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DO THE "UNDERLYING VALUES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BEGIN IN 1950?

Nearly two decades ago, the European Court of Human Rights recognised that there was a "procedural obligation" associated with the protection of the right to life, a norm enshrined in Article 2 of the European Convention on Human Rights.[1] Thus, in addition to a substantive obligation not to take the life of individuals, States are also under a duty to investigate and bring to justice persons suspected of responsibility for life-threatening attacks. This is "not an obligation of result, but of means."[2]

In *Janowiec and Others v. Russia*, the Grand Chamber of the European Court of Human Rights based its dismissal of the application by victims and survivors of the Katyń massacre upon the temporal scope of the procedural obligation. The Grand Chamber held that it was without jurisdiction to consider any breach of a procedural obligation to the extent that the loss of life with which it is associated took place prior to 4 November 1950, the date when the European Convention on Human Rights was signed at the Barberini Palace in Rome. The Grand Chamber explained that "the events that might have triggered the obligation to investigate under Article 2 took place in early 1940, that is, more than ten years before the Convention came into existence." It said that "there were no elements capable of providing a bridge from the distant past into the recent post-entry into force period."[3]

The first procedural obligation case decided by the Court did not raise any difficulties with respect to temporal jurisdiction. The killings that prompted the obligation to investigate had occurred in 1988, more than 35 years after the respondent State, the United Kingdom, had ratified the Convention.[4] The issue of temporal jurisdiction subsequently presented itself in several procedural obligation cases. Chambers of the

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[1] *McCann and Others v. the United Kingdom,* 27 September 1995, Series A no. 324, paras. 157-164.

[2] *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II, para. 71.

[3] *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, 21 October 2013, para. 160.

[4] *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, paras. 32-67.

Court reached somewhat varying conclusions. In 2001, an application based upon the procedural obligation was declared inadmissible because the events that had given rise to the duty to investigate occurred prior to entry into force of the Convention for the respondent State.[5] Subsequently, another Chamber of the Court took the view that where judicial proceedings concerning an alleged violation had begun prior to entry into force of the Convention and continued afterwards, it was entitled to exercise jurisdiction with respect to the procedural obligation, despite the fact that the actual killing was outside the scope of its temporal jurisdiction.[6] The subject was therefore ripe for consideration by the Grand Chamber.

In 2009, in *Šilih v. Slovenia*, the Grand Chamber confronted the temporal jurisdiction issue with respect to the procedural obligation in a case dealing with medical malpractice. It opted for the more generous approach by which there was a procedural obligation pursuant to Article 2 of the Convention even if the actual killing took place prior to the entry into force of the Convention for the respondent State. By 15 votes to two, the Grand Chamber held that "the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty" that constitutes "a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date."[7] The "critical date" is the moment when the respondent State has become subject to the right of individual petition before the Court.[8] Nevertheless, the Court said that "having regard to the principle of legal certainty" this extension of the temporal jurisdiction of the Court was "not open-ended".[9] The Grand Chamber explained the limitations it was placing on the procedural obligation:

> 162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.
> 163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.
> Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date.

[5] *Moldovan and Others and Rostaş and Others v. Romania* (dec.), nos. 41138/98 and 64320/01, 13 March 2001. Followed by *Moldovan and Others v. Romania (no. 2),* nos. 41138/98 and 64320/01, ECHR 2005-VII (extracts), para. 102; *Kholodov and Kholodova v. Russia* (dec.), no. 30651/05, 14 September 2006.

[6] *Bălăşoiu v. Romania* (dec.), no. 37424/97, 2 September 2003.

[7] *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, para. 159.

[8] *Ibidem*, para. 140.

[9] *Ibidem*, para. 161.

> However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.[10]

In this way, the Grand Chamber established an exception within an exception. The Court could only exercise jurisdiction with respect to a violation of the procedural obligation contained in Article 2 if a "significant proportion of the procedural steps" had been undertaken after the "critical date." However, this requirement could be waived if "certain circumstances" required the Court "to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner." This "underlying values" exception has sometimes been called the "humanitarian clause."[11] Judges Bratza and Türmen dissented, contending that the principles set out by the Grand Chamber did not in fact dispel legal uncertainty. They noted that this uncertainty was "further compounded by the concluding statement in paragraph 163 of the judgment that the Court would not exclude that, in certain undefined circumstances, the connection between the death and the entry into force of the Convention could also be based 'on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner'."[12] Concerns about the "underlying values" exception were also expressed in a concurring opinion by five judges who voted with the majority.[13]

The *Šilih* decision transformed an application filed some years earlier by Jerzy Roman Janowiec and Antoni Stanisław Trybowski, a son and grandson respectively of Polish officers who had been murdered at Katyń in 1940. A second application, submitted by several other descendants of victims of the massacre, arrived in Strasbourg barely a month after the judgment in *Šilih* was issued by the Grand Chamber. The two applications were joined in accordance with Rule 42(1) of the Rules of Court.[14] At the admissibility stage, the Chamber took note of the acknowledgement by the parties that there was no jurisdiction *ratione temporis* to examine the mass murder of Polish prisoners of war under the substantive limb of Article 2 of the Convention. In other words, the Court had no authority to rule upon Russia's responsibility for the killings. But the Chamber said that the procedural limb of Article 2 "raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits."[15]

A seven-judge Chamber dismissed the argument based upon Article 2 of the Convention although it granted the application on other grounds. After concluding that

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[10] *Ibidem*, paras. 162-163 (interior reference omitted).

[11] *E.g. Janowiec and Others v. Russia* [GC], Concurring Opinion of Judge Gyulumyan; *Janowiec and Others v. Russia* [GC], Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, paras. 7, 31.

[12] *Šilih v. Slovenia* [GC], Joint Dissenting Opinion of Judges Bratza and Türmen, para. 12.

[13] *Šilih v. Slovenia* [GC], Concurring Opinion of Judge Lorenzen; *Šilih v. Slovenia* [GC], Concurring Opinion of Judge Zagrebelsky Joined by Judges Rozakis, Cabral Barreto, Spielmann and Sajó.

[14] *Janowiec and Others v. Russia* (dec.), nos. 55508/07 and 29520/09, 5 July 2011, para. 79.

[15] *Ibidem*, para. 101.

a significant proportion of the procedural steps had not taken place after entry the "critical date", which for Russia was 5 May 1998,[16] the Court turned to the "underlying values" exception. It said that

> the reference of the underlying values of the Convention indicates that, for such connection to be established, the event in question must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes against humanity. Although such crimes are not subject to a statutory limitation by virtue of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, it does not mean that the States have an unceasing duty to investigate them. Nevertheless, the procedural obligation may be revived if information purportedly casting new light on the circumstances of such crimes comes into the public domain after the critical date. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. Should new material come to light in the post-ratification period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have temporal jurisdiction to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law.[17]

Although it appeared to recognise that the murder of the Polish prisoners was a war crime and that this would place it within the "Convention values" category, the Chamber insisted that there must be "new elements in the post-ratification period capable of furnishing the connection between the prisoners' death and the ratification and imposing a fresh obligation to investigate under Article 2 of the Convention." It concluded that there were no such new elements "capable of providing a bridge from the distant past into the recent post-ratification period and that the special circumstances justifying a connection between the death and the ratification have not been shown to exist."[18]

Three members of the Chamber, Judges Spielmann, Villiger and Nußberger, dissented from the judgment. They did not disagree substantially with the approach of the majority although they considered that "the gravity and magnitude of the war crimes committed in 1940 in Katyń, Kharkov and Tver, coupled with the attitude of the Russian authorities *after* the entry into force of the Convention, warrant application of the special-circumstances clause in the last sentence of paragraph 163."[19]

In a concurring opinion that seems to have influenced the Grand Chamber, Judges Kovler and Yudkivska noted that this was the first case before the Court concerning the

[16] *Janowiec and Others v. Russia* [Chamber], nos. 55508/07 and 29520/09, 16 April 2012, para. 138.
[17] *Ibidem*, para. 139.
[18] *Ibidem*, para. 140.
[19] *Janowiec and Others v. Russia* [Chamber], Joint Partly Dissenting Opinion of Judges Speilmann, Villiger and Nussberger, para. 4.

procedural obligation of Article 2 with respect to "an event which happened not only before ratification of the Convention by the respondent State but before the Convention was even drafted."[20] As is often the case with separate, concurring or dissenting opinions, the position of Judges Kovler and Yudkivska helps to give a sharper focus to the reasoning of the majority judgment. It clarifies the point that the majority was in agreement with the dissenters that the "underlying values" test had been satisfied. The majority only dismissed the claim under Article 2 because it felt there was an absence of new information subsequent to the "critical date" for Russia. The Convention entered into force for Russia on 5 May 1998. As this was prior to the entry into force of Protocol No. 11, necessarily the ratification was accompanied by declarations recognising the right of individual petition and the compulsory jurisdiction of the Court

The applicants applied to have the case heard again by the seventeen-judge Grand Chamber in accordance with Article 43 of the Convention. The Grand Chamber took a position with respect to the "underlying values" test and the procedural obligation under Article 2 that was quite original. According to the Grand Chamber, the Court could not consider the "underlying values" exception if the loss of life had taken place prior to 4 November 1950. Its new rule did not arise out of issues that were addressed directly in the Chamber decision or, for that matter, that were debated in the submissions before either the Chamber or the Grand Chamber. Only a trace of the Grand Chamber's position can be found in the concurring opinion of Judges Kovler and Yudkivska in the Chamber, who noted that this was the first case before the Court concerning the procedural obligation of Article 2 with respect to "an event which happened not only before ratification of the Convention by the respondent State but before the Convention was even drafted."[21] There is no discussion in the judgment about the reasons for the choice of 4 November, as if this is so obvious as not to require further explanation. In effect, the starting point for the procedural obligation under Article 2 when the "underlying values" exception is applied was cut from whole cloth by the Grand Chamber.

The Convention itself does not refer to "underlying values." It is a notion that has emerged from the case law of the Convention organs. The expression "underlying values of the Convention"[22] was first employed by the European Court of Human Rights in the landmark case of *Soering v. the United Kingdom*, a decision that is so important for many other reasons. In *Soering*, the applicant had contested his extradition to the United States where he was at risk of sentence of death and consequently of the "death row phenomenon." The Plenary Court noted that merely because the prohibition of *refoulement* where there was a risk of torture had been codified in the Convention Against Torture did not mean it was not also implied in the European Convention:

[20] *Janowiec and Others v. Russia* [Chamber], Joint Concurring Opinion of Judges Kovler and Yudkivska.

[21] *Ibidem*.

[22] In French, "les valeurs sous-jacentes à la Convention" or "les valeurs qui sous-tendent la Convention".

> It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.[23]

These words in *Soering* have been cited repeatedly in subsequent judgments, almost entirely in the context of statements about the link between political democracy and the Convention.[24]

The "underlying values" concept has also been invoked in some cases involving discrimination. Dealing with an anti-Semitic diatribe, the Court said "[s]uch a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination."[25] In a case that concerned religious discrimination, the Court wrote:

> It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were it so a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.[26]

These words were repeated in a decision concerning sexual orientation.[27] The Court has spoken of Holocaust denial being contrary to the "Convention's underlying values".[28] Speech that is in this way contrary to the underlying values of the Convention is ex-

[23] *Soering v. the United Kingdom,* 7 July 1989, Series A, no. 161, para. 88. Followed: *Aylor-Davis v. France*, no. 22742/93, Commission decision of 20 January 1994.

[24] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, *Reports of Judgments and Decisions* 1998-I, para. 45; *Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, para. 45, 31 July 2001; *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, ECHR 2002-II, para. 47; *Sadak and Others v. Turkey (no. 2)*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, ECHR 2002-IV, para. 32; *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, 10 December 2002, para. 44; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, para. 86; *Ždanoka v. Latvia*, no. 58278/00, 17 June 2004 para. 78; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para. 317; *Melnychenko v. Ukraine*, no. 17707/02, ECHR 2004-X, para. 53; *Ždanoka v. Latvia* [GC], no. 58278/00, ECHR 2006-IV, para. 98; *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, 11 January 2007, para. 47; *Kılıçgedik and Others v. Turkey*, nos. 4517/04, 4527/04, 4985/04, 4999/04, 5115/04, 5333/04, 5340/04, 5343/04, 6434/04, 10467/04 and 43956/04, 14 December 2010, para. 44.

[25] *Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007.

[26] *Barankevich v. Russia*, no. 10519/03, 26 July 2007, para. 31.

[27] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, para. 81.

[28] *Lehideux and Isorni v. France*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, para. 53. Followed: *Garaudy v. France*, (dec.), no. 65831/01, ECHR 2003-IX (extracts); *R.L. v. Switzerland* (dec.), no. 43874/98, 25 November 2003; *Palusiński v. Poland* (dec.), no. 62414/00, 3 October 2006; *Orban v. France*, no. 20985/05, 15 January 2009, para. 34; *Paksas v. Lithuania* [GC], no. 34932/04, ECHR 2011 (extracts), para. 88; *L.Z. v. Slovakia* (dec.), no. 27753/06, 27 September 2011; *Hizb Ut-Tahrir v. Germany* (dec.), 12 June 2012, para. 88.

cluded from the protection of Article 10 by the application of Article 17.[29] In *Janowiec*, the Chamber extended the denialist paradigm to encompass Russian behaviour with respect to the descendants of the Katyń victims: "By acknowledging that the applicants' relatives had been held prisoners in the Soviet camps but declaring that their subsequent fate could not be elucidated, the Russian courts denied the reality of summary executions that had been carried out in the Katyń forest and at other mass murder sites", conduct that "contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering."[30] This conclusion, which supported a finding that Article 3 had been violated, was reversed by the Grand Chamber.[31]

Even before *Soering*, there had been an isolated reference to "the values underpinning the concept of freedom of expression in the Convention" in a report of the European Commission of Human Rights.[32] The Court has also spoken of values "underpinning" the Convention, no doubt a concept entirely synonymous with "underlying values". It has said: "This notion of secularism appears to the Court to be consistent with the values underpinning the Convention and it accepts that upholding that principle may be regarded as necessary for the protection of the democratic system in Turkey."[33]

The reference by the Grand Chamber in *Šilih* to "underlying values of the Convention" with respect to the procedural obligation of Article 2 did not correspond very closely to the use that had been made of the term in earlier decisions, perhaps with the exception of *Soering* where a possible violation of Article 3 in the event of *refoulement* to the United States was the issue. In *Janowiec*, the Chamber of the Court attempted to elaborate upon the meaning of the expression when applied to the procedural obligation comprised in Article 2 of the Convention. It said that the reference to underlying values, "[f]ar from being fortuitous", indicated that "the event in question must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes against humanity."[34]

The Chamber seemed ready to accept that the Katyń massacre was indeed an act contrary to the "underlying values" of the Convention:

> The Court accepts that the mass murder of Polish prisoners by the Soviet secret police had the features of a war crime. Both the Hague Convention IV of 1907 and the Geneva Convention of 1929 prohibited acts of violence and cruelty against war prisoners and the

[29] *Gündüz v. Turkey,* no. 35071/97, ECHR 2003-XI, para. 51.

[30] *Janowiec and Others v. Russia* [Chamber], para. 165.

[31] *Janowiec and Others v. Russia* [GC], para. 189.

[32] *X. and Church of Scientology v. Sweden*, no. 7805/77, DR 16, p. 68.

[33] *Leyla Şahin v. Turkey*, no. 44774/98, 29 June 2004, para. 66. Followed: *Dogru v. France*, no. 27058/05, 4 December 2008, para. 66; *Kervanci v. France*, no. 31645/04, 4 December 2008, para. 72; *Ghazal v. France* (dec.), no. 29134/08, 30 June 2009; *Gamaleddyn v. France* (dec.), no. 18527/08, 39 June 2009; *Jasvir Singh v. France* (dec.), no. 25463/08, 30 June 2009; *Bayrak v. France* (dec.), no. 14308/08, 30 June 2009; *Ranjit Singh v. France* (dec.), no. 27561/08, 30 June 2009; *Aktas v. France* (dec.), no. 43563/08, 30 June 2009.

[34] *Janowiec and Others v. Russia* [Chamber], para. 139.

> murder of prisoners of war constituted a 'war crime' within the meaning of Article 6 (b) of the Nuremberg Charter of 1945. Although the USSR was not a party to the Hague or Geneva Conventions, the obligation to treat prisoners humanely and abstain from killing them clearly formed part of the international customary law which it had a duty to respect. In its declaration of 26 November 2010, the Russian Parliament recognised that the mass extermination of Polish citizens had been "an arbitrary act by the totalitarian State". It is further noted that war crimes are imprescriptible in accordance with Article I (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, to which Russia is a party. [35]

The dissenting judges were equally explicit on this point: "This was clearly one of the war atrocities that the drafters of the Convention sought to prevent from ever happening in the future. It was obviously an act contrary to the underlying values of the Convention."[36]

But after noting that there was no statutory limitation on war crimes and crimes against humanity, the Chamber said this "does not mean that the States have an unceasing duty to investigate them."[37] It was in this context that it developed its exception to an exception to an exception, adding the requirement that there be some substantial new development subsequent to the "critical date". *Šilih* had viewed the "underlying values" as an exception to the general requirement of some link between a substantive violation of Article 2 prior to the critical date and the procedural dimension in the period subsequent to the critical date. The Chamber in *Janowiec* had in effect restored the requirement of a link in the procedure, if it could be shown that "new material [had] come to light in the post-ratification period" that was "sufficiently weighty and compelling to warrant a new round of proceedings." It seems that the Chamber in *Janowiec* closed the door on the existence of a procedural obligation with respect to a violation of the right to life if no procedural steps had been taken by the State prior to the "critical date." Put simply, a State that had done nothing about past atrocities before the Convention's "critical date" would be in the clear while a State that had done something, albeit minimal and unsatisfactory, might find itself in Strasbourg, a perverse result. The Chamber dismissed the under Article 2 because it said the "new material" requirement had not been satisfied. These findings by the Chamber are left undisturbed by the Grand Chamber decision. The Grand Chamber merely added an additional temporal limitation on the tests that it had set out in *Šilih.*

There cannot be much doubt that many judges of the Court must have been apprehensive about the extraordinary potential of the "underlying values" exception in the *Šilih* judgment of the Grand Chamber. This might have led to claims that the procedural obligation had been breached with respect to many historical atrocities. Possible examples are the Spanish civil war, the Armenian genocide, the Irish famine

[35] *Ibidem*.

[36] *Janowiec and Others v. Russia* [Chamber], Joint Partly Dissenting Opinion of Judges Speilmann, Villiger and Nussberger, para. 5.

[37] *Janowiec and Others v. Russia* [Chamber], para. 140.

and a multitude of abuses associated with European colonialism and the slave trade. Indeed, it is hard to predict just where this might lead, although much the same can be said of many provisions in the European Convention on Human Rights. This did not concern the three dissenting judges in the Chamber. They objected to the majority's new restriction on the exception. Explaining the earlier Grand Chamber ruling, they said: "In *Šilih*, the Court included the last sentence of paragraph 163 precisely to catch exceptional cases like the one at hand and to distinguish this case from cases concerning events that happened so long ago that any investigation would be impossible to carry out and hence pointless."[38] They disagreed with a British judge who had suggested that the "underlying values" exception in *Šilih* was meant to avoid closing the door on an unforeseen connection.[39] Their view was based entirely on principle. The obligation to investigate, once the "underlying values" test had been fulfilled, would depend solely upon whether there was a realistic prospect of a meaningful inquiry, given the relevant lapse of time in any given case.

The views of the dissenters within the Chamber in *Janowiec* resonated in some of the separate and dissenting opinions in the Grand Chamber. For example, Judge Gyulumyan also seemed content to impose no temporal or other restriction on the "underlying values" exception: "The State's obligation to carry out a thorough investigation is engaged when gross human rights violations (genocide, crimes against humanity and war crimes) are at stake. The mere fact that the crimes in question took place before the Convention came into existence is not decisive."[40] However, he voted with the majority in the Grand Chamber because he felt Russia had actually fulfilled the procedural obligation.

The very substantial dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller harshly criticizes the majority for turning a "long history of justice delayed into a permanent case of justice denied."[41] With respect to the "underlying values" exception in *Šilih*, the dissenters note that the majority simply does not apply it. The majority's decision "closes the Court's door to victims of any gross human rights violation that occurred prior to the existence of the Convention", write the dissenters.[42] By failing to implement the "humanitarian clause", the dissenters say that the Court has failed "to fulfil the role for which it was intended: to provide a Court that would act as a 'conscience' for Europe."[43] It is indeed hard to be a 'conscience' if one refuses even to consider the past. Where else does "conscience" come from if not the past?

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[38] *Janowiec and Others v. Russia* [Chamber], Joint Partly Dissenting Opinion of Judges Speilmann, Villiger and Nussberger, para. 5 (internal references omitted).

[39] Referring to Lord Philipps in *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland))* [2011] UKSC 20, at para. 49.

[40] E.g. *Janowiec and Others v. Russia* [GC], Concurring Opinion of Judge Gyulumyan.

[41] *Janowiec and Others v. Russia* [GC] Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, para. 36.

[42] *Ibidem*, para. 33.

[43] *Ibidem*.

The 4 November 1950 cut-off that the Grand Chamber imposes in *Janowiec* may at first blush seem to have a certain logic, but this is apparent rather than real and does not stand up to any serious scrutiny or analysis. In a purely technical sense, the objection might be made that the Convention did not enter into force for three more years, and that the logic of the Grand Chamber's position dictates that the magic date be 3 September 1953. Indeed, theoretically the Convention, once signed, might never have entered into force, failing sufficient ratifications. It would not be the first time this has happened to a treaty. Thus, from the standpoint of treaty law, entry into force rather than signature appears to make more sense. But this is a pedantic objection

But the real problem is that the European Convention did not spring from the head of Zeus, like Athena. It was the product of a complex historical and political reality, in which the "underlying values" of the Convention are to be found. This is recognised to some extent in the preamble of the Convention. It speaks of "a common heritage of political traditions, ideals, freedom and the rule of law." Indeed, it is to this paragraph in the preamble that the Court turned when it introduced the "underlying values" notion in *Soering v. the United Kingdom*, twenty-five years ago. If the "underlying values" are associated with "a common heritage", logically the heritage was in existence prior to 4 November 1950. The preamble of the Convention also notes that the Convention is intended "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration," further confirmation that the "underlying values" existed prior to 4 November 1950. If the Convention takes steps to implement the Declaration, then the "underlying values" must also be present in the Declaration. The reference to the Universal Declaration in turn directs our attention to its owm preamble where it is explained that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind." Is not the "conscience of mankind" a cognate notion to the "underlying values of the Convention"? Or was the "conscience of mankind", like the "underlying values", invented on 4 November 1950?

The selection of the date of adoption of the European Convention as the starting point for the temporal jurisdiction of the Court with respect to the procedural obligation contained in Article 2 is artificial, contrived, unprincipled and unconvincing. The problem is not really with the choice of the date. The Grand Chamber might also have selected 10 December 1948, the date the *Universal Declaration of Human Rights* was voted by the United Nations General Assembly. Or 1 August 1789, the date that the *Déclaration des droits de l'homme et du citoyen* was adopted by the revolution National Assembly in France. Or 19 June 1215, when King John agreed to the Magna Carta at Runnymede. In reality, no single date can be identified as the starting point of the "underlying values" of the European Convention. That is the fallacy in the approach of the Grand Chamber. Indeed, the whole idea of a precise start date is at odds with the notion of "underlying values". The Grand Chamber's decision to propose 4 November 1950 as the beginning of the Convention's "underlying values" is the human rights equivalent of religious fundamentalists who argue that the world began 6,000 years ago.

It is not necessary to contemplate situations where the Court would be required to enforce the procedural obligation associated with Article 2 dating from the eighteenth or nineteenth centuries in order to acknowledge a strong association between the "underlying values" of the Convention and the atrocities of the Second World War. Some comments from judges in their individual opinions suggest a reluctance to confront Europe's recent past, or at least that part of it that belongs to the first half of the twentieth century. The Russian judge who sat in the Grand Chamber wrote that "the Convention system and *jus cogens* rules in the global context should effectively serve the modern world rather than history."[44] In the earlier ruling of the Chamber, two judges wrote that "the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted 'as part of the process of *reconstructing* western Europe in the aftermath of the Second World War', and not with the intention of delving into that black chapter."[45] Perhaps this is the heart of the problem. The idea that one can close the door on inquiry into the past at a specific date is utterly at odds with modern views about the importance of accountability for past violations of human rights.

It is true, as the Court constantly reminds us, that the Convention is not retroactive in effect. The reason for this has nothing to do with principles of international law or justice. It is entirely possible for States to agree to treaties that operate in the past, prior to their adoption. The Treaty of Versailles, with its pledge to bring the German Emperor to justice, is one such convention.[46] Similarly, the London Agreement establishing the International Military Tribunal is retroactive in nature to the extent that it defines crimes that have already taken place.[47] The European Convention on Human Rights could well have been designed to deal with previous violations of human rights. The only reason this was excluded is because of the reluctance of the States that drafted the Convention to take responsibility for past abuses. In any case, the procedural obligation relates to the conduct of investigations after entry into force of the Convention, not before, and in this sense it is not retroactive even if it is sparked by events that are themselves outside the Court's temporal jurisdiction.

One apparent justification for the Court's new rule concerning the "humanitarian clause" and the procedural obligation of Article 2 is that it will provide greater legal certainty. But is this really a serious argument? In fact, the Court will still have to establish, on a case-by-case basis, whether "underlying values" are at stake with respect to post-November 1950 events. The fact that the event in question may have taken place on 5 November 1950 rather than 3 November 1950 makes this task no simpler. The

[44] *Janowiec and Others v. Russia* [GC], Concurring Opinion of Judge Dedov, para. 33.

[45] *Janowiec and Others v. Russia* [Chamber], Joint Concurring Opinion of Judges Kovler and Yudkivska (internal reference omitted).

[46] *Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles*, 28 June 1919, [1919] TS 4, art. 227.

[47] *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.)*, annex, (1951) 82 UNTS 279.

methodology proposed by the Chamber and by the dissenters in the Grand Chamber, whereby serious international atrocity crimes create a presumption that "underlying values" have been engaged, is reasonable and workable. Some also invoke the importance of predictability for States that are now considering ratification of the Convention as a reason to limit the temporal jurisdiction. This is hardly a significant point unless the priority is bringing Belarus into the Council of Europe.

As Poland reminded the Grand Chamber at the oral hearing, the incomplete accountability for the mass killings at Katyń and the other massacre sites in eastern Europe remains a blemish on international justice. At Nuremberg, the Nazi defendants were accused of responsibility for the atrocity upon the insistence of the Soviet prosecution team. The evidence consisted of the unconvincing report of a Soviet inquiry and a half-dozen witnesses, three called by the defence and three by the prosecution. In the final judgment, the entire issue was ignored. Katyń was not mentioned even in the dissenting opinion of the Soviet judge, perhaps the most vivid confirmation of the fact that the bench smelled a rat. Nearly five decades later, the Russians started to acknowledge the truth. But they are still concealing evidence of the crime on the preposterous ground that this involves matters of national security. The European Court of Human Rights missed an historic opportunity to tidy up a piece of the continent's sombre history. It ought to have assumed its responsibility to heal the wound that was left from the inadequate treatment of Katyń by the International Military Tribunal. That would have been a great tribute to the integrity of the "underlying values" of the European Convention on Human Rights. Instead, the "underlying values" have themselves been debased by the cynical imposition of a date when they are said to have begun but for which the only real purpose is to prevent inquiries that some States find inconvenient.