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JANOWIEC AND OTHERS V. RUSSIA: A LONG HISTORY OF JUSTICE DELAYED TURNED INTO A PERMANENT CASE OF JUSTICE DENIED

INTRODUCTION

Can the Russian Federation be held responsible for violations of its international obligations under the European Convention on Human Rights (hereinafter "European Convention") in relation to the *Katyń* massacre? If so, which violations can be attributed to Russia, taking into account that the massacre was perpetrated before the European Convention had even been drafted? How far does extend the positive obligation of a State to conduct effective investigations into gross human rights violations and to prosecute and sanction those responsible? Which notion of "indirect victim" should be applied when assessing a case of massacre? What are the implications of recognizing the right to truth in its individual and collective dimensions?

These are the main questions that the European Court of Human Rights (hereinafter "ECtHR") was called upon to address when ruling on the case *Janowiec and others v. Russia*, first in its Chamber-formation (judgment issued on 16 April 2012), and then in Grand Chamber (judgment issued on 21 October 2013).[1]

The answers provided by the ECtHR are far from satisfactory in many respects and the legal reasoning is not particularly persuasive. This becomes even more evident when comparing the findings of the ECtHR with those of the Inter-American Court of Human Rights in similar cases. The latter show that a different outcome would have been possible.

1. THE CASE *JANOWIEC AND OTHERS V. RUSSIA*

Between 2007 and 2009 the ECtHR received two applications against Russia lodged by fifteen Polish nationals, who are relatives of twelve of the victims of the *Katyń*

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[1] ECtHR, *Janowiec and Others v. Russia* (55508/07 and 29520/09) Chamber, ECtHR 16 April 2012; and Grand Chamber, ECtHR, 21 October 2013. Judgments of the ECtHR are available at <http://www.ECtHR.coe.int>.

massacre. In April and May 1940 almost 26,000 Polish prisoners of war who were being held in special prison camps established by the Soviet People's Commissariat for Internal Affairs (hereinafter "NKVD") were arbitrarily executed and their bodies were thrown in mass graves. The decision to carry out this mass execution was signed by all members of the *Politburo*. Victims included Polish officers held in detention camps and members of various counter-revolutionary and espionage organizations, former landowners, officials and refugees. Prisoners from the Kozelsk camp were killed at a site near Smolensk, known as the Katyń forest; those from the Starobelsk camp were shot in the Kharkov NKVD prison and their bodies were buried near the village of Pyatikhatki; the police officers from Ostashkov were killed in the Kalinin NKVD prison and buried in Mednoye. The circumstances of the execution of the prisoners held in prisons in western Ukraine and Belarus remain unknown to date.

In 1942 and 1943 common graves were discovered near the Katyń forest and an international commission consisting of forensic experts conducted exhumations from April to June 1943. The remains of 4,243 Polish officers were excavated, and 2,730 were identified. The commission declared that the Soviets were responsible for the massacre. However, Soviet authorities denied any involvement and put the blame on the Germans. In 1959 Russian authorities destroyed the records of the persons shot in 1940 and related documents. Other sensitive files were sealed and their contents were officially made public only in 2010.

In 1991 around 200 bodies were recovered in the Kharkov, Tver and Smolensk regions, and 22 of them were identified. Between 1990 and 2004, Russian authorities opened a criminal investigation into the *Katyń* massacre, but the Chief Military Prosecutor eventually decided to discontinue the case on the grounds that all alleged suspects were dead. 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 – as "top secret" and another eight volumes "for internal use only". The decision to discontinue the investigation was also given "top secret" classification and its existence was only revealed on 11 March 2005 at a press conference given by the Chief Military Prosecutor. Although requested to do so by the ECtHR in the context of the proceedings, Russia refused to produce a copy of this decision, alleging the need for its secrecy.

The fifteen applicants before the ECtHR were all relatives of twelve of the victims of the *Katyń* massacre, including sons and daughters, wives, and grandchildren. Some of the applicants were born after the massacre took place, but they also devoted their lives to the struggle to unveil the truth and to obtain justice and redress for the harm suffered.

Between 2003 and 2008 the applicants requested documents from the Prosecutor General of the Russian Federation concerning their relatives, and asked the Chief Military Prosecutor's Office to recognize their rights as next-of-kin of the executed Polish officers. However, access to documents was precluded either because the latter had been destroyed in 1959 or because they were classified as secret. The applicants were not formally recognized as victims in the cases before the Russian authorities. In 2007 the Military Court of the Moscow Command noted that although the relatives of some

of the applicants had been listed among the prisoners in the Starobelsk camp, their remains had not been among those identified and therefore "there were no legal grounds to assume that they had died as a result of the offence in question."[2] This reasoning was upheld by the Supreme Court of Russia. In 2008 and 2009 further appeals were submitted, but Russian courts dismissed them, reiterating that although the names of applicants' relatives had been included in the NKVD lists for the Ostashkov, Starobelsk and Kozelsk camps, "the Katyń investigation did not establish the fate of the said individuals. As their bodies had not been identified, there was no proof that the applicants' relatives had lost their lives as a result of the crime of abuse of power."[3]

Applications lodged between 2008 and 2009 by the Russian NGO Memorial requesting declassification of the decision of 2004 to discontinue the investigation were rejected. Between 1998 and 2008 the applicants (i.e., those who filed applications in the ECtHR case) repeatedly applied to different Russian authorities for the rehabilitation of their relatives. Their claims were rejected.

The applicants before the ECtHR alleged a violation by Russia of Art. 2 of the European Convention (right to life) in its "procedural limb", due to the failure to conduct an adequate and effective investigation into the deaths of their relatives. Further, they alleged a violation of Art. 3 of the European Convention (prohibition of torture and inhuman or degrading treatment and punishment), submitting that, owing to the lack of information about the fate of their relatives and the Russian authorities' dismissive approach to their requests for information, they had endured inhuman and degrading treatment.

The ECtHR also considered whether the Russian refusal to produce, at its request, a copy of the decision of 2004 to discontinue the investigation into the *Katyń* massacre amounted to a violation of Art. 38 (examination of the case) of the European Convention. A violation of this provision was declared in both judgments, as the ECtHR did not find substantive grounds which could have justified the respondent State's refusal to produce a copy of the requested decision and the classification of the documents was at variance also with the requirements of domestic legislation, which precluded any information about violations of human rights by State officials from being classified.[4]

The European Convention was adopted on 4 November 1950 (i.e. almost ten years after the *Katyń* massacre) and entered into force on 3 September 1953. Russia ratified it on 5 May 1998.[5]

1.1. The Chamber and Grand Chamber judgments

On 16 April 2012 a Chamber of the ECtHR issued its judgment in the case *Janowiec and others*. The applicants obtained the referral of the case to the Grand Chamber, which on 21 October 2013 rendered its judgment. In the words of Judge Wojtyczek,

[2] ECtHR, *Janowiec and Others* (Chamber), para. 53.

[3] *Ibidem*, para. 56.

[4] Due to the limited space available, this aspect will not be further examined in this contribution.

[5] Pursuant to Art. 59, para. 4, of the European Convention "As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification."

"while the Convention does not set out a prohibition of *reformatio in peius*, the situation is paradoxical, in that a remedy provided for by Article 43 of the Convention and used by the applicants with a view to ensuring protection of human rights has ultimately led to a Grand Chamber judgment which is much less favourable to them than the Chamber judgment."[6]

1.1.1. The ECtHR's competence *ratione temporis*

First, the ECtHR had to assess whether it had the competence *ratione temporis* to examine the merits of the applicants' complaint with regard to Russia's violation of Art. 2 because of its lack of investigation into the *Katyń* massacre.

In previous cases the ECtHR has affirmed its temporal jurisdiction to review States' compliance with the procedural obligations stemming from Art. 2 of the European Convention with regard to deaths which occurred prior to the entry into force of the treaty. In the leading case *Šilih v. Slovenia,* decided by the Grand Chamber in 2009, the ECtHR held that "the procedural obligations arising under Article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date [date of entry into force of the Convention with respect to the State party or, the date on which the respondent recognized the right of individual petition, when this recognition was still optional]."[7] However, to guarantee the principle of legal certainty, the ECtHR indicated that its competence encompasses only procedural acts or omissions in the period subsequent to the Convention's entry into force. The ECtHR also found that there must be a

> *genuine connection between the death and the entry into force of the Convention in respect of the respondent State* for the procedural obligations imposed by Article 2 to come into effect. Thus *a significant proportion of the procedural steps required by this provision* – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – *will have been or ought to have been carried out after the critical date. However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner*.[8]

In its jurisprudence, the ECtHR clarified that the procedural obligation to investigate under Art. 2 of the European Convention where there has been an unlawful or suspicious death is triggered by, in most cases, the discovery of the body or the occurrence of death, but

> […] the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the

[6] ECHR, *Janowiec and Others* (Grand Chamber), partly concurring and party dissenting opinion of Judge Wojtyczek, para. 10.

[7] ECHR, *Šilih v. Slovenia* (71463/01) Grand Chamber, ECHR 9 April 2009, para. 152. *See also* para. 159.

[8] *Ibidem*, para. 163 (emphasis added).

> missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.[9]

First, in an attempt to justify its departure from the *Šilih* precedent, in *Janowiec and Others* the Chamber recalled that the period of time passed between deaths and the entry into force of the Convention for the respondent State must be relatively short, and it noted that in its case-law this ranged from one to 13 years.

In the case of *Janowiec and Others* 58 years had passed and this was arguably not short. However, the ECtHR clarified that, to comply with the "genuine connection" standard, a significant portion of the investigative steps to comply with the procedural obligation under Art. 2 must have been carried out after the ratification date (i.e. 5 May 1998). The findings on this aspect of the Chamber in *Janowiec and Others* are rather disappointing. Although in its own summary of the facts the Chamber recalls that the investigation on the *Katyń* massacre was conducted between 1990 and 2004 and that appeals to challenge the decision to discontinue the case were lodged by applicants until 2008, in its judgment the Chamber inexplicably focused only on the excavations performed in 1991, the handing over of historic documents to Polish authorities in 1992, and on a stock-taking meeting held between the Russian, Polish, Belarusian and Ukrainian prosecutors in 1995. After having completely overlooked all the other investigative steps (taken or omitted by Russian authorities) between 1998 and 2008, the Chamber concluded that it was unable to "find any indication in the file or in the parties' submissions that any procedural steps of comparable importance were undertaken in the post-ratification period. […] It follows that the criterion triggering the coming into effect of the procedural obligation imposed by Article 2 has not been fulfilled."[10]

In *Šilih* the ECtHR also held that exceptional circumstances, based on the need to ensure the effective protection of the guarantees and the underlying values of the Convention, can also justify the finding of a connection between the triggering event and the ratification. It would seem that events such as those committed in *Katyń* and the subsequent attitude of Russian authorities are blatantly in conflict with the underlying values of the Convention. The conclusion of the Chamber on this subject is somewhat surprising. The Chamber first affirmed that "far from being fortuitous, the reference of the underlying values of the Convention indicates that, for such connection to be established, the event in question must be of *a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes* against humanity."[11] But it added that the duty to investigate war crimes or crimes against humanity is not unceasing, although

> the procedural obligation may be revived if information purportedly casting new light on the circumstances of such crimes comes into the public domain after the critical date.

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[9] ECtHR, *Varnava and Others v. Turkey* (16064/90 16065/90 16066/90 16068/90 16069/90 16070/90 16071/90 16072/90 16073/90) Grand Chamber, ECtHR 18 September 2009, para. 145.

[10] ECtHR, *Janowiec and Others* (Chamber), para. 138.

[11] *Ibidem*, para. 140 (emphasis added).

> It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. […] Should new material come to light in the post-ratification period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have temporal jurisdiction to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law.

Eventually, the Chamber accepted that the massacre "had the features of a war crime" but, although not having access to the complete investigation file precisely because Russia carefully avoided producing it, the Chamber nonetheless felt confident that there were no "new elements in the post-ratification capable of furnishing the connection between the prisoners' death and the ratification and imposing a fresh obligation to investigate […] the Court is therefore bound to conclude that there were no elements capable of providing a bridge from the distant past into the recent post-ratification period and that the special circumstances justifying a connection between the death and the ratification have not been shown to exist." By a margin of four votes to three the Chamber declared that it lacked the competence to examine the merits of the complaint under Art. 2. In fact the lack of disclosure of the relevant documents was in itself a persistent omission event that corresponded to the persistent violation of the procedural obligation and could alone justify the exercise of the ECtHR's jurisdiction.

The weaknesses in the Chamber's reasoning were highlighted by Judges Spielmann, Villiger and Nußberger in their joint partly dissenting opinion. They declared they had "no doubt that the Court is able to take cognisance of the merits of the complaint under Article 2 and that this Article has been violated."[12] For the dissenting judges the criteria set out in *Šilih* were misinterpreted by the majority. In their view, the "gravity and magnitude of the war crimes committed in *Katyń* […] coupled with the attitude of the Russian authorities after the entry into force of the Convention, warrant application of the special circumstances clause in the last sentence of paragraph 163 [of *Šilih*]",[13] and "this was clearly one of the war atrocities that the drafters of the Convention sought to prevent from ever happening in the future. It was obviously an act contrary to the underlying values of the Convention."[14] They added that the existence of such an act, "which constituted a war crime not subject to a statutory limitation is, as long as investigation is still possible, sufficient in our view to establish the Court's temporal jurisdiction over the investigation into this act"[15] and "even if we were to adopt the logic of the

[12] *Ibidem*, joint partly dissenting opinion of Judges Spielmann, Villiger and Nußberger, para. 1.

[13] *Ibidem,* para. 4.

[14] *Ibidem,* para. 5. This affirmation was rebutted by Judges Kovler and Yudkivska in their joint concurring opinion, arguing that "we believe that the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted 'as part of the process of *reconstructing* western Europe in the aftermath of the Second World War', and not with the intention of delving into that black chapter". This argument resembles that used to justify amnesty laws or post-dictatorial pardon measures, where the need to "turn the page" is invoked.

[15] *Ibidem,* joint partly dissenting opinion of Judges Spielmann, Villiger and Nussberger, para. 7.

majority qualifying the 'genuine connection test' by introducing a second element (that is, sufficiently important material casting new light on the offence and coming into the public domain in the post-ratification period), we would still be satisfied that the Court has jurisdiction to examine the complaint. Indeed, both the decision of 21 September 2004 to discontinue the investigation and the decision to classify the case file amounted to major developments in the investigation."[16]

For its part, the Grand Chamber noted that the application of the criteria adopted in *Šilih* has sometimes given rise to uncertainty and therefore further clarification was desirable. It first affirmed that the notion of procedural acts "must be understood in the sense inherent in the procedural obligation under Article 2 […] namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party. *This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth*."[17] It clarified that

> omissions refers to a situation where no investigation or only insignificant procedural steps have been carried out but where it is alleged that an effective investigation ought to have taken place. Such an obligation on the part of the authorities to take investigative measures may be triggered when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible. Should new material emerge in the post-entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law.[18]

With regard to the "genuine connection" test, the Grand Chamber entered into unwarranted arithmetic considerations:

> the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the "genuine connection" standard. *Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years.* Even if, *in exceptional circumstances, it may be justified to extend the time-limit further into the past, it should be done on condition that the requirements of the 'Convention values' test have been met.*[19]

The reasons that led the Grand Chamber to fix the ten-year limitation remain obscure.[20]

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[16] *Ibidem,* para. 10.

[17] ECtHR, *Janowiec and Others* (Grand Chamber), para. 143 (emphasis added).

[18] *Ibidem*, para. 144.

[19] *Ibidem*, para. 146 (emphasis added).

[20] *But see* D. Ruck Keen, *1940 Soviet massacre outside reach of European Convention, rules Strasbourg*, UK Human Rights Blog, 29 October 2013, http://ukhumanrightsblog.com/2013/10/29/1940-soviet-massacre-outside-reach-of-european-convention-rules-strasbourg/#more-20026, accessed 25 January 2014. The author argues that "[t]he inclusion of a specific temporal limb within the 'genuine connection' test is particularly welcome".

The Grand Chamber attempted to better explain the "Convention values test", indicating that "the required connection may be found to exist if *the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity*, in accordance with the definitions given to them in the relevant international instruments."[21] Although the premise is quite sound, the outcome is astonishing. While the Grand Chamber does not go so far as to affirm that the *Katyń* massacre was not of a larger dimension than an ordinary criminal offence, nonetheless without further legal explanations it takes out of the hat a brand new criterion, according to which "the *'Convention values' clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty*."[22] But here the ECtHR ignored the fact that the "triggering event" consists of the event determining the alleged violation of the Convention, that is the lack of investigation, which continued well after the entry into force of the Convention.

It is clear that the Grand Chamber wanted to avoid opening a potential Pandora's box, but a court is called upon to give legal foundations to its decisions, and in this case there does not seem to be one. The Grand Chamber concludes that States parties "cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention. Although the Grand Chamber is sensitive to the argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the *possibility* to prosecute an individual for a serious crime under international law where circumstances allow it, and *being obliged to do so by the Convention*."[23] Hence justice is left to the goodwill of State parties and confined to a mere possibility. The dissenting judges riposted that "the interpretation of the humanitarian clause by the majority contradicts this very aim. We regret the majority's interpretation of the humanitarian clause in the most non-humanitarian way."[24]

A few months before delivering this unfortunate judgment, the ECtHR had affirmed for the first time in its jurisprudence the right to know the truth in cases of gross violations of human rights, declaring that "while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in

[21] ECtHR, *Janowiec and Others* (Grand Chamber), para. 150 (emphasis added).

[22] *Ibidem*, para. 151 (emphasis added). This criterion has been characterized as "non persuasive" also by judges voting with the majority. *See* concurring opinion of Judge Gyulumyan; and partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 8.

[23] ECtHR, *Janowiec and Others* (Grand Chamber), para. 151 (emphasis added). For a sharp critique of this paragraph of the judgment, see the joint partly dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, para. 33.

[24] *Ibidem*, para. 35.

their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[25] On that occasion, the ECtHR held that the inadequate character of investigations has an impact on the right to the truth, declaring that in cases of gross human rights violations this right pertains not only to the applicant and his or her relatives, but also to other victims of similar cases and the general public, which has the right to know what has happened. The findings of the Grand Chamber in *Janowiec and Others* are at odds with any serious attempt to guarantee the right to know the truth.

1.1.2. The applicants as victims of a violation of Art. 3

With regard to Art. 3, by a margin of five votes to two the Chamber found a violation with respect of ten of the applicants due to the suffering they incurred by the continuous disregard for their situation shown by the Russian authorities. The Chamber recalled that the essence of a violation of Art. 3 "is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention. The relevant factors include the *proximity of the family tie, the particular circumstances of the relationship*, the extent to which the family member witnessed the events in question, *the involvement of the family member in the attempts to obtain information about the disappeared person*."[26]

However, with regard to five of the applicants the Chamber seems to have considered that their family ties were not close enough. In particular, it argued that:

> two of them […] are the children of the victims of the Katyn massacre but they were born after the precipitated departure of their fathers to war and have never had a personal contact with them. Of the other three applicants who were twice removed from the Katyn victims, only Ms. Rodowicz may have had an opportunity to seeing her grandfather before he perished in the NKVD camps, whereas Mr. Trybowski and Mr. Romanowski were born in 1940 and 1953 and had never known their respective grandfather and uncle. While accepting that the fact of being raised without their father must have been a source of continuing distress for Ms. Wołk-Jezierska and Ms. Krzyszkowiak, the Court considers that the mental anguish which those five applicants experienced on account of the disappearance of their fathers or more distant relatives was not such as to fall within the ambit of Article 3.[27]

With respect to the ten 'nearest' applicants, the Chamber concluded that:

> the applicants suffered a long ordeal during the entire post-war Communist era in which political factors put insurmountable obstacles to their quest for information. The institution of Katyn proceedings gave them a spark of hope in the early 1990s but it was gradually extinguished, *in the post-ratification period, when the applicants were confronted with the attitude of official denial and indifference in face of their acute anxiety to know the circumstances of the death of their close family members and their burial sites.* They were excluded from

[25] ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* (39630/09) Grand Chamber, ECtHR 13 December 2012, para. 192.

[26] ECtHR, *Janowiec and Others* (Chamber), para. 151.

[27] *Ibidem,* para. 154.

> the proceedings on the pretence of their foreign nationality and barred from studying the materials that had been collected. They received curt and uninformative replies from Russian authorities and the findings that had been made in the judicial proceedings were not only contradictory and ambiguous but also contrary to the historic facts which, nonetheless, were officially acknowledged at the highest political level. *The Russian authorities did not provide the applicants with any official information about the circumstances surrounding the death of their relatives or made any earnest attempts to locate their burial sites*.[28]

It is actually difficult to see how these considerations can be limited to only ten of the fifteen applicants.

Judges Jungwiert and Kovler would have gone even further, denying the existence of a violation of Art. 3 with respect to all the applicants. In their view, only relatives of disappeared persons may, in certain circumstances, be considered victims of a violation of Art. 3 because of the lack of information on their relatives. But if it is assumed, as the ECtHR did, that the treatment to be given to the act at stake is that of "death" (instantaneous act) then, a more restrictive approach must be applied and no matter how negligent State's authorities have been, the distress of the applicants would not reach the minimum level of severity which is necessary to consider the treatment as falling within the scope of Art. 3.[29]

Finally, the Chamber justified its finding of a violation of Art. 3 with respect to the ten "nearest" applicants by recalling its jurisprudence, according to which "a *denial* of crimes against humanity, such as the Holocaust, *runs counter to the fundamental values of the Convention and of democracy, namely justice and peace*, and that the same is true of statements pursuing the aim of justifying war crimes such as torture or summary executions."[30] The Chamber considered that the "*approach chosen by the Russian authorities has been contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering*."[31] While the latter is hardly disputable, one may wonder why the Chamber failed to recognize that the lack of investigations into the deaths of the applicants' relatives does not run counter the fundamental values of the Convention.

With regard to the applicants' claims for just satisfaction, the Chamber held that although ten of them "must have suffered anxiety and frustration on account of the Russian authorities' flagrant, continuous and callous disregard for their enquiries […], in the exceptional circumstances of the present case, it considers that the finding of a violation would constitute sufficient just satisfaction."[32] Compensation in the form of pecuniary and non-pecuniary damages in connection with the deaths of the applicants' relatives was rejected as "the complaint about their killing in 1940 falls outside the scope of the instant case."[33]

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[28] *Ibidem,* para. 164 (emphasis added).
[29] *Ibidem*, joint partly dissenting opinion of Judges Jungwiert and Kovler.
[30] ECtHR, *Janowiec and Others* (Chamber), para. 165 (emphasis added).
[31] *Ibidem* (emphasis added).
[32] *Ibidem*, para. 173.
[33] *Ibidem*, para. 174.

The Grand Chamber, in its judgment, denied that any of the applicants was a victim of a violation of Art. 3 of the Convention, because the mental distress provoked by the Russian authorities' attitude did not reach the necessary threshold to be considered inhuman and degrading treatment. The justification put forward by the majority of the judges (by a margin of twelve votes to five) to get to this conclusion was unforeseen. On the one hand, they affirmed that the finding a violation of Art. 3 "is not limited to cases where the respondent State is to be held responsible for a disappearance. It *can also result from the failure of the authorities to respond to the quest for information by the relatives or from the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts*, where this attitude may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the fate of the missing person."[34] On the other hand, the Grand Chamber found that

> the situation which is at the heart of the complaint under Article 3 initially presented the features of a "disappearance" case. […] *By the time the Convention was ratified by the Russian Federation on 5 May 1998, more than fifty-eight years had passed since the execution of the Polish prisoners of war. Having regard to the long lapse of time, to the material that came to light in the intervening period and to the efforts that were deployed by various parties to elucidate the circumstances of the Katyn massacre, the Court finds that, as regards the period after the critical date, the applicants cannot be said to have been in a state of uncertainty as to the fate of their relatives who had been taken prisoner by the Soviet Army in 1939. It necessarily follows that what could initially have been a "disappearance" case must be considered to be a "confirmed death" case.* […] The Court does not question the profound grief and distress that the applicants have experienced as a consequence of the extrajudicial execution of their family members. […] The Court's case-law, as outlined above, has accepted that the suffering of family members of a "disappeared person" who have to go through a long period of alternating hope and despair may justify finding a separate violation of Article 3 on account of the particularly callous attitude of the domestic authorities to their quest for information. As regards the instant case, the Court's jurisdiction extends only to the period starting *on 5 May 1998, the date of entry into force of the Convention in respect of Russia. The Court has found above that as from that date, no lingering uncertainty as to the fate of the Polish prisoners of war could be said to have remained. Even though not all of the bodies have been recovered, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact. The magnitude of the crime committed in 1940 by the Soviet authorities is a powerful emotional factor, yet, from a purely legal point of view, the Court cannot accept it as a compelling reason for departing from its case-law on the status of the family members of "disappeared persons" as victims of a violation of Article 3 and conferring that status on the applicants, for whom the death of their relatives was a certainty.* The Court further finds no other special circumstances of the kind which have prompted it to find a separate violation of Article 3 in "confirmed death" cases.[35]

[34] ECtHR, *Janowiec and Others* (Grand Chamber), para. 178 (emphasis added).
[35] *Ibidem*, paras. 182, 185-187 (emphasis added).

The Grand Chamber affirmed that the relatives of victims of gross human rights violations other than enforced disappearance could be considered as victims of a violation of Art. 3, but it then concluded that, since the death of the applicants' relatives was certain, there was no suffering that could amount to a violation. The Grand Chamber carefully avoided assessing whether the failure of Russian authorities to respond to the requests for information by the applicants (which lasts to this very day and also affected the ECtHR itself), and the insurmountable obstacles placed in their way (also faced by the ECtHR, which could not obtain from Russia the requested documentation), could be considered as contrary to the provisions of Art. 3.

The findings of the Grand Chamber are a mockery in the face of persons who have been struggling for decades to discover the truth on the fate of their relatives and on the circumstances surrounding the massacre and the progress of the investigation. Earlier the Russian authorities always denied any standing in domestic proceedings to the victims' relatives. Now the ECtHR suggests that they should be satisfied with accepting that their loved ones certainly died.

2. A COMPARISON WITH THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

In its judgment in *Šilih*, the ECtHR expressly invoked the jurisprudence of the Inter-American Court of Human Rights (IACHR) to justify its decision to establish jurisdiction *ratione temporis* over the procedural complaints relating to a death which had taken place prior to the critical date.[36] By contrast, the Chamber completely ignored the very same jurisprudence in its judgment in *Janowiec and Others*. The Grand Chamber also avoided any mention of it, although both the applicants and third parties consistently referred to the Inter-American jurisprudence.[37] Indeed, had the principles set out by the IACHR been applied by its European peer, the outcome of the *Janowiec and Others* case would arguably have been very different.

The IACHR has found international responsibility of respondent States for their lack of investigation into gross human rights violations, including massacres which occurred well before the critical date.[38] The IACHR does not refer to "genuine con-

[36] ECtHR, *Šilih*, paras. 114-118 and 160.

[37] ECtHR, *Janowiec and Others* (Grand Chamber), paras. 123, 125-126, 176 and 196.

[38] *See inter alia*, IACHR, *Massacres of El Mozote and nearby places v. El Salvador*, Judgment of 25 October 2012 (the massacres took place in December 1981, while El Salvador recognized the competence of the IACHR in June 1995); IACHR, *Río Negro Massacres v. Guatemala*, Judgment of 4 September 2012 (the triggering facts occurred between 1980 and 1982 and Guatemala recognized the competence of the IACHR in March 1987); *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Judgment of 24 November 2010 (the violations occurred between 1972 and 1975, while the respondent recognized the competence of the IACHR in December 1998); *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (the triggering facts dated back to August 1974, while Mexico adhered to the American Convention in March 1981); and *Heliodoro Portugal v. Panama*, Judgment of 12 August 2008 (the triggering facts occurred in May 1970, while Panama recognized the competence of the IACHR in February 1990). Judgments of the IACHR are

nections" or "humanitarian clauses", nor does it fix random time-spans between the triggering events and the critical date. It neatly holds that it has "competence to examine human rights violations that are continuing or permanent even though the initial act violating them took place before the date on which the Court's contentious jurisdiction was accepted, if the said violations persist after the date of acceptance, because they continue to be committed; thus, the principle of non-retroactivity is not violated."[39] The obligation to investigate and to identify, prosecute and sanction those responsible for gross human rights violations is of a continuous nature. Moreover, an investigation cannot be undertaken "as a simple formality predestined to be unsuccessful". In this regard, the IACHR has established that "every State decision that is part of the investigative process, as well as the investigation as a whole, must be directed at a specific goal, *the determination of the truth and the investigation*, pursuit, capture, prosecution and, as appropriate, punishment of those responsible for the facts."[40]

With regard to massacres that occurred before the critical date, the IACHR held that in cases of serious human rights violations "the *exhumation and identification of the deceased victims forms part of the State's obligation to investigate*. Thus, this is an obligation that must be fulfilled *ex officio*."[41] Also, in cases where some exhumations had been performed which allowed for the identification of the remains of some of the victims of a massacre, the IACHR did not consider it enough to fulfil the respondent's international obligations, because "the State has not continued those exhumations or the investigations that would permit the identification of all the remains. In the IACHR's opinion, this continues to increase the uncertainty of the next-of-kin as regards the whereabouts of the victims, which affects their right to know what happened to the victims."[42] The IACHR emphasized that "the remains of the deceased are evidence of what happened to them and offer details of the treatment received, the way in which they died, and the modus operandi of the perpetrators of their death. In addition, the place where the remains were found can provide valuable information to the authorities in charge of the investigation into those responsible and the institution to which the latter belonged, particularly in the case of State agents."[43] The IACHR concluded that the measures taken by the respondent to recover the remains of people who were executed almost 30 years before were not enough and it ordered, as a measure of reparation, in addition to the investigations and criminal proceedings underway, to "find, exhume and identify the persons who were presumably executed, and to determine the cause of death and possible prior injuries."[44] The IACHR ordered the respondent to set up a genetic data base and spelled out in detail the criteria to be followed to carry out the

available at http://www.corteidh.or.cr/. See also G. Citroni, *La jurisprudencia de la Corte Interamericana de Derechos Humanos en casos de masacres,* XXI Anuario Español de Derecho Internacional 493 (2005).

[39] IACHR, *Río Negro Massacres*, para. 37 (emphasis added).

[40] *Ibidem*, para. 192.

[41] *Ibidem*, para. 217 (emphasis added).

[42] *Ibidem*, para. 220.

[43] *Ibidem*, para. 266.

[44] *Ibidem*, para. 268.

exhumations and to finalize them within four years from the notification of the judgment. The IACHR ordered that "the mortal remains of the victims in this case must be returned to their next-of-kin, following reliable authentication of their identity and relationship, if possible, through DNA testing, as soon as possible, and without any cost to the next-of-kin. In addition, the State must cover the funeral costs, in agreement with the next-of-kin of the deceased person, respecting their beliefs."[45]

The IACHR applies a wide notion of the right to know the truth and the related consequences,[46] encompassing both the individual and societal dimensions. It clarified that "the effective search for the truth is the responsibility of the State and does not depend on the procedural initiative of the victim or their next-of-kin."[47] Furthermore, the IACHR declared that "in the case of violations to human rights, state authorities *cannot hide behind mechanisms such as official secrets or confidentiality of the information or behind reasons of public interest* or national security, to justify not providing the information required by the judicial or administrative authorities in charge of the investigation or pending proceedings."[48] This holds true not only if the respondent invokes state-secrecy before the IACHR, but also if it does so at the domestic level, hampering the right to know the truth for the victims and their relatives.

When the IACHR finds that the respondent has not fulfilled its obligation to investigate gross human rights violations, including those which occurred prior to the critical date, as a measure of reparation it orders the respondent to "remove all obstacles, *de facto* and *de jure*, that maintain impunity […], and initiate, continue, facilitate or re-open the necessary investigations […]. The State must expedite, re-open, direct, continue and conclude, within a reasonable time, the pertinent investigations and proceedings to establish the truth of the facts."[49]

The IACHR found violations of the right to humane treatment in respect of the relatives of direct victims not only in cases of enforced disappearance, but also of massacres.[50] In these cases, the IACHR stressed that "no evidence is required to prove the grave impact on the mental and emotional well-being of the next-of-kin of the

[45] *Ibidem*, para. 270.

[46] For the first judgment of the IACHR where the right to know the truth is analysed, see *Castillo Páez v. Peru*, Judgment of 3 November 1997, para. 86.

[47] IACHR, *Río Negro Massacres*, para. 193.

[48] IACHR, *Tiu Tojín v. Guatemala*, Judgment of 26 November 2008, para. 77 (emphasis added).

[49] IACHR, *Río Negro Massacres*, para. 257.

[50] The interpretation of the IACHR is more in line with the definition of 'victim' contained in the United Nations 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 General Assembly Resolution 60/147 of 16 December 2005. Principle 8 provides that "victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

victims."[51] The IACHR clarified that "in this type of case, the Court has considered that the right to mental and moral integrity of the next-of-kin of the victims has been violated *owing to the additional suffering and anguish they have experienced as a result of the subsequent acts or omissions of the State authorities in relation to the investigation of the facts and to the absence of effective remedies*. The Court has considered that conducting an effective investigation is a fundamental and determinant element for the protection of certain rights that are affected or annulled by these situations."[52]

The IACHR has gone so far as to also consider relatives of direct victims who were actually born after the time when the violation took place as victims of inhumane treatment, declaring that "regarding the siblings who had not been born at the time of the facts, *it has been determined from the evidence that they also suffered a violation of their moral and mental integrity. The fact of living in an environment of suffering and uncertainty owing to the failure to determine the whereabouts of the disappeared victims, despite the ceaseless efforts of their parents, harmed the mental and moral integrity of the children who were born and lived in that environment."*[53]

All the above suggests that the IACHR seeks an interpretation of the American Convention on Human Rights that is most conducive to the protection of the fundamental rights and freedoms guaranteed therein. This has an impact also on the measures of reparation eventually ordered, which are not limited to pecuniary compensation only.[54] Besides the above-mentioned cases concerning investigations and exhumations, in cases of massacres (including where the triggering events had occurred long before the critical date), the IACHR ordered, among other things, the provision of medical and psychological assistance to survivors and relatives of direct victims;[55] the carrying out of public ceremonies where senior State officials acknowledge international responsibility for the violations and apologize;[56] the making of audio-visual documentaries[57] or the building of monuments devoted to the victims[58] to honour their memory and restore their reputation; the establishment of training and educational programmes for members of the armed forces, police and law enforcement personnel on international human rights and human rights law;[59] the development of initiatives for the systematization and publication of all the information related to the human rights violations perpetrated during a military regime, guaranteeing access to this information;[60] and the

[51] IACHR, *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, para. 262.

[52] IACHR, *Río Negro Massacres*, para. 240 (emphasis added).

[53] IACHR, *Contreras and Others v. El Salvador*, Judgment of 31 August 2011, para. 122 (emphasis added).

[54] G. Citroni, *Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts*, 5(1-2) Inter-American and European Human Rights Journal 49 (2012).

[55] IACHR, *Río Negro Massacres*, paras. 287-289.

[56] IACHR, *Contreras and Others*, para. 206.

[57] *Ibidem*, para. 210.

[58] IACHR, *Moiwana Massacre v. Suriname*, Judgment of 15 June 2005, para. 218.

[59] IACHR, *Massacres of El Mozote and nearby places*, para. 369.

[60] IACHR, *Gomes Lund*, para. 292.

strengthening of the normative framework on access to information, pursuant to the Inter-American standards of protection of human rights.[61]

CONCLUSIONS

After more than seventy years of struggle, the applicants in *Janowiec and Others* turned to the ECtHR in search of justice. Unfortunately, as noted by the four judges who attached a joint dissenting opinion to the Grand Chamber judgment, the findings of the majority turned "the applicants' long history of justice delayed into a permanent case of justice denied."[62]

Contrary to the findings of the ECtHR, truth and justice are inextricably related. One without the other would be a notion empty of any concrete content. Under the pretext of legal certainty, the ECtHR limited its competence *ratione temporis* on States' obligation to investigate gross human rights violations, basing itself on obscure calculations and disregarding the most obvious features of the case.

The United Nations Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity affirms that "every person has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the reoccurrence of violations".[63] Principle 4 adds that "irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate".

The ECtHR judgment in *Janowiec and Others* patently disregards these principles, entrusting the carrying out of investigations on gross human rights violations which occurred before 1950 to the goodwill of States, and denying that the applicants are victims of inhuman treatment for the simple reason they know that their loved ones are dead. These conclusions cannot but leave a sense of frustration, deception, and despair.

The Inter-American jurisprudence demonstrates that a different outcome was possible had other interpretative criteria, more favourable to the applicants, victims and also to society as a whole, been applied. As a judge of the ECtHR once affirmed: "What a pity!"[64]

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[61] *Ibidem*, para. 293.

[62] ECtHR, *Janowiec and Others* (Grand Chamber), joint partially dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, para. 36.

[63] Recommended by the Commission on Human Rights, resolution 2005/81 of 21 April 2005, Principle 2.

[64] ECtHR, *Al-Adsani v. United Kingdom* (35763/93), Grand Chamber, ECtHR 21 November 2001, dissenting opinion of Judge Ferrari Bravo.