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**XXXII**

POLISH YEARBOOK  
OF INTERNATIONAL LAW

**2012**

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Wydawnictwo Naukowe SCHOLAR  
Warsaw 2013

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PL ISSN 0554-498X  
DOI 10.7420/pyil2012

Wydawnictwo Naukowe Scholar Spółka z o.o.  
ul. Krakowskie Przedmieście 62, 00-322 Warszawa  
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[www.scholar.com.pl](http://www.scholar.com.pl)

Printed in Poland

First edition, 250 copies

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## AMICUS CURIAE BRIEFS IN *JANOWIEC AND OTHERS V. RUSSIA*

On 16 April 2012 the European Court of Human Rights rendered its judgment in the case of *Janowiec and Others v. Russia* (nos. 55508/07 and 29520/09). The case related to the Katyń massacre, perpetrated in 1940 by the Soviet Union based on a decision of the Politburo of the Soviet Communist Party, the highest State organ at that time. All told 21,857 Polish citizens were murdered, almost 70 per cent of them being prisoners of war. Only in 1990 did the Soviet Union authorities acknowledge Soviet responsibility for the massacre (after claiming for years the Germans were the perpetrators). Shortly thereafter a domestic criminal investigation was commenced, and eventually discontinued in September 2004. The results of the investigation are not known to the public because the final decision, and 35 volumes of the case file (out of a total of 183), still remain confidential, allegedly to safeguard “the crucial security interests of the Russian state”.

Following the termination of their Katyń investigation, the Russian authorities rejected requests for rehabilitation of the Katyń victims (filed by close relatives of the victims) due to the fact that the investigation had not definitively established what may have happened to the Polish prisoners in the spring of 1940.

The applicants in the *Janowiec* case alleged violation of three provisions of the European Convention on Human Rights (ECHR):

- a) right to life in its procedural dimension, i.e. the State’s obligation to investigate (Article 2);
- b) prohibition of inhuman and degrading treatment, based on the way the Russian authorities had reacted to the requests for rehabilitation and other motions lodged by the applicants (Article 3);
- c) obligation of co-operation with the Court, since the Russian authorities had refused to provide the Court with a copy of the decision to discontinue the Russian investigation into the Katyń massacre (Article 38).

In its judgment a chamber of seven judges found that violations of Articles 3 and 38 had taken place. At the same time, when addressing the complaint formulated under Article 2, the Court has for the first time relied on the formula that its temporal competence to hear allegations referring to the procedural obligation to conduct an effective investigation can be founded on “the need to ensure the effective protection of the guarantees and the underlying values of the Convention” (this formula is part of the famous test established by the Grand Chamber in its *Šilih v. Slovenia* judgment, 9 April 2009 (no. 71463/01). Although the Court characterised the Katyń massacre as a mass

scale imprescriptible crime under international law (war crime), and in consequence as an act contrary to the underlying values of the Convention, it deemed itself not competent to hear the case *ratione temporis*. The Court held that to become competent there must be additional new and important material emerging after the date of Russia's ratification of the ECHR.

The ruling that the complaint based on Article 2 was inadmissible was decided by a narrow majority of four votes to three. The minority criticised the Court for its narrow approach to the formula that refers to the Convention's core values.

The European Convention on Human Rights allows each party to request that a case decided by a chamber to be referred to the Grand Chamber of 17 judges. But the requesting party must demonstrate to a panel of five judges that the case is exceptional and raises a serious issue of general importance (Article 43).

The request for referral was lodged in June 2012, and the panel accepted it on 24 October 2012. In November and December 2012 six renowned non-governmental organizations asked the Court for permission to intervene in the case as third parties. The Court agreed, and they presented their written submissions in January 2013.

The hearing before the Grand Chamber was held on 13 February 2013. The final judgment is expected later this year or in the beginning of 2014.

This documentation block consists of:

- a) request for referral;
- b) *amicus curiae* brief by Amnesty International (London);
- c) joint *amicus curiae* brief by Human Rights Centre "Memorial" (Moscow), European Human Rights Advocacy Centre (London) and Essex Transitional Justice Network, School of Law, University of Essex, UK
- d) *amicus curiae* brief by Open Society Justice Initiative (New York);
- e) *amicus curiae* brief by Public International Law & Policy Group (the Hague).

*Ireneusz C. Kamiński\**

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\* Ireneusz C. Kamiński is legal representative of the applicants. In this role he has prepared legal argumentation on behalf of the applicants, and is also author of the request for referral of the case to the Grand Chamber. He is Professor of International Law at the Institute of Law Studies of the Polish Academy of Sciences, Warsaw (Poland).