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Historical Origins of International Criminal Law: Volume 3

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

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**2015
Torkel Opsahl Academic EPublisher
Brussels**

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ISBN 978-82-8348-015-3 (print) and 978-82-8348-014-6 (e-book)

The Katyn Forest Massacre and the Nuremberg Trial

William Schabas*

Count III (war crimes) of the indictment of the major war criminals by the International Military Tribunal charged the defendants with “murder and ill-treatment of prisoners of war and of other members of the armed forces of the countries with whom Germany was at war, and of persons on the high seas”. It provided nearly two pages of particulars concerning 14 cases, some set out in considerable detail, “by way of example and without prejudice to the production of evidence of other cases”. Among them was the following: “In September 1941, 11,000 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk”.¹ These 19 words, in an indictment of some 65 pages, received disproportionate attention during the trial. Testimony of witnesses, for both the prosecution and the defence, consumed two entire trial days.

The mass grave in the Katyn forest had come to the attention of German troops in early 1943, at a time when their armies were in retreat although they still occupied much of the western part of the Soviet Union. The German news agency Transocean announced the discovery on 12 April 1943. German sources claimed the victims, estimated at 10,000, had been shot in the back of the head in 1940 at a time when the territory was under Soviet control. A few days later the Soviet media charged that the murders had been committed in 1941, by German forces.² The Germans

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¹ Indictment, 1 International Military Tribunal 27, 1947, p. 54 (‘IMT’). See also, First Day, Tuesday, 20 November 1945, Afternoon Session, 2 IMT 57, 1947 p. 65.

² P.M.H. Bell, “Censorship, Propaganda and Public Opinion: The Case of the Katyn Graves, 1943”, in *Transactions of the Royal Historical Society*, 1989, vol. 39, pp. 63–64.

assembled an expert commission of inquiry that visited the site and produced a report that attributed responsibility to the Soviets. A year later, when the German forces had been pushed back, the Soviet regime organised its own commission of inquiry, known as the Burdenko Commission. Its report concluded that the massacre took place subsequent to the German invasion and that therefore Germany, not the Soviet Union, was responsible.

In its final judgment, issued on 30 September and 1 October 1948, the International Military Tribunal dealt at some length with the count in the indictment concerning the murder of prisoners of war. It concluded that the Germans were responsible for the murder of American, British and Soviet prisoners of war although it did not systematically review every factual allegation in the indictment.³ There was no reference to the murder of Polish officers at Katyn in the final judgment of the International Military Tribunal or in the dissenting opinion of Judge I.T. Nikitchenko. In his memoirs, published in 1962, the American judge, Francis Biddle, described the evidence as “inconclusive”.⁴ Testifying before a congressional committee in 1952, the American chief prosecutor, Robert Jackson, explained that “guilt for the Katyn Forest Massacre has not been adjudged by the Nuremberg Tribunal”.⁵ In his history of the Second World War, Winston Churchill wrote that “the Soviet government did not take the opportunity of clearing themselves of the horrible and widely believed accusation against them and of fastening the guilt conclusively upon the German government”.⁶ Some scholars have gone even further, interpreting the judgment as a tacit acknowledgement of Soviet responsibility.⁷ Katyn was one of those relatively rare situations in criminal justice

³ Two Hundred and Seventeenth Day, Monday, 30 September 1946, Morning Session, 1 IMT 411, 1947, pp. 471–75

⁴ Francis Biddle, *In Brief Authority*, Doubleday, New York, 1962, p. 417.

⁵ Hearings before the Select Committee to Conduct an Investigation of the Facts, Evidence and Circumstances of the Katyn Forest Massacre, Eighty-second Congress, Second Session, on Investigation of the Murder of Thousands of Polish Officers in the Katyn Forest near Smolensk, Russia, Part 7, June 3, 4 and November 11, 12, 13, 14, 1952, p. 1945 (‘Select Committee Hearings, Part 7’).

⁶ Winston S. Churchill, *The Second World War*, vol. 4, *The Hinge of Fate*, Cassel, London, 1951, p. 181.

⁷ Annette Wieviorka, *Le procès de Nuremberg*, Editions Ouest-France, Rennes, 1995, p. 92; Alexandra Viatteau, “Comment a été traitée la question de Katyn à Nuremberg”, in Annette Wieviorka (ed.), *Les procès de Nuremberg et de Tokyo*, Editions Complexe,

where, because of the nature and scale of the act, there can only be two plausible suspects. But even if the judges had been inclined to attribute responsibility to the Soviets, there was no legal basis for them to make such a finding. The Tribunal could only exercise jurisdiction over “the major war criminals of the European Axis”.⁸ The Nuremberg trial left the issue of responsibility for Katyn unresolved.

As the Cold War was coming to a close, Russian historians obtained access to previously secret documents that indicated Soviet responsibility for the Katyn massacre. Ironically, one of the researchers was Iurii N. Zoria, the son of the Soviet assistant prosecutor Nikolai Zoria at the International Military Tribunal. Nikolai Zoria was responsible for presenting the case with respect to German aggression against the Soviet Union and the subject of forced labour and deportation into German slavery.⁹ Zoria died in his Nuremberg hotel room midway through the trial under suspicious circumstances.¹⁰

On 13 April 1990 President Mikhail Gorbachev gave the Polish President, Wojciech Jaruzelski, documents containing the lists of prisoners to be executed that had been prepared by the Soviet secret police commonly known by the acronym NKVD (People’s Commissariat for Internal Affairs or Народный комиссариат внутренних дел).¹¹ At the same time, the official news agency TASS confirmed Soviet responsibility for the Katyn massacre, assigning blame primarily to the NKVD, its chief, Lavrenty P. Beria, and his deputy, Vsevolod N. Merkulov. The Russian admission does not seem to have discouraged some denialists, however, including the grandson of Joseph Stalin, Yevgeniy Yakovlevich Dzhugashvili.¹²

In its October 2013 judgment dismissing an application directed against Russia by relatives of the victims at Katyn, the Grand Chamber of

Brussels, 1996, pp. 152–53; Léon Poliakov, *Le procès de Nuremberg*, Gallimard, Paris, 1971, p. 205.

⁸ Charter of the International Military Tribunal, 82 *UNTS* 280, 1951, annex, Arts. 1, 6.

⁹ Fifty-fourth Day, Friday, Afternoon Session, 8 February 1946, IMT 177, 1948, pp. 196–97.

¹⁰ Anna M. Cienciala, Natalia S. Lebedeva and Wojciech Materski (eds.), *Katyn: A Crime Without Punishment*, Yale University Press, New Haven, NJ, 2007, p. 234.

¹¹ Eugenia Maresch, *Katyn 1940: The Documentary Evidence of the West’s Betrayal*, Spellmount, Stroud, 2010, p. 261.

¹² *Dzhugashvili v. Russia* (dec.), no. 41123/10, 9 December 2014.

the European Court of Human Rights provided the following useful summary of the relevant events:

15. On 1 September 1939 Germany invaded Poland, starting the Second World War. On 17 September 1939 the Soviet Red Army marched into Polish territory, allegedly acting to protect the Ukrainians and Belorussians living in the eastern part of Poland because the Polish State had collapsed under the German attack and could no longer guarantee the security of its own citizens. The Polish Army did not offer military resistance. The USSR annexed the territory newly under its control and in November 1939 declared that the 13.5 million Polish citizens who lived there were henceforth Soviet citizens.

16. In the wake of the Red Army's advance around 250,000 Polish soldiers, border guards, police officers, prison guards, State officials and other functionaries were detained. After they had been disarmed, some of them were set free; the others were sent to special prison camps established by the NKVD (People's Commissariat for Internal Affairs, a predecessor of the KGB) in Kozelsk, Ostashkov and Starobelsk. On 9 October 1939 it was decided that the Polish officer corps should be billeted at the camps in Kozelsk and Starobelsk and the remaining functionaries, including the police officers and prison guards, in Ostashkov.

17. In early March 1940 L. Beria, head of the NKVD, submitted to J. Stalin, Secretary General of the USSR Communist Party, a proposal to approve the shooting of Polish prisoners of war on the ground that they were all "enemies of the Soviet authorities filled with hatred for the Soviet system of government" who were "attempting to continue their c[ounter]-r[evolutionary] work" and "conducting anti-Soviet agitation". The proposal specified that the prisoner-of-war camps accommodated 14,736 former military and police officers, of whom more than 97 per cent were Polish by nationality, and that a further 10,685 Poles were being held in the prisons of the western districts of Ukraine and Belorussia.

18. On 5 March 1940 the Politburo of the Central Committee of the USSR Communist Party considered the proposal and decided as follows:

"I. Instructs the NKVD USSR as follows:

(1) the cases of the 14,700 persons remaining in the prisoner-of-war camps (former Polish Army officers, government officials, landowners, policemen, intelligence agents, military policemen, settlers and prison guards),

(2) and the cases of the persons arrested and remaining in prisons in the western districts of Ukraine and Belorussia, numbering 11,000 (members of various counter-revolutionary espionage and sabotage organisations, former landowners, factory owners, former Polish Army officers, government officials and fugitives), are to be considered in a special procedure, with the sentence of capital punishment – [execution by] shooting – being imposed.

II. The cases are to be considered without the detainees being summoned or the charges being disclosed, and without any statements concerning the conclusion of the investigation or the bills of indictment being issued to them, in the following manner:

(a) the persons remaining in the prisoner-of-war camps: on the basis of information provided by the Directorate of Prisoner-of-War Affairs, NKVD USSR,

(b) the persons arrested: on the basis of information provided by the NKVD of the Ukrainian SSR and the NKVD of the Belorussian SSR.¹³

The decision was signed by J. Stalin, K. Voroshilov, A. Mikoyan, V. Molotov, M. Kalinin and L. Kaganovich.

19. The killings took place in April and May 1940. Prisoners from the Kozelsk camp were killed at a site near Smolensk known as the Katyn Forest; those from the Starobelsk camp were shot in the Kharkov NKVD prison and their bodies were buried near the village of Pyatikhatki; the police officers from Ostashkov were killed in the Kalinin (now Tver) NKVD prison and buried in Mednoye. The circumstances of the execution of the prisoners from the prisons in western Ukraine and Belorussia have remained unknown to date.¹³

The treatment of the Katyn issue at Nuremberg has not infrequently been invoked by those who attack the legacy of the International Military

¹³ *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, 21 October 2013.

Tribunal. For example, French *négationniste* Robert Faurisson, in his unsuccessful application before the United Nations Human Rights Committee, challenged the reference to the Nuremberg judgment in French legislation dealing with Holocaust denial. He had been prosecuted under the Gayssot Act of 1990 by which it is an offence to “deny the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by the members of an organisation declared criminal pursuant to Article 9 of the Statute or by a person found guilty of such crimes by a French or international court”.¹⁴ Faurisson argued that “the ‘Gayssot Act’ promotes the Nuremberg trial and judgment to the status of dogma, by imposing criminal sanctions on those who dare to challenge its findings and premises”. This is explained in the decision of the Committee:

In substantiation of the claim that the Nuremberg records cannot be taken as infallible, he cites, by way of example, the indictment which charged the Germans with the Katyn massacre, and refers to the introduction by the Soviet prosecutor of documents purporting to show that the Germans had killed the Polish prisoners of war at Katyn (Nuremberg document USSR-054). The Soviet authorship of this crime, he points out, is now established beyond doubt. The author further notes that, among the members of the Soviet Katyn (Lyssenko) Commission, which had adduced proof of the purported German responsibility for the Katyn massacre, were Professors Burdenko and Nicolas, who also testified that the Germans had used gas chambers at Auschwitz for the extermination of four million persons (Document USSR-006). Subsequently, he asserts, the estimated number of victims at Auschwitz has been revised downward to approximately one million.¹⁵

It bears repeating that the International Military Tribunal did not find the Nazi leaders responsible for the Katyn massacre. Consequently, the Gayssot Act is utterly inapplicable. Indeed, the fact that the charge relating to Katyn was not upheld in the judgment ought to enhance, and not detract from, the credibility of the Tribunal.

¹⁴ English translation provided in *Lehideux and Isorni v. France*, 23 September 1998, § 27, *Reports of Judgments and Decisions* 1998-VII.

¹⁵ *Faurisson v. France*, UN doc. CCPR/C/58/D/550/1993, para. 2.4.

8.1. Preparation of the Indictment

The Charter of the International Military Tribunal, adopted on 8 August 1945, required each of the parties – France, the Soviet Union, the United Kingdom and the United States – to appoint a chief prosecutor. The four chief prosecutors were to act as the “Committee for the Investigation and Prosecution of Major War Criminals” in the organisation and conduct of the trial. The Committee’s tasks included preparation and approval of the indictment.¹⁶ Work on the indictment actually began in late June, more than a month before the London Agreement was finalised. A sub-committee charged with drafting the indictment first met on 23 June 1945, but with only American and British representatives in attendance.¹⁷

Robert Jackson, at the time a sitting justice of the United States Supreme Court, was designated as his country’s chief prosecutor. In November 1952 Jackson testified before a Select Committee of the United States Congress that was investigating the Katyn massacre about the decision to include the charge in the indictment. Explaining the rationale for holding the inquiry, the Committee’s chairman, Congressman Ray J. Madden, said that there had been questions about “the operation of the Nuremberg trials”.¹⁸ Jackson told the Committee that the four Allied chief prosecutors had decided to divide among themselves primary responsibility for specific issues by subject matter. He said that the preparation of evidence of crimes in Eastern Europe, which was then under Soviet occupation and “to much of which the others of us had no access”, was assigned to the Soviets. This included Katyn as well as Poland, although “at that time it was not known that the Katyn massacre would be involved”.¹⁹

As the discussions on the indictment were concluding, the Soviets proposed that the following be added: “In September 1941, 925 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk”.²⁰ Jackson said that both the British and the American representatives “protested, but they finally concluded that, despite their personal disapproval, if the Soviet thought they could prove the charge they

¹⁶ Charter of the International Military Tribunal, 82 *UNTS* 280, 1951, annex, arts. 14–15.

¹⁷ Sidney S. Alderman, “Negotiating on War Crimes Prosecutions, 1945”, in Raymond Denneff and Joseph E. Johnson (eds.), *Negotiating with the Russians*, World Peace Foundation, Boston, 1951, pp. 82–84.

¹⁸ Select Committee Hearings, Part 7, p. 1944, see *supra* note 5.

¹⁹ *Ibid.*, p. 1945.

²⁰ *Ibid.*, p. 1946.

were entitled to do so under the division of the case”.²¹ According to Jackson, “[i]n view of what we knew of the over-all Nazi plan to exterminate inhabitants of Poland, it did not seem unlikely that this was part of their programme, and the Soviet claimed to have adequate evidence of Nazi guilt”.²² Jackson told the congressional committee that “[w]hile we did not feel justified in preventing the issue, we warned the Soviet delegation that we did not have evidence to support the charge nor time nor opportunity to investigate it and that, if it met with denial or countercharges, we would keep hands off and leave the entire contest to the Soviet and German lawyers”.²³

Explaining the opposition of the British and American prosecutors to the inclusion of the Katyn charge, Jackson cited a policy decision to rely upon documentary evidence of crimes and only to proceed with charges where guilt could be “fully proved or substantially corroborated by documentary evidence captured from the Germans themselves”. In that respect, Jackson said responsibility for the Katyn massacre “did not appear to be capable of documentary proof or substantial corroboration”.²⁴ He said that “[b]ecause this was the first international criminal trial in history and was held in the wake of war when passions were high, we did not want any judgment that would rest solely on oral testimony of witnesses whose interest, bias, memory, and truthfulness would always be open to question”. For this reason, the prosecutors passed over “many tempting matters because evidence measuring up to this standard was not then obtainable”.²⁵ Jackson’s explanation was confirmed by the British prosecutor, David Maxwell Fyfe, who said in his memoirs that the British and Americans had expressed opposition to including the Katyn charge “based on the sound premise that the charge would depart from the basic plan to develop the case from authentic German documents, and no witnesses were available who, in Jackson’s own words, ‘would meet the high standards of credibility required in a criminal trial’”.²⁶

²¹ *Ibid.*

²² *Ibid.*, p. 1946.

²³ *Ibid.* See also Sidney S. Alderman, “Negotiating on War Crimes Prosecutions, 1945”, in Dennett and Johnson, 1951, pp. 96–97, see *supra* note 17.

²⁴ Select Committee Hearings, Part 7, p. 1946, see *supra* note 5.

²⁵ *Ibid.*

²⁶ David Maxwell Fyfe, *Political Adventure: The Memoirs of the Earl of Kilmuir*, Weidenfeld and Nicolson, London, 1964, p. 96.

Jackson also referred to the possibility of obtaining evidence from Polish sources. He said that “[a]ttitudes of Polish authorities at the time were conflicting”, confirming his view that “we should not participate in the trial of the Nazi-Soviet dispute”. He said that the Polish government then in power had a delegation at Nuremberg that co-operated with the Soviets, “including, as I understood it, accusing the Nazis of the Katyn murders”.²⁷ Jackson also referred to the United Nations War Crimes Commission, the London-based body established in late 1943 charged with investigating wartime atrocities. Jackson noted that Poland was a member of the Commission but that it never even raised the issue of the Katyn massacre.²⁸ Recently, researchers have obtained access to many of the records of the United Nations War Crimes Commission, which are archived with the United Nations. There is nothing to suggest that Jackson’s observation was incorrect. But Jackson added that in February 1946 a group of Polish parliamentarians submitted a letter and statement that indicated Soviet responsibility for the massacre. It concluded that “it would be ill-advised to include the Katyn case in the tasks of the Nuremberg tribunal. The case is of a special character, and needs in order to be fully elucidated, to be examined and treated independently by an international judicial body”.²⁹

There has been speculation as to whether at the time the indictment was adopted the Americans and the British “knew” that the Soviets were guilty of the massacre.³⁰ David Irving’s book on the Nuremberg Trial contends that “[t]he British government was well aware of the truth about this atrocity”.³¹ Of course, at a very basic level everyone had been informed of the truth through Nazi propaganda and the German *White Book* on Katyn. But the government officials and prosecutors could not simply ignore the Soviet denials and their accusations of Nazi responsibility. Jackson told the congressional committee that he had no opinion one way or the other about who was responsible for the massacre. He considered that both Nazi Germany and the Soviet Union were capable of the offence and “perhaps both had opportunity to commit it, and that it was perfectly consistent with the policy of each toward Poland”.³² In 1991 the American prosecu-

²⁷ Select Committee Hearings, p. 1947, see *supra* note 5.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ For example, Viatteau, 1996, p. 146, see *supra* note 7.

³¹ David Irving, *Nuremberg: The Last Battle*, Focal Point, London, 1996, p. 36.

³² Select Committee Hearings, Part 7, p. 1946, see *supra* note 5.

tor Telford Taylor told Allen Paul: “There was a feeling then that the Russians, not the Germans, were guilty”.³³ However, Taylor did not say this in his memoirs, published the following year,³⁴ and his recollection is not confirmed by contemporary materials. For example, Thomas J. Dodd, another one of the American prosecutors, wrote to his wife that the responsibility for Katyn was a “toss up”. Like Jackson, Dodd believed that both the Nazis and the Soviets were capable of the crime and had a motive to commit it. “I insist that the dispute between them is of little interest to the world – even less will it interest history”, he wrote.³⁵

The British archives indicate considerable discussion within the Foreign Office about responsibility for Katyn. In May 1943 Sir Owen O’Malley, who was British ambassador to the Polish government-in-exile during the war, in “a bold, able and emotive despatch”,³⁶ had set out the case for Soviet responsibility. O’Malley relied upon circumstantial evidence drawn from Polish sources in London, in particular the fact that the bodies bore winter clothing. In light of O’Malley’s reports, Foreign Minister Anthony Eden wrote to Prime Minister Churchill that there were “serious doubts on Russian disclaimers of responsibility” but that “the evidence is conflicting and whatever we may suspect, we shall probably never know”. Churchill answered: “This is not one of those matters where absolute certainty is either urgent or indispensable”.³⁷ On 17 February 1944 Professor B.H. Sumner, “a notable and impartial Russian scholar”, prepared a memorandum for the Research Department of the Foreign Office that concluded the report of the Soviet Commission had set out “a good, though not a conclusive, case for the perpetration of the massacres by the Germans”.³⁸ Following the issuance of the indictment, Denis Allen

³³ Allen Paul, *Katyn: Stalin’s Massacre and the Triumph of Truth*, Northern Illinois University Press, De Kalb, IL, 2010, p. 336.

³⁴ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred A. Knopf, New York, 1992, p. 117.

³⁵ Christopher J. Dodd with Lary Bloom, *Letters from Nuremberg: My Father’s Narrative of a Quest for Justice*, Crown, New York, 2007, p. 333.

³⁶ The Katyn Massacre and Reactions in the Foreign Office, Memorandum by the Historical Adviser, 10 April 1973, DS(L) 230, para. 7 (‘The Katyn Massacre’).

³⁷ *Ibid.*, para. 9. See also Alastair Noble, “British Reactions to the Katyn Massacre”, in Delphine Debons, Antoine Fleury and Jean-François Pitteloud (eds.), *Katyn and Switzerland: Forensic Investigators and Investigations in Humanitarian Crises, 1920–2007*, Georg Editeur, Geneva, 2007, pp. 221–36.

³⁸ The Katyn Massacre, para. 15, see *supra* note 36.

of the Foreign Office prepared a summary of previous developments concerning the Katyn massacre accompanied by a draft brief for a parliamentary debate that did not in fact take place. It included the following:

[His Majesty's Government] have no direct evidence on the subject in their own possession. [...] They have of course studied the reports published by the German and Soviet Commission which investigated the scene of the massacres in 1943. In their opinion the Soviet report, which was drawn up after a lengthy period of investigation by very distinguished and highly qualified Russian experts, provides sufficient *prima facie* evidence of German guilt to justify the inclusion of this charge in the indictment against the major German war criminals.³⁹

Sir Thomas Brimelow minuted agreement with Allen's paper, but with a reservation:

The Soviet investigations, if accepted as genuine, show that *some* Poles were killed at Katyn after March 1940. They do not prove that they were *all* killed after that date. In other words, the Soviet investigations inculcate the Germans without entirely exculpating the Soviet authorities. On the other hand, the evidence now available about German mass murders makes it impossible to attach credence to German evidence which might be designed to mask German crimes. We must therefore suspend judgment.⁴⁰

In effect, the Foreign Office took the "considered view" that "the evidence at present available would seem to require a suspension of judgment in regard to the whole affair".⁴¹

The original figure of 925 victims at Katyn contained in the indictment signed by the chief prosecutors on 6 October was apparently based on the number of corpses examined by the Burdenko Commission. It seems that the Russian text of the indictment, dated 9 October 1945, spoke of 11,000 victims.⁴² Perhaps at the time the Soviets did not realise the inconsistency with the English text. Nearly two weeks were spent dealing with discrepancies between the German and English texts of the indictment. But the planned filing of the indictment at the Tribunal's first

³⁹ *Ibid.*, para. 34.

⁴⁰ *Ibid.*, para. 35.

⁴¹ *Ibid.*, para. 17, citing C 2957/8/55.

⁴² Cienciala *et al.*, 2007, p. 230, see *supra* note 10.

public session in Berlin (in accordance with Article 22 of the Charter), on 15 October, was unexpectedly delayed when the Soviet chief prosecutor, Roman Rudenko, asked for a postponement so that the figure of 925 could be amended to 11,000. According to Robert Conot, the Soviet judge, Iona Nikitchenko, “asked which would be the greater evil: a postponement of a few days, or the harm that would come to Russia if the indictment were filed as it existed?”.⁴³ The American judge, Francis Biddle, told his French and British colleagues that he feared the Soviet judges “might bolt if we didn’t agree” to the postponement.⁴⁴

As they prepared for the trial to begin, the four prosecution teams considered the possibility that the German defendants would invoke acts allegedly perpetrated by the Allied governments. In addition to various violations of the laws and customs of war, they were also concerned about the aggression charge with respect to planned or actual military action directed at the sovereignty of Iceland, Norway, Poland, Finland and the Baltic States. All but the French were directly concerned by this issue. At a meeting in early November 1945 the prosecutors agreed that they would collectively defend themselves against defence charges of Allied war crimes. It was agreed that each national team would prepare a memorandum outlining its concerns in order to facilitate preparations. Robert Jackson, writing to the French and the Soviet prosecutors, said “the United States, being late in the war and remote from the scene, was little exposed to attack itself and was perhaps in the best position to lead the effort to restrict the proof closely to the charges and try to stop political discussions”.⁴⁵ The United Kingdom immediately complied with the commitment, but France and the Soviet Union did not, “perhaps uncertain about what the Americans and the British would do with the information”.⁴⁶ Only in March 1946 did the Soviets provide a list of topics that they wanted to avoid, including the Molotov-Ribbentrop Pact of August 1939 and “Soviet-Polish relations”.⁴⁷

In his testimony before the congressional committee, Jackson noted that after the indictment was filed, the Polish government-in-exile neither

⁴³ Robert E. Conot, *Justice at Nuremberg*, Harper & Row, New York, 1983, pp. 67–68.

⁴⁴ Taylor, 1992, p. 125, see *supra* note 34; also Biddle, 1962, pp. 387–88, see *supra* note 4.

⁴⁵ Francine Hirsch, “The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order”, in *American Historical Review*, 2008, vol. 113, p. 718.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p. 719.

objected to the Katyn charge nor did it provide evidence.⁴⁸ However, there are indications of attempts from other quarters, subsequent to issuance of the indictment, to influence the conduct of the prosecution with respect to Katyn. A Northern Irish Member of Parliament, Sir Douglas Savory, provided Foreign Minister Ernest Bevin with a report he had helped prepare on the Katyn massacre that pointed the finger at the Soviet Union. In response to a query from Bevin, the Attorney General, Sir Hartley Shawcross, replied:

We did our best to persuade the Russians not to include a charge about Katyn in the indictment, but they insisted on doing so, although I believe they are now a little doubtful of the wisdom of their decision. In the circumstances there is nothing that we can do except to try and steer the Russians as carefully as we can over this exceedingly delicate and difficult ground. This we are doing as best we can, but I must confess I am not at all happy about the situation which may eventually arise if evidence is called in regard to Katyn.⁴⁹

Shawcross also wrote to Savory, explaining that the Soviets had decided to attempt to prove German responsibility for the Katyn massacre, “and it will therefore be for the Tribunal after hearing the Russian evidence, and such evidence as the Germans may call in regard to the matter, to decide where the truth lies”.⁵⁰

The Foreign Office archives also contain a draft letter from a Polish parliamentarian (“We don’t know how this paper reached us”, says the minute) expressing concern about the Katyn charge: “The question arises as to whether German propaganda will not in the future be able to allude to the incident when one of the parties publicly accused was the judge in its own case?” The letter warned of anything that could diminish the credibility of the Nuremberg Tribunal. It urged that Katyn be investigated by an independent judicial body.⁵¹ In his testimony before the congressional committee, Robert Jackson referred to a letter he received in February 1946 from a group of Polish parliamentarians that indicated Soviet responsibility for the massacre. This seems to be the final version of the draft letter in the British archives. It concluded that “it would be ill-

⁴⁸ Select Committee Hearings, Part 7, p. 1947, see *supra* note 5.

⁴⁹ Sir Hartley Shawcross to Ernest Bevin, 28 December 1945, FO 371/56474.

⁵⁰ Sir Hartley Shawcross to Prof. D.L. Savory, MP, 28 December 1945, FO 371/56474.

⁵¹ Jozef Godlewski to Jan Kwapinski, Parliamentary Group 74, 7 December 1945 (translation), FO 371/56474.

advised to include the Katyn case in the tasks of the Nuremberg tribunal. The case is of a special character, and needs in order to be fully elucidated, to be examined and treated independently by an international judicial body”.⁵²

8.2. Preliminaries and Production of the Soviet Report

The first reference in the actual proceedings to the Katyn massacre occurred very early in the trial. On 14 December 1945 Major William F. Walsh of the United States prosecution team was reviewing documentary evidence that had already been produced in the record. The title of his presentation was “The Persecution of the Jews”. He drew the attention of the Tribunal to a letter that had been sent by the Reich Minister for the Occupied Eastern Territories to Alfred Rosenberg, one of the defendants, protesting against the treatment of Jews. Walsh explained that “a certain amount of discord existed between the officials of the German Government as to the proper means and methods used in connection with the programme of extermination”. The author of the letter wrote:

The fact that Jews receive special treatment requires no further discussion. However, it appears hardly believable that this was done in the way described in the report of the General Commissioner of 1 June 1943. What is Katyn against that? Imagine only that these occurrences might become known to the other side and be exploited by them! Most likely such propaganda would have no effect, only because people who hear and read about it simply would not be ready to believe it.⁵³

The Soviets began presenting their part of the case in February 1946. On 14 February 1946 Colonel Y.V. Pokrovsky, deputy prosecutor for the Soviet Union, introduced the evidence in support of the Katyn charge.

I should now like to turn to the brutalities committed by the Hitlerites towards members of the Czechoslovakian, Polish, and Yugoslavian Armies. We find, in the Indictment, that one of the most important criminal acts for which the major war criminals are responsible was the mass execution of Polish prisoners of war, shot in the Katyn Forest near Smo-

⁵² Select Committee Hearings, Part 7, p. 1947, see *supra* note 5.

⁵³ Twentieth Day, Friday, 14 December 1945, 3 IMT 542, 1947, p. 562.

lensk by the German fascist invaders. I submit to the Tribunal, as a proof of this crime, official document of the special commission for the establishment and the investigation of the circumstances which attended the executions. The commission acted in accordance with a directive of the Extraordinary State Commission of the Soviet Union. In addition to members of the Extraordinary State Commission – namely Academicians Burdenko, Alexis Tolstoy, and the Metropolitan Nicolas – this commission was composed of the President of the Pan-Slavonia Committee, Lieutenant General Gundorov; the chairman of the Executive Committee of the Union of the Red Cross and Red Crescent, Kolesnikov; of the People's Commissar for Education in the R.S.S.F.R., Academician Potemkin; the Supreme Chief of the Medical Department of the Red Army, General Smirnov; and the Chairman of the District Executive Committee of Smolensk, Melnikov. The commission also included several of the best known medico-legal experts.⁵⁴

Pokrovsky briefly read excerpts from the Burdenko report into the record.⁵⁵ The full report was produced as an exhibit.⁵⁶

On 8 March Otto Stahmer, who was counsel for Hermann Göring, applied to the Tribunal for authorisation to call evidence with respect to the Katyn case.

Another supplementary request is concerned with the following: In the session of 14 February 1946 the Soviet Prosecution submitted that a German military formation, Staff 537, Pioneer Battalion, carried out mass shootings of Polish prisoners of war in the forests near Katyn. As the responsible leaders of this formation, Colonel Ahrens, First Lieutenant Rex, and Second Lieutenant Hodt were mentioned. As proof the Prosecution referred to Document USSR-64. It is an official report of the Extraordinary State Commission of the Soviet Union which was ordered to investigate the facts of the well-known Katyn case. The document I have not yet received. As a result of the publication of this speech by the Prosecution in the press, members of the staff of the Army

⁵⁴ Fifty-ninth Day, Thursday, Morning session, 14 February 1946, 7 IMT 403, 1947, pp. 425–26.

⁵⁵ *Ibid.*, pp. 426–28.

⁵⁶ “USSR-54, Report by a Special Soviet Commission, 24 January 1944, Concerning the Shooting of Polish Officer Prisoners of War in the Forest of Katyn”, 39 IMT 290, 1949.

Group Center, to which Staff 537 was directly subordinate and which was stationed 4 to 5 kilometers from Staff 537, came forward. These people stated that the evidence upon which the Prosecution have based the statement submitted was not correct.

The following witnesses are mentioned in this connection: Colonel Ahrens, at that time commander of, later chief of army armament and commander of the auxiliary army; First Lieutenant Rex, probably taken as a prisoner of war at Stalingrad; Lieutenant Hodt, probably taken prisoner by the Russians in or near Königsberg; Major General of intelligence troops, Eugen Oberhauser, probably taken prisoner of war by the Americans; First Lieutenant Graf Berg – later ordnance officer with Field Marshal Von Kluge – a prisoner of war in British hands in Canada. Other members of the units which are accused are still to be mentioned. I name these witnesses to prove that the conclusion as to the complicity of Goring drawn by the Prosecution in the above-mentioned statement is not justified according to the Indictment.

This morning I received another communication bearing on the same question, which calls for the following request: Professor Naville, professor of forensic medicine at the University of Geneva, carried out, with an international commission at Smolensk, investigations of the bodies at that time. He established from the state of preservation of these corpses, from the notes found in the pockets of their clothes, and other means of evidence, that the deed must have been committed in the year 1940.⁵⁷

The President of the Tribunal told Stahmer to submit the request in writing.⁵⁸

The Tribunal granted Stahmer's application on 12 March. Judge Nikitchenko abstained in the vote after throwing "all his weight behind

⁵⁷ Seventy-seventh Day, Friday, Morning session, 8 March 1946, 9 IMT 1, 1947, pp. 3–4.

⁵⁸ *Ibid.*, p. 4. There is a brief description of Stahmer's motion by Robert Kempner, an American prosecutor who was in the courtroom: Hearings before the Select Committee to Conduct an Investigation of the Facts, Evidence and Circumstances of the Katyn Forest Massacre, Eighty-second Congress, Second Session, on Investigation of the Murder of Thousands of Polish Officers in the Katyn Forest near Smolensk, Russia, Part 5, 21, 22, 23, 24, 25, and 26 April 1952, pp. 1540–41 ('Select Committee Hearings, Part 5').

the Soviet prosecutor”.⁵⁹ Nikitchenko insisted that his reasons be recorded in the minutes: “I cannot participate in this vote as the discussion and putting to vote by the Tribunal of a question as to whether an official Government act may be contested is a flagrant contradiction of Article 21 of the Charter”.⁶⁰ Article 21 governed the taking of judicial notice of “the acts and documents of the committees set up in the various allied countries for the investigation of war crimes”. Nikitchenko contended that the Tribunal was bound to admit such documents as proof of the facts at issue and that contrary evidence was then inadmissible. The consequence would be to deny the defendants the possibility of attacking the conclusions of the Burdenko report, already in evidence.

The Soviet interpretation of Article 21 was “ridiculous”, wrote the American prosecutor Telford Taylor in his memoir of the trial.⁶¹ When he testified before the congressional committee in 1952, Robert Jackson was somewhat more charitable to the Soviet position. “Under Soviet law it probably could not, but would be entitled to faith and credit – as a judgment, statute, or public act would be here”, explained Jackson, speaking of the Burdenko report. However, “we thought that its nature was such that it was clearly open to contradiction”.⁶² Writing many years later, Judge Biddle admitted that the phrasing of Article 21 was “unfortunate” in that it seemed to blend “facts of common knowledge” with “government documents”, and he said “in the Russian translation the two phrases might have interlocked”.⁶³ The subtleties about judicial notice can be seen in a recent ruling of the Appeals Chamber of the Special Court for Sierra Leone.⁶⁴

After the judges ruled that Article 21 did not apply to the Burdenko report in the manner that the Soviets had contended, Prosecutor Rudenko responded with an application for this question to be reheard. His efforts may have been prompted by criticism from the Soviet journalists covering

⁵⁹ Biddle, 1962, p. 413, see *supra* note 4.

⁶⁰ Taylor, 1992, p. 468, see *supra* note 34. See also Cienciala *et al.*, 2007, p. 231, see *supra* note 10.

⁶¹ Taylor, 1992, p. 469, see *supra* note 34.

⁶² Select Committee Hearings, Part 7, pp. 1950–51, see *supra* note 5.

⁶³ Biddle, 1962, p. 413, see *supra* note 4.

⁶⁴ *Prosecutor v. Norman et al.*, Fofana – Decision on Appeal Against Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence, SCSL-04-14-AR73, 16 May 2005, para. 32; *Prosecutor v. Norman et al.*, Separate Opinion of Justice Robertson, SCSL-04-14-AR73, 16 May 2005, para. 9.

the trial. In a report sent to the country's leaders, dated 4 April 1946, the journalists faulted the Soviet legal team for failing to challenge "the defense's request to summon fascist witnesses". They said that "our prosecution lost the opportunity to prevent them from being called".⁶⁵ When the judges considered Rudenko's motion, on 6 April, Biddle produced an opinion on the matter from Herbert Wechsler, a distinguished legal scholar and adviser to the American judge, that "in dignified but forceful language, made mincemeat of Rudenko's petition".⁶⁶ Biddle considered the language of the petition, accusing the Tribunal of violating its duty and committing "gross error", to be "intemperate". He said that in the United States "the author of such an outrage would be cited for contempt". To make his point, Biddle suggested that first Wechsler's opinion should be read in open court and then Rudenko be arrested and sent to prison. The judges agreed to deny Rudenko's motion for reconsideration without giving reasons.⁶⁷

Several weeks later, Göring's counsel, Stahmer, made a supplementary application to call more witnesses about Katyn. The Soviet prosecutor Pokrovsky informed the Tribunal that the Soviet prosecution "from the very beginning, considered the Katyn Forest incident as common knowledge".⁶⁸ This was similar to the argument based on Article 21 of the Charter that the judges had already rejected. However, it seems that the earlier objection relied upon the second rather than the first sentence of Article 21. Pokrovsky went on to explain that "by the limited space allotted to this crime in the Indictment and by the fact that we found it possible to limit ourselves to reading into the record only a few short excerpts from the report of the Commission, that we consider this episode to be only an episode".⁶⁹

Pokrovsky, also alluded to remarks made by Maxwell Fyfe, the British prosecutor, a few minutes earlier. Maxwell Fyfe had been referring to the production of evidence in order to impeach the credibility of witnesses, noting the restrictive approach taken by English law in this area. Pokrovsky said that if the defendants were authorised to call witnesses

⁶⁵ Hirsch, 2008, p. 725, see *supra* note 45.

⁶⁶ Taylor, 1992, p. 469, see *supra* note 34.

⁶⁷ *Ibid.*

⁶⁸ One Hundred and Twenty-seventh Day, Morning Session, Saturday, 11 May 1946, 13 IMT 410, 1947, p. 430.

⁶⁹ *Ibid.*, pp. 430–31.

to attack the credibility of the Soviet evidence, then the Soviets would be required to call rebuttal evidence. “Thus, if the Tribunal considers it necessary to admit two new witnesses relative to the Katyn Forest shootings, the Soviet Prosecution will find itself obliged to call about ten more new witnesses who are experts and specialists, and to present to the Tribunal new evidence put at our disposal and which we have recently received – new documents”, Pokrovsky argued. He said that, in addition, the Soviet prosecutors would feel compelled to read extensive portions of the Burdenko report into the record, causing great delay to the proceedings that would “not be a matter of hours but of days”.⁷⁰ A few days later, without giving reasons or explanation, the Tribunal granted Göring’s application to call two additional witnesses.⁷¹

The Tribunal considered yet another defence motion to call three additional witnesses on 3 June. Opposing the motion, the Soviet prosecutorial team returned to the Article 21 argument:

Our position is that this episode of criminal activity on the part of the Hitlerites has been fully established by the evidence presented by the Soviet Prosecution, which was a communication of the special Extraordinary State Commission investigating the circumstances of the mass shooting of Polish officer prisoners of war by the German Fascist aggressors in Katyn Forest. This document was presented by the Soviet Prosecution under the Document Number USSR-54 on 14 February 1946, and was admitted by the Tribunal; and, as provided by Article 21 of the Charter, it is not subject to argument.⁷²

Rudenko went on to discuss the proposed testimony of the three witnesses that Stahmer was requesting. The first, a psychiatrist, had participated in the German fact-finding commission but not, Rudenko insisted, “on the basis of his competence in the field of forensic medicine, but as a representative of the German Fascist military command”. The second, said Rudenko, had been a member of the Engineer Corps that carried out the executions. “As he is an interested party, he cannot give any useful testimony for clarifying the circumstances of this matter”, Rudenko

⁷⁰ *Ibid.*, p. 431.

⁷¹ One Hundred and Twenty-ninth Day, Morning Session, Saturday, 14 May 1946, 13 IMT 496, 1947, p. 513.

⁷² One Hundred and Forty-fifth Day, Afternoon Session, Monday, 14 May 1946, 15 IMT 288, 1948, pp. 289–90.

argued. The third knew nothing about the detention of the Polish victims and in any event “cannot be considered an unprejudiced witness”. Rudenko noted that these objections to calling the three witnesses “express the opinion of all the prosecutors”.⁷³

Although the Soviets took the view that evidence to contradict the Burdenko report was simply inadmissible pursuant to Article 21 of the Charter, the other three prosecutors agreed that the proposed witnesses should not be heard because their testimony would not be relevant. This distinction was noted by the president of the Tribunal, Sir Geoffrey Lawrence, who invited Stahmer to address the issue. Stahmer said that “[o]ne cannot eliminate a witness by saying that he was involved in the act”. When Lawrence asked about the psychiatrist, Stahmer said he thought that the proposed witness was present at the inquiry but was not actually a member of the German fact-finding commission.⁷⁴ On 8 June the Tribunal granted Göring’s application with respect to the first two witnesses but “on the condition that three witnesses only may be called upon the subject concerned”.⁷⁵

By this point in the trial, according to Telford Taylor, with an evidentiary hearing looming on Katyn at which German witnesses would be heard, the Soviets appeared increasingly nervous. He wrote that on 18 June the Soviet judge, Nikitchenko, proposed to his colleagues “that the evidence on the Katyn Forest incident be presented in written form rather than by witnesses”. Taylor said that nothing came of this idea.⁷⁶ But it appears that the judges held out the hope that the Katyn evidence might be produced in the form of affidavits rather than oral testimony. This would require agreement of the parties. Stahmer told the American congressional committee that he was invited by officials of the Tribunal to meet the Soviet prosecution team for a discussion of the matter. At the meeting, a Soviet lawyer, Colonel Prochownik, told Stahmer and another defence counsel, Franz Exner, that Lawrence had requested that the proceedings be made shorter, the idea being to submit evidence by affidavit instead of live witness testimony. Both Stahmer and Exner refused, “for the result of

⁷³ *Ibid.*, p. 290.

⁷⁴ *Ibid.*, pp. 292–93.

⁷⁵ One Hundred and Fiftieth Day, Morning Session, Monday, 8 June 1946, 15 IMT 574, 1948, p. 574.

⁷⁶ Taylor, 1992, p. 470, see *supra* note 34.

such an action would have been that the documents would have been submitted without the public getting to know anything about their contents”.⁷⁷ Stahmer explained: “I gave my response for refusing by pointing out that that the Russian prosecution had accused the German Wehrmacht publicly of having murdered eleven thousand prisoners of war, and for the sake of the honour of the German Wehrmacht I thought it imperative that the public should be informed in the same way, that this accusation was without foundation”.⁷⁸

On 29 June, Lawrence issued rulings on a number of procedural motions concerning evidence. He referred to three motions by Göring but said a decision on them was postponed “subject to the possibility of agreement being reached upon the question of whether affidavits are to be presented or witnesses called”.⁷⁹ Later in the session, he asked the Soviet chief deputy prosecutor, Pokrovsky, whether agreement with Göring’s counsel had been reached. Pokrovsky replied:

My Lord, we have had three conferences with the Defense Counsel. After the second meeting I told the Tribunal that, in order to shorten the proceedings, the Soviet Prosecution was willing to read into the record only a part of the evidence submitted. About 15 minutes ago I had a meeting with Dr. Exner and Dr. Stahmer, and they told me that their understanding of the Tribunal’s ruling was that the old decision for the summoning of two witnesses was still in force and that only additional documents were now under discussion. In view of this interpretation of the Tribunal’s ruling, I do not think that we shall be able to come to an agreement with the Defense. As I see it, the decision in this matter must now rest in the hands of the Tribunal.⁸⁰

Lawrence immediately ruled that unless agreement was reached on submission of evidence by affidavit “the evidence shall not be given entirely by affidavits and that the three witnesses on either side shall be called first thing on Monday morning at 10 o’clock”.⁸¹ Erich Räder’s counsel, Walter Siemers, intervened to explain that several defence coun-

⁷⁷ Select Committee Hearings, Part 5, p. 1551, see *supra* note 58.

⁷⁸ *Ibid.*, p. 1552.

⁷⁹ One Hundred and Sixty-seventh Day, Morning Session, Saturday, 29 June 1946, 17 IMT 244, 1948, p. 244.

⁸⁰ *Ibid.*, p. 270.

⁸¹ *Ibid.*

sel interested in the Katyn issue, including Stahmer and Jodl's counsel, Franz Exner, had met earlier that day. He said they had agreed to ask the Tribunal to hear two witnesses, Colonel Friedrich Ahrens and First Lieutenant Reinhard von Eichborn. He said they could dispense with oral testimony of a third witness, whose evidence could be submitted by affidavit, together with affidavits of two other witnesses.

Lawrence was inflexible, however. He said the Tribunal would only allow three witnesses, adding that it was immaterial whether their evidence was submitted orally or by affidavit. Stahmer quarrelled with Lawrence, referring to an "original decision" allowing the defence to produce five witnesses on the Katyn issue. Lawrence challenged him to produce written proof of the Tribunal's decision. He said that "the matter is only a subsidiary allegation of fact; and the Tribunal thinks that at this stage of the proceedings such an allegation of fact ought not to be investigated by a great number of witnesses, and three witnesses are quite sufficient on either side".⁸² According to Jackson, the Soviet lawyers had proposed that if the subject was to be opened they wanted to call 10 witnesses.⁸³

8.3. The Evidentiary Hearing

With the exception of the Katyn evidence, the case for the defence was completed on 30 June 1946. All that then remained were the submissions. Two trial days, on 1 and 2 July 1946, were devoted to evidence of the Katyn massacre. The British were on alert. One note in the Foreign Office files indicates that the "British prosecution will take no part and British judges are aware of difficulties",⁸⁴ and another says "[t]here is nothing more that we can do, and the British judges are aware of the snags. With luck we shall avoid trouble".⁸⁵ Signalling the importance of the issue, the Attorney General, Shawcross, travelled from London to Nuremberg and attended the hearings.⁸⁶

As previously ordered by the Tribunal, there were three witnesses for the defence and three for the prosecution. Stahmer had been unable to obtain the co-operation of two of the witnesses he had hoped would ap-

⁸² *Ibid.*, pp. 272–73.

⁸³ Select Committee Hearings, Part 7, p. 1951, see *supra* note 5.

⁸⁴ P.H. Dean to Frank Roberts, 29 June 1946, FO 371/56476.

⁸⁵ P.H. Dean to Sir Orme Sargent, 29 June 1946, FO 371/56476.

⁸⁶ "Katyn Forest Crime, Nuremberg Defence Refuted", in *The Times*, 2 July 1946, p. 3.

pear. One of them was François Naville, the Swiss forensic pathologist who had participated in the German commission of inquiry.⁸⁷ Naville's role in the German commission was of special importance because he was the only expert who did not come from a country where the Nazis were in power. Maxwell Fyfe told the Tribunal that Naville apparently indicated that "he sees no use in his coming here as a witness for Göring".⁸⁸ In his congressional testimony, Jackson said that "at the request of the Germans, we located Dr. Naville. [...] We found him in Switzerland, but he informed the tribunal that he saw no use in coming as a witness for Goering. In other words, some of these witnesses that may be available today were not going to help Goering and his crowd".⁸⁹

The other witness, Władysław Anders, was also unwilling to cooperate with Göring. Anders had been the head of the Polish Military Mission to the Soviet Union at the time of the massacre. On 9 July 1946 Anders' assistant wrote to Colonel John L. Tappin of the United States Army Liaison Section offering to provide documents on Katyn if the Tribunal made an express request. Anders later wrote that he did not receive a reply.⁹⁰ Jackson said he did not know of Anders' offer to testify until well after the trial had been completed.⁹¹ Jackson said that Anders "did not know, nor do I, whether the tribunal was ever so advised".⁹² He referred to Anders' failure to respond to the defence request as "[f]urther evidence of the complexity of the Polish position". Anders, "while believing in Soviet guilt", manifested "a quite understandable attitude in view of what Poland had suffered at the hands of those who would benefit from his testimony".⁹³ In his book on the Nuremberg trial, Irving wrote that "Anders' allied superiors forbade him to comply" with the request from

⁸⁷ Document Göring 61: Extract from Official Material Concerning the Mass Murder at Katyn, published in 1943 by the German Foreign Office. Minutes of the International Medical Commission, 30 April 1943, containing the forensic results of the inspections and investigations, 40 IMT 272, 1949, p. 273.

⁸⁸ One Hundred and First Day, Morning Session, Saturday, 6 April 1946, 10 IMT 648, 1947. See also Delphine Debons, "Conditions d'engagements et enjeux personnels de la participation de François Naville à l'enquête de Katyn", in Delphine Debons *et al.*, 2007, p. 73, see *supra* note 37.

⁸⁹ Select Committee Hearings, Part 7, p. 1957, see *supra* note 5.

⁹⁰ Władysław Anders, *An Army in Exile: Story of the Second Polish Corps*, Macmillan, London, 1949, pp. 297–98.

⁹¹ Select Committee Hearings, Part 7, p. 1955, see *supra* note 5.

⁹² *Ibid.*, p. 1947.

⁹³ *Ibid.*

Göring's lawyer but he did not provide any authority.⁹⁴ Irving's disgraceful record as an historian would indicate caution in giving credence to his allegation.⁹⁵

Ahrens was the first witness called by Göring's counsel, Stahmer.⁹⁶ A German officer, Ahrens had been in command of Signal Regiment 537 when it was stationed in Katyn from late 1941 until 1943. The Burdenko report had named "Lieutenant Colonel Arnes" of the Engineer Battalion 537 as one of two persons responsible for the massacre. In answer to several of Stahmer's questions, Ahrens denied any knowledge of mass killings conducted by Germans in that location or of orders that any such killings were to be carried out.⁹⁷ He then explained the discovery of the mass grave. He said he had heard reports of a mound found in the forest with a birch cross planted above it. During 1942 he had been told by soldiers that killings had taken place in the wood but Ahrens said he did not pay any attention to this.⁹⁸ Then, in "January or February" 1943,

quite accidentally I saw a wolf in this wood and at first I did not believe that it was a wolf; when I followed the tracks with an expert, we saw that there were traces of scratchings on the mound with the cross. I had investigations made as to what kind of bones these were. The doctors told me "human bones". Thereupon I informed the officer responsible for war graves in the area of this fact, because I believed that it was a soldier's grave, as there were a number of such graves in our immediate vicinity.⁹⁹

Ahrens testified that Professor Dr. Butz, a German forensic pathologist who had been made responsible for the investigation, then in-

⁹⁴ Irving, 1996, p. 174, see *supra* note 31.

⁹⁵ Richard J. Evans, *Telling Lies About Hitler: The Holocaust, History and the David Irving Trial*, Verso, London, 2002.

⁹⁶ A film of a short excerpt of Ahrens's testimony is available at: https://www.youtube.com/watch?v=8VOPqD_Blqo, last accessed at 14 October 2015.

⁹⁷ One Hundred and Sixty-eighth Day, Morning Session, Monday, 1 July 1946, 17 IMT 274, 1948, pp. 276–82.

⁹⁸ The Wehrmacht War Crimes Bureau had received reports of the killings and of the mass graves as early as mid-1941, following the invasion of the Soviet Union. See Alfred de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, Lincoln, 1989, pp. 228–29.

⁹⁹ One Hundred and Sixty-eighth Day, Morning Session, Monday, 1 July 1946, 17 IMT 274, 1948, p. 282.

formed him that exhumations were to take place. He said that Butz occasionally gave him details.

I remember that he told me that he had conclusive evidence regarding the date of the shootings. Among other things, he showed me letters, of which I cannot remember much now; but I do remember some sort of a diary which he passed over to me in which there were dates followed by some notes which I could not read because they were written in Polish. In this connection he explained to me that these notes had been made by a Polish officer regarding events of the past months, and that at the end – the diary ended with the spring of 1940 – the fear was expressed in these notes that something horrible was going to happen.¹⁰⁰

Ahrens insisted that he was not personally involved in any of the exhumations “on account of the dreadful and revolting stench around our house”. He estimated that 40 to 50 Russian prisoners were used to carry out the exhumations.¹⁰¹ In reply to a question from counsel for Karl Dönitz about whether he had discussed the subject with anyone, Ahrens replied:

Yes. At the beginning of 1943 a Russian married couple were living near my regimental headquarters; they lived 800 meters away and they were beekeepers. I, too, kept bees, and I came into close contact with this married couple. When the exhumations had been completed, approximately in May 1943, I told them that, after all, they ought to know when these shootings had taken place, since they were living in close proximity to the graves. Thereupon, these people told me it had occurred in the spring of 1940, and that at the Gnesdovo station more than 200 Poles in uniform had arrived in railway trucks of 50 tons each and were then taken to the woods in lorries. They had heard lots of shots and screams, too.¹⁰²

Ahrens was cross-examined by the Soviet assistant prosecutor Smirnov. Ahrens confirmed that he had been at his post in Katyn starting in the second half of November 1941. He had no knowledge of events in the area in September and October of that year.¹⁰³ Smirnov then listed

¹⁰⁰ *Ibid.*, p. 283.

¹⁰¹ *Ibid.*, p. 283.

¹⁰² *Ibid.*, p. 284.

¹⁰³ *Ibid.*, pp. 286–87.

several names of German soldiers. Ahrens agreed that they had been at Katyn prior to his own arrival, but said he did not know what they were doing in September and October 1941.¹⁰⁴ Smirnov questioned him at some length about the nature of the forest or wood and the precise location of the mass grave.¹⁰⁵ Then he turned to the discovery of the gravesite. Ahrens specified that when he saw the wolf, he did not then identify human bones, something that happened “months later” after a thaw had taken place.¹⁰⁶ He repeated that he had not been particularly interested in the exhumation, that he could not bear the stench, and that while it was underway he was often travelling because of his military responsibilities. He said that “in the course of 1942 the stories [of graves] became more substantial. I frequently heard about them and spoke about it to Colonel Von Gersdorff, Chief of Intelligence, Army Group Center, who intimated to me that he knew all about this matter and with that my obligation ended”.¹⁰⁷

On redirect, Stahmer asked Ahrens about the evidence of Butz. Ahrens said: “Professor Butz told me that no documents or notes were found which might have given indications of a later date, and he expressed his conviction that these shootings must have taken place in the spring of 1940”.¹⁰⁸ Ahrens was also questioned by the Soviet judge, Iona Nikitchenko, about the information he had been given by Butz,¹⁰⁹ as well as by Lawrence. In answer to Lawrence, he explained that when he had first heard reports of graves in the forest, he had not been suspicious. “[F]ighting had taken place there; and at first I did not attach any importance to the stories told to me and did not give this matter any credence. I believed that it was a question of soldiers who had been killed there – of war graves, like several in the vicinity”, he said.¹¹⁰

The second defence witness was Lieutenant Reinhard von Eichborn. He had been an officer with Signals Regiment 537, posted at Katyn from about 20 September 1941. Von Eichborn confirmed that the sur-

¹⁰⁴ *Ibid.*, pp. 287–88.

¹⁰⁵ *Ibid.*, pp. 288–91.

¹⁰⁶ *Ibid.*, p. 292.

¹⁰⁷ *Ibid.*, p. 293.

¹⁰⁸ *Ibid.*, p. 295.

¹⁰⁹ *Ibid.*, p. 296.

¹¹⁰ *Ibid.*

rounding region had fallen to the Germans in mid-July 1941. The evidence in chief of von Eichborn consisted of a denial that Germany forces had been involved in the Katyn massacre. He told the Tribunal that had there been Polish prisoners in the vicinity, or had there been an order to kill such prisoners, he would have been aware of this and he was not.¹¹¹ On cross-examination, he admitted that although he was responsible for Wehrmacht signals traffic, he would not have been privy to communications from the Einsatzgruppen B, which was active in the region.¹¹²

The third witness for the defence was Lieutenant General Eugen Oberhauser. Oberhauser had been a signals officer in the Smolensk area at the relevant times. He was the superior of Ahrens and with his predecessor, Colonel Albert Bedenck. He and his staff had reached Katyn “[s]ometime during September 1941”.¹¹³ When asked about mass executions attributable to Ahrens or Bedenck, he said: “I am not informed, but I consider it absolutely impossible”.¹¹⁴ He said he had been in Katyn “three or four times” but that until the exhumations began in 1943 he had heard nothing about mass killings.¹¹⁵ Stahmer asked if Regiment 537 had “the necessary technical means, pistols, ammunition, and so on, [...] which would have made it possible to carry out shootings on such a scale”.¹¹⁶ Oberhauser replied:

The regiment, being a signal regiment in the rear area, was not equipped with weapons and ammunition as well as the actual fighting troops. Such a task, however, would have been something unusual for the regiment; first, because a signal regiment has completely different tasks, and secondly it would not have been in a position technically to carry out such mass executions.¹¹⁷

The following exchange took place:

STAHMER: In view of your knowledge of the place, would you consider it possible that 11,000 Poles could have been

¹¹¹ *Ibid.*, pp. 297–397.

¹¹² One Hundred and Sixty-eighth Day, Afternoon Session, Monday, 1 July 1946, 17 IMT 308, 1948, p. 310.

¹¹³ *Ibid.*, p. 312

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, p. 313.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

buried at that spot, people who may have been shot between June and September 1941?

OBERHAUSER: I consider that it is out of the question, for the mere reason that if the commander had known it at the time he would certainly never have chosen this spot for his headquarters, next to 11,000 dead.¹¹⁸

The Soviet prosecutor Smirnov cross-examined Oberhauser about the firearms in possession of the signal regiment. Oberhauser conceded that its non-commissioned officers would have been equipped with pistols. He also questioned Oberhauser about the presence of other forces in the region. At one point Lawrence interrupted, asking Smirnov why he needed to go into such detail.¹¹⁹ On redirect, Stahmer asked Oberhauser about the advance party that was in Katyn prior to arrival of the signal regiment in September 1941. Oberhauser testified that there would then only have been a few non-commissioned officers based in Katyn.¹²⁰

When Stahmer had finished, Lawrence intervened.

THE PRESIDENT: Were there any Einsatzkommandos in the Katyn area during the time that you were there?

OBERHAUSER: Nothing has ever come to my knowledge about that.

THE PRESIDENT: Did you ever hear of an order to shoot Soviet commissars?

OBERHAUSER: I only knew of that by hearsay.

THE PRESIDENT: When?

OBERHAUSER: Probably at the beginning of the Russian campaign, I think.

THE PRESIDENT: Before the campaign started or after?

OBERHAUSER: I cannot remember having heard anything like that before the beginning of the campaign.

THE PRESIDENT: Who was to carry out that order?

OBERHAUSER: Strictly speaking, signal troops are not really fighting troops. Therefore, they really had nothing to do with that at all, and therefore we were in no way affected by the order.

¹¹⁸ *Ibid.*, p. 314.

¹¹⁹ *Ibid.*, p. 318.

¹²⁰ *Ibid.*, pp. 319–20.

THE PRESIDENT: I did not ask you that. I asked you who had to carry out the order.

OBERHAUSER: Those who came into contact with these people, presumably.

THE PRESIDENT: Anybody who came in contact with Russian commissars had to kill them; is that it?

OBERHAUSER: No, I assume that it was the troops, the fighting troops, the actual fighting troops at the front who first met the enemy. That could only have applied to the army group. The signal regiment never came into a position to meet commissars. That is probably why they were not mentioned in the order or affected by it in any way.¹²¹

Lawrence's questions were obviously prompted by a change in the Soviet theory of the case. Stahmer's defence was premised on demonstrating that Ahrens and his unit could not have been responsible for the killings. It effectively challenged the explanation in the Burdenko report, at least to the extent that the witnesses who testified were deemed to be credible. The Soviets were improvising by offering a new explanation, by which the killings might be attributable to other German military units, in particular one of the SS units known as the Einsatzgruppen. Earlier in the day, Stahmer had applied to call a fourth witness who was expected to testify that no killings took place between July and September 1941.¹²² No decision had yet been taken on whether this would be allowed. With the conclusion of the third German witness, the defence phase of the evidentiary hearing on Katyn had come to an end.

The prosecution phase began with the testimony of Boris Bazilevsky.¹²³ Bazilevsky had been deputy mayor of the city of Smolensk, which is located about 20 kilometres from Katyn, during the German occupation. A professor of astronomy before the war, he said he had attempted to escape the advancing German armies but was unable to. He was subsequently asked by the German occupiers to participate in the local administration.¹²⁴ After the occupation, Bazilevsky returned to his ac-

¹²¹ *Ibid.*, pp. 321–22.

¹²² *Ibid.*, p. 309.

¹²³ A film of a short excerpt of Bazilevsky's testimony is available at: https://www.youtube.com/watch?v=Q_UoLtvczqE.

¹²⁴ One Hundred and Sixty-eighth Day, Afternoon Session, Monday, 1 July 1946, 17 IMT 308, 1948, p. 323. See also Laurie R. Cohen, *Smolensk Under the Nazis: Everyday Life in Occupied Russia*, University of Rochester Press, Rochester, NY, 2013, pp. 63–64.

ademic work; he said he was not punished by the Soviet authorities for his role during the occupation.¹²⁵

Asked to explain the Katyn forest or Katyn wood, Bazilevsky said: “Actually, it was a grove. It was the favorite resort of the inhabitants of Smolensk who spent their holidays and vacations there”.¹²⁶ He testified “as an eyewitness” that in 1940 and 1941 the area was not fenced in and was accessible to the public.¹²⁷ Bazilevsky testified about the presence of Polish prisoners of war in the area, something the three German witnesses had earlier denied. He said that at the beginning of September 1941 he had intervened with the major, Menschagin, on behalf of a Russian prisoner, only to be told by his superior that “Russians would at least be allowed to die in the camps while there were proposals to exterminate the Poles”.¹²⁸ He continued:

BAZILEVSKY: Two weeks later – that is to say, at the end of September – I could not help asking him, “What was the fate of the Polish prisoners of war?” At first Menschagin hesitated, and then he told me haltingly, “They have already died. It is over with them”.

MR. COUNSELLOR SMIRNOV: Did he tell you where they were killed?

BAZILEVSKY: He told me that they had been shot in the vicinity of Smolensk, as Von Schwetz [of the German Kommandantur of Smolensk] told him.

MR. COUNSELLOR SMIRNOV: Did he mention the exact place?

BAZILEVSKY: No, he did not mention the exact place.

MR. COUNSELLOR SMIRNOV: Tell me this. Did you, in turn, tell anybody about the extermination, by Hitlerites, of the Polish prisoners of war near Smolensk?

BAZILEVSKY: I talked about this to Professor Efimov, who was living in the same house with me. Besides him, a few days later I had a conversation about it with Dr. Nikolski, who was the medical officer of the city. However, I found

¹²⁵ One Hundred and Sixty-eighth Day, Afternoon Session, Monday, 1 July 1946, 17 IMT 308, 1948, p. 332.

¹²⁶ *Ibid.*, p. 322.

¹²⁷ *Ibid.*, pp. 322–23.

¹²⁸ *Ibid.*, p. 325.

out that Nikolski knew about this crime already from some other source.

MR. COUNSELLOR SMIRNOV: Did Menschagin tell you why these shootings took place?

BAZILEVSKY: Yes. When he told me that the prisoners of war had been killed, he emphasized once more the necessity of keeping it strictly secret in order to avoid disagreeable consequences. He started to explain to me the reasons for the German behavior with respect to the Polish prisoners of war. He pointed out that this was only one measure of the general system of treating Polish prisoners of war.

MR. COUNSELLOR SMIRNOV: Did you hear anything about the extermination of the Poles from the employees of the German Kommandantur?

BAZILEVSKY: Yes, 2 or 3 days later.

...

BAZILEVSKY: Two or three days later, when I visited the office of Menschagin, I met there an interpreter, the Sonderführer of the 7th Division of the German Kommandantur who was in charge of the Russian administration and who had a conversation with Menschagin concerning the Poles. He came from the Baltic region.

MR. COUNSELLOR SMIRNOV: Perhaps you can tell us briefly what he said.

BAZILEVSKY: When I entered the room he was saying, "The Poles are a useless people, and exterminated they may serve as fertilizer and for the enlargement of living space for the German nation".

...

MR. COUNSELLOR SMIRNOV: Did you learn from Menschagin anything definite about the shooting of Polish prisoners of war?

BAZILEVSKY: When I entered the room I heard the conversation with Hirschfeld. I missed the beginning, but from the context of the conversation it was clear that they spoke about this event.

MR. COUNSELLOR SMIRNOV: Did Menschagin, when telling you about the shooting of Polish prisoners of war, refer to Von Schwetz?

BAZILEVSKY: Yes; I had the impression that he referred to Von Schwetz. But evidently – and this is my firm belief – he also spoke about it with private persons in the Kommandantur.

MR. COUNSELLOR SMIRNOV: When did Menschagin tell you that Polish prisoners of war were killed near Smolensk?

BAZILEVSKY: It was at the end of September.¹²⁹

Stahmer cross-examined Bazilevsky, asking about his knowledge of the Katyn site and of the presence of Polish prisoners in the region. Bearing in mind the difficulty in appreciating the dynamics of this interaction from the transcript alone, Stahmer does not appear to have unsettled the testimony of Bazilevsky. Bazilevsky took care to distinguish facts of which he had personal knowledge from things he had been told by others. Stahmer asked if Bazilevsky had himself seen “Polish officers”. He answered that he had not, but that his students had told him they had seen them in 1941.¹³⁰ Stahmer attempted to impugn Bazilevsky by suggesting that he had not only prepared a written version of his testimony, that he read to the Tribunal, but that he had provided the interpreters with the text before the hearing.¹³¹ Although Bazilevsky denied this, later in the cross-examination Stahmer said “when you read your testimony off [...]”. Lawrence rebuked him: “Dr. Stahmer, you are not entitled to say to the witness, ‘when you read your testimony off’, just now, because he denied that he read his testimony off and there is no evidence that he has read it off”.¹³² After a recess, Thomas Dodd, one of the American prosecutors, told the Tribunal that he had been told by the lieutenant in charge of the interpretations that “no one there had any answers or questions, and I think it should be made clear on the record”. “Yes, I think so too”, said Lawrence. Then Stahmer explained he had been told this outside of the courtroom. “If it is not a fact, I wish to withdraw my statement”, he said. “I was informed outside the courtroom from a trustworthy source”. Stahmer said he could not recall the name of the person who had told him.

¹²⁹ *Ibid.*, pp. 326–27.

¹³⁰ *Ibid.*, p. 331.

¹³¹ *Ibid.*, p. 328.

¹³² *Ibid.*, p. 329.

Lawrence concluded the discussion: “Such statements ought not be made by counsel until they have verified them”.¹³³

When Stahmer had concluded his cross-examination, Lawrence asked: “Witness, do you know whether the man, whose name I understand to be Menschagin, was told about these matters or whether he himself had any direct knowledge of them?”. Bazilevsky replied: “From Menschagin’s own words, I understood quite definitely that he had heard those things himself at the Kommandantur, particularly from Von Schwetz, who was the commander from the beginning of the occupation”.¹³⁴

Marko Antonov Markov was the second witness Soviet witness. A Bulgarian, Markov was a professor at the University of Sofia. He had been a member of the German commission of inquiry that visited Katyn in April 1943. Markov explained that while working at the Medico-Legal Institute, he was telephoned, on 24 April 1943, by an official in the office of the Bulgarian Prime Minister informing him that he was to represent the government in an examination of the corpses of Polish officers discovered at Katyn. He said he asked if he could refuse but was told he had no choice in the matter. His role would be to sign, on behalf of the Bulgarian government, a report that had already been drafted. On 26 April he flew to Berlin and then onward, two days later, with the other members of the commission to Smolensk. Two days were spent in Smolensk, on 29 and 30 April. During that time there were two visits to Katyn, each of about three or four hours. On 1 May Markov and the other members of the commission returned to Berlin.

While at Katyn, Markov said the commission was shown bodies that had already been exhumed but it did not witness or participate in any exhumation. Markov said that eight corpses were subjected to autopsies by members of the commission. The commissioners were shown documents that they were told had been removed from the exhumed corpses and placed in glass cases. Markov said: “In my opinion these working conditions can in no way be qualified as adequate for a complete and objective scientific examination. The only thing which bore the character of the scientific nature was the autopsy which I carried out”.¹³⁵ Markov said that he dictated a report on the condition of the corpse that he had himself autopsied, and that the report was reproduced in the materials published

¹³³ *Ibid.*, p. 333.

¹³⁴ *Ibid.*, p. 331.

¹³⁵ *Ibid.*, p. 337.

by the Germans. He said that the condition of the corpse suggested that it had been buried for not more than a year and a half.¹³⁶

Markov went on to explain that his autopsy report had not reached any conclusion about the time the body had been buried. He said that “from the papers which were given to us there I understood that they wanted us to say that the corpses had been in the ground for 3 years. This could be deduced from the papers which were shown to us in the little peasant hut about which I have already spoken”.¹³⁷ He continued: “Inasmuch as the objective deduction regarding the autopsy I performed was in contradiction with this version, I did not make any deductions”.¹³⁸ Smirnov questioned Markov about the opinions of the other members of the commission who had performed autopsies on the corpses. He testified that most members “made their deductions without answering the essential question regarding the time the corpses had been buried”.¹³⁹ According to Markov, the Italian expert, Vincenzo Mario Palmieri, had said the body had been in the ground “over a year” and the Croatian, Miloslavich, had estimated three years.¹⁴⁰

Smirnov asked Markov to explain on what basis he had concluded that the bodies had been in the ground for three years. He was interrupted by the judges, who said that Markov had not said he had reached any such conclusion. Smirnov rephrased the question, asking Markov to give the rationale of the commission in its conclusion about three years. Markov answered that this conclusion was based upon the documents and on witness statements rather than the forensic pathology.¹⁴¹ Markov testified at some length about the signing of the report, implying that a degree of coercion had been involved.¹⁴²

In cross-examination, Stahmer asked Markov about his initial resistance to participating in the inquiry. “Did you consider the task you had to carry out there a political one or a scientific one?” he said. Markov re-

¹³⁶ *Ibid.*, p. 338.

¹³⁷ One Hundred and Sixty-ninth Day, Morning Session, Tuesday, 2 July 1946, 17 IMT 339, 1948, p. 339.

¹³⁸ *Ibid.*, p. 340.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, p. 344.

¹⁴² *Ibid.*, pp. 345–47.

plied: “I understood this task from the very first moment as a political one and therefore I tried to evade it”.¹⁴³ Stahmer then asked the Tribunal to admit the German report into evidence.¹⁴⁴ Lawrence said it would be admitted on the basis of Article 19 of the Charter but not Article 21, in that the Tribunal would not take judicial notice of its contents.¹⁴⁵ Stahmer proceeded to interrogate Markov, reading aloud portions of the German report and asking him for his views.¹⁴⁶ He concluded his cross-examination by challenging Markov’s claim to have been hesitant and equivocal about the conclusions of the commission, noting that he had signed the protocol with the other members without making any objection. “Witness, you gave two versions, one in the protocol which we have just discussed, and another here before the Court. Which version is the correct one?”, he asked provocatively.¹⁴⁷

Lawrence concluded the examination of Markov with several questions aimed at establishing whether there was evidence that might suggest the corpses that had been examined did not come from the mass grave in Katyn. He also asked Markov about his personal report on the autopsy he had conducted.¹⁴⁸

The third witness called by the Soviet prosecution team was Victor Il’ich Prosorovski. A professor of medical jurisprudence, Prosorovski had been the chairman of the medico-judicial commission of experts associated with the Soviet commission of inquiry headed by Burdenko. He described a visit to Katyn that took place in January 1944. He said that exhumations of 925 corpses had taken place in September and October 1943. With the exception of three, which had previously been dissected, the bodies examined by the Soviet commission had not previously been touched, he said. Prosorovski explained that various documents had been found on the bodies, some of them associated with or bearing dates in late 1941 and 1942. “I myself discovered a letter with the date 20 June 1941,

¹⁴³ *Ibid.*, p. 348.

¹⁴⁴ *Ibid.*, p. 349.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, pp. 350–56.

¹⁴⁷ *Ibid.*, p. 358.

¹⁴⁸ *Ibid.*, pp. 35–60.

with the name of Irene Tutchinski, as well as other documents of the same sort”, he said.¹⁴⁹

Smirnov then questioned Prosovski about whether bullets had been found in the corpses and, if so, whether their origin could be determined. But before receiving an answer, he read into evidence a document he said had been “offered us by our American colleagues”. It was described as a telegramme from an official in the Generalgouvernement (the Nazi occupation regime in Poland):

Urgent, to be delivered at once, secret.

Part of the Polish Red Cross returned yesterday from Katyn. The employees of the Polish Red Cross have brought with them the cartridge cases which were used in shooting the victims of Katyn. It appears that these are German munitions. The caliber is 7.65. They are from the firm Geco. Letter follows. signed– Heinrich.¹⁵⁰

Prosovski said that “the bullets discovered in the bullet wounds were 7.65 caliber. The cases discovered during the exhumation did indeed bear the trademark of the firm Geco”.¹⁵¹ Prosovski declared that the evidence pointed to a date of late 1941 for the burial of the corpses.¹⁵² He said that a date in 1940 was “completed excluded”.¹⁵³ He described his experience with other mass graves attributable to the Germans within the Soviet Union, noting the methods of camouflaging the burial sites as well as the method of execution. Prosovski indicated that Katyn followed a similar pattern.¹⁵⁴

Stahmer only briefly cross-examined Prosovski. He asked questions about the identity of the bodies and what was done with the documents that were found on them.¹⁵⁵ Lawrence did not question Prosovski.

Smirnov then informed the Tribunal that the Soviets could produce affidavits from several more witnesses on the Katyn issue. Stahmer said

¹⁴⁹ One Hundred and Sixty-ninth Day, Afternoon Session, Tuesday, 2 July 1946, 17 IMT 362, 1948, p. 365.

¹⁵⁰ *Ibid.*, p. 365.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, p. 366.

¹⁵³ *Ibid.*, p. 367.

¹⁵⁴ *Ibid.*, pp. 367–68.

¹⁵⁵ *Ibid.*, pp. 368–70.

he had no objection as long as he would be able to do the same. “The Tribunal has already made its order; it does not propose to hear further evidence”, said Lawrence.¹⁵⁶

Somewhat later in the day, counsel for Dönitz, Otto Kranzbühler, produced a report by the Italian expert on the German commission, Palmieri, dealing with the presence of insect larvae on the corpses exhumed at Katyn. Lawrence allowed its production after confirming that it had been referred to in the German *White Book*.¹⁵⁷ But Lawrence did not permit the production of a book published in English in London in 1946 entitled *Report on the Massacre of Polish Officers in the Katyn Wood*. Noting that it was produced for private circulation, did not bear the name of a printer and was “entirely anonymous”, Lawrence said “it would be improper to look at a document of this nature”.¹⁵⁸

Much of the secondary literature, published many years after the Nuremberg trial, presents the two-day hearing of the witnesses as a clear victory for the Germans. For example, George Sanford wrote that “[t]he German witnesses demolished the Soviet case against them”.¹⁵⁹ Allen Paul described the German testimony as “a devastating response”.¹⁶⁰ Another study says “Stahmer’s examination of the German witnesses cleared them of responsibility for the Katyn massacre”.¹⁶¹ Robert Conot reported that the testimony “was anything but conclusive”, but that “the German witnesses, however, proved far more credible”.¹⁶² “In the end, the Germans had the better of it”, wrote Joseph Persico.¹⁶³

These assessments, however, are not consistent with opinions expressed at the time by those who were present at the hearings. Instructed by Philip Deane to report by telephone on the proceedings to the Foreign Office in London, Colonel Harry Phillimore of the British War Crimes Executive concluded “that the Russians were winning”. Dean minuted: “So far so good”.¹⁶⁴ A more detailed report was to follow: “Soviet case

¹⁵⁶ *Ibid.*, p. 371.

¹⁵⁷ *Ibid.*, pp. 382–83.

¹⁵⁸ *Ibid.*, p. 383.

¹⁵⁹ George Sanford, *Katyn and the Soviet Massacre of 1940: Truth, Justice and Memory*, Routledge, London, 2011, p. 141.

¹⁶⁰ Paul, 2010, p. 335, see *supra* 33.

¹⁶¹ Cienciala *et al.*, 2007, p. 232, see *supra* note 10.

¹⁶² Conot, 1983, p. 453, see *supra* note 43.

¹⁶³ Joseph E. Persico, *Nuremberg: Infamy on Trial*, Penguin, New York, 1994, p. 359.

¹⁶⁴ Report of telephone call from Colonel Phillimore, 1 July 1946, FO 371/56476.

has undoubtedly emerged very much enhanced and they are very pleased with the way it has gone. Altogether although not of course conclusive the evidence emerged strongly in favour of the Soviet case and the German report was largely discredited and their evidence unimpressive". Dean's minute to the file reads: "The British team, who are not very credulous, told me that the Russians had much the best of the argument and in their view rightly so".¹⁶⁵

Correspondents of the major newspapers reached similar conclusions. Following the first day of hearings, *The Times* reported that "after three of the witnesses which the Tribunal allowed [Göring's] counsel to call had been heard, his attempt to establish that the crime was not committed by the Germans can hardly be said to have prospered".¹⁶⁶ The following day, the special correspondent of *The Times* said that the medical evidence "has enlightened the court but little in the attempt by the defence to unsaddle themselves of responsibility for the crime".¹⁶⁷ The *New York Times* explained that the German defendants had "revived" the argument that the Soviets were to blame, but added: "However, Russian prosecutors at once offered rebuttal testimony which put the controversy back on its previous level".¹⁶⁸ Journalistic accounts of the second day were similar in tone. According to *The Times*, "[w]hile the mystery was left in almost as much confusion as when the defence entered rebuttals, on the weight of the evidence the tribunal heard yesterday and today from six witnesses – three for the defence and three for the prosecution – it cannot be said that the German assertion that the murders were committed before the Smolensk area was occupied in July, 1941, was well maintained".¹⁶⁹ Reporting on the second day, the *New York Times* headline read: "Germans Forced Katyn Testimony: Report on Polish Massacre Faked and Signed Under Duress, Court Hears".¹⁷⁰

¹⁶⁵ Report from British War Crimes Executive, in Nuremberg, to FO, 6 July 1946, FO 371/56476.

¹⁶⁶ "Katyn Forest Crime, Nuremberg Defence Refuted", in *The Times*, 2 July 1946, p. 3.

¹⁶⁷ "Murder of Polish Officers, Medical Conclusions at Nuremberg", in *The Times*, 3 July 1946, p. 3.

¹⁶⁸ "Katyn Forest Issue Revived by Germans", in *New York Times*, 2 July 1946, p. 15.

¹⁶⁹ "Murder of Polish Officers, Medical Conclusions at Nuremberg", in *The Times*, Wednesday, 3 July 1946, p. 3.

¹⁷⁰ "Germans Forced Katyn Testimony: Report on Polish Massacre Faked and Signed Under Duress, Court Hears", in *New York Times*, 3 July 1946, p. 4.

Today we read the transcript with the benefit of hindsight, fully knowledgeable of the eventual admissions of guilt by the Soviets. Probably it colours modern attempts to evaluate the evidence that was before the Tribunal. As a matter of law, although the Burdenko report was of course not irrefutable proof of its contents, despite the Soviet claims to the contrary, it had certainly established a case to be answered. That is why the defence presented its evidence first. An experienced trial lawyer reading the testimony of the three defence witnesses would be unlikely to consider that the findings of the Burdenko commission had been “demolished”, or that the evidence was “devastating”. In effect, the testimony amounted to little more than an absolute denial, the three witnesses contending – no doubt truthfully, as history has shown – that they knew nothing of the matter. But in trial courts, absolute denials rarely tip the scales unless those doing the testifying are of unimpeachable credibility and integrity, something that would hardly be the case with German military officials in 1946.

Robert Jackson said that after the witnesses had been heard, “neither side was satisfied with its own showing and both asked to call additional witnesses”.¹⁷¹ According to Jackson, “[t]he Tribunal, wisely, I think, refused to hear more of the subject”.¹⁷² Indeed, all that remained for this first effort at an international criminal trial were the representations by counsel and then the judgment.

8.4. Submissions and Judgment

Immediately following the two days of testimony about Katyn, on 3 July the German defence lawyers began making their final submissions in the trial. At the outset of his plea, Stahmer told the Tribunal that “I have still to complete the Case Katyn”.¹⁷³ He meant that his comments had not been included in the written submissions, given that the evidentiary hearing had only taken place during the previous days. Stahmer made his oral submissions about Katyn on 5 July.¹⁷⁴ Stahmer pointed to the flaws in the Soviet account, the implausible nature of some of the allegations and the absence

¹⁷¹ Select Committee Hearings, Part 7, p. 1951, see *supra* note 5.

¹⁷² *Ibid.*

¹⁷³ One Hundred and Seventieth Day, Afternoon Session, Wednesday, 3 July 1946, 17 IMT 396, 1948, p. 397.

¹⁷⁴ One Hundred and Seventy-second Day, Morning Session, Friday, 5 July 1946, 17 IMT 516, 1948, pp. 536–45.

of evidence capable of proving the charge to an adequate standard. Noting that the Soviets themselves fixed the crime as having taken place in September 1941, he said that their attribution of responsibility to Ahrens was clearly mistaken given that he had not arrived at Katyn by that time. Stahmer went on to argue that the detention of a large number of Polish prisoners would have necessarily been reported to the army, but he said that there was no evidence of this taking place. He said the transfer of such a large number of prisoners could not have been concealed from the public.¹⁷⁵

Stahmer provided a brief explanation of the failure of the defence to call any forensic experts. He said only that “it would not have been possible to clarify completely all the medical questions which were decisive for the experts in the facts you have established. Therefore, the Defense has also refrained from calling a medical expert to exonerate the defendant”.¹⁷⁶ He argued that the report of the German commission of inquiry should be preferred over that of the Soviet commission given that the former “was given by 12 members of a commission of leading representatives of legal medicine from European universities, while the expert opinion referred to by the Prosecution was deposited by a group of Russian experts only”. The German experts “were completely non-political”, he said.¹⁷⁷

Stahmer was interrupted by Lawrence: “Dr. Stahmer, you realize, of course, that you have not offered in evidence the report of this German commission. You expressly refrained, as I understand it, from offering the report of the German commission”.¹⁷⁸ Stahmer said this was a mistake. A lengthy exchange ensued about whether the Tribunal had agreed to admit the entire German *White Book* on Katyn, or the protocol adopted by the commission of inquiry, or only the excerpts that Stahmer had read in his cross-examination of Markov. Lawrence left the matter unresolved, saying that the Tribunal would look at the record to see what had been decided.¹⁷⁹ The uncertainty about Stahmer’s position on the production of the documents, something seized upon by Lawrence, seems associated with a

¹⁷⁵ *Ibid.*, pp. 539–42.

¹⁷⁶ *Ibid.*, p. 542.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, p. 544.

strategy of avoiding an explicit allegation that the Soviets were responsible for the crime, which was of course the conclusion of the *White Book*. But rather than base the defence on submitting an alternative theory for the crime, which is certainly a very common and effective way of raising a reasonable doubt in the minds of judges, Stahmer stuck closely to the claim that the prosecutors had simply failed to prove German guilt. Stahmer concluded: “[I]t can be said that the task of this proceeding is solely to determine whether the 11,000 Polish officers were shot after the capture of Smolensk by the Germans, in other words, that this deed could have been committed by Germans. The Prosecution have not succeeded in proving this fact”.¹⁸⁰ Several years later, Stahmer told the American congressional committee: “The Russians were not accused, and therefore I had neither the task nor the duty to clear up the matter”.¹⁸¹

There were a few references to Katyn in the oral submissions of other defendants. In his summation, Robert Servatius, counsel for Fritz Sauckel, presciently observed: “The Katyn case shows how difficult it is to determine the truth of such events when they are made use of as effective weapons of propaganda”.¹⁸² Counsel for Dönitz, Otto Kranzbühler, noted that he had been denied the opportunity to participate in the cross-examination of the Katyn witnesses. This led him to conclude that “no one was accusing Admiral Donitz in connection with this case”.¹⁸³ Walter Siemers made a similar statement with respect to Erich Räder.¹⁸⁴ Alfred Seidl, counsel for Rudolf Hess, began his oral submissions by referring to two exhibits, both of them excerpts from the German *White Book* on Katyn.¹⁸⁵ This was quite strange because in his rambling plea about the origins of the Second World War Seidl never returned to the Katyn issue. In any case, there could be no question of Hess being involved in Katyn given his flight to the United Kingdom several weeks prior to the start of Operation Barbarossa.

¹⁸⁰ *Ibid.*

¹⁸¹ Select Committee Hearings, Part 5, p. 1551, see *supra* note 58.

¹⁸² One Hundred and Eighty-first Day, Afternoon session, Thursday, 18 July 1946, 18 IMT 468, 1948, p. 493.

¹⁸³ One Hundred and Seventy-ninth Day, Tuesday, Morning Session, 16 July 1946, 18 IMT 325, 1948, p. 362.

¹⁸⁴ One Hundred and Eightieth Day, Wednesday, Morning Session, 17 July 1946, 18 IMT 403, 1948, p. 424.

¹⁸⁵ One Hundred and Eighty-sixth Day, Thursday, Afternoon Session, 25 July 1946, 19 IMT 353, 1948, pp. 353–54.

The Soviet prosecutor, Roman Rudenko, made only the most perfunctory references to Katyn in his final submissions to the Tribunal. When he discussed the evidence against Hans Frank, who had been in charge of occupied Poland, Rudenko said:

It is not merely incidental that the German fascist assassins who annihilated 11,000 Polish prisoner-of-war officers in Katyn forest should refer to the regime which Frank instituted in Poland as an example for their own activities – as the Tribunal has been able to ascertain not so very long ago in this courtroom from the evidence presented by the former deputy mayor of Smolensk – Professor Bazilevsky.¹⁸⁶

But Rudenko was not addressing the facts of the Katyn massacre. Rather, he was speaking of Frank's responsibility for concentration camps in the Generalgouvernement. He cited Frank himself stating that "unfortunately, Polish public opinion, and not the intellectuals alone, compares Katyn to the mass death rate in the German concentration camps, as well as to the shooting of men, women, and even of children and old people, during the infliction of collective punishment in the districts".¹⁸⁷ In other words, the Katyn atrocity paled in comparison with others perpetrated by the Nazis. It was almost as if Rudenko was accepting Soviet responsibility for Katyn. At no point in his oral submissions did Rudenko address the evidence concerning Katyn or attempt to refute the analysis proposed by Stahmer. Testifying before the congressional committee in 1952, Robert Jackson said that "[t]he Soviet prosecutor appears to have abandoned the charge".¹⁸⁸

Nothing further on Katyn is to be found in the record of the proceedings. None of the other prosecution counsel mentioned the matter. Lawrence never returned to the issue of the production of the German *White Book*. According to the published record, the entire *White Book* was in fact never admitted into evidence. There are several exhibits for the defence: two sketch maps of the grave site,¹⁸⁹ the "autopsy reports" of the

¹⁸⁶ One Hundred and Eighty-ninth Day, Monday, Afternoon Session, 29 July 1946, 19 IMT 570, 1948, p. 606.

¹⁸⁷ *Ibid.*, p. 607.

¹⁸⁸ Select Committee Hearings, Part 7, p. 1951, see *supra* note 5.

¹⁸⁹ Gör-50, Sketch in connection with the Katyn investigation made on the instructions of General Oberhäuser, 40 IMT 260, 1949; Gör-58, Drawing by Colonel Ahrens in connection with the Katyn investigation, 40 IMT 264, 1948.

German commission¹⁹⁰ and the “Minutes of the International Medical Commission, 30 April 1943, containing the forensic results of the inspections and investigations”, sometimes referred to as the “protocol” of the commission.¹⁹¹

8.5. Concluding Observations

The silence of the judgment has been interpreted in various ways. The only comment attributable to one of the judges appeared many years later, in the memoirs of Francis Biddle, the American judge: “The evidence before us was inconclusive and, as I have said, was unrelated to any defendant. Any mention of Katyn Woods was omitted when the judgment was under consideration”.¹⁹² The British judge, who also presided at the trial, Geoffrey Lawrence, seemed at times to have manifested impatience with the issue, strictly hewing to the rule whereby only three witnesses from each side could be heard. At the same time, his attentive questioning during the evidentiary phase suggests that he did not view the hearing as merely perfunctory. Statements by diplomats in the archives of the Foreign Office to the effect that the British judges were “aware of the snags” in the case are troublesome, if only because they indicate some sort of inappropriate conduct with the judiciary. As with most of the Nuremberg proceedings, the French judge was a minor player. With respect to Katyn, he was invisible.

The Soviet judge, Iona Nikitchenko, is the real enigma. He issued a dissenting judgment but did not use the occasion to mention Katyn. Thus, along with the others he participated in the silent acquittal of the Nazi defendants for the massacre. Alone among the judges, Nikitchenko had participated in the London Conference where the Charter of the Tribunal was drafted but also where there was preliminary work on the indictment. But because the Soviet prosecution team only introduced the Katyn charge at a later date, it would not be right to suggest he had been part of the decision to prosecute the matter. Nikitchenko participated in the evidentiary

¹⁹⁰ Gör-60, Extract from “Official Material Concerning the Mass Murders at Katyn”, published in 1943 by the German Foreign Office. Autopsy report by (Italian) Professor Palmieri; Autopsy report by (Bulgarian) Professor Markov, 40 IMT 266, 1949.

¹⁹¹ Gör-61, Extract from “Official Material Concerning the Mass Murder at Katyn”, published in 1943 by the German Foreign Office. Minutes of the International Medical Commission, 30 April 1943, containing the forensic results of the inspections and investigations, 40 IMT 272, 1949.

¹⁹² Biddle, 1962, p. 417, see *supra* note 4.

debate about the scope of Article 21 of the Charter. There, he fought for the position adopted by the Soviet prosecutor with regard to the evidentiary value of the Burdenko report. After registering his dissent, he seems subsequently to have accepted the majority view. If he had not, then logically he would have convicted the defendants for the Katyn massacre because for all intents and purposes he would have been bound by the Burdenko report. Nikitchenko also questioned some of the witnesses during the evidentiary hearing but it is difficult to divine any particular orientation from his interventions.

Was Nikitchenko faithfully following instructions from Moscow to drop the issue of Katyn? This is not implausible but nor is there any evidence to support the hypothesis. Was a compromise reached whereby the majority refrained from commenting about the ambiguities of the Soviet case on Katyn in return for Nikitchenko's silence on the matter? There has been speculation about what went on in the deliberations of the judges, but little in the way of hard and credible evidence. For example, Bradley Smith suggested that the decision to restrict the evidentiary hearing was at the initiative of the Soviet judge, Nikitchenko, who "had to labour diligently and call upon every ounce of his colleagues' goodwill in order to work out formulas that would limit the courtroom presentations on Katyn". He wrote that the Katyn issue "seems to have accentuated the distance between the Soviet and Western judges"¹⁹³ and that "the judges split over Katyn".¹⁹⁴ But the authorities do not confirm this in any way. Again, such assessments are purely speculative. If Nikitchenko is given the benefit of the doubt, his failure to mention Katyn in the judgment reflects the conclusions of a jurist of honesty and integrity.

Questions have often been raised about the attitude taken by the American and British prosecutors to the Soviet case on Katyn. The suggestion has been that it was too benign and perhaps even helpful. A leit-motif of the 1952 congressional committee, meeting at the height of the McCarthyite witch-hunts, was the possibility that pro-Soviet elements within the prosecution team or the Department of State might have tilted Washington's attitude. The only real evidence of this is the reference by a Soviet prosecutor to a document he said had been "offered us by our

¹⁹³ Bradley F. Smith, *Reaching Judgment at Nuremberg*, Basic Books, New York, 1977, p. 104.

¹⁹⁴ *Ibid.*, p. 106.

American colleagues”.¹⁹⁵ This was a report from the Polish Red Cross indicating that the ammunition used in the killings was of German manufacture. The congressional inquiry heard testimony from the company that had manufactured the bullets explaining that they had been sold widely and that their German origin did not imply German responsibility for the killings. Jackson concurred, saying that the prosecution did not consider the origin of the weapons to have been significant. “You cannot tell by the gun that is used who shot it”, he said.¹⁹⁶ In its final report, the Select Committee of the United States Congress referred to “many allegations [...] that Americans on Mr Jackson’s staff at Nuremberg assisted the Soviets in the preparation of this case on Katyn against the Nazis”. The final report says that the Select Committee had “desired to clarify this point”, and that Jackson had denied the suggestion.¹⁹⁷ Jackson explained: “In fact, there was not a great deal of even conferring between their staff and ours because the Soviets are not very sociable, I might say. [...] They hesitate somewhat to be too much with us”.¹⁹⁸ Jackson acknowledged that members of the American prosecution team may have been present at meetings of German and Soviet counsel, “as observers, or something of that sort, because we were very much concerned about not having a situation that would prolong this trial. But we took no part in any arrangements between the Soviets and the Germans about it. We thought that was their fight”.¹⁹⁹

Early in the trial, the British briefly considered whether they should actually assist the Soviets in proving the Katyn charge. Colonel Harry Phillimore, of the British War Crimes Executive in Nuremberg itself, wrote to David Scott-Fox of the Foreign Office on 3 January 1946 with some ideas on how to assist the Soviet prosecution team:

If we are to give the Soviet Prosecutor any support in this matter it is very desirable that we should have your advice and be furnished with any information available to the Foreign Office. I suppose that the answer to the case prepared by Professor Savory might be on these lines:

1. It is very strange, if those murdered at Katyn were in Russian hands, that although 4,000 of them have been identi-

¹⁹⁵ One Hundred and Sixty-ninth Day, Afternoon Session, Tuesday, 2 July 1946, 17 IMT 362, 1948, p. 365.

¹⁹⁶ Select Committee Hearings, Part 7, p. 1957, see *supra* note 5.

¹⁹⁷ *Ibid.*, pp. 1952–53.

¹⁹⁸ *Ibid.*, p. 1952.

¹⁹⁹ *Ibid.*, p. 1953.

fied by letters, etc., found in the graves, in no case is it stated that any of those so identified were known to have been prisoners in Russian hands.

2. It is also strange that there is no statement that bodies so identified are known not to have been made prisoner of the Germans and that in no single case out of 4,000 is any information apparently available as to their place or date of capture.

3. The fixing of the date of death with such certainty after so long an interval is also obviously open to question. Is it certain that none of the written material found in the graves was dated after Soviet troops had retired from Smolensk.

But Foreign Office officials in London wrote minutes in the file indicating their opposition to any involvement in the Katyn case.²⁰⁰

Immediately following the initial Soviet submission and filing of the Burdenko report, in February 1946, the British ambassador to Iran, Sir Reader Bullard, wrote to the Foreign Office to express his own concerns about the Katyn charge in the indictment. “If (as I personally believe) Katyn murders were committed by the Russians (possibly without authority as in the case of the execution of the Czar and his family by Sverdlov) it would be unfortunate if the Russians managed to fob it off on the Germans before a court in which the British share is so important”, he said.²⁰¹ John E. Galsworthy of the Northern Department wrote a note in the file: “It is difficult to see what action the Ambassador hopes might be taken on this telegram. His doubts may be well-founded – and shared by many others – but there could be no question of our ‘blowing’ the Russian case either in public or in private, and, in many ways, it might be as well that Katyn should be disposed of once and for all – onto the Germans”.²⁰² Indifferent as to the real truth of the matter, Galsworthy seemed to be welcoming the possibility that “justice” would provide a politically convenient albeit completely false answer to the issue of responsibility. Another official also contributed a minute to the file:

This telegram adds nothing to our knowledge of the affair. The Polish case (against the Russians) has been exhaustively examined by Sir O. O’Malley. There are, as Sir R. Bullard

²⁰⁰ Col. Harry Phillimore to David Scott-Fox, Foreign Office, 3 January 1946, FO 371/56474.

²⁰¹ Sir R. Bullard to Foreign Office, telegram, 15 February 1946, FO 371/56474.

²⁰² *Ibid.*

points out, certain things that are difficult to explain away. But no conclusive case has ever been made and we shall probably never know the whole truth.²⁰³

The British decided that they would do nothing to undermine or otherwise cast aspersions on the Soviet claims. There were concerns about harm this might do to the increasingly strained bilateral relationship with the Soviet Union. When Bullard wrote to the Foreign Office in February 1946, Frank Roberts, who was posted in the British embassy in Moscow, replied:

I feel that I should emphasise that the effect on Anglo-Soviet relations of any apparent tendency on our part to accept the German case about Katyn would be calamitous. You will recall that it was the Katyn affair which finally ruined any hope of collaboration between the Soviet Union and General Sikorski's Government. It would surely be best for the future of Polish-Soviet, and indeed of Anglo-Soviet relations if the matter could be definitely decided once and for all at the Nuremberg trial. I hope, therefore, that the Soviet Government will be able to present a full and convincing case. Even if they do not succeed in doing so, it would I think, be wise for us to refrain so far as possible from showing any scepticism, and to guide public opinion accordingly.²⁰⁴

Sir Richard Beaumont concurred:

[W]e do not wish to stand so obviously aloof that our behaviour could be taken to imply criticism and disapproval of what the Russians are doing. [...] Remembering how thin-skinned the Russians are in matters of this sort, however, you will not doubt agree as to the political desirability of our appearing, in our dealings with the Russians themselves, to accept the Soviet case, and I hope that all concerned at Nuremberg will interpret our general instructions to "hold aloof" in this sense.²⁰⁵

These materials provide a rare glimpse of the political manipulation of the proceedings, in this case by the British. It is a feature of international criminal justice about which much is suspected but little is known. Doubtless it has become less significant at the modern international tribunals because of the genuine independence of the prosecutors, something

²⁰³ *Ibid.*

²⁰⁴ Frank Roberts (Moscow) to Foreign Office, telegram, 18 February 1946, FO 371/56474.

²⁰⁵ R.A. Beaumont to P.H. Dean, 25 February 1946, FO 371/56474.

assured by provisions within the relevant legal instruments as well as by the security of their own tenure of office. For example, a provision in the Statute of the International Criminal Tribunal for the former Yugoslavia states: “The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source”.²⁰⁶ But in 1945 and 1946 there was no suggestion that the prosecutors were independent of the governments that appointed them.

The Soviet prosecution was “micromanaged” by the Commission for Directing the Nuremberg Trials, a body that met in Moscow under the chairmanship of Andrei Vyshinskii.²⁰⁷ The Commission met on 21 March 1946, agreeing to prepare a large number of witnesses, including medical experts, as well as documents that had been found on the bodies. A documentary film was also to be prepared, although the record of the meeting does not indicate whether it was intended to be shown to the Tribunal. The film was produced and shown in Polish cinemas in 1946.²⁰⁸ It goes without saying that the Soviet leaders, who closely supervised the conduct of the Nuremberg proceedings through Vyshinskii, were in on the dirty secret.²⁰⁹ Yet even within the Soviet leadership, the truth about Katyn appears to have been closely guarded. It is difficult to know at what level those who were involved in oversight actually knew what had happened. Nevertheless, nothing indicates this cynicism at the diplomatic or governmental level is in any way reflected in the conduct of the prosecutors themselves, or for that matter of the judges.

Robert Jackson told the congressional inquiry into Katyn that “I received very little instruction from anybody. The thing was a lawyer’s job, and I had no instructions. If I may be so blunt as to say so, I thought that having once gotten me into it, there was a pronounced disposition to leave everything to me. I will not say exactly that that it was to ‘pass the buck’, but I was in charge of it”.²¹⁰ Some scholarly work has been done on the links between the American prosecution staff and the United States intelligence service. Jackson’s deputy prosecutor, William Donovan, was the

²⁰⁶ Statute of the International Criminal Tribunal for the former Yugoslavia, UN doc. S/RES/827 (1993), annex, Art. 16(2).

²⁰⁷ Hirsch, 2008, pp. 712–13, 715, 718, see *supra* note 45.

²⁰⁸ Viatteau, 1996, pp. 149–50, see *supra* note 7.

²⁰⁹ Cienciala *et al.*, 2007, p. 229–30, see *supra* note 10.

²¹⁰ Select Committee Hearings, Part 7, p. 1954, see *supra* note 5.

wartime head of the Office of Strategic Services and the ‘father’ of the Central Intelligence Agency. In his testimony before the Select Committee, Jackson noted that his staff included employees of the Office of Strategic Services.²¹¹

Ultimately, the efforts by the Soviet Union to use international justice to promote a lie did not succeed. The attitude of the American and British prosecution officials might be characterised as indifference, but that is probably an unfair assessment. The explanations, especially those of Jackson in his congressional testimony, make sense. Given the stubborn insistence of the Soviets upon proceeding with the Katyn charge, the other prosecutors had little choice. A refusal to agree upon this in the indictment might well have aborted the entire trial. They provided no real assistance to the Soviet prosecutors who were, in the end, unable to prove their case to the satisfaction of the judges.

In a presentation to the United Nations General Assembly in the early years of the International Criminal Tribunal for the former Yugoslavia, its first president, Antonio Cassese, said the institution was creating “an historical record of what occurred during the conflict thereby preventing historical ‘revisionism’”.²¹² But in *Eichmann in Jerusalem*, Hannah Arendt warned against using criminal justice to establish or clarify historical truth.²¹³ The International Military Tribunal was unable to peer through the fog of war and thereby clarify the facts of the Katyn massacre. But nor did it distort the historical truth by leaving a distorted or even dishonest record. The silence of the judges ensured that no irreparable damage was done to the historical truth. International justice, still at its very beginnings, and as flawed and imperfect as it then was, survived with its honour intact. Nuremberg’s critics, some of them with the most dubious motives, are wrong to invoke the Katyn charge as evidence of ‘victors’ justice’. Indeed, it shows quite the opposite. Faced with contradictory evidence and an incomplete picture, the judges refused to convict. The system worked. Justice was done.

²¹¹ See Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services*, Routledge-Cavendish, London, 2007.

²¹² UN doc. A/52/PV.44, p. 2.

²¹³ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking, New York, 1964, p. 253.