

## WAS KATYN A GENOCIDE?

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*On April 13, 1990, after five decades of lies and cover-ups, the Union of Soviet Republics put forward a Communiqué on Katyn that stated: “The archival materials that have been discovered, taken together, permit the conclusion that Beria and Merkulov and their subordinates bear direct responsibility for the evil deeds in Katyn Forest. The Soviet side, expressing deep regret in connection with the Katyn tragedy, declares that it represents one of the most heinous crimes of Stalinism.”<sup>1</sup> This announcement of profound historical significance was made in the midst of turbulent demise of the mighty Soviet Union. Thus the world that was rejoicing in the prospects of democratic Russia was eager to close the books on Katyn and once again brushed aside the cry of the Katyn victims for justice. It was not until April 10, 2010 when the Polish presidential plane on its way to Katyn crashed on landing in Smolensk, Russia, killing the President of Poland, First Lady, and eighty seven top Polish officials including nine generals of the Polish Armed Forces, that the world had to turn its attention once again to Katyn. What the world learned as a result of this crash was neither comforting nor encouraging. With respect to Katyn, justice has not been served and Russia has not been forthcoming in meeting its basic obligation of post-conflict reconciliation through full disclosure, compensation and remembrance. Hence, the mistrust and tension between Poland and Russia has been growing steadily.*

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<sup>1</sup> The Communiqué on Katyn was announced by the official news agency, *Telegraphic Agency of the Soviet Union* (TASS), and published in the Russian newspaper *Izvestia* on April 13, 1990. It was reprinted as *Upheaval in the East: Soviets Admit Blame in Massacre of Polish Officers in World War II*, N.Y.TIMES, Apr. 13, 1990.

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## I. INTRODUCTION

The Katyn crime, commonly understood as the murder of Polish prisoners of war (POWs) of officer rank in the Katyn forest near Smolensk, casts an ominous shadow over the legacy of Nuremberg justice by bringing to the forefront the fundamental question: can justice be served when a powerful empire does harm to a smaller country? As long as the Katyn

crime remains unpunished, the international justice system born out of Nuremberg does not meet this basic standard.

The Katyn crime attracted international attention in 1943 when the Nazi troops advancing towards Moscow discovered mass graves of Polish officers in the Katyn forest.<sup>2</sup> It took historians decades to realize that Katyn was only one of many sites of mass murder of Polish nationals by the Soviet regime between 1939 and 1941. Today the Katyn massacre symbolizes the Soviet policy of mass persecution of the Polish nationals during World War II. For fifty years, the Soviet Union covered up the Katyn atrocity, banishing the memory of the crime and the memory of the victims by effectively suppressing any mention of Katyn at home and abroad.<sup>3</sup>

In this paper, I will explore whether the leadership of the Soviet Union committed genocide on the Polish national group, as such, during the period between September 17, 1939 and June 20, 1941, when the Soviet Union acted in alliance with Nazi Germany pursuant to the Ribbentrop-Molotov Pact of August 23, 1939<sup>4</sup> and the Friendship and Boundary Treaty of September 28, 1939.<sup>5</sup> The author is mindful of the daring character of a genocide charge. After half a century of denial and twenty years of minimizing the significance of the Katyn crime, the people in Russia and in the West are not prepared to absorb the Katyn crime in its entirety. Upon murdering the Poles, the Soviets committed “memoricide” by destroying the memory of the victims. The complicity of the Western democracies in covering up the Katyn crime makes the truth about Katyn much harder to accept. As much as Katyn continues to represent the inconvenient truth of that complicity, the notion that Katyn may constitute genocide makes the inconvenient truth much more uncomfortable. Accordingly, the psychological phenomenon of genocide denial comes to forefront with full force in this instance, both in Russia and in the West.

In judging any genocide, two opposite forces come to play: interests that aim at restricting the charge of genocide, often in order to preserve the status quo for political expediency, and interests that demand it in the name of justice and long-term well-being of the international community. The unwillingness of the international courts in the early International Criminal Court (ICC) era to pursue genocide charges because of their powerful

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<sup>2</sup> See GEORGE SANFORD, *KATYN AND THE SOVIET MASSACRE: TRUTH, JUSTICE, MEMORY*, 1 (2005) (“After the German invasion of the U.S.S.R. Goebbels announced the discovery of the bodies with much propaganda fanfare in April 1943.”).

<sup>3</sup> See *id.* at 3 (“Only the Soviet admission of guilt in 1990 and the release of their documents, however, made it possible to establish the truth about the whole of the 1940 massacre . . .”).

<sup>4</sup> See *id.* at 7 (explaining how Germany and the Soviet Union formed a secret pact to partition Poland).

<sup>5</sup> *Id.* at 21.

political impact and stigmatizing effect limited the applicability of genocide. Also, some scholars warned that overusing the charge of genocide could lead to trivializing this crime, considered as the crime of crimes, or advocated a complete shift away from genocide and recommend replacing it with the charge of crimes against humanity as “an elegant and rather moving encapsulation of the tendency towards universalism and cosmopolitanism.”<sup>6</sup> However, the proponents of limiting the applicability of genocide disregard the trivializing effect this approach has on genocide when the genocidal crime that aims at destroying protected human groups is not recognized as such.<sup>7</sup> If pursued too far, such approach may lead to challenging the underlying premise of the genocide crime by questioning whether the protected national, ethnic and religious groups are worth protecting.

It shall be noted that most scholars agree that genocide denial is a harmful and dangerous phenomenon. They recognize that genocide denial tends to be deeply entrenched, often representing a societal consensus where “individual and collective narcissism plays a pivotal role.”<sup>8</sup> They point out that genocide denial can pay well since it fortifies the status quo and serves powerful and prosperous constituencies, while failure to deny genocide may result in painful economic and social consequences.<sup>9</sup> Frequently that is the key reason why two people who process the same facts come to opposite conclusions: one recognizes genocide while the other views the events as “an unfortunate but understandable effort to quell a security threat.”<sup>10</sup> However, genocide denial conceals the horror of the crime, helps preserve the distortion of history, and prevents healing of the wounds inflicted by genocide for many generations to come.<sup>11</sup> It also poses a threat to humanity for the future.

In considering the facts of the Katyn case, it is important to keep in mind that both the scholarship and jurisprudence contribute to the shared consciousness and therefore have profound implications for the struggle of humanity in dealing with large, disturbing and deadly historical events. Nowhere is scholarship more demanding of civic courage than in

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<sup>6</sup> ADAM JONES, *GENOCIDE: A COMPREHENSIVE INTRODUCTION* 540 (2d. ed. 2011).

<sup>7</sup> See Roger W. Smith et al., *Professional Ethics and the Denial of Armenian Genocide*, 9 *HOLOCAUST GENOCIDE STUD.* 1, 13–14 (1995) (discussing how genocidal denial attempts to re-write history and conceals the horror of such crimes).

<sup>8</sup> JONES, *supra* note 6, at 518.

<sup>9</sup> *Id.*

<sup>10</sup> SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 13 (2002).

<sup>11</sup> See Smith et al., *supra* note 7, at 12–13 (explaining how genocidal denial distorts the facts, harms survivors and family of the decedents, and attacks the victim peoples' cultural identity).

challenging one of the most powerful countries in the world. And nowhere is scholarship more significant than with respect to genocide where extremity of human harm brought about by genocidal policies and actions raises the stakes to the highest level.<sup>12</sup> Let us hope that the scholarship on genocide will be, above all, a quest for truth.

## II. PRESENTATION OF FACTS

### A. *Poland Reborn*

As a result of three consecutive partitions of Poland by Russia, Prussia and Austria between 1772 and 1795, Poland, that was one of the largest countries in Europe at the time, disappeared from the map for 123 years.<sup>13</sup> Owing to the matchless leadership of Marshal Josef Pilsudski, Poland reemerged from the chaos of World War I as an independent state.<sup>14</sup> But there was a price to pay for the reclaimed independence: Poland was the first country ever required to sign the Minority Protection Treaty with the League of Nations.<sup>15</sup> While this first modern treaty on minority protection assured protection to numerous ethnic groups living within the new Polish borders, the powerful neighbors that partitioned Poland at the end of 18th century effectively used the Minority Protection Treaty as a tool to infiltrate and destabilize resurrected Poland.<sup>16</sup> Furthermore, no reciprocal minority protection was given to the Polish minorities left outside the new Polish borders in Germany and in the Soviet Union.<sup>17</sup> While no mass murder of any minority took place in pre-war Poland, the Soviet Union murdered at least 111,000 ethnic Poles living in the Soviet Union only in the Polish Operation of 1937–1938, while Germans only in August 1939 arrested two

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<sup>12</sup> *See id.* at 16–17 (explaining why it is important for scholars to recognize and discuss genocide).

<sup>13</sup> SANFORD, *supra* note 2, at 5.

<sup>14</sup> *See generally id.* at 8–9 (discussing Pilsudski's war for independence).

<sup>15</sup> Also known as “The Little Treaty of Versailles,” this document was signed by Poland on June 28, 1919. The Polish Minority Treaty served as a template for future such treaties. Through this mechanism, the victorious powers of Great Britain, France, Italy, the U.S., and Japan imposed conditions which severely limited Poland's sovereignty and its ability to defend itself. The Minority Protection Treaty emboldened Nazi paramilitary groups disguised as minorities and encouraged German subversive operations in Poland. States of the Entente were not bound by similar obligations and both Germany and the Soviet Union openly persecuted the Polish minority on their territories. *See generally* STANISLAW MACKIEWICZ, COLONEL BECK AND HIS POLICY 54–58 (1944) (providing an overview of the restrictions and obligations imposed on states party to this treaty).

<sup>16</sup> *See id.* at 54–55 (discussing how the treaty limited Polish sovereignty and imposed rules regarding the treatment of Jews).

<sup>17</sup> *See id.* at 55 (explaining how Poland was obligated to help minorities within its borders assimilate, while Germany organized an anti-Polish campaign on minority grounds).

thousand ethnic Poles living in Germany.<sup>18</sup> Furthermore, both Germany and the Soviet Union justified their 1939 aggression on Poland by the need to protect their “persecuted minorities” living in Poland.<sup>19</sup> Accordingly, the minority protection argument served as a pretext to start World War II, whereby both aggressors reclaimed the territory they lost as a result of the rebirth of Poland in 1918.<sup>20</sup>

By attacking Poland, the Soviet Union violated a number of bilateral and multilateral treaties. In particular, the U.S.S.R. violated the Treaty of Riga signed on March 18, 1921, which established the permanent border between Poland and the Soviet Union.<sup>21</sup> The border so-established was subsequently approved on March 15, 1923 by the resolution of the Conference of Ambassadors acting under Article 87.3 of the Treaty of Versailles.<sup>22</sup>

To strengthen neighborly friendship in 1932, Poland signed a Non-Aggression Treaty with the Soviet Union. This treaty was initially binding for three years, but within two years it was extended until December 31, 1945.<sup>23</sup> In an effort to further the cause of peace, Poland, together with other countries bordering the Soviet Union, also signed the Convention for the

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<sup>18</sup> See TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 103 (2010) (“Of the 143,810 people arrested under the accusation of espionage for Poland, 111,091 were executed.”). Poland withdrew from the Minority Treaty in 1934, due to the admission of the Soviet Union to the League of Nations. See also MACKIEWICZ, *supra* note 15, at 54–55 (discussing how Germany aimed to discredit Poland politically and launched an anti-Polish campaign).

<sup>19</sup> See MACKIEWICZ, *supra* note 15, at 55 (explaining that Germany and Russia had previously harassed Poland about its minority treaty obligations).

<sup>20</sup> See BRONISŁAW KUŚNIERZ, *STALIN AND THE POLES: AN INDICTMENT OF THE SOVIET LEADERS* 25–26 (1949) (explaining that the invasion of Poland in September 1939 was the result of a secret agreement between Germany and Russia made under the guise of the Non-Aggression Pact).

<sup>21</sup> Article 3 of the Treaty of Riga provided that:

Russia and Ukraine explicitly abandoned all rights and claims to the territories situated to the west of it. The two Parties also undertook to respect each other’s sovereign rights and not to interfere in the domestic affairs of the other.

At the time of the signing the Treaty the head of the Polish delegation said, “we have endeavored to settle all problems in a spirit of fairness and justice, making concession not only in order to reach agreement, but also to facilitate our future relations,” and Mr. Joffe, the leader of the Soviet delegation, replied: “We have concluded a Peace Treaty giving full satisfaction to the vital legitimate and necessary interest of the Polish Nation.”

*Id.* at 22. The Treaty of Riga was signed after the Polish Army defeated the Red Army in the 1920 Battle of Warsaw. *Id.*

<sup>22</sup> *Id.* at 22–23.

<sup>23</sup> The Polish-Soviet Nonaggression Treaty was signed on July 25, 1932, and extended on May 5, 1934. See *id.* at 24.

Definition of Aggression with the Soviet Union.<sup>24</sup> This pioneering peace treaty put forward for the first time ever the most comprehensive definition of the aggressor.<sup>25</sup>

Two other documents that regulated Polish-Soviet relations in the years leading up to World War II are also relevant. The Kellogg-Briand Pact, adopted on August 27, 1928, renounced the war of aggression, prohibiting the use of war as “an instrument of national policy.”<sup>26</sup> It was the first ever multinational tool that sought to prevent wars of aggression. This pact provided the legal basis for the crime against peace that was subsequently adopted and developed by the Nuremberg Tribunal.<sup>27</sup> Poland and Germany were the initial signatories of the Kellogg-Briand Pact, while the Soviet Union became its signatory by the time it went into effect on July 24, 1929.<sup>28</sup>

One more international agreement comes to play in this context. On February 26, 1938, Poland and the Soviet Union signed a special Protocol in Moscow, whereby both countries affirmed that the existing treaties and agreements between them constituted a guarantee of the inviolability of the peaceful relations between the two countries.<sup>29</sup>

One and a half years later, on August 23, 1939, the Soviet Union violated all the above-mentioned international treaties and agreements by signing the Ribbentrop-Molotov Pact with Nazi Germany that included a secret protocol to partition Poland.<sup>30</sup> In the Secret Additional Protocol to the Soviet-German Nonaggression Treaty known as the Ribbentrop-Molotov Pact, the Soviet Union and Nazi Germany addressed the destruction of Poland “in strictly confidential terms,” and tentatively agreed upon the future boundaries of their respective “spheres of influence” that cut Poland in half.<sup>31</sup> Article 2 of the Secret Additional Protocol to the Ribbentrop-Molotov Pact stated:

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<sup>24</sup> *Id.*

<sup>25</sup> This convention was signed on July 3, 1933. *Id.* Similarly, on January 26, 1934 Poland signed a non-aggression pact with Nazi Germany. *Id.* In this bilateral agreement the contracting parties stated that their relations shall be governed by the Kellogg Pact and declared that “in no case [they would have] recourse to violence to settle the disputes.” *Id.* at 24–25.

<sup>26</sup> Kellogg-Briand Peace Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 U.N.T.S. 57, available at [www.yale.edu/lawweb/avalon/imt/kbpact.htm](http://www.yale.edu/lawweb/avalon/imt/kbpact.htm).

<sup>27</sup> See KUŚNIERZ, *supra* note 20, at 1–2 (listing the different types of punishable crimes).

<sup>28</sup> Kellogg-Briand Peace Pact, *supra* note 26.

<sup>29</sup> KUŚNIERZ, *supra* note 20, at 24.

<sup>30</sup> See Paul Halsall, *Modern History Sourcebook, The Molotov-Ribbentrop Pact, 1939*, FORDHAM UNIV., <http://www.fordham.edu/halsall/mod/1939pact.html> (last visited June 6, 2012) (providing the text to the Molotov-Ribbentrop Pact as well as the text of the Secret Additional Protocol).

<sup>31</sup> *Id.* (quoting Article IV of the Secret Additional Protocol).

In the event of a territorial and political rearrangement of the areas belonging to the Polish state the spheres of influence of Germany and the U.S.S.R. shall be bounded approximately by the line of the rivers Narew, Vistula, and San.

The question of whether the interests of both parties make desirable the maintenance of an independent Polish state and how such a state should be bounded can only be definitely determined in the course of further political developments.

In any event both Governments will resolve this question by means of a friendly agreement.<sup>32</sup>

This protocol constitutes direct proof of Soviet-German conspiracy to commit a crime against peace. While Nazi Germany was prosecuted for crimes against peace and for violations of international treaties and agreements during the Nuremberg Trial, the Soviet Union was never prosecuted for crimes against peace and for violating binding international treaties and bilateral agreements with Poland.<sup>33</sup>

#### *B. German-Soviet Attack on Poland*

On September 1, 1939, Germany attacked Poland from the north, west and south in flagrant violation of all international treaties and agreements.<sup>34</sup> On September 3, 1939, France and Great Britain declared war on Germany in accordance with guarantees of security given to Poland.<sup>35</sup> However, neither Great Britain nor France offered military assistance to Poland as was required by the security guarantees.<sup>36</sup>

On September 17, 1939, the Soviet Union attacked Poland from the east. This aggression that constituted crime against peace was implemented in accordance with the Secret Additional Protocol to the Ribbentrop-Molotov Pact. The Soviet attack on Poland occurred at the time when Warsaw effectively resisted German onslaught and the Polish Army was in the process of consolidating its forces in the east in preparation for the counteroffensive. Thus, the Soviet attack on Poland took place at the most critical juncture of Poland's defensive campaign against Germany.

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<sup>32</sup> See *id.* (quoting Article II of the Secret Additional Protocol). This secret protocol constitutes direct proof of Soviet-German conspiracy to commit a crime against peace.

<sup>33</sup> See ROBERT CONQUEST, *STALIN: BREAKER OF NATIONS* 278–279 (1991) (describing rejected efforts at the Nuremberg trials to introduce evidence of the 1939 Secret Protocols to the Molotov-Ribbentrop Pact and calling the result “more than a success” for Stalin).

<sup>34</sup> SNYDER, *supra* note 18, at 116.

<sup>35</sup> GEOFFREY ROBERTS, *STALIN'S WARS: FROM WORLD WAR TO COLD WAR, 1939–1953*, at 36 (2006).

<sup>36</sup> SNYDER, *supra* note 18, at 120 (“Poland fought alone. France and Britain declared war on Germany, as promised, but took no meaningful military action during the campaign.”).

This premeditated act of aggression was undertaken in violation of at least seven binding bilateral and multilateral treaties and pacts.<sup>37</sup>

At 2:00 AM on September 17, 1939, Vladimir Potiomkin, Deputy People's Commissar for Foreign Affairs summoned Waclaw Grzybowski, Polish Ambassador in Moscow, and read him a note of the Soviet Government.<sup>38</sup> The note stated that the Polish State had collapsed and no longer existed because Poland had lost all its industrial and cultural centers and Warsaw no longer existed as the capital of Poland; the Government of Poland had fallen apart and did not show any signs of life.<sup>39</sup> Therefore all agreements with Poland, including the non-aggression treaty, were void and the Red Army was about to cross the Polish border to bring peace and stability to its Ukrainian and White Russian brothers. Ambassador Grzybowski recalled:

I was prepared for a bad news. I thought the Soviets would, under some pretext, repudiate the non-aggression pact. What was about to happen was much worse.

Potiomkin slowly read me a note signed by the Chairman of the Council of the People's Commissars, Mr. Molotov. When he finished, I immediately

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<sup>37</sup> KUŚNIERZ, *supra* note 20, at 26–27 (listing the seven separate agreements that were violated, including the Kellogg-Briand Pact and the Covenant of the League of Nations).

<sup>38</sup> The Soviet note stated:

The Polish-German war disclosed internal bankruptcy of the Polish State. In 10 days of military operations Poland lost all its industrial and cultural centers, Warsaw no longer exists as the capital of Poland; the Government of Poland fell apart and does not show any signs of life. All this indicates the Polish State and its Government in reality ceased to exist. Left to its own devices and deprived of the leadership, Poland became a convenient ground for all sorts of activities and disruptions that may threaten the Soviet Union. Therefore the Government of the Soviet Union that has remained neutral to this point can no longer continue its neutrality in face of such facts.

Furthermore, the Government of the Soviet Union can no longer remain neutral at the time when the kindred Ukrainian and White Russians living within the territory of the Polish State are left to fend for themselves without any protection.

Considering this situation the Government of the Soviet Union issued an order to the Commander of the Red Army for its units to cross the border and take under their protection the life and livelihood of the people of Western Ukraine and Western White Ruthenia.

The Soviet Government also intends to undertake all efforts to release the Polish people from the tragic war which was forced upon them by their irresponsible leaders and to give them the opportunity to exist in peace. People's Commissar for Foreign Affairs - Viacheslav Molotov.

JERZY ŁOJEK, *AGRESJA 17 WRZEŚNIA 1939: STUDIUM ASPEKTÓW POLITYCZNYCH 186–187* (1990).

<sup>39</sup> *Id.*

stated that I refuse to accept this note and that I categorically object to its contents and form.<sup>40</sup>

Grzybowski pointed out that the statements in the note were false because the Polish Government did not collapse. To the contrary, it led the organized defense of the country on the ground. "I understand," he said, "that I have the obligation to inform my Government about the aggression that most likely is under way but I will do nothing else."<sup>41</sup> Potiomkin tried to persuade Grzybowski to accept the note to which Grzybowski replied: "Even the most pessimistic reports of military attachés cannot constitute the basis for repudiating international treaty." He also added that in 1812 when the French Army entered Moscow no one concluded that Russia ceased to exist. Grzybowski left the note on the table. It was 4:30 AM Moscow time and 1:30 AM Warsaw time. Half an hour later he sent a telegram alerting the Polish Government to the Soviet aggression.<sup>42</sup>

Facts presented in the Soviet note were false indeed. Far from being defeated, Poland was bracing for long resistance. Many key political centers and military posts successfully resisted the initial German attack. The capital city of Warsaw led by charismatic President Starzynski effectively fended off numerous German attacks and was holding on without any signs of conceding defeat. Other strategic centers like the key Baltic Sea military outpost Hel or the Modlin fortress were in a position to fight for much longer.<sup>43</sup> The Polish Army was in the process of regrouping in the east in preparation for counteroffensive. Vast stocks of armaments were amassed and concentrated in eastern Poland in preparation for the counter-attack. The Polish Central Command was in control of the situation in eastern Poland including its troops and key armament.

For Poland, the Soviet attack represented a stab in the back. It was the Soviet aggression that forced the Polish Commander-in-Chief to order evacuation of the Polish Army to Romania and Hungary.<sup>44</sup> But many cities on the Soviet side of the Ribbentrop-Molotov line organized a spontaneous defense against the Soviet forces. An eyewitness from the city of Grodno recalls that several kilometers from Grodno bodies of about one hundred

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<sup>40</sup> *Id.* at 73.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 74.

<sup>43</sup> See ATLAS OF THE SECOND WORLD WAR 39 (John Keegan ed., 2003) (Modlin surrendered on September 28, 1939, Hel on October 2, 1939, and Kock, site of the surrender of the last Polish combatants, on October 6, 1939).

<sup>44</sup> 1 SAMUEL W. MITCHAM, JR., THE RISE OF THE WEHRMACHT: THE GERMAN ARMED FORCES AND WORLD WAR II 210 (2008) ("For Marshal Rydz-Smigly, the Polish commander-in-chief, [the Soviet invasion] was the last straw.").

Poles killed in the fighting were buried in three graves.<sup>45</sup> When Red Cross representatives talked to the gravediggers they were told that one grave was for the soldiers, the second for the civilians, and the third one for the state employees.<sup>46</sup>

The Soviets took 250,000 Polish soldiers as prisoners of war.<sup>47</sup> It is estimated that in resisting the Soviet aggression at least 5,000 Polish soldiers died and about 10,000 were wounded. The Soviets also captured massive armaments of the Polish Army including 900 artillery guns, close to one million artillery shells, more than 10 thousand automatic rifles, over 300,000 regular rifles, with munitions in the millions.<sup>48</sup> These numbers proudly presented by Molotov in his victory speech on October 31, 1939, clearly prove that the Polish Army was far from being defeated by the Germans at the time of the Soviet aggression.<sup>49</sup> Accordingly, the Soviet argument that the Polish State ceased to exist had nothing to do with the reality on the ground. However, in light of aggressive anti-Polish propaganda jointly launched by both the Nazi and Soviet war machines, this “justification” for war on Poland sounds plausible to many to this day.

However, the British and American diplomats were not fooled by the Nazi-Soviet propaganda plot. The American intelligence report prepared in London in 1943 included the following observation:

It is interesting to juxtapose the text of the Soviet note of September 17, 1939, with the texts of the notes of Catherine the Great, sent between 1766 and 1795 to a number of European powers with a view to justifying the three consecutive partitions of Poland. The argumentation used is incredibly similar. Both Catherine and M. Potemkin refer to the alleged state of anarchy in Poland and both of them extend their protection to the Ukrainians and White Ruthenians, with the sole distinction that the Empress speaks of followers of the Orthodox Church while the Soviet diplomat refers to nationalities.<sup>50</sup>

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<sup>45</sup> GRAŻYNA LIPiŃSKA, JEŚLI ZAPOMNĘ O NICH 37 (1988).

<sup>46</sup> *Id.*

<sup>47</sup> See W. ANDERS, AN ARMY IN EXILE: THE STORY OF THE SECOND POLISH CORPS 11 (1949) (describing “Soviet intervention” as preventing “the escape of from 200,000 to 300,000 soldiers”).

<sup>48</sup> ŁOJEK, *supra* note 38, at 106.

<sup>49</sup> *Id.*

<sup>50</sup> U.S. DEPT. OF STATE, CONFIDENTIAL P-66020 REPORT, SOVIET DEPORTATION OF THE INHABITANTS OF EASTERN POLAND IN 1939–1941 (Dec. 1943), *reprinted in* THE POLISH DEPORTEES OF WORLD WAR II: RECOLLECTIONS OF REMOVAL TO THE SOVIET UNION AND DISPERSAL THROUGHOUT THE WORLD 211 (Tadeusz Piotrowski ed., 2004). In his speech from November 7, 1941 Stalin indeed made reference to the Great Russian Empire and great ancestors, all of them Russians. SNYDER, *supra* note 18, at 227.

This analogy was by no means accidental. Vladimir Potiomkin who handed down the note to Ambassador Grzybowski was the editor of a compendium of history of diplomacy in which Catherine the Great was quoted. Her political strategy was described as follows:

Of the old methods of diplomatic action one especially widely in use in Catherine's time was demagogic agitation among the Orthodox population in foreign states. In fact everywhere where Christians were concerned 'the Tsars could adopt the pose of liberators' so as to further their own aims.<sup>51</sup>

On the night of September 16, 1939, the Soviet forces crossed the Polish border with six armies divided into Ukrainian and Belorussian fronts, with 620,000 soldiers, 4,700 tanks and 3,300 planes.<sup>52</sup> On the day of the Soviet attack, the Polish Government and the Central Command were located in Eastern Poland. At 4:00 PM on September 17, 1939, the Polish Commander-in-Chief Rydz-Śmigły issued a directive to the Polish troops not to fight the Soviets and evacuate to Romania and Hungary.<sup>53</sup> The Polish Government refused to surrender or negotiate with the Soviets and the next day crossed the Polish-Romanian border with the intent to move to France to continue the struggle for Poland from abroad.

On September 19, 1939, the British Government expressed its deepest reservations towards the statement that the Polish State and its Government ceased to exist and towards the reasons announced by the Soviet Government for this portrayal of the matter. The statement read:

On its part the British Government continues to recognize the Polish Government as a legitimate government of the Republic of Poland and therefore cannot accept the view by which the current circumstances justify the repudiation by the Soviet Union of its treaty with Poland or the resulting thereof Soviet invasion of Poland.<sup>54</sup>

In the meantime, the Soviets decided to arrest diplomats from the Polish diplomatic missions in the Soviet Union. In blatant violation of the Geneva Convention, the Soviet Union concluded that since Poland no longer existed, the Polish diplomats lost their immunity and therefore

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<sup>51</sup> U.S. DEPT. OF STATE, *supra* note 50, at 212.

<sup>52</sup> PAWEŁ PIOTR WIECZORKIEWICZ, *KAMPANIA 1939 ROKU* 87 (2001).

<sup>53</sup> Directive of Commander-in-Chief Rydz Śmigły, issued on September 17, 1939:

The Soviets crossed the border. I order general evacuation towards Romania and Hungary using the shortest paths. Do not fight Bolsheviks unless they attack or order disarmament of the troops. Orders for Warsaw and other cities fighting against Germans remain the same. Cities approached by Bolsheviks should try to negotiate with them regarding the passage to Hungary and Romania.

*Id.* at 90.

<sup>54</sup> ŁOJEK, *supra* note 38, at 192–93.

should be arrested as the enemies of the Soviet State. Ironically, it was the German Ambassador Schulenburg who personally secured the release of the Polish Ambassador Grzybowski from the Soviet Union. But Consul General of the Republic of Poland in Kiev Jerzy Matusiński was not that lucky. Summoned on September 30, 1939 by the Soviet secret police (the NKVD), he disappeared without a trace.<sup>55</sup>

On September 28, 1939, the Soviet Union signed the Boundary and Friendship Treaty with Nazi Germany. It was only minutes before the final signing ceremony that the capital city of Warsaw finally surrendered, defying all German-Soviet plans.<sup>56</sup> The German-Soviet Boundary and Friendship Treaty provided that Germany and the Soviet Union “consider it as exclusively their task, after the collapse of the former Polish state, to re-establish peace and order in these territories.”<sup>57</sup> The treaty partitioned Poland between the two aggressors with 51.5% of the Polish territory and 37% of the Polish population (13,199,000 Polish citizens) being annexed to the Soviet Union.<sup>58</sup> The Confidential Protocol to this treaty provided for transfer of the German minority from the Soviet Union to western parts of Poland outright incorporated to the German Reich, and the same transfer rights were granted to the Ukrainians and White Russians living on the

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<sup>55</sup> Based on the same logic of non-existence of the Polish State, soldiers of the Polish Army were denied the status of prisoners of war although all Soviet internal documents, including the key execution order of March 5, 1940, clearly referred to them as prisoners of war. See RESOLUTION NO. P13/144 OF THE POLITBURO OF THE CENTRAL COMMITTEE OF THE A-UCP(b) – MARCH 5, 1940, available at [http://www.electronicmuseum.ca/Poland-WW2/katyn\\_memorial\\_wall/kmw\\_politburo\\_resolution.html](http://www.electronicmuseum.ca/Poland-WW2/katyn_memorial_wall/kmw_politburo_resolution.html) (last updated Feb. 28, 2012) (referring to the “people remaining in the prisoner-of-war camps” and the “former Polish Army officers”).

<sup>56</sup> Polish General Tadeusz Kutrzeba and German General Johannes Blaskowitz signed a document of Warsaw surrender and hostilities ceased at 2:00 pm Warsaw time on September 27, the same day the German-Soviet Boundary and Friendship Treaty was executed. MITCHAM, *supra* note 44, at 212.

<sup>57</sup> Article 1 of the German-Soviet Boundary and Friendship Treaty dated September 28, 1939 reads: “The Government of the German Reich and the Government of the U.S.S.R. determine as the boundary of their respective national interests in the territory of the former Polish state the line marked on the attached map, which shall be described in more detail in a supplementary protocol.” German-Soviet Boundary and Friendship Treaty, Ger.-U.S.S.R., art. I, Sep. 28, 1939, available at [http://avalon.law.yale.edu/20th\\_century/gbound.asp](http://avalon.law.yale.edu/20th_century/gbound.asp) (last visited June 6, 2012).

<sup>58</sup> TADEUSZ PIOTROWSKI, POLAND’S HOLOCAUST: ETHNIC STRIFE, COLLABORATION WITH OCCUPYING FORCES AND GENOCIDE IN THE SECOND REPUBLIC, 1918–1947, at 9 (1998). Nazi Germany grabbed 48% of Poland’s lands (187,644 square kilometers) containing twenty-two million people. Out of this booty, they directly incorporated into the Third Reich four Polish provinces with nearly 92,000 square kilometers and over ten million people. The Nazis also formed a German colony named the Government General with nearly 96,000 square kilometers and about twelve million people, and transformed some Polish provinces to Slovakian control. *Id.* at 8.

German side of the partition line. It shall be noted that no transfer rights were guaranteed to the Poles or the Jews as these ethnic groups became the primary targets of persecution.<sup>59</sup>

C. *German-Soviet Collaboration Against Poland 1939–1941*

A formal declaration of close cooperation between Nazi Germany and the Soviet Union was spelled out in Article III of the Ribbentrop-Molotov Pact of August 23, 1939.<sup>60</sup> The need for such close cooperation rapidly intensified in early September once it became clear that the defeat of Poland could be assured only through a joint effort of both aggressors.

In preparation for the Soviet aggression on Poland, a great deal of attention was paid to the coordination of military operations between the German and Soviet armies along the Ribbentrop-Molotov partition line. On September 15th, Ribbentrop wrote to his Ambassador in Moscow:

[A] representative of each Government, as well as German and Russian officers on the spot in the area of operations, should have a meeting in order to take the necessary steps, for which meeting we propose to assemble at Bialystok by air.<sup>61</sup>

In another secret protocol, this time attached to the German-Soviet Boundary and Friendship Treaty of September 28, 1939, the Polish people

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<sup>59</sup> The Confidential Protocol reads:

The Government of the U.S.S.R. shall place no obstacles in the way of Reich nationals and other persons of German descent residing in the territories under its jurisdiction, if they desire to migrate to Germany or to the territories under German jurisdiction. It agrees that such removals shall be carried out by agents of the Government of the Reich in cooperation with the competent local authorities and that the property rights of the emigrants shall be protected. A corresponding obligation is assumed by the Government of the German Reich in respect to the persons of Ukrainian or White Ruthenia descent residing in the territories under its jurisdiction.

German-Soviet Boundary and Friendship Treaty, *supra* note 57 (quoting the Confidential Protocol).

<sup>60</sup> Article III of the Ribbentrop-Molotov Pact dated August 23, 1939 provides: "The Governments of the two High Contracting Parties shall in the future maintain continual contact with one another for the purpose of consultation in order to exchange information on problems affecting their common interests." Treaty of Nonaggression Between Germany and the Union of Soviet Socialist Republics, Ger.-U.S.S.R., art. III, Aug. 23, 1939 [hereinafter Ribbentrop-Molotov Pact], available at [http://avalon.law.yale.edu/20th\\_century/nonagres.asp](http://avalon.law.yale.edu/20th_century/nonagres.asp) (last visited June 6, 2012).

<sup>61</sup> Telegram No. 360 from Joachim von Ribbentrop, Foreign Minister of Ger., to Friedrich Werner von der Schulenberg, Ambassador of Ger. to the U.S.S.R., (Sep. 15, 1939) [hereinafter Telegram No. 360], available at [http://avalon.law.yale.edu/20th\\_century/ns072.asp](http://avalon.law.yale.edu/20th_century/ns072.asp).

were once again singled out for special treatment and “suitable measures” by both the Nazi and Soviet war machines. This protocol read as follows:

Both parties will tolerate in their territories no Polish agitation which affects the territories of the other party. They will suppress in their territories all beginnings of such agitation and inform each other concerning suitable measures for this purpose.<sup>62</sup>

Over the period of six months following the aggression, at least four high level meetings between Nazi Germany and the Soviet Union took place on the territory of Poland. The first meeting took place on September 27, 1939, in the city of Brest while the Polish Army was still fighting.<sup>63</sup> Not much is known about the second meeting that took place at the end of November 1939 in Przemyśl.<sup>64</sup> The third meeting began on February 20, 1940 in Zakopane, southern Poland, and lasted several weeks.<sup>65</sup> The fourth high level NKVD–Gestapo meeting took place in March 1940 in Kraków.<sup>66</sup> Some historians point out that it is likely that Stalin’s decision to murder Polish officers was related to these meetings, although few documents exist to shed more light on this issue.<sup>67</sup>

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<sup>62</sup> German-Soviet Boundary and Friendship Treaty, *supra* note 57 (quoting the Secret Supp. Protocol).

<sup>63</sup> Josef A. Dembinski, *Decyzja władz sowieckich z 5 marca 1940 r. o zagładzie polskich jeńców wojennych* [*The Soviet Government's Decision of March 5, 1940 About the Extermination of Polish Prisoners of War*], NIEDZIELA, [http://www.voskresenie.niedziela.pl/artukul.php?lg=pl&nr=200409&dz=z\\_historii&id\\_art=00005](http://www.voskresenie.niedziela.pl/artukul.php?lg=pl&nr=200409&dz=z_historii&id_art=00005) (last visited June 11, 2012) (describing the Sep. 27 meeting in Brest and its focus on ways to combat the Polish insurgency and sabotage campaigns).

<sup>64</sup> *See id.* So little is known about this conference that some commentators fail to mention it at all. *See* ALLEN PAUL, *KATYŃ: STALIN’S MASSACRE AND THE TRIUMPH OF TRUTH* 68 (2010).

<sup>65</sup> Dembinski, *supra* note 63. The German side was represented in Zakopane by Adolf Eichmann and the Soviet side Grigory Litvinov. *Id.* The final report from this meeting presumably stated that the Polish ethnic group was to be liquidated by 1975 through extermination and deportation. Such document was reported to exist by the Polish underground, however it has not been located. Some historians like Norman Davies, argue that the NKVD-Gestapo meetings facilitated the coordination of repressive actions such as Katyn and “Action AB” (Ausserordentliche Befriedungsaktion). Norman Davies, *Między Swastyką a Gwiazdą* [*Between the Swastika and the Star*], 15 *APOKRYF* (1999), available at [www.tygodnik.com.pl/apokryf/15/davies.html](http://www.tygodnik.com.pl/apokryf/15/davies.html).

<sup>66</sup> *See* TADEUSZ BÓR-KOMOROWSKI *THE SECRET ARMY* 46 – 47 (1951) (discussing that in March 1940 the Polish underground reported that a special commission of NKVD arrived in Kraków to discuss with Gestapo common strategy against the Polish underground); TADEUSZ BÓR-KOMOROWSKI, *ARMIA PODZIEMNA* 174 (1951) (mentioning the development of a common propaganda strategy around that same time).

<sup>67</sup> *See* CONQUEST, *supra* note 33, at 229 (discussing a Soviet investigation linking the Katyn massacre with the conference in Zakopane); George Watson, *Rehearsal for the Holocaust*, 71 *COMMENT* 60–61 (1981) (discussing the possibility that the fate of the interned

What exactly was discussed at these meeting may never be known. Some believe that documents demonstrating the cooperation of the Soviet NKVD with the Nazi Gestapo during the Katyn-Siberia operations<sup>68</sup> are the reason that Russia keeps many documents related to the Katyn crime as classified. What is known for sure is this: The actions of Nazi Germany and the Soviet Union towards the Polish nation were remarkably similar during the period of Nazi-Soviet collaboration between September 1939 and June 1941.<sup>69</sup>

Upon invading Poland from the west, German special extermination squads called Operational Groups (Einsatzgruppen and Einsatzkommando) consisting of Gestapo and self-defense forces<sup>70</sup> had followed the German Army into Poland, undertaking a housecleaning of Polish intelligentsia, clergy and nobility. A preliminary study conducted in 1945 revealed that 714 mass executions conducted by the Einsatzgruppen execution squads claimed the life of 16,336 Polish civilians during the first fifty-five days of German occupation.<sup>71</sup> Many of the victims were identified and captured according to special lists prepared by members of the German minority living in Poland.<sup>72</sup> From day one of the Polish campaign, the Germans were implementing the "Intelligenzaktion," that is, an extermination operation directed at members of the Polish elite.<sup>73</sup> For example, on November 6, 1939, the 183 members of the faculty and staff of the Jagiellonian University in Kraków were arrested and sent to Sachsenhausen and Dachau concentration camps.<sup>74</sup> In a note dated

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Polish officers might have been decided at this conference); *but see* KATYN: A CRIME WITHOUT PUNISHMENT 143 (Anna M. Cienciala, Natalia S. Lebedeva & Wojciech Materski eds., Marian Schwartz, Anna M. Cienciala & Maia A. Kipp trans., 2007) (referencing historians' dispute regarding the German-Soviet meetings and the Katyn massacre, pointing to the lack of documentary evidence confirming any direct cooperation on this issue).

<sup>68</sup> Norman Davies is one such historian. *See* 2 NORMAN DAVIES, GOD'S PLAYGROUND: A HISTORY OF POLAND 329 (2005).

<sup>69</sup> *Id.*

<sup>70</sup> Self-defense units called *Selbstschutz* consisted of paramilitary groups formed by the German minority in Poland.

Klaus-Peter Friedrich, *Collaboration in a "Land Without a Quisling": Patterns of Cooperation with the Nazi German Occupation Regime in Poland during World War II*, 64 SLAVIC REV. 711, 725, 727 (2005).

<sup>71</sup> SZYMON DATNER, 55 DNI WEHRMACHTU W POLSCE [55 DAYS: WEHRMACHT IN POLAND] 619 (1967).

<sup>72</sup> *See* RICHARD RHODES, MASTERS OF DEATH: THE SS-EINSATZGRUPPEN AND THE INVENTION OF THE HOLOCAUST 5 (2002).

<sup>73</sup> ANNA MEIER, DIE INTELLIGENZAKTION: DIE VERNICHTUNG DER POLNISCHEN OBERSCHICHT IM GAU DANZIG-WESTPREUBEN [THE INTELLIGENZAKTION: THE DESTRUCTION OF THE POLISH ELITE IN THE GAU DANZIG-WEST PRUSSIA] (2008).

<sup>74</sup> *See* JAN S. PRYBYLA, WHEN ANGELS WEPT 134 (2010).

September 12, 1939, on a discussion with Hitler regarding Poland, General Erwin Lahousen wrote down that the goal of mass executions of the Polish intelligentsia was “national extermination.”<sup>75</sup>

As the Germans were hunting down the Polish elites on the western side of the Ribbentrop-Molotov line, in the east, squads of special NKVD operational groups had followed the Soviet Army into Poland. The NKVD-CheKa groups furthering “vengeance of the oppressed classes” were cleansing ethnic Poles, including intelligentsia, clergy, and nobility, from the Soviet half of Poland.<sup>76</sup> These special operational NKVD units, formed in accordance with NKVD order dated September 8, 1939, consisted of operational officers of the central and regional organs of NKVD and political-operational employees of the border guard for special tasks. Deputy People’s Commissar Merkulov coordinated activities of these special operational forces with the military formations of the Red Army in Ukraine while Bochkov coordinated this cooperation in Belarus.<sup>77</sup> According to NKVD documents, during the first two months of operations these NKVD special operational groups arrested on the conquered Polish territory 11,817 persons, accusing them of espionage, diversionary and anti-Soviet activities, terrorism, banditry, sabotage and other crimes.<sup>78</sup> Many of them were killed either during interrogations or later pursuant to March 5, 1940 Execution Order.

The mass killing campaigns of Polish nationals on both sides of the Ribbentrop-Molotov partition line focused on the same categories of people. All those who could resist the occupation of Poland as well as those who fought for Poland’s independence between 1918 and 1920 were at the top of the Nazi and Soviet death lists.

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<sup>75</sup> ZBRODNIA KATYŃSKA W KRĘGU PRAWDY I KLAMSTWA [THE KATYN MASSACRE: IN THE CIRCLE OF TRUTH AND LIES] 63 (Sławomir Kalbarczyk ed., 2010).

<sup>76</sup> *Id.*

<sup>77</sup> The NKVD operational groups were responsible for conducting mass arrests and round-ups, investigations, and preparation of conscript lists for future arrests and deportations. These groups were also responsible for the formation on the Polish territory of the Soviet administration including setting up NKVD branches in all major Polish cities. NKVD special operational groups were taking over state buildings, office, banks, newspapers, and publishing house, confiscated documentation of the Polish Government, its archives and valuables. *See generally* 1–2 POLSKIE PODZIEMIE NA TERENACH ZACHODNIEJ UKRAINY I ZACHODNIEJ BIALORUSI W LATACH 1939–1941 [THE POLISH UNDERGROUND IN AREAS OF WESTERN UKRAINE AND WESTERN BELARUS IN THE YEARS 1939–1941] (Wiktor Komogorow et al. eds., 2001).

<sup>78</sup> NKVD document dated November 27, 1939. Among arrested Polish citizens were Polish officers, member of Polish resistance, refugees from Western Poland, members of Polish police and gendarmerie, merchant, landowners, public employees, Ukrainians nationals, members of various Polish political parties. *See id.*

The mass killings of the Polish elites on both sides of the Ribbentrop-Molotov line were supplemented by the forced removal of the Polish populations from the conquered Polish territory. Lands taken over by the Germans were divided into western territories, which were outright incorporated to the Third Reich, and the area around Warsaw, which was designated as the General Government.<sup>79</sup> Ethnic Poles from the area incorporated to the Reich were expelled from their homes and either sent to slave labor camps into the Old Reich or deported to the General Government that served as the German equivalent of the Soviet Siberia.<sup>80</sup> In all, approximately one million Polish citizens were forcibly removed from the Polish territories annexed to the Third Reich to make room for the German settlers.<sup>81</sup>

The Polish territory taken over by the Soviets was either directly incorporated to the Soviet Union or transferred to Lithuania, leaving no residual Poland. The Polish elites in Soviet-controlled territory were arrested and killed, while the entire families of ethnic Poles were expelled from their homes and shipped to the wilderness of Siberia or deserts of Kazakhstan.

Both killings and deportations were implemented by Nazi Germany and the Soviet Union in accordance with the proscription lists prepared by their people on the ground. In the case of Germany, the German minority in Poland led the effort to identify their Polish neighbors for murder or expulsion. In the Soviet Union various minorities cooperated with the communist organizations in compiling lists of undesirable Poles and their sympathizers.

The Soviet deportation lists were prepared in accordance with Beria's instructions implementing the Deportation Resolution of the Soviet Council of People's Commissars (Sovnarkom) dated December 5, 1939.<sup>82</sup> To implement this resolution, Beria issued a number of orders and instructions. For example, on December 29, 1939, he issued a special instruction on the order of deportations from western Ukraine and Belorussia.<sup>83</sup> Another regulation on special penal camps and procedures of employment for deportees soon followed.<sup>84</sup> All these documents formed the basis for the mass deportation action that began the night of February 10,

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<sup>79</sup> SNYDER, *supra* note 18, at 127–28.

<sup>80</sup> See SNYDER, *supra* note 18, at 127–28 (discussing the use of the General Government territory as a “dumping ground for unwanted people”).

<sup>81</sup> PIOTROWSKI, *supra* note 58, at 22.

<sup>82</sup> KATHERINE R. JOLLUCK, EXILE AND IDENTITY 14 (2002). Beria appointed Tsanova and Serov to prepare lists of families to be deported in early January. *Id.*

<sup>83</sup> See *id.* at 14–16.

<sup>84</sup> See *id.* at 16.

1940, expelling Polish citizens from their homes in Poland to the wilderness of Siberia.

While meetings between German and Soviet high officials were taking place in Zakopane and Kraków in February and March of 1940, in Berlin and Moscow critical decisions were made with respect to Polish nationals. One such decision was made by Hitler on March 2, 1940, to exterminate people regarded as Polish leaders.<sup>85</sup> Known as the AB Aktion (Extraordinary Pacification Action), this mass killing operation was aimed at eliminating the leadership elements of the Polish society in the German-occupied part of Poland.<sup>86</sup> About 7,000 leaders and professors, teachers and priests considered suspects of criminal activity were subsequently massacred at various locations throughout Nazi-occupied Poland.<sup>87</sup> By the summer of 1940, more than 61,000 Polish activists, intelligentsia, scholars, actors, officers of the Polish Army, and other leaders were murdered.<sup>88</sup>

At the time when Hitler ordered the AB Aktion, Stalin and his Politburo made a decision to execute by shooting 25,700 Polish POWs and persons arrested on the conquered Polish territory, mostly officers of the Polish Army and local leaders.<sup>89</sup> This order to murder 25,700 Poles, prepared by Beria, signed by Stalin, and approved by the Soviet Politburo on March 5, 1940, was most likely made between February 28 and March 2, 1940.<sup>90</sup> Thus, Stalin's decision to murder 25,700 Polish officers held in POW camps and prisons was made at exactly the same time as Hitler's decision to authorize AB Aktion to exterminate the Polish intelligentsia on the German side of the Ribbentrop-Molotov partition line.

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<sup>85</sup> SNYDER, *supra* note 18, at 146–47. Hitler directed Hans Frank, the Governor of the General Government, that “leadership elements” had to be “eliminated.” *Id.* The list Frank drew up included the educated, clergy, and politically active individuals. *Id.*

<sup>86</sup> *Id.* at 147. Special *Einsatzgruppen* formations with some help from regular *Wehrmacht* units took part in Operation Tannenberg in the first two months of German operations in Poland. *See id.* at 126; PIOTROWSKI, *supra* note 58, at 23. In addition, a special formation was created from the German minority living in Poland called *Selbstschutz*, whose members had trained in Germany before the war in diversion and guerilla fighting. The formation was responsible for many massacres and due to its bad reputation was dissolved by Nazi authorities after the September Campaign. DATNER, *supra* note 71, at 108–22. The AB Extraordinary Pacification Action that began on March 30, 1940 was viewed as continuation of the Intelligentsia Action from fall 1939. *See* SNYDER, *supra* note 18, at 147.

<sup>87</sup> *See* RICHARD C. LUKAS, *THE FORGOTTEN HOLOCAUST* 9 (1997).

<sup>88</sup> BOGUSIA J. WOJCIECHOWSKA, *WAITING TO BE HEARD* 22 (2009) (referring to the *Sonderfahndungsbuch Polen* (Special Prosecution Book Poland) listing 61,000 Polish leaders).

<sup>89</sup> *See* SNYDER, *supra* note 18, at 147 (explaining that the German's AB Aktion was announced on March 2, three days before the Soviet's March 5 decision).

<sup>90</sup> *See* KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 475 n.290 (explaining the confusion over the dates and bringing Natalia Lebedeva's conclusion of the date coming earlier than March 5, 1940 but before February 28, 1940).

*D. Katyn Killings*

The best-known Katyn forest massacre represents only one of many mass murder sites of the Polish citizens conducted throughout the Soviet Union pursuant to the execution order issued by the Soviet Politburo on March 5, 1940 (March 5th Execution Order).<sup>91</sup> Altogether, 25,700 Polish nationals were condemned to death by this order. They represented two distinct groups. The first group consisted of 14,700 Polish POWs taken from the battlefield; mainly officers, policemen and border guards who were held in three special POW camps in Kozielsk, Starobelsk, and Ostashkov.<sup>92</sup> The second group of condemned men included 11,000 Polish citizens arrested on the conquered Polish territory in the aftermath of the Soviet invasion, mostly local leaders and members of the Polish administration.<sup>93</sup> Killings of the rank and file members of the Polish Army sent to the slave labor camps has not even been touched by the historians. According to the Russian Memorial Society, 800 burial sites had been catalogued and “what appeared to be remains of Poles” had been found in almost all of them.<sup>94</sup>

While mass graves from the Kozielsk camp were discovered in the Katyn forest in the spring of 1943 by the German Army advancing towards Moscow, the burial sites of the Polish POWs from Starobelsk and Ostashkov camps became known fifty years later.<sup>95</sup> Bodies of the Polish officers held in the Starobelsk camp were found in mass graves in Piatichatki near Kharkov,<sup>96</sup> while bodies of those held in the Ostashkov camp were identified in Mednoye near Kalinin/Tver.<sup>97</sup>

Executions of Ostashkov prisoners were conducted by a special operational force under the command of Stalin’s chief executioner, Major

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<sup>91</sup> For a translated copy of the Execution Order, see Beria Memorandum to Joseph Stalin Proposing the Execution of the Polish Officers (Mar. 5, 1940), *in* KATYN; A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 118–20.

<sup>92</sup> See PIOTROWSKI, *supra* note 58, at 15. On December 3, 1939, the Soviet Politburo issued an order to arrest all registered regular officers of the former Polish Army. See Politburo Decision to Arrest All Registered Regular Officers of the Former Polish Army (Dec. 3, 1939), *in* KATYN; A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 89. They were condemned to death by March 5, 1940 Execution Order. *Id.* at 118–20.

<sup>93</sup> See PIOTROWSKI, *supra* note 58, at 15.

<sup>94</sup> PAUL, *supra* note 64, at 351.

<sup>95</sup> See *id.* at 348–49 (explaining that forty-seven years after the first mass graves were found the Soviet Union acknowledged the prisoners at the Three Special Camps, and the construction of memorials at them).

<sup>96</sup> SANFORD, *supra* note 2, at 99.

<sup>97</sup> It is likely that the video footage from the executions of the Polish officers exists. There are reports that such a movie was shown near the end of the war for training purposes. George Sanford, *The Katyn Massacre and Polish-Soviet Relations, 1941–43*, 41 J. CONTEMP. HIST. 95, 95 (2006).

Vasil Blochin, whom Stalin sent from Moscow to Kalinin specifically for this purpose.<sup>98</sup> Together with Andrej Rubanov from Kalinin NKVD, Blochin developed a detailed plan of execution for the Ostashkov prisoners and fully implemented it.<sup>99</sup> To minimize resistance, he made sure that the victims did not suspect anything. In March of 1991, Chief of Kalinin NKVD, Dmitri Tokariev testified before the Russian prosecutor on the details of these executions.<sup>100</sup> Tokariev recalled that Blochin was amused when asked about grave diggers. “We don’t need grave diggers, we need heavy equipment,” he replied.<sup>101</sup> Indeed the graves in Mednoye were four to six meters deep. Twenty-three mass graves with about 250 bodies each were identified in Mednoye for a total of about 5,750 victims; not enough to account for the total number of murdered Ostashkov prisoners known to be 6,314.<sup>102</sup> The first executions of the Ostashkov prisoners began on April 5, 1940. Tokariev recalled that day as follows:

Blochin put on his special clothing: brown leather cap, long leather protective garment, brown leather gloves with cuffs above elbows. It made a tremendous impact on me: I recognized the executioner!<sup>103</sup>

Blochin and his team worked with great precision and incredible efficiency, killing 250 Ostashkov prisoners per day—extinguishing one life every two minutes. Tokariev observed that “it was a true industrial undertaking.”<sup>104</sup>

Bodies of the Polish POWs from the Starobelsk camp were discovered at mass burial sites in Piatichatki, near Kharkov.<sup>105</sup> After the demise of the Soviet Union, Ukraine made available to Poland documents related to the Piatichatki mass graves. This documentation revealed that on June 5, 1969, General Piotr Fieszczenko reported to Moscow<sup>106</sup> that villagers of Piatichatki near Kharkov discovered mass graves in the nearby forest. One grave was opened and buttons with the Polish eagle emblem were found. General Fieszczenko reported that people who learned about this discovery were saying that the enemies from the war were buried there. He also reported that in the event further rumors would spread as to the

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<sup>98</sup> DONALD RAYFIELD, *STALIN AND HIS HANGMEN* 378–79 (2004).

<sup>99</sup> *Id.*

<sup>100</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 124–25.

<sup>101</sup> *Id.* at 126.

<sup>102</sup> *Id.* at 440.

<sup>103</sup> *See id.* at 124 (describing Blochin’s special uniform as a leather cap, apron and gloves that extended beyond the elbow).

<sup>104</sup> *Id.* at 124–25 (describing the shooting and killing of the prisoners).

<sup>105</sup> WESLEY ADAMCZYK, *WHEN GOD LOOKED THE OTHER WAY: AN ODYSSEY OF WAR, EXILE, AND REDEMPTION* 231 (2004).

<sup>106</sup> ZBRODZIA KATYŃSKA W KRĘGU PRAWDY I KLANSTWA, *supra* note 75, at 228.

character of these graves, he would use disinformation measures.<sup>107</sup> Later Fieszczenko reported that 112 mass graves containing about 13,000 bodies were identified in the Piatichatki forest. He then recommended that these mass graves be immediately destroyed by using appropriate chemicals and heavy equipment.<sup>108</sup> The destruction of the mass graves involved grinding of the bones with heavy equipment. It was conducted over the four-year period under the guise of preparing the area for the construction of a KGB facility.<sup>109</sup>

The burial places of the second category of victims—the Polish civilians arrested after the invasion—remain mostly unknown. This category of victims included Polish citizens captured or arrested by the NKVD Special Forces in the months following the Soviet invasion of Poland. Most of the bodies of these civilians have not been found or identified. According to internal Soviet documents, at least 7,305 Polish citizens were murdered in this category.<sup>110</sup> According to the documents released in 1994 by Ukraine, 3,435 Polish civilians were murdered by the Ukrainian NKVD in the dungeons of NKVD in Kiev, Kharkov and Cherson. The victims are buried in various still-undisclosed locations; one of them being Bykovnia near Kiev.<sup>111</sup>

It is believed that between 3,870 and 4,465 Polish prisoners were murdered by the Belorussian NKVD but no list of victims murdered in Belorussia has been found or released. It is believed that some of the Polish victims from the so-called “Belarusian Katyn List” were murdered in the prisons of NKVD in Minsk and buried in Kurapaty, on the outskirts of Minsk.<sup>112</sup>

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<sup>107</sup> *Id.* at 231–36 (reproducing a report of a group leader of KGB Kharkov Region, General Fieszczenko, to Chairman of KGB USRS on the discovery in the Piatichatki forest near Kharkov of the burial sites of the murdered Polish officers).

<sup>108</sup> *Id.* at 228

<sup>109</sup> *Id.* at 235.

<sup>110</sup> A note by Shelepin to Khrushchev dated March 3, 1959, with recommendation to destroy the documents of the operation sanctioned by the Politburo on March 5, 1940 is reproduced in *KATYN: A CRIME WITHOUT PUNISHMENT*, *supra* note 67, at 332.

<sup>111</sup> *Arrangement of Polish Cemetery of NKVD Victims in Bykovnia May Start in 2011*, UKRAINIANS.CA (Jan. 27, 2011), <http://www.ukrainians.ca/hot/37563-arrangement-of-polish-cemetery-of-nkvd-victims-in-bykovnia-may-start-in-2011.html>.

<sup>112</sup> *KATYN: A CRIME WITHOUT PUNISHMENT*, *supra* note 67, at 136 (explaining the lack of details regarding prisoners in the NKVD prisons of the western region of the Ukraine and Belorussia, many of whom were shot and buried in unknown graves); *see also Belarusian 'Katyn List' Does Exist, Says a Belarusian Historian*, EASTERN PARTNERSHIP COMMUNITY (Jan. 17, 2012), <http://www.easternpartnership.org/daily-news/2012-01-17/belarusian-katyn-list-does-exist-says-belarusian-historian> (explaining that the “Katyn list” contains 3,870 names of murdered Polish citizens).

*E. Mass Deportations from Soviet-Controlled Poland*

On March 2, 1940, at exactly the same time as the decision to execute Polish POWs was made, the Soviet Politburo issued a resolution on guarding state borders, whereby the NKVD was directed to deport to Kazakhstan all families of repressed Polish citizens and POWs.<sup>113</sup> This resolution targeted for repression mostly wives, children, and parents of the men sentenced to death by the March 5th Execution Order.

On March 7, 1940, two days after issuing the March 5th Execution Order, Beria issued a directive to Soprunenko, head of the NKVD Administration for POWs, to prepare the compilation of precise lists of soldiers held in special POW camps, including the composition of the family of each POW and their exact addresses. The directive specified that family members are: the wife and children, as well as parents, brothers and sisters, if they reside with the family of the POW.<sup>114</sup> The directive was supplemented by the “Record Form” to be used to collect detailed addresses of the family members of the Polish POWs.<sup>115</sup>

On the same day Beria issued a directive to NKVD Chiefs Serov in Ukraine and Canawa in Belorussia on deportation to Kazakhstan of the families of the POWs and prisoners. In this directive Beria stated that all members of the families of former officers of the Polish Army, policeman, prison guards, gendarmerie, intelligence servicemen, former landowners, businessmen, and higher state employees of the former Polish state apparatus who were held in the POW camps and in prisons in western parts of Ukraine and Byelorussia must be deported by April 15 to the regions of Kazakhstan for a period of ten years. To accomplish this task, Beria ordered:

1. Immediately begin and finish by March 30 of this year the preparation, according to the enclosed form, registration of all family members of the above listed categories of prisoners-of-war and persons arrested. Note: Family members include by definition wives, children, as well as parents, brothers and sisters if they happen to live in the same location as the rest of the family of the POW's or prisoners. . . .
5. c) In all Western regions of Ukraine and Belarus, the operation is to be carried out in one day beginning at dawn. You will be informed of the day of the operation separately. . . .
5. e) All property and businesses of the deported families are to be confiscated. The family has the right to carry with them personal items not

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<sup>113</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 114.

<sup>114</sup> *Id.* at 149–50.

<sup>115</sup> *Id.* at 150.

exceeding a total of 100kg per person (including children) to the deportation destination.<sup>116</sup>

Accordingly, just before sending the Poles to their deaths, the NKVD collected detailed information about their family members in order to expel their women and children from homes in occupied Poland to the desert of Kazakhstan.

On March 20, 1940, Beria issued yet another directive on the resettlement in Kazakhstan of Polish POW families “to be deported from western oblasts of Ukraine and Belorussia.”<sup>117</sup> This directive was addressed to Major Semyon Burdakov, Commissar of Internal Affairs of the Kazakh Soviet Socialist Republic (SSR).<sup>118</sup> It alerted Burdakov that 25,000 families of the “repressed former officers of the Polish army, police, prison guards, gendarmes, intelligence agents, former landowners, manufacturers and prominent officials of the former Polish apparatus” were subject to deportation to the northern oblasts of Kazakhstan.<sup>119</sup> Beria estimated that the indicative number of these family members was approximately 75,000 to 100,000 people,<sup>120</sup> implying three to four members per family. Contemporary research indicates that deported Polish families consisted on average of five to seven members.<sup>121</sup>

On the night of April 12-13, thousands of people in Soviet-occupied Poland were disturbed in their sleep, forced to undergo brutal searches, randomly allowed to gather a few belongings, then transported to train stations, locked inside cargo cars, and sent eastward, across the Polish border to Kazakhstan. According to various sources, between 60,000 to 320,000 Polish civilians were forcibly removed from their homes during these two nights and sent to the deserts of Kazakhstan. Women and children represented 80% of these deportees.<sup>122</sup>

The April wave of deportations was already the second such mass deportation action directed at the Polish population. The first such wave of deportations took place on February 10, 1940 and affected between 140,000 and 220,000 people, mostly representatives of the Polish administration,

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<sup>116</sup> 1 KATYN DOKUMENTY ZBRODNI 43–46 (Rudolf G. Pichoja & Aleksander Gieysztor eds., 1995).

<sup>117</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 153.

<sup>118</sup> *Id.*

<sup>119</sup> Beria’s Directive to the Commissar of Internal Affairs, Kazakh SSR, GB Senior Major Semyon Burdakov on the Resettlement in Kazakhstan of Polish POW Families to be Deported from the Western Oblasts of Ukraine and Belorussia; Moscow, March 20 1940. *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See generally *Survivor Testimonies*, KRESY SIBERIA VIRTUAL MUSEUM, <http://kresy-siberia.org/hot/?lang=en> (last visited June 11, 2012).

<sup>122</sup> See JOLLUCK, *supra* note 82, at 12.

military families, railroad workers and forestry workers. These people were awakened in the middle of the night, put on sleds, shipped to the railroad stations, loaded into cattle trains, and sent on a three to six week-long journey to Siberia.<sup>123</sup> As reported, 110 trains took part in this operation, each containing between 1,000 and 2,000 deportees. The weather at the time was severe; temperatures were recorded as low as negative 40°C.<sup>124</sup> It is believed that the death rate in this first wave of mass deportations was the highest. The Polish citizens from the first wave of deportations were sent to penal camps in Siberia pursuant to the December 5, 1939 Resolution of the Politburo.<sup>125</sup>

The third wave of deportations took place on June 29, 1940, and involved between 80,000 and 240,000 people. This deportation impacted many refugees from western Poland occupied by Nazi Germany. The majority of these refugees were of Jewish origin. In addition, small merchants, professionals, and individuals who refused to accept the Soviet passport were subject to this deportation.<sup>126</sup>

The fourth wave of deportations took place one year later, in May and June of 1941. This deportation action was implemented in accordance with Resolution No. 1299-526 of the Central Committee of the Communist Party<sup>127</sup> which called for cleansing of the regions incorporated to the Soviet Union in 1939–1940. This wave of deportations also affected the Baltic Republics, Northern Bukovina and Bessarabia, areas which had been incorporated to the Soviet Union in the summer of 1940.

On the Polish territory this fourth wave of deportations impacted people who successfully evaded previous deportations: mostly intelligentsia, military families, public officials and civil servants. On the Polish territory incorporated to the Ukrainian Socialist Soviet Republic the first transports of the fourth wave of mass deportations of Polish citizens left on May 22, 1941, while in Belorussia the fourth wave of deportations began on the night of June 19.<sup>128</sup> This deportation coincided with the

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<sup>123</sup> See *id.* at 9.

<sup>124</sup> KUŚNIERZ, *supra* note 20, at 69.

<sup>125</sup> See JOLLUCK, *supra* note 82, at 24, 34, 118; see also Nicolas Werth, *Mass Crimes Under Stalin (1930-1953)*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE (Mar. 14, 2008), <http://www.massviolence.org/mass-crimes-under-stalin-1930-1953>.

<sup>126</sup> JOLLUCK, *supra* note 82, at 15. Similarly to the first group of deportees, this group of deportees called “spiecpieriesielieny-bezhentsy” was considered as dangerous to the Soviet power and therefore was sent to penal camps mostly in Siberia. *Id.*

<sup>127</sup> See STANISLAW CIESIELSKI ET AL., MASOWE DEPORTACJE RADZIECKIE W OKRESIE II WOJNY ŚWIATOWEJ 65 (1994) (explaining that this was a joint resolution).

<sup>128</sup> See *Soviet Deportations from the Baltic States*, CHILDREN OF THE ICE, <http://www.childrenoftheice.eu/en/soviet-deportations-baltic-states> (last visited June 11, 2012); Benjamin B. Fischer, *The Katyn Controversy: Stalin's Killing Field*, CIA, <https://www.cia.gov/>

German attack on the Soviet Union. As the Polish people were shipped eastward, the German army crossed the Ribbentrop-Molotov line and began its attack on the Soviet Union. The Soviet railway system became the primary target for the German Luftwaffe. Consequently, deportation trains moving eastward with Polish expellees became the easy prey.<sup>129</sup> As a result of the Luftwaffe bombardment of the deportation trains, many expellees lost their lives. It is estimated that this fourth wave of deportations affected up to 300,000 people.<sup>130</sup> Many of them lost their lives as a result of Luftwaffe attacks.

Comparing Deportation Order issued by the People's Commissar for the Interior Affairs of the Soviet Lithuania dated November 28, 1940<sup>131</sup> with the deportations of the Polish citizens conducted in Ukraine and Belorussia between February 1940 and June of 1941, the following observation was made in the U.S. intelligence report prepared in London in 1943:

On carefully examining the categories of deportees it will be seen that they include the majority of persons active in political, social and even economic life. The lists for Lithuania occupied by the Soviets in 1940 included about 700,000 out of a total population of three million. The extent of this action in South-Eastern Poland, Polesie and the Grodno district exceeded the limits laid down in the order we have just quoted. The following were added to the list of socially dangerous elements: university professors, teachers, doctors, engineers, the forestry service, well-to-do peasants, and even poor peasants and certain categories of workmen, the families of soldiers of all ranks who went abroad, refugees from other parts of Poland, and "speculators," which was a term applied to small traders and merchants. Thus the registers included three to four million people out of a total population of thirteen million.

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library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art6.html (last updated June 27, 2008).

<sup>129</sup> See JAMES S. CORUM & RICHARD R. MULLER, *THE LUFTWAFFE'S WAY OF WAR: GERMAN AIR FORCE DOCTRINE, 1911-1945*, at 8, 230-31 (1998) (discussing the war against the Soviet railway system).

<sup>130</sup> See *Polacy na Syberii*, INST. NAT'L REMEMBRANCE, [http://www.ipn.gov.pl/ftp/wystawy/polacy\\_na\\_syberii/html/wstep.html](http://www.ipn.gov.pl/ftp/wystawy/polacy_na_syberii/html/wstep.html) (last visited June 11, 2012); see also JOLLUCK, *supra* note 82, at 13 (expressing the deportation of 240,000 Polish in the fourth wave of mass exile). Termed as "exiled settlers" (*sylno-poselentsy*), the June 1941 group was sentenced to outlying places of exile under NKVD supervision for twenty years. Unlike the previous deportees, they were given the rights of free Soviet citizens, including a choice of job and place to live, and thus occupied a status between that of special settler of the first and third deportations and administratively exiled people from the second deportation. *Id.* at 16.

<sup>131</sup> *Strictly Secret Order of the People's Commissar Serov for the Interior of Lithuanian SSR in 1940, Order No. 0054*, 34 LITHUANIAN Q. J. ARTS & SCI., Winter 1998 (designating policemen, citizen of foreign countries, priests, former noblemen and merchants among others were targeted for deportation in Lithuania).

The registrations and deportations that followed extended also over the families of the persons enumerated [sic] above. . . . Thus the register of persons to be deported included even relatively distant connections, sometimes even friends and collaborators, etc. Hence the mass scale of the deportations and the large number of women and children they affected.<sup>132</sup>

The Polish Government in London estimated that the total number of Polish citizens transported against their will from the Polish territory under Soviet occupation into the U.S.S.R. during the twenty-one-month period of the Soviet-German cooperation was greater than 1.8 million.<sup>133</sup> These estimates included the following numbers for mass deportations: 220,000 deported in the February 10 wave; 320,000 deported in the April 13th wave, 240,000 deported in May–July 1940, and 300,000 deported in May–June 1941. These estimates also included 250,000 people arrested in the first months of the occupation and 230,000 Polish citizens forced to serve in the Red Army. About 250,000 Polish citizens were taken as prisoners-of-war.<sup>134</sup> Some of them were released, but most of those released were later captured and either imprisoned, sent to gulags, or forced to serve in the Red Army.<sup>135</sup>

After the collapse of the Soviet Union, some NKVD documents were declassified. Using lists of NKVD convoy troops responsible for transporting Polish deportees and lists of institutions charged with receiving and placement of the Polish deportees, Alexander Guryanov concluded that

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<sup>132</sup> THE POLISH DEPORTEES OF WORLD WAR II: RECOLLECTIONS OF REMOVAL TO THE SOVIET UNION AND DISPERSAL THROUGHOUT THE WORLD 217 (Tadeusz Piotrowski ed., 2004).

<sup>133</sup> See POLISH EMBASSY IN WASHINGTON, POLISH-SOVIET RELATIONS: 1918–1943, at 17–21 (1943) [hereinafter POLISH-SOVIET RELATIONS] (providing the estimate of number of Polish deported exceeding one million based on figures of deportation by region); BOHDAN PODOLSKI, POLSKA WSCHODNIA W 1939–1940, at Doc. No. 62c (Hoover Inst. Archives); see also 3 KOMISJA HISTORYCZNA POLSKIEGO SZTABU GŁÓWNEGO, POLSKIE SILE ZBROJNE W DRUGIEJ WOJNIE ŚWIATOWEJ: ARMIA KRAJOWA 33–34 (1950). According to the Polish Historical Commission of the General Command of the Polish Armed Forces, 1,200,000 Polish citizens were expelled from the Polish lands to the Soviet Far East during all four waves of mass deportation actions conducted between 1939 and 1941 by the Soviet Union on the Polish territory under Soviet occupation. *Id.* See generally KUŚNIERZ, *supra* note 20.

<sup>134</sup> 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]. According to Polish sources, the population of Poland under Soviet control decreased by at least 1.7 million during the first twenty months of the Soviet occupation. These estimates were made from material gathered and analyzed by the Polish Army formed in the U.S.S.R. in 1941, from the testimonies of Polish citizens released from Soviet detention, and from information collected by the Polish Embassy and social welfare delegates who provided relief to the amnestied Poles between February 1942 and January 1943. JOLLUCK, *supra* note 82, at 10.

<sup>135</sup> Decision to Commence Investigation, *supra* note 134.

the total number of deportees affected by four waves of mass deportations was in the range of 320,000.<sup>136</sup>

Calculations based on declassified NKVD documents raise many issues, the most obvious being whether the declassified documents represent a complete set of deportation records. Unfortunately, the process of declassification was conducted in a highly selective manner. Also, the released records do not reflect deaths that occurred during the several weeks of the transportation process since they were made at the receiving end of the deportation journey. Furthermore, these numbers do not correspond with the Soviets' own reports, made in connection with the 1942 evacuations of the Polish citizens to Iran or with the numbers of Polish citizens remaining in the U.S.S.R. as of May 1944, or with records of the Polish citizens returning from the U.S.S.R. after the war.<sup>137</sup>

Mass deportations were conducted simultaneously with mass arrests of the "enemies of the Soviet state." In March and April of 1940, at least 7,305 officers of the Polish Army and community leaders were selected from all the Polish prisoners held in the Soviet prisons and exterminated on the authority of the March 5th Execution Orders. However, the majority of the Polish prisoners were sentenced to hard labor and shipped to slave labor camps in Siberia. Furthermore, small batches of several dozens of people were continually being banished to the interior of the U.S.S.R. throughout

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<sup>136</sup> Compare JOLLUCK, *supra* note 82, at 10, 13, with *Deportacje Polaków do ZSRR: Liczba deportowanych* [The Deportations of Poles to the U.S.S.R.: Number of Deportees], DZIEJE NAJNOWSZE, available at <http://www.sciesielski.republika.pl/sov-dep/polacy/index.html> (last visited June 11, 2012) (noting revised estimates of 320,000 Polish deportation in the four waves compared to estimates of 309,000 to 327,000). Similarly, Albin Glowacki who reviewed the released documents stated that according to these documents "the mass deportations of the years 1940-41 encompassed approximately 325,000 Polish citizens." These numbers are closer to the numbers given to the Polish ambassador by Deputy Commissar of Foreign Affairs Andrei Vyshinsky in 1941, of a maximum of 400,000. JOLLUCK, *supra* note 82, at 10.

<sup>137</sup> See *Deportacje Polaków do ZSRR*, *supra* note 136; see also JOLLUCK, *supra* note 82, at 10. Some estimate of deportations and persecutions are as follows:

- a) On February 10, 1940, people from rural areas were sent to Siberia in 110 cattle trains.
- b) On April 13, 1940, around 300,000 people, mostly women & children were sent to Kazakhstan and Altai Kraj in 160 cattle trains.
- c) In June and July 1940, around 400,000 people were sent to camps in Archangelsk, Sverdlovsk, Novosibirsk.
- d) In June 1941, around 280,000 people were deported to various part of the U.S.S.R. The Polish Government estimated that some 500,000 Poles had been arrested by the Soviets between 1939 and 1941, mostly the government officials, judges, teachers, lawyers, intellectuals, writers, etc. Thus, at least 1.7 million Poles were in captivity in the Soviet Union between 1939 and 1941. Ryszard Antolak, *Iran and the Polish Exodus from Russia 1942*, PARS TIMES, [http://www.parstimes.com/history/polish\\_refuge/es/exodus\\_russia.html](http://www.parstimes.com/history/polish_refuge/es/exodus_russia.html) (last visited June 11, 2012).

the entire 21 month period.<sup>138</sup> The mortality rate in these prison-camps was estimated between 30% and 70%, with 50% per year considered average.<sup>139</sup>

*F. Exodus from the Soviet Union*

As a result of the German attack on the Soviet Union on June 22, 1941, Stalin decided to join the Allied coalition. In this ironic twist of history, the Polish Government in London suddenly became a Soviet ally. Strongly encouraged by Great Britain, the Polish Government entered into negotiations with the Soviet Union and on July 30, 1942 Polish Prime Minister Wladyslaw Sikorski and Russian Ambassador in London Ivan Mayski signed a cooperation agreement known as the Sikorski-Mayski Agreement.<sup>140</sup> In this cooperation agreement, the Soviet Government declared that “the Soviet-German treaties of 1939 as to territorial changes in Poland lost their validity.”<sup>141</sup> Furthermore, the governments of Poland and the Soviet Union agreed to render support to each other in the war against “Hitlerite” Germany.<sup>142</sup> Also, the Soviet Union consented to the formation of the Polish Army on its territory, and officially granted “amnesty” to all Polish citizens “detained on the Soviet territory either as prisoners-of-war or on other sufficient grounds.”<sup>143</sup> The only lasting result of the Sikorski-Mayski Agreement was the return to freedom of at least one million Polish citizens repressed in the Soviet Union. All other provisions of the Sikorski-Mayski Agreement were violated by the Soviet Union as their confidence in resisting the German attack grew. Once the Soviet Army reentered the Polish lands on its way to Berlin in 1944, the Soviets recaptured the eastern half of Poland from the Germans and never returned it.

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<sup>138</sup> THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 4.

<sup>139</sup> See KUŚNIERZ, *supra* note 20, 80–81, 86 (noting the mortality rate may be skewed due to Soviet authorities minimizing the figure of Polish nationals detained by 25%). Norman Davies estimates that the mortality rate in the deportation settlements was about 50% per year. See 2 DAVIES, *supra* note 68, 334 (1982); see also KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 84–86 (showing that unsanitary conditions, lack of adequate resources and starvation affected the mortality rate); *Director’s Statement, THE OFFICER’S WIFE* (Goats Hill 2010), available at <http://www.theofficerswifemovie.com/DirectorsStatement.htm> (showing Katyn as an example that the mortality rate among Polish nationals deported may be higher than reported due to the withholding of documents).

<sup>140</sup> POLISH-SOVIET RELATIONS, *supra* note 133, at 107 (presenting the Polish-Soviet Union Agreement, which is commonly referred to as the Sikorski-Mayski Agreement)

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

As a result of the Sikorski-Mayski Agreement, on August 12, 1941, the Soviet Union officially granted the so-called “amnesty” to all Polish citizens detained in the Soviet Union.<sup>144</sup> Despite extensive efforts by the Soviet government to prevent the departure of the Poles from detention camps by offering them incentives such as jobs and housing, the so-called “Polish amnesty” set in motion a mass exodus of the entire Polish settlements from remote gulag and labor sites located mostly in the north towards the south.<sup>145</sup> It was there that the Polish Army was to be formed in order to reach the protection of the Polish Government. Polish citizens, wherever they found themselves, undertook desperate efforts to travel towards the south in hope of finding shelter under the umbrella of the Polish Army. Military families were given priority in this process but every Polish citizen was desperate to reach the Polish Army, considering it to be their only safe heaven and hope for survival.

In October 1941, Beria reported to Stalin that out of 391,575 Polish citizens kept as of September 27, 1941 in various detention zones and deportation regions, 50,295 were released from prisons and camps, 26,297 were released from POW camps and 265,248 were released from special settlements and deportation regions.<sup>146</sup> In October 1941, Beria also reported that a significant group of the released Polish citizens declared their desire to join the Polish Army. For instance, in the Komi region, 9,000 individuals signed up for the Polish Army, while 7,000 headed for the formation centers of the Polish Army in the south.<sup>147</sup> Beria noted that:

According to fragmentary information from NKVD Road-Transportation Detachments of September 30, 1941, over 10,000 individuals were on their way to the centers of the Polish detachments formation. . . .

[T]he newcomers were deprived of whatever means of existence, are poorly dressed and in conditions of crying shame of hygiene. For this reasons [sic] tooth diseases, avitaminosis and gastric diseases are widely spread among them.<sup>148</sup>

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<sup>144</sup> *Id.*; see also THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 9; WOJCIECH MATERSKI, POLSCY JEŃCY WOJENNI W ZSSR 1939–1941 (1992); INSTYTUT STUDIÓW POLITYCZNYCH, Z ARCHIWÓW SOWIECKICH 77 (1992).

<sup>145</sup> THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 8–11 (discussing the mass Polish exodus to settlements in Iran and India).

<sup>146</sup> The Note of the People’s Commissar for Internal Affairs of the U.S.S.R. L. Beria to J. Stalin Concerning the Procedure of Releasing Polish Prisoners of War and Other Polish Citizens from Prisons to Camps, in KREMLIN VERSUS POLAND 1939–1945: DOCUMENTS FROM THE SOVIET ARCHIVES 16–25 (Wojciech Materski ed., 1996) [hereinafter KREMLIN VERSUS POLAND].

<sup>147</sup> *Id.* at 21.

<sup>148</sup> *Id.*

Continued friction between the Poles and the Soviets over the whereabouts of the Polish officers taken prisoner by the Soviet Union, who could not be located at this critical juncture,<sup>149</sup> and over shortages of weapons, food and clothing in the formation of the Polish Army eventually led Stalin to agree to the evacuation of the Polish Army from the Soviet Union to the Middle East. General Wladyslaw Anders, who was in charge of the formation of the Polish Army in the Soviet Union, led the evacuation of the Polish citizens from the Soviet Union through Krasnovodsk via the Caspian Sea to in Iran.<sup>150</sup> This mass exodus of thousands of human ghosts took place between March and October of 1942 in the most dramatic circumstances.

After traveling across the Soviet Union for months in the most dehumanizing conditions, between 115,000 and 120,000 Polish citizens made it to the shores of Persia before the door to freedom was shut forever.<sup>151</sup> This odyssey of the Polish people required the sacrifice of thousands of Polish lives. We will never know how many of them paid the ultimate price in the quest for freedom. One of them recalled this exodus as follows:

Exhausted by hard labour, disease and starvation—barely recognizable as human beings—we disembarked at the port of Pahlavi (Anzali). There, we knelt down together in our thousands along the sandy shoreline to kiss the soil of Persia. We had escaped Siberia and were free at last.<sup>152</sup>

On September 7, 1942, the Soviet Consul General in Pahlavi, Iran, sent a report to Stalin on the termination of the evacuation of the Polish Army from the U.S.S.R., stating that by September 1942, at least 4,239 persons died of various diseases. People most frequently suffered from typhoid fever, marsh fever, and dysentery.<sup>153</sup>

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<sup>149</sup> See STEVEN ZALOGA, *THE POLISH ARMY 1939–45* 17 (1982) (discussing the conflict with the Polish allying with the Soviet Union while the Soviets refused to disclose the location of Polish soldiers held prisoner); see also MICHAEL ALFRED PESZKE, *THE POLISH UNDERGROUND ARMY, THE WESTERN ALLIES, AND THE FAILURE OF STRATEGIC UNITY IN WORLD WAR II*, at 72–73 (2005) (summarizing another Soviet theory that the missing Polish soldiers may have escaped and fled to Mongolia).

<sup>150</sup> HOOVER INST., *WAR THROUGH CHILDREN'S EYES: THE SOVIET OCCUPATION OF POLAND AND THE DEPORTATIONS, 1939–1941*, at xxiv (1981) [hereinafter *WAR THROUGH CHILDREN'S EYES*]; see *THE POLISH DEPORTEES OF WORLD WAR II*, *supra* note 132, at 10 (stating that a total of 115,000 people were evacuated to Iran).

<sup>151</sup> *THE POLISH DEPORTEES OF WORLD WAR II*, *supra* note 132, at 10.

<sup>152</sup> Antolak, *supra* note 137.

<sup>153</sup> Telegram from Mikhail Koptelov, Consul General of the U.S.S.R. in Pahlavi, to Stalin on the Completion of the Polish Army's Evacuation from the U.S.S.R. (Sept. 5, 1942), *re-printed in KATYN: A CRIME WITHOUT PUNISHMENT*, *supra* note 67, at 304–05.

From Iran, the Polish Army and its military personnel relocated to central Iraq, northeast of Baghdad.<sup>154</sup> The civilians remained in Iran.<sup>155</sup> They were placed in four large camps: one in Isfahan and three in Teheran.<sup>156</sup> In February of 1943, the Isfahan camp housed 2,600 Polish orphans. Over time the civilian refugees, including thousands of Polish orphans, were transferred from Iran via Ahvaz and Basra to various refugee camps in every corner of the world. Settlements of Polish refugees went up in the jungles of Africa, and in the mountains of India. The Poles were sent in thousands to Lebanon (Zouk Mikael), Palestine (Jerusalem, Ain-Karem, Barbara, Nazareth) India (Bandra, Balachadi, Valivade, Karachi, Malir) Kenya (Makindu), Uganda (Masindi, Koya), Tanganyika (Tengeru, Kondo, Kidugala, Ifunda, Morogoro), Rhodesia (Lusaka, Abercorn, Rusape, Diggelford, Marandella), South Africa (Oudtshoorn), New Zealand (Pahiatua), and Mexico (Santa Rosa).<sup>157</sup> After the war, once the U.S., Canada and Australia began to accept war refugees, many of them settled in the western U.S.<sup>158</sup>

The Polish deportees left their loved ones buried in large cemeteries in Tehran, Anzali and Ahvaz.<sup>159</sup> Among those who found their eternal resting place in Teheran was Henry Synowiec, a six-year-old boy from Szemiotowka near Kobryn in Polesie, Eastern Poland. Henry was deported with his family to Siberia in the bitter cold of February 1940. His grandmother died in the Lesopunkt settlement in Siberia, his mother died on their journey to join the Polish Army, his father died soon after reaching Teheran and little Henry succumbed to neglect and disease six months later. Henry was survived by two older siblings who were sent to the orphanage in Teheran. These two only surviving children of the Synowiec family were subsequently sent to the Polish orphanage in India; from there the children

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<sup>154</sup> See THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 97 (discussing Polish evacuation to the Middle East).

<sup>155</sup> *Id.* at 10.

<sup>156</sup> *Id.* at 97; see ANNA D. JAROSZYŃSKA-KIRCHMANN, THE EXILE MISSION: THE POLISH POLITICAL DIASPORA AND POLISH AMERICANS, 1939–1956, at 27 (2004).

<sup>157</sup> THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 27 (expressing that the Polish settlements were intended to be temporary until after their homeland was liberated). More than 2,900 Polish refugees (soldiers and civilians) died in Iran soon after arrival. They were buried in two Polish cemeteries and six Polish plots in memorial parks of other nations. 1,937 Poles were buried in the major Polish cemetery in Tehran (Dulab), fifty-six in a Jewish cemetery in Tehran and ten in a British Gholhak cemetery. Individual tombs of Polish refugees can be found in the memorial sites of other nations, such as France or Italy. See, e.g., ANDRZEJ PRZEWOŹNIK, POLSKIE CMENTARZE WOJENNE W IRANIE [POLISH WAR CEMETERIES IN IRAN] (2002).

<sup>158</sup> See THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 13, 173, 195.

<sup>159</sup> WAR THROUGH CHILDREN'S EYES, *supra* note 150, at xxiv. It is estimated that 2,119 Polish refugees died in Teheran by the end of 1943. *Id.*

were shipped via the U.S. to Mexico, and later were brought to the U.S. by Catholic nuns. Sixty-six years after Henry's death, his sister Joanna—for the first time ever—saw a picture of the Polish cemetery in Teheran where her little brother was buried. "This picture is the most precious thing I ever had," Joanna explained, showing a dark picture of the Dulab Cemetery in Teheran where Henry and thousands of other Polish deportees were buried from 1942–1943.<sup>160</sup> Joanna and her second brother, Joseph, settled in the U.S.<sup>161</sup> They are among many Polish Siberian orphans who were brought to the U.S. by Catholic nuns after the war.<sup>162</sup> The places they called home were incorporated into the Soviet Union as a result of the Yalta agreements. Most of them never visited Poland, but they all cultivate the Polish language and the Polish traditions.<sup>163</sup>

Most of the Polish men who left the Soviet Union joined the 2nd Polish Corps formed in Iraq under the command of General Anders.<sup>164</sup> Fighting alongside Allies forces, General Anders led the 2nd Polish Corp into the victorious battle of Monte Cassino that opened the passage to Rome for the Allied armies.<sup>165</sup> They went on to win many more battles, but after the war could not return to their homes in Poland. Betrayed and discriminated against for speaking the inconvenient truth about Katynism, they spread around the globe. Over time many of them moved to the United States, Great Britain, and Canada, but virtually none of them returned to their native lands. Today very few ethnic Poles live in the territories of Eastern Poland incorporated to the Soviet Union. Those who remained had every incentive not to identify themselves as Poles.

### G. *Those Left Behind*

The evacuations of the Polish citizens from the Soviet Union with the Anders army were halted in October 1942.<sup>166</sup> Hundreds of thousands of Polish citizens released from gulags who were not able to reach the Polish Army by the fall of 1942 remained trapped in the Soviet Union. General

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<sup>160</sup> In Tehran's Dulab Cemetery, situated in a rundown area of the city, there are graves of thousands of Polish men, women and children. It is not the only such cemetery in Iran, but it is the largest and best known. *See generally* Antolak, *supra* note 137.

<sup>161</sup> *See generally* PRZEWOŹNIK, *supra* note 157.

<sup>162</sup> *See generally id.*

<sup>163</sup> *Survivor Testimonies*, KRESY SIBERIA VIRTUAL MUSEUM, <http://kresy-siberia.org/hot/?lang=en> (last visited June 11, 2012). The video recording of Joanna Synowiec is on file with the author.

<sup>164</sup> THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 89.

<sup>165</sup> *See* LT.-GENERAL W. ANDERS, AN ARMY IN EXILE: THE STORY OF THE SECOND POLISH CORPS 163–85 (1949) (describing Polish role at the battle of Monte Cassino).

<sup>166</sup> KEITH SWORD, DEPORTATION AND EXILE: POLES IN THE SOVIET UNION, 1939–48, at 83 (1994).

Anders, while fighting on the military front, also fought on the political front for the release of the Poles left behind in the Soviet Union who were unable to reach Iran during the six-month window open to them for evacuations.

Although formally the Poles were set free by the decree of August 12, 1941, the Soviets made every effort to prevent them from leaving their deportation sites.<sup>167</sup> Beria recommended: "In order to forestall spontaneous moves of the Polish citizens from camps, prisons, special settlement zones, deportation regions . . ." temporary employment should be offered to them immediately.<sup>168</sup> Those who would declare their willingness to work and stay there for good should receive housing, living essentials, and remuneration.<sup>169</sup> Many Polish citizens never learned of the recruitment to the Anders Army. Only some Polish detainees were told that they could join the Polish Army. On January 24, 1942, Stalin issued a top secret directive to halt in the countryside all spontaneous departures of the Polish citizens from places of their employment in the northern oblasts of U.S.S.R.<sup>170</sup> Only upon reaching the Polish Army, led by General Anders, did the Polish people realize they would be able to leave the Soviet Union.<sup>171</sup>

The Poles who were trapped in the Soviet Union became a handy source of manpower in Stalin's struggle with Nazi Germany. After severing diplomatic relations with the Polish Government in London as a result of the discovery of the mass graves in Katyn,<sup>172</sup> Stalin could build a Polish Army directly under the Soviet command without any interference from the Polish Government or the Allied Coalition. In May of 1944, Beria sent a memo to Stalin entitled "On the evidence of the citizens of the Second Polish Republic who found themselves on the territory of the U.S.S.R."<sup>173</sup> According to this memo, a new Polish army that was formed in the Soviet Union under the Soviet command included 36,510 men.<sup>174</sup> Excluding soldiers of the new Polish army under the Soviet command, about 221,000

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<sup>167</sup> *Id.* at 34, 39. The released detainees were often told they could travel anywhere in Russia but could not return to Poland. *See* POLISH DEPORTEES OF WORLD WAR II, *supra* note 132 at 96.

<sup>168</sup> KREMLIN VERSUS POLAND, *supra* note 146, at 17.

<sup>169</sup> *Id.*

<sup>170</sup> MATERSKI, *supra* note 144, at 103.

<sup>171</sup> THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 96.

<sup>172</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 219 (discussing a letter from Soviet leader Viacheslav Molotov to Polish Ambassador Tadeusz Romer on April 25, 1943 breaking off Soviet relations with Poland).

<sup>173</sup> KREMLIN VERSUS POLAND, *supra* note 146, at 73-79.

<sup>174</sup> *Id.* at 73.

Polish citizens remained in the Soviet Union as of May 1944.<sup>175</sup> In this memo, Beria also stated that forty orphanages boarding 3,523 Polish children operated in the Soviet Union.<sup>176</sup> In addition, fifty-four primary schools boarded 2,587 Polish children, twenty-four houses for disabled Poles housed 1,822 persons and nine Polish hospitals were listed.<sup>177</sup>

### III. LEGAL ANALYSIS

#### A. *Definition of Genocide*

Although various definitions of genocide exist, this analysis is based on the definition of genocide adopted by the Genocide Convention of 1948 and subsequently incorporated into the Statute of Rome. The definition of genocide formulated in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>178</sup> that was adopted without changes as Article 6 in the Statute of Rome provides that:

“[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, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>179</sup>

Article 9.1 of the Statute of Rome provides that Elements of Crime shall assist the Court in the interpretation and application of Article 6 that defines genocide.<sup>180</sup> Several types of repressive actions described in the Presentation of Facts above meet the standard of genocidal acts enumerated in the definition of genocide.<sup>181</sup> For purposes of this analysis, the first type

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<sup>175</sup> That number included 76,110 soldiers and 43,755 members of their family. *Id.* Beria also stated that 11,516 people died between 1941 and 1943. *Id.*

<sup>176</sup> *Id.* at 79.

<sup>177</sup> *Id.*

<sup>178</sup> GA Res. 260 (III), U.N. Doc. U.N. GOAR, 3rd Sess., A/RES/260(III)A (Dec. 9, 1948) (U.N. General Assembly Resolution adopting The Convention on the Prevention and Punishment of the Crime of Genocide).

<sup>179</sup> *Id.* art. 2; Rome Statute of the International Criminal Court, art. 6, Aug. 17, 1998, 2187 U.N.T.S. 90.

<sup>180</sup> Rome Statute of the International Criminal Court, *supra* note 179, art. 9.

<sup>181</sup> *See supra* Part II.B (describing the invasion of Poland and destruction of major cultural and political centers that would destroy the Polish way of life); *supra* Part II.C (identifying hundreds of mass executions and deportations to concentration camps); *supra* Part II.D (de-

of a genocidal act, that is, “killing members of the group” will be examined step by step in accordance with Article 6(a) of the Elements of Crime. The remaining four types of genocidal acts will be examined by analogy to the analysis of genocide by killing, as reflected in Articles 6(b)–(e) of the Elements of Crime of Genocide.

The elements of the crime of genocide by killing pursuant to Article 6(a) of the Elements of Crime are as follows:

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>182</sup>

#### B. *Killing and Causing Death*<sup>183</sup>

Among many pieces of evidence in the Katyn crime, a memorandum prepared by Lavrenti Beria, signed by Joseph Stalin, and approved by the Soviet Politburo on March 5, 1940 (March 5th Execution Order) stands out. This document proves that the Soviet leadership ordered the shooting of 14,700 Polish POWs and 11,000 Polish citizens arrested on the conquered Polish territory in the months following the aggression on Poland.<sup>184</sup> The March 5th Execution Order set in motion the conduct of mass killing of at least 21,857<sup>185</sup> Polish prisoners of War and members of the Polish elite throughout the Soviet Union.<sup>186</sup>

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scribing the systematic Katyn killings); *supra* Part II.E (detailing a number of official Soviet orders to deport Poles); *supra* Part II.G (noting that once the Poles were released from concentration camps, they were still prohibited from returning to Poland).

<sup>182</sup> Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes, Mar. 13–30, June 12–30, 2000, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter ICC Elements of Crimes].

<sup>183</sup> Provisions of the General Introduction to the Elements of Crimes provide, *inter alia*, that the term “killed” is interchangeable with the term “caused death.” *Id.* The General Introduction, paragraph 9, also provides that “a particular conduct may constitute one or more crimes.” *Id.*

<sup>184</sup> Letter from Lavrenty Beria to Joseph Stalin (Mar. 5, 1940), *reproduced and translated in* PAUL, *supra* note 64, at 361–63.

<sup>185</sup> Fischer, *supra* note 128. Katyn was detailed in the Shelepin Memo to Khrushchev in March 1959, which warned against the release of documents relating to Katyn. MATTHEW J. OUMET, *THE RISE AND FALL OF THE BREZHNEV DOCTRINE IN SOVIET FOREIGN POLICY* 126 (2003).

<sup>186</sup> PAUL, *supra* note 64, at 361–63. According to American intelligence sources, the NKVD filmed some executions pursuant to the March 5th Execution Order. During the Ko-

It has been proven that 4,410 bodies discovered in eight mass graves in the Katyn forest were identified as the bodies of Polish officers who were taken as POWs by the Soviet Union following the Soviet aggression on Poland on September 17, 1939, and were held in the Kozielsk POW camp in the Soviet Union until April 1940.<sup>187</sup> Accordingly, it can be proven beyond all reasonable doubt that mass killing of the Polish POWs took place.<sup>188</sup>

In addition, internal Soviet documents and exhumations conducted in the 1990s have proven that Polish citizens were murdered pursuant to March 5th Execution Order in numerous other locations throughout the Soviet Union. Polish POWs from the Starobelsk camp were murdered in the NKVD facility in Kharkov and were buried in the Piatichatki forest near Kharkov. The KGB in Kharkov deliberately destroyed mass graves of the Polish citizens in the Piatichatki forest between 1969 and 1973 by burning the remains and grinding the bones.<sup>189</sup> Polish POWs held in the Ostashkov camp were murdered in Kalinin/Tver as described in the testimony of NKVD Chief Tokariev and were buried in mass graves in Mednoye near Kalinin.<sup>190</sup>

The burial locations of the civilian victims of the March 5th Execution Order, those held in prisons on the conquered territory, have not been fully identified to this day. According to the Ukrainian list made available to Poland in 1994, at least 3,435 Polish civilians arrested on the conquered Polish territory incorporated to the Ukrainian SSR were murdered pursuant to the March 5th Execution Order.<sup>191</sup> Some of the victims were buried at the mass burial site in Bykovnia near Kiev in Ukraine.<sup>192</sup> Polish civilians arrested on the conquered Polish territory incorporated into the Belorussian SSR were murdered in Minsk. Some mass graves of the Polish citizens were discovered in the Kurapaty forest near

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rean War, the Soviets gave North Korea a copy of the film for instructional purposes. Fischer, *supra* note 128.

<sup>187</sup> 2 EUROPE SINCE 1945: AN ENCYCLOPEDIA 711–12 (Bernard Cook ed., 2001).

<sup>188</sup> According to German exhumation records, 4,143 bodies were identified by June 1943. The Polish investigators who worked on identifying Katyn victims in the spring and summer of 1943 positively identified 2,916 bodies by June 1, 1943. LISTA KATYŃSKA: JEŃCY OBOZÓW KOZIELSK–OSTASZKÓW–STAROBIELSK ZAGINIENI W ROSJI SOWIECKIEJ (Adam Moszyński ed., 1989) [hereinafter LISTA KATYŃSKA].

<sup>189</sup> ZBRODNIA KATYŃSKA W KRĘGU PRAWDY I KŁAMSTWA, *supra* note 75, at 231–35 (detailing the discovery of and decision to “decommission” the site).

<sup>190</sup> *Id.*

<sup>191</sup> Paweł Styra, *Bulletin of the Institute of National Remembrance*, reprinted in 31 SARMATIAN REV. 1558, 1559 (2011).

<sup>192</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at x.

Minsk.<sup>193</sup> However, a list of victims from the so-called Belorussian Katyn List has not yet been found or released.

According to a note that Shelepin sent to Khrushchev on March 3, 1959, a total of 21,857 Polish citizens were killed pursuant to the March 5th Execution Order.<sup>194</sup> According to Shelepin's note, this number included 14,552 Polish POWs and 7,305 Polish civilians killed in prisons.<sup>195</sup> Shelepin recommended, and the Presidium of the Central Committee of the Communist Party of the Soviet Union approved, the destruction of all the records on the operation carried out in accordance with the March 5th Execution Order except the protocols of the meeting of the Troika of the NKVD, U.S.S.R.<sup>196</sup>

In light of the above evidence, the first element of the crime of genocide, the killing and causing death of one or more persons—in this instance the killing of Polish POWs and Polish civilians arrested on the conquered Polish territory—is met.

C. *Do Katyn Victims Belong to a Protected Group?*

The March 5th Execution Order explicitly states that 14,736 POWs are “more than 97 percent Polish by nationality” and sentences 14,700 of them to death.<sup>197</sup> When referring to the second group of victims, that is, 18,632 persons arrested on the conquered Polish territory in the first months of the Soviet occupation, the order specifies that this number includes 10,685 Poles. Referring to this group of 18,632 in its next paragraph, the order states that 11,000 of them shall be executed. Accordingly, this document proves that the perpetrators of the Katyn crime perceived the persons they sentenced to death through the March 5th Execution Order as belonging to the Polish national group, which is a protected group under the Genocide Convention.

Some scholars argue that since various ethnic groups were represented among the murdered officers of the Polish Army and persons arrested on the conquered Polish territory, the victims of the March 5th

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<sup>193</sup> Alexandra Goujon, *Memorial Narratives of WWII Partisans and Genocide in Belarus*, 24 E. EUR. POL. & SOC'Y 6, 7 (2010).

<sup>194</sup> Note from Shelepin, Chairman of the Comm. for State Security of the Council of Ministers of U.S.S.R., to Khrushchev (Mar. 3, 1959), in *KATYN: A CRIME WITHOUT PUNISHMENT*, *supra* note 67, at 332.

<sup>195</sup> *See id.* (noting that a total of 21,857 were shot in the Katyn forest).

<sup>196</sup> *See id.* at 333.

<sup>197</sup> The determination that “the Polish nationals represent 97% of the prisoners-of-war” was based on Beria's inquiry and the NKVD Report on the Nationality of Polish POW Officers dated February 28, 1940, prepared by Major Soprunenko. *See* NKVD UPV Report on the Nationality of Polish POW Officers Held in Starobelsk and Kozelsk Camps, *in id.* at 112.

Execution Order do not represent the Polish national group.<sup>198</sup> In anticipation of this problem, the drafters of the Genocide Convention added ethnic groups to the protected categories and pointed out that the national groups in the ethnically mixed populations are often comprised of several different ethnic groups.<sup>199</sup> Therefore the “national group” does not coincide with the “ethnic group,” but is characterized by a common wish to live together, a common ideal, a common goal and common aspirations.<sup>200</sup> The Polish national group on the Polish territory conquered by the Soviet Union, while comprised of various ethnic groups, was distinct in its common language, tradition, values, ideals, goals and aspirations. It was comprised of people of various ethnic groups who supported Polish nationhood and the Polish State.

The case law provides further important clarification on how to define the protected group under the Genocide Convention. The Trial Chamber of the International Criminal Tribunal for Rwanda in the *Rutaganda* case held that for the purposes of applying the Genocide Convention membership in a group is, in essence, a subjective rather than objective test.<sup>201</sup> The Rwanda Tribunal thus held that a group may be identified as such by others, including perpetrators of the crime.<sup>202</sup> The International Criminal Tribunal for Yugoslavia has taken the same approach, although there have been arguments made that the subjective approach alone is not sufficient to determine victim groups.<sup>203</sup> Striking a balance between the subjective and objective approach, the Rwanda Tribunal subsequently held:

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<sup>198</sup> See, e.g., PIOTROWSKI, *supra* 58, at 17 (presenting the different nationalities of those in the Soviet-Occupied Poland).

<sup>199</sup> See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 118–20 (2d ed. 2009) (noting the groups protected by the convention).

<sup>200</sup> See Special Rapporteur, *Fourth Rep. on the Draft Code of Offences Against the Peace and Security of Mankind*, Int'l Law Comm'n, ¶ 57, U.N. Doc. A/CN.4/398 (March 11, 1986) (by Doudou Thiam). The Rwanda Tribunal held that national groups refer to a collection of people who are perceived to share a legal bond based on common citizenship coupled with reciprocity of rights and duties. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 511 (Sept. 2, 1998).

<sup>201</sup> See *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 55 (Dec. 6, 1999), <http://www.unictr.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf> (noting concepts of national, ethnical, racial, and religious groups).

<sup>202</sup> *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-I-T, Judgment, ¶ 524 (May 21, 1999), <http://www.ictrcaselaw.org/docs/doc9039.pdf> (noting that the Rwandans had to carry identification cards which placed them in a group).

<sup>203</sup> See SCHABAS, *supra* note 198, at 124 (referring to the *Krstic* trial in which “Bosnia Muslims” were included in “national groups,” a matter which was not challenged on appeal). See *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 560 (Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.<sup>204</sup>

The explicit references to the Polish national group in the March 5th Execution Order represent direct evidence that the perpetrators of the Katyn murders perceived the victims of the March 5th Execution Order as belonging to the Polish national group. This perception of the perpetrators is further confirmed by Beria's Directive dated March 20, 1940 that calls for "[r]esettlement in Kazakhstan of Polish POW families."<sup>205</sup> This directive also defines the condemned men as "former officers of the Polish Army, police, prison guards, gendarmes, intelligence agents, former landowners, manufacturers, and prominent officials of the former Polish state apparatus . . . ."<sup>206</sup> The list of categories of people demonstrates that the condemned men were people of stature, wealth and patriotism on whom the future of independent Poland depended.

In light of the above circumstances, the victims of the March 5th Execution Order belonged to the Polish national group, which is the protected group under the Genocide Convention and the Statute of Rome. The "protected group" test is therefore met.

*D. "In Whole or In Part"*

Article 6(a)(3) of the Elements of Crime requires intent to destroy "in whole or in part" the protected group.<sup>207</sup> As U.N. Secretary Kofi Anan pointed out, "genocide begins with the killing of one man—not for what he has done, but because of who he is."<sup>208</sup> Thus, the term "in whole or in part"

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<sup>204</sup> Prosecutor v. Bagilishema, Case No. ICTR- 95-1A-T, Judgment, ¶ 65 (June 7, 2001). See also Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 161–62 (Jan. 27, 2000), <http://www.ictrcaselaw.org/docs/doc15264.pdf> (defining groups as provided by the Genocide Convention).

<sup>205</sup> Record From for a Polish Prisoner of War (Mar. 16, 1940), in KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 153.

<sup>206</sup> See *id.*

<sup>207</sup> ICC Elements of Crimes, *supra* note 182, art. 6(a)(3).

<sup>208</sup> Kofi Annan, U.N. Sec'y Gen., Nobel Lecture at the Nobel Peace Prize Award Ceremony in Oslo, Norway (Dec. 10, 2001); see also JONES, *supra* note 6, at 24.

does not establish some quantitative threshold where mass murder turns into genocide but rather focuses on the intent of the perpetrator.<sup>209</sup> As the Trial Chamber in the *Krstic* case declared, this term refers to the intent as opposed to the actual destruction.<sup>210</sup> The question is whether the intent existed and not whether such intent was in fact realized. In determining whether destruction “in whole or in part” took place for purposes of genocide, the courts consider various factors, including the quantitative extent of destruction in proportional terms (substantial part test) and qualitative extent of destruction in terms of destroying the significant part of the group necessary for its survival such as its leadership (significant part test).<sup>211</sup> The intent to destroy a multitude of persons because of their membership in a particular group constitutes genocide even if these persons constitute only part of a group either within a country or within a region or within a single community.<sup>212</sup>

In order to evaluate to what extent the Soviet Union destroyed the Polish national group, as such, a point of reference must be established as to the population and territory affected. As a result of the Nazi-Soviet partition of Poland,<sup>213</sup> Germany incorporated 48% of Polish territory with twenty-two million Polish citizens while the Soviet Union incorporated 52% of the Polish territory with over thirteen million people.<sup>214</sup> Accordingly, the analysis of the Soviet destruction of Polish nationals does not include Polish nationals under Nazi occupation as it applies to the Polish citizens who found themselves on the Polish territory controlled by the Soviet Union. This territory during the applicable period of September 1939 to June 1941 went through important rearrangement however. Within one month of the invasion, the Soviet Union transferred part of the Wilno district from its

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<sup>209</sup> W. Schabas, *The International Legal Prohibition of Genocide Comes of Age*, in 5 GENOCIDE AT THE MILLENNIUM, GENOCIDE: A CRITICAL BIBLIOGRAPHICAL REVIEW 169, 172–74 (S. Totten ed., 2005).

<sup>210</sup> *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 584.

<sup>211</sup> According to Rafael Lemkin, the founding father of the Genocide Convention, the enemy nation must be destroyed, disintegrated and weakened in different degrees for decades to come so that the oppressor nation will be in the position to deal with other people from the vantage point of biological superiority. RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 81 (1973).

<sup>212</sup> *Krstic*, Case No. IT-98-33-PT, Prosecutor’s Pre-Trial Brief Pursuant To Rule 65 *ter* (E) (i), ¶ 101 (Feb. 25, 2000). See *Prosecutor v. Jelusic*, Case No. IT 95-10-T, Judgment, ¶ 83 (Dec. 14 1999), available at <http://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf> (noting that “international custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone”).

<sup>213</sup> The partition of Poland was the result of the Ribbentrop-Molotov Pact of August 23, 1939, implemented through the war of aggression on Poland and the German-Soviet Boundary and Friendship Treaty of September 28, 1939. See *cf.* PIOTROWSKI, *supra* note 58, at 160 (explaining the Soviet occupation in Lithuania).

<sup>214</sup> *Id.* at 8–9.

share of Polish booty to Lithuania.<sup>215</sup> Although Lithuania and the Wilno district were annexed to the Soviet Union just nine months later, during the first nine months of the most intense persecutions, the Wilno district served as a safe haven for Polish nationals hunted down by NKVD forces in the Soviet-controlled part of Poland.<sup>216</sup>

The remaining Polish lands under Soviet control were divided into two pieces, with the central part of Poland transferred to the Byelorussian Socialist Soviet Republic, and the southern part of Poland transferred to the Ukrainian Soviet Socialist Republic.<sup>217</sup> Thus, officially the conquered Polish territory was parceled out among Lithuania, Belorussian SSR and Ukrainian SSR.<sup>218</sup> However, for the first nine months of the Soviet occupation, the Polish areas incorporated to the Ukrainian and Byelorussian Republics remained sealed off from the rest of the Soviet Union and from Lithuania in order to assure proper implementation of repressive measures against the Polish nationals.<sup>219</sup> In June 1940, the Soviet Union took over the Baltic Republics together the Polish areas incorporated to Lithuania.<sup>220</sup> Only then the Soviet persecutions reached the Polish nationals living or hiding in the Wilno district. Thus, the evaluation of the scope of destructive actions undertaken by the Soviet Union against the Polish nationals shall refer to the geographic area of the Polish State under Soviet control between September 17, 1939 and June 20, 1941, with appropriate consideration for the situation of the Wilno district.

#### 1. Quantitative evaluation

Destructive Soviet policies towards Polish nationals were conducted in a territory inhabited by a total of 13.199 million people.<sup>221</sup> In this group, ethnic Poles represented 5.274 million (39.9%); Ukrainians 4.529 million

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<sup>215</sup> The Soviet Union transferred part of the Wilno District to Lithuania on October 10, 1939. *See id.* at 161 (noting the transfer of territory was in exchange for Soviet military bases).

<sup>216</sup> *See id.* (noting the different groups seeking refuge in Wilno).

<sup>217</sup> *See* KUŚNIERZ, *supra* note 20, at 54. Formally these two annexations were made by two decrees issued by the Supreme Council of the U.S.S.R. on November 1 and 2, 1939, in response to petitions of the National Assemblies of Ukrainian and Belorussian Socialist Soviet Republics. *Id.*

<sup>218</sup> Similarly, Nazi-occupied Poland was parceled out between the Reich, General Government and Slovakia. *See* PIOTROWSKI, *supra* 58, at 8 (explaining the divisions of Poland under the German and Soviet occupation).

<sup>219</sup> *See* KUŚNIERZ, *supra* note 20, at 185–89 (explaining the reasoning for sealing off the territory).

<sup>220</sup> *Id.* at 44.

<sup>221</sup> PIOTROWSKI, *supra* 58, at 14.

(34.4%); Byelorussians 1.945 million (14.7%); and Jews 1.109 (8.4%).<sup>222</sup> The Wilno district that was given to Lithuania accounted for approximately 573,000 people with 371,000 ethnic Poles.<sup>223</sup> Between October 1939 and August 1940, these people as well as refugees from other parts of conquered Poland were not subjected to the Soviet repressive measures, as they resided on the territory of a still-sovereign State of Lithuania. The destructive measures against the Polish nationals were first implemented on the Polish territory incorporated to the Ukrainian and Belorussian Socialist Soviet Republics. All Polish citizens who worked in the administrative, military, law enforcement and security structures of the Polish State as well as civic and academic institutions, regardless of their ethnicity, were subjected to persecution. However the Soviet hatred campaign conducted on this territory was specifically directed against ethnic Poles and resulted in ethnic violence directed primarily at the Poles.

In the first months of the Soviet invasion, special NKVD operational groups conducted drastic “purges” of dangerous anti-Soviet elements through mass murders and mass arrests.<sup>224</sup> The number of people outright murdered was never determined. What remains of these atrocities are eyewitness testimonies from various locations.<sup>225</sup> According to the Soviet records, at least 11,817 Polish citizens were arrested by NKVD Special Forces during the first two months of Soviet occupation.<sup>226</sup>

Out of about 250,000 Polish soldiers taken as prisoners of war, the Soviets separated officers and subsequently murdered them pursuant to the March 5th Execution Order.<sup>227</sup> They also selected 25,000 non-commissioned officers, certain rank and file soldiers, policemen, gendarmerie and refugees for slave labor and sent them to gulags.<sup>228</sup> Many

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<sup>222</sup> *Id.*

<sup>223</sup> STANISŁAW CIESIELSKI, *KRESY WSCHODNIE II RZECZYPOSPOLITEJ: PRZEKSZTAŁCENIA STRUKTURY NARODOWOŚCIOWEJ 1931–1948*, at 48 (Stanisław Ciesielski ed., 2006). According to the 1931 census, the Wilno district consisted of 1,275 million people with 766 thousand ethnic Poles. Only part of this district was given to Lithuania. *Id.*

<sup>224</sup> *See generally* PIOTROWSKI, *supra* 58, at 215–20 (noting the different incidents of arrest and killings in the Soviet invasion).

<sup>225</sup> Mass murders of military and civilian population took place in Rohantyn, Grodno, Nowogrod, Sarny, Tarnopol, Wolkowysk, Oszmian, Swislocz, Molodeczn, Kosow Poleski, Chodorow, Zlczow and Stryj. In Grodno and some other locations soldiers of the Red Army murdered Polish POWs. *See* 3 WŁADYSŁAW POBÓG-MALINOWSKI *NAJNOWSZA HISTORIA POLITYCZNA POLSKI, 1939–1945* (2004). It is impossible to determine today the number of people murdered by the Soviets in the first three months of the Soviet occupation of Poland. It is estimated that in September 1939 between 1,000 and 2,500 civilians were killed in Soviet occupied Poland. *Id.*

<sup>226</sup> *See id.*

<sup>227</sup> *See id.*

<sup>228</sup> The most well-known gulag was the slave labor camp in Rowne, also known as the Lvov camp, which began operation in December 1939. The Rowne camp consisted of a

Polish officers and leaders sought shelter in the Wilno district officially transferred to Lithuania. Thanks to this safe haven, some Polish officers survived the Katyn slaughter, but after the annexation of Lithuania in June of 1940, they were hunted down and sent to the Kozielsk camp that had just been emptied as a result of the Katyn massacre.<sup>229</sup> According to Soviet estimates, 4,767 Poles from Lithuania and 913 from Latvia were to be transferred to the Kozielsk camp in the summer of 1940.<sup>230</sup> Their whereabouts remain unknown.

On the authority of the March 5th Execution Order, almost half of the Polish Officer Corps were murdered.<sup>231</sup> In view of the fact that in partitioning Poland with Nazi Germany, the Soviet Union took over only 37% of the Polish population, it means that in proportion to the Soviet share of the conquered Polish population, the Soviet Union murdered more than 100% of its share of the Polish Officer Corps.

The March 5th Execution Order that condemned 25,700 Polish POWs and prisoners to death represents only one of many repressive measures directed at the Polish national group under Soviet occupation between September 1939 and June 1941. On the authority of the March 20 Directive,<sup>232</sup> on April 13, 1940, the families of the condemned Polish officers were forcibly removed from their homes, placed on cattle trains, and sent to the deserts of Kazakhstan.<sup>233</sup> On the authority of the December

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system of about 20 detention locations along the strategic Nowograd-Wołyń road that detained about 15,500 people. The second group of labor camps serviced iron ore mines of , Nikopol-Marganec” and detained about 10,300 Poles. See MATERSKI, *supra* note 144; see also Piotr H. Kosicki, *The Katyn Massacres of 1940*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE, 2–8 (Sep. 8, 2008), [http://www.massviolence.org/IMG/article\\_PDF/The-Katyn-Massacres-of-1940.pdf](http://www.massviolence.org/IMG/article_PDF/The-Katyn-Massacres-of-1940.pdf).

<sup>229</sup> See STANISŁAW CIESIELSKI, WOJCIECH MATERSKI & ANDRZEJ PACZKOWSKI, *REPRESJE SOWIECKIE WOBEC POLAKÓW I OBYWATELI POLSKICH* (2d ed. 2002).

<sup>230</sup> It is estimated that 4,380 Polish nationals were sent to the Kozielsk camp from Lithuania and Latvia in 1940.

<sup>231</sup> The Polish officers targeted in Beria’s March 5th execution order were drawn from a broad cross-section of the Polish military and government. Those targeted included generals, colonels, majors, captains, lieutenants and ensigns, as well as civil servants and private citizens such as police officers, police gendarmes, prison guards, intelligence officers, landowners and clergymen. Fischer, *supra* note 128.

<sup>232</sup> See KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 153–156 (describing the deportation of Poles on the orders of “Beria’s Directive to the Commissar of Internal Affairs, Kazakh SSR, GB Senior Major Semyon Burdakov, on the Resettlement in Kazakhstan of Polish POW Families to Be Deported from the Western Oblasts of Ukraine and Belorussia” (Mar. 20, 1940)).

<sup>233</sup> See *id.*; see also Natalia S. Lebedeva, *The Deportation of the Polish Population to the USSR, 1939–41*, in FORCED MIGRATION IN CENTRAL AND EASTERN EUROPE, 1939–1950, 28, 32–36 (Alfred J. Rieber, ed., 2000) (describing the typical conditions to which deportees shipped into the Soviet interior were subjected).

5, 1939 Resolution of the Politburo, on February 10, 1940, between 140,000 and 220,000 people, mostly representatives of the Polish administration, military families, railroad workers and forestry workers were forcibly removed from their homes and expelled to Siberia.<sup>234</sup> By the time the Nazi army attacked the Soviet Union in June of 1941, two more expulsions of Polish civilians from Soviet-occupied Poland pursuant to elaborate plans and procedures had taken place. The third wave of mass deportations affected people escaping Nazi occupation in Western Poland, mostly Polish citizens of Jewish origin, while the fourth wave of deportations was aimed primarily at Polish intelligentsia. The Nazi attack on the Soviet Union caught the Soviets—preoccupied with mass deportations—by surprise, interrupting the fourth massive deportation action of the Polish nationals to the Soviet Far East. This genocidal practice of forced removal of Polish civilians from their homes brought enormous despair and suffering to those affected. It resulted in mass deaths and serious physical and mental harm to hundreds of thousands of Polish citizens. These deportations affected at least half a million Polish civilians, mostly women, children and the elderly, inflicting on them conditions of life calculated to bring about their physical destruction.

The destruction of the Polish national group through mass arrests, mass murders, deportations, slave labor and conscription to the Soviet Army was carried out in accordance with carefully laid down plans and numerous decrees and orders. The lists of “anti-Soviet elements” singled out for destruction included a substantial part of the entire population of Soviet-occupied Poland.<sup>235</sup> A confidential report prepared by the U.S. State Department in London in 1943 concluded that, based on careful examination of the categories of deportees “it will be seen that they include the majority of persons active in political, social and even economic life.”<sup>236</sup> According to this report, the register of categories of deportees for Soviet-occupied Poland included three to four million people out of the total population of 13 million people.<sup>237</sup> It must be noted that ethnic Poles represented about five million in this ethnically mixed population; hence, the mass scale of deportations that primarily affected Polish women and children.

The Soviet leadership supplemented mass killings of the Polish elite and mass deportations of their families and other civilians suspected of loyalty to Poland with additional measures aimed at the destruction of the

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<sup>234</sup> See *id.* (providing a detailed breakdown of the deportations).

<sup>235</sup> KUŚNIERZ, *supra* note 20, at 68.

<sup>236</sup> PIOTROWSKI, *supra* note 58, at 217.

<sup>237</sup> *Id.* (“[A]n individual is the product of his environment, and therefore if a certain environment produces criminals it must be destroyed.”).

Polish national group. In violation of Articles 43, 44 and 45 of the fourth Hague Convention, on November 29, 1939, the Soviet Union stripped all Polish citizens under its control of their Polish citizenship and considered them as the citizens of the Soviet Union.<sup>238</sup> In December of 1939, the Soviets ordered conscription for military service to the Soviet Army of all men from eighteen to fifty years of age on the territory of Soviet-occupied Poland.<sup>239</sup> It is estimated that by June of 1941, between 150,000 and 250,000 Polish nationals were forced to serve in the Soviet Army.<sup>240</sup>

## 2. Qualitative evaluation

The officers of the Polish Army were initially separated from the group of Polish prisoners of war in accordance with a decision of the Central Committee of the Communist Party on prisoners of war dated October 2, 1939.<sup>241</sup> Article II of this decision specified: (a) to place generals, lieutenants colonels, prominent military and state officials, and all other officers in the South (in Starobelsk); and (b) to place intelligence agents, counterintelligence agents, gendarmes, police, and prison guards in Ostashkov camp, Kalinin Oblast.<sup>242</sup> According to a report on the situation in the Kozielsk NKVD POW camp dated December 1, 1939, the Polish POW officer contingent that arrived at the Kozielsk camp around November 1, 1939 consisted of 3,420 officers, 654 captains, 258 majors, seventy-nine lieutenant colonels, forty-three high state officials, twenty-four colonels, seventeen naval captains, seven military clergy, four generals, one admiral, three landowners, one prince, and eighty-five rank-and-file soldiers subject to being sent away.<sup>243</sup> Clearly the Soviet extermination policy targeted officers of the Polish Army.

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<sup>238</sup> The Nazi German leadership made a similar citizenship decision respecting Polish nationals at approximately the same time. George Ginsburgs, *Option of Nationality in Soviet Treaty Law: The War-Time and Post-War Record*, 49 IOWA L. REV. 1130, 1150–51(1963); see also KUŚNIERZ, *supra* note 20, at 55. Articles 43 through 45 forbid occupying forces from forcing local citizens to betray their armed forces or renounce their citizenship or allegiance to their native country. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, TS No. 539 (entered into force Jan. 26, 1910).

<sup>239</sup> See Ginsburgs, *supra* note 238, at 1150 (noting that all Polish nationals meeting Soviet enlistment requirements and of Ukrainian, Byelorussian or Jewish heritage were merged into the Soviet Army).

<sup>240</sup> KUŚNIERZ, *supra* note 20, at 57.

<sup>241</sup> See KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 26–27 (noting that the higher level officers were separated from their enlisted counterparts and other military-related government personnel).

<sup>242</sup> *Id.* at 63.

<sup>243</sup> *Id.* at 84.

Out of concern that some Polish officers evaded capture as POWs, the Politburo issued a special order on December 3, 1939 to arrest all Polish Army officers registered in NKVD files.<sup>244</sup> Within only one month on the Polish lands incorporated to the Ukrainian SSR, 1,057 Polish Army officers were hunted down and arrested.<sup>245</sup> The hunt for Polish Army officers also continued after the March 5th Execution Order. On April 4, 1940 Beria issued yet another directive to arrest all non-commissioned officers of the Polish Army.<sup>246</sup>

On the authority of the March 5th Execution Order, at least 7,305 Polish citizens arrested on the territory of Soviet occupied Poland were murdered in the Ukrainian and Belorussian Socialist Soviet Republics. In 1994, Ukraine turned over to Poland a list of 3,435 Polish citizens murdered on its territory pursuant to the March 5th Execution Order.<sup>247</sup> Of those murdered in Western Ukraine, 19% represented local leaders such as lawyers, judges, businessmen and members of elective bodies such as councilmen, town mayors and parliamentarians.<sup>248</sup> Law enforcement employees including policemen, gendarmes, border guards, agents and “spies” represented 29%; Polish Army officers and non-commissioned officers represented 14%; and other agents and enemies including military families and refugees represented 10%. About 28% of the names from the Ukrainian list remain unidentified.<sup>249</sup>

### 3. “In whole”

The first question that needs to be addressed is whether the Soviet leadership intended to destroy the Polish national group “as a whole.” The case law on genocide considers the “selective killing” of certain segments of a group as evidence of intent to destroy the group as a whole, assuming it is predicated on a calculation that destruction of the significant members of the group will irrevocably compromise the existence of what remains.<sup>250</sup> Accordingly, selective killings of patriotic segments of the Polish society,

<sup>244</sup> See Lebedeva, *supra* note 233, at 32.

<sup>245</sup> See *id.*

<sup>246</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 161

<sup>247</sup> Styrna, *supra* note 191, at 1559.

<sup>248</sup> KRZYSZTOF PERSAK, THE ROAD TO KATYN (forthcoming 2012).

<sup>249</sup> *Id.*

<sup>250</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention] (noting that the crime of genocide includes targeting a group “in whole or in part” as alternate components of the same offense); see also WILLIAM SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 171 (2006) (discussing the elements of the crime of genocide in the broader international criminal tribunal context).

including higher ranking members of the Polish Armed Forces, officials of national and local administration and judiciary, members of the law enforcement system, including policemen, gendarmes, prison guards and border guards, intellectual elite, and community and civic leaders serve as proof of the intent to destroy the Polish national group as a whole. The Soviet leadership believed that the destruction of a significant part of the Polish national group irrevocably compromised the ability of the remaining part of the Polish national group to survive on the Polish territory incorporated to the Soviet Union.<sup>251</sup> The destruction of the patriotic elite was to prevent the rebirth of the Polish nationhood based on the intellectual potential of its leadership group. It had a decisive lasting impact upon the survival of the entire Polish national group and, as such, on the Polish territory incorporated to the Soviet Union. By destroying significant and influential members of the Polish national group, the Soviet Union irrevocably compromised the ability of the remaining part of this protected group to survive. Therefore, the Soviet Union acted with specific intent to destroy the “whole” Polish national group on the Polish territory incorporated to the Soviet Union.

One could argue that the reemergence of Poland after the war stands as proof that the Soviet Union did not intend to destroy Poland. This argument is contrary, however, to the intention of the drafters of the Genocide Convention who never regarded the complete destruction of a group as a prerequisite to finding genocide.<sup>252</sup> It contradicts most, if not all, court opinions with respect to genocide, and it disregards ample evidence of specific intent of the Soviet leadership to destroy the Polish national group, as such, on the Polish territory incorporated to the Soviet Union between 1939 and 1941. However, in light of well-known resistance on the part of contemporary international tribunals, the political establishment, and some scholars to qualify acts aimed at destroying protected groups as genocide regardless of the evidence presented and gravity of the crime,<sup>253</sup> and in consideration of the fact that the Katyn crime implicates a great power of the contemporary world, such an argument must be addressed with due care.

First, it must be noted that between September 1939 and June 1941, the Soviet Union attacked Poland as an ally of Nazi Germany in accordance with Ribbentrop-Molotov Pact of August 23, 1939 and partitioned Poland in accordance with the Boundary and Friendship Treaty of September 28,

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<sup>251</sup> Cf. PIOTROWSKI, *supra* note 58, at 9–13 (describing Soviet plans to eradicate Polish culture and history alongside its systematic destruction of important groups and institutions in Polish society).

<sup>252</sup> See Genocide Convention, *supra* note 250 (noting that partial destruction of a group was sufficient to meet the requirements of the crime of genocide).

<sup>253</sup> See POWER, *supra* note 10 at 43, 57–58.

1939.<sup>254</sup> After the June 1941 German invasion of the Soviet Union, the bewildered Soviet Union joined the allied coalition thus indirectly became an ally of Poland.<sup>255</sup> Therefore, the Soviet intent towards Poland while working in alliance with Nazi Germany cannot be equated with the Soviet intent towards Poland while working in alliance with the United States, Great Britain and Poland.

Second, it shall be clarified that contemporary Poland is located on the lands of the western half of pre-war Poland, in other words primarily on the territory of Nazi-occupied Poland. The Polish national group living on the Polish territory conquered, incorporated and controlled by the Soviet Union between 1939 and 1941 was subjected to significant destruction and effectively weakened during the first twenty-one months of the Soviet occupation. As a result of German aggression, Eastern Poland was taken over by Nazi Germany and the Soviet Union in the Sikorski-Majski agreement of July 1941 expressly relinquished its rights to Eastern Poland in exchange for Allies' help in fighting the Nazis.<sup>256</sup> However, once the Red Army reclaimed the territory of Eastern Poland three years later on its way to Berlin, the Soviet Union never returned these lands to Poland and subsequently liquidated the Polish national group on these lands completely.<sup>257</sup> Thus, the Soviet Union incorporated eastern Poland in 1939, relinquished its right to this territory in the aftermath of German aggression, but reincorporated these lands back into the Soviet Union upon its victory over Germany and completed the process of destroying and liquidating the Polish national group on these lands in 1944 and thereafter.<sup>258</sup>

The Soviet genocidal policies in Eastern Poland between 1939 and 1941 as outlined above weakened the Polish national group on the eastern side of the Ribbentrop-Molotov line to such extent that the subsequent reincorporation of these lands to the Soviet Union in 1944 was achieved without much resistance. The process of "de-Polonization" of those lands that followed after the war through population transfers and further

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<sup>254</sup> See GEOFFREY ROBERTS, *STALIN'S WARS: FROM WORLD WAR TO COLD WAR, 1939–53*, at 30, 36–37 (2006).

<sup>255</sup> *Id.* at 82, 92 (referencing Operation Barbarossa, the codename for the German invasion of the Soviet Union beginning on June 22, 1941, involving over 150 German military divisions spread across a 1,000 mile front).

<sup>256</sup> *SWORD*, *supra* note 165, at 29–31.

<sup>257</sup> *Behind Closed Doors: The Struggle for Poland*, PBS, <http://www.pbs.org/behind-closeddoors/in-depth/struggle-poland.html> (last visited June 11, 2012).

<sup>258</sup> *Id.*; see also R. Gerald Hughes, *Unfinished Business from Potsdam: Britain, West Germany, and the Oder-Neisse Line, 1945–1962*, 27 *INT'L HIST. REV.* 259, 262–64 (2005) (describing the debate over and ultimate concession of substantial Polish territory, namely lands east of the Oder and Neisse rivers, to the Soviet Union).

discrimination of the Polish national group led to the total and complete destruction of the Polish national group, as such, on these lands.

To illustrate the combined effect of various destructive policies directed at the Polish national group over a considerable period of time, certain statistics are in order. The lost Polish lands included, *inter alia*, the city of Lwów that represented the third most significant cultural, educational and economic center of pre-war Poland, home to 62.5% ethnic Poles, 23.5% Jews and 7.8% Ukrainians according to 1937 records.<sup>259</sup> By 2010, ethnic Poles represented only 4% of Lviv population.<sup>260</sup> The city of Wilno was the fifth largest city in pre-war Poland with 66% ethnic Poles, 28% Jews and 1% Lithuanians.<sup>261</sup> In 2009, ethnic Poles represented 18.7% of the Vilnius population, Jews represented 0.5% and Lithuanians represented 58%.<sup>262</sup> The city of Grodno in pre-war Poland consisted of 60% ethnic Poles, 37.5% Jews, and 3% Lithuanians and Byelorussian together.<sup>263</sup> By 2010, ethnic Poles in the Grodno region represented 24.8% of the population.<sup>264</sup> These radical shifts in composition of the population on these lands were made possible in part by policies of mass destruction implemented by the Soviet Union towards the Polish national group between 1939 and 1941.

#### 4. “In part”

Although the Katyn crime meets the legal definition of destruction “in whole,” as shown above, it also meets the test of destruction “in part.” Four types of tests have been advanced by legislators, case law and scholars to evaluate destruction “in part.”<sup>265</sup> The first approach assumes that “while the result may only be partial destruction [of the protected group], the intent

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<sup>259</sup> In October 1944, approximately 66% of Lwów’s citizens were ethnic Poles. This proportion dropped to 46% by the end of November 1944, a product of the Soviet plan to improve its territorial claim to Lwów. As a result of the Yalta Agreement of February 10, 1945, Poland lost the political battle to preserve its eastern territory, including the cities of Lwów, Grodno, and Nowogródek, to the Soviet Union. *See generally* GRZEGORZ HRYCIUK, PRZEMIANY NARODOWOŚCIOWE I LUDNOŚCIOWE W GALICJI WSCHODNIEJ I NA WOŁYNIU W LATACH 1931–1948 (2005).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Alexander Gurko, *Cooperation Between the Union of Poles in Belarus and the Local and State Government to Satisfy the Educational and Cultural Needs of Polish Minority (1988–2000 and Beyond)*, *Republic of Belarus, LOCAL GOV’T & PUB. SERV. REFORM INITIATIVE*, <http://lgi.osi.hu/ethnic/csdb/results.asp?idx=no&id=250> (last visited June 11, 2012).

<sup>265</sup> SCHABAS, *supra* note 198, at 277.

must be to destroy the entire group.”<sup>266</sup> This approach advanced by the Truman administration is not supported by the legislative work or by the language of the definition of genocide.<sup>267</sup> However, as shown by the test for destruction “in whole” discussed above, the intent to destroy the entire Polish national group “in whole” is inferred from the acts of selective killings of the influential part of the Polish national group. Therefore the Katyn case meets the test “in part” as advanced by the Truman administration.

The second approach defines “the part” as “substantial part,” in other words “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.”<sup>268</sup> What constitutes the “substantial part” is open to debate. Some argue that it is “a multitude of persons of the same group” as long as the number is “substantial.”<sup>269</sup> However, the drafters of the Statute for the International Criminal Court were of the opinion that destruction of more than a small number of individuals who are members of the protected group is sufficient.<sup>270</sup> The International Criminal Tribunal for Rwanda stated that “in part” required the intent to destroy a considerable number of individuals.<sup>271</sup> The International Criminal Tribunal for the Former Yugoslavia stated that the “substantial part” means “a reasonably substantial number relative to the group as a whole.”<sup>272</sup>

The genocidal acts directed at the Polish national group on the conquered Polish territory consisted of at least the following: (a) mass killings during the invasion (between 2,500–5,000 killed); b) mass killings through the March 5th Execution Order (25,700 killings intended, at least 21,857 actually killed); (c) mass arrests and sentencing to slave labor camps and gulags (150,000–900,000); (d) four waves of mass deportations (320,000–1,200,000);<sup>273</sup> (d) prisoners of war sent to slave labor camps

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<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> United States Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093(8) (1987).

<sup>269</sup> SCHABAS, *supra* note 198, at 278 (referencing a statement by Nehemiah Robinson); *see* NEHEMIAH ROBINSON, GENOCIDE CONVENTION 63 (1960).

<sup>270</sup> SCHABAS, *supra* note 198, at 278–79.

<sup>271</sup> *Id.* at 279 (referring to the case of Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-I-T, Judgment and Sentence, ¶ 97 (May 21, 1999)).

<sup>272</sup> *Id.* (referring to the case of Prosecutor v. Sikirica et al., Case No. IT-95-8-I, Judgment on Defence Motions to Acquit, ¶ 65 (Sept. 3, 2001)).

<sup>273</sup> *See* THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 5 (according to railroad records, from 120 to 150 trains were used for each wave of deportations, each train carrying an average of 2,000 persons).

(25,000–250,000); and (e) Polish citizens forced to serve in the Red Army (150,000–230,000).<sup>274</sup> These numbers do not account for mortality rates, known to be in the range of 50% per year in many of these groups. When viewed in proportion to the multiethnic population of about thirteen million with ethnic Poles representing about five million, these numbers are substantial on its face. They are reasonably substantial relative to the group; they are also “considerable” and clearly represent “more than a small number of individuals.”<sup>275</sup> The categories of people targeted for repressive measures constituted “a distinct part” as noted by the *Krstic* case,<sup>276</sup> whereby the elimination of these groups targeted the very existence of the entire group, as such. They represented the “substantial” part of the Polish national group on the Soviet controlled Polish territory, and their destruction caused the destruction of the Polish national group as a viable entity within the multiethnic population of thirteen million people.<sup>277</sup>

It shall be considered further that, as demonstrated by the Soviet proscription lists prepared for the conquered Polish territory, the intent was to subject three to four million members of the Polish national group to repressive measures.<sup>278</sup> Taking into account that mass deportations carried out in June of 1941 were interrupted by the Luftwaffe attacks and in all likelihood would have continued, there is overwhelming evidence that the Soviet Union carried out the destruction of “a substantial part” of the Polish national group between 1939 and 1941 on the Polish territory occupied by the Soviet Union.<sup>279</sup> It shall be also noted that a number of scholars argue that the customary international rule, as codified in Article 6 of the ICC

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<sup>274</sup> *Id.* at 6

<sup>275</sup> Roberta Arnold, *The Mens Rea of Genocide Under the Statute of the International Criminal Court*, 14 CRIM. L. FORUM 127, 133 (2003).

<sup>276</sup> *Krstic*, Case No. IT-98-33-T, Judgment, ¶ 590.

<sup>277</sup> JOANNA B. MICHLIC, POLAND'S THREATENING OTHER: THE IMAGE OF THE JEW FROM 1880 TO THE PRESENT 139 (2006) (summarizing territorial and population control of Soviet Union in Poland).

<sup>278</sup> See Alexander B. Rossino, *Nazi Anti-Jewish Policy During the Polish Campaign: The Case of the Einsatzgruppe von Woyrsch*, 24 GERMAN STUD. REV. 35, 37–38 (2001) (detailing how proscription lists, also known as “Wanted Person Lists” were used); Alexander V. Prusin, *A Community of Violence: The SiPo/SD and Its Role in the Nazi Terror System in Generalbezirk Kiev*, 21 HOLOCAUST & GENOCIDE STUD. 1, 5 (2007) (describing the special proscription lists that the Gestapo and SD prepared on the eve of the German invasion of Poland).

<sup>279</sup> See e.g., Major Lonnie O. Ratley III, *A Lesson of History: The Luftwaffe and Barbarossa*, AIR UNIV. REV., Mar.–Apr. 1983, at 2 (detailing how Luftwaffe air strike devastated the Red Air Force); *Polish Experts Lower Nation's WWII Death Toll*, EXPATICA (Aug. 30, 2009), [http://www.expatica.com/de/news/german-news/Polish-experts-lower-nation\\_s-WWII-death-toll--\\_55843.html](http://www.expatica.com/de/news/german-news/Polish-experts-lower-nation_s-WWII-death-toll--_55843.html) (estimating 150,000 Poles perished, and 320,000 deported, under the Soviets).

Statute, does not require that the victims of genocide be numerous.<sup>280</sup> The only thing that can be clearly inferred from the language of this article is that genocide cannot be held to occur when there is only one victim.<sup>281</sup> However, as long as the other required elements are present, the killing or commission of the other enumerated offenses against more than one person may amount to genocide.<sup>282</sup>

The third approach to evaluate destruction “in part” focuses on the qualitative, as opposed to quantitative, aspect of the destruction by putting emphasis on the word “significant” as opposed to “substantial.”<sup>283</sup> It focuses on the viability of a group not in a numerical sense, but rather on “irreparable impact upon a group’s chances of survival when a stratum of its population, generally political, social, or economic, is liquidated.”<sup>284</sup> The U.N. Commission of Experts stated in its Final Report on the investigation of violations of humanitarian law in the former Yugoslavia that “intent to destroy a specific part of a group such as its political, administrative, and intellectual or business leaders may be a strong indication of genocide regardless of the actual numbers killed.”<sup>285</sup> The “extermination specifically directed against law enforcement and military personnel may affect a ‘significant section of a group in that it renders the group at large defenseless against other abuses of a similar or other nature’” particularly if the leadership is being eliminated as well.<sup>286</sup> The groups singled out for extermination by the March 5th Execution Order correspond exactly to the groups noted above as “significant.” They represent high-ranking military officials, law enforcement personnel, civil servants, members of the administrative structure of the Polish state, community leaders, intellectuals, businessmen and teachers.<sup>287</sup>

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<sup>280</sup> *E.g.*, CHANDRA LEKHA SIRIAM, ET AL., WAR, CONFLICT AND HUMAN RIGHTS: THEORY AND PRACTICE 216 (2010); Rome Statute of the International Criminal Court, *supra* note 178.

<sup>281</sup> Rome Statute of the International Criminal Court, *supra* note 178 (providing examples of genocide as acts against multiple people in a group).

<sup>282</sup> ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 146 (2d ed. 2008).

<sup>283</sup> SCHABAS, *supra* note 198, at 281.

<sup>284</sup> *Id.*

<sup>285</sup> Final Rep. of the Commission of Experts, II.I.1, UN Doc. S/1994/674 (May 24, 1994) (a Security Council Resolution established the Commission of experts to investigate humanitarian law violations in the former Yugoslavia).

<sup>286</sup> Final Rep. of the Commission of Experts, *supra* note 284, at II.I.1; *see also* SCHABAS, *supra* note 198 at 282.

<sup>287</sup> SCHABAS, *supra* note 198 at 282.

The U.N. Commission of Experts also noted in its Final Report that the destruction “must be viewed in the context of the fate of what happened to the rest of the group.”<sup>288</sup>

“If a group suffers extermination of its leadership and in the wake of that loss, a large number of its members are killed or subjected to other heinous acts, for example deportation, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.”<sup>289</sup>

This scenario directly applies to the Katyn case, as the mass killing of the Polish leadership was conducted simultaneously with mass deportations of their family members and the families of other leaders and pillars of the Polish society. These deportations were conducted in traumatic circumstances and resulted in severe hardship deliberately inflicted on hundreds of thousands of Polish civilians, mostly women, children, and the elderly.<sup>290</sup> The living conditions during deportation and at the destination locations, including—but not limited to—starvation, cold, infectious diseases, and hard labor, were calculated to bring about their physical destruction.<sup>291</sup>

Finally, the fourth test to evaluate destruction “in part” focuses on a group in a geographic sense.<sup>292</sup> A Trial Chamber of the Yugoslavia Tribunal noted that:

In view of the particular intent requirement, which is the essence of the crime of genocide, the relative proportionate scale of the actual or attempted physical destruction of a group, or a significant section therefore should be considered in relation to the factual opportunity of the accused to destroy a group in a specific geographic area within the sphere of his control, and not in relation to the entire population of the group in a wider geographic sense.<sup>293</sup>

In another case, the Trial Chamber held that “the physical destruction may target only a part of the geographically limited part of the larger group

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<sup>288</sup> Final Rep. of the Commission of Experts, *supra* note 284, at II.I.1; *see also* SCHABAS, *supra* note 198, at 283.

<sup>289</sup> SCHABAS, *supra* note 198, at 283; *see also* Final Rep. of the Commission of Experts, *supra* note 284, at II.I.1.

<sup>290</sup> FROM PEACE TO WAR: GERMANY, SOVIET RUSSIA, AND THE WORLD, 1939–1941, at 78 (Bernd Wegner ed., 1997) (describing the brutal deportations and the deaths of children and elderly caused by harsh weather).

<sup>291</sup> *Id.* (listing the causes of death, such as dehydration during the summer months and freezing to death during the winter months).

<sup>292</sup> SCHABAS, *supra* note 198, at 285.

<sup>293</sup> Prosecutor v. Karadzic and Mladic, Case No. IT-95-18-R61 (Int'l Crim. Trib. for the Former Yugoslavia June 27, 1996).

because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.”<sup>294</sup> Furthermore, the International Court of Justice held “that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area.”<sup>295</sup> In the Katyn case, the Soviet Union directed its policies of destruction at the Polish national group located on Polish territory conquered, incorporated, and controlled by the Soviet Union between September 1939 and June 1941.<sup>296</sup>

In light of the above analysis, the Katyn case meets the test of destruction “in whole” and destruction “in part.”

### *E. Intent to Destroy*

Material elements of the crime of genocide must be committed with intent and knowledge.<sup>297</sup> Such intent and knowledge can be proven by explicit evidence of perpetrator’s own words and acts, and “can be inferred from relevant facts and circumstances.”<sup>298</sup>

#### 1. Direct proof

The March 5th Execution Order clearly spells out the intent to destroy 14,700 Polish POWs and 11,000 persons arrested on the conquered

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<sup>294</sup> Prosecutor v. Krstic, Case No. ICTR-98-33-T, Judgement, ¶ 590 (Dec. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>; see also Prosecutor v. Sikirica et al., Case No. ICTR-95-8-T, Judgement on Defence Motion to Acquit, ¶ 68 (Sept. 3, 2001) <http://www.icty.org/x/cases/sikirica/tjug/en/010903r98bis-e.pdf> (“[T]he intent to destroy a multitude of persons belonging to a group may amount to genocide, even where these persons constitute only part of a group within a given geographical area: a country or a region or a single community.”).

<sup>295</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 199 (Feb. 26).

<sup>296</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 112 (exposing that 97% of all prisoners of war during 1940 were Poles).

<sup>297</sup> See Genocide Convention, *supra* note 250, art. 2 (referring to the intent to destroy). Article 30 of the Rome Statute discusses the mental element required for the crime of genocide. See Rome Statute of the International Criminal Court, *supra* note 178, art. 30. It states that a person has intent where: “(a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.” *Id.* Article 30 also specifies that “‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events[.]” and that “‘[k]now’ and ‘knowingly’ shall be construed accordingly.” *Id.*

<sup>298</sup> ICC Elements of Crimes, *supra* note 182.

Polish territory.<sup>299</sup> Members of the Soviet Politburo based their decision to shoot the Polish officers and other Polish prisoners on the fact that they were “all hardened, irremediable enemies of Soviet power. . . .”<sup>300</sup> By approving the March 5th Execution Order, all members of the Soviet Politburo had the knowledge that all Polish citizens listed in this order would be killed, and they intended this killing to take place.

Stalin in particular spoke of his intent to kill people of Polish descent at several different occasions. He clearly expressed his intent to kill people of Polish ethnicity in connection with a mass extermination action known as the Polish Operation, conducted in the Soviet Union between 1937 and 1938.<sup>301</sup> In replying to Yezow, who led the extermination of ethnic Poles in Ukraine, Stalin wrote: “Very well! Keep on digging up and cleaning out this Polish filth. Eliminate it in the interest of the Soviet Union.”<sup>302</sup>

Soon thereafter, on August 19, 1939, in a speech given to his most trusted members of the Politburo (Molotov, Beria, Voroshilov, Kaganovich and Malenkov), Stalin stated that “the first benefit from signing the pact [of non-aggression with Germany] will be the destruction of Poland and the movement of our borders up to Warsaw.”<sup>303</sup>

Four days later, on August 23, 1939, the Soviets signed a nonaggression treaty with Germany known as the Ribbentrop-Molotov Pact.<sup>304</sup> The Secret Additional Protocol to this Pact spells out the intent of Germany and the Soviet Union to wage a joint war of aggression on Poland as follows:

In the event of a territorial and political rearrangement of the areas belonging to the Polish state the spheres of influence of Germany and the U.S.S.R. shall be bounded approximately by the line of the rivers Narew, Vistula, and San.

The question of whether the interests of both parties make desirable the maintenance of an independent Polish state and how such a state should be bounded can only be definitely determined in the course of further political developments.<sup>305</sup>

It is important to point out that it was Joseph Stalin who ultimately decided that it was not desirable to maintain any independent Polish State.

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<sup>299</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 118–20.

<sup>300</sup> *Id.* at 119.

<sup>301</sup> *See* SNYDER, *supra* note 18, at 96.

<sup>302</sup> *Id.*

<sup>303</sup> PIOTROWSKI, *supra* note 58, at 7. The speech was first broken by the German newspaper, Die Welt (The World) on July 23, 1996, after over 50 years of secrecy. *Id.*

<sup>304</sup> *See* Ribbentrop-Molotov Pact, *supra* note 60.

<sup>305</sup> *Id.* (quoting Article 2 of the Secret Add. Protocol).

In his telegram from Moscow dated September 20, 1939 German Ambassador Schulenburg reported to Berlin that:

Molotov hinted that the original inclination entertained by the Soviet Government and Stalin personally to permit the existence of a residual Poland had given way to the inclination to partition Poland along the Pissa-Narew-Vistula-San Line.<sup>306</sup>

Other members of the Soviet Politburo also acted with specific intent to destroy the Polish national group. Lawrenti Beria prepared a plan of executions, drafted the March 5th Execution Order, and spearheaded its complex implementation.<sup>307</sup> He also authored and orchestrated plans for the deportation of hundreds of thousands Polish civilians to the Soviet Far East.<sup>308</sup> Viacheslav Molotov negotiated with Germany the destruction of Poland and its partition, and publicly spoke of his satisfaction with the destruction of Poland. At a meeting of the Supreme Council of the U.S.S.R. on October 31, 1939, Molotov used the following explicit hate language towards Poland:

The ruling circles of Poland boasted quite a lot about the “stability” of their State and the “might” of their army. However one swift blow to Poland, first by the German Army and then by the Red Army, and nothing was left of this ugly bastard of the Versailles Treaty which has existed by oppressing non-Polish nationalities.<sup>309</sup>

Molotov’s explicit admission of his intent to destroy Poland clearly echoed Stalin’s and Beria’s attitudes.<sup>310</sup> These statements demonstrate common genocidal intent that incited the Soviet public to hatred of the Polish people and aggression to destroy Poland. Thus, the above actions and statements constitute direct proof, through perpetrators’ own words and acts, that they acted in concert with knowledge and intent to destroy the Polish national group, as such.

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<sup>306</sup> See Telegram No. 395 from Friedrich-Werner Graf von der Schulenburg, Ambassador, Ger., to the German Foreign office, Berlin (Sept. 20, 1939), available at [http://avalon.law.yale.edu/20th\\_century/ns080.asp](http://avalon.law.yale.edu/20th_century/ns080.asp).

<sup>307</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 385.

<sup>308</sup> See *id.* at 114–15 (identifying the beginnings of Beria’s deportation plans).

<sup>309</sup> THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 213. Some translations of this statement are as follows: “The ragtag State of Poland, the grotesque bastard of the Versailles Treaty, has ceased to exist.” EDMUND JAN OSMANCZYK, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 810 (Anthony Mango ed., 2004).

<sup>310</sup> Compare THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 213, with SNYDER, *supra* note 18, at 96 (quoting Stalin as writing “Very well! Keep on digging up and cleaning out this Polish filth. Eliminate it in the interest of the Soviet Union.”), and with KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 385 (Beria submitted to Stalin the resolution to shoot Polish POWs).

## 2. Motive

The drafters of the Genocide Convention made it very clear that in deciding whether a perpetrator intended to destroy a protected group, the concept of intent must be distinguished from that of motive.<sup>311</sup> To establish intent for purposes of genocide, it must be proven that the perpetrator intended to destroy the protected group.<sup>312</sup> Motives for this intent are not specified or listed in the definition of genocide.<sup>313</sup>

This distinction between intent and motive is of great importance in the Katyn case because this issue often emerges in connection with the confusion between a political group, which is not a protected group under the definition of genocide, and a political motive, which does not preclude the finding of genocide.<sup>314</sup> The following scenario illustrates this problem: Consider a national group which is a protected group under the definition of genocide and a political group which is not a protected group under the definition of genocide. The destruction of any national group constitutes genocide whether there is a political motive or not, as long as the genocidal intent is established.<sup>315</sup> On the other hand, the destruction of a political group does not constitute genocide, no matter what the motive is.<sup>316</sup> Under the definition of genocide, motive is considered to be only one of many tools in establishing whether there was “knowledge and intent” to destroy the protected group.<sup>317</sup>

### a. Legislative history of the motive

The drafters of the Genocide Convention deliberated extensively whether motives for destruction should be enumerated in the definition of genocide. A representative of the Soviet Union argued that “a crime against a human group becomes a crime of genocide when that group was destroyed

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<sup>311</sup> See GAOR 6th Comm., 3d Sess., 76th mtg. at 118, U.N. Doc. A/C.6/SR.75 (Oct. 15, 1948) [hereinafter Drafting Minutes] (Mr. Fitzmaurice, representative of the U.K., stated that “[o]nce the intent to destroy a group existed, that was genocide, whatever reasons the perpetrators of the crime might allege.”).

<sup>312</sup> See ICC Elements of Crimes, *supra* note 182, art. 6(a)(3) (“The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.”).

<sup>313</sup> See Genocide Convention, *supra* note 250, art. 2.

<sup>314</sup> See *id.* (omitting political groups from the protected groups, but making no mention of motive of the perpetrators).

<sup>315</sup> See *id.* (omitting motive and requiring only intent).

<sup>316</sup> See *id.* (omitting political groups from protected groups under the Genocide Convention).

<sup>317</sup> See *id.* The destruction of a political group for whatever reason qualifies as a crime against humanity. See *Elements of Crimes*, *supra* note 304, at 10 (stating that the crime against humanity of persecution can be made if the perpetrator targets a political group).

for national, racial or religious motives.”<sup>318</sup> However, a representative of the United Kingdom was of the opinion that listing the motives was not only useless but it was dangerous because a restrictive nature of such a list “would enable those who committed a crime of genocide to claim that they had not committed that crime on grounds of one of the motives listed in the definition.”<sup>319</sup> Drafters of the Genocide Convention voted down the proposal of the Soviet Union to limit the list of motives as well as that of the U.K. to leave out any reference to motives.<sup>320</sup>

In an effort to find a compromise, Venezuela recommended that the words “as such” be introduced to the definition of genocide.<sup>321</sup> This phrase should meet the views of those who wished to retain a statement of motives because the motives were implicitly included in the words “as such” but were not listed separately, thus were not restricted to any list. By adopting the language “as such” the drafters decided to include the concept of motive in the definition of genocide but not to enumerate the motives. This discussion was concluded with the adoption of Venezuela’s proposal to delete the listing of motives but retain the phrase “as such.”<sup>322</sup>

b. “As such”

Between October 14 and October 16, 1948, at the 75th Meeting of the Contracting Parties, motive was extensively discussed in the course of deliberations on the draft Genocide Convention.<sup>323</sup> During the course of these deliberations, numerous countries expressed their concern that the requirement of motive would open the door to abuse through manipulation of motives.<sup>324</sup> Several participants commented that domestic criminal laws do not include any references to motives.<sup>325</sup> Panama stated that “according

<sup>318</sup> Drafting Minutes, *supra* note 310, at 119.

<sup>319</sup> *Id.* at 118.

<sup>320</sup> See SCHABAS, *supra* note 198, at 301 (“The words ‘as such’, . . . an important element . . . [were] deliberately included by authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime.” (quoting *Niyitegeka v. Prosecutor*, Case No. ICTR 96-14-1, Judgment, ¶ 49 (July 9, 2004))).

<sup>321</sup> Drafting Minutes, *supra* note 310, at 119 (Venezuela submitted an amendment stating that “as such” should be substituted for the list of motives).

<sup>322</sup> See 2 HIRAD ABTAHI & PHILIPPA WEBB, *THE GENOCIDE CONVENTION, THE TRAVAUX PRÉPARATOIRES* 1864 (2008).

<sup>323</sup> See Drafting Minutes, *supra* note 310, at 119 (nearly every country in the record for those two days remarks on motive).

<sup>324</sup> See *id.* at 117–120. The U.K. in particular, thought that the use of motives in the definition of genocide would be “dangerous” as it would permit those who committed Genocide to evade conviction by claiming a different motive than one listed in the definition. *Id.* at 118.

<sup>325</sup> See *id.* at 118 (Panama points out that under domestic law, intent and act are often all that is required).

to the penal codes of most countries, the establishment of crime presupposes two factors, intent and act.”<sup>326</sup> It was unnecessary to add the factor of motive to the convention, since no provision was made for it in any penal code.<sup>327</sup> Iran warned that mentioning motive “was dangerous because it allowed the guilty to exonerate themselves from the charge of genocide on the pretext that they had not been impelled by motives contained in the proposed list of motives.”<sup>328</sup> Ecuador observed that “those who committed the crime of genocide might use the pretext of the political opinion of a racial or religious group to persecute and destroy it, without becoming liable to international sanctions.”<sup>329</sup>

The adopted compromise reflected in the words “as such” was subsequently interpreted by the International Criminal Tribunal for Rwanda to mean that “the proscribed acts were committed against the victims because of their membership in the protected group but not solely because of such membership.”<sup>330</sup> Consequently, even if motives are mixed, the coexistence of other motives is no defense if the genocidal motive is present.

c. Manipulation of motive by the Soviet Union

The process of manipulating the motive for the destruction of the Polish nation can best be demonstrated by the German-Soviet negotiations leading up to the aggression and partition of Poland. Stalin’s true motive to attack Poland; i.e., the destruction of Poland and movement of the Soviet borders up to Warsaw, was top secret.<sup>331</sup> He only revealed this motive at a meeting of his closest advisors on August 19, 1939 and later included it in the top secret protocol to the Ribbentrop-Molotov Pact.<sup>332</sup> However, Stalin needed to find another, less jarring, motive for public consumption and international opinion—one that would be plausible to the masses and at the same time would avoid making the Soviet Union appear to be an aggressor. Between signing the Ribbentrop-Molotov Pact on August 23, 1939 and attacking Poland on September 17, 1939, the Soviet leadership exerted considerable effort to find a proper justification for the attack on Poland that would be acceptable to the Soviet people and also useful in international

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<sup>326</sup> *See id.*

<sup>327</sup> *See id.* (describing the basis for Panama’s support of the U.K.’s proposal).

<sup>328</sup> *Id.* at 120.

<sup>329</sup> Drafting Minutes, *supra* note 310, at 100.

<sup>330</sup> Prosecutor v. Niyitegeka, Case No. ICTR 96-14-A, Judgment, ¶ 53 (July 9, 2004).

<sup>331</sup> *See* PIOTROWSKI, *supra* note 58, at 7 (describing Stalin’s masterplan to conquer Europe which required a total mobilization of the USSR).

<sup>332</sup> *Id.* at 7.

diplomacy.<sup>333</sup> The fabrication of the reasons to go to war of aggression against Poland can be summarized as follows:

- Initially, the Soviets wanted to justify the aggression on Poland as a war of necessity in order to come to the aid of the Ukrainians and the White Russians “threatened by Germany.”<sup>334</sup>
- However, this argument did not go well with the Germans. They expressed their dissatisfaction with this reasoning, replying that the assignment of a motive of that sort would be out of the question.<sup>335</sup>
- In response, the Soviets conceded that the projected argument of the Soviet Government contained a note that was jarring to German sensibilities but stated that “the Soviet Government unfortunately saw no possibility of any other motivation, since the Soviet Union had thus far not concerned itself about the plight of its minorities in Poland and had to justify abroad, in some way or other, its present intervention.”<sup>336</sup>

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<sup>333</sup> KUŚNIERZ, *supra* note 20, at 30–31.

<sup>334</sup> Telegram No. 317 from Friedrich-Werner Graf von der Schulenburg, Ambassador, Ger., to the German Foreign Office, Berlin (Sept. 10, 1939), *available at* [http://avalon.law.yale.edu/20th\\_century/ns069.asp](http://avalon.law.yale.edu/20th_century/ns069.asp).

Then Molotov came to the political side of the matter and stated that the Soviet Government had intended to take the occasion of the further advance of German troops to declare that Poland was falling apart and that it was necessary for the Soviet Union, in consequence, to come to the aid of the Ukrainians and the White Russians “threatened” by Germany. This argument was to make the intervention of the Soviet Union plausible to the masses and at the same time avoid giving the Soviet Union the appearance of an aggression.

*Id.*

<sup>335</sup> Telegram No. 360, *supra* note 61 (arguing that assigning the threat to the Ukrainian and White Russian populations would be out of the question in practice).

We assume in proposing such a communiqué that the Soviet Government has already given up the idea, expressed by Molotov in an earlier conversation with you, of taking the threat to the Ukrainian and White Russian populations by Germany as a ground for Soviet action. The assignment of a motive of that sort would be out of the question in practice.

*Id.*

<sup>336</sup> 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). “Molotov conceded that the projected argument of the Soviet Government contained a note that was jarring to German sensibilities but asked that in view of the difficult situation of the Soviet Government we not let a trifle like this stand in our way.” *Id.*

- As a result of this debate, the Soviet Union omitted the reference to the threat “by Germany” and did not specify against whom it intends to protect the Ukrainians and Byelorussians. Instead, the statement read: “Soviet Union considered itself obligated to intervene to protect its Ukrainian and White Russian brothers and make it possible for these unfortunate people to work in peace.”<sup>337</sup>

The German Ambassador in Moscow reported that “[t]he Soviet Government intended to publicize the above train of thought by the radio, press, etc., immediately after the Red Army had crossed the border, and at the same time communicate it in an official note to the Polish Ambassador here and to all the missions here.”<sup>338</sup> The Soviets already tested these arguments at the public rallies in the Gorki Park in Moscow. As foreign diplomats and correspondents reported, Kremlin’s “line of thought,” that is the latest version of propaganda, was first presented in public parks in Moscow by party apparatchiks and later promoted by the media and spread through the party channels to regional and local leaders. One such rally ended with the following appeal: “And what? Do we, the Soviet Nation, are to stand by and watch the suffering of our Byelorussian and Ukrainian brothers from the hand of the Polish Pany?”<sup>339</sup> The speaker did not give any answer to this question but the people understood his appeal their own way: “Let’s go to help Poland!” came the reply from the crowd.<sup>340</sup> Others shouted: “Let’s go against the vicious Germans!”<sup>341</sup> Learning of the official Soviet line presented in the Gorki Park, William Seeds, British Ambassador in Moscow, concluded that the Soviet Union would be able to switch at any time from defense of persecuted brothers to defense of oppressed victims of capitalism regardless of their nationality.<sup>342</sup> As history proved, his were prophetic words.

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<sup>337</sup> *Id.*; Telegram No. 360, *supra* note 61.

In view of the complete collapse of the previous form of government in Poland, the Reich Government and the Government of the U.S.S.R. consider it necessary to bring to an end the intolerable political and economic conditions existing in these territories. They regard it as their joint duty to restore peace and order in these areas which are naturally of interest to them and to bring about a new order by the creation of natural frontiers and viable economic organizations.

*Id.*

<sup>338</sup> Telegram No. 371, *supra* note 335.

<sup>339</sup> ŁOJEK, *supra* note 38, at 59.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 201.

Before its attack on Poland, the Soviet Union wrestled with yet another problem. To protect its international image, the Soviet justification for the invasion of Poland was to be based on an argument that the Polish State had collapsed and no longer existed.<sup>343</sup> Accordingly, the resistance of the Polish Army, the presence of the Polish Government on the ground in Poland, as well as effective defense of key strategic centers including the capital city of Warsaw, contradicted the Soviet argument that Poland had collapsed.<sup>344</sup>

The most visible and most important symbol of Polish resistance was the capital city of Warsaw. The surrender of Warsaw was of utmost importance to the Kremlin. Impatient Molotov sent Hitler a congratulatory telegram on the capture of Warsaw already on September 8, 1939, despite the fact that the stubborn capital of Poland would not succumb to the German onslaught for the next twenty days.<sup>345</sup>

The Soviets' efforts to cover up their true intentions towards Poland are also documented in a telegram of the German Ambassador Schulenberg sent from Moscow to Berlin on September 14, 1939.<sup>346</sup> Schulenberg reported:

For the political motivation of Soviet action (the collapse of Poland and protection of Russian "minorities" it was of the greatest importance not to take action until the governmental center of Poland, the city of Warsaw, had fallen. Molotov therefore asked that he be informed as nearly as possible as to when the capture of Warsaw could be counted on. . . . I would direct your attention to today's article in Pravda, carried by DNB, which will be followed by a similar article in Izvestia tomorrow. The articles serve [to prepare] the political motivation mentioned by Molotov for Soviet intervention.<sup>347</sup>

But Warsaw did not budge.<sup>348</sup> Therefore, the Soviets had to make a decision: whether to risk the German takeover of their agreed-upon share of

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<sup>343</sup> Telegram No. 350 from Friedrich-Werner Graf von der Schulenburg, Ambassador, Ger., to the German Foreign Office (Sep. 14, 1939) [hereinafter Telegram No. 350], *available at* [http://avalon.law.yale.edu/20th\\_century/ns071.asp](http://avalon.law.yale.edu/20th_century/ns071.asp).

<sup>344</sup> KUŚNIERZ, *supra* note 20, at 34–36.

<sup>345</sup> Telegram No. 300 from Friedrich-Werner Graf von der Schulenburg, Ambassador, Ger., to the German Foreign Office (Sep. 9, 1939), *available at* [http://avalon.law.yale.edu/20th\\_century/ns065.asp](http://avalon.law.yale.edu/20th_century/ns065.asp). "I have just received the following telephone message from Molotov: 'I have received your communication regarding the entry of German troops into Warsaw. Please convey my congratulations and greetings to the German Reich Government. Molotov.'" *Id.*

<sup>346</sup> Telegram No. 350, *supra* note 342.

<sup>347</sup> *Id.* (alteration in original).

<sup>348</sup> PIOTROWSKI, *supra* note 58, at 9 (explaining that the Soviet Union acted sooner than expected against Poland because of the rapidly deteriorating Polish resistance and the fear that the German army would expand into the Soviet's prospective portion of Poland).

booty, or to risk the damage to its international reputation. At the end, they chose to protect their prey while taking the risk to jeopardize their international standing, and attacked Poland while Warsaw was still fighting.<sup>349</sup> To minimize the damage to their international reputation, the Soviets engaged in a ferocious anti-Polish propaganda offensive that reverberates to this day.<sup>350</sup> Together with the Goebbels propaganda machine of Nazi Germany, they portrayed Poland as a vicious oppressor of its minorities that needed to be destroyed.<sup>351</sup> As the British observer ably predicted, they quickly broadened this motive by mixing the message of oppressing minorities with the image of oppressing the working classes, thus portraying the Polish people as the oppressive bourgeois or the so-called “Polish Pany,” and making them the number one enemy of the Soviet people.<sup>352</sup>

It is worth noting here that both Germany and the Soviet Union officially justified their aggression on Poland by the need to protect “their” minorities oppressed by the Polish Government.<sup>353</sup> The minority protection paradox is daunting in this context. While Poland was bound by the restrictive International Treaty on Minority Protection signed with the League of Nations in 1919,<sup>354</sup> neither Germany nor the Soviet Union was bound by any minority treaty or other international obligations to protect their minorities.

It shall be further noted that no mass murders of any minorities took place in pre-war Poland, while at that time both Germany and the Soviet Union were actively engaged in exterminating the Polish minority on their territory.<sup>355</sup> While the Soviets murdered 111,000 ethnic Poles in the Polish Operation of 1937–1938, the Germans, in August 1939 alone, arrested 2,000 ethnic Poles living in Germany.<sup>356</sup>

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<sup>349</sup> *Id.*

<sup>350</sup> Grzegorz Joniec, *Antypolskie kampanie prasowe w sowieckiej prasie polskojęzycznej w latach 1939–1941*, in 4 Wschodni Rocznik Humanistyczny 287–303 (2007).

<sup>351</sup> SNYDER, *supra* note 18, at 131.

<sup>352</sup> ŁOJEK, *supra* note 38, at 59; see also ANDRZEJ FRISZKE, *Polska: Losy Państwa i Narodu 1939–1989* (2003).

<sup>353</sup> SNYDER, *supra* note 18, at 131.

<sup>354</sup> Polish Minority Treaty, (June 28, 1919), available at [http://www.maclester.edu/courses/intl245/docs/treaty\\_poland.pdf](http://www.maclester.edu/courses/intl245/docs/treaty_poland.pdf) (last visited June 15, 2012). The Minority Treaty effectively limited Poland’s ability to defend itself against diversionary operations of its minorities acting on behalf of the foreign governments. See also U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 14, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

<sup>355</sup> SNYDER, *supra* note 18, at 409.

<sup>356</sup> U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 14, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

Finally, it shall be noted that no meaningful Russian minority lived in pre-war Poland.<sup>357</sup> Thus, the Ukrainians and White Ruthenians were considered minorities worth Soviet protection, the Jews and Lithuanians were excluded from the groups worth protection, while the Poles were made public enemies of the Soviet people.<sup>358</sup> Accordingly, the minority protection argument was used by both Nazi Germany and the Soviet Union as powerful pretext to destroy Poland.<sup>359</sup>

d. Motive behind the Katyn crime

An argument is often made that the Katyn crime was committed out of political rather than national motive, and therefore that it cannot be classified as genocide.<sup>360</sup> In other words, the Polish officer POWs were murdered not because they were Polish patriots defending their country against the Soviet aggression and the right of re-born Poland to exist, but rather because they were anti-communist oppressors of the working poor, and therefore political enemies of the communist system.

The language of the March 5th Execution Order offers important insight into this debate. The key statement from the March 5th Execution Order that provides the formal justification for shooting 25,700 Polish citizens states: “they are all hardened irremediable enemies of the Soviet power . . . .”<sup>361</sup> This statement does not provide sufficient answer to the fundamental question why the condemned men were such hardened irremediable enemies of the Soviet power. Is it because the Soviet Union destroyed their homeland, or is it because the Soviet Union sponsored communism? The vagueness of this train of thought can be observed in most NKVD documents pertaining to the persecuted Polish citizens.<sup>362</sup>

The victims’ selection criterion sheds more light on the motive issue. The March 5th Execution Order explicitly states that people on this

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<sup>357</sup> See James Mayfield, *Ethnic and Religious Map of Poland Before the Nazi Invasion*, EUR. HERITAGE LIBR., <http://euroheritage.net/polandethnicmap.shtml> (last visited June 15, 2012) (describing the minority groups in pre-war Poland as being comprised of mainly Jews, Germans, Lithuanians and Ukrainians).

<sup>358</sup> See Richard Doody, *From Rebirth to the Establishment of the People’s Republic*, WORLD AT WAR: POLAND 1918–1952 (Feb. 28, 2012), <http://worldatwar.net/timeline/Poland/18-52.html> (indicating that, upon the Soviet invasion of Poland, “the Soviets . . . [took] measures to protect inhabitants of Belyorussia and the western Ukraine”).

<sup>359</sup> *Id.*

<sup>360</sup> See, e.g., Anna M. Cienciala, *The Katyn Syndrome*, 65 *RUSS. REV.* 117, 120 (2005) (describing the Polish as “counterrevolutionaries” and enemies of the USSR).

<sup>361</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 119.

<sup>362</sup> PAUL R. GREGORY, *LENIN’S BRAIN AND OTHER TALES FROM THE SECRET SOVIET ARCHIVES* 1–8 (2008), available at <http://www.policyarchive.org/handle/10207/bitstreams/11850.pdf>.

list are 97% Polish by nationality, and the categories of people listed refer to the officers of the Polish Army, law enforcement personnel, and intellectual leadership of the Polish nation.<sup>363</sup> According to the March 5th Execution Order, among the Polish POWs sentenced to death were over 6,000 lieutenants, 2<sup>nd</sup> lieutenants and ensigns, over 5,000 rank-and-file police gendarmes, prison guards, and intelligence agents; over 1,000 police officers, junior officers, border guards and gendarmerie; and 144 officials, farmers, priests and military settlers.<sup>364</sup> Clearly, the selection criterion for these groups was based primarily on the function of these men within the administrative and military structures of the Polish State and not on their social class or wealth. All these factors explicitly and unequivocally point out to the national motive.

The March 5th Execution Order also includes the following phrases: “former officers of the Polish Army,” “former workers in the Polish police and intelligence organs,” members of “Polish nationalist counter-revolutionary parties,” and “participants in exposed counter-revolutionary insurgent organizations” who attempt to continue their “counter-revolutionary work” and conduct “anti-Soviet agitation,” and “enter actively into the battle against Soviet power.”<sup>365</sup> In these statements the anti-Polish national motive is clearly present and effectively mixed with the political motive as phrases such as “former officers of the Polish army,” “former workers in the Polish police,” “Polish nationalists” and “insurgents” are mixed with “counter-revolutionaries.”<sup>366</sup>

The Soviet leadership was well aware that vague statements worked to their advantage.<sup>367</sup> Vagueness and imprecision in identifying the enemy was intended to spread fear among the people and provide cover-up for the masters.<sup>368</sup> This strategy of vagueness was well developed and even spelled out in the Internal Soviet Directives found in Poland after the war.<sup>369</sup> The

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<sup>363</sup> *Id.*

<sup>364</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 119.

<sup>365</sup> *Id.* at 118–20.

<sup>366</sup> *Id.* To put this language in the historical context, it shall be noted that it was a common practice at that time in the U.S.S.R. to stigmatize all people subject to repression as the enemies of the people, i.e., counterrevolutionaries. Thus, all the enemies of the Soviet power were always labeled as “counterrevolutionaries.” *Id.* It is important to note that some of the most efficient murderers of the Katyn victims received NKVD rewards for the liquidation of ‘the Polish nationalists’ in the Smolensk oblast. Accordingly, the Russians in their own terminology classified the Katyn victims as belonging to the Polish national group. *Id.* at 119.

<sup>367</sup> *Boleslaw Bierut's Archives: NKVD Text Detailing the Soviet Takeover of Poland, Instruction No. NK/003/47, in 14 SARMATIAN REV.* ¶14 (1994), available at <http://www.ruf.rice.edu/~sarmatia/194/instruct.html> (stating that documents should deliberately be imprecisely written).

<sup>368</sup> *See id.*

<sup>369</sup> *Id.*

directive provided: “See to it that all legal, economic and organizational documents (except military documents) are written in such a way as to be imprecise.”<sup>370</sup>

The national motive can be further confirmed by other genocidal acts directed at the Polish national group at the same time by the same people. For example, the data collected by the Polish Red Cross from nearly 120,000 Polish refugees soon after their 1942 arrival in Persia revealed that over 50% of these deportees from Eastern Poland were workers, tradesmen, farmers and member of the forestry service.<sup>371</sup> Thus, half of the deportees belonged to the poorest classes, which the Soviet communist regime was supposed to liberate from capitalist oppression and protect.<sup>372</sup> This data directly contradicts the political class motive.

The argument that the victims of the March 5th Execution Order were murdered for political rather than national motives cannot stand in light of the explicit evidence of national motive; the clear intent of the drafters of the Genocide Convention not to allow for political motive to be used as pretext to evade the responsibility for genocide; and in view of the case law on genocide.<sup>373</sup> In fact, it would be in direct contradiction to the intent of the drafters of the Genocide Convention to allow the perpetrators of the Katyn atrocity to exonerate themselves on the pretext of political motive: that tactic that was envisioned and clearly rejected by the drafters of the Genocide Convention.<sup>374</sup>

### 3. Intent and knowledge inferred from facts and circumstances

Considering that the crime of genocide requires the proof of specific intent,<sup>375</sup> which is the highest standard of proof to be met, the above explicit evidence of specific intent to destroy the Polish national group can be corroborated by the vast body of evidence of specific intent that can be inferred from facts and circumstances of the Katyn case. Considering the

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<sup>370</sup> *Id.* This Instruction was sent from Moscow to the KGB Headquarters in the Soviet Embassy in Warsaw and was subsequently found in Boleslaw Bierut’s files after his sudden death in 1956. *Id.*

<sup>371</sup> THE POLISH DEPORTEES OF WORLD WAR II, *supra* note 132, at 219–20.

<sup>372</sup> *Id.* at 220.

<sup>373</sup> Prosecutor v. Niyitegaka, Case No. ICTR 96-14-A, Judgment, ¶ 49 (July 9, 2004), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=41591f1b4> (describing how the Genocide Convention drafters deliberately replaced an explicit reference to motives in the definition of the crime of genocide).

<sup>374</sup> Representatives of Iran and Egypt warned that any mention of motive was dangerous because it allowed the guilty to exonerate themselves from the charge of genocide on the pretext that they had not been impelled by motives contained in the proposed list of motives. See Drafting Minutes, *supra* note 310, at 120.

<sup>375</sup> Genocide Convention, *supra* note 250, art 2.

enormity of indirect evidence, the most obvious examples of such implied evidence of specific intent are highlighted below.

a. Nazi-Soviet conspiracy to destroy Poland

The Katyn crime shall be considered, interpreted, and evaluated in the context of the illegal and unprovoked war of aggression, waged jointly by Germany and the Soviet Union on Poland in accordance with the Secret Additional Protocol to the Ribbentrop-Molotov Pact. Accordingly, the perpetrators' intent and knowledge can be inferred from the facts and circumstances of their jointly preparing, waging, and executing the war of aggression against Poland, and by jointly planning and implementing inconceivable repressive measures directed at the Polish civilian population on the conquered Polish territory.

The Nazi-Soviet collaboration is outlined in greater detail in Section C of the Presentation of Facts.<sup>376</sup> Thus, only highlights of this collaboration are listed below:

- The Polish national group was singled out for special treatment in the Secret Supplemental Protocol to the Friendship and Boundary Treaty, in which Nazi Germany and the Soviet Union declared their intention to work together to combat Polish resistance.<sup>377</sup>
- The Extraordinary Pacification Operations conducted in Poland between September and December 1939 by Nazi special extermination squads resulted in 714 mass executions of civilian population in the first fifty-five days of German occupation and claimed the life of 16,336 Polish civilians.<sup>378</sup> Special pacification operations conducted by the Soviet NKVD and by special CheKa operational groups that followed the Red Army to Poland to cleanse the lands from intelligentsia, clergy and nobility resulted in the unknown number of brutal murders and arrests of at least 11,817 civilians.<sup>379</sup>
- The above "cleansing" operations were conducted at the same time, in the same manner, based on proscription lists prepared in

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<sup>376</sup> See *supra* Part II.C.

<sup>377</sup> German-Soviet Boundary and Friendship Treaty, *supra* note 57.

<sup>378</sup> See *Wystawa "Zagłada polskich elit. Akcja AB-Katyn,"* INST. NAT'L REMEMBRANCE (Sept. 28, 2006), <http://www.ipn.gov.pl/portal.php?serwis=pl&dzial=47&id=4038>.

<sup>379</sup> *Id.*

advance by local collaborators, without following any judicial proceedings, with the aim to speed up the process.<sup>380</sup>

- Four high-level NKVD-Gestapo meetings to coordinate Soviet-German actions in dealing with Polish resistance took place on the conquered Polish territory between September 1939 and April 1940. They took place in Brest-Litovsk, Przemyśl, Zakopane and Kraków.<sup>381</sup>
- On March 2, 1940, Hitler ordered the AB Aktion against the Polish leading elite.<sup>382</sup> On March 5, 1940 the Soviet Politburo issued an order to exterminate 25,700 Polish POWs of officer rank and other leaders.<sup>383</sup> Stalin made this decision on or about March 2, 1940, at exactly at the same time as Hitler made his decision to begin the AB Intelligentsia Action.<sup>384</sup> Stalin's decision resulted in the Katyn Massacre as we know it today.
- As a result of the AB Intelligentsia Action, about 7,000 leaders, professors, teachers, and priests considered suspected of criminal activities were subsequently massacred at various locations throughout Poland.<sup>385</sup> By the summer of 1940, more than 61,000 Polish activists, intelligentsia, scholars, actors, former officers, and other leaders were murdered.<sup>386</sup>
- Both the Nazis and the Soviets supplemented their mass extermination operations with mass deportations of the Polish people from their homeland.<sup>387</sup> While the Soviets were shipping the Poles to Siberia and Kazakhstan, the Germans pursued their own strategy of expelling the Poles from their homes.<sup>388</sup> From the

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<sup>380</sup> *Id.*

<sup>381</sup> *See* ŁOJEK, *supra* note 38.

<sup>382</sup> *See* SNYDER, *supra* note 18, at 146–47. “Whereas the Germans preserved the Polish-Jewish elites . . . they tended to regard non-Jewish Polish elites in Poland as a political threat. . . . [Hitler] told [Governor Hans] Frank that Polish ‘leadership elements’ had to be ‘eliminated.’ Frank drew up a list of groups to be destroyed . . .” *Id.* Action AB was announced on March 2, 1940. *Id.*

<sup>383</sup> *See supra* notes 89–90 and accompanying text.

<sup>384</sup> *Id.*

<sup>385</sup> *See supra* note 87 and accompanying text.

<sup>386</sup> *See supra* note 88 and accompanying text.

<sup>387</sup> *See* SZYMON DANTER, JANUSZ GUMKOWSKI & KAZIMIERZ LESZYŃSKI, GENOCIDE 1939–1945, at 41 (1962).

<sup>388</sup> *See id.*

Polish lands directly incorporated to the Reich, the Germans were expelling the Poles and shipping them either east to the General Government, designated as a dumping ground for all undesirable humans of the Third Reich, or west to slave labor or concentration camps in the Old Reich. Nearly one million Poles were evicted from the Polish lands incorporated into the Reich between 1939 and 1944.<sup>389</sup>

- The Germans engaged in extensive abduction operations of Polish children in order to raise them as Germans. It is estimated that about 250 thousand Polish children were abducted from their Polish families to be raised as Germans.<sup>390</sup> It is the massive scale of the German abduction of Polish children that led to the inclusion of the act of kidnapping children into the list of genocidal acts.<sup>391</sup> Recently, evidence has emerged that the Soviets implemented similar practices on their side of the partition line. For example, Irena Sienkiewicz-Mrówczyńska, born into a Polish military family in Kowle, Wołyń, in 1930, was kidnapped at the age of eleven directly from school and sent to a children's camp in Bojarka near Kiev.<sup>392</sup> The purpose of the camp was to Russify alien children through pioneer youth organizations.<sup>393</sup>

b. Hatred directed at the Polish national group

Some scholars argue that the organizers and planners of genocide must have a racist or discriminatory motive, that is, a genocidal motive. They point out that “evidence of hateful motive will constitute an integral part of the proof of existence of a genocidal policy and therefore of a genocidal intent”<sup>394</sup> even if “individual participants may be motivated by a range of other factors including financial gain, jealousy and political ambition.”<sup>395</sup>

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<sup>389</sup> See *id.* at 43–44.

<sup>390</sup> ROMAN HRABAR, *HITLEROWSKI RABUNEK DZIECI POLSKICH 1939–1945* (1960).

<sup>391</sup> *Id.*

<sup>392</sup> Katarzyna Mrówczyńska, *Wspomnienie Niezapomnianej Historii, BOHATEROWIE OPOWIEŚCI RODZINNYCH* <http://www.patriotyzmjutra-korzenie.sto.org.pl/?action=papers&pid=17> (last visited June 15, 2012) (telling a story of a grandmother who experienced Russification).

<sup>393</sup> *Id.*

<sup>394</sup> SCHABAS, *supra* note 198, at 305.

<sup>395</sup> Memorandum from Uma Arunachalam for the Deputy Prosecutor of the Int'l Criminal Tribunal for Rwanda (Dec. 20, 2002), *available at* <http://www.nesl.edu/userfiles/file/wc memos/2002/uarunachalam.pdf>; SCHABAS, *supra* note 198, at 305.

Hatred directed at the Polish people was the foundation on which both Stalin and Hitler built their genocidal policies towards the Polish nation. While on the German side of the Ribbentrop-Molotov line the Poles were hunted down and murdered for being “under-humans,” on the Soviet side the Poles were hunted down and murdered for being “above-humans.”<sup>396</sup> Together with terror, propaganda of hatred became the main tool to subjugate the conquered Poland on both sides of the Ribbentrop-Molotov partition line.<sup>397</sup> The ease with which the Germans and Soviets were able to wage their wars of aggression against Poland by assigning to ethnic Poles radically opposite characteristics in order to incite hatred towards them among their own people is a somber reminder of how easy it is for unscrupulous leaders to manipulate their own people into committing grave atrocities in the name of the most absurd justifications for war. The Nazi-Soviet propaganda portraying Poland as a tyrant state that brutally oppressed its people was so intensely venomous that the echoes of this propaganda of hatred effectively reverberate to this day in the Soviet Union, in Germany, and also in the West.<sup>398</sup>

From the very beginning of the Soviet invasion, the Polish people were singled out for special persecution.<sup>399</sup> Top military commanders of the Soviet Army made and disseminated statements loaded with hateful and inflammatory language that incited violence against the Poles.<sup>400</sup> For example, General Timoshenko, who commanded the Ukrainian Front of the Red Army, used the following hate language in his appeals directed at the civilian population of the conquered multiethnic lands: “With weapons, pitchforks, scythe and axes go after your eternal enemy, Polish ‘Pany.’”<sup>401</sup> He also vilified the Polish Government by making the following remark: “former Polish Government—mean, slothful and treasonous, covering up its back” took shelter abroad.<sup>402</sup> The Military Council of the Belorussian Front in its order issued a day before the attack on Poland stated: “Polish landowners and capitalists have enslaved the working people of Western Belorussia and Western Ukraine. Through the use of White terror, field

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<sup>396</sup> M.B. SZONERT, NULL AND VOID POLAND: CASE STUDY ON COMPARATIVE IMPERIALISM 66 (2008) (discussing the hardships of the Polish people on both sides of the Ribbentrop-Molotov Partition Line).

<sup>397</sup> *Id.* at 58.

<sup>398</sup> MIECZYSLAW BISKUPSKI, HOLLYWOOD WAR WITH POLAND 1939–1945 48 (2009); see DANUSHA V. GOSKA, THE BRUTE POLAK STEREOTYPE IN POLISH-JEWISH RELATIONS AND AMERICAN POPULAR CULTURE 80–82 (2010) (discussing several instances when the mainstream press portrayed Poland as a tyrant state).

<sup>399</sup> BISKUPSKI, *supra* note 397, at 48.

<sup>400</sup> *Id.*

<sup>401</sup> FRISZKE, *supra* note 351, at 25.

<sup>402</sup> Joniec, *supra* note 349, at 295.

courts-martial, and punitive expeditions, they are suppressing the revolutionary movement, imposing national oppression and exploitation, and sowing ruin and devastation.”<sup>403</sup> The Order further stated:

In a lightning, crushing blow, rout the lordly-bourgeois Polish troops and liberate the workers, peasants and laborers of Western Belorussia. Under the slogans “For our happy Soviet homeland” and “For our great Stalin,” let us fulfill our military oath and our duty to our homeland.<sup>404</sup>

The Soviet propaganda was of mobilizing character, calling for action and appealing to act. Based on the mythological dialectics of good and evil, it contrasted the absolute good that is the Soviet State with the Soviet enemy, never precisely defined but always represented as absolute evil. To legitimize the Soviet aggression and annexation of Polish lands, Poland and all those loyal to Poland became such an absolutely evil enemy that they had to be destroyed. The Soviet press introduced the language of “us” versus “them” and used emotionally loaded terms to mobilize the Soviet people to action.<sup>405</sup> The following hateful terms were used: “cowardly and hated by all of us government of exploiters,” “the rulers of robber truncheons,” “traitors of their own nation together with its hideous constitution,” “Yoke State,” “times of darkness,” “enemies of the motherland,” “Polish Fascists,” and “nationalist Fascists.”<sup>406</sup>

The hate language intensified over time as the NKVD special operational forces were cleaning out the conquered territory from all those suspected of loyalty to Poland. To incite hatred towards the Poles, the following statements were published: “destroyed cities, burning villages, thousands of devastated workers—that’s what the Polish nobility left behind,” or “high taxes, numerous penalties, executions, ignorance, superstition, lawlessness, hunger, poverty and death—that’s the life of a peasant in Western Ukraine.”<sup>407</sup> This hateful language served as incitement to violence against ethnic Poles and resulted in widespread ethnic cleansing. It laid the foundation for the extermination of ethnic Poles by the Ukrainians in Volhynia in 1943.<sup>408</sup>

<sup>403</sup> KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 42.

<sup>404</sup> This order addressed to the troops spelled out the goads of the Red Army and was read out loud in all companies, batteries, squadrons and garrisons the night before the attack on Poland. *Id.* at 43.

<sup>405</sup> See SZONERT, *supra* 395, at 58–59 (discussing the Soviet’s propaganda and mass extermination of those loyal to Poland).

<sup>406</sup> Joniec, *supra* note 349, at 296; see SZONERT, *supra* 395, at 58–59.

<sup>407</sup> Joniec, *supra* note 349, at 296.

<sup>408</sup> Ryszard Szawlowski, *Genocide Committed by Ukrainian Nationalists on the Polish Population During World War II*, ELECTRONIC MUSEUM, [http://www.electronicmuseum.ca/Poland-WW2/ukrainian\\_insurgent\\_atrocities/uia\\_ukrainian\\_genocide.html](http://www.electronicmuseum.ca/Poland-WW2/ukrainian_insurgent_atrocities/uia_ukrainian_genocide.html) (last visited June 15, 2012); *Genocide, Ethnic Cleansing, and Deportation: How Volhynia Became West*

The national hatred was integrally connected with class hatred as illustrated in this statement: “Capitalist and landowners, clergy and state employees robbed our rich nation, sucking out last juices from the working people, with sword and fire suppressing the slightest signs of protest.”<sup>409</sup> The propagandist rejoiced that “with Stalinist sunshine, the workers of Belorussia are building a new bright future.”<sup>410</sup> Routinely and interchangeably, the Soviet propaganda was referring to the Polish fascists, Polish nationalists and counterrevolutionaries.<sup>411</sup> Towards the end of the war, the Soviet propaganda demonstrated its sophistication by calling members of the Polish Home Army as “expectant dwarfs of reaction.”<sup>412</sup>

c. Sovietization of the Polish nation

William Seeds, British Ambassador in Moscow, in his telegram to Lord Halifax dated September 25, 1939 wrote:

When I learned that the soldiers called to military service by general mobilization were being told that a revolution had broken out in Poland against its government, and that pundits in public parks proclaimed similar revelations stating that in this war caused by the bourgeois the people may benefit and have the opportunity to be liberated, the situation looked very different. It became clear to me that there were preparations under way to take over the Polish territory under the cover up of bringing help to the people’s movement in Poland. . . . If the sovietization process that is currently under way in the borderlands with Poland will be extended to a new demarcation line, it will become clear then that Sir. Stalin, similarly like Herr Hitler in Sudeten and Czechoslovakia, will lose all the arguments to justify his intervention as made on behalf of oppressed by Poland Soviet brothers.<sup>413</sup>

That sovietization process took place with unprecedented brutality on a massive scale on the entire Polish territory conquered by the Soviet Union.<sup>414</sup> The Polish language was banned in official use.<sup>415</sup> The educational system was turned into a monstrous tool of Soviet indoctrination.<sup>416</sup> Compulsory study of the Russian language and history replaced the study of

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*Ukraine, 1939–46*, KENNAN INST. (Jan. 30, 2002), <http://www.wilsoncenter.org/event/genocide-ethnic-cleansing-and-deportation-how-volhynia-became-west-ukraine-1939-46>.

<sup>409</sup> Joniec, *supra* note 349, at 299.

<sup>410</sup> *Id.*

<sup>411</sup> See SZONERT, *supra* 395, at 116.

<sup>412</sup> *Id.*

<sup>413</sup> See ŁOJEK, *supra* note 38, at 201 (translated by the author).

<sup>414</sup> See SZONERT, *supra* 395, at 59.

<sup>415</sup> PIOTROWSKI, *supra* note 58, at 10.

<sup>416</sup> SZONERT, *supra* 395, at 59.

Polish language and history.<sup>417</sup> Polish monuments were razed, streets renamed, bookshops and publishing houses closed, libraries destroyed, and books burned.<sup>418</sup> The Polish language press became a vehicle for Soviet propaganda.<sup>419</sup> Religious education was forbidden.<sup>420</sup> The Polish children remember these first days of Soviet rule as follows: “In school they were breaking all the portraits, broke down crosses, arrested teachers for being Polish, and sent their own. Those taught to sing songs against God and against Poland and other unheard-of things.”<sup>421</sup> Another student remembers: “We saw tearing of the national emblem off the walls, destruction of the library which contained about 200 volumes.”<sup>422</sup>

By late 1939, terror, fear, and secrecy pervaded the atmosphere in eastern Poland. In the initial days after the entry of the Red Army, the invaders inflamed tensions among Ukrainians, Belorussians, and ethnic Poles, which often resulted in bloody conflicts and the seizure of property. Individuals were prompted to denounce neighbors and coworkers. Many people lost their jobs, others had to accommodate to the new conditions to keep their positions by learning Ukrainian, Belorussian, or Russian languages. Teachers, in particular, had to make significant adjustments in their work, including removing all mention of God or Poland from their lessons. The Soviet regime disbanded social, charitable, and cultural organizations; it viewed even scout leaders as politically dangerous and, therefore, targets for arrest.<sup>423</sup>

#### F. *Manifest Pattern of Similar Conduct*

The Katyn crime, understood as a pattern of genocidal acts directed at the Polish national group by the Soviet leadership between September 1939 and June 1941 on the Polish territory conquered and controlled by the Soviet Union, took place in the context of a manifest pattern of similar conduct by the Soviet leadership directed against the Polish people before September 1939 invasion and after the 1944 recapture on its way to Berlin.<sup>424</sup>

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<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 58

<sup>420</sup> PIOTROWSKI, *supra* note 58, at 10.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> JOLLUCK, *supra* note 82, at 8–9.

<sup>424</sup> See, e.g., SNYDER, *supra* note 18, at 96–104 (documenting the history and pattern of genocidal acts against the Poles in the era before and after the Katyn massacre).

### 1. Polish operation of 1937–1938

The Polish ethnic group living in the Soviet Union before the outbreak of World War II consisted of ethnic Poles who inhabited these lands for centuries and decided not to relocate within Poland's new borders upon Poland's reemergence as an independent state in 1918.<sup>425</sup> They represented a group distinct by its language, history, culture, tradition, and Roman Catholic religion.<sup>426</sup> In August 1937 the NKVD Central Committee issued Order Number 00485 on total liquidation of the Polish diversionist and espionage groups.<sup>427</sup> This order became the basis for an action of mass extermination of ethnic Poles living in the Soviet Union, known as the "Polish Operation."<sup>428</sup> Unlike previous NKVD orders which targeted familiar categories of enemies at least theoretically defined by class, Order 00485 targeted a national group as an enemy of the state.<sup>429</sup>

The extermination of the ethnic Poles and people considered having ties with Poland or sympathetic to Poland took place between August 25, 1937 and November 15, 1938.<sup>430</sup> Out of the total number of 143,810 arrested, the staggering number of at least 111,091 Poles and people accused of ties to Poland were executed.<sup>431</sup> An additional 28,744 were sentenced to labor camps, for a total number of persecuted reaching 139,835, according to NKVD archives.<sup>432</sup> Considering that Poles represented less than 0.4% of the Soviet population, their rate of death by execution is the highest of all ethnic groups persecuted in the national operations of the late thirties in the Soviet Union.<sup>433</sup> According to Timothy

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<sup>425</sup> *Id.* at 98.

<sup>426</sup> *Id.*

<sup>427</sup> ROZSTRZELAĆ POLAKÓW: LUDOBÓJSTWO POLAKÓW W ZWIĄZKU SOWIECKIM W LATACH 1937–1938: DOKUMENTY Z CENTRALI [SHOOT THE POLES: GENOCIDE OF POLES IN THE SOVIET UNION 1937–1938: DOCUMENTS FROM THE HEADQUARTERS] (Tomasz Sommer ed., 2010) [hereinafter ROZSTRZELAĆ POLAKÓW]. Order No. 00485 purported to be aimed at espionage groups of the Polish Military Organization. This organization was officially dissolved in 1918. Subjected to extermination of this order were all people of Polish ethnicity regardless of their class status. Having relatives in Poland or having correspondence from Poland was the sufficient ground for execution. Mass graves of ethnic Poles murdered in the Polish Operations are located all over the Soviet Union. *Id.*

<sup>428</sup> SNYDER, *supra* note 18, at 93–96 (discussing the particularly ethnic characteristics and targeting of ethnic Poles and referring to these acts as the Polish operation).

<sup>429</sup> *Id.* at 93–96 (discussing the particularly ethnic characteristics and targeting of ethnic Poles and referring to these acts as the Polish operation).

<sup>430</sup> *See, e.g.,* PIOTROWSKI, *supra* note 58, at 8–13 (discussing the protracted assault by the Soviets against the ethnic Poles).

<sup>431</sup> SNYDER, *supra* note 18, at 103.

<sup>432</sup> *Id.* at 103–04. Some Polish historians argue that these numbers are much higher. *See, e.g.,* ROZSTRZELAĆ POLAKÓW, *supra* note 426.

<sup>433</sup> SNYDER, *supra* note 18, at 104.

Snyder, "Soviet Poles were about forty times more likely to die during the Great Terror than Soviet citizens generally."<sup>434</sup>

Most of the persecuted Poles lived in Soviet Belarus and Soviet Ukraine, lands that Poles inhabited for centuries.<sup>435</sup> These are the lands that had been part of the Polish-Lithuanian Commonwealth in the sixteenth and seventeenth century but were annexed to Russia during the eighteenth century partitions of Poland.<sup>436</sup> Thus the Poles represented indigenous population on these lands. The Rychalski family had been living in the steppes of Ukraine for as long as they can remember.<sup>437</sup> Their forefathers built roads, railroads, and factories there. Anatol Rychalski who found new home in the U.S. reflects on the fate of his family as follows: "the multileveled Rychalski clan, counted in hundreds had been exterminated during the revolution in 1917, collectivization in 1929–1933, Stalin-Yezov genocide of 1937–38, and it hurts."<sup>438</sup> As a young boy, Anatol was deported with his family to the desert of Kazakhstan during the collectivization action.<sup>439</sup> In 1938 the NKVD sent the black raven for his father and no one ever heard from him again.<sup>440</sup> For his entire life, Anatol searched for any information about the fate of his father.<sup>441</sup> In 1993 the Ukrainian Security Service replied to his numerous inquiries stating that as a result of the 1938 repressive action, his father, Joseph Rychalski, was killed on April 15, 1938.<sup>442</sup> The Ukrainian Security Services was not able to establish the burial location of Joseph Rychalski.<sup>443</sup>

During the Polish Operation, "[b]iographies became death sentences, as attachment to Polish culture or Roman Catholicism became evidence of participation in international espionage."<sup>444</sup> While Polish men were routinely shot, their wives were sent to special settlements in Siberia and Kazakhstan and their children over the age of ten were abducted and sent to orphanages, thereby assuring that they would not be raised as

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<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at 98.

<sup>436</sup> *Id.*

<sup>437</sup> Anatol Rychalski, Personal Reflections: Honoring Poland's Millennium Plus Year of Courage, paper prepared for the Polish Club of the University of Pittsburgh (May 1, 2011) (on file with author).

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> Document of the Ukrainian Security Services (Jan. 13, 1993) (on file with Anatol Rychalski).

<sup>444</sup> SNYDER, *supra* note 18, at 96.

Poles.<sup>445</sup> Some of the persecuted people were Belarusians and some were Jews, but the overwhelming majority of them were ethnic Poles.<sup>446</sup> The targeting of a person on the ground of his ethnicity, as was the case with the cotemporaneous persecution of Jews in Nazi Germany, did not mean that the persecuted person actually identified himself or herself with the Polish ethnic or national group.<sup>447</sup> It meant however that the perpetrators perceived such person as belonging to the persecuted group.

The Polish Operation was the bloodiest of all ethnic operations conducted during the Great Terror in the Soviet Union.<sup>448</sup> At one point, Yezhov, who was in charge of the Polish Operation, reported to Stalin that in twenty days, 23,216 arrests were made.<sup>449</sup> Stalin rejoiced: “Very good! Keep on digging up and cleaning out this Polish filth.”<sup>450</sup> In 2002, mass graves were found near Tavda and Tomsk, east of the Urals.<sup>451</sup> It is believed that these mass burial sites contain remains of ethnic Poles massacred in the Polish Operation of 1937.<sup>452</sup> The extermination of ethnic Poles in the Soviet Union between 1937 and 1938 meets the test of genocide as defined in the Genocide Convention and the Statue of Rome.

## 2. 1943 and thereafter

The intent of the Soviet leadership to destroy Poland is corroborated by a series of actions taken by the Soviet Union against Poland after the Battle of Stalingrad. On June 22, 1943 Stalin ordered to combat the Polish underground in the eastern territories of Poland “with every possible means.”<sup>453</sup> On July 14, 1944, when the Red Army reentered Polish territory on its way to Berlin, Stalin ordered the execution of members of all Polish underground forces.<sup>454</sup> Members of Polish resistance who had been fighting against Nazi Germany for five years suddenly were labeled by the Soviet

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<sup>445</sup> *Id.* at 102.

<sup>446</sup> *Id.* at 99.

<sup>447</sup> *Id.* at 98.

<sup>448</sup> *Id.* at 103–104.

<sup>449</sup> *Id.* at 96.

<sup>450</sup> SNYDER, *supra* note 18, at 96. Michael Ellman asserts that the ‘national operations,’ particularly the Polish Operation, may constitute genocide as defined by the U.N. Genocide Convention. Michael Ellman, *Stalin and the Soviet Famine of 1932–33 Revisited*, 59 EUR.-ASIA STUDIES 663, 690 (2007). His opinion is shared by Simon Sebag Montefiore. SIMON SEBAG MONTEFIORE, *STALIN: THE COURT OF THE RED TSAR* 229 (2004).

<sup>451</sup> Fischer, *supra* note 128.

<sup>452</sup> *See id.* (noting that the Tavda and Tomsk graves contained Polish corpses).

<sup>453</sup> PIOTROWSKI, *supra* note 58, at 19.

<sup>454</sup> *Id.*

propaganda as “nationalist fascists,” and thousands of them were executed while tens of thousands were once again deported to the Soviet Far East.<sup>455</sup>

In July 1945, the Red Army together with NKVD Special Forces conducted an extraordinary pacification action in the Augustów region of north-east Poland against the Polish Home Army.<sup>456</sup> Two thousand people were arrested and subjected to torture during the investigations; six hundred of them were sent to the Soviet Union and were never heard from again.<sup>457</sup> A formal request of the Polish Government submitted to the Russian Federation to assist in locating the burial sites of the people who disappeared in the Augustów operation in 1945 was formally rejected in 2006 by the Russian Federation on the grounds of the statute of limitations.<sup>458</sup>

The Soviet withholding of military assistance to the capital of Poland during the Warsaw Uprising of August–September 1944 against Germans represented an act of support for German genocidal destruction of Warsaw that claimed close to 200,000 lives, more than the Hiroshima and Nagasaki losses combined, and resulted in Warsaw being leveled.<sup>459</sup>

The postwar strategy of luring members of the Home Army to reveal themselves to the communist authority through amnesty resulted in subsequent mass arrests, executions and new deportations to the Soviet Union.<sup>460</sup> The following acts demonstrate the consistent intent of the Soviet leadership to prevent the reemergence of Poland as an independent state: the 1945 kidnapping of sixteen Polish leaders associated with the Polish Government in London for a show trial in Moscow and subsequent elimination of all of them in the Lubianka prison; the creation in Moscow of a puppet government that replaced the legitimate Polish Government; the introduction of the Soviet oppression apparatus in post-war Poland, post-war murders and persecutions of members of the Home Army, deportations

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<sup>455</sup> See *id.* (discussing the treatment, execution, and deportation of members of the Polish resistance).

<sup>456</sup> Adam Bialous, *Unsolved Communist Crimes: The Augustów Roundup in July, 1945*, DOOMED SOLDIERS, <http://www.doomedsoldiers.com/augustow-roundup.html> (last visited June 15, 2012).

<sup>457</sup> *Id.*

<sup>458</sup> See *id.* (declaring that numerous requests for information about the Augustów Roundup have not been answered by the Russian government).

<sup>459</sup> PIOTROWSKI, *supra* note 58, at 19. Studies show the death toll for Hiroshima to be as much as 130,000, while Nagasaki lost 60,000 to 70,000 people. Jerald Richards, *Hiroshima, Morality, and Democracy*, in PROBLEMS FOR DEMOCRACY 83, 84 (John Kultgen & Mary Lenzi eds., 2006).

<sup>460</sup> PIOTROWSKI, *supra* note 58, at 19.

of Polish patriots to gulags, and the illegal seizure of Poland's eastern territories after the war.<sup>461</sup>

The list of heinous crimes committed upon the Polish people by the Soviet Union after 1943 goes on and on. This policy of destruction can be succinctly summarized by a simple statement from the 1947 NKVD Instruction to the Soviet agents controlling Poland: "While rebuilding the industry and building new industry make sure that industrial waste is directed to rivers which will be used as reservoirs of drinking water."<sup>462</sup>

#### IV. STATUS OF THE KATYN CRIME SEVENTY YEARS LATER

While the Soviet Union denied its responsibility for the Katyn crime, destroyed the evidence of the crime and conducted massive cover-up operations, the Russian Federation seeks to minimize the scope and significance of the Katyn crime and works on developing an anti-Katyn doctrine to justify the crime.<sup>463</sup> This strategy of anti-Katynism is consistent with a decree of President Gorbachev dated November 3, 1990 directing the Russian Academy of Science and other institutions to search for "archival materials relating to the events and facts in the history of bilateral Soviet-Polish relations, which resulted in losses to the Soviet side."<sup>464</sup> The following examples illustrate the strategy employed by the Russian Federation to justify and minimize the Katyn crime and evade responsibility for it:

- Selectively declassifying Katyn-related documents<sup>465</sup>
- Minimizing the number of victims;
  - a) The Polish Red Cross positively identified 2,916 bodies in the Katyn forest during the investigation conducted by the International Red Cross in 1943.<sup>466</sup>

<sup>461</sup> *Id.*; see also *Sowieckie Deportacje*, SOWIECKIE DEPORTACJE (Sept. 1, 2008), <http://www.deportacje.eu>.

<sup>462</sup> *Boleslaw Bierut's Archives*, *supra* note 366, ¶ 29.

<sup>463</sup> See Michael P. Scharf & Maria Szonert-Binienda, *Katyn: Justice Delayed or Justice Denied?*, 44 CASE W. RES. J. INT'L L. 20–21 (describing the Russian government's response to the Katyn crime and the Anti-Katyn doctrine).

<sup>464</sup> Decree by President Gorbachev, in Connection with the Visit of Minister of Foreign Affairs Krzysztof Skubiszewski, on Speeding up the Investigation of the Fate of the Polish Officers Held in the Three Special Camps, *reprinted in* KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 346.

<sup>465</sup> See Fischer, *supra* note 128 (noting that documents turned over to Polish authorities in 1990 did not amount to "a full and complete disclosure").

<sup>466</sup> See LISTA KATYŃSKA, *supra* note 187, and accompanying text.

- b) In disregard of the official Russian records that 21,857 Poles were murdered, the Russian investigation established that 14,542 persons were detained, 1,803 died, and 22 persons were identified.<sup>467</sup>
- Emphasizing other victims of the Stalinist regime persecuted within the Soviet Union;<sup>468</sup>
  - Putting blame on “totalitarianism;”<sup>469</sup>
  - Pointing to World War II losses as a common Russian and Polish tragedy;<sup>470</sup>
  - Emphasizing non-Polish ethnic groups among the persecuted Polish citizens;<sup>471</sup>
  - Pointing to political as opposed to national motives of the crime;<sup>472</sup>
  - Justifying the Katyn crime by implementing the anti-Katyn strategy that points, *inter alia*, to the maltreatment of Soviet POWs by Poland in the 1920 war;<sup>473</sup>
  - Treating the Katyn crime as an ordinary crime of “exceeding official authority” subject to a 10-year statute of limitations;

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<sup>467</sup> Press Release, V.K. Kondrashov, Prosecutor General’s Office (Mar. 24, 2005), *available at* <http://www.memo.ru/daytoday/5katyn2.htm>. This statement came in response to the Letter from Arseny Roginsky, Chairman of the Board & Alexander Guryanov, Coordinator of the Polish Committee, Memorial, to Alexander Savienkov, Deputy Att’y General, Russ. Federation, *available at* <http://www.memo.ru/daytoday/5zaprgwp1.htm> (last visited June 15, 2012); *see also* Fischer, *supra* note 128 (stating that the death toll was 21,857 and that Russian pronouncements have often not reflected this figure).

<sup>468</sup> *See* Fischer, *supra* note 128 (quoting a Russian official’s pronouncement that millions of Russians had been killed).

<sup>469</sup> *Id.* President Yeltsin in 1995 proclaimed: “[T]otalitarian terror affected not only Polish citizens but, in the first place, the citizens of the former Soviet Union.” *Id.*

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> *See id.* (noting President Yeltsin’s contention that thousands of bodies found in Katyn were of various nationalities, not just Polish).

<sup>473</sup> *See* KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 262 (noting that the Politburo justified executing Polish prisoners of war by labeling them “counterrevolutionaries” who were “enemies of Soviet power”).

- a) Such treatment is contrary to the position of the Soviet Union's treatment of the Katyn crime at the Nuremberg Trial where the Soviet prosecutor, accusing German leaders of this crime, referred to the Katyn murder as "one of the most important criminal acts for which the major war criminals were responsible."<sup>474</sup>
  - b) Such classification stands in sharp contrast to the determination of the U.S. Special Committee to Investigate the Katyn Forest Massacre that described the Katyn massacre as "one of the most barbarous international crimes in world history."<sup>475</sup>
  - c) Such classification of the Katyn crime contradicts the conclusion of the Committee of Experts of the Main Military Prosecutor's Office of the Russian Federation that classified the Katyn crime as genocide according to international law as well as the public proclamation of the leading Russian scholars dated January 18, 1995 that refers to the Katyn crime as "genocide aimed at Polish citizens."<sup>476</sup>
- Classifying as top secret the 2004 decision of the Russian Military Prosecutor General to discontinue the Russian investigation into the Katyn crime, the legal justification for discontinuance of the Katyn case, and all evidentiary documentation from the Katyn investigation;<sup>477</sup>
  - Denying legal standing to families of the Katyn victims who attempt to obtain information about the Russian investigation into the Katyn crime and/or pursue compensation claims before the Russian courts.<sup>478</sup>

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<sup>474</sup> 7 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: PROCEEDINGS 5 FEBRUARY 1946 - 19 FEBRUARY 1946, at 425 (1995).

<sup>475</sup> H.R. REP. NO. 82-2505, at 1 (1952).

<sup>476</sup> See KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 260 (providing the view of the Committee of Experts and the Military Prosecutor that the Katyn crime was genocide).

<sup>477</sup> Scharf & Szonert-Binienda, *supra* note 462, at 7-10. After the crash of the Polish presidential plane in Smolensk on April 10, 2010, President Putin promised to release documentation from the Katyn investigation. One year later, Russia was still withholding thirty-six volumes of documents from the Katyn investigation. *Id.*

<sup>478</sup> Janowiec and Others v. Russia, Judgment, App. Nos. 55508/07, 29520/09, ¶¶ 49-54 (Eur. Ct. H.R., 2012), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&>

On April 10, 2010, the President of Poland and eighty seven top officials of the Polish State were on their way to Katyn for the commemoration of the 70<sup>th</sup> anniversary of the Katyn crime when their plane crashed on landing in Smolensk near Katyn, killing everyone on board.<sup>479</sup> In response to this tragedy, the leadership of the Russian Federation made conciliatory gestures and promised to release more documents from the Russian investigation into the Katyn crime but was slow in fulfilling this promise.<sup>480</sup> Furthermore, on November 26, 2010, the Parliament of the Russian Federation adopted a resolution that officially recognized Stalin and his associates as the main perpetrators of the Katyn massacre.<sup>481</sup>

As much as the political declarations and gestures of the Russian Federation are welcome, they do not correspond with the legal treatment of the Katyn case by the Russian courts. The legal position of the Russian Main Military Prosecutor's Office that classified the Katyn crime as an act of "exceeding official authority" remains unchanged. As of spring 2012, conciliatory gestures have not been aligned with any change regarding the legal treatment of the Katyn case by the Russian Federation.<sup>482</sup>

On the first anniversary of the 2010 tragic crash of the Polish presidential plane in Smolensk, near Katyn, leading Polish historians warned of dangerous developments in Russia regarding the Katyn massacre.<sup>483</sup> The "anti-Katyn doctrine" that aims at justifying the Katyn crime had been widely promoted in Russia. Arguments have been raised that the Soviet Union took revenge on the Polish officers for the mistreatment of the Soviet prisoners of war during the Polish-Soviet War of 1920.<sup>484</sup> Such arguments not only trivialize the Katyn crime but also represent a fundamental threat to Poland's liberty and sovereignty. Arguments that seek to justify the Katyn murders go to the very heart of Poland's right to exist as a sovereign and independent nation.

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documentId=888266&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

<sup>479</sup> Nicholas Kulish, Ellen Barry & Michal Piotrowski, *Polish President Dies in Jet Crash in Russia*, N.Y. TIMES, Apr. 11, 2010, at A1.

<sup>480</sup> Scharf & Szonert-Binienda, *supra* note 462, at 7–10 (noting that Russia still has yet to release thirty-six of the 183 volumes from its investigation into the Katyn crimes).

<sup>481</sup> *Duma Votes to Blame Stalin for the Katyn Crime*, MOSCOW TIMES (Nov. 26, 2010), <http://www.themoscowtimes.com/news/article/duma-votes-to-blame-stalin-for-katyn-massacre/425136.html>.

<sup>482</sup> See Scharf & Szonert-Binienda, *supra* note 462, at 19–20 (detailing the Russian Federation's legal position that prosecution is barred by a ten-year statute of limitations and that the Katyn investigation is terminated).

<sup>483</sup> See *Jest Zamówienie na Anty-Katyn*, NASZ DZIENNIK, Aug. 13–15, 2011, <http://www.naszdziennik.pl/index.php?dat=20110813&typ=po&id=po37.txt>.

<sup>484</sup> See KATYN: A CRIME WITHOUT PUNISHMENT, *supra* note 67, at 263.

## V. CONCLUSION

The primary focus of this analysis has been on the question of whether the Katyn crime, as redefined in light of the latest evidence, meets the legal definition of genocide under the Genocide Convention of 1948. This article deals mainly with one type of genocidal activities, that of “killing members of the group” as spelled out in the March 5th Execution Order. The remaining four types of genocidal acts, such as: (i) causing serious bodily or mental harm to the members of the group; (ii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iii) imposing measures intended to prevent births within the group; and (iv) forcibly transferring children of the group to another group, were discussed or mentioned but not analyzed separately due to space limitations. Nevertheless, the facts as presented herein demonstrate beyond a reasonable doubt that the Soviet Union committed all five types of genocidal acts on the Polish population on the conquered Polish territory between 1939 and 1941.

By focusing just on one type of the genocidal act—that of killing—it has been proven beyond all reasonable doubt that the leadership of the Soviet Union, while acting in collaboration with Nazi Germany between September 1939 and June 1941, had engaged in carefully planned genocidal killings directed at the Polish POWs of officer rank and members of the Polish state apparatus such as the judiciary, law enforcement and security forces, Polish intelligentsia and civic leaders. These selective killings must be viewed in conjunction with other genocidal operations. Based on the analysis presented herein, it has been proven beyond a reasonable doubt that the action of mass killing was augmented by large-scale arrests and massive actions of forced removal from the conquered Polish territory of the civilian population consisting of the entire families perceived as Polish nationals and/or supporters the Polish State, and by forced conscription of the Polish citizens into the Soviet Army. These policies of destruction and dispersal of Polish nationals throughout the Soviet Union directly impacted the ability of the Polish national group, as such, to survive on the Polish territory incorporated to the Soviet Union. Accordingly, it has been proven beyond a reasonable doubt that during the twenty-one month period of Nazi-Soviet collaboration, the officials of the Soviet Union acted with specific intent to destroy the Polish national group, as such, on the Polish territory conquered, incorporated, and controlled by the Soviet Union, and therefore committed the crime of genocide as defined by the Genocide Convention of 1948.

The group of Soviet leaders who committed the crime of genocide on the Polish national group consists of, but is not limited to, the following: (1) the top leadership of the U.S.S.R. consisting of Joseph Stalin, Lawrenti Beria, and Vyacheslav Molotov; (2) members of the Soviet Politburo: Kliment Voroshilov, Anastas Mikoyan, Michail Kalinin, and Lazar

Kaganovich; (3) members of the execution troika as specified in the March 5th Execution Order: Vsevolod Merkulov, Bakhcho Kobulov and Leonid Bashtakov; (4) NKVD employees listed in the Rewards Order issued on October 26, 1940 for "Clearing out" the Prisons and the Three Special Camps;<sup>485</sup> (5) other NKVD functionaries who directly participated in the killings of the Polish citizens;<sup>486</sup> (6) NKVD functionaries who actively participated in the destruction of evidence of the crime by destroying files and mass graves of the Polish victims;<sup>487</sup> and (7) the Union of Soviet Socialist Republics.<sup>488</sup>

## VI. EPILOGUE

Despite clear evidence against the Soviet Union and subsequent admission of guilt by the Soviet Union's successor in the U.N., the Russian Federation, justice has not been served in the Katyn case.

When in 1943 mass graves were discovered in the Katyn forest, the families of the victims cried in vain for justice. When in 1952, the U.S. Congress took no action upon recommendations of its own Select Committee on the "Katyn Forest Massacre," the families of the victims cried in vain for accountability. When in 1991 Mikhail Gorbachev officially admitted that the Soviet NKVD committed the Katyn crime, and the full scope of the crime began to emerge, Franciszek Herzog wrote to the President of the United States:

Mr. President, as a US citizen and a son of the Polish officer, Lt. Col. Franciszek Herzog, murdered in Kharkov I beg you and implore you to look at the facts again. And then, in the name of the US Government, please apologize to the Polish people, and especially to the families of the victims, for sheltering the criminals for over half a century. It will not resurrect the men, but will give moral satisfaction to the widows and orphans of the victims. It will also gain you respect and undying gratitude of the Polish Nation.<sup>489</sup>

After many more letters and some assistance from Senator Christopher Dodd, in August of 1992 the U.S. Department of State replied

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<sup>485</sup> Order of the People's Commissar of Internal Affairs of the USSR for [the Year] 1940, No. 001365, in *KATYN: A CRIME WITHOUT PUNISHMENT*, *supra* note 67, at 272.

<sup>486</sup> See *KATYN: A CRIME WITHOUT PUNISHMENT*, *supra* note 67, at 271 (stating that it was "customary" for NKVD workers to engage in "special tasks," including executions, with some workers trained to kill and others "participat[ing] in support roles").

<sup>487</sup> See Fischer, *supra* note 128 (describing NKVD efforts to destroy evidence, including graves).

<sup>488</sup> See *Janowiec and Others*, Judgment, App. Nos. 55508/07, 29520/09, ¶ 51.

<sup>489</sup> Letter from Franciszek Herzog to President George H.W. Bush (Dec. 26, 1991) (on file with author).

that “changes in Eastern Europe and the former Soviet Union that have occurred in the past three years have made it possible to uncover the truth” and that “in 1990 the Russians officially apologized to Poland for this atrocity.”<sup>490</sup> Herzog replied:

Unfortunately, [your letter] does not answer my question and concerns. . . . Changes that occurred in Eastern Europe and the former Soviet Union uncovered not the truth, as this was known since 1943 to all people of good will, but the places of massacres of POWs from Starobelsk and Ostaszkow camp. . . . I hope that one day US Government will officially declare who was guilty of this horrendous crime against Polish Nation and humanity.<sup>491</sup>

The day of accountability for the Katyn crime has not yet arrived, even though the prosecution of serious international crimes such as genocide is required as a matter of law. The Katyn families and the Polish people wait in vain for justice to be served for one of the greatest crimes of World War II.

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<sup>490</sup> Letter from Thomas Gerth, Deputy Dir. of the Office of E. Eur. Affairs, U.S. Dep’t of State, to Francisek Herzog (Aug. 12, 1992) (on file with author).

<sup>491</sup> Letter from Franciszek Herzog to Thomas Gerth, Deputy Dir. of the Office of E. Eur. Affairs, U.S. Dep’t of State (Sept. 1, 1992) (on file with author).