Application nos. 55508/07 and 29520/09 – *Janowiec and others v. Russia*

WRITTEN COMMENTS OF
THE OPEN SOCIETY JUSTICE INITIATIVE

Pursuant to leave granted on 19 December 2012 by the President of the Chamber, acting under Rule 44 § 2 of the Rules of Court, the Open Society Justice Initiative hereby submits its written comments on issues presented by this case concerning the right to truth.

Introduction

1. The applicants are Polish descendants of victims of the Katyń massacre, the 1940 summary execution by the People's Commissariat for Internal Affairs (NKVD), then the Soviet secret police, of more than 21,000 Poles detained after the Soviet invasion of Poland. Much remains unknown about the identities of the deceased, and the circumstances of their execution. There were no criminal investigations until 1990 when Russian prosecutors initiated investigations. The Russian authorities discontinued investigations in 2004, pursuant to a decision that remains classified and has not been provided to the Court, and have denied relatives of the victims access to significant portions of the investigation and the reasons for its discontinuation. In 2004, the Russian government classified as "top secret" the decision to discontinue the investigation, and 36 of 183 volumes, and classified eight volumes as "for internal use only".

2. In the proceedings at issue in Application No. 55508/07, relatives of two victims of summary execution unsuccessfully sought access to the investigative files concerning their relatives. The Supreme Court upheld the denial of access to the case file on the ground that the decision to discontinue the investigation is a "State secret." In the proceedings at issue in Application No. 29520/09, relatives of ten victims of summary execution appealed the decision to discontinue the investigation, challenging among other things the effectiveness of the investigation and their lack of access to it. The Military Court rejected the applicants' challenge and denied access to the classified information, a judgment upheld by the Supreme Court in its entirety. Memorial, a Russian non-governmental organization, applied to the Military Prosecutor, the Interagency Commission for the Protection of State Secrets, and the judicial authorities, respectively, for the declassification of the decision to discontinue the investigation; each rejected the application.[1]

3. In a Fifth Section decision of 16 April 2012, the Chamber recognized a violation of Article 38 due to Russia's failure to provide the Court with a copy of the classified 2004 decision discontinuing the criminal investigation, and a violation of the Article 3 prohibition against inhuman treatment in the State response to ten of the applicants. The Court held that it did not have temporal jurisdiction to consider the merits of the Article 2 claim given Russia's 1998 ratification of the Convention.[2]

4. These comments address two aspects of the case.

   - *A. Temporal Jurisdiction.* The failure to carry out an effective and thorough investigation of the crimes at issue constitutes a continuing violation which establishes temporal jurisdiction. States have an obligation to investigate international crimes and gross human rights violations as long as it is practically feasible to do so, and prosecution of crimes from World War II was still possible after 1998. Indeed, hundreds of such cases are still ongoing.

   - *B. The Right to Truth.* In exceptional cases, the Court should consider the right to truth arising from Articles 2, 3, and 5, read together with Article 13. The right applies in the context of gross human rights violations and serious violations of international humanitarian law, and may outlive the duty to conduct an investigation. The right requires effective access to the results of investigations, and to archives and investigative files, any restriction of which must be narrowly construed, and more so with the passage of time. An ongoing failure to provide access amounts to a continuing violation of the Convention.

[1] *Janowiec v. Russia*, ECtHR [5th Sec.], Judgment of 16 April 2012, paras. 10-71.
[2] *Ibid*., paras. 101, 129-42, 165-67.

A. Temporal jurisdiction over investigation of international crimes

5. The Chamber was split 4-3 on the question of whether the Court has jurisdiction to consider the Respondent's alleged failure to conduct an effective investigation, under the procedural arm of Article 2. The majority noted that the time lapse since the Katyń massacre was "excessively long in absolute terms to establish any genuine connection between the deaths and the entry into force of the Convention in respect of Russia". It acknowledged that the Court might nevertheless assert jurisdiction over special cases that "constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes against humanity", which are not subject to statutory limitation. It noted, however, that that "does not mean that the States have an unceasing duty to investigate them" and held that there had been no significant post-ratification developments in the current case to provide a reasonable "bridge to the past". [3]

6. The minority opinion argued that the principles the Grand Chamber outlined in *Silih v. Slovenia* allowed the Court to assert jurisdiction, and that this is one of those exceptional cases representing a "need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner". They noted that "the gravity and magnitude of the war crimes … coupled with the attitude of the Russian authorities after the entry into force of the Convention, warrant application of the special-circumstances clause" of the *Silih* judgment.[4] They also argued that the majority had improperly restricted the application of that principle by requiring positive proof that significant investigative developments occurred post-ratification.

1. States have an obligation to investigate international crimes and other gross violations for as long as it is practically feasible.

7. It is respectfully submitted that the Chamber majority failed to take due account of the ongoing state obligation, under the Convention and customary international law, to investigate and prosecute war crimes, crimes against humanity, and other gross violations of comparable severity, for as long as it remains possible to conduct effective investigations and fair trials.

8. That obligation is implicit in the prohibition, firmly established in customary international law, of the application of statutory limitations to war crimes and crimes against humanity.[5] The UN General Assembly has declared that "[w]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment".[6] The obligation is not subject to any temporal qualification.

9. As a practical matter, the conduct of effective investigations may become more challenging with the passing of time and prosecuting authorities should be entitled to a degree of discretion, when properly justified, as to whether to bring charges against individual suspects at any given time. However, the passage of time cannot, by itself, be sufficient justification for the failure to investigate. It is not unprecedented for both national and international courts to assert jurisdiction over decades-old violations, especially in cases of large-scale crimes of a political nature. In fact, state practice indicates that meaningful and successful prosecutions are possible even many decades after the underlying facts.

10. The case law of this Court and other international tribunals lends support to that approach. The Court emphasized that "there is little ground to be overly prescriptive as regards the possibility of

[3] *Ibid*., paras. 137, 139.
[4] *Ibid*., Joint partial dissent of Judges Spielmann, Villiger and Nussberger, para. 4.
[5] *See inter alia* UNHRC, *General Comment No. 31, The Nature of Legal Obligations Imposed on the State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15, 18; and *Almonacid-Arellano et al. v. Chile*, IACtHR, Judgment of 26 September 2006, paras. 152-53.
[6] UN General Assembly Resolution 3074 (XXVIII) on Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 3 December 1973, UN Doc. A/9030/Add.1, para. 1. Furthermore, the General Assembly noted that "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of" such crimes. *Ibid*., para. 8.

an obligation to investigate unlawful killings arising many years after the events, since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity."[7] The Court has asserted jurisdiction over failures to investigate decades-old violations committed during armed conflict. In the 2008 case of *Varnava v. Turkey*, for instance, the actual disappearances occurred in 1974, nearly 35 years prior to the Grand Chamber judgment and 13 years before Turkey's acceptance of the Court's jurisdiction.[8]

11. The Inter-American Court of Human Rights similarly asserted jurisdiction over failures to investigate violations going back several decades.[9] Thus, in the 2008 case of *Heliodoro Portugal v. Panama*, the Court considered the 1970 forced disappearance of the applicant's relative, whose remains were identified in 2000; the events pre-dated Panama's ratification of the American Convention by 20 years.[10] In 2010, the Court passed judgment on Brazil's 40-year failure to investigate the arbitrary detention, torture, and forced disappearance of some 70 members of the so-called Guerrilla of Araguaia in the period between 1972 and 1975.[11]

12. National courts have gone even further back in time, allowing criminal and civil proceedings related to crimes or violations committed during the World War II period or shortly thereafter, both within and outside situations of armed conflict. (See below.)

2. Effective Investigations of World War II-era Crimes Were Still Possible Post-1998.

13. One factor considered by the Court in deciding questions of temporal jurisdiction is whether an effective investigation was still possible at the relevant time and whether the Court's review of the State's actions or omissions can be meaningful.[12] Recent state practice related, in particular, to the prosecution of suspected Nazi war criminals suggests that successful investigations into World War II-era crimes were still possible, in principle, in the relevant period.

14. In the past decade, authorities in Germany, Hungary, Italy and Poland, among other countries, have undertaken investigations into Nazi-era crimes, some of which resulted in successful prosecutions, despite the age of the defendants. In April 2010, Germany had 177, and Poland had 316, ongoing investigations into Nazi-era crimes.[13] Since 2009, Italian military courts have convicted (in absentia) three people for the 1944 murders of Italian civilians, and German prosecutors secured at least three convictions.[14] In 2012, Hungarian police arrested the 97-year-old former police chief of

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[7] *Brecknell v. United Kingdom*, ECtHR, Judgment of 27 November 2007, para. 69.

[8] *Varnava v. Turkey*, ECtHR [Grand Chamber], Judgment of 18 September 2009. Unlike confirmed killings, considered instantaneous acts, international law treats disappearances as ongoing violations. However, once the ongoing duty to investigate pre-ratification killings is established, there is no reason from a practical perspective to distinguish those investigations from disappearances, especially where the circumstances of the killings are unclear. These raise similar questions as to the feasibility, effectiveness or fairness of criminal investigations.

[9] The Inter-American Court tends to adjudicate such cases on the basis of Article 8 of the American Convention, which, when read together with the Article 25 right to judicial protection, guarantees the right to a fair trial in relation to rights and obligations of any nature (unlike Article 6 of the European Convention). The Inter-American Court treats post-ratification investigations as "independent facts" that must be considered separately from the underlying substantive violations. *See Serrano-Cruz Sisters v. El Salvador*, IACtHR, Judgment of 23 November 2004, para. 84. However, this Court has also established that the duty to investigate alleged violations of Articles 2, 3 and 5 of the European Convention is "a separate and autonomous duty" capable of binding the state even in relation to pre-ratification events.

[10] *Heliodoro Portugal v Panama*, IACtHR, Judgment of 12 August 2008, para. 27.

[11] *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, para. 18.

[12] *Varnava v. Turkey*, ECtHR [Grand Chamber], Judgment of 18 September 2009, para. 161.

[13] Efraim Zouoff, "Worldwide Investigation and Prosecution of Nazi War Criminals" (Simon Wiesenthal Center), November 2010, p. 21, available at http://www.wiesenthal.com/atf/cf/%7B54d385e6-f1b9-4e9f-8e94-890c3e6dd277%7D/ASR-2010.PDF.

[14] *Ibid*., p. 14. Jack Ewing & Alan Cowell, "Demjanjuk Convicted for Role in Nazi Death Camp," *New York Times*, 12 May 2011.

Kosice (now in Slovakia) for his alleged role in the deportation of thousands of families, with Hungarian and Slovak authorities cooperating in the investigation.[15]

15. Nazi-era cases are not the only historic cases prosecuted in national courts decades after the fact. In late 2012, a British court allowed a civil action to proceed for damages against the British Government brought by individuals alleging torture at the hands of British officials during the Kenyan Mau Mau uprising that took place between 1952 and 1961. The court dismissed the Government's objections that the action was time-barred, and that it was impossible to have a fair trial because many witnesses had died. The judge concluded that a fair trial remained possible despite the significant time lapse: "the evidence on both sides remains significantly cogent for the Court to complete its tasks satisfactorily. The documentation is voluminous". [16]

16. It is particularly problematic for a respondent state to argue that an effective investigation is not possible, or not subject to the Court's jurisdiction, when an ongoing investigation is terminated without bringing charges and without explaining to the victims and the public the reasons for doing so. The Court should draw appropriate inferences from a state's failure to justify such actions or omissions, particularly in cases involving international crimes and other gross violations of the Convention.

B. The Right to Truth

17. The Chamber found that Russia violated Article 3 by failing to disclose in large part the truth of the decades-old massacre to the victims' relatives. The Court found that "Article 3 requires [the State] to exhibit a compassionate and respectful approach to the anxiety of the relatives of the deceased or disappeared person and to assist the relatives in obtaining information and uncovering relevant facts", and that it was inhuman treatment to refuse to allow relatives of victims "for political reasons, to learn the truth about what […] happened and force [them] to accept the distortion of historical fact", particularly as the "denial of crimes against humanity … runs counter to the fundamental values of the Convention and of democracy".[17] The Court recognized that relatives of victims of disappearance and execution are entitled to more than "a mere acknowledgement of the fact of death".[18] Three judges, in a separate partial dissent, would have also recognized similar considerations in finding a violation of the procedural limb of Article 2. The dissent would have held that "the public interest in uncovering the crimes of the totalitarian past should have coincided with the applicants' private interest in finding out the fate of their relatives, and outweighed any outstanding national-security considerations".[19]

18. The Court should consider the right to truth in its analysis of whether there is a violation of Articles 2 and 3, with regard to both the rights of individual victims, and also the broader societal interest in the truth. (1) The right to truth, which applies in the context of gross human rights violations and serious violations of international humanitarian law, has evolved under the jurisprudence of this Court and other tribunals as an independent right and remedy, complementary to and yet distinct from the duty to investigate, and grounded in Articles 2, 3 and 5, read together with Article 13. (2) The right to truth has individual and collective components. Thus, it mandates that the State make known not only to victims and their relatives, but also to the broader public, the truth about violations and their surrounding circumstances. (3) The right to truth requires access to the results of investigations, as well as archives and investigative files. (4) Where the right to truth applies, classification of information may only be justified in exceptional cases to the extent strictly necessary to protect a compelling national security interest. (5) This is particularly true where the

[15] Bruno Waterfield, "Nazi war criminal arrested in Budapest insists he was 'only following orders,'" *The Telegraph* (UK), 18 July 2012.
[16] *Mutua v. The Foreign and Commonwealth Office*, [2012] EWHC 2678 (QB), para. 95. Despite the differences between civil and criminal proceedings, it is significant in this context that the British court considered that there remained sufficient documentary and testimonial evidence to permit a fair trial.
[17] *Janowiec v. Russia*, ECtHR [5th Sec.], Judgment of 16 April 2012, paras. 156, 163, 165.
[18] *Ibid*., para. 162.
[19] *Ibid*., Joint partial dissent of Judges Spielmann, Villiger and Nussberger, para. 11.

information concerns past abuses, and even more so if related to atrocities committed by a prior authoritarian regime.

1. The Right to Truth is Evolving as an Independent Right and Remedy

19. International tribunals and human rights mechanisms have helped define the contours of the right to truth as an autonomous right or one emerging from a combination of rights. This Court and others have recognized that the right belongs to victims, as well as society as a whole.

20. A "Study on the right to truth," by the UN Office of the High Commissioner for Human Rights, found that the core content of the right to truth has crystallized sufficiently to include "knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them."[20]

21. The right to truth is established firmly in relation to missing persons, forced disappearances, and secret executions, arising in this context from the right of families to know the fate of their relatives. It requires State parties to an armed conflict, as an obligation of customary international law, to search for persons reported missing.[21] It is now widely accepted that the scope of the right to truth extends beyond forced disappearances and includes a State obligation to shed light on all gross human rights violations or serious violations of international humanitarian law, including torture and extrajudicial executions.[22] The right attaches not only to cases of massive or repeated violations, but also to singular cases of sufficient gravity.[23]

22. In earlier cases, this Court implied a right to truth in affirming a state's obligation to investigate and make transparent allegations of serious violations of Articles 2, 3 and 5.[24] However, in at least three recent cases, including the Chamber judgment in the present case, the Court explicitly affirmed the rights of victims of gross human rights violations, as well as society, to the truth regarding the circumstances of the violations. In so doing, the Court treated the right to truth as a component of fundamental substantive rights.[25]

23. In *Association 21 December 1989 v. Romania*, involving Romania's failure to investigate multiple killings by state agents during the 1989 revolution, the Court, in finding a violation of Article 2, made reference to the "right of the victims and of their families and dependents to ascertain the truth about the circumstances of events involving a large-scale violation" of fundamental rights.[26] In *Janowiec*, the Chamber similarly acknowledged a right to truth, here emerging from Article 3. The Chamber identified a "double trauma: not only had their relatives perished in the war but they were not allowed, for political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years."[27]

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[20] OHCHR, *Study on the right to truth*, UN Doc. E/CN.4/2006/91, 8 February 2006 ("OHCHR Study on the right to truth"), para. 59. *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, para. 200 (right to "be informed of everything that has happened in connection with" past atrocities).

[21] ICRC, *Customary International Humanitarian Law, Vol. I, Rules* (Cambridge University Press, 2005), Rule 117, p. 421. Additional Protocol to the Geneva Conventions (Protocol I), Arts. 32-33. International Convention for the Protection of All Persons from Enforced Disappearances, Art. 24(2). Parliamentary Assembly of the Council of Europe, Resolution 1463(2005), para. 10(2).

[22] UN Human Rights Council, Resolution 9/11, UN Doc A/HRC/9/L.12. OHCHR Study on the right to truth.

[23] *See, e.g., Association 21 December 1989 v. Romania*, ECtHR, Judgment of 24 May 2011, para. 144.

[24] *See, e.g., Kelly v. United Kingdom*, ECtHR, Judgment of 4 May 2001, para. 118. *Ramsahai v. Netherlands*, ECtHR, Judgment of 15 May 2007, para. 325.

[25] *Association 21 December 1989 v. Romania*, above, paras. 144-45. *Janowiec v. Russia*, above, para.156. *El-Masri v. Macedonia*, ECtHR [Grand Chamber], Judgment of 13 December 2012, para. 191.

[26] *Association 21 December 1989 v. Romania*, above, para. 144 (in French original: "La Cour a déjà souligné ci-dessus l'importance du droit des victimes et de leurs familles et ayants droit de connaître la vérité sur les circonstances d'événements impliquant la violation massive de droits aussi fondamentaux que le droit à la vie".).

[27] *Janowiec v. Russia*, ECtHR [5th Sec.], Judgment of 16 April 2012, para. 156.

24. In the most recent case, *El-Masri v. Macedonia*, the evolving state of the law was evident. The judgment recognized a right to truth for victims and society, as an element of the duty to investigate under Article 3. The Grand Chamber found that the "concept of 'State secrets' has often been invoked to obstruct the search for the truth," and held that "the summary investigation … cannot be regarded as an effective one capable of leading to the investigation and punishment of those responsible for the alleged events and of establishing the truth."[28] The first concurring opinion (of Judges Tulkens, Spielmann, Sicilianos and Keller) took a different approach, grounding a right to truth "in the context of Article 13," as well as Articles 2 and 3, and taking note of the significance of the "scale and seriousness of the human rights violations at issue … together with the widespread impunity." The concurring judges would have found a denial of the right to truth, defined as "the right of an accurate account of the suffering endured and the role of those responsible for that ordeal."[29]

25. In the Inter-American system, the right to truth is emerging as an autonomous right. The Inter-American Court's decision in *Gomes Lund v. Brazil* grounded the right to truth in the rights to information, an effective investigation, and a judicial remedy, finding that "all persons, including the next of kin of the victims of gross human rights violations, have the right to know the truth" and "be informed of all that occurred in regard to said violations."[30] More recently, in *Gudiel Álvarez v. Guatemala*, the Inter-American Court concluded that continued impunity, and the refusal of authorities to provide information to an investigative commission, "denied relatives of the victims clarification of the truth by either judicial or extra-judicial means."[31]

26. The right to truth complements the duty to investigate, and the rights to a judicial remedy and investigation help elucidate the contours of the content of the right to truth.[32] Effective investigations into gross human rights violations seek to establish, at a minimum, the identities of the victims and a comprehensive account of the circumstances of the violations.

27. Significantly for this case, the right to truth may continue even after the obligation to investigate is extinguished. In *Association 21 December 1989 v. Romania*, the Court recognized that a right to truth attached even if prosecutions of the perpetrators were to become impossible due to a time bar then written into law.[33] The Inter-American Court has also consistently emphasized that the right to truth attaches even absent the possibility of successful prosecutions, asserting that, "[e]ven in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."[34] Indeed, in such cases, truth and official apologies may be some of the few significant forms of reparation available.[35]

2. The Right to Truth has both Individual and Collective Components

28. The right to truth has individual and collective components. The individual component requires disclosure of information for victims and their relatives.[36] Indeed, under the jurisprudence of this Court and the Inter-American Court, relatives of victims of forced disappearances or secret executions may suffer violations of their own right not to be subjected to inhuman or degrading treatment as a result of state actions and omissions. The tribunals have found violations in cases

[28] *El-Masri v. Macedonia*, ECtHR above, paras. 191-93. *See also ibid*., paras. 263-65.
[29] *Ibid*., Joint concurring opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, paras. 1, 4, 5.
[30] *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, para. 201.
[31] *Gudiel Álvarez v. Guatemala*, IACtHR, Judgment of 20 November 2012, paras. 300-01.
[32] *See e.g. Association 21 December 1989 v. Romania*, ECtHR, Judgment of 24 May 2011, para. 144.
[33] *Association 21 December 1989 v. Romania*, ECtHR, Judgment of 24 May 2011, paras. 141, 144.
[34] *Velásquez Rodriguez v. Honduras*, IACtHR, Judgment of 29 July 1988, para. 181.
[35] *Lucio Parada Cea v. El Salvador*, IACommHR, Report No. 1/99, Case 10.480, Report of 27 January 1999, paras. 148-158.
[36] *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, para. 197.

where State authorities failed to search for the disappeared or their remains, harassed families, delayed investigations and/or failed to inform relatives of progress.[37]

29. The right to truth has also increasingly been recognized as having a collective component. In *Association 21 December 1989 v. Romania*, this Court emphasized "the importance for Romanian society" of "knowing the truth of what happened."[38] The Inter-American Court, for its part, has recognized that the right to truth belongs to "all persons."[39] The UN Impunity Principles declare that "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances that led, through massive or systematic violations, to the perpetration of those crimes."[40]

3. The Right to Truth includes Access to the Results of Investigations, as well as Archives and Investigation Files

30. Access to records held by public authorities is essential to any process that seeks to reconstruct the truth about past atrocities and other gross human rights violations. This applies in particular to the results of investigations, as well as archives or information in closed investigative files that are directly or indirectly related to abuses committed by state agents, and in some cases also to open investigation files. Such records provide victims and society at large an essential tool for getting at the truth and securing justice.

31. The findings of investigations – and to some degree the investigative process itself – must be public.[41] Such disclosures are deemed essential to remedy and prevent violations, fight impunity, and maintain public faith in the rule of law. Sensitive details can be withheld from the general public only for genuine and compelling reasons. As this Court stated in *Jordan v. United Kingdom*, "there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."[42] UN standards related to investigations into gross human rights violations make clear the obligation of states to provide public reports on the investigations, including processes, findings and conclusions, with very limited exceptions for secrecy.[43]

32. The right to truth also includes the right of access to archives and closed investigative files. This right may be limited only in narrow circumstances, which cannot be used to prevent access to the victims. When prosecutors decide not to bring charges in cases in which gross human rights violations are alleged, the State must provide the fullest possible access to investigative files for victims and the public since truth then becomes the only meaningful remedy. In *Kelly v. the UK*, the Court found an Article 2 violation from a refusal to release a prosecutorial report finding no criminal prosecutions were warranted in a situation that "crie[d] out for explanation". The Court

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[37] *See e.g. Janowiec v. Russia*, above, paras. 151-52, 156-58, 163-64. *Nineteen Merchants v. Colombia*, IACtHR, Judgment of 5 July 2004, paras. 210-216. *Almeida de Quinteros v. Uruguay*, UNHRC, Decision of 21 July 1983, UN Doc. CCPR/C/OP/2 at 138 (Comm. 107/1981), para. 14.

[38] *Association 21 December 1989 v. Romania*, above, para. 194 (in French original: "de l'importance pour la société roumaine de savoir la vérité sur les événements de décembre 1989").

[39] *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, para. 200.

[40] UNHRC, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, Resolution 2005/81, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 ("UN Impunity Principles"), Principle 2. *See also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UN General Assembly Resolution 60/147 of 16 December 2005, Principle 22(b).

[41] *See Association 21 December 1989 v. Romania*, ECtHR, Judgment of 24 May 2011, para. 42.

[42] *Jordan v. United Kingdom*, ECtHR, Judgment of 4 May 2001, para. 109. *See also Güleç v. Turkey*, ECtHR, Judgment of 27 July 1998, para. 78 ("agents of the State must be accountable for their use of lethal force; their actions must be subjected to some form of independent and public scrutiny capable of determining whether the force used was or was not justified in a particular set of circumstances").

[43] *See, e.g.*, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, endorsed by UN General Assembly, Resolution 44/162, 15 December 1989, UN Doc. A/RES/44/162, Principle 17 (requiring "a written report" to be made "on the methods and findings" of investigations into alleged executions, with the report "made public immediately").

concluded that the failure to provide a "reasoned decision … to reassure a concerned public that the rule of law had been respected … cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way."[44]

33. In some circumstances, the right to truth may also require access to open investigative files, particularly in the right's individual dimension. In *Association 21 December 1989 v. Romania*, this Court recognized the right of to access information collected by military and civilian prosecutors where related to the truth about the military killing of protesters during the 1989 Romanian revolution. Where investigators, victims and the public were denied access to classified information, the Court "was not convinced that the interests of the applicants to participate in the investigation as well as the interests of the public to have a sufficient say in the investigation were sufficiently protected."[45] The Court has also recognized in a series of cases that individuals have a right to access, challenge and correct information the state holds about them – including in (formerly) classified files of the totalitarian secret services.[46]

34. The Inter-American Court has similarly recognized the right of victims of human rights violations to obtain open case files where the information sought "refers to the investigation of crimes that constitute grave violations to human rights," such as a forced disappearance, even in the face of legislative provisions justifying non-disclosure of such information and the State's assertions that complete disclosure would limit the effectiveness of an ongoing investigation.[47]

4. Where the Right to Truth applies, Classification of Information can be Justified Only in Exceptional Cases and Only to the Extent Strictly Necessary to Protect National Security

35. The right to truth creates a strong presumption in favour of the disclosure of information concerning human rights violations or violations of international humanitarian law, regardless of its asserted classification status. Classification on national security grounds of information related to human rights violations is permissible only in exceptional circumstances upon a demonstration of a compelling State interest, pursuant to an independent judicial review, for a time-limited period, and only where there are no less restrictive alternatives, and secrecy neither prevents accountability nor deprives a victim of access to an effective remedy.

36. A public authority carries a particularly heavy burden to demonstrate that a compelling State interest justifies the secrecy of information concerning gross violations of human rights. Since there is no benefit to a democratic society from the cover-up of human rights abuses, there is a strong presumption that any information held by public authorities that sheds light on such violations must be made public.[48] Thus, the Chamber in the present case rejected "that a public and transparent investigation into the crimes of the previous totalitarian regime could have compromised the national security interests of the contemporary democratic" state.[49]

37. Core information about the circumstances of the violations and those responsible can never be withheld. This would strip the right to truth of its very essence and thus cannot be "necessary in a

[44] *Kelly v United Kingdom*, ECtHR, Judgment of 4 May 2001, para. 118.
[45] *Association 21 December 1989 v. Romania*, ECtHR, Judgment of 24 May 2011, paras. 139-41 (in French original: "la Cour n'est pas convaincue que les intérêts des requérants de participer à l'enquête tout comme l'intérêt du public d'avoir un droit de regard suffisant sur l'enquête aient été suffisamment protégés.").
[46] *Rotaru v. Romania*, ECtHR [Grand Chamber], Judgment of 4 May 2000, paras. 60-63 (Article 8 violation for the state's failure to properly regulate access to the archives inherited from the *Securitate)*.
[47] *See e.g. Radilla Pacheco v. Mexico*, IACtHR, Judgment of 23 November 2009, para. 25.
[48] *See e.g. Association 21 December 1989 v. Romania*, above, paras. 141-42. *Turek v. Slovakia*, ECtHR, Judgment of 13 September 2006, para. 115. *Jalowiecki v. Poland*, above, para. 37 ("there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former [authoritarian] regime. Nevertheless, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created." *See also Toktakunov v. Kyrgyzstan*, UNHRC, Decision of 28 March 2011, UN Doc. CCPR/C/101/D/1470/2006, paras. 7.7-7.8 (finding a violation of Article 19 of the ICCPR where the State party classified and withheld on national security grounds death penalty statistics, given the public's "legitimate interest in having access to information on the use of the death penalty"). UN Impunity Principles, Principle 16.
[49] *Janowiec v. Russia*, ECtHR [5th Sec.], Judgment of 16 April 2012, paras. 94, 104, 109.

democratic society." This is implicit in the jurisprudence of the Inter-American Court, which prohibits states from invoking state secrecy to evade the duty to investigate.[50]

38. State practice is increasingly consistent with the principle that information related to human rights violations should be subject to mandatory or presumptive disclosure. Thus, governments have declassified *en masse* records from prior authoritarian regimes in Argentina, Brazil, the Czech Republic, Estonia, Germany, Guatemala, Hungary, Latvia, Lithuania, Paraguay, Poland, Romania and Spain, among other countries.[51] Further, a study of 93 right to information laws found that nearly half (44) expressly require information to be released where the public interest in disclosure outweighs any interest in secrecy (called "the public interest override") concerning at least certain exceptions. More recent laws are more likely to include a public interest override, and the override in recent laws is more often mandatory.[52] The laws of several Latin American countries, as well as a Model Inter-American Law on Access to Public Information, explicitly provide that information about human rights violations may not be withheld. The Model Inter-American Law provides, for instance, that exceptions to the right of access provided for in the law "do not apply in cases of serious violations of human rights or crimes against humanity."[53] Several Eastern European countries also have laws that prohibit withholding information about corruption and other serious government wrongdoing.[54]

39. The withholding of any information related to human rights violations on national security grounds must be subject to independent review. As this Court held in *Jalowiecki v. Poland*, concerning access to secret information in lustration trials, "[i]t is for the Government to prove the existence of [a compelling State interest in maintaining secrecy] in the particular case because what is accepted as an exception must not become a norm."[55] The Inter-American Court likewise held, in *Mack Chang v. Guatemala*, "when a punishable act is being investigated, the decision to define the information as secret … can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act."[56]

40. European state practice is largely consistent with this. A recent survey of relevant law and practice found that courts have the authority to examine classified information in 19 of 20 countries (all save France), and that, in 15 of 18 countries, judges have the authority to order the release of information if they determine that information does not need to be kept secret, despite a public authority's assertion that national security justifies withholding the information.[57]

41. Even where secrecy may be warranted in exceptional circumstances, the withholding must be strictly time-limited. In *Giulani and Gaggio v. Italy*, for instance, the Grand Chamber held that "sensitive issues with possible prejudicial effects to private individuals or other investigations"

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[50] *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, para. 202.
[51] *See* Annex: Fact Sheet on Archives of States Security Service Records.
[52] Maeve McDonagh, *The public interest test in FOI legislation* (2012), for the Transatlantic Conference on Transparency Research (Netherlands), p. 7, available at http://www.transparencyconference.nl/papers/.
[53] Brazil: Bill PLC 41/2010 (2010), Art. 21. Guatemala: Law on Access to Public Information, No. 57-2008 (2008), Art. 24. Mexico: Federal Law on Transparency and Access to Public Information (2002), Art. 14. Peru: Transparency and Access to Public Information Act, No. 27806, Art. 15. Uruguay: Right of Access to Public Information Act, No. 18.381 (2008), Art. 12. Organization of American States, Model Inter-American Law on Access to Public Information of 2010, Art. 45, pursuant to OAS General Assembly Resolution 2514.
[54] Sandra Coliver, *National Security and the Right to Information*, Testimony to Legal Affairs and Human Rights Committee, Parliamentary Assembly of the Council of Europe, 11 December 2012 (Paris), p. 7, available at http://www.right2info.org/resources/publications/publications/s.-coliver-presentation-to-pace-committee-on-principles-of-natl-security ("Coliver, Testimony to PACE Legal Affairs and Human Rights Committee").
[55] *Jalowiecki v. Poland*, above, para. 37 ("It is for the Government to prove the existence of such [a compelling State interest in maintaining secrecy] in the particular case because what is accepted as an exception must not become the norm."). *Association 21 December 1989 v. Romania*, ECtHR, Judgment of 24 May 2011, para. 139.
[56] *Mack Chang v. Guatemala*, IACtHR, Judgment of 25 November 2003, para. 181 (adopting the language of the Inter-American Commission on Human Rights). *See also* UN Impunity Principles, Principle 16.
[57] See survey of European countries conducted by Amanda Jacobsen of the University of Copenhagen, cited in Coliver, Testimony to PACE Legal Affairs and Human Rights Committee, above, note 54.

may necessitate delayed publication, but that the "requisite access of the public or the victim's relatives" would nonetheless "be provided for in other stages of the procedure."[58]

42. Secrecy can also only be warranted where there are no less restrictive alternatives. Thus, the Chamber in this case rejected the State claims that secrecy was required when it did not "edit[] out the sensitive passages or suppl[y] a summary of the relevant factual grounds."[59] Moreover, secrecy cannot prevent accountability or deprive a victim of access to an effective remedy.[60]

5. The Right to Truth Applies to Past Abuses and can Become Stronger with Time.

43. Any possible justifications for the non-disclosure of records become progressively weaker over time. This is particularly true for records related to the violations committed by prior authoritarian regimes. In *Turek v. Slovakia*, the Court found that "it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former [authoritarian] regimes," especially when such records are "not directly linked to the current functions and operations of the security services."[61] Further, experience from various transitional justice processes has also shown that, in hindsight, classification of old records served little or no genuine national security interest, and was often invoked only to shield perpetrators from truth and justice.[62]

44. Excessively long classification periods, including for national security-related records, undermine the essence of the right to truth. For these reasons, exceptions to disclosure must be time-limited. This is reflected in European state practice: the domestic laws of most European countries contemplate maximum periods for maintaining classified information secret.[63]

45. The objective reconstruction of the truth about past abuses is essential to enable nations to learn from their history and take measures to prevent future atrocities.[64] The importance of truth may increase with time as the prospects for criminal accountability reduce. At the same time, the passage of time diminishes any legitimate justification for classification.

Conclusion

46. Temporal jurisdiction exists where there is a continuing obligation to investigate international crimes and gross human rights violations, something still feasible for World War II era crimes. The explicit recognition of a right to truth, originating in Articles 2, 3, and 5, read together with Article 13, would bring the Court in line with the evolving European and international trend to recognize this independent right and remedy applicable in the context of gross human rights violations and serious violations of international humanitarian law. The right to truth requires access to the results of investigations as well as archives and investigative files. An ongoing failure to provide such access would amount to a continuing violation of the Convention.

16 January 2013

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[58] *Giuliani and Gaggio v. Italy*, ECtHR [Grand Chamber], Judgment of 24 March 2011, para. 304. *See also Jalowiecki v. Poland*, ECtHR, Judgment of 17 February 2009, para. 37 (recognizing that the "considerable time that has elapsed" heightens the Government's burden to justify continued secrecy).

[59] *Janowiec v. Russia*, para. 102. *Nolan and K. v. Russia*, ECtHR, 12 February 2009, para. 56.

[60] *See El-Masri v. Macedonia*, above, para. 192 (finding "[t]he inadequate investigation … deprived the applicant of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal", and recognising that "[t]he concept of 'State secrets' has often been invoked to obstruct the search for the truth").

[61] *Turek v. Slovakia*, ECtHR, Judgment of 14 February 2006, para. 115 (involving lustration proceedings against the applicant). *See also Jalowiecki v. Poland*, ECtHR, Judgment of 17 February 2009, para. 37.

[62] *See, e.g.*, Dale McKinley, *The State of Access to Information in South Africa* (2003), prepared for the Center for the Study of Violence and Reconciliation, p. 23.

[63] A study of laws and regulations governing classification and declassification in 19 European countries found that 13 have mandatory maximum classification periods. Of the six countries that do not have mandatory maximum periods, two of them nonetheless require review of the classification decision at least every 5 years. The four states that allow indefinite classification without periodic review are Albania, Belgium, Spain and Turkey. See http://www.right2info.org/resources/publications/publications/declassification-procedures-council-of-europe-states.

[64] UN Impunity Principles, Principles 2, 3.