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*Susana Sanz-Caballero**

HOW COULD IT GO SO WRONG? *REFORMATIO IN PEIUS* BEFORE THE GRAND CHAMBER OF THE ECtHR IN THE CASE *JANOWIEC AND OTHERS V. RUSSIA* (OR POLISH COLLECTIVE MEMORY DECEIVED IN STRASBOURG)

INTRODUCTION

By a strange coincidence (or not) on 21 October 2013, the European Court of Human Rights (hereinafter ECtHR) issued two judgments which created social alarm in two European States with a vivid interest in the facts under scrutiny. Both were rulings in cases introduced by individuals *ex* Article 34 of the European Convention on Human Rights¹ (hereinafter ECHR). However, what was behind them was not only a personal situation. Instead, the people of those States, namely, Poland and Spain, were deeply concerned because the applications touched upon very sensitive issues at the national level. When the verdicts were given, most people in Poland and Spain gasped, because they had been expecting a very specific solution from the European Court which did not come. They turned their eyes towards the Strasbourg Court in disbelief.

The ECtHR guarantees the application of the ECHR and its protocols in the territory of those European States that have ratified the treaties, but only with respect to events which occurred after the State's ratification. No more, but no less, than that. Its function is not to heal historical wounds, nor to confirm national authorities' views or policies on sensitive domestic issues such as the fight against terrorism or the search for truth concerning mass crimes committed decades ago.

The ECtHR does not have general jurisdiction to deliver justice for past and present national dramas or grievances irrespective of the content of the ECHR. On the contrary, its

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¹ "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".

powers are of a technical nature and are restricted to the implementation of the articles of the ECHR and its optional Protocols. But societies look for justice and redress, especially for crimes that have affected their histories and left a lasting memory. For this reason it's difficult for the Spanish and Polish people to understand the ECtHR's latest judgments in the highly controversial cases of *del Río Prada v. Spain*,² and *Janowiec and Others v. Russia*.³ The former has forced Spain to release more than sixty ETA terrorists who, according to Spanish law, would have remained in prison for years due to their bloody record. In order to abide by Strasbourg's requirements, Madrid authorities had to overrule Spanish legislation and case law which was deemed to be contrary to the ECHR.

The outrage that this decision has produced in Spanish society is difficult to measure. The Court has been criticized for its insensitivity towards the victims of terrorism. However, the ECtHR is not to blame. The ends do not justify the means, and Article 7 of the ECHR clearly states that no one shall have a heavier penalty imposed on them than the one that was applicable at the time the criminal offence was committed. Article 5 also establishes the right to liberty and security. Thus, no matter how grave and reprehensible the crimes were, Spanish authorities are prevented from applying penalties that are more severe than those that were in force at the time when the perpetrators were convicted.

The factual circumstances of *Janowiec and Others v. Russia* are completely different from those in the case against Spain. However, the Polish people experienced the same outrage at this verdict that Spanish felt on the same date. The Polish public wonders whether the Strasbourg Court has turned its back on them. The result has been astonishment and a feeling of impotence.

The following pages present the facts that were at the source of the case *Janowiec and Others* and explains the reasoning of the ECtHR in its verdict(s), both in Chamber – in its judgment of 16 April 2012⁴ – and in the Grand Chamber on 21 October 2013. The applicants' disappointment with the ruling issued by the Chamber led them to refer the case to the Grand Chamber within the three month period established in Article 43 of the ECHR and Rule 73 of the Rules of the Court for doing so. The applicants felt deceived by the first ruling because, on the whole, the Chamber rejected all but one of their claims for relief. But the Grand Chamber's ruling was worse. Not only did it refuse to revise the previous negative rulings against the victims, but further it rejected the only one aspect of the applicants' complaints that had been accepted in Chamber (i.e. a *reformatio in peius* ruling). In this paper we analyze not only those aspects where the

² ECtHR, *del Río Prada v. Spain*, Grand Chamber, 21 October 2013, application no. 42750/09. In this judgment the ECtHR found a violation of Article 7 under the principles of no punishment without law, *nulla poena sine lege*, and non-retroactivity.

³ ECtHR, *Janowiec and Others v. Russia*, Grand Chamber, 21 October 2013, applications nos. 55508/07 and 29520/09.

⁴ ECtHR, *Janowiec and Others v. Russia*, Fifth Section, 16 April 2012, applications nos. 55508/07 and 29520/09.

Grand Chamber followed the Chamber's reasoning, but also the grounds upon which the Grand Chamber decided not to follow the Chamber's judgment; in other words, why and how the Grand Chamber ruled *reformatio in peius* for the applicants. We also comment on the alternative judicial options that the Strasbourg Court had before it and could have chosen instead.

1. THE CASE

How do modern societies deal with mass crimes committed in distant times – times of extreme violence and conflict? How can the victims of these massacres obtain redress and rehabilitation when the political elites decide to turn the page and not look back? Is applying *Realpolitik* preferable to doing justice? Should victims forget about their claims in the name of reconciliation? Is oblivion needed in order to recover and build a future of cooperation between States? Does democracy necessarily imply transparency and recognition? What can be the overwhelming national security interests which prevent the disclosure of information about abhorrent facts that happened more than seventy years ago? These are some of the questions that were raised by the 2004 Russian decision to discontinue its investigation, voluntarily undertaken by Moscow authorities at the end of the Cold War, into the Katyń Forest massacre of the early 1940s. And these questions were the grounds and motivation for the applications in the case *Janowiec and others*, introduced before the ECtHR by family members of twelve of those persons who disappeared in the Katyń Forest massacre. *Janowiec* is not about unpunished mass murder, but about the right to know the fate of the loved ones and the right to obtain a thorough State investigation into mass slaughters.

1.1. Historical facts

The Katyń Forest massacre still torments our collective conscience and resists oblivion. In collective memory, it has remained one of the most determinant episodes in modern Polish history.⁵ The Second World War began on 1 September 1939 when the Germans invaded Poland. Only a fortnight later, the Soviet Army also marched into Polish territory during the short period of German-Soviet cooperation. The reason given for the Soviet invasion was that Poland could no longer guarantee the security of Ukrainians and Belarusians living in Poland. During the process of annexation of the Eastern part of Poland, some hundred thousand Poles, both members of the military and civilians, were detained by the Soviet Army. Some of them were released. Others were deported to the Soviet Union, where many of them died of cold and hunger in

⁵ For more on the massacre, see A. Cienciala et al., *Katyń: A crime without punishment*, Yale University Press, New Haven: 2007; F. Miller et al., *Soviet War Crimes*, Alphascript Publishing, Beau Bassin: 2010; J. K. Zawodny, *Death in the Forest: The story of the Katyń Forest massacre*, University of Notre Dame Press, Notre Dame, IL: 2011; M. Tuszynski, *Soviet war crimes against Poland during the Second World War and its aftermath: A review of the factual record and outstanding questions*, 44(2) *The Polish Review* 183 (1999).

Siberia. Some others were sent to special prisons. The Soviet Secret Police (NKVD) decided to send the Polish officer corps to the camps of Kozelsk and Starobelsk, and some of the most literate Polish government officials, police officers and elites (including landowners, businessmen, professors, doctors, priests, rabbis, judges and settlers) were billeted to the Ostashkov camp.

On 5 March 1940, the head of the NKVD submitted a proposal for shooting some 25,700 Polish prisoners under the pretext that, if released, they would conduct anti-Soviet agitation, sabotage and counter-revolutionary work. On that same day, the Politburo of the Central Committee of the Soviet Communist Party instructed the NKVD to consider the 14,700 remaining prisoners of war held in camps and the 11,000 remaining in prisons in the districts of Ukraine and Belarus to be subject to “a special procedure”. The instruction made it clear what this “special procedure” was to consist of: execution by shooting squads without the detainees being summoned, the charges being disclosed, or bills of indictment being issued to them. Stalin himself signed the decision, as well as the rest of the members of the Politburo. Some of the Polish nationals concerned were transferred to the Katyń Forest, where they were massacred. The rest of them were shot in the Kharkov and Kalinin prisons. The killings took place in April and May 1940. The bodies were buried in the Katyń Forest and in the sites of Pyatikhatki and Mednoye.

In 1942 the German Army discovered mass graves in the Katyń Forest, but the Soviet authorities blamed the Nazis for carrying out the killings. The NKVD established a commission to collect evidence and to investigate the burials. On 22 January 1944 this NKVD commission concluded that Germany was responsible for the massacres. During the Nuremberg Trials, the deputy Chief Prosecutor for the USSR maintained the official Soviet version and accused the Nazi defendants of the killings. However, no mention of the Katyń massacre was made in the Tribunal’s final judgment. In March 1959, the head of the KGB proposed the destruction of documents relating to the executions on the grounds that these files had neither operational nor historical value for the Soviet Union and, if revealed, they could only lead to undesirable consequences concerning relations between the USSR and the allied communist authorities of Poland. But not all the documents were destroyed. Those remaining were labeled as “package no. 1” and the files kept secret.

Investigations into the mass murders commenced in 1990. During the month of April that year, under the banner of Glasnost and Perestroika, the President of the USSR Mikhail Gorbachev handed over documents on the Katyń massacre to the President of Poland, Wojciech Jaruzelski.⁶ That same year, the Soviet Kharkov regional prosecutor’s office opened *ex officio* a criminal investigation into the origins of the mass graves. In 1991 Russian and Polish forensic experts exhumed corpses from the mass burial sites. On 14 October 1992, the Russian President Boris Yeltsin revealed that Stalin and his Politburo had ordered the killings without trial and he paid tribute to

⁶ G. Sanford, *Katyn: The whole truth about the Soviet massacre*, Routledge, Abingdon: 2005, p. 12.

the victims during an official visit to Poland. In 1995 Russian, Belarusian and Polish prosecutors worked together for a while in the investigation.

But Poland was unsuccessful in its attempts to obtain access to the files from the Russian Chief Military Prosecutor's Office. On 21 September 2004, the latter decided to discontinue the investigation on the ground that the suspects for the crimes were dead. At the end of that year, the Russian Agency for the Protection of State Secrets classified most of the files as "top secret" and the rest of them "for internal use only". The decision to discontinue the investigation was also classified, and the text of this decision has remained secret to date. However, on 28 April 2010 some of the documents, including the NKVD proposal of 1940 to execute Polish prisoners without trial, the Politburo's decision confirming the executions issued on the same date, and the KGB note on the destruction of records in 1959 were made public. On 26 November 2010, the Russian State Duma adopted a statement on the Katyń tragedy and its victims, whereby it recognized the mass extermination during the Second World War of Polish citizens on the then-USSR territory as an arbitrary act of a totalitarian State and deemed it necessary to continue studying the archives, to verify the lists of victims, restore the names of those who perished in Katyń, and uncover the circumstances of the tragedy. None of this has been done so far.

1.2. Grounds for the application

The ECHR entered into force on 3 September 1953, but Russia was not a party to the treaty until 5 May 1998. The applicants in this case are relatives of Polish nationals whose corpses have been found as well as some still missing in relation to those events. At the beginning of the war, the families knew that their relatives were held prisoner in Russia, but they stopped receiving mail from them in 1940. The lapse of such a long period of time with no news from them makes it clear to them that their relatives are dead. They are also aware that, according to Article 28 of the Vienna Convention on the Law of Treaties⁷ (hereinafter VCLT), Russia cannot be held responsible before the ECtHR for facts that happened long before Russia was a party to the ECHR. However, they filed their applications on the premise that Russia violated its international obligations under the ECHR on the following grounds:

1) The discontinuation of the investigation: the investigation into the Katyń massacre began in 1990 but was discontinued in 2004. The text of the decision to discontinue the investigation has remained classified to date and the applicants have not had access to it or to any other documentation, despite their persistent requests.

2) Russia's failure to account for the fate of Polish prisoners executed by the NKVD: The applicants were never informed about the fate of their relatives because they were never given the status of victims and because of them not having Russian nationality.

⁷ "Non retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

According to the applicants, the above failures constituted breaches of Articles 2 and 3 of the ECHR. They argue that Article 2 on the right to life, and Article 3 on the prohibition of torture and inhuman or degrading treatment have been violated. As far as Article 2 is concerned, the applicants complained that Russia had not discharged its obligations under the procedural limb of Article 2, because it did not conduct an effective and adequate investigation into the deaths of their relatives following Russia's ratification of the ECHR. As to the alleged violation of Article 3, the applicants claimed that the prolonged rejection of historical fact and memory, the withholding of information about the fate of their relatives, and the denial of rehabilitation for the Katyń victims, together with the dismissive and contradictory replies by Russian authorities to their requests for information, amounted to inhuman and degrading treatment.

1.3. The case before the ECtHR

1.3.1. Chamber

The applicants are fifteen close family members of twelve Polish military officers and civilians who were detained by Soviet troops during the USSR invasion of Eastern Poland in 1939. The applicants include wives, sons, daughters, nephews and grandchildren of those who were taken prisoner by the Red Army. Most of the applicants were born before their relative was captured, but some of them were born later and never had the chance to meet their father, grandfather or uncle. The corpses of some of the applicants' relatives have been identified but others are still missing.

By decision of 24 November 2009, the ECtHR granted priority to their applications under Rule 41 of the Rules of the Court, and by decision of 5 July 2011 it decided to join the applications. It further decided under the procedural limb of Article 2 of the Convention to rule on the merits with respect to Russia's objection to the Court's jurisdiction *rationae temporis*, and declared the applications partially admissible.

On 16 April 2012, a Chamber of seven judges delivered its judgment. It found, by the narrow margin of four votes to three, that it was unable to take cognizance of the merits of the complaint under Article 2 of the Convention. By a margin of five votes to two the Court's Chamber stated that there had been a violation of Article 3 of the Convention with respect to ten of the applicants (those who were already born when the massacre took place), but not with respect to the other five. It also found by four votes to three that the defending State had failed to comply with its procedural obligation under Article 38 of the ECHR⁸ because of the Russian authorities' adamant refusal to produce a copy, at the request of the Strasbourg Court, of the decision of 2004 by which the investigation into the Katyń massacre was discontinued. The Chamber held unanimously that the respondent State (Russia) was to pay the costs and expenses of the process, but dismissed the remainder of the applicants' claims for just satisfaction.

⁸ "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

1.3.2. Grand Chamber

From the applicants' point of view, to a large extent the Chamber's judgment meant that Russia had not violated the rights of the Katyn victims' relatives. Thus, they referred the case to the Grand Chamber (consisting of seventeen judges). According to Article 26.5 of the ECHR, when a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat from the responding State. This is why a Russian judge sat in both processes before the ECtHR (Judge Anatoly Kovler in the Chamber judgment and the new-elected Russian judge, Dmitry Dedov, in the Grand Chamber judgment⁹).

The Grand Chamber in no small part relied on the legal reasoning of the Chamber, but extended the argumentation in some respects and changed it in others. The Grand Chamber held, by thirteen votes to four, that the Court had no competence to examine the complaint under Article 2 of the ECHR, just as the Chamber had held before. But it also held, by twelve votes to five, that there had been no violation of Article 3 of the Convention with respect to any of the fifteen applicants, regardless of their date of birth. Similar as to the Chamber's ruling, the Grand Chamber held unanimously that Russia, by its failure to hand over copies of the 2004 decision to the ECtHR, had failed to comply with its obligation under Article 38 of the Convention. It dismissed by twelve votes to five the applicants' claims for just satisfaction and did not pronounce itself with respect to the costs and expenses of the trial.

Reformatio in peius is a legal expression meaning that a lower court judgment is amended by a higher court into a worse one for those appealing it. Under some legal systems, this practice is forbidden and an appellant cannot be placed in a worse position as a result of filing an appeal, a referral or a request for revision of the judgment to a higher court or chamber. The ECtHR has in fact sometimes scrutinized the legal order of some European States which allegedly failed to comply with Article 6 of the ECHR – on the right to a fair trial – because of acts of *reformatio in peius* in cases where this practice was forbidden by national law.¹⁰ However, the ECtHR is not itself bound by the doctrine forbidding *reformatio in peius*. Applicants referring cases to the Grand Chamber of the ECtHR should be aware of the fact that the judgment of the Grand Chamber is final and that there is always the possibility that this final judgment will place them in a worse position than they were before the referral. Some cases where the Grand Chamber has ruled for worse – compared to the Chamber's previous verdict – include *Lautsi v. Italy* and *Sindicatul Pastoral v. Romania*.¹¹

⁹ Due to the expiration of the former's term of office on 31 October 2012.

¹⁰ Including, among others: ECtHR, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, Grand Chamber, 19 July 2013, applications nos. 2312/08 and 34179/08; *Cani v. Albania*, Fourth Section, 6 March 2012, application no. 11006/06; *Agati and others v. Italy*, Second Section, 7 June 2011, applications 43549/08, 5087/09 and 6107/09.

¹¹ Cf. the judgment of *Lautsi v. Italy*, application no. 30814/06 decided in Chamber on 3 November 2009, and the Grand Chamber's decision of 18 March 2011. Compare also the judgment of *Sindicatul*

In 2013, in *Janowiec and others* there was a clear *reformatio in peius* for those who referred the case to the Grand Chamber, i.e. the applicants. They were deprived of the only claim that the Chamber had partially accepted in 2012, namely the violation by the respondent State, with respect to the ten family members who were born before their relatives' disappearance, of their right to be free from degrading and inhuman treatment.

1.4. Comparison between the judgments of the Chamber and the Grand Chamber

1.4.1. Alleged violation of Article 2 of the ECHR

The Katyń massacre is, by any standard, an act outside the temporal reach of the ECHR. The killings took place in 1940. The ECHR was signed in 1950. It entered into force in 1953. The Convention entered into force in the Russian Federation on 5 May 1998 (which is known in ECtHR doctrine as the "critical date"). Article 28 of the VCLT forbids the retroactivity of treaties unless a different intention appears in the treaty or is otherwise established, which is not the case with the ECHR. So how can the applicants rely on Article 2's right to life if the substantive aspect of the Article (the deaths themselves) cannot be the object of scrutiny or redress before the ECtHR? They do so by maintaining that the procedural aspect of Article 2 was violated, namely, the observance by Russia of the applicants' right to obtain an effective investigation of the deaths of their relatives. They also maintain that the soldiers captured by the Red Army should have been granted the full protection guaranteed to prisoners of war, including the protection against acts of cruelty by the provisions of The Hague Convention IV of 1907 and the Geneva Convention of 1929.¹² Even though the USSR was not a party to these conventions, it had a duty to respect the universally binding principles of international customary law, which had merely been codified in those conventions. According to customary law, the execution of prisoners is a war crime. According to the applicants, such an abhorrent act deserves a proper investigation, and the Court was competent to examine the complaint on account of the fact that a significant part of the investigation had taken place after the critical date, but was unexpectedly and abruptly discontinued.

Russia raised a preliminary objection to the Court's competence *rationae temporis* to deal with the merits of the complaint under the procedural limb of Article 2 of the ECHR. It maintained that the alleged violation of Article 2 under the procedural limb not only fell outside the Court's temporal jurisdiction, but also had not existed at all *de iure* since the Katyń tragedy had preceded the adoption of the ECHR by ten years and its ratification by Russia by 58 years. In the Russian Government's view, this precluded

Pastorulcel bun v. Romania, application no. 2330/09, Chamber, 31 January 2012 with that of the Grand Chamber of 9 July 2013.

¹² The Hague Convention (IV) on the Laws and Customs of War on Land of 28 October 1907 and Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929.

the Court from examining its compliance with any procedural obligation arising under Article 2. Russia added that most investigative actions in the Katyń case took place between 1990 and 1995, that is, during Perestroika, but before the ratification of the Convention by Russia. Also, owing to the destruction of records the investigation could not go on and the authorities were unable to determine the circumstances under which Polish citizens were detained, what the charges were against them, whether they were proved guilty, or who carried out the executions. In Russia's opinion, the perpetrators of the acts are probably dead now and, even if not, they would be exempted from criminal liability. The investigation during Perestroika had been conducted as a goodwill gesture, but no one could reasonably expect to carry out an effective investigation almost 60 years after the events, when the witnesses had died and the basic documents had been destroyed. Moreover, the crimes could not be labeled as war crimes since from the standpoint of international humanitarian law since, at least until 1945, there was no universally binding provision of international law on the definition of war crimes.

Both the Chamber in 2012 and the Grand Chamber in 2013 decided to examine together the applicants' complaint under the procedural limb of Article 2 and the defending State's preliminary objection to the ECtHR's competence *rationae temporis* to deal with the right to life. And both of them reached the same conclusion; namely the ECtHR accepted the Russian Government's objection and concluded that it had no competence to examine the complaint under Article 2 of the Convention. The construction of the ECtHR's reasoning in both the Chamber and the Grand Chamber is based on the doctrine that stems from the case *Šilih v. Slovenia*.¹³ However, the Grand Chamber felt itself obliged to clarify the Chamber's interpretation in *Šilih*,¹⁴ as the application of the criteria adopted in *Šilih* has sometimes given rise to uncertainty.¹⁵ The applicants in the *Šilih* case are the parents of a boy who sought medical assistance on 3 May 1993 and who died in a hospital on 19 May 1993 after suffering anaphylactic shock, probably resulting from an allergic reaction to the medication administered for his minor disease. The applicants lodged a criminal complaint for medical negligence. However, the criminal complaint was dismissed by the Slovenian judiciary. On 1 August 1994, after the entry into force of the ECHR in Slovenia, the parents lodged a new request for a criminal investigation. On 26 April 1996 the investigation was reopened but discontinued in 2000. The applicants appealed unsuccessfully and, in the meantime, brought civil proceedings against both the doctor and the hospital. After more than 13 years of proceedings and the attribution of the case to six different judges, the case is still pending before the Slovenian Constitutional Court.

Although the death of the boy happened before the ratification of the ECHR by Slovenia, the ECtHR found a violation of Article 2, not in its substantive aspect but in

¹³ ECtHR, *Šilih v. Slovenia*, Grand Chamber, 9 April 2009, application 71463/01.

¹⁴ For more on the *Šilih* case, see E. Bjorge, *Right for the wrong reasons: Šilih v. Slovenia and jurisdiction rationae temporis in the European Court of Human Rights*, Law (2013), doi: 10.1093/bybil/brt001. The Grand Chamber's clarification of this doctrine is contained in paras. 140-151 of its judgment.

¹⁵ Grand Chamber judgment, para. 140.

its procedural one. The Court concluded that the procedural obligation to carry out an effective investigation has evolved into a separate and autonomous duty. It can be considered as a detachable obligation arising out of Article 2, capable of binding the State even when the death took place before the critical date. However, in order not to undermine the principle of legal certainty, the Court's temporal jurisdiction with respect to deaths which occurred before the critical date is limited and has to comply with three requirements: 1) only procedural acts or omissions occurring after the critical date can fall within the ECtHR's temporal jurisdiction; 2) there must be a "genuine connection" between the death and the entry into force of the ECHR with respect to the respondent State for the procedural obligations of Article 2 to come into effect – which means that a significant proportion of the procedural steps required by this provision will have been or ought to have been carried out after the critical date; 3) a connection which is not genuine in the sense of the former requirement may nonetheless be sufficient to establish the ECtHR's jurisdiction if it is needed to ensure that the underlying values of the ECHR are protected in a real and effective manner (paras. 159-163).

As mentioned before, in *Janowiec* both the Chamber and Grand Chamber applied the doctrine established in *Šilih* to the point that they both reproduced paragraphs 159-163 of *Šilih* in their judgments. Both ECtHR formations reiterated that the provisions of the Convention do not bind a contracting party in relation to any act or fact that took place, or for omission of a duty which ceased to exist before the entry into force of the ECHR with respect to that party. But the obligation to carry out an effective investigation into unlawful or suspicious deaths binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it.¹⁶ The ECtHR compared the lapse of time between the Katyń murders and Russia's critical date (58 years) with that of *Šilih*'s death and Slovenia's critical date (one year). The Chamber emphasized that the lapse of time between the triggering event and the ratification date must remain reasonably short if it is to comply with the "genuine connection" standard,¹⁷ but it did not specify how short it should be, whereas the Grand Chamber went further and said it should not exceed ten years.¹⁸ In legal terms, setting a concrete number of years seems quite arbitrary or at least, limiting, but the Grand Chamber smoothed out the toughness of this new condition by adding that, in exceptional circumstances, it may be justified to extend the time-limit further into the past if the third requirement of the *Šilih* case is met (the need for ECtHR's jurisdiction to ensure that the underlying values of the ECHR are protected in a real and effective manner).

Although the ECtHR is sensitive to the applicants' submission that the Katyń acts constitute war crimes and that this type of crime is imprescriptible and not subject to limitations, the Chamber also understood that States do not have an unceasing duty to

¹⁶ Chamber judgment, para. 130 and Grand Chamber judgment, para. 142.

¹⁷ Chamber judgment, para. 135.

¹⁸ Grand Chamber judgment, para. 146.

investigate them.¹⁹ Both the Chamber and the Grand Chamber noted that a significant proportion of the Katyń criminal investigation took place before the ratification date (between 1991 and 1995).²⁰ In fact, after the critical date there were no new forensic developments or investigative work which could revive the procedural obligation of the investigation.²¹ Having regard to these considerations, the Court upheld Russia's objection and declared it did not have jurisdiction to examine the merits of the complaint under Article 2 of the ECHR.

1.4.2. Alleged violation of Article 3 of the ECHR

It is with respect to the alleged violation of Article 3 that the legal reasoning of the Chamber and the Grand Chamber differ the most. As a consequence, the verdicts of the ECtHR in these two formations do not coincide either. Whereas the Chamber found that the lack of information about the fate of the applicants' relatives and the Russian authorities' dismissive approach to their requests for information amounted to inhuman and degrading treatment with respect to two-thirds of the applicants, the Grand Chamber dismissed the Chamber's argumentation and found no violation of Article 3 with respect to any of the fifteen applicants.

As a preliminary question, the Chamber wanted to make clear that the authorities' obligation under Article 3 is distinct from the obligation flowing from Article 2, both in substance and in temporal outreach. The procedural obligation under Article 2 requires the authorities to take specific legal action(s) capable of leading to the identification and punishment of those responsible for a violation of the right to life, whereas the obligation under Article 3 is of a more humanitarian character, for it enjoins the authorities to react to the requests of relatives of the dead or unaccounted for in a compassionate way. Moreover, the authorities have to comply with Article 3 irrespective of whether they are responsible for the criminal act.²² The interesting but also controversial manner employed by the Chamber to solve the complaint under Article 3 was to distinguish two groups of applicants on the basis of the proximity of the family ties that linked them to the Katyń victims, namely, relatives with strong family bonds and relatives with more distant bonds.²³ In the first group, the Chamber placed widows and children born before their father's disappearance, while it placed children born in 1940 or later, nephews and grand-children in the second group. The reasoning was that the first group of applicants had close links with the Katyń victims, especially children that were in their formative years when their fathers went missing. For the remaining five applicants, the anguish experienced on account of their relatives' disappearance was deemed to be more distant and hence not fall within the scope of Article 3. This distinction is controversial. One can question whether the fact of being born after the tragic disappearance

¹⁹ Chamber judgment, paras. 139-140.

²⁰ Chamber judgment, para. 138 and Grand Chamber judgment, para. 159.

²¹ Chamber judgment, para. 140 and Grand Chamber judgment, para. 159.

²² Chamber judgment, para. 152.

²³ *Ibidem*, para. 153.

of one's father turns this child into someone with "distant" family ties with his or her father. It could be argued that, quite the opposite, this child will be brought up without having the opportunity of knowing his or her father or developing any personal contact with him, which is a double anguish and a handicap in his or her life. Exaggerating the Chamber's reasoning to its limit, it could also be questioned whether the fact of having met one's father always makes for a strong family bond, because there are many individuals with no contact at all with their fathers.

Nonetheless, the Chamber made this distinction and thus the rest of its reasoning only refers to the first group of applicants. It went on to examine the emotional situation of the ten remaining applicants over different periods of time. First, during the Second World War, when they remained in a state of uncertainty as to the fate of their relatives, and especially after 1940 when the sporadic mail they used to receive from them stopped. After the war, they could still nurture hope that at least some of them could have escaped or could have been released and/or gone into hiding. Throughout the communist period, they experienced fear as they were not allowed to ask national authorities about their fate because of political reasons, and were forced to accept the official version that the Germans were to blame for their disappearance. The actions by the authorities must have aggravated their suffering. At the end of the Cold War, they had a spark of hope again with the undertaking and advance of an investigation, but this hope was suddenly frustrated by the 2004 decision to discontinue the inquiry. Importantly, after the ratification by Russia of the ECHR there was a callous disregard for the applicants, consisting of the persistent denial of access to the records on account of their foreign nationality and also due to the Russian authorities' refusal to grant them the status of victims.²⁴ After due consideration of the previous elements, and despite the Chamber's awareness that 58 years had elapsed after the events, it decided the applicants could not be made to suffering any more the agony of not knowing whether their family member was still alive, hence the Chamber determined that Russia's attitude and actions were inhuman and found a violation of Article 3.

The applicants disagreed with the distinction made between those applicants with strong and those with "loose" family ties. They were victims in an equal measure. This is one of the reasons why they referred the case to the Grand Chamber. They added a new argument, namely, that the moral suffering of all of them could not be classified as inherently arising from the killings themselves, but resulted from the treatment they experienced at the hands of the Russian authorities.

In the referral of the case, Russia objected that there was an absence of "special factors" which would give the applicants' sufferings a dimension and character distinct from the inevitable emotional distress caused to the families of any other victim of human rights' violations.²⁵ Moreover, in the instant case, they had not witnessed their relatives' deaths and for decades had not asked the authorities for an investigation. As

²⁴ *Ibidem*, paras. 158 and 159.

²⁵ Grand Chamber judgment, para. 169.

justification for the Russian authorities' acts, it was contended that the relatives could not be given the status of victims because the destruction of records made it impossible to establish the causal connection between the "Katyń events" and the deaths of their relatives, or to determine whether their detention in 1939 had been lawful.

The Grand Chamber disregarded most of the previous Chamber's judgment with respect to the application of Article 3. It supported Russia's view that there must be special factors in place giving a dimension to the victims' suffering distinct from the emotional distress that stems from the violation itself, as established in the ECtHR's previous case-law.²⁶ These factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family witnessed the events, and the involvement of the applicants in the attempts to obtain information. A finding of a violation on these grounds is not limited to cases where the State is responsible for the disappearance, but it can also result from the failure of authorities to respond to quests for information or placing obstacles in their way. In other words, the Grand Chamber was referring to the doctrine of positive obligations, without naming it. The Court did not question the profound grief that the applicants have suffered as a consequence of the arbitrary execution of their relatives, but it stated that in the interest of legal certainty and equality before the law it could not depart from its own precedents without compelling reasons. In 1990 the USSR officially acknowledged the responsibility of Soviet leadership for the killings of Polish prisoners, and partial exhumations gave evidence of the facts. By the time Russia ratified the ECHR, in consideration to the lengthy period of time that had elapsed, the applicants could not be said to remain in a state of uncertainty as to the fate of the individuals who were detained in 1939 by the Soviet Army and from whom they had not heard since 1940. The Grand Chamber found it could only take into account the anguish and distress suffered by the applicants from the critical date (1998) and, in this respect, there were no special factors or new elements that contributed to extend their suffering. Thus, the death of their relatives has become a historical fact and, from a legal point of view, the missing persons can be considered "confirmed deaths".²⁷

1.4.3. As to the observance of Article 38 of the ECHR by the Respondent Government

Article 38 of the ECHR makes it compulsory for State parties to produce, at the Court's request, any document or information. Compliance with this obligation is a condition *sine qua non* for the effective conduct of proceedings and must be enforced regardless of any finding or the final outcome. States have to furnish the evidence from the moment of formulation of the request, in its entirety and within the time-limit fixed by the Court.

²⁶ *I.e.* in a series of Chechen cases (*Velkhiyev and Others v. Russia*, application no. 34085/06, 5 July 2011; *Sambiyev and Pokayeva v. Russia*, application no. 38693/04, 22 January 2009, *Tangiyeva v. Russia*, application no. 57935/00, 29 November 2007).

²⁷ Grand Chamber judgment, para. 186.

The ECtHR repeatedly asked Russian authorities to produce a copy of the decision of 21 September 2004 by which the investigation into the Katyń atrocity was discontinued, but the Russians always refused on the grounds that the disclosure of classified documents to an international organization violates domestic law. It maintained that information on intelligence, counterintelligence and operational and search activities constitute state secrets within the meaning of national law. Russia also contended that the 2004 decision is not crucial because it does not mention the applicants' names and does not contain information on their fate or burial sites. However, for the applicants this document was crucial in order to determine whether the Russian investigation was effective. Russia said, before the Grand Chamber, that it would not execute the request because the document was likely to prejudice the sovereignty, security, public order and essential interests of the country. It disagreed that the obligation under Article 38 had to be enforced in all circumstances.²⁸

Article 27 of the VCLT²⁹ establishes that no internal rule, even of a constitutional character, can be invoked as an excuse for the non-observance of international law. This rule is the natural corollary of the principle *pacta sunt servanda* and is also a longstanding principle of customary international law. Taking this principle of international law as the basis for their legal reasoning, both the Chamber and the Grand Chamber reiterated that it is of the utmost importance for the effective operation of the system of individual petitions instituted by Article 34 that States should furnish all necessary facilities to make possible a proper and effective examination of applications.³⁰ Granting a blanket right to States to withhold documents from proceedings for security reasons would jeopardize the very functioning of the Court.

The texts of the Chamber's and Grand Chamber's judgments are very similar concerning the refusal to hand over the required documentation. Neither were satisfied with the respondent State's excuses. Being a master of its own procedure and its own rules, the Court has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it. This is why it could not tolerate Russia's response that the documents are not necessary for the conduct of the proceedings. Russia is not entitled to invoke the provisions of its own domestic law to justify the non-observance of an obligation arising from the ECHR. It is noteworthy that at no point in the proceedings did the Russian Government explain the exact nature of the security concerns which required classification of the decision. Neither formation of the Court was convinced that a public and transparent investigation into past crimes committed by a previous totalitarian regime, and whose authors are certainly dead, could compromise the interests of national security of contemporary Russia.³¹ *In extremis*, if there were very legitimate security reasons, sensitive passages of

²⁸ *Ibidem*, para. 195.

²⁹ "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty [...]"

³⁰ Chamber judgment, para. 99 and Grand Chamber judgment, para. 202.

³¹ Chamber judgment, para. 109 and Grand Chamber judgment, para. 213.

the document could have been suppressed or access to the document could have been restricted.

At the end of its judgment, the Grand Chamber is even tougher in its reasoning, raising the idea that Russia suffers from structural deficiencies in its domestic law and may not be acting in good faith.³² Documents on human rights violations can never remain secret. In the balancing exercise between the need to protect information owned by secret services and the public interest in a transparent investigation into mass crimes, the latter prevails.

2. THE ROLE OF A STATE'S POSITIVE OBLIGATIONS

Even if not mentioned by the ECtHR using these words, the case *Janowiec and Others* is a clear example of use of the doctrine of a State's positive obligations by the Strasbourg Court.³³

2.1. The doctrine of positive obligations

Traditionally it was considered that most human rights were protected by a State's mere abstention from prohibited activities, especially in the case of civil and political rights. To be protected, it was sufficient that State agents did not commit forbidden activities (i.e. that they not violate the right to life of individuals, did not torture or inflict inhuman treatment or punishments, did not illegally detain an individual etc.). However, the evolution of the international law of human rights has led many to consider that today States not only have obligations *not* to do forbidden things or *not* to interfere, but also have the positive obligation to prevent abuses of human rights produced by private individuals or by catastrophes or acts that the State could have avoided, or whose effects should have mitigated. In other words, although a State, in principle, is only responsible for what its organs and agents do, it may also be held responsible for their omissions. Human rights have become rights whose enjoyment must be ensured by the State. To enjoy a right does not only mean entitlement to its non-violation by State agents, but also entitlement to demand that States to take measures to protect enjoyment of the right. Human rights now have both a negative dimension (which limits the power of the State) and a positive dimension, which presupposes that States must also ensure the free exercise of the rights.

The legal basis of the doctrine of positive obligations is the assumption that States have the means to fulfill their obligations and to prevent, investigate, report and punish any unlawful act. States have mechanisms to prevent violations (through law enforce-

³² Grand Chamber judgment, paras. 211-212.

³³ For more on the positive obligations of States, see S. Sanz Caballero, *Las obligaciones positivas del Estado en Derecho Internacional Público y Derecho Europeo*, [in:] M. Alvarez, R. Cippitani (eds.), *Diccionario analítico de derechos humanos e integración jurídica*, TEC, Ciudad de México: 2013, pp. 466-473.

ment, social services, the judiciary, the army etc.). States have bodies and mechanisms to inform citizens, investigate and punish, as well as legislative institutions to prevent and alleviate abuses. For this reason, States may be liable when, while being empowered to do so, they do not take appropriate measures to prevent damage or abuse, or when they act with negligence or lack of care, or when they do not properly investigate and repair abuses. States are responsible not only for their actions but also for their omissions (*not* preventing, *not* legislating, *not* investigating, *not* informing, *not* pursuing, *not* punishing, *not* restituting victims' honor).

The ECHR is no stranger to this trend. Positive obligations are also a component of the human rights included in the Convention.³⁴ In addition to the classical negative obligations of non-violation and non-interference, a State party to the ECHR must actively protect the human rights of individuals within its jurisdiction. Article 1 of the ECHR³⁵ establishes a general obligation of respect for the rights and freedoms referred to in it. This requires State parties to “ensure” these rights. The ECtHR has understood that States have obligations of prevention, research, reparation and rehabilitation of victims.³⁶ Article 13 of the ECHR guarantees the right to an effective remedy, also generating positive obligations for States. In the past 30 years the ECtHR has applied the doctrine of positive obligations, contrasting it with other interests at stake. For the ECtHR, when positive obligations are violated, either the State allowed the right's interference – in a conscious or unconscious way – or the violation was facilitated by its inaction, or a combination of the two. The involvement of the State can be in the form of a law, a judicial decision, an administrative order or a combination thereof. The test of effectiveness involves, among other things, administrative measures including a mechanism for investigation and supervision. The State's positive obligations may also include precautionary measures (informing the victims), reactive measures (punishing criminals) or redress measures (rehabilitating or compensating the victims). All rights are likely to engender positive obligations. According to the ECtHR, all public authorities, through their actions or inactions, may be the cause of a breach (police, legislative, government, judges, administration, social services, military etc.).³⁷

³⁴ F. Sudre, *Les obligations positives dans la jurisprudence européenne des droits de l'homme*, [in:] P. Mahoney, F. Matscher (eds.), *Protecting Human Rights: The European Perspective*, Carl Heymanns Verlag, Köln: 2000, p. 1359.

³⁵ “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

³⁶ D. Xenos: *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge, New York: 2012, p. 59.

³⁷ One of the positive obligations of States under the ECHR is to investigate possible abuses. This obligation extends to all types of agents who perform functions on behalf of the State. In *Jordan* and in *Shanaghan* (ECtHR, *Jordan v. UK*, 4 May 2001, application no. 24746/94 and *Shanaghan v. UK*, 4 May 2001, application no. 37715/97), the respondent State was held to blame for the actions of its police forces. On both verdicts the sentence was not for the death of suspects by police gunfire but because the State did not undertake a quick, official and independent investigation of these deaths. In cases of dysfunctional families, or children under the guardianship of the State, positive obligations soar. In *Z and others* (*Z and*

2.2. The application of the doctrine of positive obligations to *Janowiec and Others*, and how the Court could have resolved the case

It might appear on the surface that the language in the *Janowiec* case is about the non-retroactivity of international treaties –and this is the way Russia approached the application. However, its substance is about the limits of States' positive obligations. Oddly enough, in *Janowiec* the ECtHR did not refer to the doctrine of positive obligations. When the ECtHR declared the admissibility of this case on alleged violations of Articles 2 and 3 of the ECHR related to facts that happened almost sixty years before the Convention's entry into force in Russia, the ECtHR was clearly implying that there were grounds to believe that the respondent State failed to comply with its procedural obligations of investigation, punishment, information, redress and rehabilitation of the victims of those distant events, and that those procedural obligations have not ceased to exist.

Criminal responsibility for the mistreatment or murder of the prisoners may have been extinguished years ago, but States still have the legal and material means to investigate the facts and mitigate the suffering caused by atrocities. And they are obliged to use these means in the name of justice. State authorities cannot contribute, through a disinformation campaign and/or opacity, to increasing the families' distress. The search for truth is inherent in the very conditions surrounding those who lost their relatives in a violent way. The ECtHR has declared that the procedural obligation to carry out an effective investigation has evolved into a separate and autonomous duty. Thus, if a Court takes into consideration that there may have been a violation of the right to life or the right to be free from torture and inhuman treatment with respect to the relatives of those who were massacred, it is only saying that the respondent State may have failed in its international obligations under the ECHR to conduct all the procedural steps necessary to alleviate the families' suffering. However, the ECtHR finally concluded in the Grand Chamber's judgment that the recent date of the entry into force of the ECHR in Russia did not permit it to find any new element in the investigation or, better said, – in the discontinuation of the investigation – that could lead to Russia's responsibility and condemnation.

This is the restrictive way the ECtHR understood its own competence in this case. But the ECtHR could have used *Janowiec* to further extend its interpretation of the

others v. UK, 10 May 2001, application no. 29392/95) the State breached its positive obligations by the negligence of social services in relation to four brothers subjected to inhuman treatment. And in *Hokkanen (Hokkanen v. Finland)*, 23 September 1994, application no. 19823/92) Finland was responsible for the repetition of children's sexual abuse in their family environment when the social services knew that this had already happened in the past. To prevent, protect, and repair the victims are positive obligations that intermingle in the case of *Osman (Osman v. UK)*, 28 October 1998, application no. 23452/94), in which a harassing teacher killed a student and wounded his father. British police never gave credence to parents' allegations of harassment and therefore did not order protective measures. In *Kilic* and in *Özgür Gündem* Turkey was sentenced because it did nothing to prevent the threats and death of a journalist and did not rehabilitate the memory of the victim (*Kilic v. Turkey*, 28 March 2000, application no. 22492/93 and *Özgür Gündem v. Turkey*, 16 March 2000, application no. 23144/93).

positive obligations of States. Of course the Court should not go as far as to declare its competence to rule on mass crimes committed before the ECHR itself was even concluded. This would go against the principle of legal security.³⁸ But *Janowiec* was about the unavoidable duty to investigate and prosecute war crimes, which are imprescriptible and not subject to any statutory limitation. Any contrast or juxtaposition between the *Šilih* case concerning the suspicious death of a person allegedly due to medical negligence, and the *Janowiec* case, which concerned the calculated murder of almost 26,000 prisoners on the direct orders of a foreign State, aimed at getting rid of the elites of another State so as to allow a smooth transition to a totalitarian-controlled regime,³⁹ resists comparison.

The facts of the *Janowiec* case demonstrate a lack of good faith (another basic principle of international law, established in Article 2 of the Charter of the United Nations⁴⁰) on the part of the respondent State with respect to the relatives of those massacred. The files on the circumstances of the 1940 events were either destroyed or kept classified, and the families' requests for information and investigation were ignored. Even if we only take into account the period after the critical date, the positive obligations of the Russian State after that date were the following: 1) to disclose the 2004 decision on the discontinuation of the investigation; 2) to waive the secret character of all records about Polish prisoners; 3) to reinstate the forensic investigation of burial sites. By not doing so, Russians' attitude after the critical date could be interpreted as non-collaborative, or even as obstruction. The positive obligation to investigate and to inform the victims is an obligation of means, not of result. Russia could have proved its goodwill by accepting that documents on gross violations of human rights can never remain secret and by trying to look for the corpses that are still missing. By doing that, it would demonstrate its respect for the principles of international law concerning the imprescriptibility of war crimes and the continuing nature of the crime of disappearance (until the moment the body is found).

Certainly, States cannot be asked to investigate violent acts forever. To give rise to a fresh obligation to investigate, the ECtHR requires the discovery of new evidence or material after the entry into force of the ECHR in the affected State. The application of this rule is fair and logical. But blocking the disclosure of information on human rights violations (including to the ECtHR) after the critical date is not acceptable. Denying the status of injured party to the relatives of the Katyń massacre after the critical date on account of the fact that most of the victims are missing and Russia cannot be sure whether they were killed on Stalin's orders or went into hiding is offensive to the families and also to history. The arbitrary denial of rehabilitation for the Katyń victims after the

³⁸ However, it should be noted that this is the case with the work of the *ad hoc* international criminal courts of ex Yugoslavia, Rwanda, Sierra Leone, Timor or Cambodia, created after the crimes were perpetrated.

³⁹ V. Zaslavsky, *Class Cleansing: The Katyń massacre*, Telos Press Publishing, Candor: 2008, *passim*.

⁴⁰ “[...] All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter [...]”.

critical date on the grounds that the destruction of records makes it impossible to know whether they were detained because of illegal acts is untenable. As far as the burials are concerned, after the critical date the development of new technologies such as satellite vision, topographic techniques and advances in forensic medicine can be considered as new means which could be used to locate the mass graves, exhume corpses and identify the remains. Ultimately, the ECtHR could have considered that the duty of the State to investigate was reinstated in 2010 on account of two facts: the unexpected disclosure of some essential documents that had been classified until that moment (e.g. the 1940 Politburo decision to execute all Polish prisoners), and the highly symbolic declaration of the Russian Parliament acknowledging Soviet responsibility for the “Katyń atrocity” and asserting the need to resume the investigation, which certainly gave the applicants a spark of hope.

CONCLUSIONS

Following decades of denial, at the beginning of the Perestroika era Russian authorities admitted publicly that, during Stalinism, a single order led to the extrajudicial execution of almost 26,000 Polish nationals. In the light of the policy of Glasnost, in 1990 criminal investigations into this massacre were commenced, but they were discontinued and its provisional results were classified in 2004 on the orders of Moscow. No one has ever been convicted in connection with these facts. The families of those who were killed have never learned about the circumstances of their relatives’ deaths. After long years of silence under communist Poland, with the beginning of democratic changes these families demanded information from Russia. However, the Russian Government has consistently prevented them from finding out the truth. The files containing the decision to discontinue the investigation remain classified on grounds of security interests. It is difficult to understand why a comprehensive and transparent investigation of a massacre of foreigners committed 58 years ago by an now-extinct totalitarian regime could compromise the security of a State today.

In the debate on the Katyń Forest massacre, which is at the very origins of Second World War, the Grand Chamber of the ECtHR ruled it had no competence over the atrocity itself or over the subsequent improper treatment received from the Russian authorities by the relatives of those who were shot to death in 1940. With this verdict, the Grand Chamber deprived the applicants of the only one of their claims that the previous formation of the ECtHR – the Chamber – had earlier ruled in favor of; namely, that some of the applicants had received improper treatment from the respondent State.

In contrast, the final judgment of the ECtHR unanimously found that Russia, in refusing to submit a key procedural piece of evidence to the Court, had failed to comply with its obligations under the ECHR.

Polish authorities and the Polish people have shown their disappointment with the verdict. Most if not all of them believe that there has always been a conspiracy of silence

over the Katyń tragedy and they cannot understand why Russian authorities are unable to now face up to a killing that happened 70 years ago. What is it so horrible that the information cannot be disclosed today, when both the authors of the massacre and their victims are dead? The applicants thought that the Strasbourg Court would force Russia to acknowledge the mistaken Soviet practices of denial and disinformation. But Russia seems to be still unable to confront its past, and the ECtHR's capacity of action is limited by ECHR provisions, and in the *Janowiec and Others* case it interpreted its own competence in a very restrictive manner.