FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications nos. 55508/07 and 29520/09
by Jerzy-Roman JANOWIEC and Others
against Russia

The European Court of Human Rights (Fifth Section), sitting on 5 July 2011 as a Chamber composed of:

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Anatoly Kovler,
Mark Villiger,
Isabelle Berro-Lefèvre,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having regard to the comments submitted by the Polish Government,

Having deliberated, decides as follows:

I. PROCEDURE

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

2. The applicants' names are listed in paragraphs 19 to 31 below. All of them live in Poland or the United States of America. They were represented before the Court by Mr I. Kamiński, Mr R. Nowosielski, Mr B. Sochański and Mr J. Szewczyk, Polish lawyers practising respectively in Cracow, Gdańsk, Szczecin and Warsaw, and also by Mr R. Karpinskiy and Ms A. Stavitskaya, Russian lawyers practising in Moscow.

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

4. The Polish Government, who intervened in the case in accordance with Article 36 § 1 of the Convention, were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

5. On 7 October 2008 and 24 November 2009 the President of the First Section decided to give notice of the applications to the Russian and Polish Governments. It was also decided to grant priority to the applications under Rule 41 of the Rules of Court. The parties submitted their observations on the admissibility and merits of the applications.

II. THE FACTS

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

A. Background

7. On 23 August 1939 the Foreign Ministers of Germany and the Soviet Union signed a non-aggression treaty (known as the Molotov-Ribbentrop Pact) which included an additional secret protocol whereby the parties agreed to settle the map of their "spheres of interests" in the event of a future "territorial and political rearrangement" of the then independent countries of Central and Eastern Europe, including Poland. According to the protocol, the eastern part of Polish territory was "to fall to" the Soviet Union.

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

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

10. On 5 March 1940 Mr Lavrentiy Beria, head of the NKVD, wrote to Joseph Stalin, Secretary General of the USSR Communist Party, proposing to approve the shooting of Polish prisoners of war on the grounds that they were all "enemies of the Soviet authorities and full of hatred towards the Soviet system". The proposal specified that the POW camps held 14,736 former Polish officers, officials, landowners, police officers, gendarmes, prison guards, settlers and intelligence officers, and that the prisons in the western regions of Ukraine and Belarus accommodated a further 18,632 former Polish citizens who had been arrested.

11. On the same day the Politburo of the Central Committee of the USSR Communist Party, the highest governing body of the Soviet Union, took the decision to consider "using a special procedure" and employing "capital punishment – shooting" in the case of 14,700 former Polish officers held in the prisoner-of-war camps, as well as 11,000 members of various counter-revolutionary and espionage organisations, former landowners, industrialists, officials and refugees held in the prisons of western Ukraine and Belarus. The cases were to be examined "without summoning the detainees and without bringing any charges, with no statement concluding the investigation and no bill of indictment". Examination was delegated to a three-person panel ("*troika*") composed of NKVD officials, which operated on the basis of lists of detainees compiled by the regional branches of the NKVD. The decision on the execution of the Polish prisoners was signed by all the members of the Politburo, including Stalin, Voroshilov, Mikoyan, Molotov, Kalinin and Kaganovich.

12. The killings took place in April and May 1940. 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 (now Tver) NKVD prison and buried in Mednoye. The circumstances of the execution of the prisoners from the prisons in western Ukraine and Belarus have remained unknown to date.

13. The precise numbers of murdered prisoners were given in a note which Mr Shelepin, Chairman of the State Security Committee (KGB), wrote on 3 March 1959 to Nikita Khrushchev, Secretary General of the USSR Communist Party: "All in all, on the basis of decisions of the Soviet NKVD's special *troika*, a total of 21,857 persons were shot, 4,421 of them in Katyń Forest (Smolenskiy district), 3,820 in the Starobelsk camp near Kharkov, 6,311 in the Ostashkov camp (Kalininskiy district) and 7,305 in other camps and prisons in western Ukraine and Belarus".

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

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

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

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

18. The remaining documents were put in a special file, known as "package no. 1", and sealed. In Soviet times, only the Secretary General of the USSR Communist Party had the right of access to the file. On 28 April 2010 its contents were officially made public on the website of the Russian State Archives Service (rusarchives.ru[1]). The file contained the following historical documents: Mr Beria's note of 5 March 1940, the Politburo's decision of the same date, the pages removed from the minutes of the Politburo's meeting and Mr Shelepin's note of 3 March 1959. On 8 May 2010 the Russian President conveyed to the Speaker of the Polish Parliament sixty-seven volumes of the Katyń investigation files.

B. The applicants and their relationship to the victims

1. Applicants in case no. 55508/07

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

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

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

2. Applicants in case no. 29520/09

22. The first and second applicants, Ms Witomiła Wołk-Jezierska and Ms Ojcumiła Wołk, were born respectively in 1940 and 1917. They are the daughter and wife of Mr Wincenty Wołk, born in 1909, who was a lieutenant in a heavy artillery unit of the Polish Army before the Second World War. He was taken prisoner of war by the Red Army in the night of 19 September 1939 and held in Kozelsk special camp (listed in position 3 on NKVD dispatching list 052/3 04.1940). He was killed on 30 April 1940 and buried in Katyń. His body was identified during the 1943 exhumation (no. 2564).

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

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

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

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

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

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

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

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

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

C. Investigations in criminal case no. 159

32. On 13 April 1990, during a visit by Polish President Mr Jaruzelski to Moscow, the official news agency of the USSR published a communiqué which affirmed, on the basis of newly disclosed archive materials, that “Beria, Merkulov and their subordinates bore direct responsibility for the crime committed in Katyń Forest”.

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

34. In the summer and autumn of 1991, Polish and Russian specialists carried out exhumations of corpses at the mass burial sites in Kharkov, Mednoye and Katyń. They also reviewed the archive documents relating to the Katyń massacre, interviewed no fewer than forty witnesses and commissioned medical, graphology and other forensic examinations.

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

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

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

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

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

40. Further to a request from the Court for a copy of the decision of 21 September 2004, the Russian Government refused to produce it, citing its secrecy classification. However, it transpired from their submissions that the investigation had been discontinued on the basis of Article 24 § 4 (1) of the Russian Code of Criminal Procedure (cited in paragraph 68 below).

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

D. Proceedings in application no. 55508/07

42. In 2003, Mr Szewczyk – a Polish lawyer retained by the applicant Mr Janowiec and by the applicant Mr Trybowski's sister – applied to the Prosecutor General of the Russian Federation with a request to be provided with documents concerning Mr Janowiec, Mr Nawratil and a third person.

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

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

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

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

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

48. Counsel lodged a judicial appeal against the Chief Military Prosecutor's Office's refusals of 10 February 2005 and 7 November 2006. He submitted, in particular, that the status as a victim of

a criminal offence should be determined by reference to the factual circumstances, such as whether or not the individual concerned had sustained damage as a result of the offence. From that perspective, the investigator's decision to recognise someone as a victim should be viewed as formal acknowledgement of such factual circumstances. Counsel sought to have the applicants Mr Janowiec and Mr Trybowski recognised as victims and to be granted access to the case file.

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

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

E. Proceedings in application no. 29520/09

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

52. On 14 October 2008 the Military Court of the Moscow Command dismissed the appeal. It found that in 1943 the International Commission and the Technical Commission of the Polish Red Cross had excavated the remains and then reburied them, without identifying the bodies or counting them. A subsequent excavation in 1991 had only identified 22 persons and the applicants' relatives had not been among those identified. The Military Court acknowledged that the names of the applicants' relatives had been included in the NKVD lists for the Ostashkov, Starobelsk and Kozelsk camps; however, “the '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 (Article 193.17 of the 1926 Soviet Criminal Code) referred to in the decision of 21 September 2004. Accordingly, there was no basis for granting victim status to the applicants under Article 42 of the Code of Criminal Procedure. Moreover, classified materials could not be made accessible to “representatives of foreign States”.

53. Counsel submitted a statement of appeal in which they pointed out that the lack of information about the fate of the applicants' relatives had been the result of an ineffective investigation. The twenty-two persons had been identified only on the basis of the military identity tags found at the burial places and the investigators had not undertaken any measures or commissioned any forensic examination to identify the exhumed remains. Furthermore, it was a

publicly known fact that the 1943 excavation had uncovered the remains of 4,243 people, of whom 2,730 individuals had been identified. Among those identified were three persons whose relatives had been claimants in the proceedings. The granting of victim status to the claimants would have allowed the identification of the remains with the use of genetic methods. Finally, counsel stressed that the Katyń criminal case file did not contain any information supporting the conclusion that any of the Polish officers taken from the NKVD camps had survived or died of natural causes.

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

F. Proceedings for the rehabilitation of the applicants' relatives

55. The applicants repeatedly applied to different Russian authorities, first and foremost the Chief Military Prosecutor's Office, for information on the Katyń criminal investigation and for the rehabilitation of their relatives.

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

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

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

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

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

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

G. Statement by the Russian Duma on the Katyń tragedy

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

“Seventy years ago, thousands of Polish citizens held in the prisoner-of-war camps of the NKVD of the USSR and in prisons in the western regions of the Ukrainian SSR and Belarusian SSR were shot dead.

The official Soviet propaganda attributed responsibility for this atrocity, which has been given the collective name of the Katyń tragedy, to Nazi criminals... In the early 1990s our country made great strides towards the establishment of the truth about the Katyń tragedy. It was recognised that the mass extermination of Polish citizens on USSR territory during the Second World War had been an arbitrary act by the totalitarian State...

The published materials that have been kept for many years in secret archives not only demonstrate the scale of this terrible tragedy but also attest to the fact that the Katyń crime was carried out on the direct orders of Stalin and other Soviet leaders...

Copies of many documents which had been kept in the closed archives of the Politburo of the Communist Party of the Soviet Union have already been handed over to the Polish side. The members of the State Duma believe that this work must be carried on. It is necessary to continue studying the archives, verifying the lists of victims, restoring the good names of those who perished in Katyń and other places, and uncovering the circumstances of the tragedy...”

II. RELEVANT INTERNATIONAL LAW

A. The Hague Convention IV

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

"Art. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

...

Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden –

...

(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion...

...

Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

B. Geneva Convention

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

"Art. 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.

Measures of reprisal against them are forbidden.

...

Art. 61. No prisoner of war shall be sentenced without being given the opportunity to defend himself.

No prisoner shall be compelled to admit that he is guilty of the offence of which he is accused.

...

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

C. Charter of the International Military Tribunal

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

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

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

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

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

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

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

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

Article I

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

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

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

Article IV

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

III. RELEVANT DOMESTIC LAW

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

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

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

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

70. According to the preamble, the purpose of the Rehabilitation Act is the rehabilitation of all victims of political repression who were prosecuted on the territory of the Russian Federation after 7 November 1917, and restoration of their civil rights. Political repression is defined as any measure of restraint, including a deprivation of life, which was imposed by the State for political motives (section 1).

C. State Secrets Act (Law no. 5485-I of 21 July 1993)

71. Section 7 contains a list of information which may not be declared a State secret or classified. The list includes in particular information about violations of rights and freedoms of individuals and citizens and information on unlawful actions by the State authorities or officials.

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

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

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

IV. COMPLAINTS

74. The applicants complained under Article 2 of the Convention that the Russian authorities had not carried out an adequate and effective criminal investigation into the circumstances leading to and surrounding the death of their relatives.

75. The applicants complained that the way the Russian authorities had reacted to their requests and applications amounted to treatment proscribed under Article 3 of the Convention.

76. The applicants complained under Article 6 of the Convention that the Russian authorities had refused them victim status in criminal case no. 159, that they had been denied access to the documents in that case which had been classified without any particular reason and that their appeals against the decisions by the prosecuting authorities had been rejected.

77. The applicants complained under Article 8 of the Convention about the Russian authorities' refusal to rehabilitate their relatives and their refusal to give the applicants access to the case file, which could have indicated, in particular, the burial places of their relatives. The applicants also relied on Article 9 of the Convention in connection with the last point, on account of their inability to pay their respects to their relatives in accordance with their religion.

78. Finally, the applicants complained under Article 13 of the Convention that they had been denied an effective remedy capable of revealing the true circumstances in which their relatives had been killed. They pointed out that the above-mentioned deficiencies in the criminal investigation had undermined the effectiveness of other remedies, as the success of civil-law measures was dependent on the results of the criminal investigation.

V. THE LAW

A. Joinder of the applications

79. Observing that both applications have at their origin the death of the applicants' relatives at the hands of the USSR authorities in 1940 and concern the investigation into their death and the proceedings for their rehabilitation, the Court is of the view that, in the interests of the proper administration of justice, the applications should be joined in accordance with Rule 42 § 1 of the Rules of Court.

B. Article 2 of the Convention

80. The applicants complained that the Russian authorities had not discharged their obligation flowing from the procedural limb of Article 2 of the Convention, which required them to conduct an adequate and effective investigation into the death of their relatives. Article 2 provides as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

1. The parties' submissions

(a) The Russian Government

81. The Government stressed that the "Katyń events" had preceded the adoption of the Convention on 4 November 1950 by ten years and its ratification by Russia on 5 May 1998 by fifty-eight years. In their view, the alleged violation of Article 2 under its substantive limb not only fell outside the Court's temporal jurisdiction but also had not legally existed. The Russian authorities had no real means or legal obligation to protect the lives of the Polish citizens held in the NKVD camps in 1940. Referring to the Court's findings in the *Moldovan* and *Blečić* cases (*Moldovan v. Romania (no. 2)*, nos. 41138/98 and 64320/01, ECHR 2005-VII (extracts), and *Blečić v. Croatia* [GC], no. 59532/00, ECHR 2006-III), they stressed that in the absence of a violation of Article 2 under its substantive limb no procedural obligation to conduct an effective investigation could arise.

82. In the Government's opinion, the Russian authorities could not be held responsible under the Convention for events that had happened more than seventy years ago. A different interpretation of the Convention would allow the Court to look into the events, however long ago they had occurred, provided that an investigation had been instituted and the third or fourth-generation descendants of the alleged victims had lodged an application. This approach would be contrary to Article 19 of the Convention, which provided that the Court had been set up "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto".

83. The Government also distinguished the present case from *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009) and *Varnava and Others v. Turkey* ([GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § ..., ECHR 2009-...). Whereas in *Šilih* a significant number of the procedural steps had been carried out after the

entry into force of the Convention in respect of Slovenia (§§ 163 and 165), the most important investigative actions in case no. 159 had taken place between 1990 and 1995, before the ratification of the Convention by the Russian Federation. The Government further stressed that in *Varnava* the alleged disappearances had occurred after the adoption of the Convention and had therefore legally existed, which was a pre-condition for the Court's finding that it had temporal jurisdiction over the investigation. This element distinguished the *Varnava* situation from the instant case concerning events in 1940.

84. The Government stressed that the Russian authorities had never investigated "the circumstances of the death of the applicants' relatives"; criminal case no. 159 had been instituted in connection with the mass graves of unknown Polish citizens discovered near Kharkov. The investigation had established that certain officials of the USSR NKVD had exceeded their official duties and that the so-called "*troika*" had taken extrajudicial decisions in respect of certain prisoners of war. However, owing to the destruction of the records, the investigation had not been able to determine in what circumstances Polish citizens had been taken prisoner and detained in the NKVD camps, what charges had been brought against them and whether their guilt had been proven or who had carried out the executions. The suspects in case no. 159 had died before the proceedings had been instituted; even if they had been alive in 2004, they would have been exempt from criminal liability. Moreover, since the suspects would not be able to participate in the criminal proceedings, those proceedings would not have an adversarial character and their prosecution would run counter to the fairness requirement.

85. In addition, the institution of case no. 159 had been unlawful because the decision of 22 March 1990 did not refer to any specific provisions of the Ukrainian Code of Criminal Procedure and because the maximum prescription period – set at ten years under the RSFSR[2] Criminal Code applicable at the time – had already expired. The "Katyń events" had not been recognised by any national or international tribunal as falling into the category of crimes not subject to prescription. Accordingly, neither Article 78 § 5 of the Criminal Code concerning imprescriptible crimes nor the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968 was applicable. Accordingly, the Russian authorities had no legal obligation, under either national or international law, to carry out an investigation in case no. 159.

86. The Government stressed that neither the applicants in case no. 55508/07 nor the Polish side had produced any "credible evidence" of Mr Janowiec or Mr Nawratil's death in the NKVD camps. Their names had featured on the dispatching list of the Starobelsk camp but their subsequent fate remained unknown because their remains had not been found. Referring to "various sources", the Government stated that more than ten thousand Polish citizens had been held, or worked, in the NKVD camps. Of those who had been detained in the Ostashkov, Starobelsk and Kozelsk camps, 1,803 had "perished"; the destiny of the others was not known. The Government claimed that, by virtue of the presumption of innocence principle, there was no sufficient basis for the assertion that Mr Janowiec or Mr Nawratil had died as a result of an abuse of power committed by NKVD officials.

87. In response to the Court's request for a copy of the decision of 21 September 2004 and the NKVD documents relating to the applicants' relatives, the Government declined to produce the documents. They stated that the disclosure of the decision of 21 September 2004, which had been

given top-secret classification, would impair the national security of the Russian Federation. They acknowledged that the names of the relatives of the applicants in case no. 29520/09 were mentioned in three lists that had been compiled by the NKVD of the USSR, but stressed that those lists were for internal use only. The Government pointed out that the applicants' relatives had not been among the twenty-two persons identified during the 1991 exhumation works, while the list compiled by the German authorities during the exhumation in 1943 had not been admitted in evidence in criminal case no. 159.

(b) The applicants

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

89. The applicants disagreed with the legal characterisation of the Katyń massacre as an abuse of power by Soviet State officials, an offence which was subject to a three-year prescription period. They submitted that the Polish soldiers captured by the Red Army had been entitled to the full protection guaranteed to prisoners of war, including the protection against acts of violence and cruelty afforded by the provisions of the Hague Convention IV of 1907 and the Geneva Convention of 1929 (cited in paragraphs 63 and 64 above). The murder of Polish prisoners of war in 1940 had been an unlawful act which violated Articles 4, 23(c) and 50 of the Hague Convention IV and Articles 2, 46, 61 and 63 of the Geneva Convention. Even though the USSR had not been a party to either Convention, it had a duty to respect the universally binding principles of international customary law, which had merely been codified in those Conventions. That such an obligation was recognised as legally binding by the USSR was clearly evidenced by the fact that, at the Nuremberg trial, the Soviet prosecutor had attempted to charge the Nazi leaders with the murder of Polish prisoners of war. The extermination of Polish prisoners of war was a war crime within the meaning of Article 6 (b) of the Nuremberg Charter and the shooting of civilians amounted to a crime against humanity as defined in Article 6 (c) of the Nuremberg Charter. The Katyń massacre could also be characterised as an act of genocide, especially when seen in combination with other Soviet policies directed against the Polish population, including mass deportations to Siberia.

90. In the applicants' view, the Court was competent to examine the observance by Russia of the procedural aspect of Article 2 because Russia was the legal successor to the USSR and because the obligation to treat prisoners of war and civilians humanely and not to kill them had existed *de jure* at the time of the Katyń massacre and had been binding on the USSR. If the Katyń case were to be treated as a “confirmed death case” – the interpretation favoured by the applicants as being consistent with the established historical facts – the obligation under Article 2 to carry out an effective investigation into the Katyń massacre should be analysed in the light of the “need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner” (the applicants referred to *Šilih*, cited above, § 163 *in fine*). In that case the proportion of procedural steps undertaken before or after the “critical date” (the date of ratification) was not relevant for determining the Court's jurisdiction *ratione temporis*. As the mass killings of Polish citizens constituted both a war crime and a crime against humanity, they

were to be characterised as contrary to the very foundations of the Convention. In such a case compliance with the procedural limb of Article 2 was to be seen as the only real and effective protection of the Convention's underlying values.

91. Furthermore, the Court was also competent to examine the complaint on account of the fact that a significant part of the procedural steps in the Katyń investigation had taken place after the ratification date on 5 May 1998, since the facts established before and after that date differed profoundly. Whereas at earlier stages of the investigation the execution of Polish prisoners by the NKVD organs had not been doubted – as evident from the prosecutor's letter of 21 April 1998 to Ms Wołk and that of 10 February 2005 to Mr Nawratil and Mr Janowiec – by late 2004 the position of the Russian authorities had changed and the prosecutors and the courts had accepted the disappearance of the Polish prisoners as the only version. Although it was impossible to determine precisely what legal steps had taken place before and after the ratification date, owing to the classified nature of the bulk of the Katyń investigation files, the fact that the crucial decisions to discontinue the investigation and to classify its materials had been made only in September and December 2004, long after the "critical date", was of relevance. The applicants also referred to the Court's judgments against Romania in which the deaths under investigation had occurred long before the ratification date, during the riots preceding the collapse of the Ceausescu regime in December 1989, but the investigation itself had been carried out after ratification. The applicants cited *Şandru and Others v. Romania*, no. 22465/03, 8 December 2009, and *Agache and Others v. Romania*, no. 2712/02, 20 October 2009.

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

93. The applicants rejected the Russian Government's argument that the investigation in case no. 159 had not concerned the death of their relatives. The case had been instituted in 1990 to investigate the disappearance of Polish officers and the relevant decision had never been declared unlawful by any prosecutorial or judicial body. The investigation had uncovered dispatch records mentioning the applicants' relatives' names and had determined that Polish prisoners had been placed "at the disposal" of the NKVD organs. The witnesses examined during the investigation had confirmed that the Polish prisoners had been shot dead, and had provided the names of NKVD officials who had been their source of information or who had actually executed Polish citizens. The materials in case no. 159 contained no information to suggest that any of the applicants' relatives might have died of natural causes or been set free by the NKVD. The legal characterisation of the Katyń massacre was not dependent on a prior decision of any international or domestic court and, as it constituted an imprescriptible crime under international law, the Russian authorities had an obligation to institute and conduct a criminal investigation into the circumstances of the massacre. The applicants referred to the Court's findings in *Kononov v.*

Latvia to the effect that a domestic prosecution for war crimes would have required reference to international law, not only as regards the definition of such crimes, but also as regards the determination of any applicable limitation period (they cited *Kononov v. Latvia* [GC], no. 36376/04, § 230 *in fine*, ECHR 2010-...).

94. On the merits, the applicants considered that the investigation in case no. 159 could not be regarded as effective. Firstly, the Russian authorities had given contradictory information about the fate of the applicants' relatives, initially confirming their death at the hands of the NKVD squads and subsequently describing them as disappeared persons. Secondly, the Chief Military Prosecutor's Office had disregarded numerous pieces of evidence, including the findings of the 1943 exhumation and the NKVD dispatching lists, and had failed to commission DNA tests comparing genetic samples taken from the interred bodies with samples from living relatives. Thirdly, the applicants had been refused victim status in case no. 159 and the Russian authorities had taken no steps to identify the relatives of the alleged victims. Fourthly, owing to the classified status of the materials, the applicants had been denied access to the documents concerning the fate of their relatives. Lastly, the investigation, which had lasted from 1990 to 2004, had failed to meet the promptness and reasonable expedition requirements.

95. As to the Russian Government's refusal to submit a copy of the decision of 21 September 2004, the applicants pointed to the contradictions in the Government's position. On the one hand, the Government claimed that Russia did not bear any responsibility for the events, which were attributable to a previous, totalitarian regime, and on the other hand, they had classified the investigation files as damaging to the core interests of the present-day democratic State. Moreover, pursuant to section 7 of the State Secrets Act, information regarding abuses of power by State authorities or officials or information on violations of human rights and freedoms could not be declared secret.

(c) The Polish Government

96. The Polish Government submitted that application of the Court's case-law relating to the "detachability" of the procedural obligation under Article 2 of the Convention should lead to the conclusion that the death of the applicants' relatives had been the result of actions by State officials and that the obligation to conduct an investigation was autonomous in character and unconnected with the original interference with the rights of the applicants' relatives resulting in their death. The need to carry out an independent investigation was supported by the fact that the investigation had been instituted *proprio motu* many years after the events of 1940, and, as admitted by the Russian authorities, with the purpose of accurately determining the circumstances of those tragic events. Even though the Court was not competent *ratione temporis* to examine the substantive aspect of Article 2, this should not prevent it from assessing the fairness of the investigation.

97. The assessment of the duties incumbent on the respondent Government should be carried out in the light of the Court's case-law pertaining to the obligations of the State in relation to disappearances (here the Polish Government referred to *Varnava*, cited above, §§ 181-194). They pointed out that the Russian authorities had never questioned the assertion that the applicants' relatives had found themselves under the jurisdiction of the Soviet authorities in late 1939 or early 1940. Article 2 placed upon the respondent Government an unceasing duty to provide

information on the fate of disappeared persons. However, during the domestic proceedings the applicants had received contradictory information about the fate of their relatives.

98. In the Polish Government's view, the investigation fell short of the fairness requirement because the Russian authorities had not made use of the evidence collected by the Polish side in the context of the legal-assistance request of 25 December 1990 by the USSR Chief Prosecutor's Office. It was clear from the Russian Government's submissions that between 1995 and 2004 no efforts had been made to collect evidence independently. The Russian authorities had not examined the applicants residing in Poland or asked their Polish counterparts to examine them.

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

100. As regards the Russian Government's position on the credibility of the 1943 excavation works in which three of the applicants' relatives had been identified, the Polish Government presented a number of Polish documents confirming the reliability of the 1943 findings. Those materials included a report and statements by a Polish citizen, Dr Edmund Seyfried, who had been present in Katyń Forest in 1943, the final report of the Technical Commission of the Polish Red Cross which had conducted a major part of the excavation works in 1943 and legal materials prepared by the Polish justice authorities after 1945. The Polish Government emphasised that the contents of those documents should have been known to the Russian authorities since they had been handed over to them between 1991 and 1995 in response to the Russian request for legal assistance in the investigation of case no. 159.

2. The Court's assessment

101. The Court notes that the parties have acknowledged that it has no competence *ratione temporis* to examine the mass murder of Polish prisoners of war in 1940 from the standpoint of the substantive limb of Article 2 of the Convention. Accordingly, the Court will not have to examine this issue in the instant case. It is, however, in dispute whether or not this fact precludes the Court from taking cognisance of the applicants' complaint under the procedural limb of that provision concerning the allegedly inadequate character of the investigation in so far as it was conducted after the ratification date. The Court considers that the issue of temporal jurisdiction is so closely linked to the merits of the applicants' complaint under Article 2 that a joint examination of these matters would be more appropriate in the circumstances of the present case. Accordingly, it joins the Russian Government's objection as regards the Court's competence *ratione temporis* to the merits and, having found no other ground for declaring this complaint inadmissible, considers, in the light of the parties' submissions, that it raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits.

C. Alleged violation of Article 3 of the Convention

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

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

1. The parties' submissions

(a) The Russian Government

103. The Government confined their submissions to stating that the Russian authorities' approach to the applicants' enquiries had not attained the minimum level of severity required for the application of Article 3 of the Convention. The mere fact that the Russian authorities' replies to the applicants had differed did not amount to inhuman or degrading treatment and the Russian authorities had had no intention of causing suffering to the applicants by providing the information contained in their replies.

(b) The applicants

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

105. The applicants' expectations and hopes of having the circumstances of the Katyń massacre elucidated had been further dashed by the Russian courts' decisions declaring that it had not been established what had happened to their relatives after they had been placed "at the disposal" of the NKVD. Those findings represented a sheer denial of the basic historical facts and were tantamount to informing a group of relatives of Holocaust victims that the victims must be considered unaccounted for as their fate could only be traced to the dead-end track of a concentration camp because the documents had been destroyed by the Nazi authorities.

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

deserved capital punishment. This was to be considered highly offensive and degrading to the applicants.

(c) The Polish Government

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

2. The Court's assessment

108. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

D. Alleged violation of Article 6 of the Convention

109. The applicants complained under Article 6 of the Convention that the domestic proceedings had been unfair because they had been refused victim status and access to the case file and because the courts had dismissed their appeals against the prosecutors' decisions. Article 6, in its relevant part, provides as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

1. The parties' submissions

(a) The Russian Government

110. The Government rejected the argument that Article 6 could apply under its civil head in the present case. In their view, the applicants possessed no right which could be said, at least on arguable grounds, to be recognised under domestic law (here they referred to *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 44, Series A no. 327-A). Granting victim status to an individual was conditional on three elements: (1) the commission of a criminal offence, (2) the existence of damage and (3) a causal link between the offence and the damage. The domestic judgments of 18 April and 24 May 2007 had not established any causal link between the abuse of power by the NKVD officials and the damage allegedly caused to the applicants because the

circumstances of the death of their relatives had not been clarified. Accordingly, those judicial proceedings had not been decisive for the applicants' civil right to compensation.

111. Since neither the investigation nor the courts had been able to establish convincingly that their relatives had died as a consequence of the crime of exceeding official duties, there had been no legal grounds for granting victim status to the applicants in case no. 159. The bodies of the applicants' relatives had not been uncovered and no “credible evidence” of their death had been collected. Accordingly, it was impossible to determine that the applicants had been victims of the alleged crime. Besides, victim status could not legally be granted in a case that had already been closed. The applicants had applied for that status only in 2008, that is, four years after the investigation had been discontinued.

112. The Government also stressed that all the existing documents mentioning the names of the applicants' relatives had been examined in the hearing before the Moscow Military Court, which had been attended by the applicants' representatives, who were Russian nationals. Being of Polish nationality, the applicants themselves were not permitted to access those documents in case no. 159 which were classified as top secret or for internal use only, that is, 116 volumes out of 183.

(b) The applicants

113. The applicants submitted that Article 6 was applicable under its civil limb even in the absence of a claim for financial reparation (here they referred to the Court's findings in, among other cases, *Perez v. France* [GC], no. 47287/99, ECHR 2004-I, and *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I). The applicants had sought access to the Katyń investigation file in order to elucidate the circumstances of their relatives' death and to lodge a rehabilitation application; both of those interests were of a purely civil character. The concept of rehabilitation was closely connected to a person's good name and reputation, which were ranked as civil rights within the meaning of Article 6 (they referred again to *Perez*, § 70). As long as the applicants' relatives were not rehabilitated they could still be considered criminals who had been rightly prosecuted and punished. Although the direct bearer of such interests was the executed person, his relatives should have at least an ancillary civil right to have his reputation cleared. The applicants also prayed in aid Committee of Ministers' Recommendations No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, No. R (87) 21 on assistance to victims and the prevention of victimisation and Rec(2000)19 on the role of public prosecution in the criminal justice system.

(c) The Polish Government

114. The Polish Government submitted that Article 6 was applicable in the instant case under its civil head. Although the Convention did not directly guarantee the right to various forms of participation in proceedings, its guarantees did apply to persons who had the right to participate in the proceedings under national law (they referred to *Kuśmierek v. Poland*, no. 10675/02, §§ 48-49, 21 September 2004). The applicants had attempted to avail themselves in domestic proceedings of their judicial rights guaranteed by Russian law, in order to obtain credible, honest and official information concerning the death of their relatives, but access to that information had been denied to them. The right to obtain information about the circumstances of the death of their

relatives and the place of their burial was undeniably a “civil right” within the meaning of Article 6.

115. The Polish Government considered that the domestic proceedings had failed to comply with the adversarial principle and the principle of equality of the parties because the applicants had been denied access to the materials in the investigation files, to which the prosecution had had full access. In addition, the Russian authorities had dismissed all the applications for rehabilitation of the applicants' relatives “in a mechanical manner”, citing the same arguments.

2. The Court's assessment

116. The Court reiterates that the scope of application of Article 6 is determined by the fact that the Convention does not confer any right to “private revenge” or to an *actio popularis*. Thus, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently. It must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a “good reputation”. The waiver of such a right must be established, where appropriate, in an unequivocal manner (see *Perez*, cited above, § 70, with further references). For victims of alleged criminal offences, Article 6 § 1 may be applicable to criminal proceedings against the putative perpetrator as long as the civil limb of those proceedings remained closely linked to the criminal limb (see *Calvelli and Ciglio*, cited above, § 62).

117. The applicants instituted two kinds of proceedings. In the first set of proceedings they sought to be formally granted victim status, which would have allowed them to access the materials in the case file and to file motions and petitions. In the second set of proceedings they challenged the prosecutor's refusal to entertain their applications for the rehabilitation of their relatives.

118. It is evident that Article 6 did not apply under its criminal head to the first set of proceedings, as the applicants did not have any criminal charge to answer. Nor is the Court able to find, on the facts of the case, that the outcome of those proceedings was decisive for the applicants' civil rights or obligations. At no point in the proceedings did the applicants indicate any intention to file a civil claim and they consistently denied that they would file any pecuniary claims against the alleged perpetrators or the Russian authorities. Their deceased relatives were not the defendants in criminal case no. 159 and it is not apparent how the disclosure of the case materials could have been conducive to protection of their right to their reputation (see, by contrast, *Nölkenbockhoff and Bergemann v. Germany*, no. 10300/83, Commission decision of 12 December 1984, Decisions and Reports (DR) 40, p. 180). Finally, while the elucidation of the circumstances of the death of the applicants' relatives was undoubtedly of great emotional importance to them, the Court cannot describe it as a right of a civil nature. Accordingly, Article 6 does not apply to this part of the complaint under either its criminal or its civil head. This part of the complaint is therefore incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

119. On the other hand, the Court has held that Article 6 applies under its civil head to rehabilitation proceedings in so far as such proceedings concern the right of the applicants to defend their reputation and that of their deceased relatives (see *Brudnicka and Others v. Poland*,

no. 54723/00, §§ 24-34, ECHR 2005-II; *Kurzac v. Poland* (dec.), no. 31382/96, 25 May 2000; and also *Grădinar v. Moldova*, no. 7170/02, §§ 96-98, 8 April 2008). Assuming that Article 6 applies in the particular circumstances of this case, the Court considers that there is no indication of procedural unfairness in those proceedings as conducted in the present case. Counsel's challenge against the prosecutor's refusal to rehabilitate the applicants' relatives was examined several times at two levels of jurisdiction and the applicants were not prevented from submitting their evidence. The fact that the outcome was not satisfactory for them is not in itself indicative of any violation of the principle of a fair hearing. In the light of all the material available in the case file, the Court finds no appearance of a violation of Article 6 of the Convention. It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

E. Alleged violation of Article 13 of the Convention

120. The applicants complained under Article 13 of the Convention that they had not had an effective remedy by which to obtain access to information about the fate of their relatives and that they would be unable to make a successful civil claim in the absence of any results from the criminal investigation. Article 13 provides as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

1. The parties' submissions

(a) The Russian Government

121. The Government submitted that the Russian Constitution guaranteed to all individuals the judicial protection of their rights and freedoms. The applicants had been able to lodge an application for judicial review of the prosecutors' decisions and their application had been examined at two levels of jurisdiction by the Moscow courts. The Government pointed out that Ms Ojcumiła Wołk had not been a party to any domestic proceedings.

(b) The applicants

122. In the applicants' view, their grievances under Article 13 were closely related to those regarding the lack of an effective investigation under Article 2, and the arguments presented in relation to Article 2 applied *mutatis mutandis*. They additionally submitted that they could have access to civil remedies only in the wake of an effective criminal investigation. They referred to the Court's finding of a violation of Article 13 in conjunction with Article 2 in many "Chechen" cases against Russia on account of the fact that the Russian courts were unable, in the absence of any results from a criminal investigation, to consider a civil claim on its merits (here they referred to *Baysayeva v. Russia*, no. 74237/01, § 106, 5 April 2007).

(c) The Polish Government

123. The Polish Government also referred to the Court's case-law in cases against Russia in which it had found that the Russian Government had not presented any practical examples confirming that the Russian courts would be capable, in the absence of any results from a criminal investigation such as the determination of the perpetrators, to consider the merits of a civil claim by an injured party. They believed that the Court should not depart from those findings in the instant case. In addition, they considered that the contradictory decisions of the Russian judicial bodies and their replication of entire passages in the reasoning of their judgments indicated the absence of an effective appeal remedy.

2. The Court's assessment

124. The Court notes that the only element of this complaint which is not subsumed by the procedural limb of the complaint under Article 2 of the Convention is the alleged unavailability of a civil-law remedy in the absence of an effective criminal investigation. However, as noted above, the applicants never manifested any intention to introduce a civil claim for compensation. Even had they wished to do so, the Court cannot presume that it would inevitably have failed. Accordingly, the Court finds that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

F. Other alleged violations of the Convention

125. Finally, the applicants complained under Article 8 of the Convention about the Russian authorities' refusal of their applications for rehabilitation of their relatives and under Article 9 about the lack of information on the burial places of their relatives.

126. The Court considers that, although the applicants had a legitimate interest in seeking the rehabilitation of their relatives, the refusal of their applications did not amount to interference with their right to respect for their family life. Monuments and commemorative plates were erected in Katyń Forest and elsewhere to mark the places where the applicants' relatives had been executed. Likewise, it cannot be said that the lack of precise information prevented the applicants from performing religious ceremonies or otherwise exercising their right to freedom of religion. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court

Decides, by a majority, to join the applications;

Joins unanimously the Government's objection as to the temporal jurisdiction of the Court in respect of the procedural limb of Article 2 of the Convention to the merits;

Declares unanimously admissible, without prejudging the merits, the applicants' complaint concerning the alleged inadequacy of the investigation into the Katyń massacre;

Declares, by a majority, admissible, without prejudging the merits, the applicants' complaint about the allegedly degrading treatment inflicted on them by the Russian authorities; and

Declares unanimously the remainder of the application inadmissible.

Claudia Westerdiek Dean Spielmann
Registrar President

1. Last visited on the date of this decision.

2. RSFSR – Russian Soviet Federative Socialist Republic.

JANOWIEC AND OTHERS v. RUSSIA DECISION