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# The Crime of Genocide Committed against the Poles by the USSR before and during World War II: An International Legal Study

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A stylized world map in shades of blue and white, serving as a background for the top section of the cover.

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THE CRIME OF GENOCIDE COMMITTED  
AGAINST THE POLES BY THE USSR  
BEFORE AND DURING WWII:  
AN INTERNATIONAL LEGAL STUDY

*Karol Kariski*

# THE CRIME OF GENOCIDE COMMITTED AGAINST THE POLES BY THE USSR BEFORE AND DURING WORLD WAR II: AN INTERNATIONAL LEGAL STUDY

*Karol Karski\**

*The USSR's genocidal activity against the Polish nation started before World War II. For instance, during the NKVD's "Polish operation" of 1937 and 1938, the Communist regime exterminated about 85,000 Poles living at that time on the pre-war territory of the USSR. In Soviet newspapers and literature the image had been created of the Pole as an enemy. The USSR citizens were afraid to acknowledge Polish nationality because that meant death. After the aggression of the Third Reich and the USSR against Poland in 1939, this policy was extended into territory annexed by the USSR and its Polish inhabitants. On the basis of the Political Bureau of the All-Union Communist Party (Bolsheviks) decision of March 5, 1940 about 22,000 Poles were exterminated. Despite the different places of the slayings, activities included in its execution are described as the Katyn Massacre. Further, four waves of deportations from 1940 to 1941 were conducted as a way of disintegrating ethnic ties. This genocide lasted until the moment when the USSR—not of its own will—became a member of the anti-Hitler coalition in 1941.*

*Genocide was legally separated as a new type of international crime by virtue of the 1948 Genocide Convention. Post-war genocide cases, including the Adolf Eichmann trial, are not affected by nullum crimen sine lege principle, since acts, especially murders, being elements of the crime of genocide were already forbidden by international law at the time of its commission. Their new classification based on the intent, which is the destruction of the group, does not violate that principle.*

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*On the basis of the 1948 Genocide Convention, German perpetrators of pre-war and the World War II genocide were brought to justice. On the Soviet and then Russian side no one has been punished for the Katyn Massacre.*

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## I. INTRODUCTION

“People belonging to national minorities ‘should be forced to their knees and shot like mad dogs.’ It was not an SS officer speaking, but a communist party leader, in the spirit of the national operations of Stalin’s Great Terror.”<sup>1</sup> Timothy D. Snyder makes us realize that the communist propaganda was highly effective in shaping the narrative concerning the Stalinist terror in a way that would discourage us, as much as possible, from associating it with the German Nazi terror.<sup>2</sup> He notes that:

[T]he picture of Stalin’s terror, both in the West and in Poland, was shaped by Khrushchev’s 1956 speech in which he talked about repressions against the party, against the communists.

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1. TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 89 (2010).  
2. *Id.* at 89–90 (giving examples of Communist propaganda).

Not against those who really suffered, i.e., the people, peasants and also some nationalities.<sup>3</sup>

During the Great Terror period in the USSR there were cases of whole nationalities being destroyed.<sup>4</sup> The motives behind the Soviet authorities' actions varied, although they were largely political. As a result, both political and national groups were annihilated.<sup>5</sup> Under modern principles of international law, if a national group is destroyed for any reason, we are dealing with a case of genocide crime.<sup>6</sup>

According to the Russian historian Natalia Lebedeva, Soviet Stalinism and German Nazism were an example of twin regimes.<sup>7</sup> As Yuri Stetsovsky, a Russian lawyer, points out, even before the USSR's and Third Reich's attack on Poland (i.e., before the beginning of World War II), the USSR authorities launched a smear campaign against Poles and began to create a negative Polish stereotype in Soviet society.<sup>8</sup> Stetsovsky stresses that the "image of Poles as enemies could be found not only in newspapers but also in fiction, in works by Sholokhov, Babel and Ostrovsky."<sup>9</sup> The anti-Polish attitude created by the Soviet authorities gave birth to the image of the "Polish lord" as a dangerous and untrustworthy exploiter of other nations.<sup>10</sup>

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3. Timothy Snyder, *Człowieczeństwo szpadłem mierzone* (interview conducted by Krzysztof Masłoń), RZECZPOSPOLITA (May 28, 2011) at P8, <http://www.rp.pl/artukul/664909-Czlowieczestwo-szpadlem-mierzone.html> (last visited May 6, 2013). Unless otherwise noted, all translations of sources originally written in Polish or Russian are provided by the author.
  4. Nicolas Werth, *The NKVD Mass Secret National Operations (August 1937 - November 1938)*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE (May 17, 2010), <http://www.massviolence.org/The-NKVD-Mass-Secret-National-Operations-August-1937?cs=print> (discussing the NKVD's secret operational orders and the Great Terror's target victims).
  5. *Id.*
  6. *See generally* NORMAN M. NAIMARK, *STALIN'S GENOCIDES* (2010) (arguing that Stalin's terroristic reign would constitute genocide).
  7. NATALIA S. LEBEDEVA, *KATYŃ: ZBRODZIA PRZECIWKO LUDZKOŚCI* 283(1998).
  8. *See generally* 1 YURI I. STETSOVSKY, *ISTORIYA SOVETSKIKH REPRESSIY* (1997).
  9. *Id.* at 454.
  10. NAIMARK, *supra* note 6, at 92 (providing information on anti-Polish attitudes generated by the Soviet authorities).

Joseph Stalin's anti-Polish sentiment has been a well-known and widely described fact.<sup>11</sup> George Sanford discusses this issue in detail.<sup>12</sup> There were many manifestations of this attitude. For instance, when the People's Commissar for Internal Affairs, Nikolai Yezhov, reported that as part of the Soviet secret police's (NKVD) so-called Polish operation between 1937 and 1938, as many as 23,216 people had already been arrested, the dictator was very pleased: "Very good! Keep on digging up and cleaning out this Polish filth. Eliminate it in the interest of the Soviet Union."<sup>13</sup>

## II. NKVD'S "POLISH OPERATION" OF 1937–1938 AS AN EXAMPLE OF GENOCIDE CRIME COMMITTED BY THE USSR AGAINST THE POLES BEFORE THE OUTBREAK OF WORLD WAR II

Deportations and murders of Poles living in the USSR as well as the destruction of "Polishness" in that country had been going on, with greater or lesser intensity, from the very moment the Bolsheviks came to power.<sup>14</sup> By definition, the Poles were regarded as a nationality with a particular predilection for spying, sedition and wreaking havoc, a view that can be seen in the surviving extermination instructions issued by the Soviet authorities. As the American historian Terry Martin has calculated, among the various national groups subjected to repression, it was the Poles who suffered most in the USSR in terms of loss of life.<sup>15</sup>

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11. See GEORGE SANFORD, *KATYN AND THE SOVIET MASSACRE OF 1940: TRUTH, JUSTICE AND MEMORY* 82–83 (2005).
  12. *Id.* at 84.
  13. SNYDER, *supra* note 1, at. 96. See also NICOLAS WERTH, *LA TERREUR ET LE DÉSARROI: STALINE ET SON SYSTÈME* 294 (2007).
  14. See *WWII: Behind Closed Doors: The Struggle for Poland*, PBS, <http://www.pbs.org/behindcloseddoors/in-depth/struggle-poland.html> (last visited May 6, 2013).
  15. See generally Terry Martin, *The Origins of Soviet Ethnic Cleansing*, 70 J. MODERN HIST. 813, 813–61 (1998). See also Stephane Courtois, *Raphael Lemkin and the Question of Genocide Under Communist Regimes*, in RAFAŁ LEMKIN: A HERO OF HUMANKIND 117, 138 (Joanna Sokólska ed., Jean-Jacques Granas trans., 2010); MIKOŁAJ IWANOW, *PIERWSZY NARÓD UKARANY: POLACY W ZWIĄZKU RADZIECKIM W LATACH 1921–1939* (1991); WOJCIECH LIZAK, *ROZSTRZELANA POLONIA. POLACY W ZSRR 1917–1939* (1990); MIECZYŚLAWA ŁOZIŃSKIEGO, *OPERACJA POLSKA: STALINOWSKA ZBRODNIA NA POLAKACH W LATACH 1937–1938* (2008) (providing more information on the actions of the Soviet government against Poles before WWII).

In the period preceding World War II, the extermination of Poles in the USSR reached its apogee during the Great Terror.<sup>16</sup> The so-called Polish operation was one of the national operations carried out at the time by the NKVD. It was based on an order issued by the People's Commissar for Internal Affairs, Nikolai Yezhov, and approved by the Political Bureau of the All-Union Communist Party (Bolsheviks) (hereinafter the Politburo) on August 9, 1937.<sup>17</sup> The broad scope of repressions meant that in practice the action covered all Poles, regardless of their social group or class.<sup>18</sup> What constituted a crime and could lead to death was, for instance, having relatives in Poland and staying in touch with them, even if only through correspondence. The decisive factors were national origin and links to Poland and Poles. In order to be shot, one did not even have to be a pronounced member of the "Polish Military Organisation;"<sup>19</sup> "potential membership" was enough.<sup>20</sup> There is some logic in it, if we bear in mind the fact that the Soviet authorities knew that this organisation did not exist.<sup>21</sup>

According to Snyder:

Between 1937 and 1938 Poles were blamed in the USSR for the failures of collectivisation and the Great Famine, allegedly caused by an extensive spy network masquerading as the Polish Military Organisation. Of course the name of this WWI independence-oriented organisation is well-known, but in areas that came under Soviet rule it ceased to operate in...1921. However, the NKVD decided to reactivate it for its own purposes; as a result, among the 143,000 people arrested on a charge of spying for Poland, 111,000, including at least 85,000

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16. *1937-1939: The Great Terror*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/russia/stalin-great-terror.htm> (last updated Sept. 7, 2011) (describing the specifics of the Great Terror and Stalin's use of the Great Terror to increase his control and power).
  17. See Rolf Binner, Marc Junge & Terry Martin, *The Great Terror in the Provinces of the USSR, 1937-1938*, 42 *CAHIERS DU MONDE RUSSE* 679, 680 (2001).
  18. Werth, *supra* note 4, at 2.
  19. See *id.* (noting the all-encompassing breadth of Yezhov's directives targeting Polish nationals for liquidation).
  20. *Cf. id.*
  21. SNYDER, *supra* note 1, at 90-91 (describing the Polish Military Organization as a "pure bureaucratic fantasy" invented during the 1933 Soviet famine).

Poles, were executed. As far as I know, none of the victims of this terror against a nation was a spy.<sup>22</sup>

When it comes to sheer numbers, this was NKVD's largest operation against members of a specific nationality, in this case Polish.<sup>23</sup> Those who were arrested but not murdered were deported to the Central Asian republics and to Siberia.<sup>24</sup> The scale of the operation was so huge that, for instance, in Berdichev, 60% of Poles living there were arrested by June 1938. The graves of people murdered at the time are scattered throughout the former USSR.<sup>25</sup> Dariusz Kucharski notes that:

There are well-known cases of Poles (and Latvians) being arrested in Rostov-on-Don on the basis of information received from address bureaus (for their Polish-sounding names), often without any charges; only after they were executed were actions "unworthy of Soviet citizens" attributed to them. People, including minors and pregnant women, were shot without exception for [Polish] nationalism.<sup>26</sup>

During the NKVD's so-called Polish operation, "data on local Poles would be collected on a mass scale. The anti-Polish pressure created in society was so huge that in practice the very fact of being Polish and admitting it was tantamount to suicide."<sup>27</sup>

Even the "correct ideological attitude" was no protection against extermination. It was at that time that members of the Communist Party of Poland (KPP) who had found themselves in the USSR were murdered. Among the members of the KPP's Central Committee, those that survived were kept in Polish prisons at the time, which

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22. SNYDER, *supra* note 3. See also Krzysztof Kloc, *Historyczny przegląd prasy (23-29 maja 2011)* HISTMAG.ORG (May 31, 2011), <http://histmag.org/?id=5586>.

23. SNYDER, *supra* note 1, at 103–04.

24. Werth, *supra* note 4, at 3 (discussing the Soviet deportation policy of targeted national and ethnic groups).

25. For example, Polish graves exist in Bykivnia and Kurapaty. See generally François-Xavier Nérard, *The Levashovo Cemetery and the Great Terror in the Leningrad Region*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE 6–7 (Feb. 27, 2009), <http://www.massviolence.org/the-levashovo-cemetery-and-the-great-terror-in-the?cs=print> (providing information on mass burial sites scattered across parts of the former Soviet Union).

26. DARIUSZ PIOTR KUCHARSKI, *LUDOBÓJSTWO NA POLAKACH W SOWIETACH W OKRESIE MIĘDZYWOJENNYM (1921–1939): POCZĄTEK WIELKIEJ NARODOWEJ TRAGEDII* 35 (2010).

27. *Id.* at 41.



meant that they could not be political refugees in the USSR. As Tomasz Sommer emphasizes:

A genocide of Poles took place in the Soviet Union in the late 1930s. The victims were selected on the basis of national and political criteria, with their ethnicity being cited in both cases as a function that determined their alleged “guilt.” The decision to carry out the genocide was made by the highest ranking Soviet officials.<sup>28</sup>

### III. THE KATYN MASSACRE AS AN EXAMPLE OF GENOCIDE CRIME COMMITTED BY THE USSR AGAINST THE POLES AFTER THE OUTBREAK OF WORLD WAR II

As Germany and the USSR started World War II in September 1939, millions of Poles found themselves under these two invaders’ power.<sup>29</sup> The USSR expanded its criminal policy against the Poles to its expanding territories.<sup>30</sup> Nationalistic anti-Polish slogans were bandied about during the USSR’s attack on Poland.<sup>31</sup> The Ukrainian historians Nikolai Kucherepa and Valentin Visyn point out that the Soviet army entering Poland on September 17, 1939, “called on the locals to murder the ‘Polish lords.’”<sup>32</sup> The locals were supposed to be Russians, Belarusians, and Ukrainians persecuted by the allegedly few Poles living there. The “Polish lords” included all the Poles living in the area annexed by the USSR at the time. Shaped by Soviet propaganda, this was a synonym of every Pole, a person deserving

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28. See ROZSTRZELAĆ POLAKÓW: LUDOBÓJSTWO POLAKÓW W ZWIĄZKU SOWIECKIM W LATACH 1937–1938 ; DOKUMENTY Z CENTRALI, pt. IV (Tomasz Sommer ed., 2010); SIMON SEBAG MONTEFIORE, STALIN: THE COURT OF THE RED TSAR 228 (2004) (referring to the Polish massacre as a “mini-genocide”).
  29. *Invasion of Poland, Fall 1939*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005070> (last updated May 11, 2012) (discussing the 1939 partitioning of Poland).
  30. Zbigniew Gluza, *The Katyn Massacre*, REPUB. OF POL., <http://en.poland.gov.pl/The,Katyn,Massacre,,7296.html> (last visited May 6, 2013) (defining Katyn as the “symbol of the criminal policy of the Soviet system against the Polish nation”).
  31. See, e.g., MARTIN A. DOHERTY, NAZI WIRELESS PROPAGANDA: LORD HAW-HAW AND BRITISH PUBLIC OPINION IN THE SECOND WORLD WAR 41–42 (2000) (discussing German and Soviet cooperation in the production of anti-Polish propaganda).
  32. Nikolai Kucherepa & Valentin Visyn, *Radjynska Vlada na Volyni 1939–1941 Rokakh*, in ZBRODNIENIE NKWD NA OBSZARZE WOJEWÓDZTW WSCHODNICH RZECZYPOSPOLITEJ POLSKIEJ 69 (Bogusław Polak ed., 1995).

nothing but hate and contempt, allegedly exploiting the Belarusians, and Ukrainians living in these lands—that is, the people whom the Red Army came to “protect.”<sup>33</sup>

Six months after the Third Reich’s and the USSR’s aggression on Poland, on March 5, 1940,<sup>34</sup> the Politburo approved the conclusions concerning the intellectual elite of the Polish nation imprisoned by the USSR. These conclusions were included in a note written by the People’s Commissar for Internal Affairs of the USSR, Lavrenty P. Beria, to Stalin.<sup>35</sup> A decision was made at the time to murder “the 14,700 former Polish officers, officials, landowners, police, intelligence agents, gendarmes, [military] settlers, and prison officers” as well as “the 11,000 members of various [counter-revolutionary] espionage and sabotage organisations, former landowners, manufacturers, former Polish officers, officials and refugees. . . .”<sup>36</sup> The decision made at the time meant the extermination of about 25,700 Polish nationals held in camps located in Kozelsk, Starobelsk, and Ostashkov as well as in various prisons, including those in Minsk, Kharkhov, Kiev, and Kherson. In the end, a total of 21,768 people, both civilians and

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33. Cf. Telegram No. 371 from Friedrich-Werner Graf von der Schulenburg, Ambassador, Ger., to Joachim von Ribbentrop, Foreign Minister of Ger., (Sep. 16, 1939) [hereinafter Telegram No. 371], *available at* [http://avalon.law.yale.edu/20th\\_century/ns073.asp](http://avalon.law.yale.edu/20th_century/ns073.asp) (arguing that the Soviet Union must enter Poland to protect its “Ukrainian and Belarusian brothers”).
34. For more on the Third Reich’s and the USSR’s aggression on Poland in 1939 and on the annexation of Poland’s territory by these states, see Czesław Grzelak, *Agresja Związku Sowieckiego na Polskę we wrześniu 1939 r.*, in *ZBRODNIA KATYŃSKA: DROGA DO PRAWDY : HISTORIA, ARCHEOLOGIA, KRYMINALISTYKA, POLITYKA, PRAWO* 17 (Marek Tarczyński ed., 1992) (providing more information on the German and Soviet invasions of Poland in 1939 and their subsequent annexations of Polish territory); Mirosław Granat, *Aspekty prawne agresji 17 września 1939 r.*, in *O LIKWIDACJĘ SKUTKÓW ZMOWY HITLER-STALIN : MATERIAŁY Z KONFERENCJI ZORGANIZOWANEJ PRZEZ KOMISJĘ USTAWODAWCZĄ ORAZ KOMISJĘ SPRAW ZAGRANICZNYCH I INTEGRACJI EUROPEJSKIEJ* 58–59 (Małgorzata Lipińska ed., 1999); JERZY ŁOJEK, *AGRESJA 17 WRZEŚNIA 1939: STUDIUM ASPEKTÓW POLITYCZNYCH* 65–71 (1990); TADEUSZ JASUDOWICZ, *WIDMO KRĄŻY PO EUROPIE: BEZPRAWIE PAKTU RIBBENTROP-MOŁOTOW* 52–80, 170–74 (1993); Karol Karski, *Agresja ZSRR na Polskę w 1939 roku: Aspekty prawnomiedzynarodowe*, *I MIĘDZYNARODOWE PRAWO HUMANITARNE* 205, 205–25 (2010).
35. Beria Memorandum to Joseph Stalin Proposing the Execution of the Polish Officers (Mar. 5, 1940), in *KATYN: A CRIME WITHOUT PUNISHMENT* 118–20 (Anna M. Cienciala, Natalia S. Lebedeva & Wojciech Materski eds., Marian Schwartz, Anna M. Cienciala & Maia A. Kipp trans., 2007) [hereinafter March 5th Execution Order].
36. *Id.* at 119–20.

military men, were killed on the basis of this decision.<sup>37</sup> The latter group included landowners, government officials, settlers, refugees, and even pupils.<sup>38</sup> The victims of the Katyn Massacre were not, as it is commonly believed, only soldiers taken prisoner during military operations, but also civilians and soldiers arrested after the military operations had already ended.<sup>39</sup> The murder itself—institutionalised and carried out on behalf of the Soviet state—took place between April 3 and May 19, 1940.<sup>40</sup> Regardless of the number of sites where Poles were slaughtered, for the international community this will always be the Katyn Massacre, because Katyn, where the first mass graves of the victims were discovered, has become its symbol.

This massacre is often classified as genocide.<sup>41</sup> However, there are opinions to the contrary. People who voice their views on the issue are not only lawyers, but also politicians, sociologists, political scientists, and historians. We should, therefore, establish whether this crime—for there is no doubt that it was a crime—can be treated as the crime of genocide under international law.<sup>42</sup>

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37. Press Release, The Institute of National Remembrance, Decision to Commence Investigation into Katyn Massacre (Jan. 12, 2004), *available at* [http://www.ipn.gov.pl/portal/en/2/77/Decision\\_to\\_commence\\_investigation\\_into\\_Katyn\\_Massacre.html](http://www.ipn.gov.pl/portal/en/2/77/Decision_to_commence_investigation_into_Katyn_Massacre.html) [hereinafter Decision to Commence Investigation]. *See also* Wojciech Materski, *Jeńcy wojenni i internowani w latach 1939–1941*, in *POLSKA 1939–1945. STRATY OSOBOWE I OFIARY REPRESJI POD DWIEMA OKUPACJAMI* 215, 221 (Wojciech Materski & Tomasz Szarota eds., 2009).
38. Jędrzej Tucholski, *Katyn – liczby i motywy*, in 5 *ZESZYTY KATYŃSKIE – II PÓLWIECZE ZBRODNI: KATYŃ, TWER, CHARKÓW* 46, 46–63 (Marek Tarczyński ed., 1995).
39. *See, e.g.*, Janina Snitko-Rzeszut, Jan Kiński, *Pro Memoria*, 3–4 *WOJSKOWY PRZEGLĄD HISTORYCZNY* 355, 355–91, 347–73 (1995); *Pro Memoria*, 1 *WOJSKOWY PRZEGLĄD HISTORYCZNY* 262, 262–93, 251–80 (1996); *Pro Memoria*, 4 *WOJSKOWY PRZEGLĄD HISTORYCZNY* 383, 383–408 (1996); *Pro Memoria*, 1–2 *WOJSKOWY PRZEGLĄD HISTORYCZNY* 360, 360–86 (1997) (providing a list of people that were murdered at Katyn). *See also* TERESA KACZOROWSKA, *CHILDREN OF THE KATYN MASSACRE: ACCOUNTS OF LIFE AFTER THE 1940 SOVIET MURDER OF POLISH POWs* 1, 3, 4, 17, 58, 80, 92, 249 (2006) (providing an interesting look into the people listed above through the memories of their children, who, are convinced that the Katyn Massacre was an act of genocide).
40. Tucholski, *supra* note 38, at 136.
41. *See* Anna Cieniala, *Poland, Russia, and Katyn – Is Reconciliation Possible?*, *COSMOPOLITAN REV.*, Dec. 6, 2010, <http://cosmopolitanreview.com/poland-russia-and-katyn/> (describing public demand in Poland to classify Katyn as a genocide).
42. On the changing positions of the USSR and the Russian Federation in this respect, especially in the political context, *see id.* ROBERT H. DONALDSON & JOSEPH L. NOGEE, *THE FOREIGN POLICY OF RUSSIA: CHANGING SYSTEMS, ENDURING INTERESTS* 380 n.32 (4th ed. 2009).

Genocide could have been committed during World War II both by the Germans and by the USSR and its officials. Symptomatically, the Soviet prosecutor, Colonel Yury Pokrovsky, accused the Germans before the International Military Tribunal (Nuremberg Tribunal) of committing genocide in Katyn. Referring to the statements of the indictment concerning genocide conducted by the Germans on February 14, 1946, he presented the Katyn Massacre as a planned “physical extermination of the Slav peoples.”<sup>43</sup> This was part of the indictment into which the USSR added the information that the massacre was a German crime. In the end, the Nuremberg Tribunal, having examined the witnesses, did not attribute this crime to the Germans. In its judgment, it did not refer to this matter at all. As scholars have pointed out, attributing this crime to its real perpetrator—Germany’s totalitarian Soviet ally at the time when the crime was committed—could have led to the collapse of the trial and the Soviet judge’s refusal to sign the entire judgment.<sup>44</sup>

The USSR did not hesitate in trying to obtain a confirmation of the “Katyn denial” from the Nuremberg Tribunal. In this way, the Soviet crime would have been attributed to the German Nazis thanks to the authority of this judicial body. At the same time the Soviet Union tried—and, incidentally, failed—to ban evidence to the contrary, including evidence from the examination of witnesses. It hoped that one official document submitted by the Soviet government would be sufficient. The USSR was a state, which treated the international justice system as an instrument of its own policy. When commenting on the Soviet attempt to put the blame for its crime on the Germans, the Russian historian Nikita Petrov said:

Moscow had to lose the [Nuremberg] battle for Katyn, because those in the Kremlin did not understand (just like they do not understand it today) what an independent court was. There was and there still is a belief that the role of judges is to confirm the government’s decisions by issuing their rulings, and witnesses are just a decoration. The script is written outside the courtroom.<sup>45</sup>

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43. See Adam Bosiacki, *The Unfinished Business of Katyn*, HOOVER DIGEST (2012), available at <http://www.hoover.org/publications/hoover-digest/article/105461>; Tadeusz Jasudowicz, *Zbrodnia Katyńska przed Trybunałem Norymberskim*, SYBIRAK, 1990, at 12–15.
44. Witold Kulesza, *Zbrodnia Katyńska jako akt ludobójstwa*, in *ZBRODNIA KATYŃSKA: W KRĘGU PRAWDY I KŁAMSTWA* 52-67 (Sławomir Kalbarczyk ed., 2010).
45. Wacław Radziwinowicz, *Żelazna Mask: tajny więzień Stalina*, GAZETA WYBORCZA, Feb. 27, 2012, at 6.

#### IV. THE CONCEPT OF THE CRIME OF GENOCIDE

The concept of genocide emerged during World War II.<sup>46</sup> The term's creator, Raphael Lemkin, said at the time that this new word denoted "an old practice in its modern development." He defined it as "a crime of destruction of national, racial and religious groups."<sup>47</sup> He also added that genocide:

[D]oes not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups.<sup>48</sup>

This was repeated—many years later—by the International Criminal Tribunal for Rwanda, which stated that:

Contrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) [of the Tribunal's Statute] is committed with the specific intent to destroy 'in whole or in part' a national, ethnical, racial or religious group.<sup>49</sup>

These acts are:

- a) Killing members of the group;

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46. See Raphael Lemkin, *Genocide*, 15 AM. SCHOLAR 227, 227–28 (1946) (discussing the etymology of the term genocide).

47. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (2d ed. 2005). For more on Lemkin's concept, see generally Adam Daniel Rotfeld, *The Lemkin Concept of Genocide: A New Definition for an Old Crime*, in RAFAL LEMKIN: A HERO OF HUMANKIND, *supra* note 15, at 19, 19–27 (discussing Lemkin's development of the term genocide in light of post-World War II global developments and United Nations responses); Jean-Louis Panné, *Raphael Lemkin and Raul Hilberg: About a Concept*, in RAFAL LEMKIN: A HERO OF HUMANKIND, *supra* note 20, at 101–16 (describing the influences of legal frameworks on the development of the term genocide).

48. LEMKIN, *supra* note 47, at 79.

49. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 497 (Sept. 2, 1998).

- 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; and
- e) Forcibly transferring children of the group to another group.<sup>50</sup>

The solution adopted in Article 2(2)(a) through 2(2)(e) of the Statute of the Tribunal repeats the definition included in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on December 9, 1948.<sup>51</sup>

As Lemkin noted, “Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”<sup>52</sup> In this light a special meaning can be attributed to a statement included in a decision of the Politburo on March 5, 1940. This decision said that, all people—both civilians and military men—should, “using the special procedure, apply to them the supreme punishment, [execution by] shooting. Examine these cases without calling in the arrested men and without presenting [them with] charges, the decision about the end of the investigation or the document of indictment. . . .”<sup>53</sup> They were treated not as individuals but as members of a collective, as members of a group.

The UN General Assembly, in a unanimously adopted resolution, number 96(I) of December 11, 1946, affirmed that “genocide is a crime under international law . . .” and moreover, “is contrary to

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50. Statute for the International Criminal Tribunal for Rwanda art. 2(2)(a)–(e), Nov. 8, 1994, 33 I.L.M. 1598.

51. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, *opened for signature* Dec. 9 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

52. LEMKIN, *supra* note 47, at 79. *See also* Lemkin, *supra* note 46, at 229 (“Genocide can be carried out through acts against individuals, when the ultimate intent is to annihilate the entire group composed of these individuals. . .”).

53. March 5th Execution Order, *supra* note 35, at 120 (alterations in original).

moral law. . . .”<sup>54</sup> Generally speaking, this resolution reflects the nature of this crime as Lemkin perceived it. The Convention on the Prevention and Punishment of the Crime of Genocide defines the crime of genocide providing that genocide is a crime under international law. According to Article 2(a), genocide is an act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, and involving killing members of the group.<sup>55</sup> Unlike the resolution, the Convention enumerates the groups that can be subjected to genocide. It also removes from the list political groups, which were included in the resolution.<sup>56</sup> What does come to the fore in the Convention—among the vast group of “other”—is the protection of national groups. The Convention also clarifies that genocide is an act intended to destroy specific groups “in whole or in part.”<sup>57</sup>

In order to establish whether a given act falls within the definition of genocide, it is just as important to clarify the legal regulations, as it is to establish the real state of affairs. With regard to the latter, the decisive factor is the intent to destroy a group in whole or in part. Given the lack of access to Bolshevik Party documents and documents of the Soviet authorities, as well as the impossibility of questioning both the perpetrators and the witnesses of the Katyn Massacre, it is difficult to establish the intentions of the officials who ordered, organized, and committed the murders of Poles. But these are problems that international tribunals set up to try individuals accused of committing genocide have already faced.<sup>58</sup> However, as Malcolm Shaw notes:

The importance of establishing the specific intent to destroy the group in question in whole or in part was emphasised by the Yugoslav Tribunal in the *Jelisić* case, while it has been held with regard to the difficulties in establishing the critical intent

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54. G.A. Res. 96(I), U.N. Doc. A/RES/96(I) (Dec. 11, 1946) [hereinafter Genocide Resolution].
55. *Id.* art. 2.
56. Compare Genocide Resolution, *supra* note 54 (“Many instances of such crimes of genocide have occurred when racial, religious, political or other groups have been destroyed . . . .”), with Genocide Convention, *supra* note 51, art. 2 (“[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. . . .”).
57. Genocide Convention, *supra* note 51, art. 2.
58. See Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT’L L.J. 286, 306–12 (1999) (describing the intent element of the crime of genocide, both theoretically and in practice).

requirement, the recourse may be had in the absence of confessions to inferences from facts.<sup>59</sup>

In this, we must not confuse the intent with the motive. As Maria Szonert-Binienda rightly points out:

In criminal law these are separate concepts. In order to demonstrate that Katyn was genocide under the 1948 Convention, we must prove the intent to destroy the Polish national group. On the other hand, the question why the perpetrators had this intent, i.e. what their motive was, does not matter. The definition of genocide was deliberately constructed in such a way so as not to limit the motives of the perpetrators destroying a protected group. Just as the number of protected groups was reduced by listing them in the definition itself, the possible motives of the perpetrator were deliberately not listed. Already at that time the authors predicted that the perpetrators might try to defend themselves by citing political motives in order to demonstrate their actions were not genocidal in nature. The authors of the definition of genocide debated for a long time about the question of motive. The Soviet Union representatives insisted that the definition of genocide contained possible motives, which should be limited to national, racial, ethnic or religious motives—corresponding to the protected groups. However, other states did not agree to such a solution, warning even that it would be used as a pretext for avoiding responsibility for genocidal acts. For it is extremely easy to hide a genocidal motive behind a political one.<sup>60</sup>

Thus, the USSR's suggestion to limit the possible motives was rejected.<sup>61</sup> The solution adopted in the end was the one proposed by Venezuela, in which motives were neither listed nor limited.<sup>62</sup>

The Russian Federation is today trying to take advantage of this partial success achieved by the USSR. However, there are no reasons

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59. MALCOLM NATHAN SHAW, INTERNATIONAL LAW 263–64 (5th ed. 2004) (citation omitted); *Prosecutor v. Jeliscic*, Case No. IT 95-10-T, Judgment (Dec. 14 1999), available at <http://www.icty.org/x/cases/jeliscic/tjud/en/jel-tj991214e.pdf>.

60. Maria Szonert-Binienda, *Sąd nad Katyniem*, NASZ DZIENNIK (May 14–15, 2011) at 8.

61. *Id.*

62. See 1 HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES (2008) (providing more information on the process that occurred to finalize the 1948 Convention); see also THE UN GENOCIDE CONVENTION: A COMMENTARY (Paola Gaeta ed., 2009); ELŻBIETA KARSKA, *Manfred Lachs wobec ludobójstwa i zbrodni wojennych*, in MANFRED LACHS: WYBITNY PRAWNIK ŚWIATA 377 (Zdzisław Galicki et al. eds., 2011).



why the 1948 Genocide Convention should be redefined today. Under this Convention, we will not regard as genocide the physical destruction or attempt at destruction of a political group (*e.g.*, Trotskyites) for political reasons. What will be regarded as genocide, however, will be the same act committed for political reasons with regard to a national, racial, ethnic or religious group. We must bear in mind the fact that the motives of the Soviet authorities, though mainly political, also involved, nevertheless, inciting and using aversion to the Poles as a nation.

#### V. THE DOCTRINE ON THE CLASSIFICATION OF THE KATYN MASSACRE UNDER INTERNATIONAL LAW—AN OUTLINE

As Adam Basak rightly concludes:

[I]n the light of that . . . decision of the Soviet Politburo, there is no doubt that its intent was to destroy a part of the Polish national group; namely, the part made up of the nearly twenty-six thousand representatives of the intellectual elite, selected because of their social status and social function.<sup>63</sup>

That is why Cezary Mik writes about a “genocidal murder of the Polish elite in Katyn and other places.”<sup>64</sup> Marian Flemming concludes, on the other hand, that the formulation of the concept of genocide and the attribution of normative content to it after the Katyn Massacre was committed means that the massacre must be classified in this category.<sup>65</sup> He adds that the massacre was also a war crime.<sup>66</sup>

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63. See Adam Basak, *Katyni: Problem odpowiedzialności karnej sprawców w świetle Norymbergi*, in 21 *STUDIA NA FASZYZMEM I ZBRODNIAMI HITLEROWSKIMI* 325, 325–60 (Karol Jonca ed., 1998).

64. See Cezary Mik, *Lech Aleksander Kaczyński (18.6.1949-10.4.2010)*, 1/2 *KWARTALNIK PRAWA PUBLICZNEGO* 5, 10 (2010) (describing the life as well as public and academic work of the late Lech Kaczyński, President of Poland, who, while heading a Polish delegation for the celebrations of the seventieth anniversary of the Katyn Massacre, died along with the ninety-five people accompanying him on April 10, 2010 in a plane crash in Smolensk). In this context Mik notes that President Kaczyński:

[B]elieved that partnership and friendship between nations had to be developed. At the same time he believed that this could be done provided that such actions were based on both the historical and contemporary truth. From this also stemmed the need to find out the truth about the genocidal murder of the Polish elite in Katyn and other places.

*Id.*

65. See generally MARIAN FLEMMING, *JĘŃCY WOJENNI: STUDIUM PRAWNO-HISTORYCZNE* (2000).

66. *Id.* at 324.

Karolina Kosińska, too, sees the Katyn Massacre as an element of the crime of genocide.<sup>67</sup> Discussing the definition of this international crime, she states unequivocally:

If we talk about a specific plan to destroy a group, we can undoubtedly point to the USSR's policy with regard to the Polish lands that found themselves under Soviet rule after the Soviet attack. This policy was exactly such a plan, implemented through various genocidal acts against the Polish nation, acts the most spectacular of which was the Katyn Massacre.<sup>68</sup>

On the other hand, Małgorzata Kuźniar-Plota—incidentally, a prosecutor in charge of the Polish investigation into the matter—states that acts comprising the Katyn Massacre “had all the characteristics of the crime of genocide specified in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide.”<sup>69</sup> Witold Kulesza, who regards the massacre as both an act of genocide and a war crime, refers to it as “wartime genocide.”<sup>70</sup> Tadeusz Jasudowicz, in turn, makes a general statement, that during World War II the USSR committed “a series of horrible war crimes, crimes against humanity and the crime of genocide.”<sup>71</sup> He also concluded that the Katyn Massacre was “an act of Soviet genocide.”<sup>72</sup>

During the conference *Katyn: Justice Delayed or Justice Denied?*, which took place at Case Western Reserve University School of Law in Cleveland, Ohio, on February 4–5, 2011, the view that the Katyn Massacre could also be regarded as an act of genocide was expressed by the U.S. Ambassador-at-Large for War Crimes Issues, Stephen Rapp, and by the former Prosecutor of the Special Court for Sierra Leone, David M. Crane.<sup>73</sup> William A. Schabas, on the other hand, pointed out that a court or tribunal hearing such a case would be under tremendous political pressure from the Russian Federation,

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67. KAROLINA KOSIŃSKA, ZBRODZIA LUDOBÓJSTWA W PRAWIE MIĘDZYNARODOWYM 34 (2009).

68. *Id.*; see also ZDZISŁAW PESZKOWSKI & GRZEGORZ JĘDRZEJEK, ZBRODZIA KATYŃSKA W ŚWIETLE PRAWA 134 (2004).

69. See Małgorzata Kuźniar-Plota, *Kwalifikacja prawna Zbrodni Katyńskiej—Wybrane zagadnienia*, in ZBRODZIA KATYŃSKA: W KRĘGU PRAWDY I KLAMSTWA 46 (Sławomir Kalbarczyk ed., 2010).

70. KULESZA, *supra* note 44, at 52.

71. JASUDOWICZ, *supra* note 34, at 174.

72. Tadeusz Jasudowicz, *Zbrodnia Katyowicz, akt sowieckiego ludobójstwa*, SYBIRAK 1990, at 9.

73. See Michael P. Scharf & Maria Szonert-Binienda, *Katyn: Justice Delayed or Justice Denied? Report of the Cleveland Experts' Meeting*, 44 CASE W. RES. J. INT'L L. 535 (2012).

which would make it difficult for it to give such a ruling.<sup>74</sup> However, this is an extra-legal conclusion in the sense that a legal classification of an event is made in the context of a practical possibility of enforcing this internationally. Yet, possible objections of the other party and the difficulties—which are, after all, to be expected in any international dispute—cannot constitute an objective argument for a revision of the legal classification.

What must be noted here is that a committee of experts set up by the Chief Military Prosecutor's Office of the Russian Federation on March 17, 1992 concluded that the Katyn Massacre was an act of genocide under international law.<sup>75</sup> This group included lawyers, Boris Topornin (member of the Russian Academy of Sciences, director of its Institute of Law and the State) and Aleksandr Yakovlev (head of the Department of Criminal Law and Criminology at the Institute), as well as representatives of other disciplines, Inessa Yazhborovska (historian), Valentina Parsadanova (historian), Yuriy Zoria (military sciences) and Lev Belayev (medical sciences). A statement of August 2, 1993, signed by all members of the committee reads, "The murder . . . of Poles has all the characteristics of genocide, the responsibility for which lies with Stalin, Beria, Molotov, Voroshilov, Mikoyan, Kalinin, Kaganovich, Merkulov, Kobulov, Bashtakov and other individuals who committed the murder in practice."<sup>76</sup> The authors of the documents also add that:

[A]n accurate legal assessment . . . of the crimes committed as part of the state-sanctioned terror should be based on the principles of international law developed in detail after World War II, the system of special norms of substantive and procedural law, with genocide and crimes against humanity being recognised as having taken place and as not being subject to the statute of limitations.<sup>77</sup>

In addition, the authors concluded that these acts had also been war crimes.<sup>78</sup> The committee also recommended that those who had

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74. See Szonert-Binienda, *supra* note 61, at 8–9; see also Case Western Reserve School of Law, *Katyn: Justice Delayed or Justice Denied?—Was Katyn a Genocide?*, YOUTUBE (Feb. 4, 2011), <http://www.youtube.com/watch?v=E3HAZeNsozk>; Case Western Reserve School of Law, *Hon. Stephen Rapp at Conference on Katyn*, YOUTUBE (Feb. 4, 2011), <http://www.youtube.com/watch?v=YpXoKt9PBXw>.

75. The text of this decision is available in ROSJA A KATYN 48–108 (Anna Dzienkiewicz ed., 2010).

76. *Id.* at 100.

77. *Id.* at 103.

78. When it comes to all people involved in the Katyn Massacre—from the highest echelons of the USSR to those who had actually committed the crimes—the conclusion was that “they committed acts of genocide, war

committed these crimes—listed by name—be arrested and tried before a Russian court.<sup>79</sup>

The term genocide is also used by authors of non-legal publications. For instance, a distinguished Polish historian, Wojciech Materski refers to the Katyn Massacre as “genocide” and to the Politburo decision of March 5, 1940 as a “genocidal decision.”<sup>80</sup> Stanisław Jaczyński describes it as an act “ordering the crime of genocide.”<sup>81</sup> The military historian Jędrzej Tucholski describes these actions as “the crime of mass genocide.”<sup>82</sup> This opinion is shared by some Russian historians as well. For example, Lebedeva—in her monograph about the Katyn Massacre—writes about the “genocidal practices used by Stalin’s regime against the Polish nation.”<sup>83</sup> The same view on the problem is expressed by a Canadian political scientist specializing in genocide, Adam Jones, who—when describing the Katyn Massacre—notes that, though terrifying, “[t]his was only a small part of a wider Soviet campaign against the Polish nation.”<sup>84</sup> He points out that these authorities committed the crime of genocide against the Poles at the time.<sup>85</sup> The American historian Norman Naimark emphasizes that the Katyn Massacre was only a part of a consistently implemented plan of genocide of Poles that had taken place in the USSR since the early 1930s.<sup>86</sup> He even called in an emblematic case of Stalinist genocide.<sup>87</sup>

In June 1952, Zdzisław Stahl wrote:

During its deliberations, the American Congress, and especially members of the Katyn Committee of the House of Representatives were right in describing the mass murder committed in 1940 . . . as an act of genocide. The crime of genocide, made current by the total systems and still posing a

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crimes and crimes against humanity, which do not fall under the statute of limitations.” *Id.* at 101.

79. *Id.* at 103.

80. *See* Materski, *supra* note 37, at 220–21.

81. Stanisław Jaczyński, *Jeńcy Polscy w Związku Sowieckim, in* ZBRODNIENKWD NA OBSZARZE WOJEWÓDZTW WSCHODNICH RZECZYPOSPOLITEJ POLSKIEJ: MATERIAŁY I MIĘDZYNARODOWEJ KONFERENCJI NAUKOWEJ 140 (Bogusław Polak ed., 1995).

82. Tucholski, *supra* note 38, at 125.

83. LEBEDEVA, *supra* note 7, at 283–84.

84. ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 199 (2nd ed. 2011).

85. *See id.* at 131–34.

86. *See* NAIMARK, *supra* note 6, at 135.

87. *Id.* at 3.

real danger to the world as long as the Soviet tyranny lasts, has been defined anew and condemned by international law. . . . It has also been reflected in the Genocide Convention.<sup>88</sup>

When quoting the definition of genocide as included in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, Stahl concluded that the Katyn Massacre fell within this definition.<sup>89</sup>

As we can read in a monograph published by Stahl and Józef Mackiewicz, entitled *The Katyn Massacre in the Light of Documents*, with an introduction by General Władysław Anders:

The above definition suggests the mass murder in Katyn must be classified as a classic example of the horrible crime of genocide. For the Polish prisoners were murdered in a premeditated fashion and according to a plan, and only because they were Poles, (i.e., with the intent of destroying a valuable part of the Polish nation). . . . The history of this crime testifies to this beyond any doubt . . . . This blow was dealt in order to destroy the Polish nation (i.e., in order to commit the crime of genocide against this nation) by the government of the Soviet Union, which organized the mass murder in Katyn.<sup>90</sup>

As Roman Kwiecień rightly notes, “For Poland, this is a crime under international law; for Russia—an ‘ordinary’ crime the statute of limitations of which has expired.”<sup>91</sup> The Katyn Massacre cannot be perceived as a one-off act outside the historical and geopolitical context. It should be perceived as part of the policy of the Soviet authorities vis-à-vis the Poles as a nation—including the policy

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88. ZBRODZIA KATYŃSKA W ŚWIETLE DOKUMENTÓW 285 (Józef Mackiewicz & Zdzisław Stahl eds., 10th ed. 1982).

89. *Id.*

90. *Id.* at 285–86.

91. Roman Kwiecień, *Przewycięzanie przeszłości przez prawo międzynarodowe*, in *PROBLEMY PRAWNE W STOSUNKACH POLSKO-NIEMIECKICH U PROGU XXI WIEKU* 35 (Czapliński Władysław & Łukańko Bernard eds., 2010). For instance, after the Chief Military Prosecutor of the Russian Federation rejected, in 2009, successive motions by the families of the victims of the Katyn Massacre to declassify the files and rehabilitate the victims posthumously, the Military Chamber of the Supreme Court of the Russian Federation—rejecting complaints submitted by Russian lawyers—concluded that, in accordance with the 1926 Soviet Criminal Code, this crime, as a common crime, fell under the statute of limitations. See Andrzej Przewoźnik, *Zbrodnia Katyńska: Proces Odkrywania Prawdy i Upamiętnienie Ofiar*, in *BIAŁE PŁAMY—CZARNE PŁAMY: SPRAWY TRUDNE W POLSKO-ROSYJSKICH STOSUNKACH 1918-2008*, at 329 (Adam Rotfeld et al. eds., 2010).

implemented in the USSR before the outbreak of World War II. The opening of archives and new scholarly publications allow us to add new facts to the legal assessment of the classification of these events.

It must be stressed at this point that the acts committed by the perpetrators of the Katyn Massacre can be classified not only as acts of genocide, but can also be regarded as other international crimes, including war crimes. There are no legal obstacles to declaring one act as having the characteristics of two or more crimes.<sup>92</sup> The conclusion that the Katyn Massacre is either an act of genocide or a war crime, and the juxtaposition of the two, does not find enough justification in law. This is not an exclusive disjunction. In this context it is worth bearing in mind the official and publicly expressed position of the Polish state formulated by the Prime Minister of Poland, Jerzy Buzek, who, during the opening of the Polish War Cemetery on June 28, 2000, said that, “The word ‘Katyn’ will, for whole generations in Poland and in the whole world, signify genocide and a war crime.”<sup>93</sup>

One act can have the characteristics of several types of crimes. Depending on the solution adopted by the legislator, the punishment is imposed for each of such crimes separately (ideal concurrence of offenses) or only for the crime carrying the highest penalty (eliminative concurrence of offenses). In the case of international crimes discussed here, given the fact that they involved the murder of people, they all carry the same maximum penalty, the highest penalty known to every legal system. There is no doubt, however, that among international crimes that can be attributed to the perpetrators of the Katyn Massacre the most serious is the crime of genocide.<sup>94</sup>

This classification has been used from the very beginning of the official investigation of the Katyn Massacre and prosecution of its perpetrators by the Polish authorities after the transformations of 1989. As early as October 1989, the Prosecutor General of the People’s Republic of Poland, Józef Żyta, submitted to the Prosecutor General of the USSR, Alexander Sukhariev, the first Polish request to

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92. See Assembly of States Parties to the Rome Statute of the Int’l Crim. Ct., Elements of Crimes, General Introduction ¶ 9, at 112, ICC-ASP/1/3 (Sep. 9, 2002), available at [http://www.amicc.org/docs/Elements\\_of\\_Crimes\\_120704EN.pdf](http://www.amicc.org/docs/Elements_of_Crimes_120704EN.pdf) (“A particular conduct may constitute one or more crimes.”).

93. Jerzy Buzek, Prime Minister of Poland, Speech at the Ceremonial Opening of the Polish War Cemetery at Katyn (July 28, 2000), in ANNA M. CIENCIALA ET AL., *KATYN: A CRIME WITHOUT PUNISHMENT* 350, 351 (2007).

94. See Karol Karski, *The Katyn Crime under Nuremberg Principles*, in *KATYN: STATE-SPONSORED EXTERMINATION* 31–32 (Maria Szonert-Binienda ed., 2012).

launch an investigation into the case.<sup>95</sup> In describing the basis for the request, he invoked the duties of this state under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, Article 1, of which states that:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) war crimes . . . (b) crimes against humanity . . . and the crime of genocide as defined in the 1948 Convention . . . even if such acts do not constitute a violation of the domestic law of the country in which they were committed.<sup>96</sup>

The European Court of Human Rights in the Chamber judgment of April 16, 2012 in *Janowiec and Others v. Russia* (concerning the effectiveness of the Russian investigation into the Katyn Massacre) confirmed that the murder committed on Polish prisoners was a war crime.<sup>97</sup> In so doing, the Tribunal did not negate that this action was also a crime of genocide or a crime against humanity. It analyzed whether it was one of the types of crime for which prosecution is not subject to a statute of limitations. It established this with the simplest example, showing that in 1939 during the use of the Soviet-Polish armed conflict, war crime occurred. Nothing more—to justify the argument that it is a crime—for which the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity is applicable—is needed, so nothing more was done. In the same verdict, the Tribunal also named *the Holocaust* a crime against humanity. Yet in so doing, it did not negate that it was also a crime of genocide.

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95. *Kalendarium Zbrodni Katyńskiej* [Timeline of the Katyn Massacre], ONET.PL (Apr. 10, 2010), <http://wiadomosci.onet.pl/kraj/kalendarium-zbrodni-katynskiej,1,3571752,wiadomosc.html>.

96. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 26, 1968, 754 U.N.T.S. 73.

97. *Janowiec v. Russia*, Nos. 55508/07 and 29520/09, Chamber, Judgment of Apr. 16, 2012, available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-110513>. The judgment still is not final, because the parties may request within three months from the date of the judgment that the case be referred to the Grand Chamber, in accordance with Article 44 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This case is now before the Grand Chamber.

## VI. THE POLICY OF THE SOVIET AUTHORITIES WITH REGARD TO THE POLES AND THE POLISH NATION

There are suggestions that the Poles in the USSR were not treated as one nation, and that the repressions affected only some of them, those that the Soviet authorities found convenient. However, the facts are against such a conclusion. A description of one of the waves of mass deportations of Polish families in 1940 can be found, for instance, in Beata Obertyńska's reminiscences, recorded during the war:

They knew that the only way to “depolonize Poland” was to deprive it of Poles. So they concocted a devilishly perfidious plan not to take away a country from people but people from a country. The plan was carried out suddenly, deviously, one night over the entire occupied territory. . . . Suddenly, at night, the surprised village got half an hour to assemble, after which its entire population, put on sledges, was driven for miles, in biting cold, and then was put on trains. No one was left alone. Old men and infants, cripples and cretins were among those taken. Women in labour were chased off their beds and told to get on the sledges. The bedridden and the paralysed were dragged too. Not a living soul had the right to remain in a village or settlement condemned to extinction. Their cattle and livestock from then on automatically belonged to the state, forming the germs of the future collective farms. The victims were, first of all, purely Polish villages and settlements, as well as soldiers' settlements in the borderlands.<sup>98</sup>

This is a typical description not of political but of ethnic cleansing. In the USSR at that time, all Poles were politically suspect and what decided who among them was to be the first victim and according to what “sub-criteria” was the specific, murderous whim of the Soviet authorities.<sup>99</sup> As we can read in the monograph *The Katyn Massacre in the Light of Documents*:

In the Bolsheviks' colloquial parlance—and those who had the grim opportunity to be under Soviet rule, especially in the hands of the NKVD, must have heard this technical term—the

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98. BEATA OBERTYŃSKA, *W DOMU NIEWOLI* 288–89 (2d ed. 1968).

99. Regardless of whims and “sub-criteria,” the end result was the same. Cf. DONALD RAYFIELD, *STALIN AND HIS HANGMEN: THE TYRANT AND THOSE WHO KILLED FOR HIM* 310–11 (2004) (“Poles, Finns, Estonians, and Latvians were singled out [for arrest and likely execution] to the extent that the USSR in 1937 had half as many ethnic Poles and Balts as it had in 1926. Virtually all ethnic Poles—some 144,000—were arrested and three quarters of these were shot.”).



operation of destroying the leading elements of a nation conquered by communism is called ‘obezkholovenye’ [decapitation], (i.e., depriving society of its head and, consequently, spiritual leadership). . . . The germs of genocidal plans are also to be found in the fundamental theories of Soviet communism. . . . We find them . . . in the Stalinist theory of nationality with its principle of “culture—national in its form and socialist in its content” providing a convenient theoretical foundation for the destruction of any nation under Soviet rule with the destroyed nation allowed to keep the external marks of independence and separateness. For the Sovietization process destroys the roots of national individuality and source of civilizational power, while leaving the external marks and forms.<sup>100</sup>

The Secretary of the Council for the Protection of Struggle and Martyrdom Sites of the Republic of Poland, Andrzej Przewoźnik, has reminded us that, “Having attacked Poland, the Nazi and the Soviet regimes, which had formed an alliance in August 1939, began to carry out their programmes of ‘destroying the leadership of the Polish nation’ (Germans) and ‘obezkholovenye’ (Soviets).”<sup>101</sup> Both states decided to subjugate the Polish nation by depriving it of its leading, culture-creating parts. Materski notes that, “What both [occupying powers] had in common was deliberate destruction of the Polish intellectual elite.”<sup>102</sup> As the then-ally of the USSR, Adolf Hitler said in autumn 1939, “Only the nation whose leaders have been destroyed can be turned into a nation of slaves.”<sup>103</sup> A recently discovered note by Beria suggests that the number of Polish nationals arrested by Soviet authorities just between September 1939 and December 1, 1940 was 409,000.<sup>104</sup>

Organized campaigns against Poles were instigated in the USSR even before the outbreak of World War II. As Lebedeva points out:

Fight[ing] against entire nations and nationalities became an organic component of the policy of eliminating ‘hostile’ and ‘socially dangerous’ elements and spreading its rule over ever more new territories. The first victim of this policy was the

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100. ZBRODNIA KATYŃSKA W SWIETLE DOKUMENTÓW, *supra* note 88, at 287–88.

101. Andrzej Przewoźnik, *W holdzie ludziom nauki*, in JOLANTA ADAMSKA ET AL., REŻIMY TOTALITARNE WOBEC LUDZI NAUKI 1939-1945: UNIWERSYTET JAGIELLOŃSKI, SONDERAKTION KRAKAU, ZBRODNIA KATYŃSKA 3 (2007).

102. Materski, *supra* note 37, at 201.

103. HERMANN RAUSCHNING, GESPRÄCHE MIT HITLER 3 (1940).

104. Materski, *supra* note 37, at 203.

Polish nation. In April 1936 the Council of People's Commissars adopted a top secret resolution, no. 776-120 ss, *On resettling politically suspect Poles from the Ukrainian SSR to the Kazakh SSR*. The resulting repressions affected 30,000 families from Marchlewski and Dzerzhynsky Raions. Between 1922 and 1925 Poles from all parts of the country were brought there to autonomous national *raions* created by the Soviet authorities. However, the rejection by those Poles of collective farming led not only to the disbanding of the Marchlewski Raion in 1935 and the Dzerzhynsky Raion in 1938 but also to the persecution of the Polish community.<sup>105</sup>

Naimark, too, notes that the actions of the Soviet authorities against Poles immediately after the outbreak of World War II did not result from any new policy. The territorial spread of Soviet rule only led to another part of the Polish nation being covered by it. Thus, the Soviets continued their existing genocidal policy towards this nation. Naimark stresses that:

The attack [of the Soviet authorities] against specific “hostile” nations was in some cases genocidal in its form. Early in the 1930s those nationalities that had ostensible homelands abroad—the Poles, Germans and Koreans in particular—were separated out from the rest of the Soviet national groupings and deemed inherently dangerous to the Soviet state. In particular, the actions against the Poles, starting with mass deportations to the special settlements in 1934, and culminating in the arrests and deportations of 1939–1940 and the Katyn Massacre of June 1940, can be thought of as genocidal.<sup>106</sup>

The punishing of entire nations reached its height in 1944. The destruction and deportations affected, among others, the Ingrian Finns living near Leningrad, the Kalmyks from the Caspian Sea, the Chechens and the Ingush, people living in the Karachay Republic in the Caucasus, Crimean Tatars, and several thousand Greeks, who had settled on the peninsula centuries earlier.<sup>107</sup> In order to carry out mass deportations, the Soviet authorities created permanent new structures within the Soviet NKVD, including the Convoy Troops of the NKVD. It is worth bearing in mind that there is a surviving letter from Lemkin to August Heckscher II from 1951, in which Lemkin used the term genocide to refer to the mass deportations conducted by the Soviet authorities of the Volga Germans in 1941, and of the Crimean

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105. LEBEDEVA, *supra* note 7, at 296.

106. NAIMARK, *supra* note 6, at 135.

107. See JONES, *supra* note 84, at 134–35; NAIMARK, *supra* note 6, at 135–36; SANFORD, *supra* note 11, at 86.

Tatars, Chechens, the Ingush, Karachays, and Balkars in 1944 to 1945.<sup>108</sup> This is worth noting because Lemkin did not include members of political groups, persecuted for political reasons, among the victims of genocide.<sup>109</sup> It seems, however, that he believed that the destruction of nations for political and not only racial reasons did deserve to be classified as such.<sup>110</sup> For him, political groups were not protected by the 1948 Convention, although he did want to provide that protection at the Convention preparation stage.<sup>111</sup> However, he did not protest too much against the removal of political groups from its definition, because of the Convention. Yet, he was right in maintaining that in the light of an already adopted international agreement, when a national group was physically eliminated “in whole or in part” for political reasons, such a situation did fall within the definition included in the agreement.

It has to be said at this point that the so-called Polish operation conducted by the NKVD caused the destruction of around 30% of the total number of Poles living in the USSR at the time. As scholars point out, “Poles, persecuted and punished by the authorities, came to the very top of the list of the persecuted. They were subjected to destruction more than others, and were also the first to be treated in this manner for reason of their nationality.”<sup>112</sup>

Lemkin’s authority is invoked by, for instance, the International Criminal Tribunal for the Former Yugoslavia in the Appeals Chamber judgement of March 22, 2006 in the case of Milomir Stakić.<sup>113</sup> The Tribunal affirmed the words of the “scholar who first conceptualised the term,” according to which genocide signifies “a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups,” with the aim of annihilating the groups themselves.<sup>114</sup> In addition, the Tribunal stated that according to the author of the term, the perpetrator’s objective “would be

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108. See JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 216–17 (2008); Courtois, *supra* note 15, at 122.

109. See COOPER, *supra* note 108, at 90–91.

110. See *id.* at 81 (stating that Lemkin included national and racial groups as victims of genocide).

111. See *id.*

112. Kucharski, *supra* note 26, at 58.

113. Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 21–22 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), <http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf> (“This reading of Article 4 finds support in the etymology of the term ‘genocide,’ and in the definition of the crime given by Raphaël Lemkin, the scholar who first conceptualised the term.”).

114. *Id.* ¶ 21.

disintegration of the political and social institutions, of culture, language, national feelings, religion, the economic existence of national groups.”<sup>115</sup>

We should remember that both the Third Reich and the USSR pursued the policy of depriving the Poles of their national rights.<sup>116</sup> In a secret additional protocol to the non-aggression pact between Germany and the USSR of August 23, 1939 (Ribbentrop-Molotov Pact), the sphere of influence over the territory of Poland was divided in the context of a question posed in the document of “whether the interests of both parties make desirable the maintenance of an independent Polish state . . .” as well as the statement that this question would be resolved by future will of the contracting powers, expressed “by means of a friendly agreement.”<sup>117</sup> Following a suggestion submitted by the USSR on September 19, 1939, Germany agreed to a total liquidation of Poland as a state. This was reflected in the agreement on friendship and the border between the USSR and Germany of September 28, 1939.<sup>118</sup> The Polish state was to cease to exist once and for all.

The Soviets did not provide for any formal conditions of the existence of a separate Polish national grouping or nationality within the territory annexed by the USSR. For instance, they did not establish a Polish-Soviet republic, like they did in 1940 with regard to the annexed territories of Lithuania, Latvia, and Estonia, or parts taken from Romania (Moldavian SSR) and Finland (Karelo-Finnish SSR).<sup>119</sup> The annexed lands of the Second Polish Republic were incorporated directly into the Belarussian SSR and Ukrainian SSR.<sup>120</sup> Nor did the Soviets create—within these latter two—a Polish autonomous republic or a Polish autonomous district, though such a

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115. *Id.*

116. Tadeusz Jasudowicz, *Od Tragedii Katyńskiej do Tragedii Smoleńskiej—z perspektywy prawa międzynarodowego i standardów praw człowieka*, in 1 FIDES ET BELLUM: KSIĘGA POŚWIĘCONA PAMIĘCI KSIĘDZA BISKUPA, PROFESORA, GENERALA ŚP. TADEUSZA PŁOSKIEGO 13-25 (Bronisław Sitek, Tadeusz Jasudowicz & Martyna Seroka eds., 2012)

117. *See* Treaty of Nonaggression Between Germany and the Union of Soviet Socialist Republics with Secret Additional Protocol, U.S.S.R.-Ger., art. II, Aug. 23, 1939.

118. *See* Boundary and Friendship Treaty Between Germany and the Union of Soviet Socialist Republics, U.S.S.R.-Ger., art. II, Aug. 28, 1939.

119. *See* SNYDER, *supra* note 1, at 128 (providing a map of the division of Poland and the surrounding Republics, as well as a discussion of that division); JAMES E. MCSHERRY, *STALIN, HITLER, AND EUROPE: THE IMBALANCE OF POWER 1939-1941*, at 10–16 (1970) (explaining the detailed treaty provisions between the Soviet Union and Estonia, Latvia, and Lithuania).

120. *See* SNYDER, *supra* note 1, at 128.

solution was known in the Soviet constitutional system.<sup>121</sup> The fact that—contrary to the prevailing standard at the time—no administrative Polish unit was created in the USSR in 1939 demonstrates that the status of Poles was lower than that of nationalities with their own Soviet republics or autonomous districts. That nations with “their place on the map” of the USSR were, too, subjected to murderous repression cannot change the fact that such a place was not even earmarked for the Poles.

The Poles were not a nation that was supposed to continue to exist and maintain its identity, even to the extent known in Soviet practice and law.<sup>122</sup> Its members were to be deprived of their national identity, while their culture-creating leaders and those who resisted were to be murdered. The Poles were victims of mass repressions.<sup>123</sup> Their Polish citizenship was disregarded. They were given Soviet citizenship *en bloc*. They were arrested, sent to the Gulag camps, and forcibly conscripted into the Soviet army, where they had to swear allegiance to the Soviet Nation, Soviet Fatherland, and the Workers’ and Peasants’ Government.<sup>124</sup> “The Poles—regardless of their domicile at the time—were to be sent to . . . military districts” outside the annexed territories.<sup>125</sup> “The soldiers who would not let their Polish patriotism be eradicated,” and would show that either actively or passively, “exposed themselves to repressions on the part of the secret service.”<sup>126</sup>

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121. For more on the constitutional and international aspects of territorial division of the USSR, see generally KAROL KARSKI, *MIĘDZYNARODOWE ASPEKTY PRAWNEGO STATUSU REPUBLIK ZWIĄZKOWYCH ZSRR* (1991).

122. See TADEUSZ PIOTROWSKI, *POLAND’S HOLOCAUST* 10 (1998) (discussing Soviet policy’s goal of “eliminating all traces of that county’s [history]”); 2 NORMAN DAVIES, *GOD’S PLAYGROUND: A HISTORY OF POLAND* 327 (discussing the new territories and their “democratic elections” performed as part of the Byelorussian SSR and the Ukrainian SSR).

123. See SNYDER, *supra* note 1, at 128–29 (explaining the NKVD’s mass deportation of Polish citizens and their families); PIOTROWSKI, *supra* note 122, at 11–12 (discussing the Soviets’ crushing economic policies placed on Polish nationals).

124. See SNYDER, *supra* note 1, at 128–29 (discussing the deportation and conscription of Polish nationals); JAMES E. MCSHERRY, *STALIN, HITLER, AND EUROPE: THE IMBALANCE OF POWER 1939–1941* at 105–06 (1970) (discussing the conscription process).

125. Albin Głowacki, *Przymusowo wcieleni do Armii Czerwonej, w tym pełniący służbę w tzw. strajbatalionach*, in *POLSKA 1939–1945: STRATY OSOBOWE I OFIARY REPRESJI POD DWIEMA OKUPACJAMI* 254–55 (Wojciech Materski & Tomasz Szarota eds., 2009).

126. *Id.*

Between 1940 and 1941, citizens of the Second Polish Republic who were Poles were subjected to mass deportations. A “total of over 1,200,000 Polish citizens, mainly Poles” were deported in four mass transports during that period.<sup>127</sup> For instance, among those deported in the first transport, between February 8 and February 10, 1940, 82% were Polish.<sup>128</sup> The number of Polish citizens of all nationalities deported to the USSR is estimated at 1.4-1.5 million, 1.2 million of those being ethnic Poles.<sup>129</sup> Thus, Poles constituted as much as 80–86% of all the deported, though they constituted less than half—just 38%—of people living in the territories annexed by the USSR.<sup>130</sup> In referring to the subsequent waves of deportations, Lebedeva calls them collectively “deportations of the Poles from western Ukraine and Belarus.”<sup>131</sup> She also adds that “[p]ercentage-wise, the number of the displaced was no lower than that in areas occupied by the Third Reich.”<sup>132</sup> Historians note that “the Soviet attack was directed mainly at the leaders of the Polish nation” and that the actions were to “weaken the Polish element in the Eastern Borderlands.”<sup>133</sup>

This genocide was not an exception but a manifestation of the working of the Soviet system:

The Soviet system . . . cannot maintain its hold over nations with individuality and culture; in order to hold on to power, it must turn nations into a shapeless mass of terrorised slaves. . . . The Soviet practice with regard to the Polish nation can—in addition to the murder of prisoners—‘boast’ a number of other genocidal acts, making up a consistent whole of a cruel plan to destroy the Polish nation. During the first occupation of the eastern part of Poland, following the joint attack with Hitler in 1939, Moscow managed, over less than two years of governing

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127. 3 HISTORICAL COMMISSION OF THE POLISH GENERAL STAFF, *POLSKIE SIŁY ZBROJNE W DRUGIEJ WOJNIE ŚWIATOWEJ: ARMIA KRAJOWA 33–34* (1950).

128. GŁOWACKI, *supra* note 125, at 241.

129. *See* PIOTROWSKI, *supra* note 122, at 13–14.

130. At that time, 11% of the population of the territory annexed by the USSR was deported. *See id.* (expressing that out of 1.4–1.5 million deported approximately 1.2 million were calculated as ethnically Polish). Czesław Partacz, *Losy ludności rodzimej na Kresach Wschodnich w czasie pierwszej okupacji sowieckiej 1939–1941*, in *ZBRODNIENIE NKWD NA OBSZARZE WOJEWÓDZTW WSCHODNICH RZECZYPOSPOLITEJ POLSKIEJ: MATERIAŁY I MIĘDZYNARODOWEJ KONFERENCJI NAUKOWEJ 70, 76* (Bogusław Polak ed., 1995). *See also* WŁODZIMIERZ BONUSIAK, *POLSKA PODCZAS II WOJNY ŚWIATOWEJ* 108, 113, 123 (1995).

131. LEBEDEVA, *supra* note 7, at 159.

132. *Id.* at 285.

133. Partacz, *supra* note 130, at 72.

half of Poland, to deport over 1.5 million of the best elements of the local population, totalling 13 million people. Thus over 10% of the population of eastern Poland—and culturally the most active part at that—was doomed to extinction or, at best, to vegetation or deprivation of national identity.<sup>134</sup>

Also, some Russian scholars studying the crimes of Stalin's era—including Lebedeva—admit that the treatment of the Poles by the Soviet authorities was influenced by their nationality (*i.e.*, being Polish was an incriminating circumstance).<sup>135</sup> The attitude of the Soviet authorities to the Poles can be seen, for instance, in a proposal submitted by the People's Commissar for Defence, Grigoriy Kulik, on September 21, 1939, to Stalin, regarding "the release of Belarussian and Ukrainian prisoners," but not Polish prisoners.<sup>136</sup> Lebedeva points to the arrests of Poles. She stresses that these arrests:

[W]ere not isolated excesses of overzealous NKVD officers, but were a result of a carefully planned policy of destroying the representatives of the Polish statehood, a policy that began to be pursued long before Katyn, Kharkhov and Mednoye. The idea was to demolish the foundations of the Polish state and its culture. The arrests were overseen by the central authorities. In December [1939], for instance, they ordered the arrest of all reserve officers, also those that had retired, and shortly before in the war [of 1941] the arrests included people from central and western parts of Poland.<sup>137</sup>

Petrov explains why the Poles murdered at the time were not, for instance, sent to forced labor camps, where, after all, they would not be able to do any harm to the Soviet authorities. As the Russian scholar notes:

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134. ZBRODNIA KATYŃSKA W ŚWIETLE DOKUMENTÓW, *supra* note 88, at 286–87.

135. LEBEDEVA, *supra* note 7, at 287.

136. *Id.* at 68, 85–86; Materski, *supra* note 37, at 216–17; Tucholski, *supra* note 38, at 133–34. For more on the treatment of Poles in areas annexed by the USSR, see *e.g.*, ALBIN GŁOWACKI, *SOWIECI WOBEC POLAKÓW NA ZIEMIACH WSCHODNICH II RZECZYPOSPOLITEJ 1939-1941* (1998); Alexander Guryanov, *Sowieckie represje wobec Polaków i obywateli polskich w latach 1936-1956 w świetle danych sowieckich*, in *EUROPA NIEPROWINCJONALNA: PRZEMIANY NA ZIEMIACH WSCHODNICH DAWNEJ RZECZYPOSPOLITEJ (BIAŁORUŚ, LITWA, ŁOTWA, UKRAINA, WSCHODNIE POGRANICZE III RZECZYPOSPOLITEJ POLSKIEJ) W LATACH 1772-1999*, (Krzysztof Jasiewicz ed., 1999); Krzysztof Jasiewicz, *Obywatele polscy aresztowani na terytorium tzw. Zachodniej Białorusi w latach 1939-1941 w świetle dokumentacji NKWD/KGB*, KWARTALNIK HISTORYCZNY, 1994, at 105–34.

137. LEBEDEVA, *supra* note 7, at 287.

Stalin thought otherwise. For him, those young, very well-educated and very patriotic Poles were Poland itself. Little crystals or, rather, seeds that would sprout wherever they would be thrown. They would return to Poland and create Poland in it. Sent to Voronezh or Magadan, they would build Poland there. And for Stalin, after September 1939 your state was to be no more. He agreed that within the territory of the former Second Polish Republic there would remain a mass of ordinary people he would be able to mould into whatever he chose.<sup>138</sup>

Historical publications compare the fates of various victims:

[S]ome of the best scholars—not only in Poland but also in the world—became victims of [both] totalitarian regimes. The Kraków Gestapo wrote down just one cause of the arrest: *Aktion gegen Univers. Professoren* [action against university professors], while the Political Bureau of the Central Committee of the All-Union Communist Party (Bolsheviks) condemned to death 25,700 Polish citizens as “diehard, inveterate enemies of the Soviet authorities.”<sup>139</sup>

It is worth noting here that the extermination of the Polish intellectual elite happened simultaneously on either side of the German-Soviet partition border.<sup>140</sup> Some authors, when comparing the German Nazi and the Stalinist crimes, point out that in some respects the Stalinist regime was even more criminal than its German Nazi equivalent. For example, according to Marek Rezler:

The murder of the Polish POWs from the three camps was completely different in nature to the extermination in the Nazi concentration camps or the Soviet labour camps. The attack was deliberate and—as it turned out—effective, because the murdered officers were often part of the elite of Polish science, medicine, culture and politics.<sup>141</sup>

Rezler also notes that this was unique, at least when it comes to World War II, as there were no other cases of deliberate

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138. Nikita Petrov, *Katyń to logiczna zbrodnia Stalina* (interview conducted by Waclaw Radziwinowicz), *GAZETA WYBORCZA*, Mar. 5, 2010, at 2.

139. Przewoźnik, *supra* note 101, at 3. Neil Ascherson calls the Katyn Massacre “an act of selective genocide against a part of the Polish national elite, closely parallel to Hitler’s order to exterminate the Polish intellectual class.” NEIL ASCHERSON, *THE STRUGGLES FOR POLAND* 124 (1987).

140. LEBEDEVA, *supra* note 7, at 140.

141. Marek Rezler, *Kilka uwag o realiach katyńskiej historiografii, in ZBRODNIE NKWD NA OBSZARZE WOJEWÓDZTW WSCHODNICH RZECZYPOSPOLITEJ POLSKIEJ* 161 (Boguslaw Polak ed., 1995).



extermination of an entire camp, not to mention three camps at the same time. He adds:

Even the Germans, who had a specific extermination plan, provided for a similar action only after they had won the war. By liquidating the Kozelsk, Starobelsk and Ostashkov camps, the Soviet leaders assumed from the very beginning that the decisions sanctioning the division of the Polish state were final; they did not consider a possibility of the rebuilding of Poland or a military conflict in which the newly imprisoned Polish officers would become useful—not to mention their becoming allies.<sup>142</sup>

In his analysis Rezler points to features common to different acts of genocide. He observes that:

Just like the Germans in their decisions made during the Wannsee Conference confirmed their ‘final solution to the Jewish question’, so too the Kremlin, at the turn of 1939 and 1940, decided to finally resolve the question of the Polish elite that had found themselves in its power. This led to the pits of death in the Katyn Forest, in Piatykhatky and Mednoye, as well as the camps in Siberia and the Polish settlements in Kazakhstan.<sup>143</sup>

The author also notes that the Katyn Massacre is not just a tragic event that took place in the past and can be analysed today only as a one-off event, as an act, which, although terrible, is in its consequences solely historical. The criminal effects of the Massacre are still felt today. As Rezler wrote, “[t]he results of these decisions combined with the effects of the actions of the western invader, can still be seen in Poland today, and it will take several generations to fill those gaps; an avalanche of university degrees as well as high-level positions or financial status are not enough.”<sup>144</sup> These words, spoken and written down in 1995, are to a large extent still valid today. A similar view is expressed by Grzegorz Łukomski. He notes that in the case of both invaders we were dealing with:

[P]lanned and mass extermination. Universities played a special role in the occupying powers’ plans. The losses among the intellectual elite and intellectuals—unlike material losses—are immeasurable and the most difficult to compensate. The mass murders committed by both invaders in Polish science and culture created a huge generational gap and the effects of the losses can still be felt today. For the murders not only broke the

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142. *Id.*

143. *Id.*

144. *Id.*

continuity of research work and programmes; first and foremost, they caused an irretrievable loss of distinguished, often brilliant individuals, who represented nearly all areas of knowledge and human intellectual activity.<sup>145</sup>

Both the German Nazis and the Soviets would murder the Polish intellectual elite first.

We often hear that the Poles were treated as an objective political opponent and not as a national opponent. Some claim that repression against members of the nation was directed at specific individuals for political reasons. Even if this had been the case, which is by no means obvious, this does not change the fact that these individuals as a nation were regarded collectively as an element resisting Sovietization.<sup>146</sup> Does it really matter that the Polish nation as a whole was regarded as a politically suspect element? According to the definition of the crime of genocide, it does not. Rather, it seems to confirm the argument that actions directly against the Polish nation took place in the USSR.

Not all Polish prisoners of the Soviet POW camps were murdered; some individuals survived.<sup>147</sup> Yet the view that this is an argument for concluding that the “massacre was political and not genocidal in nature” is not justified.<sup>148</sup> In the German Nazi concentration camps, too, there were isolated cases of representatives of nations subjected to genocide leaving the camps for various reasons.<sup>149</sup> This may have been caused by external interventions, both political and financial

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145. Grzegorz Łukomski, *Straty wśród kadry naukowej oraz absolwentów i studentów Uniwersytetu Poznańskiego poniesione na Kresach Wschodnich Rzeczypospolitej 1939-1945*, in ZBRODNIENIE NKWD NA OBSZARZE WOJEWÓDZTWA WSCHODNICH RZECZYPOSPOLITEJ POLSKIEJ 241 (Bogusław Polak ed., 1995).

146. When investigating the “counterrevolutionary” activities of various prisoners, the NKVD officers “would take particular care when recording all statements defending the honour of Poland and its government . . . and expressing religious feelings.” LEBEDEVA, *supra* note 7, at 148.

147. See SNYDER, *supra* note 1, at 135–36.

148. See KAROLINA WIERCZYŃSKA, POJĘCIE LUDOBÓJSTWA W KONTEKŚCIE ORZECZNICTWA MIĘDZYNARODOWYCH TRYBUNAŁÓW KARNYCH AD HOC 195 (2010).

149. See, e.g., MIECZYŚLAW (MIETEK) PEMPER, DER RETTENDE WEG. SCHINDLERS LISTE – DIE WAHRE GESCHICHTE. AUFGEZEICHNET VON VIKTORIA HERTLING UND MARIE ELISABETH MÜLLER, 205–6 (2005) (describing the transfer of a group of 300 Jewish women from the Plaszow bei Krakau concentration camp thru the Auschwitz concentration and extermination camp to the Brännlitz forced labor camp); HENRYK PIERZCHAŁA, POMOCNE DŁONIE EUROPEJCZYKÓW (1939-1944) 298 AND 447 (2005) (detailing the release of selected Polish professors from the Dachau and Sachsenhausen concentration camps).

(e.g., economical), or justified or unjustified expectations of the occupation authorities with regard to the usefulness of the various individuals to the regime. These almost incidental cases confirm the genocidal rule by virtue of their exceptional nature.<sup>150</sup> Not all Poles, including soldiers, who found themselves under Soviet rule died.<sup>151</sup> However, in no case of genocide, did the perpetrators kill all members of a national or ethnic group to which they had access; nor did they always do so immediately after such a physical possibility had opened up.<sup>152</sup>

What deserves recognition and support is the concept—included in the grounds for the decision to launch a Polish investigation into the Katyn Massacre—that the main motive behind the decision to execute Poles, motive expressed directly in the decision of the Politburo on March 5, 1940, is not what they had done in the past but what they could do in the future. Kuźniar-Plotka writes, “Therefore, the proposal to murder [the Poles] was a preventive measure intended to prevent the rebirth of Polish national aspirations which, obviously, had to be directed also against the USSR as an aggressor and invader, and therefore possessed an ‘anti-Soviet’ dimension.”<sup>153</sup>

Another argument against the Katyn Massacre being regarded as genocide is the fact that the victims included not only Poles but also some individuals of other nationalities, including Jews, Ukrainians, and Belarusians.<sup>154</sup> The Poles constituted a vast majority of the people that were kept in POW camps and prisons and subsequently

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150. For more on the various reasons how 395 prisoners saved their lives, see, e.g., Sławomir Kalbarczyk, *Zbrodnia Katyńska po 70 latach: krótki przegląd ustaleń historiografii*, in *ZBRODNIA KATYŃSKA: W KRĘGU PRAWDY I KŁAMSTWA* 19 (Sławomir Kalbarczyk ed., 2010); J. Kurtyka, *POLSKA 1939–1945. STRATY OSOBOWE I OFIARY REPRESJI POD DWIEMA OKUPACJAMI*, at VIII (Wojciech Materski & Tomasz Szarota eds., 2009); Natalia S. Lebedeva, *Zbrodnia Katyńska: Proces odkrywania prawdy i upamiętniania ofiar*, in *BIAŁE PŁAMY–CZARNE PŁAMY: SPRAWY TRUDNE W POLSKO-ROSYJSKICH STOSUNKACH 1918–2008*, at 348–49. (Adam Rotfeld et al. eds., 2010) (noting that many of the saved prisoners were released on request of German and Lithuanian embassies as persons of their national origin).

151. See, e.g., SNYDER *supra* note 1, at 153.

152. *Soviet Crimes Against Poland During the Second World War, On the Occasion of the Commemoration of the 65th Anniversary of the Katyn Forrest Massacre: St. Paul University, Ottawa, April 21, 2009*, ELECTRONIC MUSEUM (April 21, 2005), [http://www.electronicmuseum.ca/Poland-WW2/soviet\\_crimes/soviet\\_crimes\\_eng.html](http://www.electronicmuseum.ca/Poland-WW2/soviet_crimes/soviet_crimes_eng.html) (“[I]n the case of Katyn, we have a national group (the Poles), which was destroyed ‘in part.’”).

153. Decision to Commence Investigation, *supra* note 37.

154. See *id.*

murdered.<sup>155</sup> Subjected to extermination, they were treated as members of the Polish nation in the ethnic sense of the term or as people who supported or could support the Polish nation in its state-building activities. In addition to an ethnic concept of the “Polish nation” there is also its formal meaning. As Kuźniar-Plota has indicated,

It has to be noted that Poland at the time was a multi-national state in which coexisted representatives of various nationalities treated by the law as ‘ethnic elements’ of the Polish nation. This formulation was adopted by eminent Polish lawyers in a commentary on Article 152 of the 1932 Criminal Code (“Those who publicly malign or deride the Polish Nation or the Polish State. . .”), with the legal term “Polish nation” encompassing all citizens of Poland regardless of their nationality.<sup>156</sup>

This is a definition of nation adopted with regard to many states, especially those that are or were inhabited by a number of ethnic groupings (American nation, Yugoslav nation, Czechoslovak nation, etc.).<sup>157</sup> We have to bear in mind that this is how we should understand the intent expressed in Article 2 of the Genocide Convention, which refers not only to national groups but also to ethnic and racial groups.<sup>158</sup> Thus, they do not have to be equivalent terms.

Let me now return to the old cliché that during the Stalinist period in the USSR, human life was not respected. The Soviet authorities acted in accordance with the principle that the death of several innocent people is better than one guilty individual surviving, regardless of what this guilt was supposed to signify in Stalin’s state. That is why the margin of those subjected to repressions was so wide. As has already been mentioned, the victims of the Katyn Massacre were not only ethnic Poles. Polish citizens of other ethnicities were killed at the time as well.<sup>159</sup> For the Soviet authorities, Polish officers

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155. *See id.*

156. *See id.* For more on the definition of the term “nation” as all citizens of a state in the Polish legislation and the legislations of other states at the time, *see, e.g.*, JULIUSZ MAKAREWICZ, *KODEKS KARNY Z KOMENTARZEM* 402–04 (5th ed. 1939) and LEON PEIPER, *KOMENTARZ DO KODEKSU KARNEGO, PRAWA O WYKROCZENIACH, PRZEPISÓW WPROWADZAJĄCYCH OBIE TE USTAWY* 322–25 (2d ed. 1936).

157. In this context we can also point to a state which is ethnically relatively homogenous. A member of the French nation is every person holding French citizenship, regardless of his or her ethnic affiliation (for example Arab).

158. Genocide Convention, *supra* note 51, art. 2.

159. *See* Decision to Commence Investigation, *supra* note 37.

were contaminated with “Polishness”—they were a Polish state-building element. It seems that the Soviets concluded it would be better if everyone died, even if some were Belarusians, Ukrainians, or Jews. The executioners themselves referred to all the victims collectively as “the Poles,” because for them they were the Poles.<sup>160</sup> It is all the more important given the fact that in case law the decisive factor in classifying a crime as genocide is how the perpetrator perceived the group being destroyed. If we assumed that in order to classify a crime as genocide, the uniformity of the group criterion had to be met 100% for the group to be deemed protected, the accused could always find someone who does not belong to the group to avoid responsibility. Thus, we could in practice question any group being classified as protected.

As mentioned above, the executioners themselves as well as other NKVD officers and collaborators—in their statements recorded in official documents written during the genocide<sup>161</sup> and made during hearings that took place already in the Russian Federation<sup>162</sup>—usually referred to all victims, using the collective terms “the Poles.” This term was also often used in the materials of Nikolai Burdenko’s Extraordinary State Commission set up by the Soviet authorities to pin the blame for the massacre on the Germans.<sup>163</sup> This description is also used by Russian historians today.<sup>164</sup> As Lebedeva unequivocally says, “Katyn was . . . not only a heinous crime but also part of the crackdown on the Polish nation.”<sup>165</sup> There is no doubt that the

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160. *See id.*

161. Report of the Head Department VI of the NKVD’s Chief Directorate of Economics, Ivan Bezrukov, to Deputy People’s Commissar for Internal Affairs of the USSR, Bogdan Kobulov of March 23, 1940, *in* LEBEDEVA, *supra* note 7, at 165.

162. Such a statement was made by, for instance, the former head of the Kaliningrad Directorate of the NKVD, Dmitri Tokarev, showing how the deputy people’s commissar for internal affairs of the USSR, Kolubov, described the exterminated during a meeting with heads and deputy heads of the NKVD’s organizational units concerning the organization of the “relief” of camps and prisons on March 14, 1940. D.S. Tokarev himself, when describing the executions, called all the victims “the Poles.” *See id.* at 157, 213. Those subjected to extermination were referred to collectively as “the Poles” also by the former officer of the NKVD prison in Smolensk, Pyotr Klimov. He did that in a statement made to the Commission for the Rehabilitation of Repression Victims in the Smolensk District. *See id.* at 210–11. Analogous statements were also made by a former member of the Soviet kitchen staff in the NKVD camp in Ostashkov, Maria Sidorova. VLADIMIR ABARINOV, *KATYNSKII LABIRINT*, 47–48 (1991).

163. *See* LEBEDEVA, *supra* note 7, at 258–59.

164. *See id.* at 189, 190, 211–12, 258.

165. *Id.* at 277.

actions by the Soviet authorities and officials were directed against the Polish nation, both in the ethnic and in the formal sense.

The policy of subjugating the Polish nation also involved physical destruction of its culture-creating class. The actions of both occupying powers can be compared in this respect. As noted in a publication by the Council for the Protection of Struggle and Martyrdom Sites about the extermination of the Jagiellonian University professors in *Sonderaktion Krakau* and about the Katyn Massacre, “What constituted a heavy blow and irretrievable loss not only to Polish society but also to the world civilization were the arrests and murders of eminent representatives of Polish science carried out by both occupying powers.”<sup>166</sup> When analysing the attitude of the Soviet authorities to Polish officers, Zdzisław Jordanek wrote, “the imperial objectives were a decisive factor here. The Polish intellectual elite had to be removed to make it easier for the Polish nation to become enslaved and deprived of its national identity.”<sup>167</sup> As Jędrzej Tucholski has remarked, the Katyn Massacre involved “a physical elimination of the imprisoned elite of an indomitable nation which for centuries had been causing trouble for the signatories of all four partitions of Poland.”<sup>168</sup> For Tucholski, the massacre was one of the elements of:

[T]he ordeal of Polish people who for nearly two years (17 September 1939–22 June 1941) were subjected to the most severe repressions of the Soviet system. The motivation behind these repressions was obvious: to terrorise en bloc and then to drain the areas behind the River Bug of quality Polish element, with ruthless physical annihilation of those who—to apply the invader’s reasoning—were a potential threat.<sup>169</sup>

Lebedeva writes, “The prisoners of Kozelsk, Starobelsk and Ostashkov constituted the country’s military and intellectual elite absolutely ready to join the fight for the restoration of their homeland’s independence.”<sup>170</sup> She stresses that “after more than six months spent in the harsh prison conditions, they were broken neither mentally nor morally. They did not disavow their homeland, their

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166. ADAMSKA ET AL., *supra* note 104, at 42.

167. Jędrzej Jordanek, *Założenia polityki hitlerowskiej i stalinowskiej wobec oficerów Wojska Polskiego*, in *ZBRODNIENIE NKWD NA OBSZARZE WOJEWÓDZTW WSCHODNICH RZECZYPOSPOLITEJ POLSKIEJ* 119 (Bogusław Polak ed., 1995).

168. Tucholski, *supra* note 38, at 135.

169. *Id.* at 125.

170. LEBEDEVA, *supra* note 7, at 140–41.

religion or the political and moral principles they upheld.”<sup>171</sup> Owen O’Malley, the British ambassador to the Polish government in exile in London, remarked that the Poles thought of the Katyn Massacre as an attempt to destroy the foundations of the future Polish statehood by means of destroying the force of the Polish nation.<sup>172</sup>

Among the 25,700 Polish nationals exterminated on the basis of the March 5, 1940 Politburo order, there were not only army officers but also officers of other uniformed services as well as civilians.<sup>173</sup> The prisoners kept in the Ostashkov camp included priests, people working in the judicial system and settlers.<sup>174</sup> Among them there were also reserve officers who, after graduating from high school, were called up into the army and after a year-long course at an officer cadet school received the rank of second reserve lieutenant.<sup>175</sup> Among the reserve officers of the Polish Armed Forces were “members of parliament and senators, academics (professors and associate professors), government officials, teachers of various types of schools, doctors and pharmacists, lawyers (judges, prosecutors, barristers and solicitors), engineers and technicians, writers and journalists, artists and poets, chaplains of various denominations, distinguished sportsmen.”<sup>176</sup> Among the victims known by name there were, for instance: 760 doctors (including eight professors), 1,040 teachers (including university graduates and people with PhDs), over 100 lawyers, nineteen generals, and over 350 colonels and lieutenant-colonels.<sup>177</sup> The lists of the Katyn Massacre victims also comprise thirteen academics from the Jagiellonian University, including six professors and two assistant professors.<sup>178</sup> In total, around 100 scholars and graduates of the Jagiellonian University were killed in Katyn.<sup>179</sup> Wanting to quell the Polish national element, the Soviet authorities found themselves in a situation that was very favourable from their point of view. The reserve officers were people who made up the social, academic and

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171. *Id.* at 141.

172. SIR OWEN ST. CLAIR O’MALLEY, *KATYN: DESPATCHES OF SIR OWEN O’MALLEY TO THE BRITISH GOVERNMENT* 15 (1972).

173. JOSEPH HOWARD TYSON, *WORLD WAR II LEADERS: A HISTORICAL AND ASTROLOGICAL STUDY* 312 (2011).

174. Maria Szonert-Binienda, *Katyn Families Struggle for Justice*, in *KATYN: STATE-SPONSORED EXTERMINATION* 51 (Maria Szonert-Binienda ed., 2012).

175. See Inessa Jazhborovskaya, *The Katyn Case: Working to Learn the Truth*, *RUSS. ACAD. SCI. SOC. SCI.*, 2011, at 34, 45.

176. ADAMSKA ET AL., *supra* note 104, at 42.

177. Tucholski, *supra* note 38, at 134.

178. *Id.*

179. *Id.*

cultural elite of the Polish nation.<sup>180</sup> As historians have established, they constituted a “particularly active, highly patriotic, independence-oriented element.”<sup>181</sup>

The criminal actions of the political police of the Third Reich and of the USSR against Poles were coordinated. As scholars point out:

What influenced the fate of the Polish officers was the collaboration between the NKVD and the Gestapo that began as early as autumn 1939 with meetings of representatives of both services: in October 1939 in Lviv, in January 1940 in Kraków, and in March 1940 in Kraków and Zakopane (‘Pan Tadeusz’ and ‘Telimena’ villas).<sup>182</sup>

Some authors (*e.g.*, Władysław Bartoszewski, Jerzy Łojek and Tucholski) suggest that the Katyn Massacre may have been linked to the results of talks between the NKVD and the Gestapo.<sup>183</sup> In this context Lebedeva observes that, “The ‘relief operation’ in the three camps by Beria’s department and the ‘A-B’ operation of the Nazi secret service were carried out simultaneously is . . . highly symptomatic.”<sup>184</sup>

It is important to remember that genocide exists not only when the perpetrators intend to destroy an entire group, but also when they want to destroy some part of it. Thus the problem can be viewed from the perspective adopted by the president of the Institute of National Remembrance of the Republic of Poland, Janusz Kurtyka, and the president of the board of the Karta Foundation, Zbigniew Gluza, who have suggested that the subject of genocide was not only the Polish nation but also its leadership part: the intellectual elite. Both authors have written about “the Polish intellectual elite (“intelligentsia”) whose extermination by the Germans and the Soviets

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180. *Id.*

181. *Id.*

182. Jordanek, *supra* note 167, at 121; Jacek Ślusarczyk, *Agresja sowiecka na Polskę w 1939 r.*, WOJSKOWY PRZEGLĄD HISTORYCZNY, no. 2, 1993, at 16.

183. Władysław Bartoszewski, *Pakt Ribbentrop-Mołotow w doświadczeniu Polskiego Państwa Podziemnego*, in O LIKWIDACJĘ SKUTKÓW ZMOWY HITLER-STALIN. MATERIAŁY Z KONFERENCJI ZORGANIZOWANEJ PRZEZ KOMISJĘ USTAWODAWCZĄ ORAZ KOMISJĘ SPRAW ZAGRANICZNYCH I INTEGRACJI EUROPEJSKIEJ SENATU RZECZYPOSPOLITEJ POLSKIEJ 58–59 (Małgorzata Lipińska ed., 1999); JERZY ŁOJEK & LEOPOLD JARZEWSKI, *AGRESJA 17 WRZEŚNIA 1939. STUDIUM ASPEKTÓW POLITYCZNYCH* 65–71 (4th ed. 1990); Tucholski, *supra* note 38, at 133.

184. LEBEDEVA, *supra* note 7, at 159.



was to have deprived the captive nation of its leadership class.”<sup>185</sup> Scholars indicate that “part of a group” may mean also in this sense its leadership,<sup>186</sup> intellectuals<sup>187</sup> or soldiers.<sup>188</sup> A crucial part of a group is the part that is critical to its survival.<sup>189</sup> The International Criminal Tribunal for the former Yugoslavia notes that “selective” destruction of a national group remains genocide.<sup>190</sup> The perpetrators may be motivated by, for instance, their desire to seize power in a state. Thus, political intent does not exclude the possibility of a crime being classified as genocide.

VII. THE NKVD’S POLISH OPERATION IN 1937–1938 AND THE  
KATYN MASSACRE AS THE CRIME OF GENOCIDE WITH  
REGARD TO THE PRINCIPLES OF *LEX RETRO NON AGIT*

and *Nullum Crimen Sine Lege*

Some scholars wonder whether the Katyn Massacre may be considered an act of genocide, given the fact that the Convention on the Prevention and Punishment of the Crime of Genocide was only adopted in 1948. Moreover, the USSR as well as the Belarusian SSR and the Ukrainian SSR did not ratify it until 1954.<sup>191</sup> The issue of whether the Convention on the Prevention and Punishment of the

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185. Janusz Kurtyka & Zbigniew Gluza, *Przedmowa*, in *POLSKA 1939–1945. STRATY OSOBOWE I OFIARY REPRESJI POD DWIEMA OKUPACJAMI* 7 (Wojciech Materski & Tomasz Szarota eds., 2009).

186. Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, ¶ 29, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by Benjamin Whitaker).

187. JOHN QUIGLEY, *THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS* 182 (2006).

188. *Id.* at 183–85.

189. DOMINIKA DRÓŹDŹ, *ZBRODZIA LUDOBÓJSTWA W MIĘDZYNARODOWYM PRAWIE KARNYM* 212, 215(2010); QUIGLEY, *supra* note 187, at 188.

190. Prosecutor v. Jelisić, Case. No. IT-95-10-T, Judgment, ¶ 82 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 19, 1999). The Tribunal stated:

Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group “selectively.”

*Id.*

191. Genocide Convention, *supra* note 51, art. 10.

Crime of Genocide was constitutive or declarative in its nature with regard to determining the content and the penalization of the crime of genocide was taken up by, among others, the International Court of Justice (ICJ). It did so in its Advisory Opinion of May 28, 1951, concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>192</sup> The Court states, “The principles underlying the Convention are recognized by civilized nations as binding on States even without any conventional obligations.”<sup>193</sup> Thus, the ICJ admits that the Convention does not ban genocide and does not penalize such actions, but only codifies the existing custom.

A number of treaty regulations are just codifications of existing international customs and vice versa: many legal norms contained in international agreements with time become customary law, which is in force regardless of whether a state is or is not party to an agreement. International custom is a source of international law equal to that of a treaty. This is reflected, for instance, in the content of Article 38(1)(b) of the ICJ Statute.<sup>194</sup>

The recognition that customary provisions may be binding in states not all of which are parties to treaty regulations equivalent to these provisions has been reflected, for example, in the judgement of the International Military Tribunal (Nuremberg Tribunal).<sup>195</sup> We can also refer here to the ICJ judgement of June 27, 1986 in the case concerning military and paramilitary activities in and against Nicaragua. In this judgment, the Court concluded that states might be bound by certain norms of customary law without being parties to treaties that formulated the norms.<sup>196</sup> As scholars, including Shaw, later stressed, “the Court observed that the Convention did not contain any clause the object or effect of which was to limit the scope of its jurisdiction *ratione temporis* so as to exclude events prior to a particular date.”<sup>197</sup>

The question whether genocide is an act for which perpetrators may be prosecuted when they committed it before the entry into force of the Genocide Convention is one that national courts have had to

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192. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

193. *Id.* at 23.

194. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

195. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Sept. 20–Oct. 1, 1946), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf).

196. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98–99 (June 27).

197. SHAW, *supra* note 59, at 265.

face as well. The court's position is extremely important, given the fact that, as Lech Gardocki rightly points out, persons in breach of international criminal law may be charged and brought before both international and national courts.<sup>198</sup> Domestic courts, when trying people charged with committing international crimes, exercise both international and national jurisdiction, for they are bodies of states (*i.e.*, entities authorised by the provisions of international law to act in this respect).<sup>199</sup> Generally speaking, a state may act only through its bodies, in this particular case, through judicial bodies. Furthermore, in most cases it is the states—through actions of their judicial bodies—that enforce the provisions of international criminal law. This reflects the general structure of this body of law whereby responsibility under the law is enforced by states through their judicial bodies unilaterally (before domestic courts) or collectively (before international courts).<sup>200</sup> Article 6 of the Genocide Convention states that such cases can be tried by an international tribunal or by a tribunal of the state in the territory of which an act of genocide was committed.<sup>201</sup> As Gardocki stresses:

This provision does not limit the criminal jurisdiction based on principles other than the principle of territoriality, but only imposes an obligation on the state in which the crime was committed. It also indicates the priority of this state with regard to trying the perpetrator, which may be of significance for the enforcement of Article 7 concerning extradition. Article 7

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198. LECH GARDOCKI, ZARYS PRAWA KARNEGO MIĘDZYNARODOWEGO 114–15 (1985). Anna Sosińska expressed the existence of this rule, when she referred to the case law of the Supreme National Tribunal [a special court in Poland from 1946 to 1948, with jurisdiction over “fascist-hitlerite criminals and traitors to the Polish nation”], saying that the Tribunal “fulfilled its duty to its own nation and to humanity.” Anna Sosińska, *Powstanie i działalność Najwyższego Trybunału Narodowego*, in *W CZTERDZIESTOLECIE POWOŁANIA NAJWYŻSZEGO TRYBUNAŁU NARODOWEGO, MATERIAŁY Z POSIEDZENIA NAUKOWEGO GŁÓWNEJ KOMISJI BADANIA ZBRODNI HITLEROWSKICH W POLSCE – INSTYTUTU PAMIĘCI NARODOWEJ W DNIU 20 STYCZNIA 1986 R.*, at 41(1986).
199. See MARKUS BENZING, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, in 2003 U.N.Y.B. 591, 592.
200. See KAROL KARSKI, OSOBA PRAWNA PRAWA WEWNĘTRZNEGO JAKO PODMIOT PRAWA MIĘDZYNARODOWEGO 241, 249, 263, 361 (2009); Michał Królikowski, *Problem “Prawa Karnego Międzynarodowego,”* 3 KWARTALNIK PRAWA PUBLICZNEGO 60, 60–61 (2007); Philippe Sands, *After Pinochet: The Role of National Courts*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 68–108 (Philippe Sands ed., 2004).
201. Genocide Convention, *supra* note 51, art. 6.

also introduces a principle whereby genocide shall not be considered as a political crime for the purpose of extradition.<sup>202</sup>

The issue of responsibility for genocide committed during World War II was considered by the American Military Tribunal III, which heard the case of high-ranking officials of the Reich ministry of justice as well as German Nazi prosecutors and judges (the so-called Justice Trial).<sup>203</sup> This took place before the adoption of the Genocide Convention. The Tribunal concluded that genocide could be classified as a form of crime against humanity. This is pointed out by, for instance Basak, who states that:

This is how we can interpret the view that due to its scope and influence on the international order, it is ‘the most specific illustration’ of these crimes. Consequently, it held that the perpetrators of crimes against humanity thus defined—i.e., as genocide—cannot complain of injustice. They bear the responsibility, because they must have been aware of the unlawfulness of their acts, so they knew these acts were punishable.<sup>204</sup>

The American occupation tribunal based its reasoning on the UN General Assembly resolution number 96(I) of December 11, 1946.<sup>205</sup> It affirms that “genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable.”<sup>206</sup> Thus the resolution was treated as a document codifying the existing customary norm.<sup>207</sup>

As Basak rightly notes, this was codification in the same sense as the inclusion in the London Agreement and the Charter of the International Military Tribunal (Nuremberg Tribunal) of a provision

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202. GARDOCKI, *supra* note 198, at 111.

203. The trial is discussed in greater detail in *id.* at 69–71.

204. Basak, *supra* note 63, at 355. *See also* FALL 3: DAS URTEIL IM JURISTENPROZESS GEFÄLLT AM 4. DEZEMBER 1947 VOM MILITÄRGERICHTSHOF III DER VEREINIGTEN STAATEN VON AMERIKA 135 (P. A. Steiniger et al. eds, 1969) [hereinafter FALL 3: DAS URTEIL IM JURISTENPROZESS].

205. *See* Affirmation of the General Principles of International Law Recognized by the Nuremberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/Res/95(I) (Dec. 11, 1946).

206. *See id.* *See also* Genocide Resolution, *supra* note 54.

207. For more on the legal significance of this resolution, *see, e.g.*, WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 45–47 (2000).

referring to crimes against humanity.<sup>208</sup> This conclusion was probably inspired by a remark made by Tadeusz Cyprian and Jerzy Sawicki that such was the relation between resolution 96(I) and the 1948 Genocide Convention codifying the principles expressed in it.<sup>209</sup>

The American Military Tribunal III also made an interesting interpretation of the significance of the UN General Assembly resolutions, which—as we know—are not legally binding acts. It said that the UN's main body adopting the resolutions was not an "international law-making body."<sup>210</sup> It was, however, the "most reliable, among the bodies existing today, to express the world opinions."<sup>211</sup> Therefore, the fact that it recognized genocide as "a crime under international law" was the "key evidence" of the fact that this was indeed the case in the legal sense. The Tribunal stated, "We agree with its position and adopt it as our own."<sup>212</sup> Cyprian and Sawicki, too, considered genocide to be a special form of crime against humanity.<sup>213</sup>

The problem of whether someone might be tried for and convicted of genocide committed during World War II was one that faced the Israeli court in Adolf Eichmann's case. The crimes of this officer of the SS, the SD and the Department IV (Gestapo) of the Reich Security Head Office (RSHA) were also committed in 1940 (*i.e.*, at the same time as the Katyn Massacre).<sup>214</sup> The trial took place after the adoption of the Genocide Convention, on the basis of the Knesset Act on August 1, 1950 regarding the punishment of Nazis and people collaborating with Nazis.<sup>215</sup> Adolf Eichmann was charged with and then convicted of crimes against humanity, war crimes, membership of hostile organizations and crimes against the Jewish people.<sup>216</sup> In

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208. Basak, *supra* note 63, at 355.

209. See TADEUSZ CYPRIAN & JERZY SAWICKI, PRAWO NORZYMBERSKIE: BILANS I PERSPEKTYWY 537 (1948).

210. FALL 3: DAS URTEIL IM JURISTENPROZESS, *supra* note 204, at 135.

211. *Id.*

212. *Id.*

213. CYPRIAN & SAWICKI, *supra* note 209, at 537.

214. See generally *The Eichmann Trial—Proceedings: The 15 Charges*, REMEMBER.ORG, <http://remember.org/eichmann/charges.htm> (last visited May 6, 2013) (listing the charges against Eichmann, as well as details like when they were committed).

215. Nazi and Nazi Collaborators (Punishment) Law, 5710–1950, 2 LSI 115 (1950–1951).

216. See KAZIMIERZ KAŁOL, ADOLFA EICHMANNA DROGA DO BEJIT HAAM 315–16 (1962); BARON EDWARD FREDERICK LANGLEY RUSSELL OF LIVERPOOL, THE TRIAL OF ADOLF EICHMANN 29–31, 305 (2nd ed. 2002) [hereinafter LORD RUSSELL OF LIVERPOOL]; WIERCZYŃSKA, *supra* note 148, at 47.

this case, “the Israeli court invoked, in fact, Article 2 of the Convention (i.e., the designation of the crime of genocide contained in it) because Section (b) of the Act (‘Crimes against the Jewish people’) was simply a transformation of this designation.”<sup>217</sup> In its judgement the Israeli court observed that Section (b) of the Act was modelled on Article 2 of the Convention.<sup>218</sup> It also added that “the ‘crime against the Jewish people under . . . the Israeli law constitutes a crime of ‘genocide’ within the meaning of Article 2 of the Convention, and inasmuch as it is a crime under the law of nations, Israel’s legislative authority and judicial jurisdiction in this matter is based upon the law of nations.”<sup>219</sup> In this context William Schabas observes that:

A more direct link with the Genocide Convention itself exists in the Eichmann prosecution. The accused was charged pursuant to legislation enacted to give effect to Israel’s obligations under the Convention. The Nazi and Nazi Collaborators (Punishment) Law, which was adopted in 1950 and was explicitly intended to apply retroactively, contained a provision entitled “crimes against the Jewish people.” It was essentially identical to the definition of genocide in Article 2 of the Convention except that it did not apply generally to national, ethnical, racial and religious groups, but only to “the Jewish people.” Eichmann was convicted on this basis for acts perpetrated between 1941 and 1945.<sup>220</sup>

Schabas added, “there is some evidence of proceedings for the crime of genocide directed at acts perpetrated prior to entry into force of the Convention. The *Eichmann* trial, held in Israel in the early 1960s, is the great example here.”<sup>221</sup> As Basak notes:

[T]he judgement in question was to prove that genocide had been recognized as a crime under international law already during World War II. This was required by the fundamental tenet of the judgement whereby the law, though retroactive, was by no means an ex post law. For it did not lead to

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217. Basak, *supra* note 63, at 356.

218. IsrDC (Jer) 40/61 *Attorney-General v. Eichmann*, [1961] 36 ILR 18 (DC), para. 16. The Supreme Court of the State of Israel upheld this ruling. IsrSC (Jer) 40/61 *Attorney-General v. Eichmann*, [1968] 36 ILR 277.

219. 36 ILR 18 (DC), para. 25.

220. William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J.L. & PUB. POL’Y 36, 46 (2009) (footnotes omitted).

221. *Id.* at 41.

punishment of acts which were not recognized as crimes when they were committed.<sup>222</sup>

On the other hand, Wierczyńska stresses that “this trial was unique. . . . [I]t called genocide a crime under international law and applied universal jurisdiction to it. In the end it treated genocide, here appearing as ‘crimes against the Jewish people’ as a crime separate from crimes against humanity.”<sup>223</sup>

Significantly, the Israeli court invoked the 1948 Convention “by name,” stating in paragraph 16 of its judgment that it was a model for the “crimes against the Jewish people” that Eichmann was charged with.<sup>224</sup> This was how genocide committed against the Jews was defined in Israel at the time.

In this case, the Israeli court invoked Resolution 96 (I) which affirms that “genocide is a crime under international law” and that even before the resolution was adopted “many instances of such crimes of genocide” had occurred.<sup>225</sup> Notably, the former concept was formulated before the adoption of the Genocide Convention. Moreover, in the 1948 Convention the parties observe that humanity had seen acts of genocide before this international agreement was concluded.<sup>226</sup> The very nature of the Convention means that it is not a constitutive act when it comes to defining and punishing the crime of genocide. The Israeli court also invoked the Advisory Opinion of the ICJ from 1951.<sup>227</sup> Given the fact that the principles of the 1948 Convention are—according to the ICJ—“binding on States, even without any conventional obligations,” the Israeli court concluded that “there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, *ex tunc*. That is to say, the crimes of genocide committed against the Jewish People and other peoples were crimes under international law.”<sup>228</sup>

Kubicki rightly points out that in such cases “from the point of view of the protection of fundamental rights of individuals, of great significance is the *nullum crimen sine lege poenali anteriori*

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222. Basak, *supra* note 63, at 356.

223. WIERCZYŃSKA, *supra* note 148, at 48.

224. 36 ILR 18 (DC), para. 16.

225. *Id.* para. 17.

226. See Genocide Convention, *supra* note 51, pmb1.

227. 36 ILR 18 (DC), para. 18.

228. *Id.* para. 19. See also KAŁOL, *supra* note 216, at 316–18; LORD RUSSELL OF LIVERPOOL, *supra* note 216, at 306–08. In this context we should add that Adolf Eichmann was also convicted of deportation in inhumane conditions of about 500,000 Polish civilians.

principle.”<sup>229</sup> That is why an assessment of a legal instrument with regard to general principles of criminal law should involve checking whether and to what extent the instrument covers acts that were not prohibited by criminal law when they were committed. However, if acts included in the scope of a legal instrument were unlawful and punishable already as they were committed, then the instrument does not establish the unlawfulness of an act *ex post facto*; it concerns unlawful acts *ex tunc*. In such a case, as Kubicki rightly observes, the instrument simply creates “a new, more synthetic legal construct bringing a provision of the law closer to specific manifestations of the occupying power’s criminal activities and made the criminal sanction more severe owing to the drastic scale of the consequences of these activities.”<sup>230</sup> The crime of genocide may comprise various actions and omissions. However, in the case of the Katyn Massacre we are dealing with murders, which have always carried the maximum sentence in any legal system. Thus, in this particular case sanctions could not be more severe.

As Basak noted, referring in 1998 to the judgment of the Israeli court, “There is no reason why such a conclusion should not be applied to the victims of the Katyn Massacre only because the court quoted here had a different perpetrator in mind. Moreover, this murder fully complies with the designation of Article 2 of the Convention.” Basak further added, “We could, referring to the description included in the judgment of the Supreme National Tribunal in the case of Arthur Greiser, observe that the genocidal intent also involved fatal mutilation, weakening of the ‘physical force’ and ‘national resistance’ of the Poles.”<sup>231</sup> Anna Sosińska also pointed to the trial of Amon Göth, the “subject of which was genocide.”<sup>232</sup> She added that:

It was the first trial in the history of the judicial system, not only Polish but also international, concerning exclusively the issue of genocide. This trial as well as that of Arthur Greiser took place before the end of the Nuremberg Trial. The judgments were delivered before those delivered in Nuremberg. It is all the more important to emphasize the fact in the Tribunal’s view the actions of the accused had all the

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229. Leszek Kubicki, *Najwyższy Trybunał Narodowy. Próba bilansu orzecznictwa*, in *W CZTERDZIESTOLECIE POWOŁANIA NAJWYŻSZEGO TRYBUNAŁU NARODOWEGO, MATERIAŁY Z POSIEDZENIA NAUKOWEGO GŁÓWNEJ KOMISJI BADANIA ZBRODNI HITLEROWSKICH W POLSCE – INSTYTUTU PAMIĘCI NARODOWEJ W DNIU 20 STYCZNIA 1986 R.*, at 18(1986).

230. *Id.*

231. Basak, *supra* note 63, at 358.

232. Sosińska, *supra* note 198, at 43.



characteristics of genocide; a new type of crime [which had previously been known] was named.<sup>233</sup>

Kubicki was right when—referring to the formulation by the Supreme National Tribunal of general legal principles—he said that:

The lack of appropriate precedents in the history of Polish law as well as the relatively considerable general nature of the norms included in the “August decree” and of the norms of international law applicable here meant that when formulating these principles the Tribunal played an important role as a law-maker, with many of its conclusions being pioneering, and not only in Poland. The Tribunal’s judgment in Greiser’s case was delivered before the judgment of the International Military Tribunal in Nuremberg.<sup>234</sup>

We should also take into account the fact that Canada’s Crimes Against Humanity and War Crimes Act of June 29, 2000, empowers national courts to exercise jurisdiction over genocide committed in the past, without any temporal limitation.<sup>235</sup> According to Section 6(1) of this Act, “Every person who, either before or after the coming into force of this section, commits outside Canada . . . genocide . . . is guilty of an indictable offence and may be prosecuted for that offence.”<sup>236</sup>

The Nuremberg Tribunal held that the non-retroactive nature of the provisions of criminal law was a principle that could be adopted in any legal system.<sup>237</sup> It is not, however, a constitutive principle or foundation of such a system. It is introduced by means of positive law instruments. In its 1946 judgment, the Tribunal said that that “it is

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233. *Id.* at 42. For more on the trials before the Supreme National Tribunal, see, e.g., TADEUSZ CYPRIAN & JERZY SAWICKI, *SIEDEM WYROKÓW NAJWYŻSZEGO TRYBUNAŁU NARODOWEGO* (1962); GARDOCKI, *supra* note 198, at 93–95.

234. Kubicki, *supra* note 229, at 11. Kubicki refers to the Decree of August 31, 1944 on the sentencing of the Fascist-Hitlerite criminals guilty of murders and persecution of the civilian population and POWs, and of the traitors of the Polish Nation. See *Journal of Laws* 1944, no. 4, item 16 (Poland). See also Alexander V. Prusin, *Poland’s Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946–1948*, HOLOCAUST GENOCIDE S., Spring 2010, at 1, 3 (describing the August Decree and the prosecution of criminals).

235. See Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, § 8(b) (Can.).

236. *Id.* § 6(1).

237. Cf. James Popple, *The Right to Protection from Retroactive Criminal Law*, 13 CRIM. L.J. 251, 252 (1989) (describing the novel step to apply criminal law retroactively at the Nuremberg Tribunal).

to be observed that the maxim ‘*nullum crimen sine lege*’ is not a limitation of sovereignty, but is in general a principle of justice.”<sup>238</sup> This court concluded that international law did not contain such a limitation at the time.<sup>239</sup> It is recognized to have been introduced into international law by Article 15(1) of the International Covenant on Civil and Political Rights of December 19, 1966.<sup>240</sup> However, when constructing this provision, its authors made sure that it would not preclude the possibility of bringing to justice the perpetrators of crimes committed before and during World War II on the basis of international agreements adopted later. That is why the Covenant includes Article 15(2), which states that, “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”<sup>241</sup>

The authors of the treaty—a fundamental document concerning the protection of human rights—made sure that international criminals would not be able to use its provisions in order to escape justice. A solution analogous in its effects can also be found in Article 7(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.<sup>242</sup>

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238. Judgment of the International Military Tribunal for the Trial of German Major War Criminals, at 39 (Sept. 20–Oct. 1, 1946), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf).

239. *See id.*

240. The ICCPR states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

International Covenant on Civil and Political Rights, art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171.

241. *Id.* art. 15(2).

242. In particular, Article 7 states:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when

The adoption of these provisions was another confirmation in international law of the fact that the prosecution and punishment of the perpetrators of international crimes in the second half of the 1930s and first half of the 1940s had so far been and would continue to be a manifestation of binding international law. Mass murders, whatever name and classification are attributed to them, have always been crimes.<sup>243</sup> If several years after they were committed they are classified and, for instance, some of them are termed “genocide,” then there is no obstacle in international law to bringing their perpetrators to justice by defining them in this manner. According to the written statement of the U.S. government to the ICJ in 1951:

The practice of genocide has occurred throughout human history. The Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the Nazis are outstanding examples of the crime of genocide. This was the background when the General Assembly of the United Nations considered the problem of genocide.<sup>244</sup>

In this context it is worth returning once again to Lemkin’s observation that this new word that he coined in 1944 denoted an “old practice in its modern development.”<sup>245</sup> Marian Flemming noted

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it was committed, was criminal according the general principles of law recognized by civilized nations.

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, Nov. 4, 1950, 213 U.N.T.S. 221.

243. This can be seen, for instance, in the case of a Burgundian knight and governor of Alsace, Peter von Hagenbach, who in 1474 was tried by an international—German-Swiss-Alsatian—tribunal and convicted of cruelty to the inhabitants of Breisach, of acts which we today describe as “war crimes.” Edoardo Greppi considers these acts to be also “early manifestations of what are now known as ‘crimes against humanity.’” For more on the case of von Hagenbach, see, e.g., Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 835 INT’L R. RED CROSS, Sept. 1999, at 531, available at <http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm>. See also ANNA POTYRAŁA, WSPÓLPRACA PAŃSTW Z MIĘDZYNARODOWYMI TRYBUNAŁAMI KARNYMI A SUWERENNOŚĆ: STUDIUM POLITOLOGICZNO-PRAWNE 9 (2010); WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1 (3d ed. 2007); GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 462–466 (1968); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 6, 29–30, 59, 342 (2010).
244. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, Written Statement of the United States of America, 1951 I.C.J. 25 (May 28).
245. LEMKIN, *supra* note 47, at 79.

that as well. Writing about the Katyn Massacre, Flemming pointed out that, “[u]nder the legislation in force in 1940, this was a war crime.”<sup>246</sup> He was, however, right in adding that, “[u]nder the current provisions of international law, it is, in addition, a crime of genocide.”<sup>247</sup> It should be mentioned that Schabas stresses that the 1948 Convention is applicable to international criminal atrocities that occur during peacetime; this view was prompted by Lemkin’s displeasure with the inability to prosecute German Nazis for the atrocities immediately preceding the outbreak of World War II.<sup>248</sup> For the 1948 Convention is an instrument intended by its authors to cover crimes like those committed against Jews during the Nazi regime period in Germany.<sup>249</sup> This period was also marked by the acts of the Soviet authorities against the Poles, including the NKVD’s so-called “Polish operation” and the Katyn Massacre. Schabas doubted only whether the Convention could be applied to events that had occurred much earlier, for instance, the massacre of the Armenians between 1915 and 1917.<sup>250</sup>

### VIII. THE PROBLEM OF RESPONSIBILITY

The issue of the subjective scope of the Convention application returned many years later, when it turned out that the crime of genocide was not a historical phenomenon. In its judgment of July 11, 1996, in the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide—*Bosnia and Herzegovina v. Yugoslavia*—the ICJ concluded that the regulations enshrined by the Convention are rights and obligations *erga omnes*.<sup>251</sup> Moreover, the type of responsibility provided for under Article 9 of the Convention does not exclude any form of state responsibility. In

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246. FLEMMING, *supra* note 65, at 324.

247. *Id.*

248. William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE W. RES. J. INT’L L. 35, 36 (2008).

249. See LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 108 (1991) (stating that the language of the Genocide Convention, in combination with the negotiations that were on-going at the time of its drafting, indicated that the drafters of the Convention “had the Holocaust in mind when they adopted it”).

250. This view was expressed during a conference entitled *Katyn: Justice Delayed or Justice Denied?* that took place at Case Western Reserve University School of Law in Cleveland, Ohio, on February 4–5, 2011.

251. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections, 1996 I.C.J. 595, 616 (July 11).

the case of the Katyn Massacre, responsibility is attributed to the USSR, the continuator of which is the Russian Federation.<sup>252</sup>

Both historians and lawyers are working on bringing to light all the circumstances of this crime. What matters is the truth. At the same time we cannot forget that some perpetrators of the Katyn Massacre might still be alive. If we are still prosecuting and finding German Nazi criminals from that period who are still alive, this might also be the case with the perpetrators of Stalinist crimes. The crime of genocide is not subject to the statute of limitations under Article 1(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968.<sup>253</sup>

The perpetrators of genocide can be tried by national courts. Under Article 6 of the Genocide Convention, persons charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed.”<sup>254</sup> With regard to the territory of Poland, this state is Poland. In the case of the entire territory of the former USSR (*i.e.*, state whose agents committed the crime) this state is its continuator, the Russian Federation. Moreover, with regard to acts committed within the territory of the former Belarusian SSR and Ukrainian SSR, these states are—in addition to

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252. For more on the co-existence of international responsibility of the state and the individual for infringements of humanitarian law of armed conflicts, see ELŻBIETA KARSKA, ODPOWIEDZIALNOŚĆ PAŃSTWA ZA NARUSZENIA MIĘDZYNARODOWEGO PRAWA HUMANITARNEGO KONFLIKTÓW ZBROJNYCH 76–86 (2007) and Elżbieta Socha, *International Responsibility of Individuals for Breaches of Humanitarian Law*, 26 POLISH YEARBOOK INT’L L. 67–84 (2002).

253. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 1(b), Nov. 11, 1970, 754 U.N.T.S. 73.

254. Most places where Poles were murdered, including Katyn, are located outside the territory of Poland, as defined in the Peace Treaty of Riga of March 18, 1921, 6 L.N.T.S. 123. However, some of the atrocities were committed within this territory. Under international law and Polish law, the territories that Poland lost in the East following World War II did not become subject of cession of territory between Poland and the USSR until February 5, 1946, *i.e.*, the day of the exchange of ratification documents related to the Agreement on the Polish-Soviet State Border of August 16, 1945, 10 U.N.T.S. 193. The date of the cession is confirmed in, for instance, the case law of the Polish Constitutional Tribunal. See Resolution of the Tribunal of April 30, 1996 Concerning a Universally Binding Interpretation of Article 8(2)(a) of the Act of February, 23 1991 on Finding Invalid the Rulings Concerning Persons Persecuted for Their Work for an Independent Polish State as Formulated by the Act of February 20, 1993, OTK ZU, no. 2/1996, tem 15; Judgement of the Tribunal of November, 18 2003, case file P 6/03, OTK ZU, no. 9A/2003, item 94. See also Karol Karski, *Agresja ZSRR na Polskę w świetle prawa międzynarodowego*, in RZECZPOSPOLITA, Sept. 16–17, 1995, at C19.

the Russian Federation—their continuators. All the more so, given the fact that both these Soviet republics, the Republic of Belarus and Ukraine, apart from the USSR itself, also ratified the Convention on their own.<sup>255</sup>

As stated above, Gardocki notes that Article 6 of the 1948 Convention “does not limit the criminal jurisdiction based on principles other than the principle of territoriality, but only imposes an obligation on the state in which the crime was committed.”<sup>256</sup> Under the principle of universal jurisdiction competent courts in this case include the courts of all other states whose domestic laws make it possible.<sup>257</sup> Among them is the state whose citizens were victims of the crime. In Poland, investigations of acts of genocide committed between September 1, 1939 and July 31, 1990 against Polish nationals or Polish citizens of other nationalities were launched and conducted by the prosecutors of the Institute of National Remembrance.<sup>258</sup> In such cases, an investigation is not only to achieve the standard objective of criminal proceedings, mentioned in Article 2(1) of the Polish Code of Criminal Procedure,<sup>259</sup> including finding the perpetrator and having him punished by a court, but also to bring to light all the circumstances of the case, in particular, to establish the names of the victims.<sup>260</sup> This is why an investigation may be conducted, even when the perpetrator is known to have died. Only after this particular objective has been achieved are the proceedings discontinued.<sup>261</sup> The objective of the proceedings is not just to bring

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255. For more on the relations under international law between the Russian Federation and the USSR, the Republic of Belarus and the Belarusian SSR, and Ukraine and the Ukrainian SSR, see, e.g., Karol Karski, *Kontynuacja prawnomiędzynarodowej podmiotowości ZSRR i jego części składowych przez państwa istniejące na obszarze postradzieckim*, STUDIA IURIDICA, 2006, at 74–101.

256. GARDOCKI, *supra* note 198, at 111.

257. KAŁOL, *supra* note 216, at 317; LORD RUSSELL OF LIVERPOOL, *supra* note 216, at 310–11.

258. The Act on the Institute of National Remembrance—Commission for the Prosecution of Crimes Against the Polish Nation, arts. 1(1)(a), (3), & 5(1), Journal of Laws 1998, no. 155, item 1016, as amended [hereinafter IPN Act], available at [http://www.ipn.gov.pl/portal/en/31/327/The\\_Act\\_on\\_the\\_Institute\\_of\\_National\\_Remembrance.html](http://www.ipn.gov.pl/portal/en/31/327/The_Act_on_the_Institute_of_National_Remembrance.html).

259. CODE OF CRIMINAL PROCEDURE, art. 2(1), Journal of Laws, no. 89, item 555, as amended (stating that one of the purposes of the code is to hold criminals liable and to ensure that innocent people are not held liable for criminal offenses).

260. IPN Act, *supra* note 258, art. 45(3).

261. Compare *id.* art. 45(4) with CODE OF CRIMINAL PROCEDURE, art. 17(1)(5).

the perpetrator to justice, but primarily to shed light on a case (*i.e.*, establish all the facts related to the crime). From the point of view of Poland, what matters is bringing these crimes out of the fog of secrecy, to save them from oblivion and to establish the names of the victims, many of whom are still unknown today.

Article 6 of the Genocide Convention states that persons accused of genocide can also be tried by “such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>262</sup> No current international criminal court would have jurisdiction with respect to the perpetrators of the Katyn Massacre. It certainly cannot be any of the existing *ad hoc* tribunals, because their statutes contain territorial, temporal, and personal limitations. The permanent International Criminal Court does not have jurisdiction in this case either. It is competent only with respect to trying people charged with international crimes—specified in its statute<sup>263</sup>—committed after the entry into force of this international agreement.

Theoretically, a new international court or tribunal could be established. The perpetrators of the Katyn Massacre (recognized as genocide) could be tried provided that “the creators of such new *ad hoc* tribunal, when defining the basis of its jurisdiction, took into account . . . the category” of the crime of genocide “and, just like the Israeli legislator, used the designation of Article 2 of the Convention. . . . The genocide category would not require differentiation of the victims’ formal status, as it would be the case with crimes against humanity.”<sup>264</sup> For the latter may be committed only against “any civilian population.”<sup>265</sup> It would, therefore, cover only some victims. Such a tribunal could base its jurisdiction on a transfer of national jurisdiction, including national jurisdiction resulting from the exercise of universal jurisdiction.

Zdzisław Galicki wrote as early as 1992 in the context of an analysis of the Katyn Massacre with regard to international law that:

The political changes of recent years have made it possible to open and thoroughly investigate the case of the Polish prisoners of war in the Soviet Union during World War II. It seems, however, that we should not limit ourselves to revealing the

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262. Genocide Convention, *supra* note 51, art. 6.

263. Rome Statute of the International Criminal Court, arts. 5–8, July 1, 2002, 2187 U.N.T.S. 90.

264. Basak, *supra* note 63, at 358.

265. Charter of the International Military Tribunal (Nuremberg Tribunal), art. 6(c), annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.

facts that have been concealed so far. Rather, we should seek with determination to take appropriate legal measures, which find, as a matter of fact, their full justification in the norms of international law currently in force. It seems also that in the states that have emerged following the break-up of the Soviet Union it will be possible to find an appropriate political climate, enabling us to identify and bring to justice people guilty of crimes against the Polish prisoners of war. Regardless of the passage of time, which naturally reduces the number of people responsible for these acts, the actions to bring them to justice would show that there is respect for the law and, more importantly, for all those blameless people who met such a tragic end.<sup>266</sup>

Wierczyńska makes an important point, stressing that:

[I]n civilized countries a crime should be punished and stigmatized. The way we deal with a criminal system may be a measure of our civilization. Undoubtedly, Russia aspires to be among civilized states. . . . The responsibility of the perpetrators, a will to cooperate seem to be sine qua non conditions of a true reconciliation between Poland and Russia.<sup>267</sup>

The “appropriate political climate” mentioned by Galicki changes both temporally and territorially.<sup>268</sup> Moreover, the murderous acts

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266. Zdzisław Galicki, *Zbrodnie przeciwko jeńcom wojennym w świetle prawa międzynarodowego (ze szczególnym uwzględnieniem jeńców polskich w Związku Sowieckim)*, in ZBRODZIA KATYŃSKA : PROBLEM PRZEBACZENIA 410 (Marek Tarczyński ed., 2003).

267. WIERCZYŃSKA, *supra* note 148, at 196.

268. JASUDOWICZ, *supra* note 34, at 174. Some positive aspects concerning the duty to punish the perpetrators of crimes committed by both the German Nazi and the Soviet regimes could be found in a big, soul-searching interview with the President of the Russian Federation Dmitry Medvedev, which was published in the *Izvestia* daily on May 7, 2010. We can read there, for instance, that:

There is no statute of limitations for such crimes, irrespective of who committed them. It is a question of our moral responsibility to the future generations. If today we turn a blind eye to these crimes, then such crimes may be repeated in the future—in one form or another, in one country or another. That is why—harsh as it sounds—there is indeed no statutory limitations for such crimes. Those who committed them should be brought to justice, regardless of how old they are today.

*Dmitry Medvedev: “Nam ne nado stesnyat’sya rasskazyvat’ pravdu o voyne—tu pravdu, kotoruyu my vystradali”:* *Interv’yu vzyal Vitaliy Abramov*, IZVESTIA.RU, May 7, 2010, <http://izvestia.ru/news/361448>. See also PAP, Mku, *Rosja chce odtajnić dokumenty katyńskie i ukarać winnych*, ONET.PL, May 7, 2010, <http://www.poczciarz.home.pl/w>



were committed a long time ago. However, there are no grounds to not prosecute the still living individuals who, as agents of the Soviet state, committed international crimes, including the Katyn Massacre.

According to the Russian government, none of these individuals are alive today. However, given the scale of the crime and the involvement of the huge state apparatus in it, we may rightly assume that some of the perpetrators may still be alive. We still encounter living perpetrators of the German Nazi crimes, which were committed in exactly the same period. In April 2013 German prosecutors announced that investigations are being launched into the crimes of 50 former guards of the Auschwitz-Birkenau concentration and extermination camp.<sup>269</sup> The Nuremberg standards should be applied not only to the German Nazi murderers but also to the Stalinist murderers.<sup>270</sup>

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iadomosci/2010/05/2166474,12,1,1,item.html. So far, however, these words have not been translated into concrete decisions of the Russian prosecution service and the judiciary bodies.

269. *GERMANY TO INVESTIGATE 50 AUSCHWITZ GUARDS*, The Jerusalem Post, APR. 7, 2013, [HTTP://WWW.JPOST.COM/JEWISH-WORLD/JEWISH-NEWS/GERMANY-TO-LAUNCH-CASE-AGAINST-50-AUSCHWITZ-GUARDS-308951](http://www.jpost.com/Jewish-World/Jewish-News/Germany-to-launch-case-against-50-Auschwitz-guards-308951).
270. Few people know that on July 13, 1994, the head of the investigative group of the Chief Military Prosecutor's Office of the Russian Federation, prosecutor Anatoly Y. Yablokov, when deciding to discontinue criminal proceedings on account of the death of the perpetrators, said in giving grounds for his decision that the members of the Politburo—Joseph Stalin, Anastas Mikoyan, Mikhail Kalinin and Lazar Kaganovich—as well as the head of the NKVD, Lavrenty Beria, were guilty of crimes against peace, war crimes, and crimes against humanity mentioned in Article 6(a)–(c) of the Charter of the International Military Tribunal (Nuremberg Tribunal). The remaining NKVD employees who committed the murder were guilty of war crimes and crimes against humanity. Prosecutor Yablokov also concluded that these acts were acts of genocide under the Genocide Convention of 1948. But three days later the Chief Military Prosecutor's Office of the Russian Federation revoked that decision and took the case away from him. It was finished by another prosecutor in 2004 and the decision to discontinue the investigation was not made public. LEBEDEVA, *supra* note 7, at 358–59; Mikhael Zygar & Yelena Chernenko, *Strach Rosji*, NEWSWEEK RUSSKIY, no. 37, 2009, at 18–21. For more on responsibility of natural persons under international law, see Gardocki, *supra* note - 198, at 22–101; MICHAŁ KRÓLIKOWSKI, PAWEŁ WILIŃSKI, JACEK IZYDORCZYK & MAŁGORZATA ZNOJEK, PRAWO KARNE MIĘDZYNARODOWE WYBÓR ŹRÓDEŁ 50–362 (2008); Elżbieta Mikos-Skuza, *Odpowiedzialność osób fizycznych*, EDUKACJA PRAWNICZA, no. 1, 1998, at 28–30; E. Socha, *Odpowiedzialność osób fizycznych w międzynarodowym prawie karnym*, in 7 NOWA KODYFIKACJA PRAWA KARNEGO 77 (Leszek Bogunia ed., 2003). For more on the application of Nuremberg standards to natural persons who committed Stalinist crimes, see also Basak, *supra* note 63, at 325–358; Piotr Kładoczny,

## IX. CONCLUSION

The actions taken by the Soviet authorities with regard to the Poles, both before and during World War II, including the NKVD's so-called Polish operation and the Katyn Massacre, were acts of genocide under international law. They were part of the USSR's genocidal policy, which included deprivation of national identity, deportations, and mass murders of members of the Polish nation. These actions were taken before the outbreak of World War II with regard to the Poles living in the USSR. The spread of the USSR's territorial rule in 1939 only extended this criminal policy to new areas.

This genocide lasted until the moment when the USSR—not of its own will—became a member of the anti-Hitler coalition in 1941. One should remember that activity intended to exterminate Poles on the basis of national criteria had been continued until the end of July 1941, thus after the German-Soviet conflict begun. They were stopped for pragmatic reasons when the USSR concluded a treaty with the Polish government-in-exile about conducting common warfare against a new enemy, which was Germany.

When pointing to the political context of these actions, we have to remember that Poles were not the only victims of the Soviet system. People were exterminated according to criteria other than the nationality criterion. Yet, when this occurred because the victims were Polish or belonged to any other national or ethnic group, the classification as genocide cannot be avoided. If genocide is part of a state's policy, this does not mean that we are not dealing with this international crime only because an entire nation is classified as "politically suspect and hostile element." One of the protected groups—by virtue of the Genocide Convention—is the nation. Its destruction in whole or in part, as such, on national or for political reasons, is a crime of genocide. During preparatory works, the USSR's proposal to limit the applicable motives was rejected and a solution proposed by Venezuela, with no enumeration and no limitation of motives, was adopted. The object, which is to destroy the protected group, must not be confused with the motive. We have to agree with the German historian Klaus Hildebrand, who said that, "Genocide was committed by the Nazi Germany under the aegis of race, and by the Stalinist Soviet Union under the aegis of class struggle."<sup>271</sup> It is also true that Stalin was a *Polonophobe* and that even before the outbreak of World War II the Soviet authorities carried out a smear campaign against the Poles and created a negative image of them in

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*Zbrodnie stalinowskie na terytorium II Rzeczypospolitej w latach 1939-1945 w świetle Prawa Norymberskiego*, 27 STUDIA IURIDICA 187 (1995).

271. Courtois, *supra* note 15, at 125.

Soviet society. The genocide was stopped for pragmatic reasons only when the USSR found itself—by no means willingly—among the states of the anti-Hitler coalition.

Only a few Poles, included in the Katyn extermination order, enacted by the USSR's authorities, avoided death. The Hitlerite Concentration Camps also released a few representatives of exterminated groups from time to time, which does not mean, that one may question whether on that basis genocide then took place. Among those murdered by the USSR authorities, there were also some representatives of other nationalities. They died, because by the Soviet regime they were subjectively recognized as Poles, an element of Polish national core. It must not be forgotten that German Nazis murdered not only Jews, Poles, and Gypsies; the Serbs not only Bosnian Muslims; and the Hutu not only Tutsis. In those crimes, international, occupation and national courts recognized that genocide was committed.

Genocide was legally separated as a new type of international crime by virtue of the 1948 Genocide Convention. On the grounds of its provisions adopted after its implementation, German perpetrators of the World War II genocide were brought to justice. This happened, for example, during the trial of Adolf Eichmann, held in Israel in 1961–1962 among other instances. This case is not affected by the *nullum crimen sine lege* principle, since acts, especially murders, being elements of the crime of genocide, were already forbidden by international law at the time of its commission. Their new classification based on the intent, which is the destruction of the group does not violate that principle. Today, these activities are called genocide. Moreover, the drafters of the 1948 Convention understood that they were codifying existing law, rather than creating new law.

The actions of the USSR against the Poles, including the NKVD's so-called Polish operation and the Katyn Massacre, fall within the scope of applicability of the 1948 Genocide Convention. On the other hand, Article 15(2) of the International Covenant on Civil and Political Rights as well as Article 7(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms should, in accordance with the will of their authors, overcome any doubts as to the possibility of punishing the perpetrators of crimes committed before and during World War II on the basis on international law instruments adopted later. The statute of limitations ceased to be applied to these crimes under Article 1(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

The responsibility for these crimes rests with the USSR, the continuator of which is the Russian Federation, and with specific individuals who committed these acts both on the highest and the lowest level. Individual infringements of international criminal law co-

exist with international responsibility of the state. That the Katyn Massacre was an act of genocide does not mean that it cannot also be classified as a war crime. Taking into consideration all of the qualifications, it should be recognized that genocide should be indicated as the gravest of the implicated crimes.



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