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KATYN FOREST MASSACRE: OF GENOCIDE, STATE LIES, AND SECRECY

*Milena Sterio**

The Soviet secret police murdered thousands of Poles near the Katyn Forest, just outside the Russian city of Smolensk, in the early spring of 1940. The Soviets targeted members of the Polish intelligentsia—military officers, doctors, engineers, police officers, and teachers—which Stalin, the Soviet leader, sought to eradicate preventively. At the start of World War II, the Soviet Union viewed Poland as attractive territory, to be conquered and potentially annexed after the war. The Katyn massacre was not discovered until 1943, by the Germans, who instantly blamed the Soviets. The latter, however, blamed the Germans, and the Western Allies begrudgingly accepted this untruthful claim. The Katyn Forest Massacre remained taboo for many years, and it has only attracted significant scholarly, historical and political interest in the last two decades, following the fall of the Iron Curtain. This Article seeks to decipher the Katyn myth, by describing in Part II, the events which led to the Katyn Forest Massacre, as well as the killings themselves. In Part III, this Article focuses on subsequent investigations into Katyn, including the U.S. congressional inquiry in 1952, as well as post-Cold War revelations about Katyn, permitting to officially inflict responsibility on the Soviet Union. In Part IV, this Article examines the Katyn killings in light of international law, concludes that the killings constitute war crimes and, crimes against humanity, and that they may perhaps constitute genocide, under a more expansive reading of the Genocide Convention. Finally, Part V concludes that the admission of guilt by Russia about its role at Katyn is necessary and plays a crucial role in the thawing of Russian-Polish relations.

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I. INTRODUCTION

Near the Katyn Forest, just outside the Russian city of Smolensk, in the early spring of 1940, the Soviet secret police (NKVD) murdered thousands of Poles—military officers, doctors, engineers, police officers, teachers, and other members of the Polish intelligentsia—which Stalin, the Soviet leader, sought to eradicate preventively.¹ At the start of World War II, Germany and the Soviet Union viewed Poland as attractive territory, to be conquered and divided by the two powerful nations.² The Katyn massacre was not discovered until 1943, by the Germans, who instantly blamed the Soviets.³ The latter, however, blamed the Germans, and the Western Allies begrudgingly accepted this untruthful claim.⁴ In fact, Western countries remained fearful of the Soviet Union during the Cold War. Reluctant to alienate this powerhouse, they officially supported the laying of blame upon Germany.⁵ The Katyn Forest Massacre remained

¹ See Benjamin B. Fischer, *The Katyn Controversy: Stalin's Killing Field*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art6.html> (last updated June 27, 2008) (noting Stalin “signed their death warrant” when he ordered the NKVD to shoot the prisoners). See generally GEORGE SANFORD, *KATYN AND THE SOVIET MASSACRE OF 1940: TRUTH, JUSTICE AND MEMORY* (2005) (studying Katyn and the Soviet Massacre by using Soviet documents to uncover the truth that the Soviet government had tried to hide).

² In fact, in September 1939, Nazi Germany invaded Poland, followed by the Soviet Union, on September 17, 1939, in accordance with the Molotov-Ribbentrop Pact, signed by Hitler and Stalin. Fischer, *supra* note 1.

³ *Id.*

⁴ For example, unofficial and classified British documents concluded that the Soviet guilt in the Katyn massacre was almost a “certainty,” but because of the strategic importance of the war-time alliance with the Soviets, the British, in their official stance, supported the Soviet denial of guilt. See NORMAN DAVIES, *EUROPE: A HISTORY 1004–05* (1998).

⁵ *Id.*

taboo for many years, and it has only attracted significant scholarly, historical and political interest in the last two decades, following the fall of the Iron Curtain.

This Article seeks to decipher the Katyn myth, by describing in Part II the events that led to the Katyn Forest Massacre, as well as the killings themselves. Part III focuses on subsequent investigations into Katyn, including the U.S. congressional inquiry in 1952, as well as post-Cold War revelations about Katyn, permitting to officially inflict responsibility on the Soviet Union. Part IV examines the Katyn killings in light of international law and concludes that the killings constitute war crimes, crimes against humanity, and perhaps even genocide under a more expansive reading of the Genocide Convention. Finally, Part V concludes that the admission of guilt by Russia about its role at Katyn is necessary and plays a crucial role in the thawing of Russian-Polish relations.

II. KATYN FOREST MASSACRE: A HISTORICAL OVERVIEW

In the spring of 1940, the NKVD murdered close to 22,000 Polish nationals in the Katyn Forest in Russia, in the nearby prisons of Kalinin and Kharkov, at more remote sites such as the Soviet headquarters in Smolensk (a prisoner-of-war camp in Moscow), and in Starobelsk and Ostashkov.⁶ The term “Katyn massacre” originally referred only to the massacre carried out at Katyn Forest, but the more modern-day investigations of this crime cover both the massacre at Katyn Forest as well as the killings carried out at the sites mentioned above.⁷

The orders for the mass murder had been given by Lavrenty Beria, the head of NKVD, and had been signed and approved by the Soviet Politburo, including its leader, Joseph Stalin.⁸ The Polish victims included about 8,000 officers who had been taken prisoner of war during the 1939 Soviet invasion of Poland and about 14,000 doctors, professors, lawmakers, public servants, and police officers arrested by the Soviets for being “intelligence agents and gendarmes, spies and saboteurs, former landowners, factory owners and officials.”⁹

The Soviet motivation for killing the Poles was to rid Poland of all intelligentsia who could offer meaningful resistance to the Soviets after

⁶ See Fischer, *supra* note 1 (noting the different locations of the massacre); see also JANUSZ K. ZAWODNY, DEATH IN THE FOREST: THE STORY OF THE KATYN FOREST MASSACRE 1–11(1962) (describing the prisoners who vanished).

⁷ See *Decision to Commence Investigation into Katyn Massacre*, INST. NAT’L REMEMBRANCE (Jan. 12, 2004), http://www.ipn.gov.pl/portal/en/2/77/Decision_to_commence_investigation_into_Katyn-Massacre.html (noting the other areas included in the “Katyn Massacre”).

⁸ Fischer, *supra* note 1; SANFORD, *supra* note 1, at 43–44.

⁹ *Decision to Commence Investigation into Katyn Massacre*, *supra* note 7.

World War II.¹⁰ In fact, the Soviet Union and Germany had signed a well-known pact, the Molotov-Ribbentrop Pact, according to which they agreed to conquer and divide Poland.¹¹ Pursuant to the Molotov-Ribbentrop Pact, Nazi Germany invaded Poland on September 1, 1939, and the Soviets followed on September 17, 1939.¹² Historical records show that the Soviet plans for Poland included the creation of a Soviet-ruled puppet state in which no dissent would be tolerated. According to historian Gerhard Weinberg, “[s]ince [Stalin] intended to keep the eastern portion of the country in any case, Stalin could be certain that any revived Poland would be unfriendly. Under those circumstances, depriving it of a large proportion of its military and technical elite would make it weaker.”¹³

Despite the Molotov-Ribbentrop Pact and the pro forma allegiance of Germany and the USSR at the beginning of World War II, the Soviets kept the Katyn killings secret from the Germans. When the Germans overtook Poland in their successful surge toward the east in 1943, they accidentally discovered mass graves in the Katyn Forest.¹⁴ Germany saw this discovery as an excellent vehicle to drive a wedge between Poland, the Soviet Union, and the Western Allies.¹⁵ Thus, immediately upon discovering these mass graves, the Germans charged the Soviets with carrying out the massacre in 1940.¹⁶ In order to prove their claim, the

¹⁰ Historian Gerhard Weinberg has suggested that the true motivation of the Soviets was to rid Poland of any meaningful resistance and intelligentsia. GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 107–08 (2d ed. 2005).

¹¹ Fischer, *supra* note 1.

The considerable logistic effort required to handle the prisoners coincided with the USSR's disastrous 105-day war against Finland. The Finns inflicted 200,000 casualties on the Red Army and destroyed tons of materiel—and much of Russia's military reputation. That war, like the assault on Poland, was a direct result of Stalin's nonaggression pact with Hitler.

Id.

¹² See Fischer, *supra* note 1; see also *Invasion of Poland, Fall 1939*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005070> (last visited Mar. 9, 2012).

¹³ WEINBERG, *supra* note 10, at 107.

¹⁴ Fischer, *supra* note 1.

¹⁵ *Id.* (“[Nazi] propaganda minister Josef Goebbels hoped that international revulsion over the Soviet atrocity would drive a wedge into the Big Three coalition and buy Germany a breathing space, if not a victory, in its war against Russia.”).

¹⁶ DAVID ENGEL, *FACING A HOLOCAUST: THE POLISH GOVERNMENT-IN-EXILE AND THE JEWS, 1943–1945*, at 71 (1993) (“The German broadcast [announcing the discovery of the Katyn graves] charged that these officers had been shot by the Soviets in March 1940 . . .”).

Germans brought in an independent European commission consisting of twelve forensic experts from a variety of European countries.¹⁷

The Soviets vehemently denied their involvement in the massacre. Instead, they claimed that the Polish victims had been German prisoners of war and had been killed by the Germans in the summer of 1941.¹⁸ Consequently, the Soviets broke off diplomatic ties with the Polish government-in-exile, accusing the latter of collaborating with Nazi Germany.¹⁹ Moreover, when the Soviets retook the Katyn area toward the end of World War II, they organized a cover-up in order to solidify the claim that the Germans were indeed responsible for the Katyn massacre.²⁰ The Soviets thus formed a special commission, the Burdenko Commission, to investigate the Katyn incidents again.²¹ No foreign countries were allowed to participate in the Burdenko Commission, which concluded in 1944 that the Polish victims had been killed by the German forces in the fall of 1941.²² In fact, the Soviet Union continued to deny responsibility for the massacres until 1990, when it finally acknowledged its role in the Katyn killings and condemned their perpetration.²³ In subsequent investigations, the Soviet Union and the Russian Federation have confirmed Soviet responsibility for the killing of roughly 1,800 Polish citizens at Katyn Forest, but both have refused to classify these acts as war crimes or acts of genocide.²⁴ In November 2010, the Russian Parliament (Duma) voted a

¹⁷ See ALLEN PAUL, *KATYN: STALIN'S MASSACRE AND THE TRIUMPH OF TRUTH* 234–36 (N. Ill. Univ. Press 2010) (1991) (describing the makeup of the international commission and its work at the site).

¹⁸ ZAWODNY, *supra* note 6, at 15.

¹⁹ Fischer, *supra* note 1 (“When the Polish government-in-exile in London demanded an international inquiry, Stalin used this as a pretext to break relations.”).

²⁰ *Id.* (“For 50 years, the Soviet Union concealed the truth. The coverup [sic] began in April 1943, almost immediately after the Red Army had recaptured Smolensk. The NKVD destroyed a cemetery the Germans had permitted the Polish Red Cross to build and removed other evidence.”).

²¹ *Id.* (“In January 1944, Moscow appointed its own investigative body, known as the Burdenko Commission after the prominent surgeon who chaired it.”); see also ZAWODNY, *supra* note 6, at 49–55 (describing the investigation of the Burdenko Commission).

²² Fischer, *supra* note 1 (“Predictably, [the Burdenko Commission] concluded that the Polish prisoners had been murdered in 1941, during the German occupation, not in 1940.”); ZAWODNY, *supra* note 6, at 49 (“The Commission and the medical experts associated with it included a number of distinguished Soviet names, but no foreign medical representatives were invited and even the Polish communists were barred from the participation in exhumations.”).

²³ An investigation conducted by the Prosecutor General’s Office of the Soviet Union in 1990–91 and the Russian Federation (1991–2004) has confirmed Soviet responsibility for the Katyn killings. See, e.g., PAUL, *supra* note 17, at 348–49.

²⁴ It is significant to note that the Soviets only admitted responsibility for the killing of 1,800 Poles, thus denying their role in the killing of the remaining 19,000 Poles—the official

declaration blaming Stalin and other Soviet officials for having personally ordered and approved the Katyn massacre.²⁵

The Western Allies were ambivalent about the Katyn massacre during World War II.²⁶ In fact, the Poles' importance for the Allies began to fade toward the end of the war in light of U.S. and Soviet involvement.²⁷ Simultaneously, the need to retain the Soviet Union as an ally grew exponentially, and the Western Allies saw themselves unwilling to publicly accuse the Soviets of the Katyn massacre despite their private concerns about the truthfulness of the German accusations. Winston Churchill, the British Prime Minister, admitted in 1943, in a private conversation, that "the German revelations are probably true. The Bolsheviks can be very cruel."²⁸ However, at the same time, Churchill publicly assured the Soviets that the Western Allies would oppose any investigation into Katyn, as such investigation "would be fraud and its conclusions reached by terrorism."²⁹

The U.S. took a similar stance. In 1944, President Roosevelt charged his special emissary to the Balkans, George Earle, to produce a report on Katyn.³⁰ Earle concluded in his report that the Soviets were responsible for the massacre.³¹ However, Roosevelt rejected this conclusion and ordered that the Earle report be suppressed.³² When Earle requested to publicize his findings, Roosevelt issued a written order to desist; subsequently, Earle was reassigned to American Samoa, where he spent the remainder of World War II.³³ Moreover, two American prisoners of war, Donald Stewart and John Van Vliet, had been captured by Germans and taken to Katyn. In 1945, Van Vliet authored a report concluding that the Soviets were responsible for the massacre, but his superior, Major General

number of victims at Katyn is almost 22,000 individuals. Fischer, *supra* note 1; see also *Russian Parliament Condemns Stalin for Katyn Massacre*, BBC NEWS (Nov. 26, 2010, 8:57 AM), <http://www.bbc.co.uk/news/world-europe-11845315>.

²⁵ *Russian Parliament Condemns Stalin for Katyn Massacre*, *supra* note 24.

²⁶ Fischer, *supra* note 1.

²⁷ See *id.* (stating that the U.S. suppressed evidence that the Soviets were responsible for Katyn so as to not "embarrass an ally whose forces were still needed to defeat Japan").

²⁸ DAVID CARLTON, *CHURCHILL AND THE SOVIET UNION* 105 (2000).

²⁹ 1 JOSEPH STALIN, *CORRESPONDENCE BETWEEN THE CHAIRMAN OF THE COUNCIL OF MINISTERS OF THE USSR AND THE PRESIDENTS OF THE USA AND THE PRIME MINISTERS OF GREAT BRITAIN DURING THE GREAT PATRIOTIC WAR OF 1941-1945*, at No. 151 (Documentary Publications 1978), available at <http://www.marxists.org/reference/archive/stalin/works/correspondence/01/43.htm> (last visited on Mar. 20, 2012).

³⁰ Fischer, *supra* note 1.

³¹ *Id.*

³² *Id.*

³³ *Id.*

Clayton Bissell, destroyed the report.³⁴ Thus, the U.S., much like Great Britain, had significant information to indicate that the Soviets were indeed responsible for the Katyn killings. Yet, because of fear of alienating the Soviet Union during World War II, the U.S. chose to publicly disavow this information and to blame Germany.³⁵

The Soviets continued to blame Germany for the Katyn massacre after World War II. In 1945 and 1946, a Soviet military court in Leningrad tried seven German servicemen.³⁶ The court accused one of them, a man named Arno Diere, of having participated in the Katyn killings.³⁷ He confessed to having taken part in the burial of Katyn victims; however, his confession was inconsistent and full of absurdities, and Diere later claimed that he had been forced to confess.³⁸ Moreover, at the London conference where the Allies drew up the Nuremberg charter, the Soviets put forward an allegation that the Germans had killed 925 Polish prisoners of war in the Katyn Forest in September 1941.³⁹ The U.S. reluctantly agreed to include this allegation in the Nuremberg tribunal's investigation, but it was allegedly "embarrassed" by this accusation and insisted that the Soviets had to prove any such claims.⁴⁰ At the Nuremberg trials in 1946, Soviet General Roman Rudenko stated in an indictment that "one of the most important criminal acts for which the major war criminals are responsible was the mass execution of Polish prisoners of war shot in the Katyn forest near

³⁴ *Id.*; *Select Committee on the Katyn Forest Massacre (Madden Committee): Witnesses' Testimonies*, ELECTRONIC MUSEUM, http://www.electronicmuseum.ca/Poland-WW2/katyn_memorial_wall/madden_committee/witnesses_testimonies/van-vliet_john.html (last visited Mar. 20, 2012).

³⁵ In fact, Major General Clayton Bissell argued several years later before the U.S. Congress that it had not been in the American interest to embarrass the Soviet Union, an important ally needed in order to defeat Japan and end World War II. H.R. REP. NO. 82-2505, at 8 (1952) [hereinafter *Madden Committee Report*], available at http://www.electronicmuseum.ca/Poland-WW2/katyn_memorial_wall/madden_committee/final_report/final_report_eng.html.

³⁶ H. Famira, *Germans Hanged for Katyn*, MONTREAL GAZETTE, Nov. 5, 1990, available at <http://www.fpp.co.uk/History/General/Katyn/KatynHanged.html>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sidney S. Alderman, *Negotiating on War Crimes Prosecutions, 1945*, in *NEGOTIATING WITH THE RUSSIANS* 49, 96 (Raymond Dennett & Joseph E. Johnson eds., (1951)). The next month, the Soviets boldly changed their allegation from 925, to 11,000 Polish officers killed by Germans in the Katyn Forest. *See id.* at 97.

⁴⁰ *See id.* at 96-7 ("There was grave doubt as to who had murdered the Polish officers in the Katyn Forest. . . . The Germans further claimed that when the bodies were exhumed their state of disintegration proved that the murders had dated from a time when the Russian armies were in the possession of Katyn Forest.").

Smolensk by the German fascist invaders."⁴¹ However, the Soviet prosecutors failed to prove their case, and the American and British judges dismissed the charges.⁴²

III. THE U.S. CONGRESSIONAL INVESTIGATION, POST-COLD WAR REVELATIONS, AND RUSSIA'S ACKNOWLEDGMENT OF RESPONSIBILITY

In 1951 and 1952, a U.S. Congressional investigation chaired by Representative Ray Madden (the Madden Committee) reviewed the events at Katyn Forest once again.⁴³ In fact, by the early 1950s, the Soviet Union was no longer a desperately needed war-time ally. Rather, the Soviets had become a Cold War foe against which the U.S. was fighting actively in Korea.⁴⁴ The Madden Committee, after a lengthy investigation, concluded that the Soviets had massacred the Poles.⁴⁵ Moreover, the Madden Committee recommended that the matter be referred to the International Court of Justice for a formal judicial inquiry.⁴⁶ Interestingly, Major General Bissell, who had destroyed the Van Vliet report, concluding that the Soviets were responsible for the Katyn killings, testified before the Madden Committee and defended his actions.⁴⁷ Bissell claimed that during World War II, it had been contrary to U.S. interests to embarrass the Soviet Union, which the U.S. viewed as an ally whose forces were still needed to defeat Japan.⁴⁸

Despite the Madden Committee's findings, the Katyn Forest issue remained controversial in the West during the Cold War, likely for fear of alienating an unfriendly nuclear power such as the Soviet Union. In the U.S., after the end of the Madden investigation, the political will to pursue the matter any further was lacking, and Stalin's death and the end of the

⁴¹ 7 INTERNATIONAL MILITARY TRIBUNAL, THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 16 (1947).

⁴² See 2 EUROPE SINCE 1945: AN ENCYCLOPEDIA 712 (Bernard A. Cook ed., 2001).

⁴³ See Madden Committee Report, *supra* note 35; see also Fischer, *supra* note 1.

⁴⁴ See Fischer, *supra* note 1.

⁴⁵ H.R. REP. NO. 82-2505, App. (1952), available at http://www.electronicmuseum.ca/Poland-WW2/katyn_memorial_wall/madden_committee/final_report/appendix_11.html (last visited Mar. 20, 2012) ("This committee unanimously finds, beyond any question of reasonable doubt, that the Soviet NKVD (Peoples' Commissariat of Internal Affairs) committed the mass murders of the Polish officers and intellectual leaders in the Katyn Forest near Smolensk, Russia.").

⁴⁶ See *id.*

⁴⁷ See Madden Committee Report, *supra* note 35, at 7-8 (summarizing Major General Bissell's testimony before the Madden Committee, including his involvement with the Val Vliet report and his justifications for his actions).

⁴⁸ *Id.*

Korean War seemed to promise a thawing of U.S.-Soviet relations.⁴⁹ Thus, any mention of Katyn or the possibility of building a victims' memorial was viewed as too provocative in the unstable political climate of the Cold War.⁵⁰

The Soviets contributed to the Katyn confusion. In 1969, they built a war memorial at the former Belarusian village named Khatyn, which was the site of a 1943 Nazi massacre of the entire village population.⁵¹ The Soviets allegedly purposely chose this site, whose name is very similar to Katyn, or even identical in other languages and spellings.⁵² In Poland, a country that existed behind the Iron Curtain during the Cold War, Katyn remained a forbidden topic.⁵³ When a Polish trade union called Solidarity erected a memorial in 1981 with the inscription "Katyn, 1940," the police confiscated it and replaced with a monument with the inscription: "To the Polish soldiers—victims of Hitlerite fascism—reposing in the soil of Katyn."⁵⁴ It wasn't until the fall of the Iron Curtain in the late 1980s that the Katyn taboo was lifted.

In 1989, Soviet President Mikhail Gorbachev allowed a delegation of Poles, organized by a Polish Katyn victims' association, to visit the Katyn memorial.⁵⁵ This group included a former U.S. national security advisor, Zbigniew Brzezinski.⁵⁶ Mourners held a mass and corrected the above-mentioned memorial inscription to read that the NKVD had murdered the Polish officers.⁵⁷ Brzezinski acknowledged that the Soviet willingness to allow for such an event to take place was symbolic of their breach with Stalinism.⁵⁸ Finally, in 1990, the Soviet Union formally expressed "profound regret" and admitted its responsibility.⁵⁹ It is interesting to note, however, that Gorbachev initially blamed Stalin's secret

⁴⁹ Fischer, *supra* note 1.

⁵⁰ E.g., FOREIGN & COMMONWEALTH OFFICE, KATYN IN THE COLD WAR (2003), available at <http://www.fco.gov.uk/en/about-us/our-history/historical-publications/research-projects/katyn/introduction/katyn-in-cold-war/> (plans for a memorial to the Katyn victims in the United Kingdom in the late 1970s were condemned as too provocative during the Cold War political climate).

⁵¹ See Fischer, *supra* note 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *Commemoration of Victims of Katyn Massacre*, BBC NEWS, Nov. 1, 1989, available at LexisNexis All News Database (describing the mass and noting that a piece of paper bearing the letters NKVD was affixed to the memorial).

⁵⁸ See Deborah G. Seward, *Brzezinski: Soviets Should Take Responsibility for Katyn Massacre*, ASSOCIATED PRESS, Oct. 30, 1989, available at Westlaw All News Plus Database.

⁵⁹ *Chronology 1990*, 70 FOREIGN AFF. 206, 216 (1991).

police chief, Lavrenty Beria, for the Katyn massacre.⁶⁰ Thus, Gorbachev made Katyn look like a rogue secret police action rather than an official act of mass murder approved by Stalin himself.⁶¹

Russian President Boris Yeltsin subsequently released top-secret documents and transferred them to the Polish President, Lech Walesa.⁶² The documents included, among other things, a proposal by Lavrenty Beria, dated March 5, 1940, to execute 25,700 Poles from various prisoner camps; the proposal was signed by Stalin himself.⁶³ The documents also included an excerpt from a March 5, 1940 shooting order, as well as notes to Nikita Khrushchev, the Soviet leader in 1959, with information confirming the execution of close to 22,000 Poles and with a proposal to destroy their personal files.⁶⁴ In 1991, the Chief Military Prosecutor in the Soviet Union contemplated beginning proceedings against P.K. Soprunenko for his role in the Katyn killings, but ultimately, the prosecution never took place because of Mr. Soprunenko's old age and ill health.⁶⁵

In 1994, a Soviet historian published a book that called Katyn, for the first time in Soviet history, a "crime against humanity."⁶⁶ Russian nationalists and communists, however, continued to oppose any admission of guilt by the Soviet Union in the Katyn tragedy.⁶⁷ In 1996, a book entitled "The Katyn Crime Fiction" written in Polish under a pen name Juri Micha began to circulate in the Russian Duma.⁶⁸ The book repudiated Gorbachev's 1990 admission and repeated the Stalin-era claim of German guilt.⁶⁹ In 1998, Russia raised the issue of Soviet prisoner of war deaths in Polish camps in 1919–1924, where between 16,000 and 20,000 men died of disease.⁷⁰ Russian officials argued that this was "genocide [] applied to Red Army POWs."⁷¹ Russia raised similar claims in 1994, but most viewed these attempts as a highly provocative way to create an anti-Katyn climate and to

⁶⁰ Fischer, *supra* note 1.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ MICHAEL PARRISH, *THE LESSER TERROR: SOVIET STATE SECURITY, 1939–1953*, at 325 (1996).

⁶⁶ N. LEBEDEVA, *KATYN: PRESTUPLENIE PROTIV CHELOVECHES'TVA [KATYN: A CRIME AGAINST HUMANITY]* (1994).

⁶⁷ Fischer, *supra* note 1.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See* THE HEAD OFFICE OF THE STATE ARCHIVES, *POLISH-RUSSIAN FINDINGS ON THE SITUATION OF RED ARMY SOLDIERS*, available at <http://www.archiwa.gov.pl/en/exhibitions/398-polish-russian-findings.pdf> (last visited Mar. 20, 2012).

⁷¹ Fischer, *supra* note 1.

balance a historical record.⁷² In fact, a rumor claimed that Gorbachev had ordered his staff to find a “counterbalance” to Katyn.⁷³ In March 2005, the Russian Prosecutor’s Office concluded its decade-long investigation into Katyn and confirmed the death of roughly 1,800 Polish prisoners.⁷⁴ The Prosecutor failed to account for the remainder of Polish victims, refused to label the killings as genocide or a war crime, and denied the need to have any subsequent formal juridical inquiries.⁷⁵

Recently, Katyn has sparked novel academic and media interest. In 2008, a British historian, Laurence Reese, produced a television documentary series about World War II, and the Katyn massacre was a central theme.⁷⁶ In 2009, Reese published an accompanying book in which he concluded that Katyn had been a cover-up and that the Poles had been treated unworthily by the Western Allies.⁷⁷ In 2007 and 2008, several Russian newspapers printed stories that implicated Nazi Germany in the Katyn massacre, and some continued to believe that Germany had been at least complicit in the Katyn killings.⁷⁸ As a result, the Polish Institute of National Remembrance decided to launch an investigation, and the Polish government requested that Russia declassify Katyn files and documents and hand them over to Poland.⁷⁹ Poland also requested that Russia label Katyn as genocide.⁸⁰ In June 2008, Russian courts heard a case about the

⁷² SANFORD, *supra* note 1, at 8 (providing that the Soviets attempted to equate the death of Soviet prisoners of wars in Poland from illness with the massacre of Poles at Katyn).

⁷³ Fischer, *supra* note 1 (suggesting Soviet officials attempted to rectify the massacre at Katyn with the abuses in Polish prisoner of war camps that held Soviets).

⁷⁴ See *Russian, Polish Leaders to Mark Katyn Anniversary*, RADIO FREE EUROPE/RADIO LIBERTY (Apr. 6, 2010), http://www.rferl.org/content/Russian_And_Polish_Leaders_To_Mark_Katyn_Anniversary/2004394.html (noting Russian authorities concluded that the killing of less than 2,000 in Polish citizens did not constitute genocide).

⁷⁵ Ian Traynor, *Russian Victory Festivities open Old Wounds in Europe*, GUARDIAN (U.K.) (Apr. 29, 2015), <http://www.guardian.co.uk/world/2005/apr/29/russia.artsandhumanities>; see also Fischer, *supra* note 1.

⁷⁶ *WWII Behind Closed Doors: Stalin, the Nazis and the West* (PBS television broadcast May 6, 2009), available at <http://www.youtube.com/watch?v=99gEEnotAp0>.

⁷⁷ LAURENCE REES, *WORLD WAR II BEHIND CLOSED DOORS: STALIN, THE NAZIS AND THE WEST* 410 (2009).

⁷⁸ See *In Denial: Russia Revives a Vicious Lie*, THE ECONOMIST, Feb. 7, 2008, available at <http://www.economist.com/node/10639983> (stating that the Soviet continue to place blame for Katyn on the Nazis).

⁷⁹ *Senate Pays Tribute to Katyn Victims*, EMBASSY REPUBLIC OF POLAND IN CANADA (Mar. 31, 2005), http://web.archive.org/web/20050420045807/http://www.polishembassy.ca/news_details.asp?nid=230.

⁸⁰ *Id.*

declassification of Katyn documents.⁸¹ In May 2010, Russia transferred to Poland 67 volumes of the Katyn criminal case, launched in the 1990s to investigate the Soviet role in this crime.⁸² In 2010, The Russian Prime Minister, Vladimir Putin, invited his Polish colleague Donald Tusk to attend a Katyn memorial; the visit took place on April 7, 2010.⁸³ Finally, in November 2010, the Russian Parliament (Duma) passed a resolution declaring that the Katyn crime had been carried out pursuant to direct orders of Stalin and other Soviet officials.⁸⁴ The declaration called for a further investigation into these events, but Communist Party representatives in the Duma continued to deny Soviet blame for the Katyn killings.⁸⁵

IV. KATYN AND INTERNATIONAL CRIMINAL LAW

Most scholars and politicians agree that the Katyn killings constitute a "crime."⁸⁶ Even the Russians, once they accepted responsibility for this event, acknowledged that Katyn was a crime.⁸⁷ The question that remains unanswered fully has to do with the classification of Katyn as a crime under international criminal law. Does the Katyn massacre constitute the gravest offense of genocide? If not, does it amount to a crime against humanity? Finally, does it constitute a war crime?

A. Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") defines genocide as "[k]illing members of the group" that is "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."⁸⁸ This definition has

⁸¹ *Dead Leaves in the Wind: Poland, Russia and History*, ECONOMIST (June 19, 2008), available at <http://www.economist.com/node/11579381> (noting the continued ambivalence of Russian authorities toward Katyn-related proceedings).

⁸² *Russia Hands over Volumes of Katyn Massacre Case to Poland*, RIA NOVOSTI (May 9, 2010), <http://en.rian.ru/russia/20100509/158936509.html>.

⁸³ *Russians Not to Blame for Katyn Massacre -- Putin*, RIA NOVOSTI (Apr. 7, 2010), <http://en.rian.ru/russia/20100407/158469409.html>.

⁸⁴ *Russian Parliament Condemns Stalin for Katyn Massacre*, BBC NEWS (Nov. 26, 2010), available at <http://www.bbc.co.uk/news/world-europe-11845315>.

⁸⁵ *Id.*

⁸⁶ See *supra* notes 76–77 on Laurence Rees and the scholarly view of Katyn; *supra* note 84 on the Russian political view of Katyn.

⁸⁷ See *supra* note 84 and accompanying text.

⁸⁸ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III)A, U.N. Doc. A/RES/260(III), art. II (Dec. 9, 1948) [hereinafter Genocide Convention].

reached the status of a customary norm under international law, and is universally accepted by virtually all international law actors.⁸⁹

Undoubtedly, the Katyn massacre constituted a “killing” of “members of the group” (the Poles). However, the *mens rea* requirement, represented by the phrase “intent to destroy” a group “as such” may be more problematic to fulfill. The Soviets certainly had the intent to destroy a part of the Polish national group. However, the subgroup that they targeted (the Polish intelligentsia) is not defined under the Genocide Convention, which only contemplates the destruction of “national, ethnic, racial or religious” groups “as such.”⁹⁰

The situation is similar to that of Cambodia in the late 1970s, during the Khmer Rouge regime. The Khmer Rouge, like Stalin, endeavored to destroy the Cambodian elites and intelligentsia in a quest to rid the Cambodian society of any potentially dissenting elements.⁹¹ While some scholars have argued that the Khmer leadership committed genocide toward its own population, others have claimed that the Khmer crimes do not amount to genocide because their intent was simply to destroy a part of the Cambodian population that cannot be described as one of the “protected” groups under the Genocide Convention.⁹² Thus, under a *stricto sensu*, technical reading of the Convention, neither Stalin nor Pol Pot, the Khmer Rouge leader, committed genocide: each merely intended to destroy a part of a national group, unprotected by the drafters of the Genocide Convention. The International Court of Justice (ICJ) has confirmed the need to interpret the Convention strictly in a recent ruling involving a lawsuit by Bosnia and Herzegovina against Serbia for the latter’s involvement and alleged genocide in Bosnia during the Yugoslav civil war in the early 1990s.⁹³ The ICJ ruled that the Serbs lacked the specific “intent” to destroy a group in Bosnia, with respect to some of the atrocities committed in the territory of

⁸⁹ See Seth Korman, *Indigenous Ancestral Lands and Customary International Law*, 32 U. HAW. L. REV. 391, 401(2010); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 4 (2000).

⁹⁰ See Genocide Convention, *supra* note 88.

⁹¹ See, e.g., JEFFERY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 564–65 (2002) (describing the Khmer Rouge’s rule over Cambodia in the late 1970s and the atrocities committed by this regime).

⁹² For the view that the Khmer Rouge committed genocide upon its own national group, see Hurst Hannum & David Hawk, *The Case Against the Standing Committee of the Communist Party of Kampuchea* (1986), reprinted in DUNOFF ET AL., *supra* note 91, at 571–73. For the view that the Khmer Rouge acts did not amount to genocide, see STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 285–87 (2001).

⁹³ Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 ¶ 190–201 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

the latter.⁹⁴ The narrow reading of the Genocide Convention, although unpopular with victims' rights groups and many scholars,⁹⁵ has been embraced by the World Court and remains of invaluable legal authority.

One could argue, however, that the Katyn killings did constitute genocide under a less technical reading of the Genocide Convention. The Soviets intended to destroy a "part" of the Polish national group.⁹⁶ It does not matter that the Convention does not specifically enumerate the subgroup, as the listing of protected groups in Article II should not be read as exhaustive. In other words, the Convention drafters certainly intended for the treaty to cover crimes such as Katyn or the Khmer Rouge killings in Cambodia.⁹⁷ The drafters must have wanted for such rogue leaders as Stalin or Pol Pot to face criminal responsibility. One should not use a technical reading of the Genocide Convention to absolve potential criminals of responsibility or to deny justice to victims of horrific atrocities. As many scholars have argued with respect to the situation in Cambodia,⁹⁸ the Katyn crimes could be interpreted as constituting genocide under a less narrow reading and interpretation of the Genocide Convention.

B. Crimes Against Humanity

Crimes against humanity have been defined by various domestic laws of different states, as well as by several international tribunals.⁹⁹ For example, according to the statute of the International Criminal Tribunal for the Former Yugoslavia, crimes against humanity are crimes "committed in armed conflict, whether international or internal in character, and directed

⁹⁴ *Id.* ¶¶ 190, 209–24. The world court held that under the Genocide Convention, members of a group must be targeted because they belong to that group, because the perpetrator has a "discriminatory intent." *Id.* ¶ 187. Thus, acts of ethnic cleansing may not amount to genocide if not carried out with the specific intent to destroy an enumerated group under Article II of the Genocide Convention, in whole or in part. *Id.* ¶ 190. Specifically, the world court held that some of the acts of Serbian forces in Bosnia did not amount to genocide, because there was insufficient proof that Serbian forces had the required specific intent under Article II. *Id.* ¶ 190, 209–24.

⁹⁵ See generally John Quigley, *International Court of Justice as a Forum for Genocide Cases*, 40 CASE W. RES. J. INT'L L. 243 (2007) (documenting the dissatisfaction with a narrow interpretation of the Genocide Convention).

⁹⁶ The Soviet motivation for the Katyn killings, as argued by historian Gerhard Weinberg, seems to have been the desire to rid Poland of all of its military and technical elites. See WEINBERG, *supra* note 10 and accompanying text.

⁹⁷ Hannum & Hawk, *supra* note 92, at 572 ("[T]he language [of the Genocide Convention] seems plain and straightforward; there must be a specific intent to destroy wholly or partially a group qua group, but the particular motive or motives behind that destruction are immaterial.").

⁹⁸ *Id.*

⁹⁹ DUNOFF ET AL., *supra* note 91, at 575.

against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”¹⁰⁰ Similarly, according to the statute of the International Criminal Court, a crime against humanity:

[M]eans any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁰¹

This definition has reached the status of a customary norm of international law, and has been embraced in similar versions by other recent international and hybrid tribunals.¹⁰² Unlike the crime of genocide, a finding of specific intent or *mens rea* is not necessary for the constitution of a crime against humanity.¹⁰³ However, a crime against humanity, according to the above definitions, can only be committed against a *civilian* population, not against imprisoned soldiers of an opposing army.

¹⁰⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute], available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

¹⁰¹ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute], available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

¹⁰² See, e.g., James Morrissey, Note, *Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute*, 20 MINN. J. INT’L L. 144, 153–54 (2011) (noting that the ICTY’s and the ICTR’s statutory provisions were meant to codify norms of customary international law; one such norm is liability for crimes against humanity).

¹⁰³ Article II of the Genocide Convention requires the “intent to destroy” a protected group, while Article 5 of the ICTY Statute and Article 7 of the ICC Statute merely require the commitment of certain enumerated acts against a civilian population, without any mention of specific intent. Compare Genocide Convention, *supra* note 88, with ICTY Statute, *supra* note 100, and ICC Statute, *supra* note 101.

The Soviet forces committed a crime against humanity when they murdered Polish civilians at Katyn "as part of a widespread or systematic attack."¹⁰⁴ Thus, with respect to civilians who disappeared at Katyn, the Soviets committed a crime against humanity. However, the killing of Polish prisoners of war would not constitute a crime against humanity, as the latter were not civilians and are thus excluded from protection under the definition of crimes against humanity.¹⁰⁵ With respect to the killing of Polish prisoners of war, the Soviet forces committed war crimes at Katyn, as described below.

C. *War Crimes*

Prisoners of war are "protected persons" within the meaning of the Third Geneva Convention.¹⁰⁶ It is a "grave breach" of the Geneva Convention, and thus a war crime, to willfully kill a protected person.¹⁰⁷ The Soviets committed such a grave breach, and thus a war crime, when they willfully killed thousands of Polish prisoners of war at Katyn. Soviet liability for war crimes with respect to the killing of Polish prisoners of war is certain.

Moreover, civilians, like prisoners of war, are protected persons within the meaning of the Fourth Geneva Convention.¹⁰⁸ Civilians are protected persons, moreover, within the meaning of the 1977 Additional Protocol I to the Geneva Conventions, which states that civilians "shall not be the object of attack."¹⁰⁹ It is a grave breach of the Fourth Geneva Convention, and a violation of Additional Protocol I, and thus a war crime, to willfully kill civilians, who are protected person.¹¹⁰ Soviet forces, in addition to committing a crime against humanity, also committed a war crime when they murdered Polish civilians at Katyn.

Finally, under the statute of the International Criminal Court, article 8.2.b, it is a violation of war to kill a soldier who has surrendered and who no longer poses a threat, as well as to purposefully direct attacks at

¹⁰⁴ See ICC Statute, *supra* note 101.

¹⁰⁵ The definition of crimes against humanity requires that acts be committed against civilian populations. See ICTY Statute, *supra* note 100, *accord* ICC Statute, *supra* note 101.

¹⁰⁶ See Geneva Convention Relative to the Treatment of Prisoners of War, art. 13, Aug. 12, 1949, 75 U.N.T.S. 287 (describing the protections available to prisoners of war).

¹⁰⁷ See *id.* art. 3 (setting forth specific obligations not to harm prisoners of war).

¹⁰⁸ See *id.* art. 15 (allowing parties to a conflict to create neutral zones intended to shelter civilians).

¹⁰⁹ Protocol Addition to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, June 8, 1977, 1125 U.N.T.S. 3.

¹¹⁰ *Id.*; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 108, art. 15.

civilians.¹¹¹ The Soviets violated article 8.2.b when they killed Polish prisoners of war, who had surrendered and were no longer a military threat for Soviet forces, as well as when they deliberately murdered thousands of Polish civilians.

The Soviet killings of thousands of Poles at Katyn and at other sites in the spring of 1940 constitute war crimes with respect to all the victims, as well as crimes against humanity with respect to the killing of Polish civilians. It is a plausible argument that the killings constituted genocide as well. The Soviets should bear criminal responsibility for their acts.

V. CONCLUSION AND POSTSCRIPT: TOWARD RECONCILIATION BETWEEN POLAND AND RUSSIA?

The Russian acknowledgment of its secret police's responsibility in the Katyn killings represents a tremendously important step toward a potential reconciliation between Russia and Poland. What other steps could the two countries undertake toward this goal? Russia could potentially accept the label of war crimes or crimes against humanity for its acts at Katyn; a true acceptance of responsibility could include an acknowledgment of Katyn as genocide, although this label appears to be more controversial. Russia could also continue to honor Katyn victims at the erected memorial, which Russian leaders should routinely visit along with their Polish counterparts. Poland could formally accept a Russian apology and move forward while acknowledging the past and ensuring that similar crimes never happen in the future. Academic conferences on Katyn, such as this one, are another useful vehicle in bringing the Russians and the Poles together, and in embracing history with an eye toward the future.

¹¹¹ ICC Statute, *supra* note 101, art. 8(2)(b).



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