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Confronting Complexities through the Diversity of International Law

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FOREWORD:

**CONFRONTING COMPLEXITIES THROUGH THE DIVERSITY OF
INTERNATIONAL LAW**

*Michael P. Scharf**
Cameron MacLeod†

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I. INTRODUCTION

U.S. State Department Legal Adviser Harold Koh noted in his remarks at the 2012 annual meeting of the American Society of International Law that diversity of approach in complex international situations is absolutely necessary for achieving the best results.¹ While his comments were aimed at responding to the crisis in Syria, the same multi-faceted approach to resolving conflict can be applied to many contexts in these challenging times. This issue of the *Case Western Reserve Journal of International Law* highlights application of this approach in the context of two case studies: (1) proposals to effectively redress the Katyn forest massacre, and (2) proposals to more successfully combat terrorist financing.

II. KATYN

In 1940, over 22,000 Polish officers, prisoners of war, and members of the Polish elite were slain in the Polish forest known as Katyn. Initially, the Soviet Union blamed the Nazis for the massacre. In 1990, the Russian government finally admitted that the Soviet government had been responsible for the Katyn killings, and launched a criminal investigation.

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¹ Harold Hongju Koh, Legal Advisor, U.S. Dep't State, Statement Regarding Syria, Speech at the American Society of International Law Annual Meeting (Mar. 30, 2012) (transcript available at <http://opiniojuris.org/2012/03/30/statement-regarding-syria/>).

But by 2004, the investigation was terminated and the files were classified. On the seventieth anniversary of the Katyn massacre, tragedy struck again as the plane carrying Polish President Lech Kaczynski and ninety-five other high level Polish officials and VIPs crashed in western Russia while en route to the Katyn memorial services.

A year later, the Frederick K. Cox International Law Center of Case Western Reserve University School of Law and the Libra Institute Inc. hosted an international conference and experts meeting to explore the continuing legal implications of the Katyn massacre, entitled "Katyn: Justice Delayed or Justice Denied?" Participants included many of the authors in this Issue, as well as other experts from Russia, Poland and the broader human rights community.² Throughout the proceedings, the experts debated whether the Katyn killings rose to the level of genocide, and discussed avenues through which the Polish and international communities can most effectively seek justice for these extraordinary crimes. Following the first day's panel presentations, the participating experts held a round-table session on the second day to flesh out the pros and cons of the several proposals, ranging from action at the European Court of Human Rights to suit under the U.S. Alien Tort Statute.³ The transcript of the session was edited and transformed into a report following the Chatham House Rule. The report, published herein, precedes several excellent articles generated from the Katyn conference.

For years, the massacres at Katyn have been generally overlooked in the history of Soviet occupation. In *What was Distinctive about Katyn: The Massacres in Context*, Professor Mark Kramer, Director of the Cold War Studies Program at Harvard University, notes that while the mass killings of people was by no means unusual during the period of Soviet occupation, the massacre at Katyn did mark a sort of paradigm shift.⁴ Drawing a parallel to his family's experiences during the Soviet occupation of Latvia, Kramer notes the benefits of historical justice.⁵ According to Professor Kramer, the benefit of transparency in contextualizing these killings is historical accuracy. While part of the story has been told through the release of some Soviet records, he argues that much more is still obscured. He concludes that only through the release of all of these documents can the puzzle of why the massacre at Katyn occurred be solved.⁶

² *Katyn: Justice Delayed or Justice Denied? – Report of the Cleveland Experts Group*, 44 CASE W. RES. J. INT'L L. 535 (2012).

³ *Id.* at 560.

⁴ Mark Kramer, *What was Distinctive about Katyn? The Massacres in Context*, 44 CASE W. RES. J. INT'L L. 569 (2012)

⁵ *Id.* at 574–76.

⁶ *Id.* at 575–76.

Similarly, in *Mass Murderers Discover Mass Murder*, Professor Kenneth Ledford of Case Western Reserve University advocates refocusing the historical lens onto Katyn, and repairing the massacre to its real historical significance.⁷ Professor Ledford examines the role of Katyn in the Nazi propaganda machine, and Goebbels' campaign to divide the Anglo-Soviet forces from their Polish support. After the discovery of the mass graves in 1943, Goebbels initiated a press campaign where the blame was placed squarely on the Soviets for the massacre.⁸ Using videos of the exhumation of the graves, along with pamphlets and books, Goebbels sought to vilify the Soviets, and drive a wedge between Poland and their Soviet support against the Nazis. While seemingly successful on some fronts, the propaganda campaign was on the whole a failure, even though the allegations of Soviet responsibility for the massacres were true. Just as Kramer emphasized the value of historical accuracy for resolution, so too does Ledford, as a matter of restorative justice.

After repeated calls for Soviet investigations into the massacre at Katyn, the post-Communist Polish government initiated its own investigation into the murders. In *Post-1991 Katyn Investigations in Poland*, Professor Janusz Cizek, Executive Director of the Museum of the Polish Army, chronicles the Polish investigation, as well as the relationship and cooperation between the Polish investigators and their Russian and Belorussian counterparts.⁹ He also provides a useful overview of the several institutions that have chronicled the events surrounding the massacre, acknowledging that the efforts continue to shed light on what happened in the Katyn Forest in 1940.

Looking specifically at redress and accountability for the families of those killed at Katyn, Allan Gerson, a former trial attorney in the Department of Justice's Office of Special Investigations and Legal Adviser to the U.S. Ambassador to the UN, echoes the call for restorative justice through historical accuracy.¹⁰ In *72 Years Later: Still Seeking Accountability for the Katyn Forest Massacre*, Gerson makes the case that while finding the truthful records alone is tremendously valuable, there are steps that should be taken to more fully account for the massacre at Katyn, either through compensation by the Russian government or possibly through international legal and political action against it.¹¹

⁷ Kenneth Ledford, *Mass Murderers Discover Mass Murder: The Germans and Katyn, 1943*, 44 CASE W. RES. J. INT'L L. 577 (2012).

⁸ *Id.* at 584.

⁹ Janusz Cizek, *Post-1991 Katyn Investigations in Poland*, 44 CASE W. RES. J. INT'L L. 591 (2012).

¹⁰ Allan Gerson, *72 Years Later: Still Seeking Accountability for the Katyn Forest Massacre*, 44 CASE W. RES. J. INT'L L. 605 (2012).

¹¹ *Id.* at 609.

Returning to the characterization of the Katyn crime, in *Katyn Forest Massacre: Of Genocide, State Lies and Secrecy*, Professor Milena Sterio of the Cleveland Marshall College of Law, examines whether the killings constituted a war crime, genocide, or both.¹² During the late twentieth century, various Russian and American committees investigated the Katyn massacre. In the U.S., the Madden Committee ultimately recommended proceedings against the Soviet Union before the International Court of Justice.¹³ When Russia finally admitted responsibility for the massacre in 1990, then-President Yeltsin released a large number of classified documents to Poland, including the secret order by Stalin for the killings.¹⁴ Professor Sterio argues that these are most certainly war crimes, as the killing of prisoners of war is itself a grave breach of the laws of war, but may also rise to the level of genocide.¹⁵ On the same theme, in *Was Katyn a Genocide*, Maria Szonert-Binienda, President of the Libra Institute, Inc., makes the case that proof exists beyond a reasonable doubt that former Soviet officials can and should be held criminally responsible for the crime of genocide in relation to Katyn.¹⁶ Further, both Professor Sterio and Ms. Szonert-Binienda agree that Russia, as the successor state to the Soviet Union, bears the responsibility for some form of apology and redress to the Polish people for the massacre.

In total, this section of the Issue focuses heavily on the interests not only of those whose families were torn apart by the slaughter of thousands of Poles, but also the interests of the international community in having a historically accurate understanding of the events at Katyn. We hope that the conference and experts meeting hosted by Case Western Reserve University and the Libra Institute will facilitate steps toward achieving that goal, and that while justice has been significantly delayed, it can be denied no longer.

III. THE FINANCING OF TERRORISM

The threat of terrorist attacks has waned as of late, due to in no small part to the limitations on the ways by which al-Qaeda, Boko Haram, and various other international criminal networks can obtain financial support. In 2008, Case Western Reserve University School of Law's Institute for Global Security Law and Policy hosted the "World Conference on Combating Terrorist Financing," examining many of the

¹² Milena Sterio, *Katyn Forest Massacre: Of Genocide, State Lies and Secrecy*, 44 CASE W. RES. J. INT'L L. 615 (2012).

¹³ *Id.* at 622.

¹⁴ *Id.* at 624.

¹⁵ *Id.* at 626–28.

¹⁶ Maria Szonert-Binienda, *Was Katyn a Genocide?*, 44 CASE W. RES. J. INT'L L. 633 (2012).

recommendations of the inter-governmental Financial Action Task Force (FATF).¹⁷ In the four years since that event, the international community has taken significant steps in regulating international financial transactions, and in 2012, the Institute for Global Security Law and Policy convened a follow-up symposium, titled “Preventing the Financing of Terrorism,” to assess the implementation of the Task Force’s recommendations and other advances in combating terrorist financing. The *Journal of International Law* is pleased to publish four articles generated from the 2012 event.

In *Preventing the Financing of Terrorism*, Richard Barrett, coordinator of the U.N. al-Qaeda Sanctions Monitoring Team, questions whether terrorist groups remain viable in their present form in light of the successful actions taken to dry up their funding.¹⁸ He examines the effectiveness of state regulation to combat terrorist financing, and discusses how future success requires that these regulations be more narrowly focused.¹⁹ Barrett suggests that closer interactions between the public and private sectors on addressing terrorist financing is absolutely necessary, and calls for flexibility and openness between private and public institutions to most effectively combat these terrorist organizations.²⁰

Trade-based money laundering remains the one aspect of the terrorist financing regime that is unregulated by the recommendations of the FATF. In *Strengthening our Security: A New International Standard on Trade-Based Money Laundering is Needed Now*, anti-money laundering specialists, Ross Delston and Stephen Walls, set forth the justification, and propose language for, an additional recommendation of the FATF focused on money laundering through the abuse of the international trade system.²¹ In examining the current domestic and international mechanisms to combat trade-based money laundering, Delston and Walls acknowledge that a skeletal framework exists, but advocate stronger compliance and investigatory powers for states, along with more aggressive regulations of internal controls and record keeping for business.²²

In *Financial Controls and Counter-Proliferation of Weapons of Mass Destruction*, Professor Nikos Passas of Northeastern University focuses on proliferation finance, and advocates further concrete measures to

¹⁷ See Richard Gordon and Christyn Rossman, *Foreword: Combating Terrorist Financing*, 41 CASE W. RES. J. INT’L L. 1 (2009).

¹⁸ Richard Barrett, *Preventing the Financing of Terrorism*, 44 CASE W. RES. J. INT’L L. 719 (2012).

¹⁹ *Id.*

²⁰ *Id.* at 731–32.

²¹ Ross Delston & Stephen Walls, *Strengthening our Security: A New International Standard on Trade-Based Money Laundering is Needed Now*, 44 CASE W. RES. J. INT’L L. 737 (2012).

²² *Id.* at 741–44.

restrain the trade and financing of weapons of mass destruction.²³ While some states have, independently, taken significant steps to address and implement international norms against proliferation financing, the best solutions must come from interaction and cooperation between the stakeholder states, private parties and international organs.²⁴ Professor Passas argues that limiting commercial, financial, and information flows through regulation will help to better address the crime and security concerns posed by proliferation of these weapons.²⁵

The U.N. Counter-Terrorism Implementation Task Force asked Sue Eckert of Brown University, Nikos Passas of Northeastern University, and Richard Gordon, Director of the Institute for Global Security Law and Policy at Case Western Reserve University School of Law to undertake a world-wide study to see if there were any patterns or indicators of terrorism financing. Professor Gordon's contribution, focusing on the situation in the U.S., is reflected in the final article in this volume of the *Journal*, entitled, *Terrorism Financing Indicators for Financial Institutions in the United States*.²⁶ To prepare his study, Professor Gordon, with the assistance of the U.S. Justice Department and eight law student research assistants, reviewed 266 instances of prosecutions that involved charges of terrorism, material support of terrorism, or other terrorism-related matters. Of that number, thirty were found to involve financial institutions. The study found twenty-four cases where there was sufficient information regarding the defendants' financial transactions to determine if there were any indicators of terrorism financing. Surprisingly, the study revealed that sixteen of those cases involved known indicators of money laundering, but that only three involved the proceeds of crime. The study suggests that terrorists may use money-laundering techniques to prevent law enforcement from tracing payments from end-users back to originators, and concludes that known money-laundering indicators can play a critical role in identifying the financing of terrorism. With this empirical data as backdrop, Professor Gordon looks at how effective the Recommendations of the FATF have been thus far in combating terrorist financing, and how they might be amended to better address the realities of evolving money laundering techniques or other methods to obscure the identity of financiers.²⁷

²³ Nikos Passas, *Financial Controls and Counter-Proliferation of Weapons of Mass Destruction*, 44 CASE W. RES. J. INT'L L. 747 (2012).

²⁴ *Id.* at 762.

²⁵ *Id.* at 763.

²⁶ Richard Gordon, *Terrorism Financing Indicators for Financial Institutions in the United States*, 44 CASE W. RES. J. INT'L L. 765 (2012).

²⁷ *Id.*

IV. CONCLUSION

From the Katyn massacre to counter-terrorism financing, the articles contained in this issue of the *Journal of International Law* illustrate both the complexity of the problems confronting international lawyers and the diverse and innovative approaches that international law provides to meeting these challenges. We are extremely grateful to the experts who participated in the conference “Katyn: Justice Delayed or Justice Denied?” and the symposium, “Preventing the Financing of Terrorism,” to the Cox Center Fellows and Institute for Global Security Law and Policy Fellows who assisted in the preparation of the Katyn and Terrorist Financing reports, to the experts who provided articles for this publication, and to the student editors of the *Journal* who worked diligently on the preparation of this issue.