.

In 2007, when the first legal steps taken by the applicants were underway in Russia, the Court delivered, as a chamber, its judgment in *Šilih v. Slovenia*.[17] The case concerned the lack of an efficient investigation into death of the applicants' son, who had died due to alleged medical malpractice. The fatal event happened prior to the ratification of the ECHR by Slovenia. In a unanimous judgment the Court first declared the application admissible under Article 2 of the ECHR, and then found a violation of the procedural obligation inherent in Article 2 (the procedural limb). In this judgment the Court returned to its position from the *Bălăşoiu* decision, and it repeated that approach several months later in *Teren Aksakal v. Turkey*.[18]

As the Court's case law was conflicting at that point, in order to solve the matter the Court had to set a clear standard, convening as the Grand Chamber.[19] This took place on 9 April 2009 in *Šilih v. Slovenia*, reheard by 17 judges following a request lodged by the government. Happily for us, this judgment closely coincided with our receipt

[16] *Moldovan and Others v. Romania (no. 2)*, Application nos. 41138/98 and 64320/98, Judgement of 12 July 2005, ECHR 2005-VII. The violations resulted from the deplorable living conditions of the applicants after they had left their destroyed houses.

[17] *Šilih v. Slovenia*, Application no. 71463/01, Judgement of 28 June 2005. Making use of new procedural opportunities, the Court did not render a separate decision on admissibility but decided to examine the merits of the application at the same time as its admissibility.

[18] *Teren Aksakal v. Turkey*, Application no. 51967/99, Judgement of 11 September 2007. The chamber vote was 5 to 2.

[19] The two dissenting judges in the *Teren Aksakal* case remarked on the Court's conflicting case law and called on the Court to set the standard in a Grand Chamber judgment. It is worth noting that already in that case the chamber intended to relinquish its jurisdiction in favour of the Grand Chamber, but the Turkish government objected to the motion.

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of final decisions in our Russian cases (the two sets of proceedings were finished on 25 November 2008 and 29 January 2009).

In the *Šilih* judgment the Court, aware of the precedential character of its ruling, pointed out some general principles applicable when the issue of the temporal reach of the ECHR is raised under Article 2 (paras. 161-163). Having regard to the principle of legal certainty, the temporal jurisdiction of the Court must not be open-ended. It also made clear that the Court could only deal with procedural acts and omissions which occurred after the critical date of ratification. Then the Court proceeded to the most important part of the principles enunciated in the judgment. It held that the Court would be competent to adjudicate on the efficacy of a national investigation if there exists "a genuine connection" between the death and the entry into force of the ECHR for a particular state. This genuine connection is deemed to exist when "a significant proportion" of procedural steps have been or ought to have been carried out after the ratification date (this can be called "the proportion rule"). But the Court also added that it would not exclude that "in certain circumstances" the required connection could be based "on the need to ensure that the guarantees and the underlying values of the ECHR are protected in a real and effective manner" (later called by the Court "the humanitarian rule" or "the Convention values rule").

The judgment of the Grand Chamber was rendered by a huge majority of 15 votes to two. It formulates an original judicial vision of the test (or rather several tests) to be used for answering the question whether the Court has temporal jurisdiction to verify the quality of a domestic investigation when the triggering act (in this case death, but also acts contrary to Article 3) occurred in the pre-ratification period. At the same time, the proposal of the Court is complex. While I accept the final conclusion confirming the Court's temporal competence, I fully share some criticisms of the judgment. The *Šilih* case could (and should) have been decided in a simpler and clearer way by adhering to the existing international case law on temporal jurisdiction, above all that elaborated by the Permanent Court of International Justice and International Court of Justice.[20] Instead, we were offered an unclear road-map with a plenty of confusing signs.[21] This uncomfortable situation was made even worse by several concurrent opinions appended to the judgment.

3. LODGING THE "KATYŃ COMPLAINT" AT STRASBOURG

The "Katyń complaint", which was lodged with the Court as a preliminary application in May and as a final one in August 2009,[22] made use of the *Šilih* narrative. But

[20] *See* E. Bjorge, *Right for the Wrong Reasons: Silih v. Slovenia and Jurisdiction Ratione Temporis in the European Court of Human Rights*, 83 British Yearbook of International Law 115 (2012).

[21] *See e.g.* UK Supreme Court's judgment of 18 May 2011, *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)*) [2011] UKSC 20. Justice Lord Phillips called the "genuine connection" factor not an easy one and the referral to the Convention values Delphic.

[22] *Wołk-Jezierska and Others v. Russia*, Application no. 29520/09, which later became the case of *Janowiec and Others v. Russia*, Applications nos. 55508/07 and 29520/09.

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first of all I referred to the need for protecting the fundamental Convention values as the justification for the Court's competence to hear the allegations under Article 2, the right to life. If, as the Court specified in its case law on hate speech, expressions denying the reality of crimes against humanity and war crimes contravened the core values of the ECHR,[23] all the more the same rationale should apply to such crimes themselves. I also pointed out the drafting history of the ECHR, which clearly specified that the treaty was a reaction to the atrocities committed by the totalitarian regimes during WWII.

I also drew the Court's attention to the fact that the Katyń massacre constituted a crime under international law, not subject to a statute of limitations. At the same time I also submitted that, alternatively, the Court could adjudicate by relying on "the rule of proportion of procedural steps". Some new important activity must have taken place after 5 May 1998 if the Russian authorities had so radically departed from the established historical facts (the murder of Polish citizens) and had accepted the "disappearance version" as their final one.

The applicants also complained that the Russian Federation had violated Article 3, which prohibits degrading and inhuman treatment (by, *inter alia*, denial of the crime and providing contradictory information on the fate of the applicants' relatives, and suggesting that there may have existed due reasons for the execution, if "hypothetically" conducted, in 1940). Additionally, I did not resign from relying on Article 8 (right to private and family life) as a Convention ground for the applicants' entitlement of access to the Russian Katyń investigation.

In November 2009, the application was granted priority status[24] and the case was communicated to the Russian government for comments. In January 2010 the Polish government decided to join the case as a third party.

In principle, the proceedings before the Court are in written form, with an oral hearing before a chamber reserved only for the most difficult cases. In its submissions, the Russian government never called Katyń a massacre or a crime, but consistently referred to it as the "Katyń events". It insisted that neither under national legislation nor international law did there exist any obligation to conduct the Katyń investigation which, actually, was only started as a political "goodwill gesture" to the Polish side. Moreover, Russia refused to provide the Court with a copy of the decision to discontinue Katyń investigation no. 159 (requested by the Court in the application communication document), alleging in could not do so for reasons of its core national security.

In July 2011 the Court declared the application admissible as to the claim under Article 3 (degrading and inhuman treatment). It further decided to join the issue of the applicability of Article 2 (right to life in its procedural aspect) with the analysis on the merits. Additionally, in August the Court asked the parties whether Russia, by not producing a copy of the decision the Court had asked for, had failed to comply with its obligation to cooperate under Article 38.

[23] *Garaudy v. France*, Application no. 65831/01, decision of 24 June 2003, ECHR 2003-IX.

[24] This status was important, as there were almost 150,000 cases awaiting examination by the Court.

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The Court decided to hold an oral hearing on 6 October 2011 in Strasbourg. From the questions prepared for the hearing it clearly transpired that the Court was ready for the first time to make use of the clause of the core values of the Convention as a justification for its competence to examine allegations concerning the lack of an efficient investigation. The parties were asked whether "the mass murder of Polish prisoners can be characterised as a war crime?"[25]

The chamber that examined the case was composed of the following judges: Dean Spielmann (President, Luxembourg), Karel Jungwiert (Czech Republic), Boštjan M. Zupančič (Slovenia), Anatoly Kovler (Russia), Mark Villiger (Swiss representing Liechtenstein), Ganna Yudkivska (Ukraine) and Angelika Nußberger (Germany).

4. CHAMBER JUDGMENT

The Court's judgement was delivered on 16 April 2012 at a public hearing in Strasbourg.[26] Russia was found guilty of violations of Article 3 (by its treatment of the applicants not only in a degrading way, but also a severely inhuman way) and Article 38 (lack of due cooperation with the Court). In giving the reasons for its finding of a violation of Article 3 (declared by a vote of 5 to 2; the Russian and Czech judges dissenting), the Court stated that it was "struck by the apparent reluctance of the Russian authorities to recognize the reality of the Katyń massacre, to which the applicants' relatives had fallen victim"; that "the approach chosen by the Russian military courts which consisted in maintaining, to the applicants' face and contrary to the established historic facts, that the applicants' relatives had somehow vanished in the Soviet camps, demonstrated a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katyń massacre" (para. 159); 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); that "the Russian authorities did not provide the applicants with any official information about the circumstances surrounding the death of their relatives or make any earnest attempts to locate their burial sites" (para. 164); and that "by acknowledging that the applicants' relatives had been held prisoners in the Soviet camps but declaring that their subsequent fate could not be elucidated, the Russian courts denied the reality of summary executions that had been carried out in the Katyń forest and at other mass murder sites. The Court considers that such approach chosen by the Russian authorities has been contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering" (para. 165). The Court referred also to the corresponding case law of the UN Human Rights

[25] Answers to the questions submitted on behalf of the applicants were published in XXXI Polish Yearbook of International Law 409 (2011).

[26] This is a rare practice, as the Court's judgments are usually sent by mail to the parties and posted on the Court's website.

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Committee.[27] At the same time, the Court made a certain unconvincing distinction among the applicants (paras. 153-154). It considered that those born "after the precipitated departure of their fathers to war had never had a personal contact with them", and thus could not be regarded as victims in the context of Article 3.

By a vote of 4 to 3 the Court also held[28] that the Russian Federation's government had breached its obligation of co-operation with the Court under Article 38 on account of its failure to submit a copy of the decision to discontinue Russian investigation into the Katyń massacre. At no point in the proceedings did Russia explain the exact nature of its current core security concerns that required classification of the document regarding the mass scale murder committed by the totalitarian Soviet regime. Moreover, in 2010 it turned out that the identity of the authority which had made the decision, in 2004, to classify the document was far from clear. When Memorial, a Russian human-rights non-governmental organization, instituted domestic proceedings to declassify the decision to close the Katyń investigation, the Interagency Commission for the Protection of State Secrets, which had allegedly – according to government statements – approved the classified status, informed the Moscow City Court that it had actually made no classification decision. This meant that both the Polish side and the Strasbourg Court had been given untrue information by the Russian government. The Court added that it was not convinced that a public and transparent investigation into the crimes of the previous totalitarian regime could have compromised the national security interests of the contemporary democratic Russian Federation. Moreover, the classification decision appears to have been at variance even with the relevant Russian legislation, that expressly precludes any information about violations of human rights by State officials from being classified (section 7 of the State Secret Act of 21 July 1993). The Court concluded that no substantive grounds could have justified the refusal to produce a copy of the requested decision (para. 109).[29] It is also worth stressing that for

[27] UN Human Rights Committee, *Mariam Sankara et al. v. Burkina Faso*, no. 1159/2003, views of 28 March 2006.

[28] The Russian, Czech and Slovenian judges dissented. They voted for non-violation of Article 38, based on the fact that the Court declared itself not competent to adjudicate on the allegations concerning Article 2 (see below). As a copy of the decision to discontinue the Russian Katyń investigation was needed in the framework of allegations raised under Article 2, finding these allegations inadmissible *ratione temporis* should have automatically led to no violation of the State's obligation to co-operate with the Court. In other words, the dissenting judges treated the procedural co-operation obligation as corollary to (and conditional upon) the Court having jurisdiction to hear any substantive claims under the Convention. On the other hand, the position taken in the judgment treated the obligation to co-operate as absolute and independent on the final decision(s) as to the admissibility of allegations.

[29] The Court also added that "even assuming that the Russian Government had legitimate security considerations for keeping secret the text of the requested decision, those could have been accommodated with appropriate procedural arrangements, including a restricted access to the document in question under Rule 33 of the Rules of Court and, *in extremis*, the holding of a hearing behind closed doors. Although the Russian Government was fully aware of those possibilities, they preferred not to make use of them or seek their application by the Court, which is an additional indication of their reluctance to comply with the Court's request under Article 38 of the Convention" (para. 110).

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the first time the Court analysed the obligation to co-operate under Article 38 of the ECHR as 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").

On the other hand, by a narrow majority of 4 votes to 3 the Court ruled, with respect to the claim under Article 2, that it was "unable to take cognisance of the merits of the complaint". Although all the judges agreed that the Katyń massacre was, as a war crime, an imprescriptible crime under international law that contradicted the underlying Convention values, the majority held that this feature alone did not suffice to make the Court competent to verify if an effective investigation had been carried out domestically.

The majority (judges from Russia, Ukraine, Slovenia and the Czech Republic) stated that a second element must additionally occur.[30] Information casting new light on the crime's circumstances must come into the public domain in the post-ratification period in order to "provide a bridge from the distant past into the recent post-ratification period" (para. 140). In the opinion of the Court's majority, in the period after 5 May 1998 no such piece of evidence had been produced or discovered. This new-piece-of-evidence requirement was specified for the first time in the Katyń judgment; it did not exist in the previous case law of the Court identifying the pre-conditions of the Court's jurisdiction *ratione temporis*.[31] Had we been aware of such a requirement prior to the hearing we could have undertaken efforts to demonstrate that important new evidence had been transmitted to the Russian investigation after the ratification date (5 May 1998). It is also puzzling how the majority could have ascertained that there was no new evidence surfacing after the critical date, since the substantive part of the Russian investigation no. 159 remained classified.

[30] Actually, however, this approach was accepted by only two judges (Slovenian and Czech), as the Russian and Ukrainian judges adhered to another view (see their concurrent opinion attached to the judgment). According to their ("realistic") view, as several decades elapsed since the Katyń massacre, there were no prospects of success to conduct the investigation effectively. They also made a distinction between two types of investigations: the first one being instituted by "real legal causes", the second one being conducted only due to political or moral motives (as "a political gesture"). In their view, the Convention standards on effective investigation applied only to the first category. These differences of opinions among the majority judges meant that the important standard set in the *Katyń* judgment (the new element test) was actually shared (and authored) only by two judges of the seven judges chamber.

[31] *Brecknell v. the United Kingdom* (Application no. 32457/04, Judgement of 27 November 2007), on which the Court relied, is not a temporal jurisdiction case where the Convention-values test was to be applied, but an entirely post-ratification case raising the issue of what can renew the procedural obligation under Article 2 when the case was stalled for many years. Of some relevance for the *Katyń* case might be the inadmissibility decision in *Çakir and Others v. Cyprus* (Application no. 7864/06, decision of 29 April 2010), rendered in a case where all the circumstances of a killing committed at the time of Cypriot conflict in 1975 were known from the very beginning, but there was no investigation thereafter. The *Katyń* case differed from the Cypriot one, however, because the circumstances of the Katyń massacre were not known and the Soviet Union denied its involvement, putting the blame on the German side. The *Çakir* decision was not referred to by the Court in the *Katyń* judgment.

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The approach taken by the majority was criticised by the three-judge minority (Luxembourg, Liechtenstein and Germany). They wrote, in their joint dissenting opinion appended to the judgement, that the Court's position resulted in narrowing the reference to the underlying Convention values. Due to the scale and magnitude of the Katyń massacre, coupled with the attitude of the Russian authorities after the entry into force of the Convention, the Court should have found the complaint under Article 2 admissible and then should have decided that there was a violation of that provision.

The three dissenting judges went on to stress that even if they had adopted the logic of the majority by introducing a second element (sufficiently important material casting new light on the crime and emerging in the post-ratification period), they would still be satisfied that the Court had jurisdiction to examine the complaint. The sudden swings in the Russian investigation (i.e. "murdered soldiers" turning into "disappeared ones") should be interpreted as a new element relevant for the Court.

The dissenting opinion starts with the statement that the case raises "important questions affecting the <u>application</u> of the Convention as well as <u>serious issues of general importance</u> in respect of Article 2 (procedural limb)" [underlined in the original]. This refers *verbatim* to the wording of Article 43(2) of the ECHR, that specifies when a case should be reheard by the Grand Chamber upon a request of a party to the dispute.

And here I add one more piece of information to make the picture of the judgment complete: we learned about the ruling four days before it was officially pronounced at a hearing at Strasbourg. On 12 April 2012, the Russian daily newspaper „Moskovskiye Novosti" published an article "We are not responsible for Stalin". It gave details of the judgment (with some incorrect information as to the voting results) and heralded that the Poles, all in all, had lost the case. Following subsequent interventions of the Polish government (Ministry of Foreign Affairs) and myself at the Court, the President of the Court conducted an investigation into the leak (among others, it interviewed all the judges involved in the case, and a similar scrutiny took place at the Court Registry). Although the investigation did not identify those responsible, we were informed that the Court had introduced new safeguards to prevent such leaks from occurring in the future.

5. REFERRAL OF THE CASE TO THE GRAND CHAMBER

A request for referring the Katyń case to the Grand Chamber was submitted in June 2012.[32] A panel of five judges granted the request on 24 September 2012.[33] A public

[32] This request was supported by the Polish government, a third party to the proceedings.

[33] Requests for a rehearing must not be confused with traditional domestic appeals motions. At Strasbourg, requests are allowed sporadically only when a panel a five judges has been convinced by the requesting party that a case raises a serious question affecting the interpretation or application of the Convention, or a serious issue of general importance. The text of the request is reproduced in XXXII Polish Yearbook of International Law 327 (2012).

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hearing was scheduled for 13 February 2013. The parties were invited to state their final legal positions, and again, prior to the hearing, they were sent questions to be answered. The questions, while generally similar to those posed earlier by the chamber, contained three novelties. First, the parties were asked if the Court had jurisdiction to assess the respondent State's compliance with the procedural obligations arising out of Article 2 of the ECHR relating to an investigation into deaths that occurred before the entry into force of the Convention on 3 September 1953. From this question it clearly transpired that the Court intended to consider whether there is a difference, in legal terms, between situations in which the triggering act (death) occurred before, and those in which such act occurred after the date on which the European Convention came into legal force.[34] Second, the Court asked the opinion of the parties on whether a procedural obligation under Article 2 of the Convention can be said to have arisen by reason of any events which took place in the post-ratification period. Third, the Court inquired if the proximity of family ties can be a factor justifying a distinction between two groups of applicants, as was done in the chamber judgment.

In addressing the question whether the Court had jurisdiction to assess the compliance of Russia with its procedural obligations under Article 2, inasmuch as the Katyń massacre predated the entry into force of the Convention, I broadly referred to the case law of several international courts and bodies which was relevant in the context of determining whether competence *ratione temporis* exists to adjudicate temporally "stretched" cases. The Permanent Court of International Justice and the International Court of Justice made the distinction between situations or facts which constitute a source of the rights claimed by a party to a proceeding, and those being a source of the dispute.[35] Whereas the source of the dispute must relate to situations or facts subsequent to the ratification, the source situation giving rise to the rights of a party to the dispute may originate in the pre-ratification period.[36] Applying this reasoning to the "Katyń case", I argued that the dispute was not about the killings that occurred before the critical date of the Convention's ratification by Russia, but about Russia's subsequent failure to effectively investigate the 1940 massacre. 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

[34] After the Grand Chamber's *Šilih* judgment, the Court delivered 21 judgments concerning investigations into deaths that predated the ratification date of the Convention. In all these cases the Court, adjudicating as a chamber, has unanimously found itself to be temporarily competent, and thereby strongly confirmed the position taken in *Šilih*. The Katyń complaint was the first case before the Court in which the deaths as a triggering event took place prior to the Convention's coming into legal force.

[35] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 4 April 1939, PCIJ Rep. Series A/B No. 77, para. 87; *Jurisdictional Immunities of the State: Germany v. Italy*, order of 20 July 2010.

[36] *Phosphates in Morocco*, Judgment of 14 June 1938, Series A/B no. 74, p. 24; *Right of Passage over Indian Territory, Portugal v. India*, Judgment of 12 April 1960, ICJ Reports 1960. p. 33/35); *Electricity Company of Sofia and Bulgaria*, para. 87, and a summary of the PCIJ case law in *Certain Property, Liechtenstein v. Germany* [preliminary objections, judgment], Judgment of 10 February 2005, ICJ Reports 2005, para. 41.

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the pre-accession facts. But the source of the actual dispute, i.e. the non-fulfilment of the procedural obligation, is located squarely in the post-ratification period. What is also important is that the obligation to investigate (to establish the circumstances surrounding the killings and to draw the required consequences therefrom) was not a legal novelty introduced upon the entry of the Convention into legal force, but resulted from universally binding international law in effect at the time the massacre had occurred. As is clearly evidenced by the post-war trials, international law, as it existed in 1939, made not only States but also individuals responsible for war crimes.[37]

This procedural obligation under Article 2 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, an obligation to determine and reveal the circumstances of tragic events. The obligation to hold an effective investigation has been especially stressed in the case law of the Inter-American Court of Human Rights, which has been confronted with numerous cases involving massacres committed by state agents.[38] The right to truth is of particular and preponderant importance in cases of gross human rights violations.[39]

The attention of the Court was also drawn to the practice of two human rights bodies: the Inter-American Court on Human Rights and the United Nations Committee on Human Rights. The Inter-American Court found itself competent to adjudicate on the obligation to investigate even when the killings occurred before the Inter-American

[37] 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" (*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, pp. 60-61. 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.

[38] In *Velásquez Rodriguez v. Honduras* (Judgment of 29 July 1988), the Court held 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).

[39] The UN Human Rights Council, in 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).

Convention on Human Rights entered into legal force.[40] Even more interesting is a case from the United Nations Committee on Human Rights, which concerned an enforced disappearance in 1974. The applicant (mother of the disappeared person) relied on the International Covenant on Civil and Political Rights, which entered into force in 1976. The Committee found the communication inadmissible *ratione temporis*, having regard to a declaration the Chilean government made upon the ratification of the Covenant. The declaration stipulated that the Committee would be competent to consider communications only with respect to acts which began after 11 March 1990.[41] The Committee's acceptance of this declaration demonstrates that there exists a legal instrument for States wishing to limit, in temporal terms, the application of a given treaty. The Russian Federation did not make an analogous declaration or reservation when ratifying the European Convention.[42]

With respect to the Grand Chamber's question whether there were any events in the post-ratification period that might have given rise to a procedural obligation under Article 2, the Court's attention was drawn to the so-called "Ukrainian list", recognised by historians as containing the names of 3,435 prisoners held in the prisons of Western Ukraine and executed in 1940 in the Ukrainian part of the Katyń massacre.[43] 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 Ukrainian list discovered in the archives in Ukraine. Some documents contain data indicating that there might have been unknown execution and burial sites. This ample material was included into the case file of the Russian investigation as late as 2 August 2004, hence only forty days before the investigation was discontinued. The Ukrainian *dossier* should be considered as a fresh and important new evidentiary material coming in the post-ratification period.

It was lastly submitted that the test applied by the chamber to establish if a given applicant could be considered a victim (which resulted in dividing the applicants into two

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[40] *Gomes Lund and Others ("Guerrilha Do Araguaia") v. Brazil*, paras. 16-18. See also *Almonacid-Arellano and Others v. Chile* [preliminary objections, merits, reparations and costs], Judgment of 26 September 2006, paras. 46-50. In the same vein, the Appellate Body of the World Trade Organisation has 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. See: *Banana (III)* case (*European Communities – Regime for the Importation, Sale and Distribution of Bananas*) WT/DS27/AB/R; report of 9 September 1997, paras. 235-237; *Canada – Term of Patent Protection*, WT/DS170/AB/R; report of 18 September 2000, paras. 70-72.

[41] *Norma Yurich v. Chile*, no. 1078/2002, 2 November 2005, UN Doc. CCPR/C/85/D/1078/2002 (2005).

[42] It must be assumed that, unless otherwise expressly 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 so by means of an express reservation. This position is mirrored in the case law of the Permanent Court of International Justice and the International Court of Justice *(Mavrommatis Palestine Concessions, Phosphates in Morocco, Case Concerning Application of the Genocide Convention)*.

[43] The "Ukrainian list" contains the names of persons whose personal files were forwarded on 24 November 1940 by the Ukrainian NKVD to the Soviet NKVD after the execution actions were completed.

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distinct groups) is too narrow, as it is limited only to one factor, i.e. family relationship. It does not take into account other circumstances relevant for determining whether an applicant may be treated, in the particular circumstances of a 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. Moreover, although any feasible test must be based on a family relationship/bond, it should also refer to the behaviour of the applicant. In other words, if personal involvement of a (more distant) relative demonstrates that he/she is attached to the killed/disappeared person, such a relative should be afforded victim status under Article 3. This approach was illustrated by the practice of the Inter-American Court on Human Rights.[44]

In December 2012 the Court allowed six non-governmental organisations to join the case. They all presented *amicus curiae* briefs that supported, in one way or another, the applicants' claims. These organisations were: Amnesty International (London), Open Society Justice Initiative (New York), Public International Law & Policy Group (The Hague), and acting jointly the Human Rights Centre "Memorial" (Moscow), European Human Rights Advocacy Centre (London) and Essex Transitional Justice Network, School of Law, University of Essex, UK.[45]

In its final written submissions, sent to the Court shortly before the Grand Chamber hearing, the Russian government claimed that the ruling taken by the Russian Chief Military Prosecutor's Office on 2 August 2004, by which the documents received from Ukraine had been included in the file of Katyń investigation, was "a procedural mistake". It stated that the ruling "contains a manifestly unsubstantiated conclusion about the fact that those documents concerned the execution of 3,435 Polish citizens in the spring of 1940 in the territory of the Ukrainian Soviet Socialist Republic" (para. 5). The Russian government argued further 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. By its submissions the Russian government made an attempt, at the very last moment, to undermine the argument that the Ukrainian documentation should to be treated as an important new element emerging in the post-ratification period, giving the Court temporal competence over the Katyń case (if the 'new element test' used by the chamber was to be applied).[46]

At the hearing held on 13 February 2013, the parties recapitulated their legal positions as expressed in their written submissions. The Polish government made a comprehensive analysis of the Ukrainian material, demonstrating its pertinent role to Katyń investigation. No questions were asked by the Grand Chamber after the parties' statements.

The Grand Chamber was chaired by Josep Casadevall, Vice-president of the Court and judge elected in respect of Andorra. Usually the Grand Chamber cases are headed by President of the Court. On 1 November 2012 this post was taken by Dean Spiel-

[44] *Gomes Lund and Others ("Guerrilha Do Araguaia") v. Brazil*, para. 235-238.

[45] These *amicus curiae* briefs are reproduced in XXXII Polish Yearbook of International Law 334 (2012).

[46] It is puzzling which Russian authority, and on what legal grounds, "excluded" or "disqualified" the material in question from the file when the case had already been closed.

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mann. Inasmuch as he headed the chamber's Katyń case (and co-authored the dissenting opinion to the chamber's ruling under Article 2), he preferred to withdraw from sitting in the case pending before the Grand Chamber, even though under the procedural rules of the Court he was not obliged to do so.[47]

6. THE GRAND CHAMBER JUDGMENT

When the Grand Chamber pronounced its Katyń judgment on 21 October 2013, the words most often heard in the Court building at Strasbourg were "unbelievable" and "incredible". The ruling, initiated at the request of the applicants, turned out to be worse for them than the previous chamber judgment. The Grand Chamber concluded that:

• Russia had not duly co-operated with the Court and accordingly violated Article 38 (unanimous ruling);

• the Court was not competent *ratione temporis* to examine, under Article 2, whether the Russian investigation into the Katyń massacre was effective (13 votes to four);

• there was no violation of Article 3's prohibition of inhuman and degrading treatment (12 votes to five).

I consider the Grand Chamber's Katyń judgment as one of the worst rulings of the Court. My highly critical assessment is based on two reasons. One is related to what is *missing* in the judgment; the other touches upon what was *said* in the ruling.

In each judgment the Court, before giving its opinion on particular allegations raised in the application, first makes a summary of the parties' submissions and then addresses them. That is the basic precept of the requirement to hear the case fairly. Nevertheless, in the *Katyń* judgment the Grand Chamber did not answer the applicants arguments submitted under Article 2, nor were these arguments recapitulated by the Court. Readers of the judgment are not aware that the applicants broadly referred to the international case law on temporal jurisdiction from such bodies and courts as the Permanent Court of International Justice, the International Court of Justice, the Inter-American Court on Human Rights, the United Nations Committee on Human Rights, and others. No mention is made of the crucial distinction between the source of right and the source of the dispute, as applied in international judicial practice. No information can be found on the fact that there is a mechanism for legal reservations available to states wishing to limit the temporal application of a given treaty. On the other hand, the Grand Chamber summarizes the applicants' arguments in an accurate and adequate manner and with no omissions when they suit the conclusion reached in the judgment that Russian Federation violated Article 38 (referring to the international

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[47] Under Rules of the Court, all judges who rendered a chamber judgment subsequently referred to the Grand Chamber are excluded from the Grand Chamber rehearing of the case with the exception of the chamber's president and a judge elected in respect of the state concerned (Rule 24). Before the chamber the Russia was represented by Anatoly Kovler. His term in office terminated on 31 October 2012, and from 1 November 2012 the new Russian judge is Dmitry Dedov.

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case law broadly identified by the applicants in the context of the state's obligation to co-operate and relevant to Article 38).

The omissions in the judgment leave me – I'm trying to use elegant language here – deeply perplexed. Careful readers of Strasbourg judgments may have already earlier come across some instances of such a worrying practice on the part of the Court. I cite here only one example: in a partly dissenting opinion to the Grand Chamber judgment in *Kafkaris v. Cyprus* judge Javier Borrego Borrego specifies those facts pertinent to the case that were mislaid in or vanished from that part of the ruling that provided an account of the factual background of the case.[48] Following my personal and very disappointing experience in the *Katyń* case I have become more inclined to concede, with great regret, that omissions and misrepresentations occur at Strasbourg even in the most important cases decided by the Grand Chamber. This practice is possible because the Court does not make public, as other international courts do, the submissions of the parties. I am strongly convinced that the time has come for the Court to post the parties submissions on the Court's website, along with the decisions made by the Court in particular cases.

I am also unable to accept the reasoning the Grand Chamber applied in finding that it lacked competence to hear the Katyń case on the merits under Article 2. The *Janowiec* case was used by the Court to clarify, as it expressly admitted, its case law with respect to the *Šilih* criteria (paras. 140 and subseq.). Nevertheless, I have serious doubts if this was done in a convincing manner, for the following reasons:

First, the Grand Chamber confirms the 'new element test' (discovery of new and sufficiently important material after the critical date of ratification as triggering a fresh procedural obligation under Article 2), but does not give it an independent status. The application of this test is made conditional upon positively passing through either the "genuine connection" test or the "Convention values" test (para. 144 *in fine*). This approach has huge consequences. In its *Katyń* judgment, the chamber posed the question of the Court's temporal jurisdiction in the following way: did any unknown and sufficiently important material emerge after the ratification date that might cast new light on the case? If the answer is positive, the Court becomes competent *ratione temporis*. The Grand Chamber's position was different. The 'new element test' is not an independent tool and as such cannot open the door to the Court's jurisdiction.

Second, in the *Šilih* judgment the Court pointed out that there must exist a 'genuine connection' between the triggering event (death) and the entry into force of the Convention in respect of a given state. This connection was understood as requiring that much of the investigation into the death took place, or ought to have taken place, in the period following the ratification (the proportion rule). The Grand Chamber in its *Katyń* judgment introduces into the content of the genuine connection requirement a new time factor of specified duration. In the *Šilih* judgment the Court merely stated that its temporal jurisdiction must not be open-ended. I find this approach justified because it allows for taking into account the differing and specific circumstances of particular

[48] *Kafkaris v. Cyprus*, Application no. 21906/04, Judgement of 12 February 2008.

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cases. The first and foremost element of this approach is how much of the investigation was carried out after the critical date. In its *Katyń* ruling, the Grand Chamber departed from this assumption. The time factor becomes "the first and most crucial indicator of the 'genuine' nature of the connection". And the duration of that time-span must remain "reasonably short" and should not exceed ten years (para. 146). Why not five years or twenty years? Because ten is the first two-digit number? Although the Court refers to its previous case law, in which the relevant ratification date and the death date was separated by more or less ten years, I consider this "factual justification" to be unconvincing.[49] Already in *Mladenović v. Serbia* the time span was 13 years.[50] Must the applicant in that case consider herself lucky that her judgment preceded by one year the Grand Chamber's ruling in the *Katyń* case, or is the decreed time-span to be treated flexibly? Neither explanation offers consolation to the applicants.

The insertion of the definite time factor corresponds with the view expressed by judge Peer Lorenzen in a concurrent opinion appended to the *Šilih* judgment. His individual view, not joined by any other Grand Chamber judge in *Šilih*, seems to have eventually attained the status of the Court's standard in the Grand Chamber's *Katyń* judgment.

Third, the Grand Chamber confirms that the reference to the underlying Convention values in *Šilih* (Convention values test) means that the required connection for the Court's jurisdiction may be found to exist if the triggering event is of a larger dimension than an ordinary criminal offence, and amounts to the negation of the very foundations of the Convention. This is the case with respect to serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments (para. 150). The Court has stated that the heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that such crimes must be imprescriptible and not subject to any statute of limitations in the domestic legal order (para. 151). But now a dramatic change suddenly appears in the reasoning of the Court. The Grand Chamber considers that the Convention values clause cannot be applied to events which occurred prior to 4 November 1950, i.e. the adoption of the Convention.[51] As a result, a state party cannot be held responsible under the Convention for its failure to investigate even the most serious crimes under international law if such criminal actions predated the Convention.

According to the Grand Chamber, inasmuch as the Katyń massacre was committed in 1940, Article 2 of the Convention cannot be applied to the Russian investigation,

[49] One may argue that had the Court in its previous case law allowed a longer (e.g. twenty years) or a shorter period (e.g. five years), it would have been likely for the Court to adhere to such a time span, according to the position taken by the Grand Chamber in *Katyń*.

[50] *Mladenović v. Serbia*, Application no. 1099/08, Judgement of 22 May 2012.

[51] This date is termed the beginning of the Convention's "existence as an international human rights treaty". In a cursory remark, I wish only to recall that an international treaty begins to exist in the legal sense of the word when it enters into force. In the case of the Convention this date was 4 November 1953.

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neither under the genuine connection test (more than ten years separates the date of the crime and Russia's ratification of the Convention in 1998), nor when the Convention values test is evoked (the massacre predates the enactment of the Convention). Having ascertained the existence of these two critical circumstances, which according to the Court rendered it not competent *ratione temporis*, one might expect that the Court would finish its analysis at this point.[52] But to the reader's surprise, the Grand Chamber additionally indulges in verification whether any new important material came to light after the ratification date, causing the case to fall "within the scope of 'procedural acts and omissions' for the purposes of Article 2 of the Convention" (para. 158). The Court concludes that it is not possible to identify any real investigative steps taken after 5 May 1998, nor did any new relevant piece of evidence or substantive information come to light in the period after the critical date. At the same time, the re-evaluation of the evidence, the departure from previous findings, and the decision regarding the classification of the investigation materials are held not to have amounted to the "significant proportion of the procedural steps" which is required for establishing a genuine connection for the purposes of Article 2 of the ECHR (para. 159).

I do not share the Court's conclusion as to the lack of any new important material emerging in the post-ratification period (the Ukrainian list and the accompanying *dossier*). But above all, I cannot grasp the logic that might justify the Grand Chamber's decision to make the analysis whether there were significant novelties in the course of investigation no. 159 after the critical date. The status of the 'new material test' remains uncertain to me. Does this test exist as separate and independent from the genuine connection test (now based on the 'ten years rule') and the Convention values test? Elementary logic answers that this is not possible, yet the reasoning of the Court demonstrates the opposite. Those who are to apply the Convention standards domestically (and perhaps at Strasbourg too) are left confused.

There is another problem with the coherence of the Grand Chamber's reasoning. Imagine that Russia (the Soviet Union) ratified the Convention in 1950. Then the Court would have had jurisdiction to adjudicate on the fulfilment of its procedural obligations because the Katyń massacre was perpetrated only 10 years earlier, hence within the time limits needed to satisfy the genuine connection requirement. But the Court's jurisdiction could not have been founded on the Convention values test as it applies only when the killings in question took place after 3 September 1950. Which component is stronger and matters more: Convention values or the ten year rule? In the Grand Chamber's answer it is not the fundamental and underlying axiology of the Convention values, but the simple arithmetical counting of years. But perhaps the Court simply forgot in its judgment to provide information that the ten-year rule does not extend beyond 3 September 1950, and it will correct the omission on a future occasion.

[52] The Court expressly stated that "if the triggering event lies outside the Court's jurisdiction *ratione temporis*, the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test or the 'Convention values' test has been met" (para. 144 *in fine*).

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Fourth, referring to the notion of "procedural acts", the Court made a distinction between, on the one hand, acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party, and on the other hand, other types of inquiries that may be carried out for other purposes, such as establishing a historical truth (para. 143). The procedural obligations under Article 2 only apply to the first type of proceedings. This distinction is artificial and unfortunate. Only upon the conclusion of some cases dealing with historical events will it be possible to ascertain if there are people who should be accused or victims' interests to protect. Moreover, even accepting this distinction, I see no reasons why the Article 2 procedural obligations should be so sharply differentiated with regard to the two types of proceedings.

My criticisms with respect to the Court's finding under Article 2 are mostly of a legal and logical character. A different kind of criticism relates to the conclusion under Article 3. As already mentioned above, the chamber stated in its *Katyń* judgment that it was struck by a number of individual specific, quoted, or described reactions and statements of the Russian authorities, which it considered tantamount to a denial of the reality of the Katyń massacre, running against the underlying values of the Convention and eventually qualified as acts not only of a degrading nature but also inhuman treatment. On the other hand, the Grand Chamber limits its reasoning to a couple of statements. The applicants knew their close relatives had been murdered, hence there was no uncertainty as to their fate (differently than in disappearance cases). The pronouncements of the Russian courts that withheld acknowledgment of the fact that the applicants' relatives had been killed in 1940 hence did not change the emotional position of the applicants. Thus, it could not be held that "the applicants' suffering reached a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of victims of a serious human rights violation" (para. 188). What was striking to the chamber turned out to be nothing to the Grand Chamber. I write not another word on this…

The four judges who did not agree with the judgment appended a virulent joint dissenting opinion to it (Ineta Ziemele, Latvia; Vincent A. de Gaetano, Malta; Julia Laffranque, Estonia and Helen Keller, Switzerland). As a diligent reader of the Strasbourg rulings, I have read only a few other opinions of such strength and emotion. The joint dissent deserves a fuller description and treatment, but as this article has its space limitations, I limit myself to reproducing only a few selected quotations.

The dissenting judges wrote that the Grand Chamber in the Katyń judgment: "has missed an opportunity to (…) uphold the 'Convention values' clause in the Šilih principles. In doing so, it has deprived that clause of its humanitarian effect in the case at hand and potentially weakened its effect in the event of its future application. This approach is untenable if the Convention system is to fulfil the role for which it was intended: to provide a Court that would act as a 'conscience' for Europe". And further: "We regret the majority's interpretation of the humanitarian clause in the most non-humanitarian way". And still further: "We express our profound disagreement and dissatisfaction with the findings of the majority in this case, a case of most hideous

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human rights violations, which turn the applicants' long history of justice delayed into a permanent case of justice denied."

7. IF I HAD KNOWN…

The Grand Chamber judgment came like a bolt from the blue. In my darkest scenario I did not imagine that the seventeen judges might find no violation of Article 3. But it happened. It is also striking that the Grand Chamber found, for the first time in its history, a separate violation of Article 38. The State's obligation of co-operation with the Court is auxiliary to the task of determining if there was a violation of one or more of the substantive provisions of the Convention. Therefore in its previous case law, if a state's failure to submit information or documents to the Court resulted in a finding of a breach of Article 38, the Court also drew inferences as to the well-foundedness of the allegations raised under other provisions of the Convention. In the *Katyń* judgment the Grand Chamber decided differently, while at the same time it made the obligation under Article 38 absolute. Thus, the lesson given by the Strasbourg Court is clear and simple: even if the Court eventually declares it has no jurisdiction to adjudicate on the applicants' substantive grievances, there is a violation of Article 38 if the state does not comply with the Court's order to submit requested information.

The allegation raised under Article 38 was not at heart of the Katyń complaint. In 2004 the relatives of the Katyń victims suddenly heard that the case had been closed and the investigation's findings would not be available as it would compromise Russia's core national security interests. Then came the refusal of rehabilitations and statements denying the reality of the Katyń massacre, even suggesting that the killings, "if they had hypothetically happened", might have been justified. Strasbourg seemed to be the last resort for assistance. Eventually to no avail.

Is the Court prepared to repeat its conclusions if there are analogous acts and statements of state authorities regarding the reality of the Holocaust? If it is to be consequent, it should.

If only I had known what the *Katyń* judgment rendered by the Grand Chamber would be… On many occasions I am asked this question. The European Court of Human Rights was to be a court of conscience. The Convention was enacted in the face of heinous atrocities committed by two totalitarian regimes, and it was to prevent such horrible acts from occurring again. The final *Katyń* judgment does not testify to the truth of this supposition.

The chamber's *Katyń* judgment fell only one step short from giving full satisfaction to the applicants. If I had known the subsequent Grand Chamber judgment, I would have gone with the Katyń complaint to the United Nations Committee of Human Rights. And when asked today by people who have serious grievances related to the way the Russian authorities answer to their "historical inquiries" I answer: think about Geneva rather than Strasbourg.