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THE DIFFICULTY OF TEMPORAL JURISDICTION IN *JANOWIEC AND OTHERS v. RUSSIA*

JULIA KOCH*

Abstract: In October 2013, the European Court of Human Rights ruled on claims brought against the Russian Federation for the 1940 massacre of more than 21,000 prisoners of war. Relatives of the prisoners challenged that Russia had, among other things, failed in its legal obligation to carry out an adequate and effective investigation into the massacre. The court concluded that it did not have temporal jurisdiction to evaluate the merits of these claims; it stated that Russia's legal obligation to investigate could not extend to transgressions that occurred prior to the existence of the convention under which the claims had been brought. Unfortunately, in looking to the convention and not to international customary law as the source of temporal jurisdiction, the court was unable to protect the rights of the prisoners and their relatives. The court should have looked to customary law to establish temporal jurisdiction so that it could reach the merits of the case and hold Russia accountable for its gross violation of human rights.

INTRODUCTION

After more than seventy years, the families of prisoners of war who were massacred during World War II continue to search for justice and relief in *Janowiec and Others v. Russia*.¹ On October 13, 2013, the European Court of Human Rights (ECtHR) ruled on applications brought by fifteen Polish nationals (applicants) against the Russian Federation under the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).² The applicants were relatives of Polish prisoners who were killed by the Soviet Army in 1940.³ In total, 21,857 Polish, Ukrainian, and Belarusian prisoners perished in what became known as the Katyn Massacre.⁴ The Grand Chamber of the ECtHR found Russia to be in violation of Article 38 of the Convention for its refusal to furnish documents to the court.⁵ The ECtHR, however, reject-

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¹ See *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, Eur. Ct. H.R. ¶¶ 1, 19 (2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684>, archived at <http://perma.cc/CC2P-V4FK>.

² See *id.*

³ *Id.* ¶¶ 25–37.

⁴ *Id.* ¶¶ 18, 23.

⁵ *Id.* ¶ 216.

ed the applicants' claims as to violations of Article 2, which alleged Russia's failure to conduct an adequate investigation of the massacre, and Article 3, which alleged that Russia's prolonged denial of the facts and withholding of evidence amounted to inhuman or degrading treatment.⁶ This case highlights the difficulty of holding states accountable for past atrocities, particularly because the ECtHR rejected the applicants' Article 2 claims on the grounds that it had no temporal jurisdiction over Russia.⁷

Part I of this Comment provides the facts of the case, including the circumstances and subsequent investigation of the Katyn Massacre. Part II presents a discussion of the parties' arguments and the ECtHR's holding regarding the applicants' Article 2 claims. Part III challenges the ECtHR's evaluation of temporal jurisdiction with respect to the Article 2 claims and posits that the court should have recognized that international customary law obligated Russia to conduct an effective investigation into the Katyn Massacre.

I. BACKGROUND

A. *The Katyn Massacre*

In late 1939, the Soviet Army invaded and annexed portions of eastern Poland, detaining approximately 250,000 Polish soldiers, border guards, police officers, and state officials.⁸ Although some were released, the remaining detainees were sent to regional Soviet prison camps established by the People's Commissariat for Internal Affairs (NKVD).⁹ On March 5, 1940, Lavrentiy Beria, head of the NKVD, submitted a proposal to Joseph Stalin, Secretary General of the Soviet Communist Party, to execute the detainees.¹⁰ The proposal labeled the prisoners as "enemies of the Soviet authorities and filled with hatred towards the Soviet system," and it identified approximately 14,700 Polish prisoners and 11,000 Ukrainian and Belarusian prisoners to be shot.¹¹ On the same date, the country's highest governing body, the Politburo of the Central Committee of the Soviet Communist Party, approved the proposal, determining that executions would occur without summoning the detainees and without

⁶ *Id.* ¶¶ 102, 161–162, 189.

⁷ *See id.* ¶¶ 159–161.

⁸ *Id.* ¶¶ 15–16.

⁹ *Id.* ¶ 16. In Russian, NKVD stands for Narodny Komissariat Vnutrennikh Del, which functioned as the Soviet secret police and was superseded by the KGB, or the Komitet Gosudarstvennoy Bezopasnosti, in 1954. *See id.*; Robert W. Pringle, *KGB*, ENCYCLOPAEDIA BRITANNICA [ONLINE], (Feb. 18, 2013), <http://www.britannica.com/EBchecked/topic/315989/KGB>, archived at <http://perma.cc/39KQ-C9NF>; *NKVD*, in ENCYCLOPAEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/416682/NKVD>, archived at <http://perma.cc/5NDH-TNZP>.

¹⁰ *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, Eur. Ct. H.R. ¶ 17 (2013).

¹¹ *Id.*

bringing any charges.¹² Between April and May of that year, 21,857 prisoners were summarily shot and buried in mass graves in the Katyn Forest in Russia and elsewhere throughout Eastern Europe.¹³

Key documentation of the massacre includes Beria's March 5, 1940 proposal; the Politburo's March 5, 1940 approval; certain pages removed from the minutes of the Politburo's meeting; and a 1959 note to Nikita Krushchev, Secretary General of the Soviet Communist Party, confirming the execution of 21,857 prisoners and suggesting that all records regarding the prisoners be destroyed.¹⁴ Specifically, the 1959 note recommended:

[A]n unforeseen incident could lead to the [true nature of the Katyn Massacre] being revealed, with all the undesirable consequences that would entail for our country, especially since, as regards the persons shot in the Katyn Forest, the official version was confirmed by an investigation carried out on the initiative of the Soviet authorities On the basis of the above, it seems opportune to destroy all the records concerning the persons shot in 1940 in the above-mentioned operation¹⁵

These key documents were put into a file known as Package Number 1, which remained sealed until 2010 when the Russian State Archives Services published them online.¹⁶

B. Investigation and Inquiry

For much of the century, the Soviet government denied or deflected wrongdoing with respect to the Katyn Massacre, and in 1946 it accused and attempted to indict German war criminals for the killings before the International Military Tribunal.¹⁷

It was not until 1990 that Soviet President Mikail Gorbachev produced to the Polish government certain documents pertaining to the massacre.¹⁸ Also in 1990, a regional Ukrainian prosecutor's office opened what would become known as Investigation Number 159—a criminal investigation into the prisoners' disappearances that the Soviet government would later take over.¹⁹ In 1991, as part of Investigation Number 159, Polish and Russian specialists interviewed approximately forty witnesses and exhumed corpses that had been

¹² *Id.* ¶ 18.

¹³ *Id.* ¶ 19.

¹⁴ *See id.* ¶¶ 23–24.

¹⁵ *Id.* ¶ 23.

¹⁶ *Id.* ¶ 24.

¹⁷ *Id.* ¶¶ 21–22.

¹⁸ *Id.* ¶ 38.

¹⁹ *Id.* ¶ 39.

discovered in mass burial sites in and around the Katyn Forest.²⁰ In 1992, Russian President Boris Yeltsin formally acknowledged that Stalin and the Politburo had sentenced the prisoners to death and turned over additional documents to the Polish authorities, including the Politburo's March 5, 1940 approval of the executions.²¹ Additionally, in 2002, Ukrainian authorities discovered and produced documents showing the transfer of Polish prisoners to a NKVD camp in the Katyn Forest region.²²

In 2004, however, the Russian government discontinued Investigation Number 159 because the people allegedly responsible for the massacre were deceased.²³ As a result, Russian authorities classified forty-four of the 183 volumes of the case as well as the reason for discontinuing the investigation as "top-secret" or for "internal use only."²⁴ Russian authorities refused, at multiple junctures in this case, to produce the 2004 decision to the ECtHR, despite the court's request.²⁵

In October 2008, the Military Court of the Moscow Command dismissed an appeal by several of the applicants challenging both the efficacy and the discontinuation of Investigation Number 159.²⁶ The Supreme Court of the Russian Federation affirmed the dismissal in its entirety, agreeing with the Military Court that, while the names of the applicants' relatives appeared on NKVD prisoner lists, the actual fate of these prisoners could not be determined since their bodies had not been recovered.²⁷ The applicants countered that the investigation's ineffectiveness was a direct result of the authorities' failure to take biological samples from the applicants in an attempt to identify the exhumed corpses as those of the applicants' relatives.²⁸

Memorial, a Russian human rights organization, also attempted to gain access to information surrounding Investigation Number 159.²⁹ In 2008, it sought to declassify the 2004 decision to discontinue Investigation Number 159 via an application to the Inter-Agency Commission for the Protection of State Secrets (Commission).³⁰ The Moscow City Court held that, under the States Secrets Act, there were no legal grounds for granting Memorial's request since the 2004 decision contained intelligence and information that con-

²⁰ *Id.* ¶ 40.

²¹ *Id.* ¶ 41.

²² *Id.* ¶ 43.

²³ *Id.* ¶ 45.

²⁴ *Id.*

²⁵ *Id.* ¶¶ 46, 207, 216.

²⁶ *Id.* ¶¶ 57–58.

²⁷ *Id.* ¶¶ 58, 60.

²⁸ *Id.* ¶ 59.

²⁹ *Id.* ¶¶ 61–62.

³⁰ *Id.*

stituted a state secret.³¹ The Supreme Court of the Russian Federation affirmed both the Commission's and the City Court's refusal to declassify the 2004 decision.³²

As a result of these frustrations and repeated dismissals in Russian courts, the applicants, in 2007 and 2009, filed two applications with the ECtHR against the Russian Federation alleging violations of Articles 2, 3, and 38 of the Convention.³³ Article 2 guarantees "[e]veryone's right to life" and has also been interpreted to require an "adequate and effective investigation" into the alleged violation of the right to life, which the applicants claimed that Russia failed to do.³⁴ Article 3 protects from "torture or . . . inhuman or degrading treatment or punishment," which the applicants alleged resulted from Russia's prolonged denial of the facts and withholding of pertinent information about the applicants' relatives.³⁵ Finally, Article 38 requires the production of "all necessary facilities" and documents to the ECtHR so that the court can undertake a proper investigation, which the applicants alleged that Russia failed to do with respect to the 2004 decision to discontinue Investigation Number 159.³⁶ In 2012, a Chamber of the ECtHR's Fifth Section found that Russia had violated Article 3 as to certain applicants and Article 38 as to all applicants.³⁷ Additionally, the court stated that it could not reach the merits of the Article 2 claims.³⁸ The applicants appealed the entire decision to the Grand Chamber of the ECtHR.³⁹

II. DISCUSSION

In October 2013, the Grand Chamber overruled the lower court's holding regarding Russia's violation of Article 3, but affirmed its holding regarding the violation of Article 38.⁴⁰ The Grand Chamber also affirmed the holding regarding Article 2 and concluded that it lacked the temporal jurisdiction necessary to adjudicate the applicants' Article 2 claims.⁴¹

³¹ *Id.* ¶ 64.

³² *Id.* ¶ 65.

³³ *See id.* ¶¶ 1, 7, 56, 60.

³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 (*as amended by Protocol No. 11, which entered into force May 11, 1994*) [hereinafter Convention]; *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 102; *McCann v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R. ¶ 161 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943>, archived at <http://perma.cc/RT9J-YHU6>.

³⁵ Convention, *supra* note 34, art. 3; *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 162.

³⁶ Convention, *supra* note 34, art. 38; *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 190.

³⁷ *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 7.

³⁸ *Id.*

³⁹ *Id.* ¶¶ 7, 8.

⁴⁰ *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, Eur. Ct. H.R. ¶¶ 8, 189, 216 (2013).

⁴¹ *Id.* ¶¶ 8, 161.

A. Temporal Jurisdiction Over the Article 2 Claims

Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms states that “[e]veryone’s right to life shall be protected by law,” which is considered the Article’s substantive obligation.⁴² Pursuant to ECtHR case law and Article 28 of the Vienna Convention on the Law of Treaties, however, the Convention for the Protection of Human Rights and Fundamental Freedoms cannot retroactively bind a party on the basis of events that wholly took place prior to its date of entry into force.⁴³ Although the human rights Convention was concluded on November 4, 1950, Russia did not become a party to the treaty until May 5, 1998, which is the date of entry into force or the “critical date.”⁴⁴ Russia’s rights and obligations arising out of the human rights convention are strictly limited to those occurring on or after May 5, 1998.⁴⁵

The applicants, however, did not challenge the Russian government’s failure to protect their relatives’ right to life under Article 2, but rather the government’s failure to put forth an “adequate and effective investigation” of the massacre.⁴⁶ This obligation to conduct a meaningful investigation into the Katyn Massacre is considered the “procedural limb” of Article 2.⁴⁷ While not expressly contained in the text of the Article, the ECtHR first recognized this procedural obligation in its 1995 decision in *McCann v. United Kingdom*.⁴⁸ The court continued to develop this case law, and several years later, in *Šilih v. Slovenia*, it determined that the procedural limb is detachable and autonomous from the Article’s substantive obligations.⁴⁹ Thus, in certain circumstances, the court may have temporal jurisdiction over a party’s procedural obligation to investigate, but not over a party’s substantive obligation.⁵⁰ This separation may grant the ECtHR jurisdiction over a party’s procedural obligation, even though

⁴² Convention, *supra* note 34; *see Janowiec*, App. Nos. 55508/07 and 29520/09, ¶¶ 131–132.

⁴³ Vienna Convention on the Law of Treaties, art. 28, May 23, 1969, 18232 U.N.T.S. 332; *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 128; *see Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 13, 58–59 (2009); *Šilih v. Slovenia*, App. No. 71463/01, Eur. Ct. H.R. ¶ 140 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92142>, archived at <http://perma.cc/R9VZ-5W59>; *Blečić v. Croatia*, 2006-III Eur. Ct. H.R. 51, 73 (2006).

⁴⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms Treaty Status*, COUNCIL OF EUROPE (July 10, 2014), <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Oct. 6, 2014), archived at <http://perma.cc/EF3E-XVB9>; *see Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 128.

⁴⁵ *See Janowiec*, App. Nos. 55508/07 and 29520/09, ¶¶ 128, 130, 157.

⁴⁶ *Id.* ¶ 102.

⁴⁷ *Id.*

⁴⁸ *McCann v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R. ¶ 161 (1995).

⁴⁹ *Šilih v. Slovenia*, App. No. 71463/01, Eur. Ct. H.R. ¶ 159 (2009).

⁵⁰ *See Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 131; *Šilih*, App. No. 71463/01, ¶ 159.

the substantive facts that trigger the offending state's obligation occurred before the critical date.⁵¹

1. The Genuine Connection Test

The ECtHR recognized that the *Šilih* decision created two limitations on jurisdiction in instances where the substantive violation occurred before the critical date.⁵² First, the court must successfully apply the Genuine Connection Test in order to demonstrate its jurisdiction.⁵³ Only if there is a genuine connection between the triggering event and the Convention's entry into force will the court have jurisdiction to evaluate whether the investigation was adequate and effective.⁵⁴

In this determination, the most important element to consider is whether the lapse of time between the triggering event and the critical date is "reasonably short."⁵⁵ In addition, a major portion of the investigation must be carried out, or should have been carried out, after the critical date.⁵⁶ In its interpretation of *Šilih*, the *Janowiec* court noted that if a major portion of the investigation occurs before the critical date, the court may not have temporal jurisdiction over the claim.⁵⁷ Failure to establish both a reasonably short time lapse and a major portion of post-critical date investigation will lead to a determination that there is no genuine connection and thus, that there can be no temporal jurisdiction over procedural claims that arose from events preceding the critical date.⁵⁸

2. The Convention Values Test

If there is no genuine connection, the court may alternatively apply the Convention Values Test and exercise jurisdiction if the court determines that jurisdiction is "needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way."⁵⁹ This test is reserved for extraordinary situations in which the triggering event was larger, more offensive, and in stark opposition to the foundations of the Convention—essentially war crimes, crimes against humanity, and genocide.⁶⁰ Pursuant to the ECtHR case law however, the Convention Values Test cannot apply to

⁵¹ *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶¶ 131, 138.

⁵² *Id.* ¶ 141; see *Šilih*, App. No. 71463/01, ¶ 163.

⁵³ See *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 141.

⁵⁴ See *id.* ¶¶ 141, 145, 147.

⁵⁵ *Id.* ¶ 146.

⁵⁶ *Id.* ¶¶ 147–148.

⁵⁷ *Id.* ¶ 147.

⁵⁸ See *id.* ¶ 148.

⁵⁹ *Id.* ¶¶ 141, 149.

⁶⁰ *Id.* ¶¶ 150–151.

events that occurred prior to the adoption date of the Convention and its values, which was November 4, 1950.⁶¹

B. The Parties' Arguments and the Court's Holding

With this in mind, the applicants argued that, with respect to the Genuine Connection Test, the meaning of “major part of the investigation” should be construed broadly to include not only the most important steps of the investigation but also “new and sufficiently important procedural facts.”⁶² Accordingly, this would include the 2004 decision to discontinue Investigation Number 159, which would constitute a new procedural development in terminating the investigation.⁶³ Additionally, the applicants argued that, under the Convention Values Test, Russia’s procedural obligations were well within the jurisdiction of the court.⁶⁴ They argued that the very nature, magnitude, and gravity of certain acts should grant the court temporal jurisdiction, and to hold otherwise would undermine the very purpose of the Convention, which is to “secur[e] the universal and effective recognition” of human rights.⁶⁵

Finally, the applicants charged that, independent of the Convention, the Katyn Massacre was a violation of international law under The Hague Convention IV of 1907, which put into writing the accepted laws and customs of war, and the Geneva Convention of 1929, which instituted international law specifically on the treatment of prisoners of war.⁶⁶ Although the Soviet Union was not a party to either convention in 1940, the applicants asserted that the protection of prisoners from acts of violence and cruelty was international customary law and was merely codified in the conventions.⁶⁷ Thus, regardless of the Soviet Union’s participation in the conventions, it was bound by custom not to commit war crimes against the prisoners.⁶⁸

The Russian government, on the other hand, focused on the basic chronology of events and emphasized the legal distinction between a situation where a violation of the Convention occurred outside of the court’s temporal jurisdiction and a situation where a violation did not legally exist at all.⁶⁹ Russia argued that the court did not have the ability to evaluate its compliance with the procedural limb of Article 2 for two reasons—first, the Convention and its

⁶¹ *Id.* ¶ 151.

⁶² *Id.* ¶¶ 118, 148.

⁶³ *Id.*

⁶⁴ *Id.* ¶ 115.

⁶⁵ Convention, *supra* note 34, at pmb.; *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 115.

⁶⁶ Geneva Convention Relative to the Treatment of Prisoners of War, arts. 2, 46, 61, 63, July 27, 1929, 118 U.N.T.S. 343; The Hague Convention IV Annex to the Convention, arts. 4, 23(c), 50, Oct. 18, 1907, 36 Stat. 2277; *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 116.

⁶⁷ *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 116.

⁶⁸ *Id.*

⁶⁹ *Id.* ¶ 108.

procedural obligation did not even exist at the time of the Katyn Massacre; and second, Russia did not agree to be bound by the Convention until fifty-eight years after the massacre.⁷⁰ Russia also contended that, at the time of the Katyn Massacre, there was “no universally binding provision of international law on the definition of war crimes or crimes against humanity.”⁷¹ It argued that international law, as of 1940, did not provide a suitable definition or basis for characterizing the Katyn Massacre as a war crime or crime against humanity.⁷² Moreover, any of these crimes, insufficiently defined as they were, could only be attributed to major war criminals of the European Axis powers, pursuant to the findings of the International Military Tribunal.⁷³

Ultimately, the ECtHR found the fifty-eight-year period between the trigger event in 1940 and the critical date in 1998 to be too long in “absolute terms” to establish a genuine connection.⁷⁴ It also refused to characterize any of the Investigation Number 159 procedures that occurred after 1998 as “real investigative steps.”⁷⁵ Although a significant number of investigative steps were recently taken, including the excavation of mass burial sites, forensic studies, interviews, and coordinated meetings between various multinational authorities, they occurred primarily in 1991 and 1992, several years before the critical date of May 5, 1998.⁷⁶ Thus, as the court found that neither requirement set out in *Šilih* was met—the reasonably short time lapse and a majority of investigative steps occurring subsequent to the critical date—it could not find a genuine connection between the Katyn Massacre and the entry into force of the Convention.⁷⁷

Additionally, the court rejected the use of the Convention Values Test as a means to establish temporal jurisdiction simply because at the time of the massacre in 1940, the Convention itself did not exist.⁷⁸ That the massacre preceded the Convention by ten years led the court to hold that a contracting party “cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention.”⁷⁹ Thus, due to the time lapse and particular chronology of events, the ECtHR concluded that it did not have the temporal jurisdiction needed to evaluate Russia’s compliance with Article 2.⁸⁰

⁷⁰ *Id.*

⁷¹ *Id.* ¶ 110.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* ¶ 157.

⁷⁵ *Id.* ¶ 159.

⁷⁶ *Id.*

⁷⁷ *Id.* ¶¶ 159, 161.

⁷⁸ *Id.* ¶ 160.

⁷⁹ *Id.* ¶¶ 151, 160.

⁸⁰ *Id.* ¶ 161.

III. ANALYSIS

A. *International Customary Law*

The ECtHR should have considered Russia's procedural obligations as arising out of customary law rather than out of the Convention itself.⁸¹ Since the court relied on the law of the Convention, it was bound to identify May 5, 1998 as the critical date, as that is when Russia ratified the Convention.⁸² Therefore, the court was also bound to find a lapse of fifty-eight years between the trigger event in 1940 and the critical date in 1998.⁸³ If however, the court had relied on international customary law as the source of Russia's procedural obligations, the lapse of time between the trigger event and the critical date establishing the obligations would have been significantly shorter and not "too long in absolute terms for a genuine connection to be established."⁸⁴

The obligation to conduct effective investigations, existing as international custom, is best illustrated by international case law and various treaties, catalyzing and ultimately codifying this obligation.⁸⁵ Since these authorities date back to 1945, the lapse of time between the trigger event in 1940 and the new critical date may be as short as five years.⁸⁶ Therefore, in applying the Genuine Connection Test, the court should have been able to find temporal jurisdiction over the applicants' Article 2 claims because the new lapse of time would not be "too long in absolute terms" and major portions of Investigation Number 159 would have occurred after this new critical date.⁸⁷ Relying on international

⁸¹ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 12, Dec. 10, 1984, 1465 U.N.T.S. 24841 [hereinafter Convention Against Torture]; Charter of the International Military Tribunal, arts. 14, 15, Aug. 8, 1945, 82 U.N.T.S. 284; *McCann v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R. ¶ 161 (1995); G.A. Res. 3074 (XXVIII), ¶ 1, U.N. Doc. A/9326 (Nov. 30, 1973); G.A. Res. 2583 (XXIV), ¶ 1, U.N. Doc. A/7840 (Dec. 15, 1969); G.A. Res. 3 (I), 10, U.N. Doc. A/50 (Feb. 13, 1946); Brief for Amnesty Int'l as Third Party Intervener Supporting Applicants at 2–3, *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, Eur. Ct. H.R. (2013), available at <http://www.amnesty.org/en/library/asset/IOR61/001/2013/en/2f7e3df1-7280-46e7-802a-008885788722/ior610012013en.pdf>, archived at <http://perma.cc/WS2Q-H6P3>.

⁸² See *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, Eur. Ct. H.R. ¶¶ 104, 157 (2013).

⁸³ *Id.* ¶ 157.

⁸⁴ *Id.*; see Convention Against Torture, *supra* note 81, art. 12; Charter of the International Military Tribunal, *supra* note 81, arts. 14, 15; *McCann*, App. No. 18984/91, ¶ 161; G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1; G.A. Res. 2583 (XXIV), *supra* note 81, ¶ 1; G.A. Res. 3 (I), *supra* note 81, at 10.

⁸⁵ See Convention Against Torture, *supra* note 81, art. 12; Charter of the International Military Tribunal, *supra* note 81, arts. 14, 15; *Šilih v. Slovenia*, App. No. 71463/01, Eur. Ct. H.R. ¶¶ 158–159 (2009); *McCann*, App. No. 18984/91, ¶ 161; G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1; G.A. Res. 2583 (XXIV), *supra* note 81, ¶ 1; G.A. Res. 3 (I), *supra* note 81, at 10.

⁸⁶ Charter of the International Military Tribunal, *supra* note 81, arts. 14, 15.

⁸⁷ See *id.*; *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶¶ 148, 157.

customary law, the Court should have adjudicated the applicants' Article 2 claims.⁸⁸

The following non-exhaustive list of case law and treaties, spanning from 1995 back to 1945, represents international customary law requiring states to investigate the substantive violation of the right to life.⁸⁹ In 1995, the ECtHR first imposed the procedural obligations in *McCann and Others v. United Kingdom*, holding that states were obliged to conduct effective investigations since the "prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the [State authorities' acts]."⁹⁰ The *McCann* decision is evidence of the ECtHR's recognition of states' procedural obligations prior to 1998, the date of the Convention's entry into force.⁹¹

Numerous other international treaties obligated states to conduct effective investigations, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was concluded in 1984.⁹² In this United Nations (U.N.) treaty, Article 12 requires that "[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."⁹³ By the end of the 1980s, forty-six states had ratified this treaty, and to date, 156 states have ratified the agreement.⁹⁴ The number of states and the diversity of these parties, both in the 1980s and today, is illustrative of a distinct pattern of states' behavior that is motivated by the legal obligation to protect human rights, in part through thorough investigation of possible violations.⁹⁵

In the 1960s and 1970s, the U.N. General Assembly passed several resolutions regarding the investigatory obligations of states in the context of war

⁸⁸ See Convention Against Torture, *supra* note 81, art. 12; Charter of the International Military Tribunal, *supra* note 81, arts. 14, 15; *McCann*, App. No. 18984/91, ¶ 161; G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1; G.A. Res. 2583 (XXIV), *supra* note 81, ¶ 1; G.A. Res. 3 (I), *supra* note 81, at 10.

⁸⁹ See Convention Against Torture, *supra* note 81, art. 12; Charter of the International Military Tribunal, *supra* note 81, arts. 14, 15; *McCann*, App. No. 18984/91, ¶ 161; G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1; G.A. Res. 2583 (XXIV), *supra* note 81, ¶ 1; G.A. Res. 3 (I), *supra* note 81, at 10.

⁹⁰ *McCann*, App. No. 18984/91, ¶ 161; Roe Ariav, *National Investigation of Human Rights Between National and International Law*, 4 GOETTINGEN J. INT'L L. 853, 857–58 (2012).

⁹¹ See *McCann*, App. No. 18984/91, ¶ 161.

⁹² Convention Against Torture, *supra* note 81, art. 12.

⁹³ *Id.*

⁹⁴ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Treaty Status*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited on Oct. 8, 2014), archived at <https://perma.cc/43RH-GXNC>.

⁹⁵ See *Paquete Habana*, 175 U.S. 677, 708 (1900) (evaluating long line of related precedents, established authorities, and instances of states' behaviors to conclude that "by the general consent of the civilized nations of the world" and "founded on considerations of humanity," certain coastal fishing vessels are exempt from capture as prize of war).

crimes and other crimes against humanity.⁹⁶ Specifically, a 1973 General Assembly resolution stated that “[w]ar crimes and crimes against humanity . . . shall be subject to investigation.”⁹⁷ When put to vote, ninety-four members of the U.N. voted “Yes,” while zero members voted “No,” and only twenty-nine members chose to abstain from the vote.⁹⁸ The vast majority of the fifty-one original states in the U.N. voted “Yes” on this resolution in addition to a variety of the U.N.’s newest members, which included states like Yemen, Bahrain, and the German Democratic Republic.⁹⁹ Prior to 1973, the U.N. General Assembly passed a similar 1969 resolution calling on all states “to take the necessary measures for the thorough investigation of war crimes and crimes against humanity.”¹⁰⁰ With another overwhelming majority of the member states voting favorably—seventy-two states, including the Soviet Union, affirming and thirty-two abstaining—the resolution reflected a codification of the international customary law requiring states to investigate.¹⁰¹ The large number of diverse votes in support of both resolutions indicates a distinct and defined pattern of states’ behavior.¹⁰² Additionally, the increase in “Yes” votes between 1969 and 1973 demonstrates an unmistakable codification of a customary obligation to investigate.¹⁰³

Additionally, a 1946 U.N. General Assembly resolution regarding the extradition and punishment of war criminals obliged governments of member states, but also the “governments of States which are not Members of the United Nations . . . to take all necessary measures for the apprehension of [war] criminals.”¹⁰⁴ While this resolution does not explicitly require states to investigate, the obligation is certainly implied in the broad and expansive phrase “to take all necessary measures.”¹⁰⁵ Moreover, that the U.N. addressed this resolution to non-member states suggests that this obligation to investigate trans-

⁹⁶ See G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1; G.A. Res. 2583 (XXIV), *supra* note 81, ¶ 1.

⁹⁷ G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1.

⁹⁸ *Voting Record Search for A/RES/3074(XXVIII)*, UNITED NATIONS BIBLIOGRAPHIC INFORMATION SYSTEM, <http://unbisnet.un.org/> (follow “New Keyword Search” hyperlink under “Voting Records” heading; then type “ares3074(XXVIII)” next to “UN Resolution Symbol” search) (last visited Oct. 1, 2014), *archived at* <https://perma.cc/C8YM-NPPT>.

⁹⁹ *Id.*; see *Growth in United Nations Membership, 1945-present*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Oct. 6, 2014), *archived at* <https://perma.cc/NN6H-8MFY> [hereinafter *Growth in UN Membership*].

¹⁰⁰ G.A. Res. 2583 (XXIV), *supra* note 81, ¶ 1.

¹⁰¹ *Voting Record Search for A/RES/2583(XXIV)*, UNITED NATIONS BIBLIOGRAPHIC INFORMATION SYSTEM, [http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares2583\(xxiv\)](http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares2583(xxiv)) (last visited Oct. 1, 2014), *archived at* <https://perma.cc/N2BN-WSTJ>.

¹⁰² See *Texaco Overseas Petroleum Co. v. Libya*, 17 I.L.M. 1, ¶¶ 86–87 (1978); *Growth in UN Membership*, *supra* note 99.

¹⁰³ See *Texaco Overseas Petroleum*, 17 I.L.M. ¶¶ 86–87; *Voting Record Search for A/RES/3074(XXVIII)*, *supra* note 98; *Voting Record Search for A/RES/2583(XXIV)*, *supra* note 101.

¹⁰⁴ G.A. Res. 3 (I), *supra* note 81, at 10.

¹⁰⁵ See *id.*

cends the limits of U.N. membership and extends to the international community at large.¹⁰⁶

Lastly, in 1945, the four major Allied powers, including the Soviet Union, signed the Charter of the International Military Tribunal (1945 Charter), which, while directed at the Nazis and other European Axis powers, required states to conduct relevant investigations so as to advance the prosecution of war criminals.¹⁰⁷ Specifically, the agreement stated that each signatory shall appoint a Chief Prosecutor to investigate war crimes and that each signatory shall individually and collaboratively undertake investigation, collection, and production of all necessary evidence needed in the war criminals' prosecution.¹⁰⁸ Thus, it was recognized even in 1945 that in order for states to uphold their duty to prosecute war crimes, there was a complimentary duty to conduct adequate investigations thereof.¹⁰⁹ By the end of 1945, nineteen other states had also ratified this agreement, including other European states, like Czechoslovakia and Belgium, as well as states in distant locations, including Uruguay and Ethiopia.¹¹⁰ That such a wide range of states signed the agreement suggests that it reflected global ideals and obligations.¹¹¹ World War II, with its unprecedented damage and destruction, created a need for states to implement both preventative and putative measures that had not previously existed.¹¹² Thus, the 1945 Charter catalyzed a custom that required states to conduct investigations so as to effectively prosecute the violation of substantive rights, particularly those regarding war crimes and crimes against humanity.¹¹³

By looking at these various treaties and international agreements, a pattern of states' behavior that is motivated by a sense of legal obligation and

¹⁰⁶ See *North Sea Continental Shelf Cases* (FRG v. Den.; FRG v. Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20); *Paquete Habana*, 175 U.S. 677, 708 (1900).

¹⁰⁷ Charter of the International Military Tribunal, *supra* note 81, arts. 1, 14, 15.

¹⁰⁸ *Id.* arts. 14, 15.

¹⁰⁹ See *id.*

¹¹⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280, 280 n.1 [hereinafter Agreement for the Prosecution of Axis War Criminals].

¹¹¹ See *Texaco Overseas Petroleum Co. v. Libya*, 17 I.L.M. 1, ¶¶ 86–87 (1978); *North Sea Continental Shelf Cases*, 1969 I.C.J. ¶ 77; *Paquete Habana*, 175 U.S. at 708.

¹¹² See Agreement for the Prosecution of Axis War Criminals, *supra* note 110, at 280.

¹¹³ See *North Sea Continental Shelf Cases*, 1969 I.C.J. ¶ 77; Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001) (“[M]odern custom is derived by a deductive process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes *opinion juris* rather than state practice because it relies primarily on statements rather than actions. Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.”).

rights emerges.¹¹⁴ This pattern of behavior obliging states to conduct investigations bound Russia to conduct investigations long before its 1998 ratification of the Convention.¹¹⁵

B. The Genuine Connection Test

Given that international customary law required Russia to conduct an adequate and effective investigation of the Katyn Massacre, the Genuine Connection Test should be applied as originally done by the ECtHR, with a primary focus on lapse of time and a secondary focus on the post-critical date investigation.¹¹⁶ Because the 1945 Charter of the International Military Tribunal catalyzed states' procedural obligations as international custom in 1945, the court should focus on that date rather than 1998.¹¹⁷ Using this new critical date, only five years passed between it and the trigger event in 1940.¹¹⁸ Five years falls well within the period of time that the court has deemed to be reasonably short.¹¹⁹

Even if the court focused on the codification of this custom in the 1973 General Assembly resolution, the lapse of time between 1973 and the trigger date is only thirty-three years.¹²⁰ While thirty-three years is still, in absolute terms, longer than thirteen years—which the court referred to as a guide for appropriate application of the Genuine Connection Test—the court must recall that the reason for the detachable obligation is to “ensure that the rights guaranteed under the Convention are not theoretical or illusory, but practical and effective.”¹²¹ In *Mladenović v. Serbia*, where an off-duty police officer accidentally shot and killed an individual, the *Janowiec* court referred to “the thirteen-year period separating the death of the Applicant’s son . . . and the entry

¹¹⁴ See Convention Against Torture, *supra* note 81, art. 12; Charter of the International Military Tribunal, *supra* note 81, arts. 14, 15; *McCann v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R. ¶ 161 (1995); G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1; G.A. Res. 2583 (XXIV), *supra* note 81, ¶ 1; G.A. Res. 3 (I), *supra* note 81, at 10.

¹¹⁵ See G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1; G.A. Res. 3 (I), *supra* note 81, at 10.

¹¹⁶ See *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, Eur. Ct. H.R. ¶¶ 146–147 (2013).

¹¹⁷ See *North Sea Continental Shelf Cases*, 1969 I.C.J. ¶ 77; Roberts, *supra* note 113, at 758.

¹¹⁸ See *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 146; G.A. Res. 3 (I), *supra* note 81, at 10.

¹¹⁹ See *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 138; *Mladenović v. Serbia*, App. No. 1099/08, Eur. Ct. H.R. ¶¶ 36, 39 (2012), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-110935>, archived at <http://perma.cc/959G-YKZU> (concluding that although death occurred thirteen years before Serbia’s ratification of Convention, court nevertheless had *ratione temporis* to adjudicate claim).

¹²⁰ See *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 146; G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1.

¹²¹ *Šilih v. Slovenia*, App. No. 71463/01, Eur. Ct. H.R. ¶ 153 (2009); see *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 138.

into force of the Convention . . . as [not] outweighing the importance of the procedural acts that were accomplished after the critical date.”¹²²

Considering the court’s own language, a thirty-three-year time lapse should be seen as not outweighing the importance of the procedural acts accomplished subsequent to 1973, which includes the 1990 production of critical documents to Polish authorities; the 1991 exhumations, interviews, and forensic examinations of the mass graves; and the 1992 admission by Yeltsin that the Polish prisoners had been sentenced to death by Soviet authorities.¹²³ There is an important distinction between the impact of an investigation arising from a World War II massacre that claimed the lives of over 21,000 prisoners, and one arising from a single death caused by an accidental gunshot wound, as was the case in *Mladenović*.¹²⁴ The procedural acts taken after 1973 were of the utmost importance, particularly considering that the killing of the prisoners occurred “without the detainees being summoned or the charges being disclosed, and without any statements concerning the conclusion of the investigation or the bills of indictment being issued to [the prisoners].”¹²⁵ It is precisely a crime like the Katyn Massacre that is grossly contrary to the Convention’s values that the ECtHR must address.¹²⁶

CONCLUSION

Janowiec demonstrates the difficulty of holding states accountable for crimes that occurred many years in the past. The ECtHR was unable or unwilling to find temporal jurisdiction over the applicants’ claims and to hold Russia accountable for failing to adequately investigate the Katyn Massacre. Although the court missed an opportunity to apply international customary law, the decision in *Janowiec* continues to shape and define the obligations of states to conduct adequate investigations into war crimes and crimes against humanity. Even in declining to exercise jurisdiction, the court nevertheless acknowledged the potential for retroactive obligations to arise in the context of remedying serious human rights abuses.

¹²² *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 138 (emphasis added); *Mladenović*, App. No. 1099/08 ¶ 7.

¹²³ See *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶¶ 38, 40–41; G.A. Res. 3074 (XXVIII), *supra* note 81, ¶ 1.

¹²⁴ See *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 23; *Mladenović*, App. No. 1099/08 ¶ 7.

¹²⁵ See *Janowiec*, App. Nos. 55508/07 and 29520/09, ¶ 18.

¹²⁶ See Convention, *supra* note 34, at pmb1.