Answers to the questions for the hearing in the case of *Janowiec and Others v. Russia* (joint cases nos. 55508/07 and 29520/09) Strasbourg, 6 October 2011

On 6 October 2011, the European Court on Human Right held a hearing in the joint cases of *Janowiec and Trybowski v. Russia* (application no. 55508/07) and *Wołk–Jezierska and Others v. Russia* (application no. 29520/09). The historical background for these two cases was the Katyń Massacre committed in 1940, when 21,857 Polish citizens were murdered, pursuant to a decision taken on 5 March 1940 by the Politburo of the Central Committee of the USSR Communist Party.

The Russian Federation ratified the European Convention on Human Rights on 5 March 1998. The applicants alleged that the Russian investigation into the Katyń Massacre, which had started in 1990 and was discontinued in 2004, was not efficient as required by the Convention (violation of Article 2). Furthermore, they complained that the way the Russian authorities reacted to their requests and enquiries amounted to denigrating and inhuman treatment (violation of Article 3). Lastly, they claimed that the refusal of the Russian government to disclose documents from the Russian investigation into the massacre, which the Court had requested, could constitute a violation of Article 38 of the Convention (obligation to co-operate with the Court).

Before the hearing, the Court asked the participants (applicants, Russian government and the government of Poland, which joined the case as a third party) a number of questions to be answered. These questions related to important issues relevant to the case but also very crucial for the application of the Convention as such (in particular, competence *ratione temporis* of the Court). A recording of the hearing is available on the website of the Court (www.echr.coe.int).

Each participant had only 30 minutes to summarise its legal observations. An extended version of the answers was submitted to the Court in writing. Below are presented the legal observations prepared on behalf of the applicants. The author of this document is Professor Ireneusz C. Kamiński from the Institute of Legal Studies, Polish Academy of Sciences, Warsaw, Poland. In Strasbourg, he acted in his capacity as a legal representative for the applicants.

Article 2 of the Convention

1. Does the Court have [temporal] jurisdiction to assess the respondent State's compliance with the procedural obligations flowing from Article 2 of the Convention?

(a) *The parties are invited in particular to comment on whether or not the Court's jurisdiction can be founded on the "humanitarian clause" in the last subparagraph of paragraph 163 in Šilih v. Slovenia] ([GC], no. 71463/01, 9 April 2009).*

More specifically,

(i) Can the mass murder of Polish prisoners be characterised as a "war crime"?

1.1. The Katyń massacre was committed in 1940. In total, at least 21,857 people were killed. The majority of the individuals executed, i.e. 14,552, among them the applicants' relatives, were kept before the killing in three prisoner-of-war camps.

1.2. When the war started in September 1939, its participants had a duty to abide by the rules of military law (humanitarian law). At that time the basic precepts of international humanitarian law were contained in the IV Hague Convention respecting the Laws and Customs of War on Land (and especially its annex: Regulations concerning the Laws and Customs of War on Land) of 18 October 1907, and in the Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929.

1.3. The provisions of the Hague and Geneva Conventions set forth fundamental and universal principles regarding the treatment of prisoners of war. Under these principles prisoners of war remained under the power of the hostile State (government), and not that of the individuals and formations who had captured them. Prisoners of war were to be treated humanely at all times and especially, as stated in Article 2 of the Geneva Convention, protected against "acts of violence, from insults and from public curiosity. Measures of reprisal against them [were] forbidden." Prisoners of war were entitled to respect of their persons and honour (Article 3). Also Article 4 of the Hague Rules of Land Warfare stated that "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…"

1.4. The provisions of the two Conventions also regulated the conditions under which prisoners of war were to be held and the possibility of applying penal sanctions against them. Regarding the latter issue, it was generally believed that prisoners of war were subject to the regulations and orders that applied to the army of the country under whose authority they were held (Article 8 of the Hague Convention, Article 45 of the Geneva Convention). Nevertheless, in the application of disciplinary measures, corporal punishment and cruelty in any form was forbidden. Collective punishment for the deeds of an individual was also forbidden (Article 46 of the Geneva Convention).

1.5. Special protection was accorded to the rights of prisoners of war in court proceedings, whereby they were entitled to defence and to the presence of

representatives of the caretaker powers in their proceedings. They also had a guaranteed right of appeal against their sentences at the same level as the members of the armed forces of the country in which they were detained (Chapter III of the Geneva Convention).

1.6. Although the two Conventions do not contain a rule that expressly prohibits killings of prisoners of war kept in detention centres, it belongs to the very fundamentals of legal argumentation that from the prohibitions of cruel treatment and of killing in direct post-combat situations also ensued the prohibition of killing those already held in prisoner-of-war camps (*a fortiori* reasoning). Moreover, the preamble to the IV Hague Convention provides that in cases not included in the Regulation *"the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."*

1.7. The soldiers captured by the Red Army in 1939 were entitled to prisoner-of-war status, and therefore to the full protection reserved for prisoners of war. In Russian too these soldiers were termed "prisoners of war" (*военнопленные*) and the Soviet institution set up for the management of detention centres was the Administration for Prisoners' of War and Internees' Affairs (*Главное управление по делам военнопленных и интернированных*).

1.8. In 1939, the Republic of Poland was party to the two Conventions. However, the fact that the USSR was party neither to the IV Hague Convention (and to the Regulations appended thereto) nor to the Geneva Convention did not release that country from the duty to respect the universally binding principles of international customary law, which existed side by side with treaty obligations.

1.9. The legal status of norms contained in the IV Hague and Geneva Convention was addressed during the post-war trials. In 1946 the Nuremberg International Military Tribunal stated (*Goering and Others Trial*) with regard to the Hague Convention of 1907: *"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."*[1]

[1] The Nuremberg International Military Tribunal judgement (*Goering and Others Trial*), published in: *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. XXII, p. 497.

In another part of its judgement the Nuremberg Tribunal stated that: *"Article 6(b) of the Charter provides that 'ill-treatment (...) of civilian population of or in occupied territory (...) killing of hostages (...) wanton destruction of cities, towns or villages' shall be a war crime. In the main these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention."*[2]

The opinion of the International Military Tribunal was subsequently substantially adopted by the United States Military Tribunal in the *High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*[3] and the *Krupp Trial*.[4]

1.10. As far as the Geneva Convention is concerned, in the *High Command Trial* the United States Military Tribunal, while reconstructing the position of the International Military Tribunal in the *Goering and Others Case*, stated that the Geneva Convention *"was not binding between Germany and Russia as a contractual agreement, but that the general principles of International Law as outlined in those Conventions were applicable. In other words, it would appear that the International Military Tribunal in the case above cited [Goering and Others], followed the same lines of thought with regards to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of International Law as accepted by the civilised nations of the world, and this Tribunal adopts this viewpoint"* (p. 88).

The Tribunal continued that *"most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilised nations and binding (...) These concern the treatment of prisoners of war (...)"* – p. 89.

Subsequently, while enumerating which provisions (or their parts) should be cited "*in this category*", the Tribunal pointed, among others, to Article 4 of the Hague Rules of Land Warfare *("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...")* and Article 2 of the Geneva Convention (*"They [prisoners of war] must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity ...")* – pp. 89-91.

1.11. A similar position to that of the Nuremberg International Military Tribunal was adopted by the International Military Tribunal for the Far East (Tokyo Tribunal) when it stated that *"the [IV Hague] Convention remains good evidence of the customary law of nations."*[5]

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[2] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. XXII, p. 475.

[3] *Law Reports of Trials of War Criminals*, vol. XII.

[4] *Law Reports of Trials of War Criminals*, London 1949, vol. X, p. 133.

[5] "Digest of Public International Law Cases" 1948, vol. 15, p. 366.

1.12. The legal characterisation under international law of the Hague Regulations, as applied at the post-war trials, was followed by this Court in the seminal Grand Chamber judgement of *Kononov v. Latvia* (appl. no. 26376/04, judg. of 17 May 2010). The Court stated that the Hague Regulations were, although not ratified by the Soviet Union or Latvia, binding on them, as these rules *"were solidly part of international law by 1939"* (para. 200).

1.13. In the course of the Nuremberg Trial the Soviet prosecutors sought to charge the German forces with the Katyń massacre. The Katyń massacre was mentioned in the indictment as an instance of a war crime:

"Indictment: Count Three – War Crimes
(Charter, Article 6, especially 6 (b))
(…)
(C) MURDER AND ILL-TREATMENT OF PRISONERS OF WAR, AND OF OTHER MEMBERS OF THE ARMED FORCES OF THE COUNTRIES WITH WHOM GERMANY WAS AT WAR, AND OF PERSONS ON THE HIGH SEAS
(…)
In September 1941, 11,000 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk."[6]

During the proceedings before the International Military Tribunal General R.A. Rudenko, Chief Prosecutor for the USSR, referred to the Katyń massacre as *"the mass shooting of Polish officers by the Fascist criminals in Katyn Forest"*, *"criminal activity"*[7], *"mass shooting of Poles"*, *"a link in the chain of many bestial crimes perpetrated by the Hitlerites"*,[8] *"atrocities at Katyn"*.[9]

Eventually, the charge related to the Katyń massacre, as brought against the Germans accused at Nuremberg, was dismissed by US and British judges for lack of evidence.

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[6] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. I, pp. 42-54.

[7] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1948, vol. XV, p. 289. In full: *"the Soviet Prosecution have several times expressed their view respecting the application of Defense Counsel to call witnesses with regard to the mass shooting of Polish officers by the Fascist criminals in Katyn Forest. Our position is that this episode of criminal activity on the part of the Hitlerites has been fully established by the evidence presented by the Soviet Prosecution"*.

[8] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1948, vol. XV, p. 290.

[9] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. IX, p. 28.

1.14. The classification of the Katyń massacre as a war crime, as made by the Nuremberg Tribunal, must be treated in objective terms and is not dependent upon who actually committed the atrocity.

1.15. The Charter of the International Military Tribunal defines war crimes in its Article 6 (b) as, among others, acts consisting in murder or ill-treatment of prisoners of war.

1.16. Examining evidence on charges related to war crimes committed against prisoners of war, the International Military Tribunal at Nuremberg pointed to the executions of:

- members of Allied "commando" units who, following a directive issued on 18 October 1942 by Adolf Hitler, were to be "slaughtered to the last man", even if they attempted to surrender;
- escaped officers and non-commissioned-officers who, upon recapture, were to be sent, as ordered by the so-called "Bullet decree" issued in March 1944, to the Mauthausen camp to be shot there;
- 50 officers of the British Royal Force, who escaped from the POW camp at Sagan, but on recapture were shot on the direct orders of Adolf Hitler;
- "Red commissars" of the Soviet Army, as they were considered by the German forces as not benefiting from the status of prisoners of war;
- those Soviet prisoners of war who, following the Gestapo order of 17 July 1941, were identified as important functionaries of the Soviet State, Jews, political agitators and fanatical communists.[10]

1.17. War crimes that were committed against prisoners of war and consisted in their executions or killing were also the subject matter of other post-war trials. Besides the main Nuremberg trial, this kind of war crimes occurred in particlar in the the *German High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*,[11] before the United States Military Tribunal at Nuremberg (30 December 1947–28 October 1948).

The charges against the accused referred to:

- "Commando" order, and the following war crimes:
  a) on or about 7 July 1944 near Poitiers in France, troops of the LXXX Corps of the 18th Army, under Army Group G, executed 1 American prisoner of war and 30 British prisoners of war;

[10] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. XXII, pp. 471-475.

[11] *Law Reports of Trials of War Criminals*, vol. XII.

b) on or about 22 May 1944 on the island of Alimnia near Greece an English soldier and a Greek sailor were executed;
c) on or about 16 April1944 a British prisoner of war was turned over by Stalag 7a to the SD for execution;
d) on or about 10 December 1942· in or near Bordeaux, France, members of the German naval forces executed 2 uniformed British soldiers;
e) on or about 20 November 1942 near Stavanger, Norway, members of the German armed forces executed 17 uniformed British soldiers;
f) on or about 22 March 1944 near La Spezia, Italy, members' of the German armed forces executed 15 uniformed US soldiers;
g) in January 1945 in the Mauthausen Concentration Camp, Austria, from 12 to 15 American prisoners of war, comprising an American military mission, were executed.

- Eastern Front, and the following war crimes:
  a) on or about 28 July 1941 in the sector of Zwiahel in the USSR troops within the rear area of Army Group South, killed 73 surrendered Soviet prisoners of war as "guerrillas";
  b) on or about 25 August 1941, in the USSR, troops of the 18th Army under Army Group North killed 35 wounded prisoners of war;
  c) on or about 9 September 1941 in Djedkowow in the USSR, troops of Panzer Group 3 killed 4 Soviet prisoners of war;
  d) on or about 13 September 1941, troops of the 213th Security Division of the Rear Area Army Group South, executed 13 escaped and recaptured Soviet prisoners of war;
  e) on or about 15 October 1941 in the area of the 24th Infantry Division, more than 1,000 Soviet prisoners of war were shot to death because they were unable to march, or died from exhaustion;
  f) on 16 October 1941 in Nikolayev, troops of the 11th Army delivered 75 Jewish prisoners of war to the SD for execution;
  g) on or about 22 October 1941, 20 Soviet prisoners of war were executed at concentration camp "Gross Rosen"; on or about 15 October 1941, 21 Soviet prisoners of war were executed at Dachau; on or about 22 October 1941, 40 Soviet prisoners of war were executed at Dachau; on or about 8 November 1941, 99 Soviet prisoners, of war were executed at Dachau; on or about 12 November 1941, 135 Soviet prisoners of war were executed at Dachau; between 1 September 1941 and 23 January 1942, 1,082 Soviet prisoners of war were selected by the Gestapo at Regensburg for execution and executed;

h) in the month of September 1942 in the rear area of the 2nd Army, 384 prisoners of war died or were shot and 42 others were turned over to the SD for execution;
i) in the period from 1 January 1942 to 6 March 1942 in the rear area of the 11th Army, 2,366 prisoners of war were killed or died of exhaustion, neglect and disease, and 317 prisoners of war were turned over to the SD for execution;
j) from 14 January 1942 to 29 September 1942 in the rear area of Army Group North, 200 captured Soviet prisoners of war were executed;
k) in July 1943 in the rear area of the 4th Panzer Army, 24 prisoners of war were turned over to the SD for execution, and in August 1943, 39 prisoners of war were turned over to the SD for execution;
l) in January 1945 a French prisoner of war, the General Mesney, then under the control of the German Prisoner of War Administration, was murdered, and thereafter false reports of the cause and nature of his death were issued.

- The "Commissar" Order:
  a) from 21 June 1941 to about 8 July 1941, troops of the XXXXI Corps in Panzer Group 4 under Army Group North killed 97 "political commissars";
  b) from 21 June 1941 to about 19 July 1941, troops of Panzer Group 4, under Army Group North, killed 172 "political commissars";
  c) from 21 June 1941 to about 1 August 1941, troops of Panzer Group 3 killed 170 "political commissars";
  d) on or about 1 October 1941, troops of the rear area of the 11th Army, killed 1 "political commissar";
  e) on or about 4 October 1941, troops of the 454th Security Division, of the Rear Area of Army Group South, killed 1 "political commissar";
  f) from about 18 October 1941 to 26 October 1941, in the operational area of the XXVIII Corps in the USSR, troops of the 18th Army, under Army Group North, killed 17 "political commissars";
  g) on 29 May: 1942, in the operational area of the XXXXIV Corps. troops of the 17th Army, killed 2 "political commissars".

1.18. The other most important post-war cases on war crimes were:

- The case of Anton Dostler, adjudicated by the United States Military Commission (Rome, 8-12 October 1945). Dostler was accused of having ordered the shooting of fifteen American prisoners of war. Two officers and 13 men of a special reconnaissance battalion disembarked from some United States Navy boats and landed on the Italian coast about 250 miles

behind the front-line. The 15 members of the United States Army were on a military mission, which was to demolish a railroad tunnel. After having been captured and interrogated, they were summarily executed on an order of General Dostler (*Law Reports of Trials of War Criminals*, vol. I, p. 22 and subseq.).

- The Almelo Trial (trial of Otto Sandrock and three others), before British Military Court for the Trial of War Criminals (held at the Court House, Almelo, Holland, 24-26 November 1945). The four accused individuals were charged with committing a war crime that consisted in killing of a British prisoner of war who was living in hiding (*Law Reports of Trials of War Criminals*, vol. I, p. 35 and subseq.).
- The Jaluit Atoll Case (trial of Rear-Admiral Nisuke Masuda and four others of the Imperial Japanese Navy), before the United States Military Commission (United States–Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945). Killing of three America unarmed airmen who were captured and held in custody (*Law Reports of Trials of War Criminals*, vol. I, p. 71 and subseq.).
- The Dreierwalde Case (trial of Karl Amberger), before British Military Court (Wuppertal, 11-14 March 1946). Shooting five allied prisoners of war, allegedly on their attempts to escape, when on the way, under a convoy, to a railway station (*Law Reports of Trials of War Criminals*, vol. I, p. 81 and subseq.).
- The Essen Lynching Case (trial of Erich Heyer and six others, before British Military Court for the Trial of War Criminals (Essen, 18-19 and 21-22 December 1945). Lynching by civilians of three airmen when they were escorted to an interrogation centre. Erich Heyer, who was the commanding officer, gave order to the escort not to interfere if civilians should molest the prisoners of war (*Law Reports of Trials of War Criminals*, vol. I, p. 88 and subseq.).
- Trial of Albert Bury and Wilhelm Hafner, before the United States Military Commission (Freising, Germany, 15 July 1945). Killing of an American airman (*Law Reports of Trials of War Criminals*, vol. III, p. 62 and subseq.).
- The case of Aoki Toshio, by British Military Court (Singapore, 11 February 1946). Toshio was charged with "committing a war crime in that he at Sonkurai Camp in the month of November 1943 in violation of the laws and usages of war by forcing some three hundred British prisoners of war at that time in his custody the majority of whom were sick and injured to enter a train containing no sufficient or suitable accommodation and by

allowing Korean soldiers under his command to beat, kick and otherwise maltreat the prisoners, causing the death of seven of the prisoners and further injured the health of the remainder."

- The trial of Major Karl Rauer and six others before British Military Court (Wuppertal, Germany, 18 February 1946). Rauer and co-accused were charged with committing war crimes in that they were "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on 22, 24 and 25 March, 1945 (*Law Reports of Trials of War Criminals*, vol. IV, p. 113 and subseq.).
- The trial of Karl Buck and ten others before British Military Court (Wuppertal, Germany, 6-10 May 1946) The accused were charged with committing a war crime, in that they, at Rotenfels Security Camp, Gaggenau, Germany, on 25 November, 1944, in violation of the laws and usages of war, were concerned in the killing of six British prisoners of war, all of No. 2 Special Air Service Regiment, four American prisoners of war, and four French Nationals (*Law Reports of Trials of War Criminals*, vol. V, p. 39 and subseq.)
- The trial of Karl Adam Golkel and thirteen others before British Military Court (Wuppertal, Germany, 15-21 May 1946). The accused were charged with committing a war crime in that they at La Grande Fosse, France, on 15 October 1944, in violation of the laws and usages of war, were concerned in the killing of eight named members of No. 2 Special Air Service Regiment, a British unit, when prisoners of war (*Law Reports of Trials of War Criminals*, vol. V, p. 45 and subseq.)
- The trial of Lieutenant General Harukei Isayama and seven others before the United States Military Commission (Shanghai, 1-25 July 1946). The accused were charged with committing a war crime in that they did each "at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American prisoners of war, by permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war" (*Law Reports of Trials of War Criminals*, vol. V, p. 60 and subseq.)
- The trial of Gerhard Friedrich Ernst Flesch, SS OBE Sturmbannführer, Oberregierungsrat before Frostating Lagmannsrett (November December1946) and the Supreme Court of Norway (February 1948). The accused was charged with having committed war crimes *inter alia* in that in August-September 1944, he gave orders for the hanging of 15 Russian prisoners of war and supervised himself the execution (*Law Reports of Trials of War Criminals*, vol. VI, p. 111 and subseq.)

- The trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess before the Supreme National Tribunal of Poland (11-29 March 1947). The accused was the Commandant of the Auschwitz Camp. He was charged with committing a war crimes and crimes against humanity in that from 1 May 1940 till the end of October 1943, as Commandant of the Auschwitz concentration camp set up by him, and thereafter from December 1943, till May 1945, as Head of the D.I. Department of the SS Central Economic and Administrative Office, as well as in June, July and August 1944, as commander of the SS garrison at Auschwitz he *inter alia* acting either himself or through the subordinate camp personnel deliberately deprived of life about 12,000 Soviet prisoners of war (*Law Reports of Trials of War Criminals*, vol. VII, p. 11 and subseq.)
- The trial of Karl Bauer, Ernst Schrameck and Herbert Falten, adjudicated by Permanent Military Tribunal (Dijon, 18 October 1945). The accused were charged with complicity in murder in that, by abusing authority and powers, they had provoked murder in reprisals of three soldiers of the F.F.I. captured as prisoners of war *(Law Reports of Trials of War Criminals*, vol. VIII, p. 28 and subseq.).
- The Dachau concentration camp trial. The trial of Martin Gottfried Weiss and thirty nine others, adjudicated by General Military Government Court of The United States Zone (Dachau, 15 November-13 December 1945). The accused were charged of cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities of prisoners whom app. 10 per cent were prisoners of war. In spring 1942, 6,000-8,000 Russian prisoners of war were killed. Around September 1944, 90 Russian officers were hanged in the camp (*Law Reports of Trials of War Criminals,* vol. XI, p. 17 and subseq.).
- The trial of Generaloberst Nickolaus von Falkenhorst, adjudicated by British Military Court (Brunswick, 29 July – 2 August 1946). He was charged with 9 charges, among them that he was responsible as Commander-in-Chief of Armed Forces, Norway, for the handing over by forces under his command, to the Security Service of, in total, 41 British prisoners of war of different ranks and 7 Norwegian prisoners of war, with the result that said prisoners were killed (*Law Reports of Trials of War Criminals,* vol. XI, p. 30 and subseq.).
- The Stalag Luft III Case. The trial of Max Wielen and 17 others, adjudicated by British Military Court (Hamburg, 1 July-3 September 1947). All the accused were charged with committing a war crime in that they were concerned in the killing in violation of the laws and usages of war

of prisoners of war who had escaped from Stalag Luft III (*Law Reports of Trials of War Criminals,* vol. XI, p. 43 and subseq.).

- The trial of Lieutenant-General Baba Masao, adjudicated by Australian Military Court (Rabaul, 28 May-2 June 1947). The accused was charged with failing to discharge his duty as a commander to control the members of his command whereby certain of members of his command murdered a number of prisoners of war (*Law Reports of Trials of War Criminals,* vol. XI, p. 69 and subseq.).
- The trial of Johannes Oenning and Emil Nix, adjudicated by British Military Court (Borken, Germany, 21-22 December 1945). Oenning and Nix were accused of killing of a named Royal Air Force Officer, a prisoner of war (*Law Reports of Trials of War Criminals,* vol. XI, p. 87 and subseq.).
- The trial of Hans Renoth and three others, adjudicated by British Military Court (Elten, Germany, 8-10 January 1946). All the accused were charged with and found guilty of killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals,* vol. XI, p. 89 and subseq.).
- The trial of Willi Mackensen, adjudicated by British Military Court (Hannover, 28 January 1946). He was accused of, that as a result of his ill-treatment of prisoners of war, at least 30 prisoners of war died (*Law Reports of Trials of War Criminals,* vol. XI, p. 94 and subseq.).
- The trial of Eberhard Schoengrath and six others, adjudicated by British Military Court (Burgsteinfurt, Germany, 7-11 February 1946). They were charged with the killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals,* vol. XI, p. 96 and subseq.).
- The trial of Ulrich Greifelt and others, adjudicated by United States Military Tribunal (Nuremberg, 10 October 1947 – 10 March 1948). There were three connected trials.
  a) In the trial of Hans Seibold and two others (5-7 March 1947) the defendants were implicated in the killing of a member of the United States Army, who was surrendered and unarmed prisoner of war in the custody of the then German Reich.
  b) In the trial held from 10 January to 21 March 1947, there were 23 accused with Jurgen Stroop at their head. They were implicated in the ill-treatment, including death, beatings, and torture, of members of armed forces then at war with the then German Reich, who were surrendered and unarmed prisoners of war in the custody of the then Germany Reich (*Law Reports of Trials of War Criminals,* vol. XIII, p. 14 and subseq.).

- United States Military Commission at the Mariana Islands (2-15 August 1946) tried and convicted Tachibana Yochio, a Lieutenant-General in the Japanese Army and 13 others, of murdering 8 prisoners of war.
- Australian Military Court at Rabaul (2 April 1946) sentenced Tomiyasu Tisato, a First Lieutenant in the Japanese Army, after finding him guilty of the murder of an unknown Indian prisoner of war (*Law Reports of Trials of War Criminals,* vol. XIII, p. 164 and subseq.).
- The trial of Takashi Sakai, adjudicated by Chinese War Crimes Military Tribunal of the Ministry of National Defence (Nanking, 29 August 1946). On 17 and 18 December 1941, in Hongkong, thirty prisoners of war were massacred and twenty four more prisoners were killed at West Point Fortress. Between 24th and 26th December 1941, sixty to seventy wounded prisoners of war were killed (*Law Reports of Trials of War Criminals,* vol. XIV, p. 15 and subseq.).

1.19. A comparison of the post-war trials on executions/killings of prisoners of war with the Katyń massacre reveals a certain striking and differing element. Post-war trials dealt with crimes, however heinous they were, which were either committed in a direct post-combat context or concerned certain groups of prisoners of war which were considered, for different reasons, as stripped of the benefit of prisoner-of-war status (members of "commando" units or military missions, escaped POWs, "political commissars", "terror flyers"). Such particular small groups of military personnel were selected to be killed, in violation of international humanitarian law, from the ranks of all prisoners of war. By contrast, in the case of the Katyń massacre almost all prisoners of war were designated to be killed (14,552) with only a tiny group of 395 individuals chosen to survive. In the context of the Second World War this very feature makes the Katyń massacre unique and exceptional as a war crime perpetrated against prisoners of war.

1.20. As a crime of international law, the Katyń massacre was imprescriptible at the time of its commission. The applicants' counsels rely in this respect on the Court's considerations in *Kononov v. Latvia*. First, the Court declared that in order to adequately qualify under law an act committed in 1944 (and to determine the ensuing legal consequences) the national prosecution authorities and courts were required to make reference to relevant international law, not only as regards the definition of the act, but also as regards the determination of any applicable limitation period (para. 230). Then the Court held that in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes, and neither did developments in international law since 1944 impose any limitation period with respect to war crimes (paras. 231-232)

1.21. It should be mentioned that the Katyń massacre was classified as having the features jointly of war crime, crime against humanity and genocide by the Russian Commission of Experts (in its report of 2 August 1993 prepared within the framework of investigation no. 159) and by the Polish Institute of National Remembrance (decision of 30 November 2004 to commence investigation into the Katyń crime). Furthermore, political institutions and bodies in their resolutions called the Katyń massacre "a war crime having the character of genocide": resolution of Polish Parliament of 23 September 2009 and statement of the Delegation to the EU–Russia Parliamentary Co-operation Committee, European Parliament, dated 10 May 2010.

Conclusion: The Katyń massacre constituted a violation of the prohibitions contained in the IV Hague Convention of 1907 and Geneva Convention of 1929. These prohibitions were recognised, as evidenced by post-war trials, as corresponding by 1939 to the relevant universally binding customary rules of humanitarian law. The Katyń massacre was also classified as a war crime in the indictment to the Nuremberg trial of the main war criminals before the International Military Tribunal. This legal qualification was never questioned, but fully endorsed at the Nuremberg trial by representatives of the Soviet Union, which was the legal predecessor of the Russian Federation. Furthermore the abundant case law from the post-war trials of war criminals demonstrates convincingly and unequivocally that executions of prisoners of war constituted and were treated as war crimes by the international community. Lastly, the Katyń massacre as a crime of international law was imprescriptible at the time of its commission, as it is today.

(ii) If characterised as a "war crime" contrary to the underlying values of the Convention, was the need to ensure the real and effective protection of those values sufficient for the procedural obligations imposed by Article 2 to come into effect (see Šilih, § 163)?

1.22. To date, the Court has on several occasions made reference to *"the underlying values of the Convention"* as a normatively relevant construct.

1.23. Usually, the construct of the underlying values of the Convention was used in its negative function of preventing individuals from making use of the Convention rights and freedoms for purposes or in a way contrary to the Convention axiology.

1.24. In *Lehideux and Isorni v. France [GC]* the Court held that "*[t]here is no doubt that, like any other remark directed against the Convention's underlying values (…) the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10*" (appl. no. 24662/94, judg. of 23 September 1998, RJD 1998-VII, § 53). In this judgement the Court referred to the case of *Jersild v. Denmark [GC]*, where insulting racially motivated speech was deemed not to enjoy the protection of the Convention (appl. no. 15890/89, judg. of 23 September 1994, Series A no. 298, § 35; in this sense also e.g. *Glimmerveen and Hagenbeek v. the Netherlands*, appl. nos. 8348/78 and 8406/78, dec. of 11 October 1979, DR 18, p. 187; and *Kühnen v. Germany*, appl. no. 12194/86, dec. of 12 May 1988 DR 56, p. 205).

In the subsequent decision of *Garaudy v. France* the Court was confronted with a revisionist book that denied the reality of the Holocaust (appl. no. 65831/01, dec. of 24 June 2003, ECHR 2003-IX). The Court declared that "*[d]enying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. (…) The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace.*"

This line of reasoning was repeated in *Witzch v. Germany*, where statements denying Hitler's and the National Socialists' responsibility in the extermination of the Jews were described as showing "*disdain towards the victims of the Holocaust*" and running "*counter to the text and the spirit of the Convention*" (appl. no. 7485/03, dec. of 13 December 2005).

In *Orban and Others v. France* the Court noted that "*statements pursuing the unequivocal aim of justifying war crimes such as torture or summary executions (…) amounted to deflecting Article 10 from its real purpose*" (appl. no. 20985/05, judg. of 15 January 2005, § 35).[12]

1.25. If speech denying the Holocaust or crimes against humanity or justifying war crimes has been rightly declared by the Court as contravening the underlying values of the Convention, then all the more the heinous acts themselves, the reality of which is denied or committing of which is justified, must be deemed contrary to the core values of the Convention.

[12] Original version: "*des propos ayant sans équivoque pour but de justifier des crimes de guerre tels que la torture ou des exécutions sommaires sont pareillement caractéristiques d'un détournement de l'article 10 de sa vocation.*"

1.26. In *Šilih v. Slovenia*, para. 163, the construct of the underlying values of the Convention was evoked in its positive function, i.e. as a justification for the State's obligation to conduct an effective investigation under Article 2 when a particular case of death (*resp.* killing) preceded the ratification of the Convention by the respondent State. The applicants' counsels are of the opinion, as they have already submitted to the Court in their observations, that the Court's temporal competence should be established, first of all, by reference to the need to ensure the real and effective protection of the underlying values of the Convention.

1.27. For an investigation to be effective as required by Article 2, it must include all reasonable and available measures capable of establishing the circumstances of a given tragic event and leading to the identification of the perpetrators and those who might be involved in it, as well as bringing them to justice.

1.28. Three principal arguments can be formulated in the case of the Katyń massacre, which was a mass-scale crime of international law, contrary to the underlying values of the Convention, to justify the fulfilment of the procedural obligations imposed by Article 2 being needed to ensure the real and effective protection of the Convention founding values.

1.29. Firstly, in the preamble to the Convention it was declared that the Member States of the Council of Europe and of the Convention build a community based on *"the maintenance and further realisation of human rights and fundamental freedoms."* State Parties of the Convention depend, as political democracies, on *"observance of the human rights"*, which are *"the foundation of justice and peace"*.

Crimes of international law, in particular those consisting in murders, are by definition contrary to the above-mentioned aims of the Council of Europe and the Convention. They constitute drastic violations of human rights, undermining the very sense of justice and peace. Therefore, since speech denying the reality of crimes of international law or justifying their being committed was declared by the Court to be an act of *"disdain towards the victims"* (decision *Witzch v. Germany)*, *"a serious threat to public order"* which is "*incompatible with democracy and human rights"* and running counter to *"the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace"* (decision *Garaudy v. France*), the same rationale should apply, *mutatis mutandis*, in the context of the lack of an efficient investigation into killings that are crimes of international law.

Furthermore, the lack of an efficient investigation into killings that are crimes of international law should also be qualified as act of disdain towards victims and their living relatives, sometimes even tantamount to a denial of the atrocities or a justification of their being committed (if the State authorities ignore or disregard established historical facts).

1.30. It seems unnecessary to define in abstract terms with respect to which categories of murders as crimes under international law the very character of a given act would require an effective investigation to be conducted in order to ensure the real and effective protection of Convention values. Murderous crimes of international law can be committed by "private individuals" or "occasionally" by State functionaries, but sometimes they are also perpetrated as part of a State policy, deliberately planned and realised on the orders of the highest State authorities. It is with regard to this final category of international crimes that the interrelationship between the procedural obligation of effective investigation and the real and effective protection of the Convention values becomes pertinent.

In other words, if we were to reconstruct a *continuum* of crimes of international law it would starts with crimes committed by private individuals, followed by crimes "occasionally" committed by State functionaries, and on the extreme edge of this *continuum* would be located crimes that involve States in the strongest possible way: these are mass-scale crimes orchestrated and carried out on the orders of the highest State authorities (such as the Holocaust and the Katyń massacre). If the humanitarian rule from *Šilih* is to have any normative sense and any practical effect, and to be alive at all, it must apply at least to the crimes located in and around the extreme edge of the *continuum*.

1.31. Secondly, the Council of Europe and the Convention came into being as democratic political and legal alternatives to the two totalitarian regimes, Nazism and Stalinism, which were responsible for horrific mass-scale violations of human dignity. The vision of the founders of the Council of Europe and the Convention was directed towards a system that clearly defines what is just and what unjust. This intention clearly transpires from the *Travaux préparatoires* to the Convention. To give only one example:

> *"while I was in the Gestapo prisons, while one of my brothers was at Dachau and one of my brothers-in-law was dying at Mauthausen, my father (…) was interned at Buchenwand. He told me that on the monumental gate of the camp was this outrageous inscription: 'Just or unjust, the Fatherland".*
> *I think that from our First Session we can unanimously proclaim that in Europe there will henceforth only be just fatherlands.*
> *I think we can now unanimously confront 'reasons of State' with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded – the sovereignty of justice and law."* (*Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights*, The Hague 1975-1985, vol. I, pp. 48-49).

1.32. The Katyń massacre was committed by a totalitarian regime whose aims and values radically and drastically contradicted those of the Convention. It therefore becomes mandatory, if the Convention values are to be protected in the real and effective manner, that the political successors of the totalitarian States, currently Contracting Parties to the Convention, should conduct an effective investigation into the totalitarian crimes. Whenever other *rationes* for the Court's competence are established, the temporal jurisdiction of the Court may result from the need to ensure the real and effective protection of the Convention values.

Had democratic Germany not conducted an effective investigation into the Holocaust atrocities, the Court would have been competent, relying on "the humanitarian clause" from the *Šilih* judgement, to determine whether this led to a violation of the procedural obligation under Article 2. The applicants' counsels are mindful of the differences between the Holocaust and the Katyń massacre, but they consider that in the cases of mass-scale crimes perpetrated by the two totalitarian regimes the rationale of the real and effective protection of the Convention values come into play as a specific factor for the determination of the Court's competence *ratione temporis*.

1.33. Thirdly, an effective investigation into the Katyń massacre is a prerequisite for the rehabilitation of the murdered persons as victims of political repression. To date, those persons killed are considered, in legal terms, as sentenced and executed in conformity with Soviet legislation.

It is also worth noting the social consequences of the lack of efficient investigation. The fact that the Katyń massacre was committed by the Soviet Union is broadly denied in Russia, even by members of the Russian Parliament. In a public opinion poll conducted in Russia in 2010 as many as 53 percent of the respondents did not know who committed the Katyń massacre, 28 percent attributed it to the Germans and only 19 percent pointed to the Soviet Union.

Another illustration of the indirect adverse consequences of the lack of efficient investigation is that some Russian towns continue today to bear the names of members of the Politburo of the Communist Party who on 5 March 1940 made the decision to shoot almost 22,000 Polish citizens. Among these towns is Kaliningrad, capital of the region adjacent to the Polish-Russian border.

1.34. Since, for several cumulatively applicable reasons, the effective investigation into the Katyń massacre was necessary to ensure the real and effective protection of the Convention values, the applicants' counsels respectfully invite the Court to make use of Article 46 of the Convention. In exceptional cases – as this case is exceptional – the Court indicated the type of measure that might, and sometimes should, be taken in order to put an end to the situation it found to exist

(e.g. *Abuyeva and Others v. Russia*, appl. no. *27065/05*, judg. of 2 December 2010). The applicants' counsels would wish to rely in particular on the judgement in the case of *Association of "21 December 1989" and Others v. Romania* (appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011). In this judgement the Court declared that:

> *"l'État défendeur doit mettre un terme à la situation constatée en l'espčce, jugée par elle contraire à la Convention, relevant du droit des nombreuses personnes touchées, comme les requérants individuels, à une enquęte effective, qui ne s'achève pas par l'effet de la prescription de la responsabilité pénale, compte tenu également de l'importance pour la société roumaine de savoir la vérité sur les événements de décembre 1989. L'État défendeur doit donc offrir un redressement approprié afin de respecter les exigences de l'article 46 de la Convention, en tenant compte des principes énoncés par la jurisprudence de la Cour"* (§ 194).
> *["The respondent State is to end the situation found in this case, considered by the Court as contrary to the Convention and concerning the rights of many persons affected, as individual applicants, to an effective investigation, which does not end as a result of prescription of criminal responsibility, also taking into account the importance for Romanian society of knowing the truth about the events of December 1989. The respondent State must provide an appropriate remedy to meet the requirements of Article 46 of the Convention, taking into account the principles expressed in the case law of the Court."]*

1.35. In the background of the Romanian case were the tragic events that preceded the fall of the Ceausescu regime. The Court held that the effective investigation of the events was necessary because of two principal reasons. Firstly, the persons killed were "many", and it meant several hundred. Secondly, the Court stressed the interest of Romanian society in knowing the truth about the events. This rationale applies all the more to the Katyń massacre, which was an imprescriptible crime under international law and in which 21,857 persons were murdered.

Conclusion: the humanitarian clause from the *Šilih* judgement justifies, for three reasons cumulatively present in the instant case, that the procedural obligations under Article 2 come into effect in order to ensure the real and effective protection of the Convention values. Firstly, the Katyń massacre was a mass-scale crime of international law organised and perpetrated on the orders of the highest authorities of the State, whose legal successor is a party to the Convention. Secondly, that crime was committed by a totalitarian regime in the furtherance of aims drastically contrary to the very foundations of the Council of Europe and the

Convention. Thirdly, an effective investigation is indispensible to eliminate the serious legal and societal adverse consequences of the lack of such an investigation. Additionally, the applicants' counsels respectfully invite the Court to make use of Article 46 of the Convention.

(b) In the alternative, are there any other elements of the Court's case-law capable of establishing its temporal jurisdiction in the present case?

1.36. As the applicants' counsels have already argued in their former observations submitted on 29 May 2010, the Court will also have the competence *ratione temporis* to hear the case as far as "the proportion rule" from the *Šilih* judgement is concerned.

1.37. Firstly, a significant part of the procedural steps in the Katyń criminal proceedings must have taken place after 5 May 1998, as the facts established before and after that date differ profoundly. At earlier stages of the Russian Katyń investigation the execution of Polish POWs by NKVD squads was not doubted, whereas the relevant Russian institutions later repeated that the fate of those prisoners was unknown.

1.38. On 21 April 1998 the Chief Military Prosecutor's Office of the Russian Federation confirmed in its written answer to Mrs. Ojcumiła Wołk and Witomiła Wołk-Jezierska that Wincenty Wołk, son of Wacław, born 12 May 1909, had been kept as a POW in the special NKVD camp at Kozelsk, and had been shot dead along with others in spring 1940. However, in its responses to further requests filed in 2006 and 2008 by Mrs. Witomiła Wołk-Jezierska, the Chief Military Prosecutor's Office stated that the whereabouts of Wincenty Wołk remained unknown. This position was then upheld by the Russian courts.

1.39. Therefore, there was a dramatic change in the investigation. If that change is to be presumed reasonable and justified it must have been accompanied by significant investigation activities and backed up by a solid evidentiary material. Yet, very puzzlingly, the Respondent Party alleges that only "an insignificant number of investigation activities, carried out at the end of the 1990s and after the year 2000, did not lead to any considerable advance and change in the investigation" (para. 32 of the Memorandum).

1.40. Secondly, the crucial decisions to discontinue the investigation and to classify the materials from the investigation were made only in September and December 2004 respectively.

1.41. Lastly, it must be stressed that due to the secrecy clause still imposed on a significant part of the Russian Katyń investigation files it is impossible to determine precisely how many and which legal steps took place before and after the "critical date".

1.42. After the submission of the observations of 29 May 2010, the "proportion rule" from the *Šilih* judgement was applied in the following cases concerning deaths or killings that occurred before the "critical date": *Lăpuşan and Others v. Romania*, appl. nos. 29007/06, 30552/06, 31323/06, 31920/06, 34485/06, 38960/06, 38996/06, 39027/06 and 39067/06, judg. of 8 March 2011; *Association of "21 December 1989" and Others v. Romania*, appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011; *Jularić v. Croatia*, appl. no. 20106/06, judg. of 20 January 2011; *Lyobov Efimesto v. Ukraine*, appl. no. 75726/01, judg. of 25 November 2010; *Palić v. Bosnia and Herzegovina*, appl. no. 4704/04, judg. of 15 February 2011. To date, the proportion rule has been unanimously applied in 11 judgements.

Conclusion: The applicants' counsels consider that in the present case the Court has temporal jurisdiction established both by the humanitarian rule and the proportion rule. However, they ask the Court to hold that compliance with the procedural limb of Article 2 is required by the need to ensure that the guarantees and the underlying values of the Convention are protected in the real and effective manner. Moreover, the applicants' counsels respectfully invite the Court to make use of Article 46 of the Convention.

2. *Assuming that the Court has jurisdiction to examine the case from the standpoint of the procedural obligation under Article 2, did the Russian State discharge its duty to carry out an effective investigation?*
   (a) *In particular, was the applicants' right to participate effectively in the investigation adequately secured?*
   (b) *In rendering the decision on classification of the file materials, was due weight given to the public interest in uncovering the crimes of the totalitarian past and the applicants' private interest in discovering the fate of their relatives?*

2.1. Article 2 requires States to conduct an effective investigation in all cases of violent death or allegations that this may have occurred. This duty consists in taking all reasonable steps capable of establishing the circumstances of the death in question, identifying those who were responsible for it and bringing the perpetrators to justice. This is not an obligation of result, but one of means.

The investigation must be transparent to the public, but especially to close relatives of the victim. In all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (e.g. *Hugh Jordan v. the United Kingdom*, appl. no. 24746/94, judg. of. 4 May 2001, § 109). Therefore the Court found violations of Article 2, e.g. when the family of the victim had no access to the investigation and court documents (*Ögur v. Turkey [GC]*, appl. no. 21954/93, judg. of 20 May 1999, ECHR 1999-III, § 92) and when the father of the victim was not informed of the decisions not to prosecute (*Güleç v. Turkey*, appl. no. 21593/93, judg. of 27 July 1998, Reports 1998-IV, § 92).

The obligation to carry out an effective investigation becomes especially pertinent when State functionaries are or may be implicated in the death (relevant Court's case law referred to in para. 65 of the submissions of 29 May 2010).

2.2. Russian investigation no. 159 does not meet the basic requirements of Article 2. In the proceedings it has not been established whether in 1940 there were any executions of Polish citizens. Responding to the questions formulated by the Court in the document communicating the application, the Russian government stated that, of those who had been detained in the Ostashkov, Starobelsk and Kozelsk camps, 1,803 had "perished", whereas the fate of the others was not known. Only 22 persons were identified during the 1991 exhumation works, none of whom was a relative of the applicants.

2.3. The Russian authorities did not provide any explanation as to the difference between the number of persons killed in Shelepin's note (21,857) and the much lower number of those called "perished" persons (1,803).

2.4. Actually, however, the Russian authorities have not provided any single name of the persons murdered. Illustrative of the Russian authorities' approach is the case of the two persons who were among the 22 bodies identified during the excavation work at Mednoye in 1991. These were Mr. Lucjan Rajchert and Mr. Wacław Słabolepszy. In 2006 the Memorial Association lodged an application for rehabilitation of the 16 POWs held in the special NKVD camps, among them Mr. Lucjan Rajchert and Mr. Wacław Słabolepszy. Despite the identification of these two POWs the Chief Military Prosecutor's Office rejected the rehabilitation request. This decision was confirmed by Khamovniki Circuit Court. When confronted with the results of the Russian exhumation, Judge Igor Kananovitch stated at a court hearing that a bullet hole in the skull proved only that a firearm had been used against a certain person, but not that this person had been shot dead by State functionaries and, all the more, that he was a victim of political repression (the judgements of Khamovniki Circuit Court were attached to the submissions of applicants' counsels of 12 October 2010).

2.5. In its submissions to the Court the Russian Government stated that the Russian authorities had not in any way been obliged to institute and carry out any investigation into the Katyń massacre. This position may justify why, at a certain point, when the authorities started to consider, for whatever reasons, the investigation as "mistakenly" initiated, the investigation was no longer conducted properly. It must be stressed, however, that during the first period the investigation was carried out with the full co-operation of Polish specialists and the prosecutor in charge of it intended to classify the Katyń massacre as a war crime, crime against humanity and genocide (motion of Anatoly Yablokov of 13 June 1994 and the legal opinion of the Russian Commission of Experts on the Katyń Case of 2 August 1993).

2.6. As regards the evidence collected, the Russian authorities did not conduct full-scale excavations at all burial sites. Originally, however, the excavations were to be performed not to assess the number of victims, but only to confirm that Polish citizens had been buried in certain locations. In terms of the number of victims and their names, other evidence was considered pertinent and credible. When, however, the excavation works became crucial for determining the number of victims and their identities, they should have been carried out on a full scale with the aim of identification of the bodies.

2.7. The applicants were not given the status of injured party in the investigation. As a result, they could not participate in the proceedings, present documents and evidence, or submit motions. Their participation became especially pertinent when the Russian authorities began to have doubts as to the number of victims and the fate of those whose names were on the NKVD dispatching lists.

2.8. Deprivation of opportunities to participate in the investigation was particularly detrimental to the applicants' rights as the Russian authorities consistently assured that the investigation was coming to its end without anything suggesting a sudden and dramatic change in the conclusions of the proceedings.

2.9. Irrespective of whether the Russian authorities considered the applicants' relatives as dead or disappeared, the applicants should have access to the case file, as their own legal interests were involved in the proceedings, e.g. knowing the circumstances of the death (or disappearance) of their close relatives and the decision-making process that led to this death (or disappearance).

2.10. In view of the foregoing, investigation no. 159 may not be considered transparent to the applicants.

2.11. The requirement of transparency also applies to the public at large. This requirement should be of particular importance in cases of serious human rights violations, especially those committed by totalitarian regimes in the furtherance

of aims contrary to values of the Council of Europe and the Convention. Investigation no. 159 concerned a mass-scale crime of international law perpetrated by the Stalinist regime. There therefore existed, and continues to exist, an important public interest in terms of knowing what circumstances of the Katyń massacre have been established by the prosecutor's office.

2.12. The Russian authorities rely on State security grounds as justification for the secrecy of the case file. There are several reasons for which this argument may not be accepted. Firstly, in a democratic society the public interest in uncovering the mass-scale crimes of totalitarian regimes is so preponderant that hardly may any true and real interest of the State, which pretends to be democratic and follows democratic values, be invoked to justify the secrecy of the investigation files. It is therefore unimaginable that, for example, the democratic Germany might claim security reasons for classifying files concerning Nazi crimes. If a State of the Convention relies on fundamental State interests in the context of crimes committed by its totalitarian predecessor it may be justly perceived as equal to suggesting the continuity between the regimes, and even as an act of approval of the atrocities. Secondly, societies that lived under totalitarian regimes, if these societies are to transform themselves into democratic ones, need knowledge about the atrocities of such regimes. This knowledge is part and parcel of civic and democratic education. Thirdly, the time factor must be taken into account. The applicants' counsels are ready to accept that even in the case of crimes of international law State interests may exceptionally be invoked. Nevertheless such exceptions must be very rigorously and narrowly interpreted, and may justify the classification of only particular sensitive documents relating to military and diplomatic matters. Over time, this exceptional justification ceases to exist.

2.13. The Russian authorities claimed that one of the major obstacles to the investigation into the Katyń massacre was the destruction of the prisoners' personal files. The applicants' counsels have serious doubts as to the indispensability of this material for the success of the investigation. However, in this context let us recall – although it is not a strictly legal argument – the words of Mikhail Bulgakov, the great Russian writer: "archives don't burn". The allegation that the personal files of prisoners were destroyed has never been substantiated. Reasons therefore exist for doubting the assertion of the Russian authorities. Firstly, the authorities have never shown the routine protocols of destruction of files. Secondly, in the 1990s, when Russian-Polish co-operation with regard to the Katyń massacre was proceeding smoothly, the Russian partners assured their Polish colleagues, albeit unofficially, that the files of Polish prisoners of war – not only those killed in 1940 but all of them – still existed and were divided into four different categories.

2.14. Lastly, effective investigation must be directed, by the use of all available measures, towards the identification of perpetrators and bringing them to justice. As the case file is secret, we do not know who has been declared responsible for the Katyń massacre and on which grounds. However, we know that the Katyń massacre was classified as an abuse of power. This classification entirely disregards the precepts of international law, which in 1940 already treated killing of prisoners of war as a war crime. Moreover, at the time when it was committed this crime was not subject to statute of limitation (we refer in this context to the findings of the Court in the *Kononov* judgement, § 230).

2.15. If the Katyń massacre had been given the adequate legal classification, i.e. being declared an imprescriptible crime of international law, the Russian authorities should have pursued a criminal prosecution of the key organisers and perpetrators as long as they live. In this context it is worth mentioning that in the 1990s still alive were such persons as Lazar Kaganovitch, member of the Soviet Politburo, who on 5 March 1940 made the decision to execute Polish citizens, and Piotr Soprunienko, in 1940 head of the Administration for Prisoners of War and Internees Affairs.

Conclusion: Russian investigation no. 159 did not meet the very basic requirements for being declared effective. The applicants were not given injured party status, their rights to participate in the investigation were not safeguarded properly, and – a fact which became particularly important when the Russian authorities reversed the original version of the tragic events – evidence was not collected from the applicants, basic evidentiary measures (e.g. excavation works) were not undertaken, and the adequate legal classification was not given to the Katyń massacre.

Article 3 of the Convention

3. *Did the Russian authorities subject the applicants to a form of degrading treatment in breach of Article 3 of the Convention in connection with the applicants' attempts to obtain information about the fate of their relatives and the way in which the Russian authorities treated those enquiries?*

3.1. In their written submissions the applicants' counsels have already referred to the Court's case law on Article 3. It is therefore pointless to repeat these arguments at the hearing. We will only respectfully remind the Court of some elements pertinent to the allegations concerning Article 3.

3.2. The Court emphasised in its case law that the essence of violations of Article 3 does not so much lie in the fact of the "disappearance" or killing of the family

member (in "inherent" emotional suffering concomitant with killing or disappearance) but rather concerns the authorities' reactions and attitudes to this situation when it is brought to their attention (e.g. *Çakıcı*, para. 98).

3.3. It sometimes happens that "disappeared persons" become "dead persons" when the bodies of those who disappeared are found. The peculiarity of the Katyń case is that the sequence of "first disappeared, then dead" is reversed. Those who were "dead" became the "disappeared".

3.4. When in the 1990s Mrs. Wołk and her daughter Mrs. Wołk–Jezierska enquired of the Russian Chief Military Prosecutor's Office about the rehabilitation of their husband and father they were informed that Lieutenant Wołk had been executed by the NKVD and his rehabilitation would be decided when investigation no. 159 was finished. The Russian authorities did not question the fact that Mr. Wołk had been executed in 1940 and that this had taken place during the Katyń massacre.

3.5. In reply to the requests lodged twice (2005 and 2007) by the applicants after investigation no. 159 was discontinued, the Chief Military Prosecutor's Office also confirmed that the death penalty had been carried out on the applicants' relatives.

3.6. In response to the request filed in 2008 by Mrs. Anna Stavitskaya, the Russian advocate for the applicants, the Chief Military Prosecutor's Office stated, among the reasons for rejecting the rehabilitation request, that the applicants' relatives had not been identified in the course of investigation no. 159.

3.7. In the course of the subsequent court proceedings the Moscow Circuit Military Court stated in its judgement of 14 October 2008 (upheld by the Military Division of the Supreme Court on 29 January 2009) that it had not been established what had happened to the applicants' relatives who in 1940 were held in the special POW camps at Kozelsk, Starobelsk and Ostashkov, after they had left those camps and been handed over "to the disposal" of the regional NKVD commissions. Although the transfer of prisoners of war had taken place in pursuance of the decision of the Politburo of the Communist Party to exterminate Polish prisoners and those people had been delivered to the locations where executions were carried out, their fate was declared unknown.

3.8. Such statements, enunciated in sheer denial of the very basic facts and the previous assertions of Chief Military Prosecutor's Office, must be considered as inflicting grave moral pain, anguish and stress on the applicants. By way of comparison, bearing in mind the established legal and historical standards, one

could not even imagine that a post-war German public institution might state to a group of relatives of Holocaust victims that such victims must be considered unaccounted-for as their fate could be traced only to the dead-end track of Birkenau. As a result, the competent State authorities are unable to unearth what may subsequently have happened to that group at Auschwitz, insofar as there exist no documents on their whereabouts (or because the documents have been destroyed by the Nazi authorities). Such a statement would clearly amount to an act of degrading and inhuman treatment.

We are clearly mindful of the differences between the Holocaust and the Katyń massacre. It is important to point out, however, that the destiny of those reaching the dead-end track of Birkenau and that of Gniezdovo (adjacent to Katyń) was equally tragic, with only one exception in the latter case. As the tragic events of the Holocaust and the Katyń massacre are well established, any statement of State authorities denying the reality of these two atrocities must bring about extreme distress, anguish and emotional suffering to relatives of the victims.

3.9. In response to the requests for rehabilitation the applicants were informed that the Chief Military Prosecution Office was unable to establish – as the personal files of prisoners had allegedly been destroyed – "which provision of the Penal Code formed the legal basis for calling the prisoner to account".

3.10. The motives given by the Chief Military Prosecutor's Office to support its decisions, which were upheld by the courts, demonstrate that the Chief Military Prosecution Office assumed that in the case of the victims of the Katyń massacre, who had been murdered in violation of the elementary rules of international humanitarian law and following a special extra-judicial procedure contrary even to Soviet legislation, there might have existed due reasons for the execution. This is tantamount to an allegation that the victims were criminals who deserved capital punishment.

3.11. We would also like to respectfully draw the Court's attention to certain facts occurring in the proceedings for rehabilitation. Firstly, the Moscow Circuit Court in its judgement of 16 May 2008 stated – while dismissing an appeal against the decision on rehabilitation – that the only persons entitled to institute the appeal action were the victims of the repression themselves, i.e. the executed Polish officers. Secondly, in his submissions before the Moscow Circuit Court of Khamovniki Prosecutor Blizyeyev, acting on behalf of the Chief Military Prosecutor's Office, argued that even if "hypothetically" the Polish officers "may have been killed" by organs of the Soviet state, there existed "due reasons" for the repression, as "some" Polish officers were "spies, terrorists and saboteurs" and the Polish pre-war army "had been trained to fight against the Soviet Union" (court sitting on 24 October 2008).

3.12. There is abundant evidence allowing reconstruction of the circumstances of the Katyń massacre and confirming the death of the applicants' close relatives. The names of the ten prisoners of war have been inscribed on the memorials erected in the burial places. The bodies of the three prisoners of war killed in Katyń – Mr. Wołk, Mr. Rodowicz and Mr. Mielecki – were identified during the excavations in 1943. Despite all that evidence, the applicants heard in 2008 that their relatives had "disappeared" in the spring of 1940. They also heard that if they were executed in 1940 there may have existed "due reasons" for the killing of the POWs.

3.13. The hypothesis of "disappearance" evoked by the Russian authorities must also bring about anguish and pain to the applicants because it resembles a well-known statement made by Joseph Stalin during a meeting on 3 December 1941 with Władysław Sikorski, Polish Prime Minister of the Government-in-Exile. When asked about the fate of Polish soldiers held by the Soviets in the camps for POWs, Stalin answered that those still unaccounted-for *"could have fled to Manchuria"* (minutes of talks conducted in the Kremlin on 2 December 1941).

3.14. The anguish, pain and moral suffering of the applicants cannot be classified as simply and inherently accompanying the killings themselves. It resulted from the treatment the applicants experienced from the Russian authorities when the applicants lodged their legal requests. Another factor relevant in the context of Article 3 is the age of the applicants and the fact that for most of the persons executed were fathers whom they do not remember or never had the chance to see.

Conclusions: the treatment of the applicants was degrading and inhuman, and amounted to a violation of Article 3. Their anguish and suffering clearly went beyond the emotional distress normally accompanying the killing of a close relative. The source of this anguish and suffering was the way the Russian authorities reacted to the applicants' enquiries about the fate of their close relatives.

Article 38 of the Convention

4. *As regards the Russian Government's refusal to furnish a copy of the decision of 21 September 2004 as requested by the Court, was their reference to the provisions of national law preventing confidential information from being communicated to international organisations compatible with their obligations under Article 38 of the Convention read in the light of Article 27 of the 1969 Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty")?*

4.1. The rule expressed in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) is broadly considered as a reflection of the longstanding principle of customary international law (M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden 2009, p. 375 and further references). In accordance with this principle no internal rule, even of constitutional rank, can be invoked as an excuse for the non-observance of international law. Article 27 VCTL applies only to contractual international obligations and is narrower than the customary principle of precedence of all binding norms of international law over any rule of domestic legal order.

4.2. The principle that, in international terms, the provisions of domestic law may not prevail over international obligations, goes back to the *Alabama Claims Arbitration* of 1872. In the arbitration proceedings that followed the use of a British shipyard by the American Confederates to transform a commercial vessel into a warship that subsequently sank a number of Union vessels, it was ruled that *"the government of Her Britannic Majesty cannot justify itself for a failure in due diligence of the plea of insufficiency of the legal means of action which it possessed (…) It is plain that to satisfy the exigency of due diligence, and to escape liability, a neutral government must take care (…) that its municipal law shall prohibit acts contravening neutrality"* (J.B. Moore, *International Arbitration*, New York 1898, vol. 1, p. 653).

4.3. The predominant position of international law *vis-á-vis* domestic legislation was declared in several rulings of the Permanent Court of International Justice (PCIJ).

- In the *Treatment of Polish Nationals* case the PCIJ denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the grounds that:
  "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted (…) [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals and other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig.
  The application of the Danzig Constitution may (…) result in the violation of an international obligation incumbent on Danzig towards Poland, whether

under treaty stipulations or under general international law (…) However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City";[13]

- *Greco-Bulgarian "Communities"* Case:
  "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty";[14]
- *Free Zones of Upper Savoy and the District of Gex* Case:
  "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;[15]
- *Exchange of Greek and Turkish Populations* Case:
  "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken. (…) the contracting Parties are obliged to bring their legislation into harmony with the Convention [of Lausanne of 30 January 1923], that that instrument must be construed as implicitly referring to national legislation in so far as that is not contrary to the Convention";[16]
- *Jurisdiction of the Courts of Danzig* Case;[17]
- In the *Wimbledon* case the PCIJ held that conformity with internal law does not preclude State conduct being characterised as wrongful under international law:
  "a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. (…) under Article 380 of the Treaty of Versailles, it was [Germany's] *definite duty to allow* [the passage of the Wimbledon through the Kiel Canal]. *She could not advance her neutrality orders against the obligations which she had accepted under this Article"*.[18]

4.4. In the post-war period the International Court of Justice referred and applied the same principle in a number of cases:

[13] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, Series A/B, No. 44, pp. 24-25.

[14] Greco-Bulgarian "Communities", Advisory Opinion, 1930, Series B, No. 17, p. 32.

[15] Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, Series A, No. 24, p. 12; and Judgment, 1932, Series A/B, No. 46, p. 167.

[16] Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, Series B, No. 10, pp. 20-21.

[17] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, Series B, No. 15, pp. 26–27.

[18] S.S. "Wimbledon", 1923, Series A, No. 1, pp. 29-30.

- *Applicability of the Obligation to Arbitrate* Case (Case of the PLO Mission); *"It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law"*;[19]
- In the same sense: *Fisheries* (Judgement, ICJ Reports 1951, p. 132); *Nottebohm* (Preliminary Objection, Judgement, ICJ Reports 1953, p. 123); *Application of the Convention of 1902 Governing the Guardianship of Infants* (Judgement, ICJ Reports 1958, p. 67); also: *Reparation for Injuries* case (*Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Reports 1949, p. 184) and *Elettronica Sicula S.p.A.* case (*Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgement, ICJ Reports 1989, para. 73);
- In the *LaGrand* Case the ECJ held that the US constitutional procedural rule of "procedural default" may not prevail over the obligations incumbent under Article 36 of the Vienna Convention on Consular Relations;[20] this reasoning was then followed in the *Avena and Other Mexican Nationals* case.[21]

4.5. The principle that internal law may not prevail over international law and domestic provisions may not serve as an excuse for evading international obligations was introduced in the Draft Declaration on Rights and Duties of States prepared by the International Law Commission (1949), Yearbook of the International Law Commission 1949, pp. 286-290; the Declaration was prepared in conformity with resolution 178 (II) of the General Assembly (21 November 1947). Article 13 of the Draft Declaration provided that: *"Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty"*.

Article 13 of the Draft Declaration made the principle in question closely related to another fundamental principle of international law: that of acting in good faith and respecting obligations *(pacta sunt servanda)*.

4.6. The drafting history of Article 27 VCLT shows that it resulted from an amendment proposed by the Pakistani delegation to draft Article 23 on *pacta sunt servanda* and was modelled on Article 13 of the Draft Declaration. Among the States

[19] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, para. 57.

[20] LaGrand Case (Germany v. USA), ICJ Reports 2001, para. 90-91.

[21] Avena and Other Mexican Nationals (Mexico v. USA), ICJ Reports 2004, para. 112.

which decidedly supported the amendment was the USSR. After the amendment draft Article 23 provided that:

> *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith, and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty".*

The proposal was accepted on first reading by 55 votes in favour, none against, 30 abstentions *(Vienna Conference, First Session,* p. 158*)*.

4.7. Article 27 was adopted by 73 votes in favour, 2 against, 24 abstentions (*Vienna Conference, Second Session*, p. 54). Only two States – Venezuela and Iran – expressed their opposition, suggesting the primacy of their constitutional law over treaties.

4.8. Only two States – Guatemala and Costa Rica – formulated reservations to Article 27, claiming the primacy of their constitutions. Subsequently several States raised objections to these reservations.

4.9. Article 27 or – more generally – the prohibition to invoke domestic law as an excuse for evading international obligations was referred to and applied in the practice of various international bodies and institutions.

4.10. Human Rights Committee:

- *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 (2187th meeting):
  4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although Article 2, Paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as

to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of Article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

4.11. Committee on Economic, Social and Cultural Rights

- *General comment No. 9, The domestic application of the Covenant*, adopted on 3 December 1998, E/C.12/1998/24:
  3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations.

4.12. International Criminal Tribunal for the former Yugoslavia

- *Prosecutor v. Blaškić* (IT 95-14-T), decision of 3 April 1996 made by President Antonio Cassese (Application to vary conditions of detention), (paras. 8-11), ILR 1998, vol. 108, p. 69:
  "all States have been under an unquestionable obligation to enact any implementing legislation necessary to permit them to execute warrants and requests of the Tribunal."
- *Prosecutor v. Slobodan Milošević*, Decision on preliminary motions, 8 November 2001, para. 47:
  47. Article 27 of the Vienna Convention on the Law of Treaties is also relevant. It provides: a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
  The Statute of the International Tribunal is interpreted as a treaty. The Federal Republic of Yugoslavia has an obligation under the Statute to comply with the request to arrest and transfer the accused and, therefore, cannot rely on its internal law, namely the division of power as between the federal government and its States as a justification for failure to comply.

4.13. Committee Against Torture

- Communication No. 181/2001: Senegal, 19 May 2006:
  9.8 The Committee considers that the State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with (…) obligations under the Convention.

4.14. Inter-American Court on Human Rights:

- Advisory Opinion OC-14/94 of 9 December 1994 on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), requested by the Inter-American Commission on Human Rights [116 ILR 320]. It was stated that:
  35. International obligations and the responsibilities arising from the breach thereof are another matter. Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions (...). These rules have also been codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.
- Resolution of 17 November 1999 on the compliance by the State of Peru with the judgement on the Court's ruling on the merits of the *Case Castillo Petruzzi and Others against Peru*, points 3-5.

4.15. The African Commission on Human and Peoples' Rights:

- Communication 313/05 – *Kenneth Good v Republic of Botswana*, 47th Ordinary Session, held from 12-26 May 2010, the Commission stated:
  139. The Respondent State further contends that for the legislative, executive and judicial organs of a State Party, a treaty is infrequently assessed in the hierarchy of legal norms applicable in the domestic legal order and as a consequence, treaties are sometimes deemed inapplicable if they conflict with the constitutional provisions of a state. Thus, in Botswana, treaties do not confer enforceable rights on individuals until passed into law by Parliament. However, they may be used as an aid to construction of laws including the Constitution.
  239. It is also a well established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations.
- In Communication 211/98, *Legal Resource Foundation v. Zambia*, 29th Ordinary Session, held from 23 April to 7 May 2001; the Commission reiterated that:
  "international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on State Parties" (para. 60).

4.16. The principle in question was also applied by numerous arbitrate tribunals.

- *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 331 (1922); *Aguilar-Amory and*

Royal Bank of Canada Claims (*Tinoco* case) *(Great Britain* v. *Costa Rica), ibid.*, p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1098 (*"it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject"*) (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 289 (1956) *("one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation")*; and *Flegenheimer Case*, *ibid.*, p. 360 (1958);

- International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States; *Enron Corporation and Ponderosa Assets LP v. Argentina* (ICSID Case No. ARB/01/3), 22 May 2007:
  208. It must be noted also that the very legal system of the Argentine Republic, like many modern systems, provides for a prominent role of treaties under both Articles 27 and 31 of the Constitution. Treaties are constitutionally recognised among the sources considered "the supreme law of the Nation". It follows that in case of conflict between a treaty rule and an inconsistent rule of domestic law, the former will prevail. This is not just the consequence of the Constitution so providing, but also the solution dictated by Article 27 of the Vienna Convention on the Law of Treaties in that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

4.17. Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. a (1987):

> *"[F]ailure of the United States to carry out an obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law."*

4.18. Article 27 VCLT corresponds to Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, which provides that: *"The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law".*

4.19. The position of international courts summarised above is accepted by the doctrine of international law. E.g. in P. Malenczuk, Akehurst's Modern Introduction to International Law New York 1997, 7th ed.), it is stated that:

> *"the general rule of international law is that a State cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international*

> *law. (…) This is particularly true when (…) a treaty or other rule of international law imposes an obligation on States to enact a particular rule as part of their municipal law. A similar rule can be found in Article 27 (…) in other words, all that international law says is that States cannot invoke their internal law and procedures as a justification for not complying with their international obligations. States are required to perform their international obligations in good faith, but they are not at liberty to decide on the modalities of such performance within their domestic legal systems. Similarly, there is a general duty for States to bring their domestic law into conformity with obligations under international law" (p. 64).*

4.20. Question no. 4 of this Court relates specifically to the refusal of the Russian Government to submit a copy of the decision of 21 September 2004. At the outset it should be stressed that the Respondent Government relies on its ordinary legislation provisions but not on any constitutional rule (a fact which motivated the government of Venezuela and those of Guatemala and Costa Rica to respectively vote against Article 27 and formulate reservations to it).

4.21. State secret privilege is defined as *"a long-standing evidentiary privilege that permits governments to resist discovery of evidence if disclosure reasonably could be seen as threat to military or diplomatic interest of nation"* (Henry C. Black, Black's Law Dictionary, St. Paul 1990, 6th ed., p. 1409). Therefore, the refusal must have two features: it must be related to military or diplomatic interests (but not to all security concerns as such) and additionally must be reasonable.

4.22. On several occasions international tribunals were confronted with refusals to submit the requested documents.

4.23. *In Godínez Cruz v. Honduras*, the Inter-American Court of Human Rights requested that the government of Honduras produce evidence concerning the structure of a certain unit of the national armed forces. The government averred that the evidence sought was closely related to the security of the State. Nevertheless, the government did not refuse to produce the evidence and was permitted by the Court, upon request, to present the testimony in a closed session due to *"strict security reasons of the State of Honduras"* (judg. of 20 January 1989, Ser. C No. 5, § 33-35).

4.24. In 1972, in the *Ballo* case before the Administrative Tribunal of the International Labour Organisation UNESCO, as respondent organisation, declined to make some files available to the Tribunal. UNESCO held that the requested documents were either confidential or not relevant to Mr. Ballo's situation. However, when the Tribunal repeated its request the files were submitted by UNESCO

and inspected *in camera*. Noting subsequently that the documents were indeed of a confidential character, the Tribunal decided not to communicate them to the complainant and merely informed him of the tentative conclusions which it had drawn from them (ILO Administrative Tribunal, *Ballo v. UNESCO*, judg. No. 191, 15 May 1972, International Labour Office, Official Bulletin, vol. LV, Nos. 2, 3 and 4, 1972, p. 227).

Other cases of this kind, decided in an analogous way by the Administrative Tribunal of the International Labour Organisation, are *Molina*, Judgement No. 440 [1980] (WHO) and *Alikhan*, ILO AT Judgement No. 556 [1983] (ILO).

4.25. The issue of access to confidential information also arose in the so-called *Sabotage* cases in the 1930s (concerning two destructive acts of sabotage committed by German agents during the period of American neutrality in 1916 and 1917), brought before the United States–German Mixed Claims Commission. When the German legal agent requested the inspection of certain files of the United States Department of Justice, the Umpire dismissed the request. Before taking this decision, however, the Umpire had visited the United States Attorney-General and examined the files on his own. Having inspected the files, he was satisfied that they actually contained information pertinent to the State's security.

4.26. On the other hand, the International Court of Justice in the *Corfu Channel* case did not draw any negative inference when the United Kingdom refused to submit the requested evidence, which it considered related to naval secrecy (judgement of 9 April 1949, ICJ Reports 1949, p. 32).

4.27. The objection founded on the *Corfu* judgement was raised by Croatia in the *Prosecutor v. Tihomir Blaškić* case before the International Criminal Tribunal for the Former Yugoslavia. When the Tribunal issued *subpoenae duces tecum*, requesting, among others, some documents and evidence of a military character, the Government of Croatia challenged this decision by referring to the protection of its national security. Croatia alleged that determination of whether national security interests are involved should be left solely to the State concerned.

4.28. The Tribunal dismissed these allegations first as a chamber (Decision of 18 July 1997 on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*) and then as an appeals chamber (Judgement of 29 October 1997 on the request of the Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997).

4.29. The Tribunal's rulings were based on three principal grounds. Firstly, reliance on the *Corfu* case was considered inappropriate. Article 49 of the Statute of

the International Court of Justice is couched in non-mandatory terms,[22] whereas Article 29 of the Statute of the International Criminal Tribunal for the Former Yugoslavia is worded in strong mandatory language (para. 62 AC). Secondly, the Statute and the Rules of the Yugoslavia Tribunal do not envisage any exceptions to the obligation of States to co-operate with the Tribunal (para. 112 Ch, para. 63 AC). Thirdly, a blanket right of States to withhold, for security reasons, documents necessary for proceedings might jeopardise the very function of the Tribunal (para. 147 Ch, para. 65 AC).

4.30. At the same time the Tribunal stressed that the validity of State security concerns can be scrutinised by procedural arrangements, such as *in camera* proceedings and various modalities related to communicating and recording of documents considered sensitive.

4.31. The applicants' counsels respectfully submit that the reasons enunciated by the Yugoslavia Tribunal apply, *mutatis mutandis,* to this Court. Article 38 of the Convention is worded in mandatory language, does not provide for any exceptions, and a blanket right of States may endanger the very function of the Court. Simultaneously, security concerns of States can be assessed and secured by application of Rule 33 of Rules of the Court and other specific arrangements the Court might find proper.

4.32. In the later case of *Prosecutor v. Dario Kordić and Mario Čerkez* the Yugoslavia Tribunal held that the question of the relevance of the requested documents for the proceedings falls into the full discretion of the Tribunal and cannot be challenged by States. The Tribunal declared that: *"it falls squarely within the discretion of the Trial Chamber to determine whether the documents sought are relevant to the trial. Furthermore, the State from whom the documents are requested does not have locus standi to challenge their relevance"* (Decision of 9 September 1999 on the Request of the Republic of Croatia for Review of a Binding Order, para. 40).

Conclusion: the applicants' counsels respectfully submit that in the light of the case law of various international tribunals and bodies, as well as the case law of this Court, the refusal of the Russian Government constituted a violation of Article 38 of the Convention as read in the light of Article 27 VCLT.

Written by Ireneusz Kamiński

[22] Article 49: *"The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."*