

**KATYN: JUSTICE DELAYED OR JUSTICE DENIED?**

**REPORT OF THE CLEVELAND EXPERTS’ MEETING**

Organized by:

*Frederick K. Cox International Law Center*

*Case Western Reserve University School of Law*

*and*

*The Libra Institute, Inc.*

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## I. INTRODUCTION

The Katyn massacre of 1940 involved murders at the Katyn forest and in other locations throughout the Soviet Union of about 22,000 Polish officers, prisoners of war, and members of the Polish leading elite, combined with mass deportations of the victims' families and hundreds of thousands of Polish citizens to the remote provinces of the Soviet Union.<sup>1</sup> For fifty years, the massacres in the Katyn forest and other locations were subject to massive cover-up and obfuscation operations.<sup>2</sup> Initially the Soviet Union blamed the Nazis for the murders, saying that the killings took place in 1941 when the territory was in German hands. It was not until 1990 that

<sup>1</sup> See generally Beata Pasek, *Russia Opens Its Files on the Katyn Massacre*, TIME, Apr. 30, 2010.

<sup>2</sup> See *WWII Behind Closed Doors: Stalin, the Nazis and the West – The Katyn Massacre*, PBS <http://www.pbs.org/behindcloseddoors/in-depth/katyn-massacre.html> (last visited May 15, 2012).

the Russian government admitted that the executions actually took place in 1940 and were carried out by the Soviet secret police.<sup>3</sup> In 1990, Russian prosecutors launched a criminal investigation into the murder of 22,000 Polish officers and prisoners, but the case was classified as an ordinary crime of “exceeding official authority” and was terminated in 2004 on the ground of the application of the ten-year statute of limitations.<sup>4</sup> Records and findings were classified as top secret,<sup>5</sup> and it appeared that the tragedy would once again be subject to “historical amnesia.”

On February 4–5, 2011, in commemoration of the 70<sup>th</sup> anniversary of the Katyn massacre, the Frederick K. Cox International Law Center and the Libra Institute, Inc. hosted a Symposium and Experts Meeting at Case Western Reserve University School of Law. This provided an opportunity to bring together leading international experts in jurisprudence, international criminal law, and the Katyn crime, as well as representatives from Poland and Russia in order to debate the law and policy related to Katyn in a neutral setting. During four panel-style discussions on the first day, a diverse group of highly qualified scholars presented and discussed Polish, Russian, and third-party views on the Katyn murders. The second day of the meeting consisted of a round-table discussion with all the expert participants.

The Cleveland Symposium and Experts’ Meeting was chaired by Michael P. Scharf, Director of the Cox Center and the John Deaver Drisko—Baker & Hostetler Professor of Law at Case Western Reserve University School of Law. The event kicked off with introductory speeches by Hon. Dennis Kucinich, U.S. Representative (D, OH-10), and Hon. Marcy Kaptur, U.S. Representative (D, OH-9), and video-taped remarks presented by Sherrod Brown, U.S. Senator (D, Ohio). Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues presented a Keynote Address.

The experts included (in alphabetical order): Wesley Adamczyk, victims’ representative; Prof. John Q. Barrett, St. John University School of Law; Prof. Janusz Cisek, Centre for European Studies, Jagiellonian

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<sup>3</sup> *Id.*

<sup>4</sup> See *Russia Hands Over New Declassified Files to Poland*, RIA NOVOSTI (Apr. 7, 2011), <http://en.rian.ru/russia/20110407/163420319.html> (detailing the Katyn massacre body count and the findings from the Katyn massacre investigation); see also Maria Szonert, Letter to the Editor, *Countries’ Relations Strained, Bath Resident Says*, AKRON.COM (May 12, 2011), [http://www.akron.com/editions/Akron-Ohio-News-2011-May-12/Countries\\_relations\\_strained\\_Bath\\_resident\\_says.asp?aID=12431](http://www.akron.com/editions/Akron-Ohio-News-2011-May-12/Countries_relations_strained_Bath_resident_says.asp?aID=12431) (discussing the Russian courts’ classification of the Katyn massacre as “an ordinary domestic crime of ‘exceeding official authority’”).

<sup>5</sup> See Alexander Guryanov, *Działania Stowarzyszenia Memorial W Związku Ze Sprawą Katyńską [Memorial Association of Katyn]*, in 22 ZESZYTY KATYŃSKIE – ZBRODNIA KATYŃSKA W OCZACH WSPÓLCZESNYCH ROSJAN [KATYN NOTEBOOKS – THE KATYN MASSACRE IN THE EYES OF THE CONTEMPORARY RUSSIAN] 20 (Marka Tarczyńskiego ed., 2007), available at [http://www.ipn.gov.pl/ftp/katyn/ZESZYT22-Zbrodnia\\_katynska\\_w\\_oczach\\_wspolczesnych\\_rosjan.pdf](http://www.ipn.gov.pl/ftp/katyn/ZESZYT22-Zbrodnia_katynska_w_oczach_wspolczesnych_rosjan.pdf).

University; Hon. David Crane, Founding Chief Prosecutor at the Special Court for Sierra Leone; Allan Gerson, Chairman, AG International Law, PLLC and former Senior Counsel to U.S. Ambassadors to the U.N., Jeane Kirkpatrick and Vernon Walters; Alexander Guryanov, Ph.D, Polish Program Coordinator, Memorial Group, Moscow, Russia; Prof. Kenneth Ledford, Department of History, Case Western Reserve University; Dr. Teresa Kaczorowska, Polish journalist and author; Prof. Mark Kramer, Director of the Cold War Studies Project, Harvard University; Prof. William A. Schabas, Director, Irish Centre for Human Rights, Galway; Prof. Milena Sterio, Cleveland-Marshall College of Law, Cleveland State University; and Maria Szonert-Binienda, Esq., President, Libra Institute, Inc.

The goal of the Symposium and Experts Meeting was to explore options for accountability, disclosure, dissemination of knowledge, and reparations related to the Katyn crime. In accordance with the understanding of the participants, this report follows the “Chatham House Rule.” Therefore, the views of particular experts remain unidentified in the text. In some places, the discussion has been re-ordered to enhance organizational clarity. This Report does not seek to reflect a consensus or majority view of the participating experts, but rather to indicate expert opinions on a variety of issues and proposals relating to contemporary efforts to address the Katyn crime.<sup>6</sup>

## II. CHARACTERIZATION OF THE KATYN CRIME

Katyn is often described as a “massacre,” but the assembled experts did not believe “massacre” adequately characterized the Katyn crime. Some characterized Katyn as a particularly serious war crime, in violation of the 1907 Hague Regulations<sup>7</sup> and customary international law later codified in the 1949 Geneva Conventions.<sup>8</sup> Others believed it to be a crime against humanity<sup>9</sup> aimed at Polish civilians and the military. Several of the experts

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<sup>6</sup> This Report was prepared by Michael Scharf and Maria Szonert-Binienda, with the assistance of Cox Center Fellows Katlyn Kraus, Effy Folberg, and Michael Jacobson, as well as the editors of the Case Western Reserve Journal of International Law. Drafts were circulated to the participating experts for comment.

<sup>7</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, TS No. 539 (entered into force Jan. 26, 1910); *see, e.g.*, Janowiec and Others v. Russia, Judgment, App. Nos. 55508/07, 29520/09, ¶¶ 117–27 (Eur. Ct. H.R., 2012), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=29520/09&sessionid=96396662&skin=hudoc-enpdf>.

<sup>8</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

<sup>9</sup> Natalia Lebedeva, *Katyn: A Difficult Road to the Truth*, RIA NOVOSTI (Dec. 4, 2010), <http://en.rian.ru/analysis/20100412/158536574.html>.

felt that Katyn constituted an act of genocide<sup>10</sup> aimed at destroying the Polish national group. One expert argued that the most useful label was “genocidal terrorism.”<sup>11</sup> Whatever the label, all of the experts agreed that Katyn represents one of history’s most serious international crimes.

### III. ACCOUNTABILITY FOR THE KATYN CRIME

The day of accountability for the Katyn crime has not yet arrived. In 1952, the Special Committee of the U.S. House of Representatives that investigated the Katyn Forest Massacre (the Madden Committee) concluded that the Katyn crime represents a violation of the general principles of law recognized by civilized nations, and therefore it determined that the international community should hold the Soviet Union accountable for the atrocity.<sup>12</sup> In 1990, Russia finally admitted responsibility for the Katyn crime, and in that same year, the Russian government initiated a criminal investigation into the Katyn murders.<sup>13</sup> After fourteen years of investigating the mass murder of Polish citizens on the authority of the March 5, 1940 order of the Soviet Politburo, the Russian Courts discontinued their investigation in 2004 on the basis of the statute of limitations, classifying the murder of at least 21,768 Polish prisoners of war as an ordinary crime of “exceeding official authority.”<sup>14</sup> While the investigation was terminated on September 21, 2004, it was not until March 11, 2005 that this decision was announced publicly.<sup>15</sup> Together with the decision to terminate the investigation into the Katyn crime, the entire documentation from the fourteen year-old Russian investigation—comprising 183 volumes of documents—was classified as secret and withheld from the public together with the names of the defendants.<sup>16</sup> Although sixty-seven volumes were

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<sup>10</sup> Statement by the Delegation to the EU-Russia Parliamentary Cooperation Committee on the Smolensk Tragedy (May 11, 2012), <http://www.europarl.europa.eu/delegations/en/d-ru/publications.html>.

<sup>11</sup> See Israel W. Charny, *A Classification of Denials of the Holocaust and Other Genocides*, 5 J. GENOCIDE RES. 11, 13 (2010) (defining genocidal terror as “resistance to occupation or opposition to the encroachments of global capitalism” and comparing it to the 9/11 attacks that caused the death of thousands of U.S. citizens in New York City and Washington, D.C.).

<sup>12</sup> SELECT COMMITTEE ON THE KATYN FOREST MASSACRE, FINAL REPORT, H.R. REP. NO. 2505 (1952), available at [http://www.electronicmuseum.ca/Poland-WW2/katyn\\_memorial\\_wall/madden\\_committee/final\\_report/final\\_report\\_eng.html](http://www.electronicmuseum.ca/Poland-WW2/katyn_memorial_wall/madden_committee/final_report/final_report_eng.html).

<sup>13</sup> *Russia Hands Over New Declassified Files to Poland*, *supra* note 4.

<sup>14</sup> Guryanov, *supra* note 5, at 22–23.

<sup>15</sup> See Anna M. Cienciala, *The Katyn Syndrome*, 65 RUSS. REV. 117, 120 (2006) (outlining when the investigation unofficially ended as opposed to “officially” ended).

<sup>16</sup> See Inessa Jazhborovskaya, *The Katyn Case: Working to Learn the Truth*, 5 SOC. SCI. 34, 43 (2011) (discussing the volumes of documentation found during the Katyn massacre); see also Will Stewart, *Secret Documents Confirm Stalin Did Sanction Katyn Massacre...but*

declassified after three months, the remaining eighty volumes were classified “for official use only,” and thirty-six volumes were classified as secret.<sup>17</sup> In 2009, the Supreme Court of the Russian Federation upheld the decision to discontinue the Katyn case.<sup>18</sup> Thus, the Katyn families and the Polish people continue to wait in vain for justice to be rendered for one of the most horrific crimes of World War II.

If the Katyn massacre had occurred today, it would be subject to universal jurisdiction and a duty to prosecute under the “Grave Breaches” provision of the 1949 Geneva Conventions.<sup>19</sup> To the extent that this crime could be deemed an act of genocide, the 1948 Genocide Convention requires prosecution by the state in whose territory the crime occurred.<sup>20</sup> Since the territory in question was seized by the Soviet Union, whose obligations have devolved to Russia, this would mean that Russia would have a duty to prosecute under the Convention.<sup>21</sup> Currently, Russia is only a signatory to the Rome Statute establishing the International Criminal Court, but has not yet chosen to ratify it.<sup>22</sup> States that are party to the Statute of the International Criminal Court have an obligation to prosecute acts that constitute crimes against humanity under customary international law.<sup>23</sup>

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*Russia Still Won't Name Police Who Shot 22,000*, MAIL ONLINE (April 28, 2010), <http://www.dailymail.co.uk/news/article-1269550/Russia-releases-documents-signed-Stalin-ordering-Katyn-massacre.html> (revealing the details associated with the Katyn investigation from 1990–2004).

<sup>17</sup> Guryanov, *supra* note 5, at 22; *see also Janowiec and Others*, App. Nos. 55508/07, 29520/09, ¶¶ 35–45 (describing the details of the Katyn massacre investigation); *Russia Hands Over More Katyn Massacre Files to Poland*, RIA NOVOSTI (Sept. 23, 2011), <http://en.rian.ru/russia/20100923/160696772.html>; Linda Kelly & Denis Dyomkin, *Russia Makes Public Katyn Massacre Documents*, REUTERS (Apr. 28, 2010), <http://www.reuters.com/article/2010/04/28/us-russia-poland-katyn-idUSTRE63R2WR20100428> (discussing the 1990–2004 investigation and the 116 remaining confidential documents).

<sup>18</sup> *Janowiec and Others*, App. Nos. 55508/07, 29520/09, ¶ 58.

<sup>19</sup> *See Grave Breaches Specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977*, INT'L COMM. RED CROSS (Jan. 31, 1998), <http://www.icrc.org/eng/resources/documents/misc/57jp2a.htm> (presenting a useful summary of the grave breaches).

<sup>20</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

<sup>21</sup> *See generally* Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995).

<sup>22</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf); *The States Parties to the Rome Statute*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menu/ASP/states+parties/> (last visited May 15, 2012) (listing the parties that signed onto the agreement as well as which countries only agreed to ratify the agreement).

<sup>23</sup> *See* Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 MAX PLANCK Y.B. U.N. L. 553, 568, 574

Under the Vienna Convention on the Law of Treaties, states that have signed a treaty but not yet ratified it have a duty not to defeat the treaty's object and purpose, which suggests that a general duty to prosecute crimes against humanity may be applicable to Russia.<sup>24</sup>

What complicates accountability for the Katyn crime is that it pre-dated the modern international criminal law instruments mentioned above. However, as the crime occurred during World War II, Katyn represents the same type of offense as the atrocities adjudicated by the Nuremberg Tribunal. While recognizing that the ICC could not exercise jurisdiction over acts committed prior to 2002, several of the participating experts argued that if retroactivity did not bar the prosecution of Nazi criminals before the Nuremberg Tribunal, it would likewise not bar the prosecution of Soviet criminals in other venues for the acts committed during the same time and while acting in alliance with Nazi Germany.

#### IV. RECONCILIATION THROUGH DISCLOSURE, DISSEMINATION & ACCOUNTABILITY

Several of the conference participants said that a profound sense of injustice over Russia's continuing evasion of accountability pervades the psyche of the families of the Katyn victims and the entire Polish Nation. Their long history of double victimization—first by the horror of what happened to the Polish people and then by the overwhelming sense of helplessness and humiliation by not being able to see justice done—renders reconciliation difficult today. Several of the experts felt that any meaningful reconciliation must be based on atonement, contrition, accountability, remembrance and deterrence. They stated that the deep sense of injustice that undermines contemporary Polish-Russian relations must be addressed for the sake of international peace.

##### A. *USSR/Russian Federation*

It remains to be seen whether Katyn will be a case of justice delayed or justice permanently denied. The experts agreed that justice requires a full accounting of the truth, something that to date has not yet been generated for the Katyn crime. “[M]eaningful justice begins by demanding truth,” claimed one expert. A truthful account is “above and beyond anything else that the families and victims want,” stressed another.

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(2003) (reviewing the prosecution obligations of parties that have signed on to the International Criminal Court).

<sup>24</sup> Vienna Convention on the Law of Treaties art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331 (expressing that, upon signing a treaty, a nation is “obliged to refrain from acts which would defeat the object and purpose” of the treaty “until it shall have made its intention clear not to become a party to the treaty”).

An important question is what is missing from obtaining a truthful account of Katyn?

Although Russia claims that it has taken great strides to overcome its former obstruction of justice, Russia still refuses to hand over relevant documents to Poland.<sup>25</sup> Out of the 183 volumes of documents from the Russian investigation into the Katyn crime, sixty-seven volumes are declassified, eighty volumes are marked “for official use only” and thirty-six volumes are classified as secret or top secret.<sup>26</sup> In the aftermath of the April 10, 2010 Smolensk Crash,<sup>27</sup> Russia promised to hand over to Poland classified documents from the Katyn investigation. However, as of June 2012, only 148 out of 183 volumes from the Russian investigation into the Katyn crime were made available to Poland. The remaining thirty-six volumes classified as secret or top secret have not been released, nor has the final justification for the discontinuance of the Russian investigation into the Katyn crime.<sup>28</sup> Until Russia hands over to Poland all relevant documents—which provide operational details, a complete list of perpetrators, and a history of prior investigations—the truth of Katyn will remain incomplete.

Several of the conference participants expressed the view that a truthful account would help address the profound sense of injustice that is deeply ingrained in the Polish psyche. In this regard, one participant pointed out the dichotomy between the relationships between Polish citizens with Germany as compared to the Polish relationship with Russia. Today, thousands of Polish citizens go freely into Germany and feel no bitterness. However, the expert said that the same is not true of Poles traveling to Russia. According to one expert, German youth learn about their country’s past, including the atrocities committed during the Second World War, whereas most Russian history textbooks fail to mention Katyn.

Under the early Yeltsin government, a great deal of cooperation produced a large amount of information about Katyn.<sup>29</sup> On October 14,

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<sup>25</sup> Luke Harding, *Russia Posts Katyn Massacre Documents Online*, GUARDIAN (Apr. 28, 2010), <http://www.guardian.co.uk/world/2010/apr/28/katyn-massacre-russia-documents-web> (alleging that some critics report that Russia refused to hand over some documents that detailed which NKVD officers carried out the Katyn killings).

<sup>26</sup> Guryanov, *supra* note 5, at 23.

<sup>27</sup> On April 10, 2010, while en route from Warsaw to attend an event commemorating the 70<sup>th</sup> anniversary of the Katyn massacre, a Polish Air Force aircraft crashed near the Russian city of Smolensk, killing all ninety-six people on board, including the Polish President Lech Kaczyński. *E.g.*, Ellen Barry, *Polish President Dies in Jet Crash in Russia*, N.Y. TIMES, Apr. 11, 2010, at A1.

<sup>28</sup> *Janowiec and Others*, App. Nos. 55508/07, 29520/09, ¶ 42.

<sup>29</sup> KATYN: A CRIME WITHOUT PUNISHMENT 256–57 (Anna M. Cienciala, Natalia S. Lebedeva & Wojciech Materski eds., Marian Schwartz, Anna M. Cienciala & Maia A. Kipp trans., 2007).



1992 Chief Russian Archivist Pikhov—on behalf of President Boris Yeltsin—turned over to the Polish government documents that even Mikhail Gorbachev—who presided over the first explicit condemnation of Katyn as a crime of Stalinism—was unwilling to release.<sup>30</sup> The documents included the key execution order of the Politburo from March 5, 1940 together with other secret Katyn documents from the special Soviet archives.<sup>31</sup> One expert explained that these materials were released, in part, because of Alexander N. Yakovlev and in part because of public pressure from the NGO known as Memorial Group.<sup>32</sup>

One expert stated that “[t]here were many documents that unmistakably establish Soviet culpability.” Another said that it is clear that every Soviet leader knew the identities of the culprits of Katyn and documents attesting to that were released in October of 1992. The expert added that to the extent motive can be traced from the available documentation, the evidence points to the targeting of a specific social and political class of Polish citizens. Another expert stressed a fear, however, that since the April 10, 2010 plane crash, there has been “quite [an] ugly reversionary” attitude to Soviet stultifications about Katyn.

Several experts mentioned that a knowledge gap still exists regarding the identity of the perpetrators of the Katyn massacre. Among the released documents is the top secret order No: 001365, issued on October 26, 1940 by Chief of NKVD Beria, which contained the list of 125 people who were given monetary bonuses for “the successful implementation of special tasks.” The experts inferred that those listed were among the perpetrators. But it can be assumed that the bonuses were awarded only for direct executioners of about 15,000 Polish POWs and for several lower-ranking employees participating in the preparation of the criminal action.<sup>33</sup> It was conceded that this list includes only a fraction of the perpetrators because it would have taken many more men to kill 22,000 individuals. Documentary information about executioners of more than 7,000 Polish citizens arrested on the conquered Polish territory and

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<sup>30</sup> *Id.* at 256.

<sup>31</sup> *Id.*

<sup>32</sup> Alexander N. Yakovlev known as the godfather of Russian glasnost was the intellectual force behind Gorbachev’s reforms and the first Russian politician to acknowledge the existence of secret protocols to the Ribbentrop-Molotov Pact. The “Memorial Society” is a human rights organization established in Russia in the years of perestroika. Its main task was the awakening and preservation of the societal memory of the severe political persecution in the recent past of the Soviet Union. See Carol J. Williams, *Alexander N. Yakovlev: Russia’s Would-be Kingmaker*, L.A. TIMES, May 23, 1995, available at [http://articles.latimes.com/1995-05-23/news/wr-5174\\_1\\_political-force](http://articles.latimes.com/1995-05-23/news/wr-5174_1_political-force).

<sup>33</sup> The list included the women-typists of the central apparatus of the NKVD, who typed the lists of Polish POWs to be shot.

murdered pursuant to the March 5, 1940 Execution Order has never been made public.<sup>34</sup>

One expert believed the names of perpetrators would be available through the state security archive in Russia (formally the NKVD), which is off limits. Further, some of the names of the perpetrators were presumably gathered in the 1990–2004 Russian criminal investigation but have yet to be released.

Several of the experts wanted to find out why, in 2004, the Putin government not only abandoned what the early Yeltsin government was doing, but in the words of one expert, “covered it up.” An expert described this change as “disheartening” and “repugnant” and could only hope the evidence produced by the Russian investigation into the Katyn crime will be eventually released in its entirety. Thirty-five classified files have yet to be provided to the Polish government or released to the public.

The identity of the perpetrators is important, one expert said, because it gives a face to the people who did the horrible acts, much like author Christopher Browning attempted to do in his classic work.<sup>35</sup> Another expert suggested looking beyond documents inside Russia to documents that might be available through the U.N. The expert said that during World War II, the Allies kept complete lists of potential perpetrators so they could sift through the list later and prosecute offenders. The names of the Katyn perpetrators may be contained in these lists.

Along with the names of the perpetrators, the list of the names of the victims is still incomplete. One expert expressed the belief that all the missing names of the victims could be found in the “Belarus Russian List,” which has yet to be released.<sup>36</sup> However, another expert commented that this particular list has not yet been located, and that it may no longer exist.

#### *B. The United States*

One expert observed that when the administration of President Franklin Delano Roosevelt suppressed the evidence of the Soviet guilt in the Katyn massacre<sup>37</sup> and the Nuremberg Tribunal assigned the Soviet Union to

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<sup>34</sup> Nikita Pietrow, *Kto zabijał Polaków strzałem w tył głowy* [Who Killed the Poles who were Shot in the back of the Head], in 24 ZESZYTY KATYŃSKIE – ZBRODNIA KATYŃSKA: NARÓD, PAŃSTWO, RODZINA [KATYN NOTEBOOKS – KATYN MASSACRE: NATION COUNTRY, FAMILY] 176, 176–202 (Marka Tarczyńskiego ed., 2009), available at [http://ipn.gov.pl/portal/pl/749/12442/Zeszyty\\_katynskie.html](http://ipn.gov.pl/portal/pl/749/12442/Zeszyty_katynskie.html).

<sup>35</sup> See generally CHRISTOPHER BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND (1993).

<sup>36</sup> *Katyn Killings Commemorated Without a Belarusian Delegation*, BELR. DIG. (Apr. 8, 2010), <http://belarusdigest.com/2010/04/07/2864katyn-killings-commemorated-without-a-belarusian-delegation>.

<sup>37</sup> See H.R. Rep. No. 2505.

prosecute crimes committed against the Polish people, the Katyn families fell victim to the crime of “memoricide,” understood as an international cover-up intended to destroy the memory of the crime and the memory of the victims. According to the expert, this was compounded when, in 1952, the U.S. Congress failed to take any action to implement the recommendation of its own Select Committee on the Katyn Forest Massacre to form an international tribunal on the Katyn atrocities.<sup>38</sup>

On April 13, 1990, Mikhail Gorbachev officially admitted that the Soviet NKVD committed the Katyn crime.<sup>39</sup> As the full scope and extent of the Soviet crime began to emerge, Franciszek Herzog wrote to the U.S. President:

Mr. President, as a U.S. citizen and a son of the Polish officer, Lt. Col. Franciszek Herzog, murdered in Katyn I beg you and implore you to look at the facts again. And then, in the name of the U.S. Government, please apologize to the Polish people, and especially to the families of the victims, for sheltering the criminals for over half a century. It will not resurrect the men, but will give moral satisfaction to the widows and orphans of the victims. It will also gain you respect and undying gratitude of the Polish Nation.<sup>40</sup>

After many more letters in 1992, the U.S. State Department replied that “changes in Eastern Europe and the former Soviet Union that have occurred in the past three years have made it possible to uncover the truth” and that “in 1990 the Russians officially apologized to Poland for this atrocity.”<sup>41</sup> Herzog replied:

Unfortunately, [your letter] does not answer my question . . . . Changes that occurred in Eastern Europe and the former Soviet Union uncovered not the truth, as this was known since 1943 to all people of good will, but the places of massacres of POWs from Starobielsk and Ostaszkow camp. . . . I hope that one day U.S. Government will officially declare who was guilty of this horrendous crime against the Polish Nation and humanity.<sup>42</sup>

Echoing the sentiments addressed in the Herzog letters, several of the experts felt that the U.S. Government shares some responsibility for contributing to the double-victimization of the Polish people and for preservation of a distorted historic account.

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<sup>38</sup> *Id.*

<sup>39</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 29, at 252.

<sup>40</sup> Letter from Franciszek Herzog to Bill Clinton, President of the United States (Dec. 26, 1991) (on file with author).

<sup>41</sup> Letter from Thomas Gerth, Deputy Dir. of the Office of E. Eur. Affairs, U.S. Dep’t of State, to Franciszek Herzog (Aug. 12, 1992) (on file with author).

<sup>42</sup> Letter from Franciszek Herzog, to Thomas Gerth, Deputy Dir. Office E. Eur. Affairs, U.S. Dep’t of State (Sept. 1, 1992) (on file with author).

The Katyn case, including both the mass murder and international lie to cover it up, remains to this day an effective template for unscrupulous leaders to commit mass murders with impunity. The Katyn tactic was implemented in the Korean War, as the Special Committee of the U.S. House of Representatives noted in its Final Report of 1952,<sup>43</sup> and it has been used effectively in modern times, as noted by Congressman Kucinich.<sup>44</sup> Due to the “conspiracy of silence” of over half a century, the moral calculus with respect to the Katyn crime has never been worked out to the satisfaction of the victims and as required by the standards of the civilized world.

## V. REMEDIES AT THE GOVERNMENTAL LEVEL

### A. *Poland*

#### 1. Prosecution for the Katyn Crime

For half a century after the Katyn crime, Poland had been a satellite state of the Soviet Union.<sup>45</sup> As a result, the Polish government was not in the position to pursue any independent investigation into the Katyn crime or any compensation claims against the Soviet Union. The tragic crash of the Polish Presidential Plane on its way to Katyn for the commemoration of the 70<sup>th</sup> anniversary of the Katyn massacre in Smolensk greatly complicated the position of the Government of Poland with respect to the Katyn crime.<sup>46</sup> However, regardless of the political considerations, Katyn should be prosecuted as a serious international crime as a matter of international law. Thus, several experts opined that the Republic of Poland has a viable claim against the Russian Federation, the successor to the Soviet Union,<sup>47</sup> for its failure to prosecute the Katyn crime.

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<sup>43</sup> H.R. REP. NO. 2505.

<sup>44</sup> Dennis Kucinich, U.S. Rep., Speech at the Case Western Reserve University Symposium: Katyn: Justice Delayed or Justice Denied? (Feb. 4, 2011), *available at* <http://www.youtube.com/watch?v=oq-WZ17kiEM>.

<sup>45</sup> *Poland: From Satellite State to ‘Tiger of Europe,’* CNN (May 30, 2009), [http://articles.cnn.com/2009-05-30/world/poland.profile\\_1\\_leszek-balcerowicz-modern-poland-solidarity?\\_s=PM:WORLD](http://articles.cnn.com/2009-05-30/world/poland.profile_1_leszek-balcerowicz-modern-poland-solidarity?_s=PM:WORLD).

<sup>46</sup> See RONALD TIERSKY & JOHN VAN OUDENAREN, EUROPEAN FOREIGN POLICIES: DOES EUROPE STILL MATTER? 270 (2010) (“The tragic irony of the time and place of the crash escaped no one in Poland.”).

<sup>47</sup> See generally Scharf, *supra* note 21 (discussing the U.N.’s approach to Russia, Yugoslavia, and Czechoslovakia following the demise of the Soviet Union).

2. Regional Forums
  - a. The European Union

Although the Russian Federation is not a member of the EU, the EU-Russian Partnership and Cooperation Agreement provides for a political, organizational and legal framework to carry out dialog and cooperation between the two neighboring entities.<sup>48</sup> As a member of the EU, Poland is represented by the Delegation of the EU to Russia (EU Delegation).<sup>49</sup> As such, one expert recommended that the EU Delegation should take into consideration the negative impact of the Katyn matter on justice, liberty and security of Poland and the entire region in its relations with Russia.

The role of the EU Delegation includes that of considering political events, developments and trends within Russia which may have a bearing on the strategic partnership between the EU and the Russian Federation, while at the same time advising on how best to support that partnership at the political level.<sup>50</sup> Thus, the obstruction of justice and inability of the Russian Federation to meet its obligations under customary international law and treaties with respect to the Katyn crime should be brought to the attention of the Russian Federation by the EU Delegation, which monitors political life throughout Russia, the practice of democracy and human rights in this country, and Russian policies and their implementation in the area of justice, liberty and security.

The expert concluded that Polish-Russian reconciliation based on full disclosure with respect to the Katyn crime, broad dissemination of knowledge about the Katyn crime, and good faith contrition in the form of compensation to the Katyn families and to the Polish State should become the foundation of the future EU-Russian Framework Agreement.

- b. Council of Europe

The Council of Europe, which is based in Strasbourg, France, was established to protect human rights and the rule of law pursuant to the European Convention on Human Rights by which the member states of the

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<sup>48</sup> EUROPEAN COMMISSION, THE EUROPEAN UNION AND RUSSIA: CLOSE NEIGHBOURS, GLOBAL PLAYERS, STRATEGIC PARTNERS 4–5 (2007), available at [http://eeas.europa.eu/russia/docs/russia\\_brochure07\\_en.pdf](http://eeas.europa.eu/russia/docs/russia_brochure07_en.pdf).

<sup>49</sup> See *Political Relations*, DELEGATION EU TO RUSS., [http://eeas.europa.eu/delegations/russia/eu\\_russia/political\\_relations/index\\_en.htm](http://eeas.europa.eu/delegations/russia/eu_russia/political_relations/index_en.htm) (last visited May 15, 2012).

<sup>50</sup> *Id.*

Council of Europe undertake to respect fundamental freedoms and rights.<sup>51</sup> Both Poland and Russia are members of the Council of Europe.<sup>52</sup> As the judicial organ established by the European Convention on Human Rights, the European Court of Human Rights ensures, in the last instance, that contracting states observe their obligations under the European Convention on Human Rights.<sup>53</sup>

On July 15, 2011 the European Court of Human Rights declared as admissible two complaints concerning inadequate Russian investigation into the Katyn massacre conducted in the 1990s into the deaths of twelve Polish officers in the former Soviet Union.<sup>54</sup> As these complaints were brought by Polish citizens, the Government of the Republic of Poland has the right to join the case of *Janowiec and Others v. Russia* as co-petitioner.

### 3. United Nations

#### a. International Court of Justice

Some of the experts believed that the Katyn crime must be viewed in the context of the Soviet occupation of Eastern Poland during the period between September 1939 and June 1941, when the Soviet Union acted in alliance with Nazi Germany pursuant to the Ribbentrop-Molotov Pact of August 23, 1939.<sup>55</sup> This approach, they pointed out, could potentially give the Republic of Poland a cause of action before the International Court of Justice under the compromisory clause of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which both Poland and Russia are signatories.<sup>56</sup> Pursuant to Article 9 of the 1948 Genocide

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<sup>51</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222, C.E.T.S. No. 5 (entered into force Sept. 3, 1953).

<sup>52</sup> See *Council of Europe in Brief*, COUNCIL EUR., <http://www.coe.int/aboutcoe/index.asp?page=47pays1europe> (last visited May 15, 2012).

<sup>53</sup> JEAN-FRANÇOIS AKANDJI-KOMBE, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007), *available at* <http://echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf>.

<sup>54</sup> Press Release, Registrar of the Court, Two Complaints Concerning Inadequate Investigation into Katyń Massacre Declared Admissible by European Court (July 15, 2011), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=888268&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

<sup>55</sup> Treaty of Nonaggression Between Germany and the Union of Soviet Socialist, U.S.S.R.-Ger., Aug. 23, 1939, *available at* [http://avalon.law.yale.edu/20th\\_century/nonagres.asp](http://avalon.law.yale.edu/20th_century/nonagres.asp) [hereinafter Molotov-Ribbentrop Pact].

<sup>56</sup> Article IX of the Genocide Convention provides that:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III,

Convention, disputes between the Contracting Parties relating to the interpretation or implementation of the Convention are to be submitted to the International Court of Justice at the request of any of the parties to the dispute.<sup>57</sup> The difficulty is that the Katyn crime pre-dated the adoption of the Genocide Convention, and ex-post application of the Convention could be problematic in light of the Vienna Convention on the Law of Treaties.<sup>58</sup>

In this context it is important to note, however, that the preamble to the Genocide Convention states that in “all periods of history genocide has inflicted great losses on humanity . . . .”<sup>59</sup> One expert said that this indicates that the drafters of the Genocide Convention understood that they were codifying existing law rather than creating new law. It has been recognized that the preamble to a treaty is deemed to be part of its context for purposes of the interpretation of the treaty.<sup>60</sup>

Furthermore, the International Court of Justice in its advisory opinion on the Genocide Convention issued in 1951 stated that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States even without any conventional obligation.”<sup>61</sup> General Assembly Resolution 96(I), dated December 1946, which authorized the preparation of the Genocide Convention, stated that many instances of the crime of genocide have occurred in the past.<sup>62</sup> In the course of deliberations, it was noted that genocide was not a new crime but had been committed on a vast scale during the last World War.<sup>63</sup>

Resolution 96(I) was taken as authority for the existence of the crime of genocide prior to the adoption of the Genocide Convention by several countries.<sup>64</sup> For example, the U.S. Military Tribunal in the *Altstötter* case spoke of “the crime of genocide committed during the Second World War.”<sup>65</sup> Also, the Tribunal directly addressed the retroactivity issue as

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shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Genocide Convention, *supra* note 20, art. 9.

<sup>57</sup> *Id.*

<sup>58</sup> Vienna Convention on the Law of Treaties, *supra* note 24, art. 28.

<sup>59</sup> Genocide Convention, *supra* note 20, at pmbl.

<sup>60</sup> Vienna Convention on the Law of Treaties, *supra* note 24, art. 31(2).

<sup>61</sup> Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 19 (May 28).

<sup>62</sup> See The Crime of Genocide, G.A. Res. 96 (I), U.N. Doc. A/RES/96(I) (Dec. 14, 1946).

<sup>63</sup> Genocide Convention, *supra* note 20, at pmbl.

<sup>64</sup> WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 47 (2000) (“Resolution 96(I) imposes obligations and creates international law with respect to prevention and punishment of genocide.”).

<sup>65</sup> United States v. Altstötter et al. (The Justice Case), in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1, 963 (1948).

follows: “[W]e find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.”<sup>66</sup> The Tribunal convicted Ernst Lautz for enforcing the law against Poles and Jews, which comprised “the established governmental plan for the extermination of these races. He was an accessory to, and took a consenting part in, the crime of genocide.”<sup>67</sup> Convictions for genocide with respect to crimes committed during World War II were also handed down based on international law by the courts in Poland in 1946 and 1947 and in Israel in 1961.<sup>68</sup> All these prosecutions by national courts were conducted pursuant to legislation enacted to give effect to international law and to states’ obligations under the Genocide Convention. Convictions that were handed down under these laws spoke of the crimes of genocide committed during World War II. Accordingly, one expert said they stand as direct proof of the applicability of the Genocide Convention to the crimes committed during World War II.

Nevertheless, under the Vienna Convention on the Law of Treaties, a treaty like the Genocide Convention, which creates procedural rights, does not normally apply to acts pre-dating its ratification.<sup>69</sup> One expert opined that this obstacle could be circumvented by demonstrating that the destruction of evidence and international cover-up operations through suppression of information, intimidation and undue political pressure constitute a continuing part of the genocidal crime. In 1959 the USSR State Security Committee of the Council of Ministers ordered the destruction of 21,857 files of Polish citizens shot in the operation carried out pursuant to March 5, 1940 Execution Order.<sup>70</sup> In June of 1956, Colonel Tichonov from the Ukrainian KGB ordered the destruction by burning of 2,500 evidentiary

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<sup>66</sup> *Id.* at 983.

<sup>67</sup> *Id.* at 1128.

<sup>68</sup> *See, e.g., War Crimes Trials*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005140> (last updated May 11, 2012).

Poland, the former Czechoslovakia, the Soviet Union, Hungary, Romania, and France, among others, have tried thousands of defendants -- both Germans and indigenous collaborators, in the decades since 1945. . . . One of the most famous national trials of German perpetrators was held in Jerusalem: the trial of Adolf Eichmann, chief architect in the deportation of European Jews, before an Israeli court in 1961 captured worldwide attention and is thought to have interested a new postwar generation in the crimes of the Holocaust.

*Id.*

<sup>69</sup> Vienna Convention on the Law of Treaties, *supra* note 24, art. 4. (“[T]he Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.”).

<sup>70</sup> Note by Shelepin to Khrushchev on the Destruction of Documents of the Operation Sanctioned by the Politburo on March 5, 1940 (Mar. 3, 1959), *in* KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 29, at 332.



cards of Polish citizens executed by shooting in 1940 in the Ukrainian SSR.<sup>71</sup> In June of 1969, General P. Fieszczenko reported on the decision to liquidate mass graves of the Polish victims in the Piatichatki forest near Kharkov by using chemicals.<sup>72</sup> This operation was to be conducted under the pretense of building a special educational facility for the Ukrainian KGB.<sup>73</sup> Accordingly, the remains of the 3,739 Polish officers held in the Starobelsk camp, murdered in Kharkov and buried in the Piatichatki forest were treated with caustic soda and ground by heavy equipment machinery.<sup>74</sup> Between 1973 and 1976, the Soviet Politburo was directly involved in blocking the erection of the Katyn Monument in Great Britain by issuing a resolution and instruction for the Soviet Ambassador in London regarding the projected Katyn Monument and adopting a special protocol to “Counteract Western Propaganda on the Katyn Question.”<sup>75</sup> Accordingly destruction of evidence in the Katyn crime and international cover up operations were conducted well after the ratification of the Genocide Convention by the Soviet Union on May 3, 1954.

b. Establishment of a Commission of Experts or Special Tribunal

Using its authority under Chapter VII of the U.N. Charter, the U.N. Security Council could establish a Commission of Experts or Special Tribunal to document or prosecute the Katyn crime, as it did for atrocities in the former Yugoslavia, Rwanda, and Lebanon. But with Russia wielding a veto in the Council, the experts felt that action requiring a vote of the Security Council would not be worth pursuing. While there is no precedent for such action, one expert said it is theoretically possible that the General Assembly could utilize its “Uniting for Peace” authority to set up a commission or tribunal without Security Council approval.<sup>76</sup> Moreover, the

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<sup>71</sup> Documents on the Katyń Crime made available to the Polish Institute of National Remembrance by the Security Services of Ukraine, in *ZBRODZIA KATYŃSKA W KRĘGU PRAWDY I KŁANSTWA* [THE KATYN MASSACRE: IN THE CIRCLE OF TRUTH AND LIES] 228 (Sławomir Kalbarczyk ed., 2010).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 235.

<sup>74</sup> See generally WESLEY ADAMCZYK, *WHEN GOD LOOKED ANOTHER WAY: AN ODYSSEY OF WAR, EXILE, AND REDEMPTION* (2d ed. 2006); TERESA KACZOROWSKA, *CHILDREN OF THE KATYŃ MASSACRE: ACCOUNTS OF LIFE AFTER THE 1940 SOVIET MURDER OF POLISH POWS* (2006).

<sup>75</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 29, at 334–37.

<sup>76</sup> See Uniting for Peace Resolution, G.A. Res. 377(V)(A), ¶ 1, U.N. Doc. A/RES/377(V) (Nov. 3, 1950).

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the

Special Court for Sierra Leone and the Cambodia Tribunal were established by an agreement between the host country and the U.N., rather than a Security Council Chapter VII resolution.<sup>77</sup> But without Security Council involvement, cooperation with such an institution would be voluntary rather than mandatory.

#### 4. Dissemination of Truth

Actions that aim at minimizing and justifying the Katyn crime or efforts to misinform or suppress information on the Katyn-related matters are counterproductive to reconciliation. As the Madden Committee concluded and Rep. Kucinich reiterated almost sixty years later, the Katyn crime represents a pattern of committing serious international crimes with impunity. In order to prevent such crimes from reoccurring and achieve reconciliation, the experts agreed that it is important to mobilize the international community to condemn this crime and assure wide dissemination of knowledge on the scope and character of the Katyn crime, its method, the cover-up, and its consequences. Such effort should be undertaken by Poland, in cooperation with Russia and the Western democracies.

#### B. *USSR/Russian Federation*

The lingering mistrust and resentment created by Katyn—further aggravated by the tragedy of the April 10<sup>th</sup> plane crash at Smolensk—may be remedied by other means than prosecution under international law. One expert noted that many Poles feel a sense of loss in that their family members could never truly “go home” because of Soviet efforts to cover up the massacre by disposing of all physical remains. Several experts agreed that peace and security could only be achieved by overcoming the feeling of hopelessness and despair that Katyn inflicted on the Polish people.

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matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

*Id.*

<sup>77</sup> Sarah M.H. Nouwen, *‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts*, 2 *UTRECHT L. REV.* 190, 199 (2006) (“The Extraordinary Chambers and the Special Court are clearly products of negotiations between the U.N. and the State concerned. . .”).

1. Prosecute the Katyn crime as an international crime

The current legal position of the Russian Federation with respect to the Katyn crime is as follows: (1) the Katyn crime is qualified as an ordinary crime of exceeding official authority that occurred a long time ago, and thus is barred by a ten-year statute of limitations; (2) the Katyn investigation is terminated; (3) materials from the Katyn investigation, including the resolution on its termination, are classified as top secret; (4) the perpetrators of the crime are not identified; (5) out of the total number of 21,857 victims murdered as confirmed by the Soviet report dated March 3, 1959,<sup>78</sup> the Russian Main Military Prosecutor's Office established the personal data of only twenty-two victims, refusing, however, reparation for even these persons.<sup>79</sup> Accordingly, the Russian courts treat all the victims as unidentified and unanimous. A number of Russian courts have consistently held that the Katyn victims were not eligible for rehabilitation as victims of Stalinist repression.<sup>80</sup>

The classification of the Katyn crime as an ordinary crime subject to a ten-year statute of limitations violates international law (as codified in U.N. Resolutions stipulating that statutes of limitations shall not bar the prosecution of war crimes and crimes against humanity),<sup>81</sup> and it stands in

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<sup>78</sup> Letter from Aleksandr Shelepin, Chairman of the KGB, to Nikita Khrushchev (Mar. 3, 1959), in *THE STRUCTURE OF SOVIET HISTORY: ESSAYS AND DOCUMENTS* 306 (Ronald Grigor Suny ed., 2002).

<sup>79</sup> The Russian Main Military Prosecutor's Office argues that the establishment of personal data is not synonymous with the legal identification of the victims. See *Memorial on Katyn*, HRO.ORG (May 3, 2010), [hro.rightsinrussia.info/archive/stalin/memorial-on-katyn](http://hro.rightsinrussia.info/archive/stalin/memorial-on-katyn).

To this day, the Main Military Prosecutor's Office refuses to enforce the current Russian law on rehabilitation of victims of political repression, arguing, in the face of the evidence, that the political motive, and even the very fact of the shooting, in relation to each individual prisoner of war, cannot be ascertained.

*Id.*

<sup>80</sup> Aleksander Gurjanow, *Sprawa katyńska w sądach rosyjskich 2007–2009* [*Katyn Case in Russian Courts 2007–2009*], in 24 *ZESZYTY KATYŃSKIE – ZBRODZIA KATYŃSKA: NARÓD, PAŃSTWO, RODZINA* [KATYN NOTEBOOKS – KATYN MASSACRE: NATION COUNTRY, FAMILY] 100 (Marka Tarczyńskiego ed., 2009), available at [http://ipn.gov.pl/portal/pl/749/12442/Zeszyty\\_katynskie.html](http://ipn.gov.pl/portal/pl/749/12442/Zeszyty_katynskie.html); Alexander Guryanov, Chief of the Polish Program of the Memorial Society, Speech at the Case Western Reserve University Symposium: Katyn: Justice Delayed or Justice Denied? (Feb. 4, 2011). The families of the Katyn victims are not entitled to any compensation under the Russian Rehabilitation Act of 18 October 1991 for victims of political repressions. See *Memorial on Katyn*, *supra* note 79.

<sup>81</sup> See, e.g., Declaration on Territorial Asylum, G.A. Res. 2312, U.N. Doc. A/6716 (1967) (“[S]tates shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a war crime or crime against humanity”); United Nations Resolution on War Criminals, G.A. Res. 2712, U.N. Doc. A/8028 (1970), reprinted in M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 698 (1992). This Resolution was adopted by a vote of 55 to 4, with 33 abstentions and it con-

direct contradiction to Russia's official statements including the resolution of the Duma, dated November 26, 2010 on the tragedy of Katyn and its victims.<sup>82</sup> According to this resolution adopted by the Lower House of the Russian Parliament, the Katyn crime represents mass extermination of thousands of Polish citizens held in the Soviet prisoner-of-war camps and prisons, and it thus constitutes an act of terrorism of the totalitarian state. This resolution places direct responsibility for the Katyn crime on Stalin and the Soviet leadership.<sup>83</sup>

Accordingly, the experts generally agreed that the Russian Federation has not fulfilled its international obligation to adequately investigate and adjudicate the execution of at least 21,857 Polish citizens in the Soviet custody that took place in the spring of 1940 and was accompanied by mass deportations of the victim's families from the Soviet-occupied Polish territory to the wilderness of the remote provinces of the Soviet Union.

## 2. Refrain from justifying the Katyn crime

In 1990, Mikhail Gorbachev officially admitted that the Soviet Union committed the Katyn murders. He also issued an instruction dated November 3, 1990, whereby he ordered a wide "investigative [search] to reveal archival materials relating to the events and facts in the history of bilateral Soviet-Polish relations which, resulted in losses to the Soviet side."<sup>84</sup> This decree became the cornerstone of the Russian policy of justifying and minimizing the Katyn crime. The so-called "anti-Katyn" strategy has been effectively promoted in Russia since the admission of Soviet responsibility for the Katyn crime.<sup>85</sup>

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demned war crimes and crimes against humanity and "call[ed] upon the states concerned to bring to trial persons guilty of such crimes." *Id.*; G.A. Res. 2840 (XXVI), U.N. Doc. A/8429 (1971) (adopted by a vote of 71 to none with 42 abstentions) (affirming that a state's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of war crimes or crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law"); United Nations Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, U.N. Doc. A/9030 (1973), reprinted in BASSIOUNI, *supra*, at 701 (adopted by a vote of 94 to none with 29 abstentions) (expressing that war crimes and crimes against humanity "shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trials and, if found guilty, to punishment").

<sup>82</sup> See Chayko I., *Russian MP's Statement Condemns Stalin's Crimes*, VOICE OF RUSSIA (Nov. 26, 2010), <http://english.ruvr.ru/2010/11/26/35728923.html>.

<sup>83</sup> *Id.* (discussing the Duma's admission of Stalin's responsibility for the Katyn crimes).

<sup>84</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 29, at 345–46 (reprinting a decree issued by President Mikhail Gorbachev on speeding up the investigation of Polish POWs).

<sup>85</sup> GEORGE SANFORD, KATYN – THE WHOLE TRUTH SOVIET MASSACRE 8 (2005).

On May 22, 1995, President Yeltsin warned President Wałęsa that demanding apology, seeking trials or raising compensation claims against Russia would be counterproductive.<sup>86</sup> Yeltsin pointed out that in the Katyn forest there are mass graves of people of other nationalities including at least five-hundred Soviet POWs murdered by the Nazis.<sup>87</sup>

Participating experts explained how this “anti-Katyn” strategy led to Russia’s aggressive research, investigation and information campaign on the mistreatment of the Soviet prisoners of war by Poland in the 1920 Soviet-Polish war. The efforts to water down the Katyn crime also led to trivializing the number of the Katyn victims by, among other things, presenting them in the context of a larger number of non-Polish victims of the Stalinist regime.<sup>88</sup>

### 3. Provide adequate legal remedies to victims’ families

The families of the Katyn victims were denied the status of a victim in the Russian investigation into the Katyn crime.<sup>89</sup> They were also denied access to information into the Katyn investigation, including the final decision on the reasons for termination of the Russian investigation. Numerous petitions of the Katyn families to rehabilitate their relatives murdered pursuant to the March 5, 1940 Execution Order, were consistently denied by the Russian courts as well.<sup>90</sup>

Several Katyn families have appealed to the European Court of Human Rights complaining, among other things, about the consistent policy of the Russian Federation denying them access to the Russian courts.<sup>91</sup> Accordingly, the experts felt that the Russian Federation should provide the

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<sup>86</sup> See KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 29, at 348 (presenting a letter from Russian President, Boris Yeltsin to Polish President, Lech Walesa, which stated that “solving this complex task is not aided, as practice shows, by the inflaming of emotions . . . by the escalation of demands presented to the Russian side—from making an apology to organizing a trial and the payment of compensation”).

<sup>87</sup> *Id.*

<sup>88</sup> Maria Szonert-Binienda, *Was Katyń a Genocide?*, 44 CASE W. RES. J. INT’L L. 79 (listing a number of ways the Russian Federation has attempted “to justify and minimize the Katyn crime and evade responsibility for it”).

<sup>89</sup> Vaclav Radziwinowicz, *Russian Court Laughs in Katyń Victims Face*, GAZETA WYBORCZA (Pol.) (May 28, 2008), [http://wyborcza.pl/1,86871,5252086,Russian\\_Court\\_Laughs\\_in\\_Katy%C5%84%20\\_Victims\\_Face.html](http://wyborcza.pl/1,86871,5252086,Russian_Court_Laughs_in_Katy%C5%84%20_Victims_Face.html).

<sup>90</sup> See *Wolk-Jezińska and Others v. Russia*, Statement of Facts, App. No. 29520/09 (Eur. Ct. H.R., 2009) (establishing the arguments by the families of the victims of the Katyń massacre against the Russian government). The Katyń Families appealed the decisions of the Russian courts to the European Court of Human Rights alleging violations of their rights under Articles 2, 3, 6, 8, 9 and 13 of the European Convention on Human Rights. *Id.*

<sup>91</sup> See *id.* (citing the various problems the applicants have faced seeking justice in the Russian judicial system).

Katyn families with adequate legal remedies to pursue justice before the Russian courts.

4. Provide Poland with symbolic monetary compensation

As a gesture of good will towards the Polish Nation that would demonstrate contrition with respect to the Katyn crime, experts suggested that the Russian Federation could establish an endowment fund providing the financial foundation for the educational establishment in Poland such as museum, institute or academia dedicated to the Katyn-related subject matter.

5. Reimburse Poland for the cost of building & maintaining cemeteries of the victims

In addition, experts suggested that symbolic gestures from Russia, including compensating Katyn families who paid to build cemeteries to memorialize the dead, or assisting in finding what scant physical remains of the victims can be found, could take on outsized importance in improving relations between Poland and Russia.

6. Establish the Katyn Museum & correct history books

Further, experts said that the Russian Federation should undertake appropriate steps to introduce the subject of Katyn in the context of the 1939 Soviet invasion of Poland to Russian school textbooks. The establishment of the Katyn Museum in Moscow would further the goal of correcting the distorted view of history of World War II in Russia.

C. *The United States*

1. Consider implementing the Madden Commission's recommendations

In 1952, the U.S. House of Representatives' Select Committee investigating the Katyn Massacre unanimously recommended that the House of Representatives approve its findings<sup>92</sup> and adopt a resolution:

1. Requesting the President of the United States to forward the testimony, evidence, and findings of this committee to the U.S. delegates at the U.N.;

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<sup>92</sup> The Final Report of the Select Committee Investigating the Katyn Forest Massacre incorporates the recommendations contained in the Interim Report, filed on July 2, 1952. INTERIM REPORT OF THE SELECT COMMITTEE, H.R. REP. NO. 2430 (1952); H.R. REP. NO. 2505 (final report).

2. Requesting further that the President of the United States issue instructions to the U.S. delegates to present the Katyn case to the General Assembly of the U.N.;
3. Requesting that appropriate steps be taken by the General Assembly to seek action before the International Court of Justice against the Union of Soviet Socialist Republics for committing a crime at Katyn which was in violation of the general principles of law recognized by civilized nations; and
4. Requesting the President of the United States to instruct the U.S. delegates to seek the establishment of an international commission which would investigate other mass murders and crimes against humanity.<sup>93</sup>

The recommended congressional resolution was never adopted by Congress and the recommended actions were never implemented by the President. In this way, the Katyn matter was once again relegated to historical amnesia. Considering that to this day, justice has not been served in the Katyn crime, that the Katyn families and their descendants continue to experience the syndrome of double victimization, and that the full and accurate record of the Katyn crime was never set straight in the court of justice and in the court of international public opinion, several of the experts urged that the recommendations of the Madden Committee be revisited. In particular, the referral of the Katyn case to the International Court of Justice and the formation of a special international commission to investigate the Katyn atrocities should be given due consideration.

2. Assure full disclosure of all Katyn-related materials

In order to achieve reconciliation and closure in the Katyn matter, the experts believed the action of the U.S. government could be indispensable to demonstrate a good-faith effort at coming to terms with respect to the long-lasting policy of suppression and distortion of history. Assuring full disclosure of Katyn-related materials in the possession of the U.S. government is a prerequisite to making any progress in resolving the Katyn problem from the moral, historical and political standpoint.

One expert suggested that such a good-faith gesture could be achieved by issuing an Executive Order to undertake a proactive search of U.S. government records related to the Katyn atrocities and make the results

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<sup>93</sup> H.R. REP. NO. 2505.

of such search publically available. An Executive Order on search, disclosure and dissemination of Katyn materials would aim to remedy historic distortions, denials, and suppressions of facts with respect to the Katyn atrocities and the role of Poland in World War II. Researchers believe that a large number of important documents are still within the possession of the U.S. government but beyond the reach of scholars. Such materials include documents referenced by the Madden Committee, such as: (1) reports of U.S. Army Lt. Col. Henry I. Szymanski, dated November 23, 1942 and May 1943, turned over to G-2 War Department; (2) a report of U.S. Army Col. Van Vliet dated May 22, 1945; (3) any documents and information related to the Memorandum of Owen O'Malley sent by Winston Churchill to Franklin Delano Roosevelt on August 13, 1943; (4) any records, documents and information related to Special U.S. Emissary to the Balkans, George Howard Earle meeting and correspondence with Franklin Delano Roosevelt for the period of May 1944 to April 1945; and (5) documents and papers of Averell Harriman and George Kennan dealing with the Polish-Soviet relations.

Considering the latest discoveries with respect to the scope of the Katyn crime, the documents related to the Polish POWs from the Starobelsk and Ostashkov camps and Polish officers held in prisons on the conquered Polish territory should also be considered as Katyn-related materials. Furthermore, documents related to mass deportations of families of the condemned Polish POWs, as well as documents related to mass deportations of the representatives of the official structures of the Polish State on the conquered Polish territory, should be considered as Katyn-related materials. The proactive inter-agency search should cover all sources of information owned by, produced by, or under the control of the U.S. government, including audio and video recordings, as appropriate.<sup>94</sup>

### 3. Assure dissemination of knowledge on Katyn

In recognition that vital Katyn-related materials had been repeatedly withheld from the public and the truth about Katyn had been effectively suppressed by the U.S. Government to the detriment of the families of the Katyn victims and several generations of the American people raised with a distorted view of history, several experts believed that concrete steps should be undertaken to remedy the problem of historical distortion and restore a balanced view of history of World War II in American society. An expert suggested that a presidential task force could be established to accomplish

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<sup>94</sup> See Marcy Kaptur, U.S. Rep., Speech at the Case Western Reserve University Symposium: Katyn: Justice Delayed or Justice Denied? (Feb. 4, 2011). Documents related to Katyn in the archives of the Foreign Relations Committee of the U.S. House of Representatives of the 82nd Congress shall be searched as well. *Id.*



this essential objective. The task force could develop recommendations on appropriate steps to be undertaken in order to remedy over seventy years of distortion of historical truth, stimulate academic research into the Katyn-related areas of intellectual pursuit, and adequately disseminate Katyn related information to the American academic and educational professionals and to the American public at large. Experts also proposed the establishment of a Katyn Truth and Reconciliation Institute as a vehicle to accomplish the dissemination objective.

#### 4. U.S. Congressional Resolution as moral compensation

One expert proposed adoption of legislation to include: recognition of wrong that has been done through suppression of evidence and Yalta arrangements, apology, compensation through the establishment of a Katyn Truth and Reconciliation Institute, compensation for the Katyn families with U.S. citizenship, and educational outreach through the Department of Education, the Holocaust Museum and other partners.

#### 5. U.S. Helsinki Commission

The Polish-Russian Group for Difficult Issues set up to address the so called “blank pages” of the history of WWII was formed in 2002 but ceased to operate soon thereafter.<sup>95</sup> In 2008, the Group was reactivated with new members.<sup>96</sup> Unfortunately, in the aftermath of the 2010 Polish presidential plane crash in Smolensk, the Group has made no meaningful progress and Russia reverted to the old concept of establishing the Center of Polish-Russian Friendship in Poland modeled on the communist-era approach. Experts suggested that the potential restructuring of the Polish-Russian Group for Difficult Issues by inclusion of other parties such as representatives of the U.S. Helsinki Commission, the EU, and the Federation of Katyn Families could breathe new life into this failing effort to uncover blank pages from the Stalinist period in the Polish-Russian relations and set the Katyn record straight.

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<sup>95</sup> See Agnieszka Nowak & Irina Kobrinskaya, *Polish-Russian/Russian-Polish Rapprochement: A Long-Awaited Decisive Move*, NOTES INTERNACIONALS, Dec. 2010, at 4, available at [http://www.cidob.org/en/publications/notes\\_internacionales/n1\\_23\\_24/polish\\_russian\\_russian\\_polish\\_rapprochement\\_a\\_long\\_awaited\\_decisive\\_move](http://www.cidob.org/en/publications/notes_internacionales/n1_23_24/polish_russian_russian_polish_rapprochement_a_long_awaited_decisive_move) (“The Group was first established in 2002 when Vladimir Putin visited Poland, but during 2004–08 its activities were suspended due to ‘chilly relations.’”).

<sup>96</sup> *Id.* (reporting the reactivation of the Group and highlighting many of the new participants).

## VI. REMEDIES FOR PRIVATE PARTIES

A. *European Court of Human Rights*

According to one expert, contrary to political declarations of the Russian Federation, the Russian courts have been blocking the prosecution of the Katyn crime by, among other things, denying standing to the families of the Katyn victims. Several complaints of the Katyn family members against the Russian Federation are pending before the European Court of Human Rights in Strasbourg, France.<sup>97</sup> The plaintiffs allege violation of the right to live, inhumane and degrading treatment, denial of the access to Russian courts, and lack of effective legal remedy under the legal system of the Russian Federation.<sup>98</sup> On July 15, 2011, the European Court of Human Rights “declared admissible two complaints concerning the criminal investigations in the 1990s into the deaths of [twelve] Polish men in the context of the Katyn massacre in the former Soviet Union.”<sup>99</sup> A year later, on May 11, 2012, the European Court of Human Rights held that Russia “had failed to cooperate with the Court, and that its response to plaintiffs’ attempts to find out the truth about what happened in 1940 had amounted to inhumane treatment” in violation of article 3 of the European Convention on Human Rights.<sup>100</sup>

B. *U.S. Alien Tort Statute*

The plaintiffs in the two Katyn-related cases pending before the European Court of Human Rights sought no monetary compensation for pain and suffering or their families’ lost possessions.<sup>101</sup> One expert pointed out that the reluctance on the part of the Katyn families to demand monetary compensation, although understood from the moral standpoint, runs contrary to contemporary international law that calls for acceptance of

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<sup>97</sup> Press Office, *European Court of Human Rights Declares Admissible Katyn Massacre Complaints*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF POLAND (July 12, 2011), <http://www.msz.gov.pl/European,Court,of,Human,Rights,declares,admissible,Katyn,Massacre,complaints,44225.html> (reporting the cases that the European Court of Human Rights, in Strasbourg, France, has agreed to hear).

<sup>98</sup> See generally *Wolk-Jezierska and Others*, App. No. 29520/09 (outlining the applicants’ claims against the Russian Federation).

<sup>99</sup> Press Release, *supra* note 54.

<sup>100</sup> Press Release, Registrar of the Court, *Russia Should Have Cooperated with the Court and Treated Katyn Victims’ Relatives Humanely* (Apr. 16, 2012), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=906167&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

<sup>101</sup> See e.g., *Wolk-Jezierska and Others*, App. No. 29520/09; *Janowiec and Others*, App. Nos. 55508/07, 29520/09.

responsibility through tangible evidence of contrition.<sup>102</sup> Monetary compensation may serve as the best tangible evidence of contrition. Symbolic admission of culpability is meaningless without honest acceptance of responsibility based on atonement. Several experts agreed that this necessary component of reconciliation is best assured through monetary compensation. It follows that the Katyn families should demand monetary compensation from the Russian Federation.

The experts also discussed the possible remedies for survivors of Katyn victims via U.S. courts. Pursuing litigation under the Alien Tort Statute<sup>103</sup> (ATS) was generally viewed as a favorable approach. A general consensus developed that ATS litigation may be necessary in light of the facts that Russia was not fully complying with Polish demands to disclose all the documents on the events at Katyn. Although many of the experts acknowledged that Russia has made great strides in expanding the access to information at Katyn, it was generally agreed that these efforts were insufficient to show full contrition for Russia's acts, acknowledging accountability and giving just compensation for the Katyn crimes. A majority viewed ATS litigation as a legitimate means to accomplish these objectives if Russia continued to obstruct Polish attempts to uncover more information about the events at Katyn. For these experts, the supposition is that ATS litigation would establish a historical record of events at Katyn, hold those who participated in the Katyn crimes accountable for their actions, and provide some compensation for the surviving family members of the victims.

The experts then sketched out the *prima facie* case that would need to be made for successful ATS litigation. Because Katyn occurred outside the U.S. and between two foreign entities, the majority of the discussion was focused on ensuring that Katyn could meet the demanding subject-matter jurisdictional barrier established by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*.<sup>104</sup> In order to increase the likelihood that a court would

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<sup>102</sup> See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Annex, U.N. GAOR, 60th Sess., U.N. Doc A/RES/60/147, at 7–8 (Mar. 21, 2006).

<sup>103</sup> See Alien Torts Statute, 28 U.S.C. § 1350 (West 2012) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). In order to sustain an ATS cause of action, a plaintiff must show that (1) someone committed a tort against them, (2) the victim was an alien at the time of the tort and (3) the tort violated customary international law (“the law of nations”) or a U.S. treaty. *Id.*

<sup>104</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“[A]ny claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized.”). When evaluating whether a claim based upon “the present-day law

find Katyn as within the ATS's subject matter, one expert suggested that Katyn should be characterized as "genocidal terrorism," and that such a classification would fall within the ATS's jurisdiction under recent precedent. First, the expert noted that in *Kadic v. Karadzic*,<sup>105</sup> the Second Circuit Federal Court of Appeals held that mass murder met the ATS jurisdictional barrier because violations of the law of nations must be interpreted "as [the law of nations] evolved and exists among the nations of the world today."<sup>106</sup> Second, the expert noted that in *Almog v. Arab Bank*,<sup>107</sup> the Eastern District of New York held that Hamas's use of suicide bombers against Israel amounted to a violation of the Genocide Convention and the Rome Statute.<sup>108</sup> Specifically the Court stated that:

Hammas, [and other organizations aimed to] . . . liberate [Israel] by replacing it with an Islamic or Palestinian State through the use of suicide bombings and other shockingly egregious violent acts[] [and this] reflect[s] an intent to target people based on criteria prohibited by both the Genocide Convention and the Rome Statute.<sup>109</sup>

The expert then suggested that Katyn is analogous to the Court's ruling in *Almog*. The expert suggested that the Eastern District of New York could have just as easily held that: "[b]ecause Russia aimed to liberate Poland by replacing it with a Soviet dominated Communist state through the use of mass murders, this reflects intent to target people, based on criteria prohibited by both the Genocide Convention and the Rome Statute."

However, several of the other experts expressed doubt as to whether Katyn was analogous to *Almog*. These experts believe that the Soviets did not intend to exterminate the various Polish citizens at Katyn because they were Polish. Rather, these individuals opined that Polish citizens were targeted because the Soviets viewed the Polish as political opponents to Soviet Communism.<sup>110</sup> Other experts believed that Katyn was similar to

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of nations" meets the *Sosa* test, courts should consider factors such as the exhaustion of available remedies, the burden on the federal courts for allowing the claim, the interests of the President and Congress. *Id.* at 732–34.

<sup>105</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>106</sup> *Id.* at 238 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)).

<sup>107</sup> *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007). In *Almog*, the plaintiffs allege that during the second *intifada*, the Arab Bank aided and abetted the various Hamas suicide bombings by knowingly and intentionally collecting funds to assist suicide bombings and to make payments to the "martyr" families. *Id.* at 260–63.

<sup>108</sup> *Id.* at 275–76 (explaining the international legal standards for violating the Genocide Convention and the Rome Statute, and finding that plaintiffs had indeed made such a case against defendants).

<sup>109</sup> *Id.*

<sup>110</sup> See KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 29, at 2 (summarizing why Poland was seen as a political enemy of Soviet Russia). The dispute among the experts is that

*Almog* because the Soviet actions demonstrated they sought to destroy the Polish state by eliminating their leaders, and thus, this made the Soviet *mens rea* intent to destroy a nationality and not just intent to destroy opposition to Soviet communism.

Several of the experts agreed that being able to make a *prima facie* case that Katyn was an act of genocide or “genocidal terrorism” would be essential in establishing ATS subject-matter jurisdiction and ensuring Katyn’s history was properly recorded. If Katyn could not be established as a genocide, several experts expressed doubt as to whether a court would entertain an ATS claim due to the fear of overburdening the federal docket load with ATS litigation related to any Soviet crime. However, other experts believed that Katyn, even if characterized as a crime against humanity, could be distinguished from other Soviet crimes because the planned deportation of the Polish and the subsequent cover-up demonstrates the Soviets knew Katyn was an exceptional Soviet atrocity. Therefore, under this theory, the gravity of the events at Katyn would make Katyn distinguishable from a wider scope of human rights abuses.

Moreover, several experts believed that establishing Katyn as an act of genocide was important for historical reasons. Many experts expressed displeasure that Katyn was being referred to as a massacre because the word “massacre” does not properly capture the scale, gravity, and character of the events at Katyn. However, a few experts questioned whether it was wise to use U.S. courts to establish the historical record that Katyn was genocide. These experts expressed the fear that a court could rule that Katyn was not an act of genocide and that an unfavorable court ruling would severely disappoint the Polish people. Nonetheless, several experts opined that trying and failing to establish Katyn was genocide in the courts is better than not trying at all. In explaining the psychology that survivors of atrocities possess when pursuing this sort of litigation, an expert argued:

For the families, they would rather go in and lose and feel that they have done whatever they could. If they are religious, they say when I go to heaven, I will meet my child or wife or parent who was killed, and I know

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the extermination of Polish citizens because they were *political* opponents does not fall into one of the classes of victims identified in the Genocide Convention. Genocide Convention, *supra* note 20, art. 2. The Convention defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

*Id.*

they will ask me did I do everything that I could. So for them it is much more important to have tried and lost than not to have tried at all.

Assuming that subject matter jurisdiction could be established over the crimes at Katyn, the experts then explored who could be sued in U.S. courts. A few experts noted that Russia, as the successor state to the Soviet Union, is liable for any torts the Soviet Union committed because there was not a complete destruction of the Soviet State.<sup>111</sup> However, several experts believed suing Russia in U.S. courts would be very difficult because Russia, as a sovereign State, possesses foreign sovereign immunity.<sup>112</sup> In order to circumvent Russia's foreign sovereign immunity either Russia would have to waive that immunity or the State Department would have to put Russia on the list of state sponsors of terrorism.<sup>113</sup> The prospect of either is extremely remote. While a few experts believed that the nature of the Katyn crimes as a "*jus cogens*"<sup>114</sup> violation could establish that the Soviet Union implicitly waived its foreign sovereign immunity, these experts acknowledged that this argument would be an uphill battle, and they pointed out that a similar argument was rejected by the Second Circuit in the ATC case against Libya for the bombing of Pan Am 103.<sup>115</sup> One expert stated, however, that while the *jus cogens* nature of terrorism might be in dispute, there is wide agreement that genocide is a *jus cogens* offense.<sup>116</sup>

Even if Russia as a state could not be held liable, several of the experts pointed out that any Soviet corporations that participated in covering up the Katyn crimes by disposing of Polish bodies could be.<sup>117</sup>

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<sup>111</sup> See generally Scharf, *supra* note 21, 46–52 (describing the Russian Federation's ease in assuming the former U.N. seat held by the Soviet Union).

<sup>112</sup> See Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602–11 (West 2012) (legislating that a foreign state shall generally be immune from the jurisdiction of the courts of the United States).

<sup>113</sup> *Id.* § 1605(a)(1) (explaining that a foreign state is not immune where it has waived immunity); see also Designation of Foreign Terrorist Organizations, 8 U.S.C.A. § 1189 (West 2012) (describing that the Secretary of State may designate an organization as a foreign terrorist organization, as well as the procedure for doing so).

<sup>114</sup> A *jus cogens* norm is a peremptory norm of international law binding on all States. Such norms are superior to and override other principles of international law. See Vienna Convention on the Law of Treaties, *supra* note 24, arts. 53–54.

<sup>115</sup> *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246–47 (2d Cir. 1996) (holding that Libya was not removed from the protection of the Foreign Sovereign Immunities Act, as interpreted prior to the recent amendment, because the U.N. found that an act of terrorism constituted a threshold reason to remove immunity).

<sup>116</sup> Genocide Convention, *supra* note 20, art. 1 (declaring genocide to be a violation of international law).

<sup>117</sup> *But see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 ((holding that the ATS does not provide subject matter jurisdiction over corporations), 120 (2d Cir. 2010), *reh'g*

Under this theory, foreign sovereign immunity would not be an issue because the Foreign Sovereign Immunity Act does not protect commercial activity.<sup>118</sup> On the other hand, one expert pointed out that the Second Circuit had recently held in *Kiobel v. Royal Dutch Petroleum Co.*, that corporations, unlike individuals and States, cannot be held liable for international crimes.<sup>119</sup> More recently, the D.C. Circuit held in *John Doe VIII v. Exxon Mobil Corp.*, that corporations can be held liable for violations of international law,<sup>120</sup> setting up a split in the Federal Circuits which will likely be resolved by the Supreme Court in its 2012–2013 term.

C. *Alternatives to the Alien Tort Statute*

Some of the experts suggested that modern international law features a standard that goes well beyond the requirements of the Alien Tort Statute. For example, one expert offered the example of the binding declaration of the U.N. Security Council in regards to the Pan Am 103/Lockerbie bombing, which featured a threefold requirement: (1) a renunciation of terrorism by the accused party; (2) acceptance of responsibility; and (3) just compensation to the victims or their families.<sup>121</sup>

How does Russia fare in regards to Katyn under this three-prong test? The present government has already declared Katyn a crime,<sup>122</sup> but some feel that without a full and earnest renunciation of the Katyn Massacre, Russia's repentance remains half-hearted. In the opinion of one expert, Katyn is "an infection" not capable of being cured without total renunciation and total compliance with the requirements of an international referee such as the U.N. Barring such renunciation, acceptance of responsibility and compensation, the divisiveness and rancor left in the wake of the massacre may linger on both sides. Germany was cited as an example of such compliance and renunciation, although it was distinguished

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*denied*, 642 F.3d 268 (2d Cir. 2011), and *cert. granted*, 132 S. Ct. 472, 181 L. Ed. 2d 292 (2011).

<sup>118</sup> See 28 U.S.C. §1605(a)(2) (declaring an exception to foreign sovereign immunity where the "action is based upon a commercial activity carried on in the United States by the foreign state").

<sup>119</sup> See *Kiobel*, 621 F.3d at 148–49 (concluding that a corporation has never been held liable under the customary international law of human rights).

<sup>120</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011) (finding that "corporations can be held liable for the torts committed by their agents").

<sup>121</sup> See S.C. Res. 731, U.N. SCOR, U.N. Doc. S/RES/731 (Jan. 21, 1992) (mandating action by Libyan government officials before sanctions against the country would be lifted).

<sup>122</sup> *Russian Parliament Condemns Stalin for Katyn Massacre*, BBC NEWS (Nov. 26, 2010), <http://www.bbc.co.uk/news/world-europe-11845315>.

on the basis of its prior government having been totally and utterly destroyed at the end of the Second World War.<sup>123</sup>

## VII. OTHER REMEDIES AND APPROACHES

Congressional hearings in the U.S. held by representatives from districts with significant Polish populations may help to catalyze a reconciliation process between Russia and Poland.<sup>124</sup> The experts discussed the idea of filing claims similar to those filed against Nazi Germany for slave labor.<sup>125</sup> The involvement of a third party such as Congress might provide a foundation on which to begin moving forward, without Russia having to endure a face-losing full admission of responsibility. From that point, further negotiations between Russia and Poland could take place with Congress recognizing the contributions from each side. As one participant put it, “while the desire to see Russia take full responsibility is strong, reality is quite different.”

### A. *Non-Governmental Organizations*

The experts pointed out that the U.N. Economic and Social Council and UNESCO have a vital interest in eradicating international crimes like Katyn.<sup>126</sup> They also have the authority to request an advisory opinion from

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<sup>123</sup> West Germany, for instance, did not inherit the crimes of National Socialist Germany because of the utter and complete destruction of the previous state. *See* JOHN O. KOEHLER, STASI: THE UNTOLD STORY OF THE EAST GERMAN SECRET POLICE 8 (2000) (describing the collapse of the German Democratic Republic).

<sup>124</sup> *See* Commemorating the 70th Anniversary of the Katyn Massacre, H.R. Res. 1323, 111th Cong. (2010) (encouraging Russia to “fully declassify and disclose all official records pertaining to the Katyn massacre”). In addition, it was the House of Representatives that established a Select Committee to investigate Katyn in the early 1950s and concluded unambiguously that the Soviet NKVD was responsible. H.R. Res. 213, 112th Cong. (2011) (honoring those who perished in the 2010 plane crash that killed many Polish leaders as they were on their way to commemorate the anniversary of the Katyn massacre).

<sup>125</sup> *See* *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 452 (D.N.J. 1999) (solving the problem of jurisdiction under the Alien Tort Claims Act by asserting that the civilian was part of a commercial transaction—namely, that of slave trading); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 285 (D.N.J. 1999) (dismissing a class action suit against German corporations who used slave labor under the Nazi regime, and stating that although reparations should be made, such a question falls into the political question doctrine of issues not to be decided by a court).

<sup>126</sup> Philip Alston, *UNESCO's Procedure for Dealing with Human Rights Violations*, 20 SANTA CLARA L. REV. 665, 676 (1980) (stating that massive violations of human rights including genocide fall within UNESCO's fields of competence); William A. Schabas, Introduction to The Convention on the Prevention and Punishment of the Crime of Genocide (2008), [http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf) (indicating that the U.N. Economic and Social Council has an interest in preventing genocidal crimes because of its involvement in the drafting of the Genocide Convention).



the International Court of Justice on whether Katyn constitutes genocide and whether there are legal duties to investigate and prosecute the Katyn crime.<sup>127</sup> The request for an advisory opinion on Katyn could serve as a useful tool since it follows the advisory as opposed to adversarial path, thus is less contentious politically than a potential case brought by Poland against Russia, but could set the Katyn record straight. The initiative to prompt these organizations to make a request for advisory opinion could be supported by the Worldwide Federation of the Katyn Families, human rights groups and other organizations of Polish citizens wronged by the extermination policy of the Soviet Union in World War II. The U.S. could lend its support to this process through its representatives within the U.N.

*B. Academic Community*

The academic community, in particular universities and institutes with expertise in history, international law and international relations, are in the unique position to provide necessary tools to set the Katyn record straight in the court of international public opinion. By providing legal expertise and assisting with legal research, by supporting Katyn families in pending litigation through amicus curiae briefs, and by stimulating academic research into the Katyn related subject, the academic community could play a pivotal role in setting the Katyn record straight. Doing so could both stimulate reconciliation and prevent “Katynism” from reoccurring.

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<sup>127</sup> See Press Release, I.C.J. Info. Dep’t, Questions and Answers about the Advisory Procedure (July 2010), available at [http://www.icj-cij.org/presscom/en/kos\\_faq\\_en.pdf](http://www.icj-cij.org/presscom/en/kos_faq_en.pdf) (listing both the Economic and Social Council and UNESCO as “organizations entitled to request advisory opinions”).