



Russia should have cooperated with the Court and treated Katyń victims' relatives humanely

In today's Chamber judgment in the case [Janowiec and Others v. Russia](#) (application nos. 55508/07 and 29520/09), which is not final¹, the European Court of Human Rights held, by a majority, that there had been:

A violation of Article 3 (prohibition of inhuman treatment) of the European Convention on Human Rights in respect of 10 of the applicants (see end of press release), and **no violation of Article 3** in respect of the remaining five applicants; and

A breach of Russia's obligation to cooperate with the Court under Article 38 (obligation to furnish necessary facilities for examination of the case) of the Convention.

The Court also found that it **could not examine the merits of the complaint under Article 2 (obligation to investigate loss of life)**.

The case concerned complaints about the adequacy of the investigation by the Russian authorities into the 1940 Katyń massacre.

The Court found that it could not examine the applicants' complaint about the ineffective investigation into the Katyń massacre because it could not establish a genuine connection between the deaths of the victims and the entry into force of the Convention in Russia in 1998. However, it held that Russia had failed to cooperate with the Court by refusing to provide a copy of its decision to discontinue the investigation, and that its response to most victims' relatives' attempts to find out the truth about what happened had amounted to inhuman treatment.

Principal facts

The applicants are 15 Polish nationals who are relatives of 12 victims of the Katyń massacre. The 12 victims were police and army officers, an army doctor and a primary school headmaster. Following the Red Army's invasion of the Republic of Poland in September 1939, they were taken to Soviet camps or prisons and were then killed by the Soviet secret police without trial, along with more than 21,000 others, in April and May 1940. They were buried in mass graves in the Katyń forest near Smolensk, and also in the Pyatikhatki and Mednoye villages.

The investigations into the mass murders were started in 1990. The criminal proceedings lasted until 2004 when it was decided to discontinue the investigation. The text of the decision has remained classified to date and the applicants have not had access to it or to any other information about the Katyń criminal investigation. Their repeated requests to

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

gain access to that decision and to declassify its top-secret label were continuously rejected by the Russian courts which found among other things that, as the applicants had not been recognised as victims, they had no right to access the case materials. The applicants' requests for rehabilitation of their relatives were also rejected by the Chief Military Prosecutor's Office and the courts alike.

On 26 November 2010 the Russian Duma adopted a statement about the "Katyń tragedy", in which it reiterated that the "mass extermination of Polish citizens on USSR territory during the Second World War" had been carried out on Stalin's orders and that it was necessary to continue "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...".

Complaints, procedure and composition of the Court

Relying in particular on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the Convention, the applicants complained that the Russian authorities had not carried out an effective investigation into the death of their relatives and had displayed a dismissive attitude to all their requests for information about the dead people's fate.

The applications were lodged with the Court on 19 November 2007 and 24 May 2009 respectively. They were communicated to the Russian authorities respectively in October 2008 and November 2009.

The Court declared [admissible](#), on 5 July 2011, the applicants' complaint under Article 2, namely that the Russian authorities failed to carry out an adequate criminal investigation into the circumstances surrounding the deaths of their relatives. At the same time, the Court joined to its examination of the merits of the complaint the issue of temporal jurisdiction, in other words, whether the Court could examine the adequacy of an investigation into events which had occurred before Russia ratified the Convention.

In the same decision, the Court also declared admissible the applicants' complaint that the way the Russian authorities had reacted to their requests and applications had amounted to ill-treatment under Article 3.

A [public hearing](#) was held on 6 October 2011.

Judgment was given by a Chamber of seven, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Karel **Jungwiert** (the Czech Republic),
Boštjan M. **Zupančič** (Slovenia),
Anatoly **Kovler** (Russia),
Mark **Villiger** (Liechtenstein),
Ganna **Yudkivska** (Ukraine),
Angelika **Nußberger** (Germany), *Judges*,

and also Stephen **Phillips**, *Deputy Section Registrar*.

Decision of the Court

[Article 38 \(obligation to cooperate with the Court\)](#)

The Court noted the Russian Government's continuous refusal to produce a copy of the 2004 decision to discontinue the investigation into the Katyń massacre. It emphasised in that connection that the obligation to deliver documents had to be enforced irrespective of any findings that could be made in the proceedings and of their eventual outcome.

Given that the Court had absolute discretion to determine what documents it needed to see in its examination of any case before it, it did not accept the Russian authorities'

argument that the 2004 decision to discontinue the investigation was not important. Furthermore, the Government's contention that the document could not be produced - as domestic laws and regulations prevented the communication of classified documents - ran counter to the Vienna Convention on the Law of Treaties, according to which national law could not be cited to justify a State's failure to comply with a treaty.

Finally, the Court could not see any legitimate security considerations which could have justified the keeping of that decision secret. It found that a public and transparent investigation into the crimes of the previous totalitarian regime could not have compromised the national security interests of contemporary democratic Russia, especially bearing in mind that the Soviet authorities' responsibility for that crime had been acknowledged at the highest political level.

Consequently, the Court concluded that Russia had breached its obligation under Article 38 on account of their failure to submit to the Court a copy of the 2004 decision to discontinue the investigation.

Article 2 (investigating deaths)

The Court first held that this was not a disappearance case but a confirmed death case. In the absence of any evidence that the applicants' relatives, detained at the time at Soviet prison camps, could have somehow escaped the 1940 shooting, they had to be presumed dead.

The Court then recalled that States had an obligation, well-established under the Court's case law, to investigate effectively unlawful or suspicious deaths. That obligation had evolved into a separate and autonomous duty even when the death had taken place before the Convention had entered into force in respect of that State.

Nonetheless, the Court could not consider open-ended investigations into events which had taken place before the Convention became applicable in a given State. First of all, it could only examine acts or omissions to act which had taken place after that date. Second, a genuine connection between the deaths and the entry into force of the Convention had to exist in order for the State to be obliged to investigate such deaths.

The Russian authorities had taken most of the investigative steps in the case before the date on which Russia ratified the Convention. There was no indication that any important procedural steps had taken place following the ratification. That in itself was an obstacle to the Court's assessing the efficiency of the investigation in its entirety and to it forming a view about Russia's compliance with its obligation to investigate under Article 2.

In addition, Russia had ratified the Convention 58 years after the killing of the applicants' relatives. That period was not only many times longer than the periods which had triggered the State's obligation to investigate in all earlier cases decided by the Court, but it was excessively long also in absolute terms. Therefore, it was not possible to establish a genuine connection between the deaths and the entry into force of the Convention in Russia.

The Court then examined whether the circumstances of the case could justify a connection between the deaths and the ratification on the basis of the need to ensure the effective protection of the Convention guarantees and values. It found that the mass murder of the Polish prisoners by the Soviet secret police had been a war crime, as the obligation to treat prisoners of war humanely and the prohibition to kill them had clearly been part of international customary law, which the Soviet authorities had had a duty to respect. However, even taking into account that war crimes were not subject to a statute of limitations, no evidence raising new or wider issues had been discovered after the ratification, hence Russia's obligation to investigate could not be revived.

The Court concluded that there had been no elements capable of providing a bridge between the distant past and the recent post-ratification period, and that there had been no special circumstances justifying a connection between the death and the ratification.

Consequently, the Court held that it was not able to examine the merits of the applicants' complaint under Article 2.

Article 3 (prohibition of inhuman treatment)

The Court emphasised the difference between Article 2 and Article 3: under the former the authorities were obliged to take specific action capable of leading to the identification and punishment of those responsible, while under the latter the authorities had to react to the plight of bereaved relatives in a humane and compassionate way. It then found that the Convention did not prevent it from examining a State's compliance with its obligation under Article 3 even in cases where the death itself could not be examined because it had taken place before the Convention had entered into force.

Looking into the situation of the different applicants, the Court found that those who had been the closest relatives of the Polish officers or State officials killed in 1940 could claim to be victims of an Article 3 violation. One of them was the widow, and nine - the victims' children who had been in their formative years at the time their fathers were killed. As for the other five applicants, they had never had personal contact with their missing fathers or other relatives, as a result of which the anguish they had experienced could not be examined under Article 3.

As regards the first group of 10 applicants, the Court found that they had suffered a double trauma: losing their relatives in the war and not being allowed to learn the truth about their death for more than 50 years because of the distortion of historical facts by the Soviet and Polish communist authorities. In the post-ratification period, they had not been given access to the investigation's materials, nor had they otherwise been involved in the proceedings or officially informed of the outcome of the investigation. What was more, they had been explicitly prohibited from seeing the 2004 decision to discontinue the investigation on account of their foreign nationality.

The Court was struck by the apparent reluctance of the Russian authorities to recognise the reality of the Katyń massacre. The approach chosen by the Russian military courts to maintain, to the applicants' face and contrary to the established historic facts, that their relatives had somehow vanished in the Soviet camps, demonstrated a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katyń massacre.

Furthermore, the Russian prosecutors had consistently rejected the applicants' requests for rehabilitation of their relatives, claiming that it was not possible to determine the specific legal basis for the repression against the Polish prisoners as the relevant files had disappeared. The Court found it hard to disagree with the applicants' argument that a denial of the reality of the mass murder, reinforced by the implied suggestion that the Polish prisoners might have been duly sentenced to death, demonstrated an attitude lacking in humanity.

Finally, the authorities' obligation to account for the fate of the missing people could not be reduced to a mere acknowledgment of their death. Under Article 3, the State had to account for the circumstances of the death and the location of the grave. However, the applicants had been left to bear the burden to uncover how their relatives had died, while the Russian authorities had not provided them with any official information about the circumstances surrounding the deaths, nor made any serious attempts to locate the burial sites of the relatives.

Accordingly, the Court held that there had been a violation of Article 3 in respect of the applicants Ms Wolk, Mr Janowiec, Ms Michalska, Mr Tomaszewski, Mr Wielebnowski, Mr Gustaw Erchard, Ms Irena Erchard, Mr Jerzy Karol Malewicz, the late Mr Krzysztof Jan Malewicz, and Ms Mieszczankowska, and that there had been no violation of Article 3 in respect of the other five applicants.

Just satisfaction (Article 41)

The Court decided that in the exceptional circumstances of the present case, the finding of a violation of Article 3 would constitute sufficient just satisfaction.

As regards costs and expenses, the Court held that Russia was to pay the applicants jointly 5,000 euros (EUR) for costs and expenses, as well as the applicant Mr Jerzy Karol Malewicz EUR 1,500 in respect of costs and expenses.

Separate opinions

Judges Kovler and Yudkivska expressed a joint concurring opinion. Judge Kovler, joined by Judges Jungwiert and Zupancic, expressed a partly dissenting opinion. Judges Spielmann, Viliger and Nussberger expressed a joint partly dissenting opinion, and Judges Jungwiert and Kovler expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in English.

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Press contacts

echrpess@echr.coe.int | tel: +33 3 90 21 42 08

Kristina Pencheva-Malinowski (tel: + 33 3 88 41 35 70)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Céline Menu-Lange (tel: + 33 3 90 21 58 77)

Nina Salomon (tel: + 33 3 90 21 49 79)

Denis Lambert (tel: + 33 3 90 21 41 09)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.