

# KATYŃ

**JUSTICE DELAYED OR JUSTICE DENIED?**

## **REPORT OF THE CLEVELAND EXPERTS MEETING**

**ORGANIZED BY**

***THE FREDERICK K. COX INTERNATIONAL LAW CENTER  
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW***

***AND***

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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>2</b>
<b>II.</b>	<b>CHARACTERIZATION OF THE KATYŃ CRIME.....</b>	<b>3</b>
<b>III.</b>	<b>ACCOUNTABILITY FOR THE KATYŃ CRIME.....</b>	<b>3</b>
<b>IV.</b>	<b>RECONCILIATION THROUGH DISCLOSURE, DISSEMINATION &amp; ACCOUNTABILITY.....</b>	<b>4</b>
A.	USSR/RUSSIAN FEDERATION .....	5
B.	THE USA.....	7
<b>V.</b>	<b>REMEDIES AT THE GOVERNMENTAL LEVEL .....</b>	<b>8</b>
A.	POLAND .....	8
1.	<i>Prosecution for the Katyń crime</i> .....	8
2.	<i>Regional forums</i> .....	8
a.	The European Union.....	8
b.	Council of Europe .....	9
3.	<i>United Nations</i> .....	9
a.	International Court of Justice .....	9
b.	Establishment of a Commission of Experts or Special Tribunal .....	11
4.	<i>Dissemination of Truth</i> .....	12
B.	USSR/RUSSIAN FEDERATION .....	12
1.	<i>Prosecute the Katyń crime as an international crime</i> .....	13
2.	<i>Refrain from justifying the Katyń crime</i> .....	14
3.	<i>Provide adequate legal remedies to victims' families.</i> .....	14
4.	<i>Provide Poland with symbolic monetary compensation</i> .....	15
5.	<i>Reimburse Poland for the cost of building &amp; maintaining cemeteries of the victims</i> .....	15
6.	<i>Establish the Katyń museum &amp; correct history books</i> .....	15
C.	THE USA.....	15
1.	<i>Consider implementing the Madden Commission's recommendations</i> .....	15
2.	<i>Assure full disclosure of all Katyń-related materials</i> .....	16
3.	<i>Assure dissemination of knowledge on Katyń</i> .....	17
4.	<i>U.S. congressional resolution as moral compensation</i> .....	17
5.	<i>U.S. Helsinki Commission</i> .....	18
<b>VI.</b>	<b>REMEDIES FOR PRIVATE PARTIES.....</b>	<b>18</b>
A.	EUROPEAN COURT OF HUMAN RIGHTS.....	18
B.	ALIEN TORT STATUTE .....	18
<b>VII.</b>	<b>OTHER REMEDIES AND APPROACHES .....</b>	<b>21</b>
A.	NON-GOVERNMENTAL ORGANIZATIONS .....	22
B.	ACADEMIC COMMUNITY .....	22

# KATYŃ: JUSTICE DELAYED OR JUSTICE DENIED?<sup>1</sup>

## I. INTRODUCTION

The Katyń massacre of 1940 involved murders at the Katyń forest and in other locations throughout the Soviet Union of over 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 Soviet Far East. For 50 years, the massacre in the Katyń forest and other locations was subject to massive cover-up and obfuscation operations. 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 the Russian government admitted that the executions actually took place in 1940 and were carried out by the Soviet secret police. 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 terminated in 2004 on the ground of the application of the 10-year statute of limitation; its records and findings were classified as top secret,<sup>2</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 massacre, the Frederick K. Cox International Law Center and the Libra Institute hosted a Symposium and Experts Meeting at Case Western Reserve University School of Law, which brought together leading international experts in jurisprudence, international criminal law, and the Katyń crime, as well as representatives from Poland and Russia, to discuss the law and policy related to Katyń in a neutral setting. A diverse group of highly qualified scholars presented and discussed Polish, Russian, and third party expert views on the Katyń murders in four panel sessions, followed by a round-table discussion.

The Cleveland Experts Meeting was chaired by Michael P. Scharf, Director of the Cox Center and the John Deaver Drinko—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. Senate (D, Ohio). Amb. Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues presented a Keynote Address.<sup>3</sup>

The Expert participants 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 University; Hon. David Crane, Founding Chief

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<sup>1</sup> This Report was drafted by Michael Scharf (Director of the Cox Center) and Maria Szonert-Binienda (President of the Libra Institute), assisted by Cox Center Fellows Effy Folberg, Michael Jacobson and Katlyn Kraus.

<sup>2</sup> Alexander Guryanov, "Działania Stowarzyszenia Memoriał w związku ze sprawą katyńską," *Zeszyty Katyńskie* No. 22, Warszawa, 2007, as reported on July 30, 2011 at: [www.ipn.gov.pl/ftp/Katyń/ZESZYTY22-Zbrodnia\\_Katyńska\\_w\\_oczach\\_współczesnych\\_rosjan.pdf](http://www.ipn.gov.pl/ftp/Katyń/ZESZYTY22-Zbrodnia_Katyńska_w_oczach_współczesnych_rosjan.pdf)

<sup>3</sup> This Report does not purport to reflect the views of Senator Brown, Congressman Kucinich, Congresswomen Kaptur, or Ambassador Rapp. Nor does it reflect the views of Professor Kenneth Ledford, who gave a speech at the Symposium on February 4, but did not participate in the Experts Meeting on February 5.

Prosecutor; Special Court for Sierra Leone; Allan Gerson, Chairman, AG International Law, PLLC; former Senior Counsel to U.S. Ambassadors to the U.N., Jeane Kirkpatrick and Vernon Walters; Alexander Guryanov, PhD – Polish Program Coordinator, Memorial Group, Moscow, Russia; Prof. Kenneth Ledford, PhD, Department of History, Case Western Reserve University; Dr. Teresa Kaczorowska, Polish journalist and author; Prof. Mark Kramer, PhD, 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 Katyń crime. In accordance with the understanding of the participants, this report follows the “Chatham House Rules”; therefore, the views of particular experts remain unidentified in the text. In some places, the discussion has been re-ordered to enhance organizational clarity. With a few exceptions, 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 Katyń crime, in order to facilitate progress in addressing this important issue.

## II. CHARACTERIZATION OF THE KATYŃ CRIME

Katyń is often described as a “massacre,” but the assembled experts generally did not believe “massacre” adequately characterized the Katyń crime. Some characterized Katyń as a particularly serious war crime, in violation of the 1907 Hague Regulations<sup>4</sup> and customary international law later codified in the 1949 Geneva Conventions.<sup>5</sup> Others believed it to be a crime against humanity, aimed at Polish civilians as well as the military. Several of the experts felt that Katyń constituted an act of genocide, aimed at destroying the Polish national group. One expert argued that the most useful label was “genocidal terrorism.”

## III. ACCOUNTABILITY FOR THE KATYŃ CRIME

The day of accountability for the Katyń crime has not yet arrived. In 1952, the Special Committee of the U.S. House of Representatives that investigated the Katyń Forest Massacre (“the Madden Committee”) concluded that the Katyń crime represents a violation of the general principles of law recognized by civilized nations and therefore the Soviet Union should be held accountable for the atrocity.<sup>6</sup> In 1990 Russia finally admitted responsibility for the Katyń crime and in 1992 the Russian Federation initiated a criminal investigation into the Katyń murders. After 12 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

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<sup>4</sup> Second Peace Conference of The 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.

<sup>5</sup> The Geneva Conventions of August 12, 1949. Convention (IV) relative to the Protection of Civilian Persons in Time of War.

<sup>6</sup> The Select Committee On The Katyń Forest Massacre, Final Report, House Report No. 2505, Dec. 22, 1952, 82<sup>nd</sup> Congress, Second Session.

on the basis of the statute of limitation, classifying the murder of at least 21,768 Polish POWs and prisoners of war as an ordinary crime of “exceeding official authority.”<sup>7</sup> While the investigation was terminated on September 21, 2004, it was not until March 11, 2005 that this decision was announced publically. Together with the decision to terminate the investigation into the Katyń crime, the entire documentation from the 12-year Russian investigation, comprising 183 volumes of documents was classified as secret and withheld from the public together with the names of the defendants and the court opinion justifying the discontinuance of the Katyń case.<sup>8</sup> Thus, the Katyń 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 Katyń 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. To the extent it could be deemed an act of Genocide; the 1948 Genocide Convention requires prosecution by the State in whose territory the crime occurred or by an appropriate international tribunal. 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 Genocide Convention.<sup>9</sup> While neither Russia nor Poland is a party to the Rome Statute establishing the International Criminal Court, both signed the treaty indicating their intent to eventually ratify it. 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. 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, suggesting a general duty to prosecute crimes against humanity may be applicable to Russia.<sup>10</sup>

What complicates accountability for the Katyń crime is that it pre-dated the modern international criminal law instruments. However, as the crime occurred during World War II, Katyń represents the same type of offense as the atrocities adjudicated by the Nuremberg Tribunal. Several of the participating experts argued that if retroactivity did not bar the prosecution of Nazi criminals before the Nuremberg Tribunal it would not bar the prosecution of Soviet criminals 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 Katyń 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,

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<sup>7</sup> Letter of the Russian Main Military Prosecutor’s Office to the Memorial Society dated March 24, 2005, cited in Gurianov, “Działania Stowarzyszenia ‘Memoriał’ w Związku ze Sprawą Katyńską,” pp. 22-23.

<sup>8</sup> *Id.*, p. 22.

<sup>9</sup> See Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INTERNATIONAL LAW JOURNAL 30-69 (1995).

<sup>10</sup> Vienna Convention on the Law and Treaties, (1980) 1155 UNTS 331.

accountability, remembrance and deterrence, and 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 Katyń 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 Katyń crime. “[M]eaningful justice begins by demanding truth,” claimed one expert. A truthful account is “above and beyond anything else [what] the families and victims want,” stressed another. An important question is what is missing from obtaining a truthful account of Katyń?

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. Out of the 183 volumes of documents from the Russian investigation into the Katyń crime, 67 volumes are declassified, 80 volumes are classified and 36 volumes are classified as top secret.<sup>11</sup> In the aftermath of the April 10, 2010 Smolensk Crash,<sup>12</sup> Russia promised to hand over to Poland classified documents from the Katyń investigation. However as of July 2011, only 148 out of 183 volumes from the Russian investigation into the Katyń crime were made available to Poland. The remaining 35 volumes, classified as top secret together with the final justification for the discontinuance of the Russian investigation into the Katyń crime, have not been released.<sup>13</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 Katyń remains 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 travel freely into Germany and feel no bitterness. But, the expert said, the same is not true of Poles traveling to Russia. German youth learn about their past, including the atrocities committed during the Second World War, while according to one expert, in Russia, Katyń is not even mentioned in Russian history textbooks.

Under the Yeltsin government, a great deal of cooperation produced a large amount of information about Katyń.<sup>14</sup> On October 14, 1992 Chief Russian Archivist Pikhoia 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 Katyń as a crime of Stalinism – was unwilling to release. The documents included the key execution order of the Politburo

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<sup>11</sup> Gurianov, “Zbrodnia katyńska w oczach współczesnych Rosjan,” p. 23.

<sup>12</sup> On the 10<sup>th</sup> of April, 2010 en route from Warsaw to attend an event commemorating the 70<sup>th</sup> anniversary of the Katyń Forest massacre the Polish Air Force aircraft crashed near the Russian city of Smolensk, killing all ninety-six people on board, including the Polish President Lech Kaczyński. *See*: Polish President Dies in Jet Crash In Russia, THE NEW YORK TIMES (Apr. 10, 2010) <http://www.nytimes.com/2010/04/11/world/europe/11poland.html>

<sup>13</sup> “Akta katyńskie już w IPN,” *Rzeczpospolita*, July 7, 2011; as reported on July 30, 2011 at <http://www.rp.pl/artykul/684440.html>

<sup>14</sup> A. CIENCIALA ET.AL., *KATYŃ; A CRIME WITHOUT PUNISHMENT* (Yale University Press, 2007), p. 257.

from March 5, 1940 together with other secret Katyń documents from the special Soviet archives.<sup>15</sup> One expert explained that these materials were released, in part, because of Alexander N. Yakovlev and, in part, because of Memorial.<sup>16</sup>

One expert stated: “There 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 Katyń and documents attesting to that were released in October of 1992. The expert added, to the extent that 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 a “quite ugly reversionary” attitude to Soviet stultifications about Katyń.

Several experts mentioned that a knowledge gap still exists regarding the identity of the perpetrators of the Katyń massacre. Among the released documents are lists of people who were given medals for cleaning out the Polish POWs camps; and the experts inferred those listed were among the perpetrators. But it was conceded that this could only be a small fraction of the perpetrators because it would have taken many more men to kill 22,000 individuals.

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 Yelstin 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 Katyń 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>17</sup> Another expert suggested looking beyond documents inside Russia to documents that might be available through the UN, or in national archives still-classified government files. The expert articulated that there was a practice of the allies during World War II to keep complete list of potential perpetrators so they could sift through the list later and prosecute offenders. The names of the Katyń perpetrators may be contained in these lists.

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<sup>15</sup> CIENCIALA, KATYŃ, *supra*, p. 256.

<sup>16</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 also*: [http://www.memo.ru/daytoday/5Katyń\\_eng.htm](http://www.memo.ru/daytoday/5Katyń_eng.htm)

<sup>17</sup> *See*. Browning, Christopher. ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND, New York: HarperCollins, 1992.

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. However, another expert commented that this particular list has not yet been located, and may no longer exist.

## B. *The USA*

One participating expert stated that when the Nuremberg Tribunal Prosecutors (consisting of a Chief Prosecutor from the United States, United Kingdom, France and Soviet Union) indicted German (rather than Soviet) leaders for the Katyń crime and assigned the Soviet team the responsibility to prosecute crimes committed against the Polish people, the Katyń families fell victim to the crime of “memoricide,” understood as an international cover-up or “conspiracy of silence” intended to destroy the memory of the crime and the memory of the victims.<sup>18</sup> While the Nuremberg Tribunal did not find the Germans guilty of the Katyń crime, its judgment did not state that the Soviet Union was the real culprit. According to the expert, this crime of memoricide was compounded when, in 1952, the U.S. Congress took no action upon the recommendation of its own Select Committee on the Katyń Forest Massacre to form an international tribunal on the Katyń atrocities.<sup>19</sup>

On April 13, 1990, Mikhail Gorbachev officially admitted that the Soviet NKVD committed the Katyń crime.<sup>20</sup> As the full scope and extent of the Soviet crime began to emerge, Franciszek Herzog wrote to the President of the United States:

Mr. President, as a US citizen and a son of the Polish officer, Lt. Col. Franciszek Herzog, murdered in Kharkov [A POW camp related to the Katyń massacres] I beg you and implore you to look at the facts again. And then, in the name of the US 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>21</sup>

After many more letters in 1992, the US 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>22</sup> Herzog replied:

Unfortunately, [your letter] does not answer my question and concerns. [ ... ]

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<sup>18</sup> See WESLEY ADAMCZYK, *WHEN GOD LOOKED THE OTHER WAY* (The University of Chicago Press, 2004) (detailing the conspiracy of silence relating to the Katyń crime).

<sup>19</sup> SELECT COMMITTEE ON THE KATYŃ FOREST MASSACRE, Final Report, House Report No. 2505, December 22, 1952, 82<sup>nd</sup> Cong., 2<sup>nd</sup> Sess, Recommendations.

<sup>20</sup> Cienciala, *Katyń*, p. 252.

<sup>21</sup> Letter of Franciszek Herzog to the President of the United States dated December 26, 1991.

<sup>22</sup> Letter of Thomas Gerth, Deputy Director of the Office of Eastern European Affairs of the US Department of State to F. Herzog dated August 12, 1992.

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 Ostaszkw camp. [ ... ] I hope that one day US Government will officially declare who was guilty of this horrendous crime against the Polish Nation and humanity.<sup>23</sup>

Echoing the sentiments addressed in the Herzog letters, several of the experts felt that the US Government shares some responsibility for contributing to the double victimization of the Polish people and for preservation of a distorted historic account. Due to the “conspiracy of silence” of over a half century, the moral calculus with respect to the Katyń 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 Katyń crime

For half a century after the Katyń crime, Poland was a satellite state of the Soviet Union. As a result, the Polish government was not in the position to pursue any independent investigation into the Katyń crime or pursue any compensation claims against the Soviet Union. The tragic crash of the Polish Presidential Plane on its way to Katyń for the commemoration of the 70<sup>th</sup> anniversary of the Katyń massacre in Smolensk greatly complicated the position of the current Government of Poland with respect to the Katyń crime. However, regardless of the political considerations, as a serious international crime, Katyń must be prosecuted 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>24</sup> for failure to prosecute the Katyń crime.

#### 2. Regional forums

##### a. The European Union

Although the Russian Federation is not a member of the European Union, the EU-Russian Partnership and Cooperation Agreement provides a political, organizational and legal framework for dialog and cooperation between the two neighboring entities. As a member of the European Union, Poland is represented by the Delegation of the European Union to Russia (EU Delegation). As such, one expert recommended that the EU Delegation should take into

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<sup>23</sup> Letter of Franciszek Herzog to Thomas Gerth, Deputy Director of the Office of Eastern European Affairs, US Department of State, dated September 1, 1992.

<sup>24</sup> See Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INTERNATIONAL LAW JOURNAL 30-69 (1995).

consideration the negative impact of the Katyń 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 reflecting 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>25</sup> Thus, the obstruction of justice and inability of the Russian Federation to meet its obligations under international laws and treaties with respect to the Katyń crime should be brought to the attention of the Russian Federation by the EU Delegation that 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 Katyń crime, broad dissemination of knowledge about the Katyń crime, and good faith contrition in the form of compensation to the Katyń 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 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 Council of Europe undertake to respect fundamental freedoms and rights. Both Poland and Russia are members of the Council of Europe. The European Court of Human Rights as the judicial organ established by the European Convention on Human Rights ensures, in the last instance, that contracting states observe their obligations under the European Convention on Human Rights.

On July 15, 2011 the European Court of Human Rights declared as admissible two complaints concerning inadequate Russian investigation into the Katyń massacre conducted in the 1990s into the deaths of 12 Polish officers in the former Soviet Union.<sup>26</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 Katyń 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

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<sup>25</sup>As reported: [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)

<sup>26</sup>“Two complaints concerning inadequate investigation into Katyń massacre declared admissible by European Court,” Press Release dated July 15, 2011; ECHR 109 (2011).

Pact of August 23, 1939. This approach, they pointed out, could potentially give the Republic of Poland a cause of action against Russia 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 parties. Pursuant to Article 9 of the 1948 Genocide 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. In the alternative, Poland and other interested States could seek to have the U.N. General Assembly request an Advisory Opinion of the International Court of Justice, clarifying the requirements of the Genocide Convention with respect to disclosure of information, prosecution, and compensation for the Katyn crime.

The difficulty is that the Katyn crime predated 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>27</sup> In this context it is important to note, however, that the preamble to the Genocide Convention states that at “all periods of history genocide has inflicted great losses on humanity.” 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>28</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>29</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. 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>30</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>31</sup> For example, in October 1945, the United States, Soviet Union, United Kingdom and France charged the original Nuremberg defendants with committing genocide; and in 1948, the United States Military Tribunal in the *Alstötter* case spoke of “the crime of genocide committed during the Second World War.”<sup>32</sup> Also, the Tribunal directly addressed the retroactivity issue as follows: “We 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>33</sup> The Tribunal convicted Ernst Lautz for enforcing the law against Poles and Jews which comprised ‘the established government plan for the

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<sup>27</sup> Article 28 of Vienna Convention on the Law and Treaties, 1155 UNTS 331.

<sup>28</sup> Article 31(2) of the Vienna Convention on the Law and Treaty, *id.*

<sup>29</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, (1951) ICJ Reports 16, p. 16.

<sup>30</sup> ‘Prevention and Punishment of Genocide, Historical Summary,’ 2 November 1946 – 20 January 1948, UN Doc. E/621.

<sup>31</sup> W. Schabas, *Retroactive Application of the Genocide Convention*, 2010, p. 10.

<sup>32</sup> *United States of America v. Alstötter et al.* (‘The Justice Case’) (1948), 3 TWC 954 (United States Military Tribunal), at p. 963, as quoted in Schabas, *Retroactive Application of the Genocide Convention*, p.10.

<sup>33</sup> *Ibid.*, p. 983

extermination of these races. He was an accessory to, and took a consenting part in, the crime of Genocide.’<sup>34</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 1968.<sup>35</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 predating its ratification. 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>36</sup> In June of 1956 Colonel Tichonov from the Ukrainian KGB ordered the destruction by burning of 2,500 evidentiary cards of Polish citizens executed by shooting in 1940 in the Ukrainian SSR.<sup>37</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. This operation was to be conducted under the pretense of building a special educational facility for the Ukrainian KGB.<sup>38</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 grinded by heavy equipment machinery.<sup>39</sup> Between 1973 and 1976, the Soviet Politburo was directly involved in blocking the erection of the Katyń Monument in Great Britain by issuing a resolution and instruction for the Soviet Ambassador in London regarding the projected Katyń Monument and adopting a special protocol to “Counteract Western Propaganda on the Katyń Question.”<sup>40</sup> Accordingly destruction of evidence in the Katyń 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 UN Charter, the UN Security Council could establish a Commission of Experts or Special Tribunal to document or prosecute the Katyń

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<sup>34</sup> *Ibid.*, p. 1128.

<sup>35</sup> Schabas, *Retroactive Application of Genocide Convention*, p. 11.

<sup>36</sup> Note by Shelepin to Khrushchev dated March 3, 1959 on the Destruction of Documents of the Operation Sanctioned by the Politburo on March 5, 1940, as cited in Cienciala, *Katyń*, p. 332.

<sup>37</sup> Documents on the Katyń Crime made available to the Polish Institute of National Remembrance by the Security Services of Ukraine and published in S. Kalbarczyk et. al.” *Zbrodnia Katyńska w Kręgu Prawdy i Klanstwa*,” IPN, Warszawa 2010, p. 228.

<sup>38</sup> *Ibid.*, p. 235.

<sup>39</sup> WESLEY ADAMCZYK, *WHEN GOD LOOKED ANOTHER WAY* (THE UNIVERSITY OF CHICAGO PRESS, 2004); TERESA KACZOROWSKA, *CHILDREN OF THE KATYŃ MASSACRE* (McFarland & Co. 2006).

<sup>40</sup> CIENCIALA, *KATYŃ*, *supra*, pp. 334-337.

crime, as it did for atrocities in the former Yugoslavia, Rwanda, and Lebanon. But with Russia wielding a veto in the Security 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 possible that the General Assembly could utilize its “Uniting for Peace” authority to set up a commission or tribunal on the Katyń crime without Security Council approval.<sup>41</sup> This initiative could be sponsored by Poland and other interested States. Action under the Uniting for Peace Resolution requires the approval of a two-thirds majority of the members of the General Assembly. Moreover, the Special Court for Sierra Leone and the Cambodia Tribunal were established by an agreement between the host country and the United Nations, rather than a Security Council Chapter VII resolution. But without Security Council involvement, the experts noted, cooperation with such an institution would be voluntary rather than mandatory.

#### 4. Dissemination of Truth

Actions that aim at minimizing and justifying the Katyń crime or efforts to misinform or suppress information on the Katyń-related matters are counterproductive to reconciliation. As the Madden Committee concluded and Rep. Kucinich reiterated almost sixty years later, the Katyń 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 Katyń crime, its method, as well as 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*

As a framework for addressing Katyń, one expert offered the example of the binding declaration of the UN Security Council in regards to the Pan Am 103/Lockerbie bombing, which featured a threefold requirement: first, a renunciation of terrorism by the accused party; second, acceptance of responsibility; and third, just compensation to the victims or their families. How does Russia fare in regards to Katyń under this three-prong test? The present government has already declared Katyń a crime, but some feel that without full disclosure of the evidence in its possession, earnest renunciation of the Katyń Massacre, and compensation to the victims, Russia’s repentance remains half-hearted. 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

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<sup>41</sup> See General Assembly Resolution 377(V) of 1950, known as the “Uniting for Peace Resolution,” in which the General Assembly resolved that “if 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 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.”

could only be achieved by overcoming the feeling of hopelessness and despair that Katyń inflicted on the Polish people.

### 1. Prosecute the Katyń crime as an international crime

The current legal position of the Russian Federation with respect to the Katyń crime is as follows: (1) the Kaytn crime is qualified as an ordinary crime of exceeding official authority that occurred long time ago, and thus is barred by 10-year statute of limitation, (2) the Katyń investigation is terminated, (3) materials from the Katyń 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>42</sup> the Russian court indentified only 22 victims, treating the remaining victims as unidentified and anonymous, (6) a number of Russian courts consistently held that the Katyń victims were not eligible for rehabilitation as victims of Stalinist repression, thus families of the Katyń victims were not entitled to compensation.<sup>43</sup>

The classification of the Katyń crime as an ordinary crime subject to a 10-year statute of limitation violates international law (as codified in UN Resolutions stipulating that statutes of limitations shall not bar the prosecution of war crimes and crimes against humanity),<sup>44</sup> and stands in direct contradiction to Russia's official statements including the resolution of the Duma, dated November 26, 2010 on the tragedy of Katyń and its victims. According to this resolution adopted by the Lower House of the Russian Parliament, the Katyń crime represents mass extermination of thousands of Polish citizens held in the Soviet prisoner-of-war camps and prisons, and thus constitutes an act of terrorism of the totalitarian state. This resolution places direct responsibility for the Katyń crime on Stalin and the Soviet leadership.<sup>45</sup>

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<sup>42</sup> Note by Chairman of the KGB USSR Alexander Shelepin dated March 3, 1959.

<sup>43</sup> Alexander Guryanov, Chief of the Polish Program of the Memorial Society, Speech at the Symposium "Katyń: Justice Delayed or Justice Denied?" February 4, 2011.

<sup>44</sup> See, e.g., Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR Supp. No. 16, at 81, U.N. Doc. A/6716 (1967) ("states 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, 25 U.N. GAOR Supp. No. 28, at 78-79, U.N. Doc. A/8028 (1970), reprinted in M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 698 (1992) (condemning war crimes and crimes against humanity and "calling upon the states concerned to bring to trial persons guilty of such crimes"); G.A. Res. 2840, 26 U.N. GAOR Supp. No. 29, at 88, U.N. Doc. A/8429 (1971) (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, GAOR Supp. No. 30, at 79, U.N. Doc. A/9030 (1973), reprinted in BASSIOUNI, *supra*, at 701 (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>45</sup> As reported on July 23, 2011 at <http://fakty.interia.pl/fakty-dnia/news/uchwala-dumy-w-sprawie-Katynia-przeczytaj-tekst>; See also: <http://Katyń.ru/index.php?go=News&in=view&id=206>, and [www.telegraph.co.uk/news/worldnews/europe/russia/8162859/Russian-parliament-admits-Stalin-ordered-Katyn-massacre.html](http://www.telegraph.co.uk/news/worldnews/europe/russia/8162859/Russian-parliament-admits-Stalin-ordered-Katyn-massacre.html)

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 Soviet Far East.

## 2. Refrain from justifying the Katyń crime

When, in 1990 Michail Gorbachev officially admitted that the Soviet Union committed the Katyń murders, he also issued a decree dated November 3, 1990, whereby he ordered a wide "investigative search to reveal archival materials related to the events and fact in the history of bilateral Soviet Polish relations which resulted in losses to the Soviet side."<sup>46</sup> This decree became the cornerstone of the Russian policy of justifying and minimizing the Katyń crime. The so-called "anti-Katyńism" has been effectively promoted in Russia since the admission of Soviet responsibility for the Katyń crime.<sup>47</sup>

On May 22, 1995 President Yeltsin warned President Wałęsa that demanding apology or seeking trials or raising compensation claims against Russia will be counterproductive. Yeltsin pointed out that in the Katyń forest there are mass graves of people of other nationalities including at least five hundred Soviet POWs murdered by the Nazis.<sup>48</sup>

Participating experts explained how this "anti-Katyńism" 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 Katyń crime also led to trivializing the number of the Katyń victims by, *inter alia*, presenting them in the context of a larger number of non-Polish victims of the Stalinist regime.<sup>49</sup>

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

The families of the Katyń victims were denied the status of a victim in the Russian investigation into the Katyń crime.<sup>50</sup> They were also denied access to information into the Katyń investigation, including the final decision on the reasons for termination of the Russian investigation. Numerous petitions of the Katyń families to rehabilitate their relatives murdered pursuant to the March 5, 1940 Execution Order, were consistently denied by the Russian courts as well.<sup>51</sup>

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<sup>46</sup> Order No. RP-979. *See also*: Cienciala, *Katyń*, p. 346.

<sup>47</sup> 'Anty-Katyń' as reported on July 24, 2011 at <http://pl.wikipedia.org/wiki/Anty-Katyń>

<sup>48</sup> Letter from President Yeltsin to President Wałęsa quoted in Cienciala, *Katyń*, p.348.

<sup>49</sup> Maria Szonert-Binienda, "Was Katyń a Genocide?" Paper presented at the Symposium "Katyń: Justice Delayed or Justice Denied?" February 4, 2011.

<sup>50</sup> "Russian Court Laughs in Katyń Victims Face," *Gazeta Wyborcza*, May 28, 2008, as reported on July 29, 2011 at [http://wyborcza.pl/1,86871,5252086,Russian\\_Court\\_Laughs\\_in\\_Katyń\\_Victims\\_Face.html](http://wyborcza.pl/1,86871,5252086,Russian_Court_Laughs_in_Katyń_Victims_Face.html)

<sup>51</sup> According to the Russian law, rehabilitation constitutes pre-condition to compensation for Stalinist crimes. The Katyń Families appealed the decisions of the Russian courts to the European Court of Human Rights alleging

Several Kaytn families have appealed to the European Court for Human Rights complaining, *inter alia*, about the consistent policy of the Russian Federation denying them access to the Russian courts. Accordingly, the experts felt that the Russian Federation should provide the Katyń 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 Katyń crime, experts suggested that the Russian Federation could establish an endowment fund providing the financial foundation for an educational establishment in Poland such as a museum, institute or academia dedicated to the Katyń-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 the Katyń 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 Katyń museum & correct history books

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

### C. The USA

1. Consider implementing the Madden Commission's recommendations

In 1952 the United States House of Representatives' Select Committee investigating the Katyń Massacre unanimously recommended that the full House of Representatives approve the committee's findings<sup>52</sup> and adopt a resolution:

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violations of their rights under Articles 2, 3, 6, 8, 9 and 13 of the European Convention on Human Rights. See: *Wolk-Jeziarska and Others vs. Russia* no. 29520/0.

<sup>52</sup> The Final Report of the Select Committee Investigating the Katyń Forest Massacre incorporates the recommendations contained in the Interim Report, filed on July 2, 1952 (H. Res. No. 2430).

1. Requesting the President of the United States to forward the testimony, evidence, and findings of this committee to the United States delegates at the United Nations;
2. Requesting further that the President of the United States issue instructions to the United States delegates to present the Katyń case to the General Assembly of the United Nations;
3. Requesting that appropriate steps be taken by the General Assembly to seek action before the International World Court of Justice against the Union of Soviet Socialist Republics for committing a crime at Katyń 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 United States delegation to seek the establishment of an international commission which would investigate other mass murders and crimes against humanity.<sup>53</sup>

The recommended congressional resolution was never adopted by the U.S. Congress and the recommended actions were never implemented by the President. In this way, the Katyń matter was once again relegated to historical amnesia. Considering that to this day justice has not been served in the Katyń crime, that the Katyń families and their descendents continue to experience the syndrome of double victimization, and that the full and accurate record of the Katyń crime was never set straight in a 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 Katyń case to the International Court of Justice and/ the formation of a special international tribunal to investigate the Katyń atrocities (as discussed above) should be given due consideration.

## 2. Assure full disclosure of all Katyń-related materials.

In order to achieve reconciliation and closure in the Katyń matter, the experts believed the action of the US 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 Katyń-related materials in the possession of the U.S. Government is a prerequisite to making any progress in resolving the Katyń 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 pro-active search of U.S. government records related to the Katyń atrocities and make the results of such search publically available. An Executive Order on search, disclosure and dissemination of Katyń materials would aim to remedy historic distortions, denials, and suppressions of facts with respect to the Katyń 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 United States Government but beyond the reach of scholars. Such materials include documents referenced by the Madden Committee such as: (i) reports of US Army Lt. Col. Henry I. Szymanski dated November 23, 1942 and May 1943, turned over to G-2 War Department, (ii) a report of US Army Col. Van Vliet dated May 22, 1945, (iii) any

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<sup>53</sup> Id.

documents and information related to the Memorandum of Owen O'Malley sent by W. Churchill to F. D. Roosevelt on August 13, 1943, (iv) any records, documents and information related to Special US Emissary to the Balkans George Howard Earle meeting and correspondence with F. D. Roosevelt for the period of May 1944 to April 1945, and (v) 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 Katyń 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 Katyń-related materials. Furthermore, documents related to mass deportations of families of the condemned Polish POWs and prisoners 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 Katyń-related materials. The pro-active inter-agency search should cover all sources of information owned by, produced by or under the control of the United States Government, including audio and video recordings, as appropriate.<sup>54</sup>

### 3. Assure dissemination of knowledge on Katyń

In recognition that vital Katyń-related materials had been repeatedly withheld from the public and the truth about Katyń had been effectively suppressed by the Government of the United States to the detriment of the families of the Katyń 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 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 Katyń-related areas of intellectual pursuit, and adequately disseminate Katyń related information to the American academic and educational professionals and to the American public at large. Experts also proposed the establishment of a Katyń 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 the wrong that has been done through suppression of evidence, issuance of an apology, provision of compensation through the establishment of a Katyń Truth and Reconciliation Institute, payment of compensation for the Katyń families with US citizenship, and educational outreach through the Department of Education, the Holocaust Museum and other partners.

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<sup>54</sup> See remarks by Rep. Marcy Kaptur at the Symposium “Katyń: Justice Delayed or Justice Denied?” February 4, 2011. Documents related to Katyń in the archives of the Foreign Relations Committee of the US House of Representatives of the 82<sup>nd</sup> Congress shall be searched as well.

## 5. U.S. Helsinki Commission

The Polish-Russian Commission 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. In 2008 the Commission was reactivated with new members.<sup>55</sup> Unfortunately, in the aftermath of the 2010 Polish presidential plane crash in Smolensk, the Commission has made no meaningful progress as Russia reverted to its own distorted view of the history of World War II. Experts suggested that the potential restructuring of this Commission by inclusion of other parties such as representatives of the US Helsinki Commission, the European Union and the Federation of Katyń 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 Katyń record straight.

## 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 Katyń crime by *inter alia* denying standing to the families of the Katyń victims. Several complaints of the Katyń family members against the Russian Federation are pending before the European Court of Human Rights in Strasbourg, France. 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. On July 15, 2011, the European Court of Human Rights declared as admissible two complaints concerning the criminal investigation conducted in the 1990s into the deaths of 12 Polish men in the context of the Katyń massacre in the former Soviet Union.<sup>56</sup>

### B. *Alien Tort Statute*

The plaintiffs in the two Katyń-related cases pending before the European Court of Human Rights seek no monetary compensation for pain and suffering or their families' lost possessions. One expert pointed out that the reluctance on the part of the Katyń families to demand monetary compensation, although understood from the moral standpoint, runs contrary to contemporary international law that calls for acceptance of responsibility through tangible evidence of contrition. 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 Katyń families should demand monetary compensation from the Russian Federation.

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<sup>55</sup> As reported on July 23, 2011 at [http://pl.wikipedia.org/wiki/Polsko-Rosyjska\\_Grupa\\_do\\_Spraw\\_Trudnych](http://pl.wikipedia.org/wiki/Polsko-Rosyjska_Grupa_do_Spraw_Trudnych)

<sup>56</sup> "Two complaints concerning inadequate investigation into Katyń atrocity declared admissible by European Court," Press Release dated July 15, 2011; ECHR 109 (2011).

The experts also discussed the possible remedies for survivors of Katyń victims via U.S. courts. Pursuing litigation under the Alien Tort Statute<sup>57</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 Katyń. Although many of the experts acknowledged that Russia has made great strides in expanding the access to information at Katyń, 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 Katyń 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 Katyń. For these experts, the supposition is that ATS litigation would establish a historical record of events at Katyń, hold those who participated in the Katyń 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 Katyń occurred outside the United States and between two foreign entities, the majority of the discussion was focused on ensuring that Katyń could meet the demanding subject-matter jurisdictional barrier established by the US Supreme Court in *Sosa v. Alveraz-Machain*.<sup>58</sup> In order to increase the likelihood that a court would find Katyń as within the ATS's subject matter, one expert suggested that Katyń 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>59</sup> the U.S. Court of Appeals for the Second Circuit held that mass murder met the ATS jurisdictional threshold 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." Second, the expert noted that in *Almog v. Arab Bank*,<sup>60</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. Specifically the Court stated that: "Hamas, [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>61</sup>

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<sup>57</sup> 28 U.S.C. §1350 ("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 for a plaintiff to sustain an ATS cause of action they 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 US treaty.

<sup>58</sup> 542 U.S. 692, 724 (2004) (holding that "any 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 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, and the interests of the President and Congress. *Id.* at 732-34.

<sup>59</sup> 70 F.3d. 232, 238 (2nd Cir. 1995).

<sup>60</sup> 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. 471 F.Supp.2d 257, 260-63 (E.D.N.Y 2007).

<sup>61</sup> *Id.* at 275-276

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: "Because 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>62</sup> Other experts believed that Katyn was similar to *Almog* because the Soviet actions demonstrated they sought to destroy the Polish state by eliminating its 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 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 victims 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 the courts of the United States 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 to 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

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<sup>62</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277 (defining genocide as "any 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.) The dispute among the experts is that 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.

meet my child or wife or parent who was killed, and I know they will ask me did I do everything that I could. So for them it is much more important to have tried and lost then 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 US 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>63</sup> However, several experts believed suing Russia in US courts would be very difficult because Russia, as a sovereign State, possesses foreign sovereign immunity. 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>64</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>65</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 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>66</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.

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>67</sup> Under this theory, foreign sovereign immunity would not be an issue because the Foreign Sovereign Immunity Act does not protect commercial activity.<sup>68</sup> On the other hand, one expert pointed out that the U.S. Court of Appeals for the Second Circuit had recently held that corporations, unlike individuals and States, cannot be held liable for international crimes.<sup>69</sup> More recently, the U.S. Court of Appeals for 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>70</sup> setting up a split in the Federal Circuits which will eventually have to be resolved by the Supreme Court.

## VII. OTHER REMEDIES AND APPROACHES

Congressional hearings in the United States held by representatives from districts with significant Polish populations may help to catalyze a reconciliation process between Russia and

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<sup>63</sup> See Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INTERNATIONAL LAW JOURNAL 30-69 (1995).

<sup>64</sup> See "Designation of foreign terrorist organizations," 8 U.S.C. §1189.

<sup>65</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, May 23, 1969, 1155 U.N.T.S. 331.

<sup>66</sup> *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 247 (2d. Cir. 1996).

<sup>67</sup> This assumes that *Kiobel v. Royal Dutch Petroleum* 621 F.3d 111 (2d. Cir. 2010) (holding that the ATS does not provide subject matter jurisdiction over corporations) would either be overturned by the Supreme Court or alternatively another circuit have jurisdiction over this Russian Corporation would reject *Kiobel*.

<sup>68</sup> See 28 U.S.C. §1605(a)(2).

<sup>69</sup> *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d. Cir. 2010), petition for writ of certiorari pending.

<sup>70</sup> *John Doe VIII v. Exxon Mobil Corp.*, (D.C. Cir. 2011).

Poland.<sup>71</sup> The conference specifically sought suggestions, eliciting ideas such as filing claims similar to those filed against Nazi Germany for slave labor.<sup>72</sup> The involvement of a third party such as the U.S. Congress might provide a foundation on which to begin moving forward. From that point, further negotiations between Russia and Poland could take place with Congress recognizing the contributions from each side. As one Conference 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 UN Economic and Social Council and UNESCO have a vital interest in eradicating international crimes like Katyń. They also have the authority to request an advisory opinion from the International Court of Justice on whether Katyń constitutes genocide and/or whether there are legal duties to investigate and prosecute the Katyń crime. The request for advisory opinion on Katyń could serve as a useful tool since it follows the advisory as opposed to adversarial path, and thus is less contentious politically than a potential case brought by Poland against Russia but could set the Katyń record straight. The initiative to prompt these organizations to make a request for advisory opinion could be supported by the Worldwide Federation of the Katyń Families, human rights groups and other organizations of Polish citizens wronged by the extermination policy of the Soviet Union in World War II. The US Government could lend its support to this process through its representatives within the UN bodies.

#### 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 Katyń record straight in the court of international public opinion. By providing legal expertise and assisting with legal research, by supporting Katyń families in pending litigation through amicus curiae briefs, and by stimulating academic research into the Katyń related subject, the academic community could play a pivotal role in setting the Katyń record straight in order to stimulate reconciliation and prevent “Katyńism” from reoccurring.

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<sup>71</sup> The U.S. House of Representatives has previously made gestures encouraging Russia to “fully declassify and disclose all official records pertaining to the Katyń massacre...” 2009 CONG US HRES 1323 (May 4, 2010). In addition, it was the House of Representatives that established a Select Committee to investigate Katyń in the early 1950’s and concluded unambiguously that the Soviet NKVD was responsible. 2011 CONG US HRES 213 (April 7, 2011). Here, attendees referenced specific invitations from two Congressmen to offer input.

<sup>72</sup> See, for example, *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, and *Burger-Fischer v. Degussa AG*, 65 F.Supp.2d 248. *Iwanowa* solved the problem of jurisdiction under the Alien Tort Claims Act by asserting that the claim was part of a commercial transaction; namely, that of slave trading. The claim, however, failed for other reasons, including statute of limitations and comity.