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72 Years Later: Still Seeking Accountability for the Katyn Forest Massacre

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72 YEARS LATER: STILL SEEKING ACCOUNTABILITY FOR THE KATYN FOREST MASSACRE

*Allan Gerson**

I.	INTRODUCTION	605
II.	ACCOUNTABILITY AND INTERNATIONAL LAW	606
	A. <i>Accountability in International Criminal Law</i>	606
	B. <i>Customary Norms for Measuring Accountability</i>	608
	1. Renunciation and acceptance.....	609
	2. Compensation.....	609
	C. <i>Relatives of Victims of Katyn Seek Venues for Accountability</i>	609
III.	ACCOUNTABILITY IN U.S. COURTS.....	611
IV.	CONCLUSION.....	613

I. INTRODUCTION

For more than forty years Russia dismissed as lies charges that it was responsible for the systematic murder in 1940 of over 22,000 Polish citizens at Katyn Forest, primarily around Smolensk, Russia overlooking the Dnieper River.¹ Instead, at the Nuremberg War Crimes Trials and after, it pinned the blame on the Nazis.² Only after the fall of Communism did Russia admit its responsibility and release relevant documents. But Russia has not released all of the pertinent documents, especially those identifying the persons who ordered the cover-up, euphemistically referred to as “the Katyn Lie.”³ The path to accountability was muddled once again in 2004 when Russia halted its investigation into the matter.⁴ And now, eight years after Russia ceased its investigation, and 72 years after the massacre, the question remains whether Russia will ever fully release all pertinent information and responsibly deal with the Katyn Forest atrocities.

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¹ See ALLEN PAUL, *KATYN: STALIN’S MASSACRE AND THE TRIUMPH OF TRUTH* i–xxiii (2010) (detailing the lengths to which the Soviet Union went to blame Germany).

² *Id.* at 334–37.

³ Zbigniew Gluza, *The Katyn Massacre*, KATYN CRIME, available at <http://katyncrime.pl/The.Katyn.Massacre,517.html> (last visited June 11, 2012).

⁴ *Poland Opens 1940 Massacre Probe*, BBC NEWS (Dec. 1, 2004), <http://news.bbc.co.uk/2/hi/europe/4060479.stm>.

My own professional experience may be pertinent in understanding the depth of the emotions involved in the quest for accountability. In 1979, I served as the first trial attorney with the U.S. Department of Justice's Office of Special Investigations (OSI) dealing with denaturalization and deportation of Nazi collaborators. My involvement in OSI's first trial required that I coordinate the appearance of many witnesses from Israel and abroad. I asked them, "Why did you come?" "Not," they would answer, "because I care about punishment. It doesn't mean anything to me at this point. Nor do I care about compensation. No, I care about having a true account of what actually happened." The same sentiment was expressed to me by families of victims of the Pan Am 103 bombing and the attack on the Twin Towers in my representation of both these groups. Above and beyond anything else, I discovered that the families of the victims want a true account of what happened.

Accountability may lead to punishment. That, however, is a matter reserved for the criminal justice system. In the civil context, accountability generally takes the form of compensation for the victims or their families. Or, it may do no more than create a historical record. Yet, that is valuable in itself. Ideally, accountability would include all three: a historical record, appropriate punitive action, and compensation. It is against this framework that this article examines what avenues, in justice and in contemporary international law, are accorded the families of the victims of the Katyn Massacre.

II. ACCOUNTABILITY AND INTERNATIONAL LAW

A. *Accountability in International Criminal Law*

International law proscribes certain egregious acts as embodied in treaties (conventional law) or as embodied in *jus cogens* (customary preemptory norms). Although pertinent conventional international law does not necessarily bind Russia insofar as it may not be a party to these conventions,⁵ it nevertheless sets forth standards of behavior appropriate for measuring responsibility for Katyn.

Questions of jurisdiction aside, it is indisputable that the Katyn Forest Massacre is a crime under both conventional and customary

⁵ Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 213, 220 (Sarah B. Sewall & Carl Kaysen eds., 2000). However, see later in the discussion, as Russia might be held liable under these Conventions in a suit brought in the ECHR by relatives of victims of the Katyn Forest Massacre. *See generally* Janowiec and Others v. Russia, Judgment, App. Nos. 55508/07, 29520/09 (Eur. Ct. H.R., 2012), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=29520/09&sessionId=96396662&skin=hudoc-enpdf>.

international law. It was a war crime within the meaning of the 1907 Hague Convention on Land Warfare,⁶ as well as customary international law later codified by the 1949 Geneva Conventions.⁷ Article 23 of the 1907 Hague Convention forbids the “kill[ing] or wound[ing] treacherously [of] individuals belonging to the hostile nation or army,” as well as the “kill[ing] or wound[ing] of an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.”⁸ Likewise, the Geneva Convention requires the humane treatment of prisoners of war.⁹ The Soviets, by individually murdering over 22,000 Poles with shots to the back of the head, clearly committed war crimes within meaning of these conventions.¹⁰ And under international criminal law principles of responsibility, a state adjudged guilty of war crimes must pay compensation to victims or their families—or restitution to the state involved—through monetary, or at least, symbolic means.¹¹

Under contemporary international law, as defined by U.S. courts, Katyn also represented state-sponsored genocidal terrorism.¹² The standard set forth by the U.S. district court in *Almog v. Arab Bank* regarding Hamas suicide bombers is applicable here, at least in principle.¹³ There, the court held that because Hamas aims to “liberate the area [Israel] by replacing it with an Islamic or Palestinian State through the use of suicide bombings . . . [this] reflect[s] an intent to target people based on criteria prohibited by both the Genocide Convention and the Rome Statute.”¹⁴ By that measure,

⁶ See 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) [hereinafter Hague Convention IV].

⁷ See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention] (noting that the regulations were included in the Geneva Conventions of 1949 adopted in 1977).

⁸ Hague Convention IV, *supra* note 6, art. 23(a)–(c).

⁹ Geneva Convention, *supra* note 7, art. 3 (noting the prohibition of certain harms to prisoners of war). The Convention goes on to require detaining powers to allow prisoners to receive remittances of money from their home countries and to pay the prisoners at a fair rate for work done. *Id.* arts. 61–63.

¹⁰ *Id.* art. 3(d) (noting that the “passing of sentences and the carrying out of executions without previous judgment pronounced” by court affording judicial guarantees is prohibited by the Geneva Convention).

¹¹ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Rep. of the Int’l Comm’n, 53th Sess., 2001, U.N. Doc. A/56/10, available at http://untreaty.un.org/ilc/texts/instruments/English/commentaries/9_6_2001.pdf.

¹² Inessa Jazhborovskaya, *The Katyn Case: Working to Learn the Truth*, 42 Soc. Sci. 34, 46 (2011), available at http://www.eastviewpress.com/Files/SS_FROM%20THE%20CURRENT%20ISSUE_No.%204_2011.pdf.

¹³ *Almog v. Arab Bank*, 471 F.Supp.2d 257 (E.D.N.Y. 2007) A case for which the author served as lead counsel for the Plaintiffs.

¹⁴ *Id.* at 275–76.

the Soviet killings at Katyn were genocidal acts as well as war crimes, to the extent that the Soviet Union's aim in the killings was to eliminate the entire officer corps in order to rob Poland of its intellectual and military elite,¹⁵ necessary for the formation of a viable independent post-war Poland.

Although the Katyn massacre was both a war crime and an act of genocidal terrorism, Russia might argue that it is not legally accountable under those standards by virtue of not having ratified the Hague Convention¹⁶ and because the acts in question were committed before the codification of the Geneva Convention.¹⁷ Similarly, since the United States has not designated Russia as a state sponsor of terrorism, Russia may argue that it cannot be legally bound by U.S. statutes enabling damage suits by victims of terrorism against state sponsors.¹⁸ Nevertheless, the public policies applicable to state sponsors of terrorism apply to Russia. Libya was designated a state sponsor after the 1988 terrorist bombing of Pan Am 103 over Lockerbie, Scotland, which resulted in 270 deaths.¹⁹ The Soviet Union ordered the wholesale murder of a whole class of Polish citizens. Clearly, the terrorist nature of the Soviet's action is no less repugnant to contemporary international values than the Libyan Lockerbie bombing.

B. *Customary Norms for Measuring Accountability*

The U.N. has recognized the need for a tangible expression of contrition coupled with compensation as the basis for terminating the state-sponsor of terrorism designation. The U.N. Security Council articulated a threefold requirement in its binding declaration on the 1988 Lockerbie bombing: (1) renunciation of terrorism; (2) acceptance of responsibility; and (3) just compensation.²⁰ Although this standard does not legally bind Russia, it effectively sets a norm as to how states must manifest contrition for such acts.

¹⁵ The officer corps was drawn from the top echelon of Polish society.

¹⁶ Hague Convention IV, *supra* note 6.

¹⁷ See generally, *The Geneva Conventions of 1949 and Their Additional Protocols*, INT'L COMM. RED CROSS, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> (last visited June 11, 2012) (offering a general description of the Geneva Conventions and the text of all Conventions and additional protocols).

¹⁸ See *Almog*, 471 F.Supp.2d at 265–66 (giving background information on the Anti-Terrorism Act).

¹⁹ *State Sponsors: Libya*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/libya/state-sponsors-libya/p9363> (last updated Dec. 2005).

²⁰ See S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992).

1. Renunciation and acceptance

Russia has already renounced Katyn as a crime never to be repeated.²¹ But it has failed to acknowledge, fully and unambiguously, that it was a deliberate act of the Stalin regime undertaken for ideological reasons rather than the acts of some errant military figures. By contemporary standards, acceptance of responsibility does not require admission of criminal culpability. It does require amenability to having an international court determine criminal culpability. Thus, insofar as there remain Soviet citizens who were personally involved in the Katyn executions, Russia should subject them to ICC prosecution unless all the relevant parties reach a mutually agreed upon alternative.

2. Compensation

Russia has made no offer of compensation—neither monetary nor symbolic.²² And the government of Poland has made no demand on Russia for compensation, seemingly fearing political repercussions, and instead remains focused on espousing reconciliation through exposure to the truth.²³

Thus, under the standard set forth in the U.N. Declaration after the Pan Am 103 flight bombing, Russia has not met international norms relative to compensation for properly dealing with accountability to Poland for the Katyn Forest Massacre.

C. *Relatives of Victims of Katyn Seek Venues for Accountability*

Frustrated by Russia's reluctance to make full disclosure, and driven by a sense of injustice, individual relatives of victims of Katyn have recently looked to the international community to pursue accountability for the massacre.

Fifteen relatives of victims of Katyn sought relief for the murders of their family members at the European Court of Human Rights (ECHR),²⁴ and their case was docketed based on two complaints filed against

²¹ KATYN: A CRIME WITHOUT PUNISHMENT 256 (Anna M. Cienciala, Natalia S. Lebedeva & Wojciech Materski eds., Marian Schwartz, Anna M. Cienciala & Maia A. Kipp trans., 2007) (describing the investigation conducted in July 1991 regarding previously undisclosed information about the massacre).

²² *Id.* at 261.

²³ *See Warsaw Drops Katyn Compensation Claim – Ambassador*, TATAR-INFORM (Feb. 28, 2011) <http://eng.tatar-inform.ru/news/2011/02/28/34784/> (discussing Poland's refusal to seek compensation because of Russia's cooperation in the investigation).

²⁴ *Court Set for Judgement on World War Two Katyn Massacre*, HUM. RTS. EUR. (April 12, 2012) <http://www.humanrightseurope.org/2012/04/court-set-for-judgement-on-world-war-two-katyn-massacre/>.

Russia.²⁵ The complaints alleged that: (1) under Article 2 of the European Convention on Human Rights, the Russian authorities' 1990 investigations concerning the victims' deaths were inadequate, and (2) the Russian authorities' reactions to the requests for investigation amounted to ill-treatment under Article 3 of the Convention.²⁶ On July 5, 2011, the ECHR declared the complaints admissible.²⁷

The ECHR decided the case on April 16, 2012.²⁸ The Court had to determine, in part, whether it could review the adequacy of Russia's investigation into events which occurred before Russia ratified the Convention. Russia contended that the Court could not.²⁹

The Court found that there had been a violation of Article 3 of the European Convention on Human Rights as to ten of the fifteen applicants, as well as a violation of Russia's obligation to cooperate with the Court under Article 38 of the Convention.³⁰ The Court held that it did not have jurisdiction to hear a claim brought under Article 2 of the Convention, as the acts in issue took place before the Convention was applicable.³¹

On balance, the ruling clearly favored the plaintiffs' claims insofar as the Court found that the Russian authorities demonstrated "a flagrant, continuous and callous disregard" for the concerns and anxieties of the families of victims.³² And importantly, it provided a basis for the international community to hold Russia fully responsible for provision of a complete and detailed record of the facts of the atrocity and its subsequent cover-up.

²⁵ Eur. Ct. H.R., Decision as to the Admissibility of Applications nos. 55508/07 and 29520/09 by Jerzy-Roman Janowiec and Others Against Russia (July 5, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=14&portal=hbkm&action=html&highlight=&sessionid=92029683&skin=hudoc-en> [hereinafter Janowiec Admissibility Decision].

²⁶ *Id.* at ¶¶ 74–75.

²⁷ *See generally id.*

²⁸ *Janowiec and Others*, App. Nos. 55508/07, 29520/09, ¶ 117–27.

²⁹ *Id.* at ¶¶ 134–42.

³⁰ *Id.* at ¶ 98.

³¹ *Id.*; *see also* Press Release, Eur. Ct. H.R., Russia Should have Cooperated with the Court and Treated Katyn Victims' Relatives Humanely, ECHR 163 (April 16, 2012).

The Court emphasised the difference between Article 2 and Article 3: under the former the authorities were obliged to take specific action capable of leading to the identification and punishment of those responsible, while under the latter the authorities had to react to the plight of bereaved relatives in a humane and compassionate way. It then found that the Convention did not prevent it from examining a State's compliance with its obligation under Article 3 even in cases where the death itself could not be examined because it had taken place before the Convention had entered into force.

Id.

³² Janowiec Admissibility Decision, *supra* note 25.

III. ACCOUNTABILITY IN U.S. COURTS

American jurisprudence, seeks to avoid making U.S. courts a forum for resolving disputes that involve acts committed abroad when they do not involve American citizens. Nevertheless, it also views the promotion of universal respect for human rights as integral to U.S. judicial objectives, and the U.S. Supreme Court has sought to balance these twin policies by reserving resort to adjudication in U.S. courts in such matters to instances of egregious abuse.³³ How, therefore, does U.S. jurisprudence respond to the relatives of victims of Katyn, who seek accountability and damages?

The Alien Tort Statute (ATS),³⁴ which has been a principal avenue for accountability in U.S. courts for victims of human rights violations, provides the only potential legal cause of action for relatives of victims of Katyn to bring perpetrators to justice in U.S. courts. The statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁵ In *Kadic v. Karadzic*, the U.S. Court of Appeals for the 2nd Circuit held in 1995 that the ATS provided a basis for claims of Bosnian families of victims and that, in accordance with the holding in *Filartiga v. Pena-Irala*, the law of nations prohibiting mass murder of protected persons must be interpreted “as it has evolved and exists among the nations of the world today.”³⁶ In 2004 in its *Sosa* decision, the U.S. Supreme Court affirmed this standard.³⁷ *Karadzic* in the end was subjected to a default judgment for billions of dollars under the ATS.³⁸

The *Kadic* claim, however, was based on the wrongdoing of a person, whereas, here, the actions of a foreign state, Russia—as the successor to the Soviet Union—are at issue. The ATS only allows for suits

³³ See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa v. Alvarez-Machain*, the Supreme Court held that the Alien Tort Statute gives U.S. courts jurisdiction to hear “a relatively modest set of actions alleging violations of the law of nations.” *Id.* at 720. The Court further held that “any claim based on the present-day law of nations” brought under Alien Tort Statute jurisdiction must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized,” namely violation of safe conducts, violation of the rights of ambassadors, and piracy. *Id.* at 725.

³⁴ Alien Tort Statute of 1789, 28 U.S.C. § 1350 (2006).

³⁵ *Id.*

³⁶ *Kadic v. Karadzic*, 70 F.3d 232 at 239 (2d Cir. 1995) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

³⁷ See *Sosa*, 542 U.S. at 731 (“The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala*.”).

³⁸ See Judgment, *Kadic v. Karadzic*, No. 93 Civ. 1163 (S.D.N.Y., Aug. 16, 2000) (awarding victims \$745 million in compensatory and punitive damages); Judgment, *Doe v. Karadzic*, No. 93 Civ. 878 (S.D.N.Y., Oct. 4, 2000) (awarding \$407 million in compensatory damages and \$3.8 billion in punitive damages).

to be brought against individuals and corporations.³⁹ Moreover, even were the claims against Russia to focus on individuals rather than the state, the authority of U.S. courts to assume jurisdiction against individuals and corporations charged with gross human rights violations depends in large measure on the U.S. Supreme Court's ruling in a pending case, *Kiobel v. Royal Dutch Petroleum*.⁴⁰

In *Kiobel*, the U.S. Supreme Court must decide whether corporations may be held liable under the ATS for violations of customary international law.⁴¹ The decision, of course, will not set a precedent as to whether jurisdiction will expand to reach states' violations rather than individuals and corporations. Nevertheless, an expansive reading of the ATS would enable U.S. courts to be less tolerant of human rights violations, even when committed abroad; and a restrictive interpretation would inhibit the broad application of human rights principles.

But, even with an expanded reading of the ATS, victims would still have to overcome the formidable obstacle of the Act of State Doctrine and the Foreign Sovereign Immunities Act, both of which severely limit the ability to bring an action in a U.S. court against a foreign sovereign state or official.⁴² The Court in *Kirkpatrick v. Environmental Tectonics Group* described the Act of State Doctrine as "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs.'"⁴³ The Foreign Sovereign Immunities Act is based on the same rationale.

Exceptions exist to both, such as where money damages are sought against a foreign state or official for a personal injury or death,⁴⁴ or in a suit where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or

³⁹ See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011) (discussing the evolution of Alien Tort Statute cases from those brought against governments and oppressive regimes to corporations).

⁴⁰ See *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491).

⁴¹ See *id.*

⁴² Foreign Sovereign Immunities Act, 28 USC § 1604 (1976). For a discussion on the act of state doctrine, see generally *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 400 (1964).

⁴³ *Kirkpatrick v. Environmental Tectonics Corp.*, 493 U.S. 400, 404 (1990) (quoting *Banco Nacional de Cuba*, 376 U. S. at 423).

⁴⁴ General Exceptions to the Jurisdictional Immunity of a Foreign State, 28 U.S.C. § 1605 (a)(5).

resources for such an act. . . .⁴⁵ But no exceptions exist that would allow a suit to be brought in U.S. courts where a foreign state engages in violations of the laws of the nations within the borders of its own territory.

IV. CONCLUSION

Although Russia may not be subject to a judgment of monetary or punitive damages for its role in the Katyn Forest Massacre, Russia should act in accordance with international norms to meet its responsibility to accept accountability. These norms also suggest that Russia's verbal contrition should be accompanied by compensation.

Should Russia refuse, the families of the victims of Katyn might seek accountability by asking the international community to take cognizance of Russia's actions through a U.N. resolution condemning Russia's violations of international norms with regard to full disclosure and compensation. Although Russia would likely use its power as a member of the U.N. Security Council to veto such a resolution, if presented in that forum, the process would nonetheless create a historical record of Russia's violations. And that could be of twofold benefit: (1) publically document the atrocity and its cover-up; and (2) disparage Russia's actions in such a way as to discourage similar state behavior by actors who do not have the protection of veto power.

Faced with more intense scrutiny, Russia may respond to the calls of the international community for compensation, even if only of a symbolic nature. And, if Russia appropriately responds to such requests for accountability, the ground for Russia and Poland to finally reach true reconciliation would be established so that this dark saga of the past could finally be put to rest.

⁴⁵ Terrorism Exception to the Jurisdictional Immunity of a Foreign State, 28 U.S.C. § 1605A(a)(1).