



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2912/2016*, **, ***

<i>Communication submitted by:</i>	K.K. and others (represented by counsel Ireneusz C. Kamiński)
<i>Alleged victims:</i>	The authors and their deceased relatives
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	27 October 2016 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 92 decision, transmitted to the State party on 28 December 2016 (not issued in document form).
<i>Date of adoption of decision:</i>	5 November 2019
<i>Subject matter:</i>	Lack of effective investigation into the execution of the authors' relatives – prisoners of war – by the Soviet authorities
<i>Procedural issues:</i>	Admissibility <i>ratione temporis</i> ; substantiation of claims
<i>Substantive issues:</i>	Right to life; extrajudicial execution; effective remedy; cruel, inhuman or degrading treatment or punishment
<i>Articles of the Covenant:</i>	2 (3) in conjunction with 6; 7; 14; 17 and 19
<i>Articles of the Optional Protocol:</i>	1 and 2

1. The authors of the communication are K.K., born in 1940, I.E., born in 1936, W.W.-J., born in 1940, W.R., born in 1938, G.E., born in 1935, A.T., born in 1933, and J.L.W., born in 1930. All the authors are Polish nationals. They are represented by counsel, Ireneusz C. Kamiński from the Institute of Legal Studies, Polish Academy of Sciences. The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja and Gentian Zyberi.

*** A joint opinion (partly dissenting) by Committee members Ilze Brands Kehris and Arif Bulkan is annexed to the present decision.



Facts as presented by the authors

2.1 In September 1939, Soviet troops invaded Eastern Poland and around 250,000 Polish soldiers, border guards, police officers, prison guards, State officials and other functionaries were detained. Some of them were set free, while others were sent to special prison camps established by the People's Commissariat for Internal Affairs (NKVD) in Kozelsk, Ostashkov and Starobelsk.

2.2 In early March 1940, Lavrentiy Beria, Head of the NKVD, submitted to Joseph Stalin, Secretary-General of the Communist Party of the Soviet Union, a proposal to approve the shooting of Polish prisoners of war as enemies of the Soviet State. The proposal specified that the prisoner-of-war camps accommodated 14,736 former military and police officers, of whom more than 97 per cent were of Polish nationality, and that a further 10,685 Polish nationals were being held in the prisons of the western districts of Ukraine and Belarus. On 5 March 1940, the Politburo of the Central Committee of the Soviet Communist Party approved the proposal and ordered the shooting of the detained prisoners of war. The cases were to be considered by an NKVD *troika*¹ 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 them.

2.3 Between April and May 1940, 21,857 persons were executed. Only 395 detainees were released. Prisoners from the Kozelsk camp were killed at a site near Smolensk known as the Katyn Forest; those from the Starobelsk camp were shot in the NKVD prison in Kharkov and their bodies buried near the village of Pyatikhatki; the police officers from Ostashkov were killed in the NKVD prison in Kalinin (now Tver) and buried in Mednoye.

2.4 The authors allege that their relatives, as follows, were killed in 1940:

- M.A., born in 1903, the father of K.K. and I.E., was taken prisoner after 20 September 1939, killed in Tver and buried in Mednoye;
- W.W., born in 1909, the father of W.W.-J., was taken prisoner on 19 or 20 September 1939, killed on 30 April 1940 and buried in Katyn;
- S.R., born in 1883, the grandfather of W.R., was taken prisoner around 20 September 1939 and buried in Katyn;
- S.E., born in 1900, the father of G.E., presumed killed in Kharkov and buried in Pyatikhatki;
- S.T., born in 1900, the father of A.T., was arrested on 17 September 1939, killed in Tver and buried in Mednoye;
- A.W., born in 1897, the father of J.L.W., was arrested in October 1939, killed in Tver and buried in Mednoye.

2.5 In 1942 and 1943, the German army, advancing onto the territory of the Soviet Union, discovered mass burials near the Katyn forest. An international commission consisting of 12 forensic experts was set up. It conducted the exhumation works from April to June 1943. The remains of 4,243 Polish officers were excavated, of whom 2,730 were identified. Among those identified were the relatives of two of the authors, S.R. and W.W. The commission concluded that the Soviet authorities had been responsible for the massacre. The Soviet authorities denied responsibility for the killings and in 1943 the NKVD set up an Extraordinary State Commission chaired by Nikolai Burdenko, which concluded on 22 January 1944 that the Polish prisoners had been executed by the Germans in the autumn of 1941.

2.6 On 3 March 1959, Aleksandr Shelepin, Chairman of the successor to the NKVD, the Committee for State Security (KGB), proposed to the Secretary-General of the Soviet Communist Party, Nikita Khrushchev, that the records and other materials regarding the execution of Polish prisoners of war be destroyed, except the reports of the meetings of the NKVD *troika* sentencing the persons to be shot and the documents on the execution of that decision.

¹ A trial commission that conducted summary justice proceedings.

2.7 On 13 April 1990, the Soviet news agency TASS announced publicly that Beria and his subordinates bore direct responsibility for the executions in the Katyn forest and that the Soviet side expressed deep regret in connection with the Katyn tragedy.

2.8 On 22 March 1990, the office of the Kharkov prosecutor opened a criminal investigation into the discovery of the mass graves of Polish citizens in the city's wooded park. On 20 August 1990, the criminal investigation was directed against Beria and other NKVD officials who were ranked as military officials. On 27 September 1990, the investigation was taken over by the Office of the Chief Military Prosecutor of the Soviet Union, who commenced investigation No. 159.

2.9 In the summer and autumn of 1991, Polish and Russian specialists carried out the exhumations of corpses at the mass burial sites in Kharkov, Mednoye and Katyn. They also reviewed the archive documents relating to the Katyn massacre, interviewed at least 40 witnesses and commissioned forensic examinations. Twenty-two bodies were identified on the basis of military identification tags.

2.10 On 17 March 1992, a Russian commission of experts was set up to assess the conclusions that should be drawn from the materials and evidence gathered in the course of investigation No. 159. On 13 June 1993, the head of the prosecutors conducting the investigation filed a motion for a procedural decision to discontinue the investigation because the perpetrators were all deceased. He suggested that Stalin and his collaborators in the Politburo be considered guilty of crimes against peace and humanity, of war crimes and of genocide against Polish citizens on the basis of articles 6 (a), (b) and (c) of the Charter of the Nuremberg International Military Tribunal. He also suggested that the members of the Burdenko Commission were guilty of abuse of power and argued that those who carried out the illegal orders should have been subject to grave penalties, including the death penalty. The motion was rejected by the Chief Military Prosecutor.

2.11 The Government of the Russian Federation acknowledged in several decisions that the Polish citizens shot following the Politburo decision of 5 March 1940 were victims of political repression. On 19 October 1996, decision No. 1247 was adopted to establish memorials on the burial sites of Soviet and Polish citizens who had been victims of totalitarian repression in Katyn and Mednoye.

2.12 On 21 September 2004, the Chief Military Prosecutor discontinued investigation No. 159 because the perpetrators were all deceased. That decision was classified as containing State secrets, together with 116 volumes of the investigation (out of a total of 183 volumes). The decision was announced on 11 March 2005 by the Chief Military Prosecutor. He stated that it had been established that there had been 14,542 prisoners on the territory of the former Soviet Union and that the death of 1,803 of them had been proven. The massacre was declared not to amount to genocide and because of the death of the guilty officials, there was no basis to consider it in judicial terms.

2.13 Most of the authors applied repeatedly to various Russian authorities for information on the Katyn criminal investigation. On 21 April 1998, O.W., the mother of W.W.-J., received a response to her request for the rehabilitation of her husband, W.W., from the Office of the Chief Military Prosecutor. The response noted that W.W. had been held as a prisoner of war in the Kozelsk camp and had been executed in 1940, along with other prisoners, but that the question of his rehabilitation could only be considered after investigation No. 159 had concluded. On 18 January 2006, the Office of the Chief Military Prosecutor denied the request for rehabilitation on the basis that it was impossible to establish the legal grounds on which W.W. had been sentenced to death.

2.14 The authors instituted two sets of proceedings in Russia: on the rehabilitation of their relatives who had been killed, in accordance with the provisions of the 1991 Rehabilitation Act; and on the decision to discontinue the investigation. On 21 February 2008, the authors filed a request for the rehabilitation of their relatives with the Office of the Chief Military Prosecutor. On 13 March 2008, the Office of the Chief Military Prosecutor refused to examine their motions on the merits. The Office informed the authors that the joint investigation by the Polish, Ukrainian, Belarusian and Russian law enforcement agencies had not uncovered the criminal files and other documents on the basis of which the decisions to execute the victims in 1940 had been made and that any possibility of retrieving those files had since been lost. In the absence of such files, it was not possible to decide whether the Rehabilitation Act would be applicable to the relatives

who had been killed. The authors' appeal to the Khamovniki district court in Moscow was dismissed on 24 October 2008 and their subsequent appeal to the Moscow City Court was rejected on 25 November 2008.

2.15 On 4 May 2008, the authors appealed the decision of the Chief Military Prosecutor to end the Katyn investigation to the Khamovniki district court in Moscow. They requested the court to find the decision unlawful and to grant them the status of victims in the Katyn criminal case. The appeal was rejected by the Khamovniki district court on 5 June 2008. The authors appealed this decision to the criminal division of the Moscow City Court, which on 7 July 2008, upheld the decision of the district court. The authors filed an appeal to the Moscow Circuit Military Court on 20 August 2008. On 14 October 2008, the Moscow Circuit Military Court rejected their appeal. On 29 January 2009, the authors' cassation appeal to the Military Board of the Supreme Court of the Russian Federation was rejected. In the proceedings on the discontinuance of the investigation, the authorities held that there existed no evidence that the authors' relatives, after being dispatched from the camps, had been executed, since their remains were not among the 22 bodies identified in 1991. In such circumstances, there were no grounds for recognizing the authors as victims in the investigation and giving them access to the documents relating to the proceedings and the investigation. Referring to the letter from the Office of the Chief Military Prosecutor, dated 21 April 1998, the courts stated that the confirmation of the execution of W.W. was issued in an ongoing criminal case and could not be confirmed by the final investigation.

2.16 Having exhausted domestic remedies, the authors lodged an application with the European Court of Human Rights.² On 16 April 2012, the Court rendered its judgment. It found that it lacked competence *ratione temporis* to consider the authors' complaint under article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (effective investigation into the massacre) but held that there had been a violation of article 3 of the Convention with regard to the rights of four of the authors (degrading and inhuman treatment). The case was subsequently referred to the Grand Chamber of the Court, which rendered its judgment on 21 October 2013. The Grand Chamber found that it was not competent *ratione temporis* to examine the complaint under article 2 and that there had been no violation of article 3 of the Convention.

The complaint

3.1 The authors claim that the Russian investigation into the Katyn massacre did not meet the basic requirements of an effective investigation, in violation of their rights under article 2 (3), read with article 6 of the Covenant. They claim that they were not given victim status during the investigation and, as a result, could not participate in the proceedings; that evidence was not collected from them; that basic evidentiary measures, such as excavations, were not undertaken; and that the legal classification given to the massacre was inadequate. The authors submit that the complaint is admissible *ratione temporis*, as the Russian authorities had a continuing obligation to investigate the massacre and the non-fulfilment of this procedural obligation had taken place in the post-ratification period.

3.2 The authors also claim that the treatment they received from the Russian authorities amounted to a violation of their rights under article 7 of the Covenant. They note that during the court proceedings, the courts found that what had happened to their relatives had not been established, contrary to previous statements by the Office of the Military Prosecutor in 1998, in which one of the authors had been told that her relative had been executed (see para. 2.13 above) and contrary to the conclusion of the 1943 investigation, which identified two of the authors' relatives (see para. 2.5 above). They claim that their relatives, presumed dead, became "disappeared" after the decisions of the authorities of the State party had been issued. They claim that such statements, in denial of historical facts and previous assertions, must be considered as inflicting grave moral pain, anguish and stress on them, which go beyond the emotional distress normally accompanying the killing of a close relative.

3.3 The authors also note that the facts submitted can be interpreted as a violation of articles 14, 17 and 19 of the Covenant.

² See *Janowiec and others v. Russia*, applications No. 55508/07 and No. 29520/09.

State party's observations

4.1 In a note verbale dated 23 May 2018, the State party contests the admissibility of the communication. Referring to article 1 of the Optional Protocol to the Covenant, the State party submits that as a successor of the Soviet Union, it has been a party to the Covenant since 23 March 1976. The events in the Katyn forest took place in 1940, almost 36 years before the Covenant took effect for the State party and more than 26 years before the Covenant was adopted in 1966.

4.2 The State party considers that the authors are not under the jurisdiction of the State party and cannot therefore file a complaint to the Committee, as established by article 1 of the Optional Protocol.

4.3 Referring to the conclusion of the Grand Chamber of the European Court of Human Rights in the case of *Janowiec and others v. Russia* concerning the lack of the Court's temporal jurisdiction, the State party submits that the lapse of time between the alleged death of the authors' relatives and the date of entry into force of the Covenant for the State party is not only many times longer than the periods which trigger procedural obligations under article 6 of the Covenant, but is also too long in absolute terms for a genuine connection to be established between the death of the applicants' relatives and the entry into force of the Covenant in respect of the State party.

4.4 In addition, the State party denies that the procedural obligation under article 6 of the Covenant exists, in view of the fact that the investigation in relation to the Katyn case was carried out as a gesture of political goodwill by the State party and therefore cannot be assessed from the point of procedural requirements of article 6. Only events that took place after the adoption of the Covenant could give rise to procedural obligations; an investigation carried out 50 years after the events of 1940, when the victims were long dead and the most important documents destroyed, could not have been effective and certainly could not be after 70 years.

4.5 The State party asserts that the absence of its responsibility for violation of the material part of article 6 excludes the possibility of consideration of its responsibility for a possible violation of the procedural part of article 6.

4.6 The State party notes that the preliminary investigation in the Katyn case was not carried out in order to elucidate the circumstances of the death of the authors' relatives, but to establish the responsibility of the NKVD officials who were responsible for the deaths of prisoners in NKVD camps several decades earlier. The criminal case was opened and then closed. By that time, the statute of limitations for the crimes had expired. The State party did not open a criminal case concerning the death of the authors' relatives because of lack of sufficient evidence of their death, since their remains had not been located. The authors had not requested the opening of a criminal case concerning the death of their relatives either from the Soviet authorities, or from the authorities of the State party. In considering the authors' claims, the domestic courts found that the evidence was insufficient to conclude that the authors' relatives had died as a result of abuse of power by NKVD officials. The State party concludes that it could not have positive obligations under article 6 of the Covenant because the fact of the death of the authors' relatives had not been proven and the statute of limitations for the crimes in question had expired.

4.7 In view of the above, the investigating authorities had no grounds under article 42 of the Criminal Procedure Code, to give victim status to the authors and to grant them access to the investigation documents.

4.8 The State party concludes that the authors' claim under article 6 should be found inadmissible for lack of substantiation under article 2 of the Optional Protocol.

4.9 The State party addresses the authors' claim that the way the authorities treated them during and after the investigation of the Katyn case was humiliating and inhuman and amounted to a violation of article 7 of the Covenant. The State party submits that in order to trigger a question of a violation of article 7 of the Covenant, two elements are needed: the authors should have been unaware of the fate of their relatives during a certain period of time; and the actions of the State party should have augmented their suffering during that period. Regarding the first element, although the fate of the authors' relatives could not be determined with certainty for purposes of criminal or rehabilitation proceedings, there was no basis to expect that by 1 January 1992 (the date of adoption by the State party of the

Optional Protocol) they could have been alive, taking into account their dates of birth and lack of any news from them since the Second World War. In the absence of the primary element, there can be no issues raised under article 7 of the Covenant.

4.10 The State party relies on the jurisprudence of the European Court of Human Rights and submits that there were no “special factors” which could bring the suffering of the authors “a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of serious violations of human rights”.³ As for the first factor – the proximity of the family tie – five of the authors were born after the arrest of their relatives. The second factor – the extent to which the family member witnessed the events in question – was absent, because none of the authors saw the events which caused the death of their relatives. The third factor – the involvement of family members in the attempts to obtain information about the disappeared person – was not complied with, since the authors did not participate in the Katyn investigation, did not file motions and did not provide testimonies. Although the investigation was widely publicized in the Russian and Polish media over a period of 14 years, only after it was finished did two of the authors, and then the others, request formal procedural status to be granted. The effect of the fourth factor – the way in which the authorities responded to the enquiries – is lower in the present case, in view of the 50 years that passed between the Katyn events and the opening of the criminal investigation and considering the fact that the authors were not unaware of the fate of their relatives. The actions of the domestic authorities were justified by the fact that the rehabilitation of Polish prisoners was impossible in the absence of any information on the charges against them. The authorities were not obliged to locate the authors and grant them victim status without sufficient evidence, required by a criminal standard of proof, for establishing a causal link between the Katyn events and the death of their relatives. There had been no humiliating treatment in the manner in which the authorities had responded to the authors’ requests. The State party concludes that the authors’ claim under article 7 of the Covenant is unsubstantiated.

4.11 The State party submits that the authors did not bring claims under articles 17 and 19 of the Covenant before the domestic courts and did not substantiate them in their submission to the Committee. Those claims should be considered inadmissible under article 2 of the Optional Protocol owing to non-exhaustion of domestic remedies.

4.12 The State party then summarizes in detail the proceedings undertaken by the authors in relation to the rehabilitation of their relatives and concerning the decision to discontinue the investigation and submits that the authors’ claims were duly assessed by the domestic courts and their rights under article 14 of the Covenant were respected. It submits that the Katyn criminal investigation against a number of NKVD officials, charged under article 193-17 of the Criminal Code of 1926 for abuse of power, which manifested in the unlawful decisions to execute 14,542 Polish nationals, leading to the death of 1,803 persons (only 22 bodies were identified after exhumation), was ended in 2004 on the basis of article 24 (1) (4) of the Criminal Procedure Code (death of the guilty persons). Other grounds for ending the investigation were article 24 (1) (2) of the Criminal Procedure Code (absence of corpus delicti) concerning other persons, and article 24 (1) (1) (lack of crime) concerning the investigation of evidence of genocide.

4.13 In conclusion the State party submits that the authors’ claims under articles 2, 6, 7, 14, 17 and 19 of the Covenant should be considered inadmissible. Their complaint under article 6 should be found inadmissible *ratione temporis*. The State party asserts that it has not violated the authors’ rights under the Covenant.

Authors’ comments on the State party’s observations

5.1 On 8 October 2018, the authors submitted their comments on the State party’s observations. The authors note that what began as a transparent investigation, based on established historical facts, documents and collected evidence (death lists of prisoners of war and prisoners delivered for execution to NKVD sites, exhumation works etc.), ended in secrecy and denial in 2004. People considered to have been killed in 1940 became “disappeared”. The authors reiterate that the names of their relatives are listed on the memorials constructed on burial sites in Katyn in Russia, and Kharkiv in Ukraine.

³ See European Court of Human Rights, *Gongadze v. Ukraine*, application No. 34056/02, para. 184, and *Orhan v. Turkey*, application No. 25656/94, paras. 357–358.

5.2 The authors submit that the Russian authorities rejected the request for rehabilitation on behalf of 2 Polish prisoners who were among the 22 identified in 1991. The judge of the Khamovniki district court found that a bullet hole in the skull of those people proved only that a firearm had been used against a certain person, but not that the person had been shot dead by State officials or was a victim of political repression.

5.3 The authors stress that the Katyn massacre constituted a war crime and a crime against humanity and is not subject to statutory limitations. The authors thus disagree with the classification of the crime as abuse of power in the decision of 2004 to end the Katyn investigation, as well as with the State party's argument that the investigation was time-barred.

5.4 Concerning the State party's statement that the investigation of the Katyn massacre was carried out as a gesture of political goodwill, the authors submit that in Russian law there is no distinction between a criminal investigation and a goodwill investigation. Procedural and material law apply to any investigation in the same manner. They add that when the investigation began in 1990s, some people involved in the Politburo decision to kill the Polish prisoners were still alive and should have been prosecuted.

5.5 The authors insist that the investigation into the Katyn massacre took place after the ratification of the Optional Protocol by the State party and that the procedural obligations relating to the right to life are detachable from the substantive obligations. Thus, the Committee has jurisdiction *ratione temporis* to consider their claim.

5.6 The authors submit that the classical test used by international bodies to examine the matter of jurisdiction *ratione temporis* differentiates between the source of right and the source of dispute. The former may precede a given treaty but the latter must be located in the post-ratification period. They allege that the source of right in their submission lies in the Katyn massacre of 1940, but the source of dispute relates to the way in which the investigation was conducted after the Optional Protocol had been ratified by the State party.

5.7 As to the merits of their allegations under article 6, the authors claim that the investigation into the Katyn massacre completely denied established historical facts and derailed expectations based on what had been established earlier. The authors could not have predicted the unexpected outcome of the investigation in 2004, when their relatives again became "disappeared" persons. The State party should thus be stopped from alleging that the authors should have applied for victim status when the investigation was ongoing.

5.8 The authors allege that the domestic courts acted arbitrarily in assessing the evidence submitted by them and rejecting all their motions, in violation of article 14 of the Covenant.

5.9 Under the article 7 claim, the authors add that turning persons who have been killed into "disappeared" persons is unprecedented in international practice. The authors had to wait for 15 years to ask for the rehabilitation of their relatives after the investigation of the massacre was finished. They were then informed that the fate of their relatives was unknown and that they "disappeared" in 1940. The conclusion of the authorities contradicted the established historic facts and constituted a denial of the Katyn massacre. Since a significant proportion of the files of the investigation had been classified, they were prevented from knowing the circumstances of the executions and the background of the massacres. The refusal to consider the applicants' requests for rehabilitation of their relatives was combined with at least implicit assumptions that there had existed good reasons for the execution. The authors claim that as people in their senior years, they had been exposed to acts resulting in emotional distress, anguish and suffering that reached at least the minimum level of degrading treatment.

5.10 The authors provide information to prove their emotional attachment to their relatives. They wrote articles and books about the Katyn massacre and their relatives; initiated commemoration activities, such as planting oaks for Katyn victims, placing commemorative plaques and naming schools after them; and established the Katyn National Memory Committee and the Federation of Katyn Families, among other actions.

5.11 The authors submit that in the litigation in the Russian Federation they invoked the substance of their claims under articles 17 (protection of good name as part of the right to private life) and 19 (right to receive information). The right to a good memory of their parents was part and parcel of their rehabilitation request. If not rehabilitated, the persons

who were killed might still be considered guilty of some serious crimes deserving the capital penalty. The right to seek and receive information was auxiliary to the proceedings on the discontinuation of the Katyn investigation, access to the Katyn case file and to the decision to discontinue the investigation.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's claim that the claim under article 2 (3), read in conjunction with article 6 of the Covenant, is inadmissible *ratione temporis*. It also notes the authors' assertion that the violation of their rights continues, insofar as the State party has failed to carry out an effective investigation into the killing of their relatives and that the claim is therefore admissible. The Committee recalls that it is precluded *ratione temporis* from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party, unless those violations continued after the Covenant and the Optional Protocol became effective for the State party.⁴

6.4 The Committee notes that, in the present case, the authors' claim about a continuing violation stems from the killing of their relatives in 1940, a date which precedes by 36 years the entry into force of the Covenant for the State party (23 March 1976). While the Committee notes that article 2 (3), which has been invoked by the authors in conjunction with article 6 of the Covenant, may give rise in certain circumstances to a continuing obligation to investigate violations that occurred before the entry into force of the Covenant, such a procedural obligation derives from the substantive obligation under article 6 of the Covenant. It can therefore only be applied if the status of the alleged victim as also a victim of a possible violation of article 6 has been *prima facie* established or acknowledged.⁵

6.5 The Committee notes that the events underlying the alleged violation of article 6 with respect to the authors' relatives occurred in 1940, 36 years before the entry into force of the Covenant for the State party and 52 years before the entry into force of the Optional Protocol. The obligation under article 6, read in conjunction with article 2 (3), similarly did not exist before 1976 and could not have been the subject of individual communication proceedings before 1992. In view of the significant passage of time since the events of 1940 and the absence of a formal acknowledgment by the State party of the violation of the rights of the authors' relatives in the interim, the Committee cannot conclude that in 1992, after the entry into force of the Optional Protocol for the State party, it still had a continuous obligation to investigate the 1940 killings.⁶ The Committee notes in this regard the position of the State party that its domestic courts found that the evidence was insufficient to conclude that the authors' relatives were among those who died as a result of abuse of power by NKVD officials, and the court statement that even the fate of W.W., who was initially identified as a victim, was not confirmed by the final investigation. In the light of these observations, the Committee finds itself precluded *ratione temporis* from examining the authors' claim of lack of effective investigation into the killing of their relatives under article 2 (3), read in conjunction with article 6 of the Covenant.

6.6 The Committee notes the authors' claim that the way they were treated by the authorities of the State party and their refusal to rehabilitate the relatives who had been

⁴ See the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol, para. 9; *Lovelace v. Canada* (CCPR/C/13/D/24/1977), para. 10; *Simunek and others v. Czech Republic* (CCPR/C/54/D/516/1992), para. 4.5; and *E. and A.K. v. Hungary* (CCPR/C/50/D/520/1992), para. 6.4.

⁵ See, *mutatis mutandis*, *S.E. v. Argentina* (CCPR/C/38/D/275/1988), para. 5.3.

⁶ See *Janowiec and others v. Russia*, judgment of the Grand Chamber of the European Court of Human Rights, 21 October 2013, para. 157.

killed was degrading and inhuman, in violation of article 7 of the Covenant, and that the investigation carried out by the State party changed the status of their relatives from dead to “disappeared”. The Committee notes that by the time most of the authors requested the rehabilitation of their relatives in 2008, four years after the closing of the investigation into the criminal responsibility against Beria and other NKVD officials, the fact that their relatives were dead was beyond doubt, as most of them would have been more than 100 years old by then, and that the authors themselves insisted in the domestic proceedings that their relatives had been killed in the Katyn massacre. The Committee also notes that the authors have undertaken numerous activities in honour of their relatives, perceiving their killing in the Katyn massacre as an established historical fact. The Committee does not therefore consider the authors’ relatives as persons who were “disappeared” as the result of the State party’s investigation of the massacre.

6.7 While acknowledging the tragedy and pain the authors have lived with for many years after losing their relatives in the Katyn massacre, the Committee notes that the decisions of the authorities of the State party, in the context of the criminal investigation, which did not clarify the exact circumstances of death of their relatives and rejected their rehabilitation requests, were taken more than 60 years after the killings in question and were unlikely to generate genuine uncertainty in the authors’ minds about the fate of their dead relatives. In addition, from the information on file, the Committee is not able to conclude that the manner in which the authors have been treated by the authorities of the State party was manifestly disrespectful or degrading, or otherwise aimed at causing them pain and suffering. In the light of this, the Committee finds the authors’ claim under article 7 of the Covenant inadmissible for lack of substantiation under article 2 of the Optional Protocol.

6.8 The Committee also notes the State party’s argument that the authors have not raised their claims under articles 17 and 19 in proceedings in the State party and that the rights of the authors under article 14 were fully respected. The Committee notes the authors’ argument that articles 17 and 19 were raised in their substance in proceedings in the State party and that they maintain their claims under article 14 in relation to a number failures in the legal proceedings in which they participated. The Committee considers, however, that the authors have not provided sufficient information to substantiate their claims under articles 14, 17 and 19, in light of the specific nature of the legal proceedings in question. The Committee therefore finds these claims inadmissible under article 2 of the Optional Protocol.

6.9 In the light of these findings, the Committee does not deem it necessary to consider the rest of the authors’ claims and the State party’s other objections to admissibility.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and to the authors.

Annex

Joint opinion of Committee members Ilze Brands Kehris and Arif Bulkan (partly dissenting)

1. In this case the majority has found the entire communication to be inadmissible under articles 1 and 2 of the Optional Protocol. We disagree with this outcome with regard to the claim under article 7 of the Covenant.
2. The majority decision on the claim under article 7 is based on two reasons: first that in the light of the time that has elapsed there is no uncertainty as to the death of the authors' relatives, notwithstanding the decisions of the authorities of the State party in the context of the modern criminal investigations; and second the lack of intent on the part of the authorities of the State party to cause the authors pain and suffering.
3. The protection afforded by article 7 of the Covenant covers not just physical pain and suffering, but anguish and mental stress as well.¹ Regarding the latter, the Committee has repeatedly recognized that it captures the psychological pressure experienced by individuals whose immediate relatives are the victims of serious human rights violations.² In such cases, the violation of article 7 is constituted by the effect of the continuing violation of those left behind, where that operates alongside treatment by State officials that is such as to aggravate the loss and overall injustice experienced by the bereaved survivors. The question that arises, therefore, is whether the treatment of the authors by the Russian authorities was such that it caused them mental pain and suffering of such intensity as to constitute inhuman and degrading treatment prohibited by article 7.
4. Admittedly, what uncertainty there was as to the death of the authors' relatives would have dissipated at some stage. But mere acceptance of this fact does not put an end to anguish and suffering, which are likely to persist as long as the circumstances surrounding disappearance and death remain shrouded in lies and deceit. Given the refusal of the Government of the Soviet Union to acknowledge their responsibility, the authors' grief and sense of injustice necessarily remained unassuaged for an inordinately long period.
5. The official acknowledgement and the launching of a criminal investigation in 1990 would have awakened hope in the authors for clarification of the individual circumstances of their relatives' summary executions and some historical accounting for this war crime. Instead, what should have been an investigation conducted openly and in good faith petered out in secret and answers provided to the authors at various points were uninformative, contradictory and at times profoundly insensitive. According to the undisputed facts, the authors were consistently denied a role in the investigation and requests for information were rejected on various grounds, including because the investigation was still ongoing and because they lacked "victim status". Once the investigation was discontinued in 2004, the decision to do so was classified as a State secret. Moreover, the massacre itself was declared not to amount to genocide (para. 2.12 above), other war crime classifications were not considered and the judicial proceedings initiated and then discontinued in 2004 were limited to charges of abuse of power. Ultimately, the authors were denied any role in the investigation and the classification of the decision to discontinue it, along with a number of volumes of the investigation, foreclosed any prospect of learning the truth. The refusal to grant rehabilitation of the authors' relatives, justified on the basis that the legal grounds for their execution were unknown, thus at least implicitly suggesting that they could have been legally executed, is particularly offensive and lacking in sensitivity (para. 2.13 above).
6. The presumption of certainty of death, which so influenced the majority in its finding of inadmissibility, can hardly be viewed as consequential, given that it was a certainty arising from the passage of time and not because of any positive act of

¹ See Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 5.

² See *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para 10.2; *Sankara et al. v. Burkina Faso* (CCPR/C/86/D/1159/2003), para 12.2; and *Khadzhiyev v. Turkmenistan* (CCPR/C/122/D/2252/2013), para 7.6.

acknowledgement or establishment of individual facts by the Government of the Soviet Union or its Russian successors. The committee has previously found a violation of article 7 due to the anguish and psychological pressure suffered by relatives of an individual who had been killed and who did not know the circumstances of the death of that relative.³ In the present case, to this day the authors do not know the circumstances of their relatives' death; when pressed on individual cases, the State party has responded through its officials with various excuses, such as insufficient evidence as to their death (para. 2.15 above), insufficient evidence to conclude that these deaths resulted from the abuse of power by NKVD officials (para. 4.6 above), missing files, classified files, or even that the Polish prisoners may have been duly sentenced to death for crimes committed (para. 2.13 above). These denials and other evasions dilute the generalized acknowledgment of responsibility and by casting doubt on established historical events inevitably compound – not lessen – the authors' suffering. In our view, this callous treatment of the authors in their quest for answers constitutes pain and suffering of a degree amounting to inhuman and degrading treatment in violation of article 7.

7. We are also doubtful about the other basis for the majority finding, namely that the State party was not “manifestly disrespectful” of the authors and that they did not “aim” to cause them pain and suffering. In our view, the resort to a lack of intent is problematic, as neither the text of nor the jurisprudence under the Covenant make any distinction based on intent.⁴

8. In our view, the treatment in question by the authorities of the State party failed to take into account the authors' strong emotional attachment to the dignified memory of their relatives, to the injustice they had experienced and their prolonged anxiety due to the inability to ascertain the full truth about the individual fates of their relatives, and thus they displayed callousness and a lack of compassion towards the authors. By casting doubt on the events, by refusing to acknowledge their relatives as victims of the Katyn massacre and thus refusing to rehabilitate them, by refusing even to properly investigate the facts or locate the burial sites of the authors' relatives, the stance taken by the Russian authorities could certainly have caused the authors severe distress and constitute degrading treatment, regardless of intent, reaching the minimum threshold of a violation of article 7 as interpreted in the Committee's previous jurisprudence.⁵

9. All but one of the authors of this communication are the children of Polish prisoners of war. Even if they were too young or had not been born at the time their fathers were summarily executed, the close proximity of that relationship would have ensured that the pain of that loss was directly and keenly experienced. The authors would have grown up fatherless, with the memory of that tragedy likely felt at every event in their lives, whether special or mundane. Their close emotional attachment to their relatives is evident from all that they have done to honour their memory; equally, the savagery of the events in question, the trauma of the loss they experienced and the uncertainty as to the circumstances of their relatives' death has never abated. On the contrary, that suffering has been exacerbated by the treatment they received from the Russian authorities. It is for these reasons we would find a violation of article 7.

³ See *Sankara v. Burkina Faso*, para 12.2; and *Schedko v. Belarus*, para 10.2.

⁴ See the Committee's general comment No. 20, paras. 4 and 5.

⁵ See *Sankara v. Burkina Faso*, para 12.2.