

Institute of National Remembrance

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Decision to commence investigation into Katyn Massacre

At press conference in the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation held on December 1, 2004, prof. Leon Kieres, President of the IPN, has informed about the decision to commence investigation into Katyn Massacre.

PRESS RELEASE

On 30 November 2004, the Departamental Commission for the Prosecution of Crimes against the Polish Nation in Warsaw issued a decision to commence investigations, case no. S 38/04/Zk, into the "mass murder, by shooting, of not less than 21,768 Polish citizens, for the purpose of liquidating a part of the Polish national group, during the period between 5 March and an unspecified date in 1940 in Moscow, Kharkov, Smolensk, Katyn, Kalinin (now Tver), and other locations on the territory of the Union of Soviet Socialist Republics by its state functionaries acting on instructions from the authorities of their state, which was then allied with the Third Reich, the victims being:

soldiers of the Polish Army and Border Defence Corps, officers of the State Police and of other Polish state services - prisoners of war taken by the Red Army and accommodated in "special prison camps" of the NKVD in Kozelsk, Starobelsk and Ostashkov,

civilians arrested for being, among other things „(...) intelligence agents and gendarmes, spies and saboteurs, former landowners, factory owners and officials (...)” and placed in prisons on the Eastern Territories of the Republic of Poland occupied by the USSR,

as a result of the implementation of the criminal resolution by the Politburo of the Central Committee of the All-Union Communist Party (Bolsheviks) reached in Moscow on 5 March 1940, and as a result of a violation of binding war rights and customs, especially the provisions of the IV Hague Convention of 18 October 1907 on the rights and customs of land warfare and the Geneva Convention of 27 July 1929 on the treatment of prisoners of war,

this being an offence under: art. 118 § 1 of the Criminal Code of 1997, in conjunction with art. 123 § 1 points 3 and 4 of the Criminal Code of 1997, in conjunction with art. 1 point 1

of the Decree of 31 August 1944 on the exercising of punishment for Nazi-Fascist criminals guilty of the murder and torment of the civilian population and prisoners, and for traitors to the Polish Nation, in connection with art. 11 § 2 of the Criminal Code of 1997, in connection with art. 2 par. 1 and art. 3 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.”

Regarding the subject of the notification, first of all it is necessary to present the genesis of the events which culminated in the issue of the decision by the ACP (B) Central Committee Politburo on 5 March 1940, and subsequently in the death of thousands of Polish citizens.

An important stage in the rapprochement that had been occurring between the USSR and the Third German Reich since August 1938 was the Non-Aggression Pact, signed in Moscow on 23 August 1939 by the foreign ministers of the above two countries – Vyacheslav Molotov and Joachim von Ribbentrop (the so-called Ribbentrop – Molotov pact). In a secret additional protocol signed at the same time, the USSR and Third Reich demarcated their “spheres of influence” in Eastern Europe. The border between these spheres divided Polish territory along the line of the Narew, Vistula and San rivers.

The Third Reich was the first to claim "its" sphere of interests, invading Poland on 1 September 1939. On the same day, the USSR commenced military preparations to attack the Republic of Poland. The Red Army crossed Poland’s border on 17 September 1939.

Several days after the invasion, the Soviets proposed to its German ally the final liquidation of the Polish State (the Ribbentrop – Molotov pact left its further existence as an open question). The German side agreed to such a solution, resulting in the signing of another pact between Germany and the USSR on 28 September 1939 – the treaty on friendship and borders. This pact established the border between the state interests of its signatories along the San, Bug, Narew and Pisa rivers.

The Soviet diplomatic moves were accompanied by military action against the armed forces of the Republic of Poland. As a result, some 250,000 Polish soldiers were taken into Soviet captivity. Some of them were released, and some escaped, but 125,400 prisoners were placed in NKVD prison camps in Kozelsk, Ostashkov, Starobelsk, Putivl, Yuzha, Oranki, Kozelshchina, and elsewhere.

The first three camps possessed “special status,” i.e. they were set aside for officers, policemen, senior state and military officials, persons responsible for state security, and military settlers.

On the basis of the ACP (B) Politburo resolution of 2 October 1939 and subsequent orders by the USSR NKVD Prisoners-of-War Administration, during October and November 1939 42,500 private soldiers, inhabitants of so-called Western Ukraine and Western Belorussia, were released home; 42 492 private soldiers, inhabitants of these parts of Poland which were occupied by the Third Reich were transferred to Germans, and some 25 000 were sent to build Nowogród Wołyński – Lwów road. In addition, about 15,000 prisoners were concentrated in the “special camps” in Kozelsk, Starobelsk and Ostashkov.

Those imprisoned in Kozelsk, Starobelsk and Ostashkov were subjected to mass propaganda intended to change their negative attitude towards communism and the USSR. However, it did not bring the results that were expected. Prisoners continued to display

patriotic attitudes and an attachment to religion, and they also attempted to form conspiratorial organisations in camps.

The Soviet authorities did not behave in a uniform manner to those kept in the “special camps.” They behaved in a particular manner towards the prisoners in Ostashkov, deciding to make them face the NKVD Special Conference, a non-judicial body which issued verdicts by administrative means. By the end of January 1940, the cases of over 6,000 prisoners had been referred to the Special Board. By the end of the following month, the first 600 sentences had been handed down, involving from 3 to 6 years of labour camp in the Kamchatka

Similar procedures were not applied to the prisoners in the camps in Kozelsk and Starobelsk.

In the end, these procedures were also discontinued towards the prisoners in Ostashkov: at the end of February 1940, no more sentences were issued because a whole new concept of solving the “problem” of Polish prisoners of war in the USSR had emerged.

According to a proposal presented to ACP (B) secretary Josef Stalin by USSR people’s commissar for internal affairs Lavrentii Beria on 5 March 1940, the prisoners inside the “special camps” were to be shot as “avowed enemies of Soviet authority, filled with hatred of the Soviet system.” At the same time, L. Beria also proposed the shooting of 11,000 out of the 18,632 prisoners held in prisons in the so-called western oblasts of Ukraine and Belorussia. The NKVD chief also described these as “hardened, incorrigible enemies of Soviet authority.”

The chief motive for this criminal proposal was a realisation that the prisoners expected liberation in order to join the struggle against Soviet authority.

L. Beria’s proposal was approved in a resolution adopted by the ACP (B) Politburo on 5 March 1940.

The extermination of the prisoners in the “special camps’ in pursuance of the above resolution started on 3 April 1940, when the first “death transport” was dispatched from the camp in Kozelsk. The prisoners in this camp were taken by rail to the station at Gniezdowo near Smoleńsk, and from there by prison wagons to the place of execution inside the Katyn Forest. They were executed by pistol shots in the back of the head. The bodies were buried in previously dug trenches. Not less than 4,410 prisoners from the camp in Kozelsk died.

The murder of the prisoners from Starobelsk commenced on 5 April 1940. Individual groups of prisoners were sent by rail to Kharkov and placed in an internal NKVD prison there. The victims were executed by pistol shots below the back of the head. The bodies were buried in trenches in region 6 of the forest-park zone near the village of Pyatikhatka near Kharkov. Not less than 3,739 prisoners from Starobelsk were executed.

The prisoners in Ostashkov were removed from the camp to the NKVD prison in Kalinin from 5 April 1940 onwards. They were killed by shots to the back of the head in a specially prepared cell. The bodies were buried in the village of Mednoye. Not less than 6,314 prisoners from this camp died.

For various reasons, 395 persons were excluded from execution and placed in the camp at Yukhnov.

A change was made to that part of the ACP (B) Politburo decision of 5 March 1940 regarding prisoners: instead of the planned 11,000 prisoners, 7,305 were shot, of whom 3,435 came from the prisons in so-called Western Ukraine and the remaining 3,870 from prisons in so-called Western Belorussia.

In the 1990's, lists of the persons held in prisons in so-called Western Ukraine and shot in pursuance of the decision of 5 March 1940 were released (the so-called Ukrainian Katyn List). But so far it has not been possible to discover similar lists of prisoners held in Western Belorussia and killed on the basis of this decision (Belorussian Katyn List). According to the current hypothesis, which is to be verified during the investigations, the prisoners from so-called Western Ukraine were murdered in prisons in Kiev, Kharkov and Kherson. The prisoners from so-called Western Belorussia were supposedly killed inside Minsk prison. Possible evidence of this are objects of Polish origin unearthed in the 1980's and 1990's during exhumations in Bykovnia and Kuropaty.

In the light of the above historical findings, it is an indisputable fact that on 17 September 1939 the USSR, in contravention of international law, carried out an act of aggression against Poland, and during the subsequent period of lawlessness deliberately took the lives of thousands of Polish prisoners of war and civilians, this constituting a war crime and a crime against humanity.

The incursion of the Soviet forces onto Polish territory on 17 September 1939, constituting the start of war, placed its participants under a duty to adapt to the rules of military law, including treaty obligations and the principles of international customary law. The soldiers captured by the Red Army were entitled to the status of prisoners of war, and thus to the full protection created for prisoners of war, including the protection provided under the IV Hague Convention of 18 October 1907 on the rights and customs of land warfare and under the Regulations included therein, and the Geneva Convention of 27 July 1929 on the treatment of prisoners of war, which codified the basic customary principles of military law. In 1939, the Republic of Poland was a party to both these conventions. However, the fact that the USSR was a party neither to the IV Hague Convention and the Regulations appended thereto, nor to the Geneva Convention, did not release that country from the duty to respect the universal principles of international customary law, which existed side by side with treaty provisions. In the light of doctrine and international jurisdiction including the Verdict of the Nuremberg International Military Tribunal, the fact that a certain country was not a party to the above conventions did not excuse its citizens who had perpetrated war crimes or crimes against humanity from criminal responsibility for their crimes.

Therefore, there is no doubt that the murder of Polish prisoners of war in 1940 was an unlawful act within the meaning of international law because it was a glaring violation of art. 4, 23c and 50 of the Regulations regarding the laws and customs of land warfare appended to the IV Hague Convention of 18 October 1907 on the laws and customs of land warfare, and a violation of art. 2, 46, 61 and 63 of the Geneva Convention of 27 July 1929 on the treatment of prisoners of war - therefore it was a violation of legal instruments which, because they had been recognised as generally binding principles of international law, were applicable to the whole of international society in 1940, and therefore to the

Soviet Union as well. In the light of the above it is also completely justified to say that the extermination of the Polish prisoners of war was a war crime in the strict sense of the term, within the meaning of art. VI b of the Charter (Statute) of the International Military Tribunal, set up in pursuance of an international Agreement to investigate and mete out punishment for the chief war crimes of the European Axis and signed in London on 8 August 1945 by Great Britain, the United States of America, USSR and France i.e. a violation of military laws and customs.

However, the murders of the Polish civilian population by NKVD functionaries implementing the resolution of 5 March 1940 comply fully with the meaning of a crime against humanity as defined in art. VI c of the abovementioned Charter of the International Military Tribunal, which encompasses "murder, extermination, enslavement, deportation and other inhuman acts against any civilian population before or during a war, or persecution on account of politics, race or religion in the perpetration of any form which falls within the competence of the tribunal or in connection with it, whether or not the crime was in compliance with law of the country in which it occurred."

The principles of international law adopted in the Statute of the Nuremberg Tribunal and subsequently expounded in the verdict by that Tribunal were confirmed in the UN General Assembly resolution no. 95(1) of 11 December 1946. Furthermore, that resolution declared that genocide is a crime against international law, contrary to the spirit and objectives of the United Nations, and condemned by the civilised world. The subject of genocide was expounded in the Convention on the prevention and punishment of the crime genocide, adopted by the UN General Assembly on 9 December 1948. In art. II and III it lay down the definition of genocide and the punishable forms thereof, and placed the parties under an obligation to make it enforceable by introducing suitable provisions to their domestic legislation.

Because of the circumstances of the Katyn Massacre, i.e. the fact that it was planned down to the very last detail by the highest party and state authorities of the USSR and carried out by the state apparatus under their authority, and on account of the scale and cruelty of the extermination of thousands of innocent people and the motives of the perpetrators, there is justification in considering the permissibility of applying the qualification of genocide within the meaning of art. 11 of the convention of 9 December 1948. The selection of persons for extermination was also characterised by the fact that they formed part of the intellectual elite of the Polish Nation which, under the appropriate conditions, could assume leadership. The physical elimination of these people was meant to prevent the rebirth of Polish statehood based on their intellectual potential. Therefore the decision of elimination was taken with the intention of destroying the strength of the Polish Nation and liquidate its elites. Therefore one can conclude that the murder of Polish prisoners of war and Polish civilians by the NKVD was dictated by a desire to liquidate part of the Polish national group. Hence, this action assumed the status of genocide as described in art. II of the Convention on the prevention and punishment of the crime of genocide. The view whereby the extermination of Polish citizens is an act of genocide was also expressed in the USSR's stance during the trial of Nazi war criminals before the Nuremberg Tribunal after the end of World War II. On the 59th day of that trial, Prosecutor Yuri Pokrovskiy,

deputy chief Soviet counsel for the prosecution, presented the Katyn Massacre as an atrocity that had taken the lives of 11,000 Polish victims and said that this Massacre was subject to the judgment of the International Military Tribunal in Nuremberg. Hence, such a stance by the Russian side was based on a recognition of the murder as a crime that falls within the scope of the International Criminal Tribunal on account of its seriousness, in other words a crime which, on accounts of its particular nature and the circumstances in which it was perpetrated, should be judged according to international criminal law.

Reaching conclusions on the basis of Polish criminal law, it should be stated that the current state of the law provides the basis on which to pursue criminal proceedings into the Katyn Massacre. For this deed was directed against Polish citizens, which is considered a satisfactory basis on which to apply Polish criminal sanctions by earlier criminal codes (art. 5 of the Criminal Code of 1932, art. 114 of the Criminal Code of 1969), and by the current Criminal Code (art. 110 § 1 of the Criminal Code of 1997). Furthermore, the killing of any prisoner of war and any civilian was prohibited both under the terms of Polish legislation (art. 225 § 1 of the Directive by the President of the Republic of Poland of 11 July 1932, Criminal Code) and under the terms of Soviet legislation (art. 137 of the Criminal Code of the RSFSR, effective as of 1 January 1927). Therefore, the so-called condition of dual illegality is fulfilled, art. 110 § 1 of the Criminal Code of 1997 and art. 111 § 1 of the Criminal Code of 1997, which allows the Polish authorities to investigate and punish the perpetrators of crimes against the interests of the Republic of Poland or against Polish citizens even if the perpetrators are foreigners and their deeds were committed abroad. It should also be said that under the terms of art. 114 § 1 of the Criminal Code of 1997, the fact that criminal investigations into the Katyn Massacre were previously conducted by the Chief Prosecutor's Office of the Russian Federation is no obstacle to the initiation and conduct of investigations into the same deed by the Polish law-enforcement authorities.

When determining the legal qualification of the Katyn Massacre, it must be realised that the basis of this legal qualification was provided by the terms of art. 118 § 1 and 123 § 1 point 3 and 4 of the Criminal Code of 1997, which are the equivalent of the provisions contained in the international conventions on the punishment of war crimes and crimes against humanity and which fulfil Poland's obligations to adapt her domestic law to the standards of international law. Thus, the fact that the Katyn Massacre is an act of genocide results in the adoption of the legal qualification under art. 118 § 1 of the 1997 Criminal Code, whose wording fulfils Poland's commitments under the UN Convention of 9 December 1948 on the prevention and punishment of the crime of genocide. Whereas because the Katyn Massacre is also a war crime, the provisions of art. 123 § 1 point 3 and 4 of the 1997 Criminal Code, which protect prisoners of war and the civilian population of occupied territory, shall apply to it.

Furthermore, the conduct of the USSR state officials who implemented or realised, at every administrative level, the decision of 5 March 1940 to exterminate Polish prisoner-of-war and civilians is a fulfilment of the message of art. 1 point 1 of the Decree of 31 August 1944 on the exercising of punishment for Nazi-Fascist criminals guilty of the murder and torment of the civilian population and prisoners, and for traitors to the Polish Nation because these perpetrators participated in the killing of civilians and prisoners of war „for

the benefit of the authorities of the German state or its ally.” The acceptance of this qualification is justified by the nature of relations between the Third Reich and the USSR before the outbreak of World War II and during the extermination of the Polish prisoners of war and civilian population, these relations being based on the bilateral agreements concluded between the two states in August and September 1939. In 1940, the USSR and Third Reich were states that were allied to each other and cooperating with each other. It remains an indisputable fact that the murder of the prisoners of war in the prisoner of war camps in Ostashkov, Starobelsk and Kozelsk, and of the civilians held in prisons in so-called Western Ukraine and Belorussia was ordered by members of the political and state leadership of the former USSR and that the direct perpetrators of this murder were officials serving at various posts in the USSR NKVD. Therefore, in view of the circle of people suspected of committing this murder and the purpose for which they undertook this criminal act, it appears totally justified to qualify the atrocity not just as a war crime, crime against humanity, and a crime penalised under art. 1 point 1 of the August Decree; but also as a communist crime within the meaning of art. 2 par. 1 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. There is no doubt that the persons responsible for the atrocity, both those who issued the order and those who carried it out, were officials of the communist state – the Union of Soviet Socialist Republics.

D E C I S I O N
to commence investigation

Warsaw 30 November 2004

Małgorzata Kuźniar – Plota - prosecutor of the Departamental Commission for the Prosecution of Crimes against the Polish Nation in Warsaw and Director of the Interdepartmental Investigative Team appointed by Order No. 5/04, dated 12 October 2004, issued by the Director of the Chief Commission for the Prosecution of Crimes against the Polish Nation – Deputy Prosecutor General Witold Kulesza, for the purpose of investigating the murder of Polish citizens carried out on the basis of a decision by the Politburo of the Central Committee of the All-Union Communist Party (Bolsheviks) of 5 March 1940,

having considered the notification of the crime dated 31 August 2004 issued by the Chairman of the Katyn Committee and relatives of the victims who were murdered in Katyn and Kharkov, as well as a notification of the crime dated 13 October 2004 and issued by the Chairman of the Board of the Federation of Katyn Families, pursuant to art. 45 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and art. 303 of the Code of Criminal Procedure,

has resolved to:

initiate investigation into: the mass execution, by shooting, of not less than 21,768 Polish

citizens, carried out for the purpose of liquidating part of the Polish ethnic population during the period between 5 March and an unspecified date in 1940 in Moscow, Kharkov, Smolensk, Katyn, Kalinin (now Tver), and other locations on the territory of the Union of Soviet Socialist Republics by its state functionaries acting on instructions from the authorities of their state, which was then allied with the Third Reich, the victims being:

soldiers of the Polish Army and Border Defence Corps, officers of the State Police and of other Polish state services - prisoners of war taken by the Red Army and accommodated in "special prison camps" of the NKVD in Kozelsk, Starobelsk and Ostashkov,

civilians arrested for being, among other things „(...) intelligence agents and gendarmes, spies and saboteurs, former landowners, factory owners and officials (...)” and placed in prisons on the Eastern Territories of the Republic of Poland occupied by the USSR,

as a result of the implementation of the criminal resolution by the Politburo of the Central Committee of the All-Union Communist Party (Bolsheviks) reached in Moscow on 5 March 1940, and as a result of a violation of binding war rights and customs, especially the provisions of the IV Hague Convention of 18 October 1907 on the rights and customs of land warfare and the Geneva Convention of 27 July 1929 on the treatment of prisoners of war,

this being an offence under: art. 118 § 1 of the Criminal Code of 1997, in conjunction with art. 123 § 1 points 3 and 4 of the Criminal Code of 1997, in conjunction with art. 1 point 1 of the Decree of 31 August 1944 on the exercising of punishment for Nazi-Fascist criminals guilty of the murder and torment of the civilian population and prisoners, and for traitors to the Polish Nation, in connection with art. 11 § 2 of the Criminal Code of 1997, in connection with art. 2 par. 1 and art. 3 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.

STATEMENT OF REASONS

On 31 August and 13 October 2004, the Departmental Commission for the Prosecution of Crimes against the Polish Nation in Warsaw received notifications of a crime submitted by the Chairman of the Katyn Committee and relatives of victims murdered in Katyn and Kharkov, and from the Chairman of the Board of the Federation of Katyn Families, requesting the initiation, by the Polish judicial authorities, of investigations into the murder of Polish citizens carried out on the basis of a decision by the All-Union Communist Party (Bolsheviks) dated 5 March 1940.

Prior to the submission of the above formal notifications of the crime, the Institute of National Remembrance had received appeals and open letters from representatives of

various circles, social organisations and associations, including from the Katyn Police Family Association 1939 and the Polish Katyn Foundation, expressing the need to clarify all the circumstances of the imprisonment and killing of thousands of Poles on the basis of the decision by the ACP(B) of 5 March 1940. Postulates with a similar content were also published in the press and disseminated via other media.

Regarding the subject of the notification, first of all it is necessary to present the genesis of the events which culminated in the issue of the decision by the ACP (B) Central Committee Politburo on 5 March 1940, and subsequently in the death of thousands of Polish citizens.

Since the autumn of 1938, a rapprochement had been occurring between Poland's totalitarian neighbours - the Union of Soviet Socialist Republics and the German Third Reich. Previously in the throes of a sharp ideological conflict, by the summer of 1939 these states had completely reoriented their policies toward each other. A platform of accord was the plan by both powers to conquer and divide the countries of Eastern Europe, whereby priority was attached to the liquidation of the Polish State, regarded both by the USSR and by the Third Reich as a part of the hated Versailles system, and at the same time an obstacle to the realisation of the expansionist plans of both powers: the USSR wanted to spread the communist system, whilst the Third Reich wanted Lebensraum in the East.

Talks on a normalisation of mutual relations and on the future of Eastern Europe led to the formulation of a Non-Aggression Pact which, together with a secret additional protocol, was signed in Moscow on 23 August 1939 by Vyacheslav Molotov, USSR people's commissar for foreign affairs, also serving as prime minister, and Joachim von Ribbentrop, minister of foreign affairs of the Third Reich. The non-aggression pact was of an open nature; both sides relinquished the use of force in mutual relations and pledged to resolve contentious issues and conflicts through an amicable exchange of views. However, the signed document differed from a standard non-aggression pacts in that it contained no clause permitting its repudiation in the event that one party carried out an act of aggression against a third country. Neither was there a clause requiring neutrality in the event that one of the parties became the target of an attack or itself carried out an act of aggression. Furthermore, the pact forbade assistance to the attacked country and to any country that came out in its defence. Therefore, this was really an agreement not on neutrality, but on cooperation between the parties to the pact, even if one or both of them attacked a third country.

The overt part of the pact was supplemented and substantiated by a secret additional protocol, signed at the same time as the pact by the same signatories on behalf of their governments. This document demarcated the spheres of interests of the USSR and Third Reich in Eastern Europe. To the north, the dividing line between the spheres of interests was established along Lithuania's northern border, to the south its course was determined by the USSR's "interest" in Bessarabia. As for the territory of the Polish State, the secret protocol laid down that the dividing line between the German and USSR spheres of interests would follow approximately the Narew, Vistula and San rivers (point 2 of the protocol). At the same time, both sides recognised Lithuania's "interests" with regard to the Wilno region (point 1 of the protocol).

Attributing to each other, in a manner contrary to international law, the right to decide on

the sovereignty of Poland, the USSR and Third Reich said that whether the continued existence of an independent Polish State lies "in the interests of both parties" and the final shape of this state's borders will be finally resolved during the course of further political developments. They declared at the same time that "this issue shall be resolved by way of an amicable mutual agreement."

The consequence of the Ribbentrop – Molotov pact was the start of military preparations to take over the sphere of interests granted to each party. For there was no doubt that Poland would not willingly give up any part of its territory.

At the moment of conclusion of the pact with the USSR, the Third Reich was prepared for military action because it had been preparing to attack Poland ever since March 1939. Initially, Hitler set 26 August 1939 as the date of the attack on Poland, but the German armed forces invaded the Republic of Poland on 1 September 1939. Soviet preparations to invade Poland went ahead and gathered momentum only after the German attack. Thus, on 1 September 1939, the ACP (B) Central Committee Politburo resolved to increase the size of the Worker-Peasant Red Army by 76 divisions, and on 3 September it resolved to lengthen military service in 6 Military Districts – Moscow, Leningrad, Kalinin, Kharkov, Kiev and Belorussia – by one month, as a result of which over 310,000 soldiers were kept mobilised in these districts. On 4 September 1939, Marshal Kliment Voroshilov ordered an additional intake into the army, comprising those born in 1919, and some other categories of draftees. At the same time, military units were placed in combat readiness, some units were transferred to the Polish border, and orders were given to the forces in the Special Military Districts of Kiev and Belorussia to undergo a covert concentration and be prepared to carry out a decisive attack to break up the enemy – the Polish army. From 7 September 1939 onwards, Red Army units were concentrated in the border regions with Poland, along the designated lines of attack. It was clear that these preparations were the prelude to a war of aggression against Poland.

During the preparations for the aggression, the USSR leaders remained in constant touch with the authorities of the Third Reich. For example, on 14 September 1939 Vyacheslav Molotov asked the German ambassador in the USSR, Friedrich von Schulenburg, for the planned date of the capture of Warsaw by the German forces, explaining that from the Soviet point of view, it would not be good to commence action prior to the collapse of Poland's administrative seat. Two days later, Molotov informed F. von Schulenburg that the USSR's armed intervention will occur "certainly tomorrow or the day after." The USSR authorities did not fail to disclose the final date of the attack on Poland to the Germans. They did so on 17 September 1939 in the Kremlin at 2 a.m. during a meeting between Josef Stalin, general secretary of the ACP (B) Central Committee Politburo, and F. von Schulenburg. The USSR leader asked that in order to avoid "incidents," German aircraft should not cross the Brześć – Lwów line.

Despite constant urging by Germany, the Soviet aggression on Poland did not occur until 17 days after the German invasion. The wording of a USSR note read to Waclaw Grzybowski, Polish ambassador to the USSR, on 17 September (he refused to accept it) was consulted with the Germans, what merits emphasis. What is more, at the request of the German side, fragments which the Third Reich considered unacceptable were deleted

from the note; these fragments indicated that the reason for the Red Army's incursion into Polish territory was the need to assist the Ukrainian and Belorussian population, threatened by the Germans. Only two hours after the Soviet invasion, the German forces were ordered not to cross the Lwów - Włodzimierz Wołyński - Białystok line.

The above facts justify the conclusion that in September 1939, Poland fell victim to war, an act of coordinated aggression by the neighbours who were allied to each other: the USSR and the German Third Reich.

The historical research that has been performed until now and the knowledge provided by this research about the latest history of Poland and Europe provide an unequivocal indication that the crossing of the Polish border by the Red Army on 17 September 1939 was tantamount to the start of a war against Poland, but without a formal declaration of war.

By attacking Poland, the USSR violated not only Polish-Soviet bilateral treaties (the treaty of Riga of 18 March 1921, defining the line of the Polish-Soviet border; and the Treaty on Non-Aggression of 25 July 1932, extended on 5 May 1934 for a period of ten years), but also multilateral agreements (the Pact on the non-use of war as an instrument of national policy of 27 August 1928, also known as the Briand - Kellogg Pact, or the Paris Pact and Convention of 3 July 1933 on the definition of an attack).

The USSR authorities did not formally declare war on Poland, but confined themselves, as described above, to reading a note signed by Vyacheslav Molotov, people's commissar for foreign affairs, to Polish ambassador Waław Grzybowski. In a devious and untruthful manner, the note argued that as a result of German military successes, the Polish State had ceased to exist. Therefore - said the note - the USSR government had asked the Red Army Command to order the crossing of the Polish border in order to protect the lives and property of the populations of Western Ukraine and Western Belorussia. One should note that at this time, the highest state authorities were still in Poland and exercising power to the extent determined by civil and military developments, and the Polish army was still fighting the German army. Warsaw did not capitulate until 28 September 1939.

The Soviet forces that attacked Poland were organised on two fronts: the Belorussian Front, commanded by Commander Second Class Mikhail Kovalov; and the Ukrainian Front, led by Commander First Class Siemion Timoshenko. On the first day of the aggression, the two fronts numbered some 500,000 soldiers, but this number increased later on. Despite this overwhelming superiority, the Polish forces offered fierce resistance in some places. Major battles took place at Kodziowce, Szacko and Wytyczno. The defence of Grodno became a symbol of heroic resistance to the invader.

It is reckoned that the Red Army took some 250,000 Polish prisoners of war during the military operations. Some of them were released, and some escaped, but 125,400 prisoners were put in camps. They included over 8,000 officers and 6,000 policemen.

After the aggression, and already during their occupation of Polish territory, the Third Reich and the USSR attained a factual capability of further regulating the "Polish question." As it was said above, the Ribbentrop - Molotov pact left the preservation of an independent Polish State and its borders as an open question. On 19 September 1939, the Soviets proposed to its German partner the closure of this question. Admitting that the USSR

government had rejected its hitherto concept of a rump Polish state, the Soviet side proposed a division of Polish territory along the line of the Pisa - Narew - Vistula - San rivers. The Soviet proposal was the result of fears that an independent Polish state might become an object of rivalry between Germany and the USSR. On 25 September 1939, the USSR offer underwent modifications: Stalin said he was prepared to forsake Lublin voivodship and a part of Warsaw voivodship in favour of Lithuania, which determined the future "border" between the two countries along the Bug river. The finale of the Soviet proposal was the "Treaty of friendship and borders" signed in the USSR capital on 28 September 1939 by V. Molotov and J. von Ribbentrop. In its overt part, the pact established a border between the spheres of interests "on the territory of the former Polish State, along a line marked on a map appended to the pact (art. 1)." In outline, this line ran along the San, Bug, Narwa and Pisa rivers. The USSR government was to implement the essential new state order east of this line and Germany was to do so west of it. A confidential protocol appended to the pact altered the provisions of the secret additional protocol of 23 August 1939 by including Lithuania in the USSR sphere of interests; and Lublin voivodship, part of Warsaw voivodships and the Suwalki region in the German sphere of interests. Furthermore, in this additional secret protocol, the two sides said that "they shall not tolerate in their areas any Polish agitation that might have an impact on the other side's territory. They shall nip any such agitation in their territories in the bud and inform each other about the means with which to do so."

As a result of the treaty of 28 September 1939, the USSR set in motion procedures to legalise the annexation of the Polish territory. For this purpose, on 22 October 1939, the Soviet authorities ordained elections to representative bodies - People's Assemblies of Western Ukraine and Western Belorussia. These "Assemblies," created in a climate of terror and consisting of pro-Soviet supporters, applied to the USSR Supreme Soviet for the inclusion of "Western Ukraine" and "Western Belorussia" in the Soviet Union. On 1 November 1939, the Supreme Soviet adopted a resolution to include so-called Western Ukraine in the USSR, and on the next day adopted a similar resolution with regard to so called Western Belorussia.

Two days after the attack on Poland, in an order addressed to the Military Councils of the Belorussian and Kiev Special Military Districts, Marshal Kliment Voroshilov, USSR people's commissar for defence, laid down what should be done with the Polish prisoners of war. He ordered the Military Districts to create out of the rifleman and cavalry divisions special units to relocate and transport the prisoners to collection points of the USSR People's Commissariat for Internal Affairs (NKVD). These points were to set up in the following locations: Orzechowo, Radoszkowicze, Stołpce, Tymkowicze, Żytkowicze (for the Belorussian Special Military District), and Olewsk, Szepietówka, Wołoczyska, Jarmolińce, Kamieniec Podolski (for the Kiev Special Military District). From these collection points, the prisoners were to be transported further - to Kozelsk and Putivl.

On the same day, USSR people's commissar for internal affairs Lavrentii Beria issued order No. 0308, ordaining the creation of a Prisoners-of-War Administration attached to the NKVD. Major Pyotr Karpovich Sopruienko was appointed chief of this Administration. In the same order, L. Beria asked for the creation of eight camps "to hold prisoners of war," i.e.

Ostashkov, Yukhnov, Kozelsk, Putivl, Kozelshchina, Starobelsk, Yuzha and Oransk, and appointed their commandants.

Following further decisions, another two camps were set up in Vologod oblast; in Griazovets and Zaonikiev.

The internal organisation of the camps was established on 23 September 1939 in an order issued by Major Pyotr Soprunienko, head of the NKVD Prisoners-of-War Administration. In this order, the prisoners in each camp were to be subjected to "Chekist-operational service" (Special Department), agitation-propaganda work (Political Department), and recorded in a register of prisoners of war (Evidentiary-Distribution Department). In turn, the rights and duties of prisoners of war were regulated by the "Internal regulations for NKVD camps accommodating prisoners of war," issued on 28 September 1939 by the NKVD Prisoners-of-War Administration.

On 2 October 1939, the ACP (B) Politburo issued a resolution "on prisoners of war" which possessed fundamental importance for the fate of the Polish soldiers and civilians in Soviet captivity.

The resolution said that:

- private soldiers - Belorussians, Ukrainians and members of other ethnic groups from so-called Western Belorussia and Western Ukraine - will be allowed to return home;
- 25,000 prisoners of war will be retained to build the Nowogród Wołyński - Korzec - Lwów road;
- private soldiers from Polish territories taken over by the Germans will be gathered in the camps at Kozelsk and Putivl pending the end of negotiations with the German authorities and the reaching of decisions to send them home;
- prisoners with officer rank and senior state officials will be placed in a "special camp for officers" in Starobelsk;
- intelligence and counterintelligence operatives, gendarmes, prison guards and policemen will be kept in a separate camp - in Ostashkov.

In pursuance of this resolution by the ACP (B) Politburo, on 3 October Lavrentii Beria ordered the authorities under his command to divide prisoners into the appropriate categories and gather them in the places foreseen. Furthermore, the NKVD chief ordered the selection process to be carried out in such a way as to prevent officers, policemen, intelligence and counterintelligence agents and senior state officials from being released in the same way as private soldiers. Because the camp at Starobelsk was full, on 23 October 1939 the NKVD Prisoner-of-War Administration decided that, just like in Starobelsk, only officers and senior state and military officials would be kept at Kozelsk. The NKVD Prisoner-of-War Administration made another amendment to the Politburo resolution on 29 October 1939, ordering that private soldiers who were military settlers should be excluded from "home" release and sent to the Kozelsk camp.

In the performance of the above decisions by the Soviet authorities (October-November 1939), 42,500 prisoners were released "home," 42,492 were handed over to the German authorities, over 23,000 were directed for the construction of the Nowogród Wołyński - Lwów road (Równo camp), and over 15,000 officers, policemen, gendarmes, intelligence and counterintelligence operatives, senior officials, settlers and other Polish prisoners were

accommodated in the “special camps” at Kozelsk, Starobelsk and Ostashkov.

So in the end, there were two categories of Polish prisoners of war in Soviet captivity:

1. prisoners at the Równo camp, private soldiers, who were considered a labour force and who were to be released in December 1939,
2. prisoners in the "special camps" in Kozelsk, Starobelsk and Ostashkov - officers who, unlike private soldiers, were considered a hostile element and whose release was not envisaged (a person's status played a decisive role, as illustrated by the fact that doctors were retained “as officers,” in breach of the Geneva Convention).

Reports by the NKVD Prisoner-of-War Administration in November 1939 emphasised the “sound moral-political condition” of private soldiers, and at the same time indicated the patriotic attitude of most officers and policemen, their hostility towards the Red Army's incursion, their faith in the rebirth of Polish statehood and their “counterrevolutionary agitation” among private soldiers.

Following the relocation of the prisoners, the populations of the three “special camps” at the end of December 1939 was as follows:

- Kozelsk (located in a monastery some 6 km from the railway station in Kozelsk, in Smolensk oblast) – 4,766 prisoners
- Starobelsk (located in Starobelsk, Voroshilovgrad oblast, some 3 km from the railway station) – 3,916 prisoners
- Ostashkov (located on Stolbniy island on Lake Seliger, some 10 km from the railway station in Ostashkov) – 6,291 prisoners.

The total population of these camps at that time was 14,973 Polish prisoners of war.

The prisoners inside these “special camps” became the subjects of various kinds of recruitment or “reeducation.” They were all subject to registration. Apart from having their details recorded in general compulsory personal questionnaires and record cards, some categories of prisoners received special files. They included officers from the rank of lieutenant-colonel upwards, senior state and military officials, police and military police officers, members of “anti-Soviet political parties and organisations,” intelligence and counterintelligence employees, “officers of the so-called investigative police,” prison administrators, “provocateurs, secret police and defence agents,” “landowners, counts and dukes,” land gentry and noblemen. Furthermore, the prisoners were subject to mass propaganda to alter their attitude towards communism and the USSR. For instance, in November 1939 at the camp in Starobelsk there were “talks” on the subject of “What the victory of socialism has given to the working people of the USSR” and the “Material and cultural prosperity of the working people of the USSR,” propaganda films were shown, including “Lenin in October,” and the camp radio, operating from 5 a.m. to 12 p.m., broadcast speeches by USSR leaders, including Vyacheslav Molotov.

It should be stressed that the “reeducational” activities did not bring the results which their organisers had expected. The prisoners displayed patriotic moods and an attachment to religion, and the NKVD authorities also noted numerous “anti-Soviet” remarks and attempts to create conspiratorial organisations in the camps.

One should add that operational brigades of the NKVD Prisoner-of-War Administration were posted to the “special camps.” In Kozelsk, this brigade was headed by state security major

V. Zarubin, in Starobelsk by state security captain B. Trofimov (later his place was taken by state security captain M. Yefimov), and in Ostashkov by state security captain G. Antonov (after him, the brigade's work was directed by state security lieutenant S. Biellolipieckiy). In all the camps, these formations were supposed to conduct "Czekhist-operational service" vis-a-vis prisoners to varying degrees. In Kozelsk and Starobelsk, this was limited to the detection of "counterrevolutionary" organisations. The task of the brigade in Ostashkov went much further - to gather "incriminating evidence" against prisoners, which was then to be passed to a non-judicial authority, the NKVD Special Conference, for consideration under administrative procedures. This body had the power to impose sentences of up to 10 years in labour camps. The Special Conference received the right to hand down death sentences several months after the start of German aggression against the USSR, i.e. in November 1941.

The procedure adopted in Ostashkov, i.e. sending of prisoners' cases for "judgment" by the NKVD Special Conference, was not applied to the prisoners in Kozelsk and Starobelsk. Later, on 20 February 1940, Major Pyotr Soprunienko, head of the NKVD Prisoner-of-War Administration, proposed to Lavrentii Beria that the files of 400 prisoners in the camps at Kozelsk and Starobelsk: "(...) Border Defence Corps officers, employees of courts and prosecutor's offices, landowners, activists of the POW and Sokół parties, officers of the 2nd Division of the former Polish general staff, information officers (...)" should also be prepared for review by the Special Conference. However, this plan did not proceed any further.

By the end of December 1939, the NKVD Prisoner-of-War Administration operational brigade in Ostashkov camp had prepared 2,000 indictment files, 500 of which were sent to the NKVD Special Conference. On 31 December 1939, Lavrentii Beria instructed that the investigative materials in that camp should be ready by the end of January 1940. In pursuance of that instruction, 6,050 indictment files were ready by 1 February 1940 in Ostashkov. They were sent to the Special Conference for its consideration.

From one of the surviving indictment files of a prisoner at Ostashkov, Strefan Olejnik, one may conclude that the indictments for criminal responsibility conveyed to the Special Conference concerned "criminal actions" perpetrated during the Second Polish Republic. Olejnik was accused of "having served as a policeman in the town of Borszczow between 1936 and 1939, where he waged an active struggle against the revolutionary movement."

By the end of February 1940, the Special Conference has examined the files of 600 prisoners from Ostashkov and issued sentences ranging from 3 to 6 years of labour camp in the Kamchatka. In early March 1940, the NKVD I Special Department held a two-day conference in Moscow, attended by representatives of the USSR Prisoner-of-War Administration, Main Camp Administration (GULAG), and Convoy Forces. At this conference, the manner of deporting prisoners sentenced by the Special Conference to labour camps was discussed. However, no deportations took place because on the threshold of February and March 1940, a new plan emerged involving a radical change to the hitherto treatment of the prisoners in "special camps." Henceforth, they were no longer to be chosen at random for punishment, without application of the death sentence. In what circumstances this plan emerged and what brought about the radical change in

plans vis-à-vis prisoners in the abovementioned camps has not yet been clarified. Only the end result of the decisions is known.

On 5 March 1940, people's commissar for internal affairs Lavrentii Beria conveyed to Stalin the following note:

"In NKVD camps for prisoners of war and in prisons in the western oblasts of Ukraine and Belorussia currently is held a large number of former Polish Army officers, former employees of the Polish police and intelligence services, members of Polish nationalist counterrevolutionary parties, members of disclosed counterrevolutionary insurgent organisations, escapees and others. They are all avowed enemies of Soviet authority, filled with hatred of the Soviet system.

The prisoners of war, officers and policemen inside the camps are attempting to continue counterrevolutionary activity and are engaged in anti-Soviet agitation. Each of them expects liberation so that they can join the struggle against Soviet authority.

NKVD authorities in the western oblasts of Ukraine and Belorussia have discovered a series of counterrevolutionary insurgent organisations. In all these counterrevolutionary organisations, former officers of the former Polish army, former policeman and gendarmes have played an active role.

[...]

The prisoner-of-war camps hold a total (excluding private soldiers and non-commissioned officers) of 14,736 ex-officers, officials, landowners, policemen, gendarmes, prison officers, settlers and intelligence agents. Over 97% are Poles.

[...]

Prisons in the western oblasts of Ukraine and Belorussia hold a total of 18,632 arrestees (including 10,685 Poles). [...].

In view of the fact that they are all hardened and incorrigible enemies of Soviet authorities, the NKVD considers the following actions essential:

I. Instructions to the NKVD:

1) The cases of 14,700 prisoners of war – former Polish officers, officials, landowners, policemen, intelligence agents, gendarmes, settlers and prison officers,

2) and the cases of 11,000 persons – members of various counterrevolutionary organisations, former landowners, factory owners, former Polish officers, officials and escapees – arrested and accommodated in prisons in the western oblasts of Ukraine and Belorussia,

- should be examined under special proceedings and the highest penalty – shooting – imposed.

II. The cases are to be considered without summoning the arrestees and without presenting charges, without decisions to end investigations and regarding indictments according to the following procedure:

a) towards persons held in prisoner-of-war camps – on the basis of information provided by the NKVD Prisoner-of-War Administration,

b) towards arrested persons – on the basis of information from files provided by the Ukrainian SSR and Belorussian SSR NKVD.

III. Cases are to be considered and resolutions reached by a troika composed of

MERKULOV, KOBULOV and BASHTAKOV (Chef of 1 Special Department of the USSR NKVD).” What is striking in the above document is the fact that prisoners in “special camps” were automatically classified as “enemies” deserving the highest measure of justice and that decisions regarding their fate were linked to decisions regarding the fate of the arrested civilians, persons with totally different status. We do not know how the decision-making process, ending in the proposal to treat such varied groups of people in an identical manner, took place. Nevertheless, it should be noted that insofar as the earlier concept, based on the USSR’s usurped right to judge Polish citizens for their conduct on the territory of the Polish State prior to the attack by the USSR (the case of Stefan Olejnik) envisaged the handing down of sentences upon them “for their past deeds,” the proposal of Lavrentii Beria uses the planned future activity of prisoners as the chief motive for imposing the supreme measure of justice upon them. Therefore, the proposal to murder them was a preventive measure intended to prevent the rebirth of Polish national aspirations which, obviously, had to be directed also against the USSR as an aggressor and invader, and therefore possessed an “anti-Soviet” dimension.

It still remains unexplained what categories of prisoners out of the total 18,632 held in prisons in the so-called western oblasts of Ukraine and Belorussia were excluded from planned shooting, resulting in a decrease in the number of those due to be executed to about 11,000.

Lavrentii Beria’s idea was approved by the following Politburo members: Josef Stalin, Kliment Voroshilov, Vyacheslav Molotov, Anastas Mikoyan, Mikhail Kalinin and Lazar Kaganovich. The signatures of the first four appear on the document, whereby Stalin’s signature precedes the word “For.” Also, the annotation “Kalinin – for,” “Kaganovich – for” appears on the margin of page one of Beria’s draft.

On 5 March 1940, the Central Committee Politburo of the ACP (B) issued “Decision of 5.III.40” with the following content:

“I. Instructions to the USSR NKVD:

- 1) The cases of 14,700 prisoners of war – former Polish officers, officials, landowners, policemen, intelligence agents, gendarmes, settlers and prison officers,
- 2) and the cases of 11,000 persons – members of various counterrevolutionary organisations, former landowners, factory owners, former Polish officers, officials and escapees – arrested and accommodated in prisons in the western oblasts of Ukraine and Belorussia,
- should be examined under special proceedings and the supreme penalty – death by shooting – should be imposed.

II. The cases are to be considered without summoning the arrestees and without presenting charges, and decisions to end investigations and regarding indictments are to be made according to the following procedure:

- a) towards persons held in prisoner-of-war camps – on the basis of information provided by the NKVD Prisoners-of-War Administration,
- b) towards arrested persons – on the basis of information from files provided by the Ukrainian SSR and Belorussian SSR NKVD.

III. Cases are to be considered and resolutions reached by a troika composed of Merkulov,

Kobulov (the name "Kabulov" was mistakenly given in the original – prosecutor's note) and Bashtakov (Chief of 1 Special Department of the USSR NKVD)."

The situation of the persons arrested by the NKVD and placed in prisons in the so-called western oblasts of Ukraine and Belorussia should be examined in the context of the ACP (B) Central Committee Politburo decision of 5 March 1940. The first arrests on these territories were carried out by Chekist-operational groups which followed the Red Army units. Subsequently, arrests were carried out by NKVD state structures formed on the basis of the above groups (NKVD oblast and regional administrations, NKVD road and transportation departments, NKVD Border Forces). The arrests carried out after the Soviet invasion of Poland, described in propaganda as a state with a "fascist" system, were intended to liquidate persons associated with the state apparatus (Polish Army officers, policemen, soldiers of the Border Defence Corps, judges and prosecutors), representatives of the "exploiting classes" (the aristocracy, land gentry, factory owners, wealthy farmers), members of parties and social organisations regarded as "anti-Soviet" (Polish Socialistic Party, National Party, the Bund, Organisation of Ukrainian Nationalists, Union of Riflemen, Union of Legionaries etc.). A large category of arrestees comprised people detained while attempting to cross the "border" established by the USSR and Third Reich in the Treaty of Friendship and Borders of 28 September 1939 (so-called escapees), as well as members of anti-Soviet conspiratorial organisations which were formed in large numbers on the eastern territories of the Second Republic after 17 September 1939.

The arrestees were placed in prisons created by the NKVD in various places in eastern Poland. The best known prisons were those in Białystok, Grodno, Brześć, Głębokie, Wilejka, Baranowicze, Pińsk, Łuck, Równo, Drohobycz, Tarnopol, Stanisławów and Lwów. According to the above-quoted note from Beria to Stalin dated 5 March 1940, there was a total of 18,632 arrestees in prisons in the so-called oblasts of Western Ukraine and Belorussia, comprising:

"former officers - 1 207

former policemen, intelligence agents and gendarmes - 5 141

spies and saboteurs - 347

former landowners, factory owners and officials - 465

members of various counterrevolutionary and insurgent organisations

and various counterrevolutionary elements - 5 345

escapees - 6 127".

The liquidation of prisoners in the three "special camps," in pursuance of the ACP (B) Politburo decision of 5 March 1940 proceeded as follows:

Kozelsk – on 3 April 1940, the removal of prisoners began on the basis of lists of names established as a result of the work of the troika. The rail transports were directed to Gniezdowo station, some 18 km. from Smolensk, but according to some sources they were also directed to Smolensk itself (where they were to be murdered inside an NKVD prison and in the basement of the NKVD headquarters in Smolensk). From Gniezdowo, the prisoners were taken in trucks to an NKVD recreation centre in Katyn Forest. There, they were killed by pistol shots in the back of the head. Some of them were bound with rope or wire before being executed. The bodies were buried in previously dug trenches. Not less

than 4,410 prisoners from the Kozelsk camp died.

Starobelsk – the removal of prisoners by rail on the basis of lists began on 5 April and ended on 12 May 1940. Individual groups of prisoners were taken to Kharkov, where they were placed in the basement of the NKVD prison. There, they were killed with pistol shots below the back of the head. The bodies were buried in trenches on the territory of the NKVD sanatorium in region 6 of the forest-park zone, some 1.5 km, from the village of Pyatikhatka near Kharkov.

Not less than 3,739 prisoners from Starobelsk were executed in Kharkov.

Ostashkov – on the basis of lists received from Moscow, the prisoners were taken to the NKVD prison in Kalinin on 5 April 1940, where they were killed by shots to the back of the head in a specially prepared cell. The bodies were taken to Mednoye and buried in previously-prepared trenches. Not less than 6,314 prisoners from Ostashkov were murdered.

It should be noted that on instructions from the Moscow authorities, during the process of “relieving” the camps of Kozelsk, Starobelsk and Ostashkov, as the documents described it, some prisoners were excluded from execution. This depended on various circumstances: efforts by the German authorities to release some prisoners, similar action by the Lithuanian Mission, instructions from Beria’s deputy – Vsyevolod Merkolov, and orders from Soviet intelligence.

A total of 395 prisoners in “special camps” were saved in this way: 205 from Kozelsk, 78 from Starobelsk, and 112 from Ostashkov. Among the potential victims of the atrocity there was only one prisoner, Stanisław Swianiewicz, professor from the Stefan Batory University in Wilno and a prisoner of Kozelsk, who was loaded on the prisoner transport and not removed until it had reached the station at Gniezdowo. The remainder did not reach the “death transports” – they were taken to the camp at Yukhnov.

As for the manner of implementing the ACP (B) Central Committee Politburo decision of 5 March 1940 regarding the shooting of 11,000 prisoners, it has to be admitted that information on this subject is fragmentary. It is certain that the original decision was adjusted downwards, so that in the end not 11,000 prisoners were murdered, but 7,305. Out of this number, 3,435 came from Western Ukraine and 3,870 from Western Belorussia. However, it is necessary to investigate the hypothesis put forward by some researchers whereby the ACP (B) Politburo decision of 5 March 1940 was implemented on the basis of two documents, namely the letter from Beria to Kaganovich on 21 March 1940 on the subject of preparing carriages for prisoners for the purpose of “carrying out an urgent operating task”; and Beria’s note of 22 March 1940 ordering the relocation of 3,000 prisoners held in prisons in Lwów, Równno, Wołyn, Tarnopol, Drohobycz and Stanisławów to prisons in Kiev, Kharkov and Kherson; and the relocation of 3,000 prisoners from Brześć, Wilejka, Pińsk and Baranowicze to the prison in Minsk.

Our knowledge of the extermination of the prisoners held in prisons in so-called Western Ukraine and Western Belorussia is different. Concerning those held in Western Ukraine, lists of names (death lists), described as the Ukrainian Katyn List, have been disclosed. However there is no clear indication of the manner in which these prisoners died. The site of their burial may be indicated by a "licence to drive mechanical vehicles" issued to

Franciszek Paszkiel, whose name appears in the above lists. This document was retrieved during the exhumation of victims of Stalinist repression in Bykovnia outside Kiev. According to the findings, Franciszek Paszkiel was arrested by the NKVD Administration in the Mlynów region and placed in the prison in Równo, where from he was taken to Kiev on 31 May 1940. However, this was the only incontrovertible piece of Polish evidence, for although other numerous objects belonging to Polish citizens were unearthed during the exhumation in Bykovnia, none of them provided any indication that this was the burial site of the victims of the decision of 5 March 1940.

The next indication of the site of the burial of the inmates of prisons in so-called Western Ukraine may be a sentence in a historical treatise whereby objects belonging to Stanisław Malczewski, appearing on the so-called Ukrainian Katyn List under no. 1838, were found at Kharkov. This information will be examined during investigative proceedings.

When trying to determine other places where prisoners from so-called Western Ukraine were executed and buried, one should also consider information contained in the decision to discontinue investigations issued by the Military Prosecutor's Office of Western Ukraine, no. 50-0092, on 25 June 2001, from which it transpires that the remains of 270 unidentified Polish officers are buried in Kiev. At present there is no clear evidence that these officers belonged to the 7,305 Polish prisoners executed in pursuance of the extermination decision of 5 March 1940.

It is not possible to establish how the ACP (B) Politburo decision of 5 March 1940 was implemented regarding the extermination of prisoners held in Western Belorussia because there is insufficient information on this subject. In particular, no lists of names have been found (this missing list is described as the Belorussian Katyn List), nor any clear evidence of where the executed persons were buried. However, information on the discovery of objects belonging to Polish citizens during exhumation work by the Prosecutor's Office of the Republic of Belorussia at Kuropaty near Minsk in 1988 will be examined during investigations. This may indicate that victims from the so-called Belorussian Katyn List were buried at Kuropaty.

The current level of historical knowledge provides a basis on which to state that not less than 21,768 Polish citizens were the victims of the ACP (B) Politburo decision of 5 March 1940. Determining the exact number of Polish citizens who were shot will be one of the purposes of the investigations to be commenced on the basis of this present Decision.

When describing the whereabouts of the prisoners murdered on the basis of the above decision of 5 March 1940, one should consider the fate of their families.

This fate was determined even before Lavrentii Beria put forth his idea of shooting the prisoners during the ACP (B) Politburo session on 2 March 1940. During the session, the following resolution was adopted:

„(...) 2. Instructions to the USSR NKVD:

a) All the families of the former officers of the Polish army, policemen, prison wardens, gendarmes, intelligence agents, former landowners, factory owners and officials of the Polish state apparatus, currently in prison camps, a total of 22,000-25,000 families, are to be deported to the regions of the Kazakh SSR by 15 April, for a period of 10 years (...)"

The above quoted extract from the resolution shows that already 3 days before the

emergence of L. Beria's proposal, civilian prisoners and prisoners of war were accorded equal treatment at least as far as their families are concerned. As a result of the ACP (B) Politburo resolution of 2 March 1940, over 60,000 people were deported to Kazakhstan.

The above historical information on the fate of Polish prisoners of war from the camps at Kozelsk, Starobelsk and Ostashkov and on civilians kept in prisons in the so-called western oblasts of Belorussia and Ukraine is based on the results of research derived from material from various sources, especially the documentation from Russian institutions and state archives given to Poland by the Russian Federation in the 1990's, and subsequently published in a joint treatise by the Polish and Russian archival staff under the title "Katyn - documents of an atrocity." What is more, the facts cited above fully coincide with the results of the exhumation work following the discovery of the mass graves by the Germans in Katyn in 1943, and especially with the findings and documentation of the International Medical Commission, composed of experts in forensic medicine and criminology, which visited Katyn during the period 28 to 30 April 1943, and with the findings of Polish Red Cross delegates who were present at the site and with the report of the Polish Red Cross Technical Board, which carried out exhumation work. The facts have also been confirmed by the contents of court proceedings that took place in the 1990's by the Polish Prosecutor's Office within the framework of international legal aid, case no. PR I Oz 183/91, for the needs of the Chief Military Prosecutor's Office of the Russian Federation in case no. 159 regarding the Katyn Massacre. These proceedings included the questioning of several hundreds witnesses who spoke out on the subject of the camps at Kozelsk, Starobelsk and Ostashkov and prisons on Poland's eastern territories, as well as on the places of extermination of the Polish prisoners of war and civilians in these camps and prisons. They have also been confirmed by the results of joint exhumation work by the Polish and Russian prosecutor's offices in Kharkov and Mednoye in July and August 1991 and by the documentation prepared during this work, describing the human remains and objects discovered.

In the light of the above evidence, it is an incontrovertible fact that the mass homicide of Polish citizens - prisoners of war and civilians - in 1940 was an atrocity that was planned by the highest party and state authorities of the USSR and implemented on their orders by NKVD units under their authority.

When determining the legal qualification of the circumstances of the ACP (B) decision of 5 March 1940 and its implementation, one must consider both international criminal law and domestic criminal law.

Regarding the above indisputable facts connected with the Red Army's incursion on Polish territories, it is obvious that on 17 September 1939, the USSR, acting in breach of international law, performed an act of aggression against Poland, and subsequently, in an unlawful manner, took the lives of thousands of Polish prisoners of war and citizens, this constituting a war crime.

Examining the situation that occurred after 17 September 1939, it must be said that the USSR aggression was, as stated earlier, in breach of a series of international treaties binding on both sides, including the bilateral non-aggression pact of 25 July 1932, in which Poland and the USSR relinquished the use of war as an instrument of national policy.

Within the meaning of this treaty, “war” meant any act of aggression, “even if performed without a declaration of war and without any of its possible manifestations.” So, in the light of these provisions, a formal declaration of war by the USSR was not the prerequisite for a de facto state of war.

At this point reference must also be made to the Convention of 3 July 1933 on a definition of an attack, signed by Poland and the USSR. In article II, this Convention defines an aggressor thus: “(...) a state will be regarded as an aggressor if it performs one of the following actions:

- 1) A declaration of war against another state;
- 2) Incursion onto another country’s territory with the use of armed forces, even if carried out without a declaration of war (...)”.

Particular attention should be paid to art. III of this Convention, saying that: “No political, military, economic or other considerations may excuse or justify an attack as described in article II”.

Therefore, also from this angle, the USSR armed aggression against Poland on 17 September 1939, being a breach of Poland's territorial inviolability, marked the de facto start of military action against Poland, at the same time causing a state of war to exist between these countries.

The USSR attempted to justify its conduct towards Poland on the grounds that its actions were for the sake of its own security in the face of the German invasion of Poland, it wished to come to the aid of the Ukrainian and Belorussian populations and that the treaties that bound the USSR to Poland “had been rendered void” because as a result of its defeat, the “Polish state and its government had ceased to exist.” Current historical knowledge justifies the view that the USSR government’s declaration was clearly not in conformity with the actual state of affairs; despite the USSR’s claims, Poland’s President, Government and Supreme Command were still operational within the state’s borders, and Polish forces were offering armed resistance to the German army and the arriving Red Army. Therefore, the factors that determined the existence of the Polish State were still present.

The fact that a state of war existed between Poland and the USSR after 17 September 1939 is certified by the fact that the Soviet authorities described Polish Army soldiers as “prisoners of war” and that a special Prisoner-of-War Administration was created inside the NKVD to handle the entire problem of prisoners. This reflects the conviction of USSR state officials that a war was being waged with Poland.

The entry of the Soviet forces into Poland on 17 September 1939 and the start of war meant that its participants were under a duty to adapt to the rules of military law, including the provisions of treaties and the principles of international law. At this time, the basic precepts of international law were set forth in articles 4-20 of the Regulations governing the rights and customs of land warfare contained in the IV Hague Convention of 18 October 1907 (Journal of Laws 1927 no. 21 item 161) and the Geneva Convention of 27 July 1929 on the treatment of prisoners of war (Journal of Laws 1932 no. 103 item 866). These legal instruments codified the fundamental principles of military law.

The provisions of the Hague and Geneva Conventions set forth fundamental, general principles regarding the treatment of prisoners of war. Under these principles, prisoners of

war remained under the care of the enemy state, and not under the care of the persons or units who had captured them. Prisoners of war are to be treated humanely at all times and especially, as stated in art. 2 of the Geneva Convention, "they are to be protected from acts of violence, insults and public inquisitiveness. Acts of vengeance against them are prohibited." Prisoners of war are entitled to a respect of their persons and dignity. The provisions of the above international instruments also regulate the conditions under which prisoners of war are to be held and the possibility of applying penal sanctions against them. Regarding this last issue, it was generally believed that prisoners of war are subject to the regulations and orders that apply to the army of the country under whose authority they are held. Nevertheless, in the application of disciplinary measures, corporal punishment and cruelty in any form was forbidden. Also forbidden was the application of collective punishment for the deeds of an individual. Special protection was accorded to the rights of prisoners of war in court proceedings, whereby they were entitled to defence and to the presence of representatives of the caretaker powers in their proceedings. They also had a guaranteed right of appeal against their sentences on the same level as the members of the armed forces of the country in which they were detained. This means that the soldiers captured by the Red Army were entitled to prisoner of war status, and therefore to the full protection reserved for prisoners of war, including the protection afforded by the provisions of the above-mentioned IV Hague Convention of 1907 and Geneva Convention of 1929.

In 1939, the Republic of Poland was party to both these instruments. However, the fact that the USSR was party neither to the IV Hague Convention and to the Regulations appended thereto, nor to the Geneva Convention, did not release that country from the duty to respect the universally binding principles of international customary law, which existed side by side with treaty obligations; in fact contractual obligations were simply principles of customary law set down in writing. In the light of doctrine and international jurisdiction including the verdict of the Nuremberg International Military Tribunal, the fact that a certain country was not a party to the above conventions did not excuse its citizens who had perpetrated war crimes or crimes against humanity from criminal responsibility for their crimes. For these conventions confirmed in writing the universal principles that are binding upon all civilised nations. The principles laid down in the Hague and Geneva Conventions regarding military law should also be juxtaposed with the laws and customs of war that are universally binding whether or not the above Conventions have been formally recognised by a particular state.

In this place, one should also quote a statement in the preamble to the IV Hague Convention whereby "in cases not covered by binding regulations (...), the population and the warring parties remain under the care and protection of the principles of the law of nations emanating from the customs set out between civilised nations, and from the principles of humanitarianism and social conscience." Therefore, this provision was clearly intended to extend the protection of international law to the widest circle of people possible, regarding the formal validity of the relevant international agreements.

Therefore, there is no doubt that the murder of Polish prisoners of war in 1940 was an unlawful act within the meaning of international law because it was a glaring violation of

art. 4, 23c and 50 of the Regulations regarding the laws and customs of land warfare appended to the IV Hague Convention of 18 October 1907 on the laws and customs of land warfare, and a violation of art. 2, 46, 61 and 63 of the Geneva Convention of 27 July 1929 on the treatment of prisoners of war – therefore it was a violation of legal instruments which, because they had been recognised as generally binding principles of international law, were applicable to the whole of international society in 1940, and therefore to the Soviet Union as well.

In the light of the above, it is also completely justified to say that the extermination of the Polish prisoners of war was a war crime in the strict sense of the term, within the meaning of art. VI b of the Charter (Statute) of the International Military Tribunal, set up in pursuance of an international Agreement to investigate and punish for the chief war crimes of the European Axis and signed in London on 8 August 1945 by Great Britain, the United States of America, USSR and France (Journal of Laws 1947 no. 63 item 367), i.e. a violation of military laws and customs. "Such a violation shall include, but shall not be limited to (...) the murder or ill treatment of prisoners of war or persons at sea (...)".

Furthermore, the Charter of the International Military Tribunal sets forth two types of crime that are subject to the Tribunal's jurisdiction: crimes against peace (art. VI a of the Charter) and crimes against humanity (art. VI c of the Charter). In the context of the provisions of the Charter, the murders of the Polish civilian population by NKVD functionaries implementing the resolution of 5 March 1940 comply fully with the meaning of a crime against humanity as defined in art. VI c of the abovementioned Charter of the International Military Tribunal, which encompasses "murder, extermination, enslavement, deportation and other inhuman acts against any civilian population before or during a war, or persecution on account of politics, race or creed in the perpetration of any form which falls within the competence of the tribunal or in connection with it, whether or not the crime was in compliance with law of the country in which it occurred." Regarding the terms used in the Charter of the International Military Tribunal, it should be noted that the Charter did not introduce any new type of crime to existing terminology, but referred only to existing categories of crime already described in national penal codes. Therefore, the groups of war crimes in the strict sense of the term and the category of crimes against humanity contain the same descriptions of criminal acts taken from hitherto known categories such as murder, extermination and persecution. It should be noted that the Statute of the Nuremberg Tribunal also contained provisions dealing with the criminal responsibility of persons who committed crimes on the basis of orders from their superiors; art. VIII of the Statute stated unequivocally that the action of a perpetrator of a crime which falls within the scope of the Tribunal and which was carried out in compliance of an order from his government or superior did not exclude him from criminal responsibility, but could merely be used to commute the sentence.

The principles of international law adopted in the Statute of the Nuremberg Tribunal and subsequently expounded in the verdict by that Tribunal were confirmed in the UN General Assembly resolution no. 95(I) of 11 December 1946. That resolution also declares that genocide is a crime against international law, contrary to the spirit and objectives of the United Nations, and condemned by the civilised world. The term "ludobójstwo" is the Polish

equivalent of the English word “genocide”, which was introduced to legal language and practice towards the end of World War II.

The subject of genocide was expounded in the Convention on the prevention and punishment of crimes of genocide, adopted by the UN General Assembly on 9 December 1948. In art. II and III, this Convention lay down the definition of genocide and the punishable forms thereof, and placed the parties under an obligation to make it enforceable by introducing suitable legal provisions to their domestic legislation (art. V of the Convention).

Because of the circumstances of the Katyn Massacre, i.e. the fact that it was planned down to the very last detail by the highest party and state authorities of the USSR and carried out by the state apparatus under their authority, and on account of the scale and cruelty of the extermination of thousands of innocent people and the motives of the perpetrators, there is justification in considering the permissibility of applying the qualification of genocide within the meaning of art. 11 of the convention of 9 December 1948.

It should be noted that the application of the conventional term genocide to the events that are to be investigated may arouse reservations especially with regard to an assessment of the motives of the perpetrators, i.e. whether their act was committed with the intention of eliminating the entire population or parts of it, and whether the provisions of the Convention are retroactive.

Regarding the first matter, i.e. the motives of the perpetrators, in order to reach a conclusion it is necessary to refer once again to the contents of the ACP (B) Politburo decision of 5 March 1940 and its definition of Polish citizens as “avowed, incorrigible enemies of Soviet authority.” In this context, it becomes fundamentally important to determine the circle of victims of this Massacre and find out whether the motive of those who issued the order on 5 March 1940 was to eliminate Polish citizens on account of their nationality. It is generally known that the overwhelming majority of the prisoners of war and civilians selected for extermination were of Polish nationality. There were also members of other nationalities, including Jews, Ukrainians and Belorussians, but they all constituted a group of Polish citizens. One should bear in mind that the Republic of Poland was a multinational state in which various nationalities existed side-by-side and were treated under the law as “ethnic components” of the Polish Nation. This formulation was adopted by Polish criminal law doctrine in a commentary to art. 152 of the 1932 Criminal Code (“Whoever publicly insults or defames the Polish Nation or State...”), which included in the legal concept of “Polish Nation” all the citizens of the Polish State, regardless of their nationality.

The selection of persons for extermination was also characterised by the fact that they formed part of the intellectual elite of the Polish Nation which, under the appropriate conditions, could assume leadership. It transpires from the surviving documentation on the prison camps at Kozelsk, Starobelsk and Ostashkov, where, as was mentioned earlier, “reeducational” tasks were undertaken, that this group of people did not change its attitudes and views and was determined to struggle for the return of its Fatherland’s independence. Hence, L. Beria’s note of 5 March 1940, recommending the shooting of the Poles, contained the remark whereby the prisoners of war expect “liberation in order to be

able to join the struggle against Soviet authority." The physical elimination of these people was meant to prevent the rebirth of Polish statehood based on their intellectual potential. Therefore the decisions of elimination were taken with the intention of destroying the strength of the Polish Nation and liquidate its elites. This thesis is confirmed by the careful selection of candidates to be shot, out of hundreds of thousands of other Poles in Soviet prisons and camps, on the basis of their social and professional status and their functions. Therefore one can conclude that the murder of Polish prisoners of war and Polish civilians by the NKVD was dictated by a desire to liquidate part of the Polish national group. Hence, this action assumed the status of genocide as described in art. II of the Convention on the prevention and punishment of the crime of genocide. The view whereby the extermination of Polish citizens is an act of genocide was also expressed in the USSR's stance during the trial of Nazi war criminals before the Nuremberg Tribunal after the end of World War II. On the 54th day of that trial, Prosecutor Yuri Pokrovskiy, deputy chief Soviet counsel for the prosecution, presented the Katyn Massacre as an atrocity that had taken the lives of 11,000 Polish victims and said that this Massacre was subject to the judgment of the International Military Tribunal in Nuremberg. Hence, such a stance by the Russian side was based on a recognition of the murder as a crime that falls within the scope of the International Criminal Tribunal on account of its seriousness, in other words a crime which, on accounts of its particular nature and the circumstances in which it was perpetrated, should be judged according to international criminal law. Having conducted evidentiary proceedings which did not confirm the opinion that the atrocity was carried out by the Germans, the Nuremberg Tribunal in its verdict did not make any substantive reference to the charge regarding the Katyn Massacre. Therefore, in view of the fact that the murder of Polish prisoners of war and civilians has not been clarified in law, there exist certain prerequisites for initiating and conducting investigations into this matter.

Referring to the problem of the retroactive application of the terms of the aforementioned Convention, which was adopted on 9 December 1948, in other words several years after the Katyn Massacre, reference should be made to the preamble to the Convention: "The contracting parties, having considered the declaration in the UN General Assembly resolution No. 96/I of 11 December 1946 whereby genocide is a crime against international law, contrary to the spirit and objectives of the United Nations and condemned by the civilised world: mindful of the fact that genocide has caused enormous losses to the population in all periods of history; in the conviction that international cooperation is essential in order to liberate mankind from this hideous calamity; agree to the following provisions (...)". It transpires from these opinions that genocide was recognised as an atrocity under international law, which existed before it was formally codified in the Convention. Therefore there is justification in saying that the ban on genocide, confirmed in the adoption of the Convention on the prevention and punishment of the crime of genocide, existed as a legal principle before the Convention was adopted, and possessed the nature of a principle of international customary law. Therefore the Convention itself was not ex post legislation, for it did not lead to punishment for acts of genocide which were not crimes at the moment when they were perpetrated. Genocide, as an act contrary to the universal norms that are binding upon all civilised nations and as a crime on the

basis of international customary law, was given a legal definition in 1946 which reflected the dimensions of this atrocity perpetrated during World War II. Such a stance permits the view whereby the crime of genocide, being a qualified form of crime against humanity and not constituting a separate type of crime, already existed at the moment when the Katyn Massacre was committed.

The above statements regarding the legal qualification of the Katyn Massacre also require reference to the statute of limitations of war crimes and crimes against humanity. The Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted by the UN General Assembly on 26 November 1968 (Journal of Laws 1970 no. 26 item 208, annex), in article I, which refers to the definition of war crimes and crimes against humanity contained in the Statute of the Nuremberg International Military Tribunal of 8 August 1945, states that these crimes are not subject to statutory limitations, whatever the date on which they were committed. As indicated by its preamble, this Convention possesses a declaratory nature, i.e. it conforms the existence in international criminal law of the principle, hitherto unwritten but nevertheless binding, whereby the crimes listed therein are not subject to the statute of limitations. Therefore the problem of the retroactive nature of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity does not exist. This permits the application, on the basis of this Convention, of the principle of non-limitation of war crimes and crimes against humanity as legal norms that are universally binding with respect to the Katyn Massacre, which combines the characteristics of a war crime and a crime against humanity. One should note that Poland's ratification of the above Convention impose upon Poland, as a contracting party, the obligation to take essential steps to ensure the enforceability of the provisions regarding the non-application of limitations to the investigation and punishment of the crimes set forth in art. I and II of this Convention (art. IV). The above obligation was fulfilled by introducing appropriate provisions to the 1997 Polish Constitution, which states in art. 43 that "there shall be no statute of limitation regarding war crimes and crimes against humanity," and to the Polish Criminal Code (art. 105 § 1 of the Criminal Code of 1997). It should be emphasised that neither the 1968 Convention nor Polish law do not exempt any state whose authorities committed these atrocities from the applicability of the Convention's provisions. Such a view whereby crimes against peace and humanity and war crimes are not subject to the statute of limitations also form the basis of art. 4 par. 1 of the Act of 18 December 1998 on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws 1998 no. 155 item 1016, subsequently amended).

Reaching conclusions on the basis of Polish criminal law, it should be stated that the current state of the law provides the basis on which to pursue criminal proceedings with regard to the Katyn Massacre. For this deed was directed against Polish citizens, which is considered a satisfactory basis on which to apply Polish criminal sanctions by earlier criminal codes (art. 5 of the Criminal Code of 1932, art. 114 of the Criminal Code of 1969), and by the current Criminal Code (art. 110 § 1 of the Criminal Code of 1997). Furthermore, the killing of any prisoner of war and any civilian was prohibited both under the terms of Polish legislation (art. 225 § 1 of the Directive by the President of the Republic of Poland of

11 July 1932, Criminal Code) and under the terms of Soviet legislation (art. 137 of the Criminal Code of the RSFSR, effective as of 1 January 1927). Therefore the so-called condition of dual illegality is fulfilled (a deed committed by a perpetrator abroad must be punished as a crime both under Polish criminal law and a law binding at the place and time of its committing), which under art. 110 § 1 of the Criminal Code of 1997 and art. 111 § 1 of the Criminal Code of 1997, allows the Polish authorities to investigate and punish the perpetrators of crimes against the interests of the Republic of Poland or against Polish citizens even if the perpetrators are foreigners and their deeds were committed abroad. It can be said that under the terms of art. 114 § 1 of the Criminal Code of 1997, the fact that criminal investigations into the Katyn Massacre were previously conducted by the Chief Prosecutor's Office of the Russian Federation is no obstacle to the initiation and conduct of investigations into the same deed by the Polish law-enforcement authorities.

When determining the legal qualification of the Katyn Massacre, it must be realised that the basis of this legal qualification was provided by those provisions of domestic law which are the equivalent of the provisions contained in the international conventions on the punishment of war crimes and crimes against humanity and which fulfil Poland's obligations to adapt her domestic law to the standards of international law.

Poland's commitment to punish breaches of international law regarding armed conflicts was expressed by introducing art. 120-126 to the 1997 Polish Criminal Code, and her commitment to punish crimes against humanity was reflected in the introduction of art. 118 and 119 to the 1997 Criminal Code.

It should be noted that art. 118 § 1 of the 1997 Criminal Code, whose wording fulfils Poland's commitments under the UN Convention of 9 December 1948 on the prevention and punishment of the crime of genocide, applies to a crime of genocide which is regarded as a qualified (on account of the perpetrator's intention – to eliminate the whole or part of the group described in the provision) type of crime against humanity. Apart from the groups included in the 1948 Convention, i.e. national, ethnic, racial or religious groups, protection under art. 118 § 1 of the Criminal Code is also accorded to political groups and groups with a specific world outlook. The broader scope of interpretation than the one provided by the Convention on the prevention and punishment of the crime of genocide fully includes the Katyn Massacre for, as was said above, the perpetrators performed this atrocity with the intention of liquidating a part of the Polish national group.

Because the Katyn Massacre is also a war crime, the provisions of art. 123 § 1 point 3 and 4 of the 1997 Criminal Code shall apply to it; these provisions protect prisoners of war and the civilian population of occupied territory who are exposed to particular danger because of an armed conflict, including loss of life. An atrocity under art. 123 § 1 of the 1997 Criminal Code is a qualified form of the crime of genocide; in this case, the facts that qualify it are the time at which the crime was perpetrated, in other words the period of military activities, and the fact that the persons affected were under the special protection of international law.

The application of the above provisions as the basis for the criminal-legal qualification of the Katyn Massacre also requires consideration whether the adoption of these provisions conflicts with the ban on the retroactive application of criminal law. On the basis of hitherto

jurisdiction, the principle of *lex retro non agit* can be said to be breached if a perpetrator has been convicted on the basis of a provision which introduces a given type of forbidden deed and which came into effect after the deed was perpetrated, but :

- the deed was not forbidden at the moment of its perpetration,
- it envisages more severe criminal penalties,
- it abolishes earlier circumstances which determined the illegality of the deed and the fault of the perpetrator.

In view of the above, and considering the fact that when the murder of Polish prisoners of war and civilians was carried out in 1940 each individual deed of homicide was a fulfilment of the lawless state described in art. 225 § 1 of the 1932 Criminal Code, and the provisions of the current code applied on the basis of international law are, of course, fairer to perpetrators, a consideration of the question of retroactivity should be restricted to a comparison of the scope of these crimes. The structure of art. 118 § 1 and 123 § 1 point 3 and 4 of the 1997 Criminal Code, in juxtaposition with the terms of art. 225 of the 1932 Criminal Code, no doubt possess subject-object limitations, expressed in the directionality of the action of (art.118 § 1 of the Penal Code – for the purpose of eliminating...), the circle of entities accorded legal protection (national, ethnic, racial, political and religious groups, groups with a specific world outlook, prisoners of war, civilians in occupied territory) and of the circumstances in which the deed was carried out (a breach of the standards of international law). Therefore, the scope of application of the rules currently in force is considerably narrower. Despite the fact that above provisions are not the direct equivalents of the regulations that were in force when the Katyn Massacre was committed, the above circumstances allow them to be used to qualify the atrocity. Therefore this is not a breach of the constitutional guarantee of *Lex retro non agit*.

Furthermore, it should be noted that both Poland and the USSR (whose successor on the international arena is the Russian Federation) signed the International Pact on Civil and Political Rights of 19 December 1966 (Journal of Laws 1977 no. 38 item 167, annex) which, in art. 15 par. 1, enshrines the principle of *lex retro non agit* and, in art. 2, contains the following formulation referring to above principle: “Nothing in this article shall limit the trial and punishment of any person for any deed or omission which, at the moment of its perpetration was a crime under the general principles of law recognised by international society.” In the domestic legal order, this principle is enshrined in art. 42 par. 1 of the Polish Constitution, whereby “Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.”

Therefore, the punishment on the basis of art. 118 § 1 of the 1997 Criminal Code and 123 § 1 point 3 and 4 of the 1997 Criminal Code of those who committed the extermination of Polish citizens in 1940 is not a breach of the principle of *lex retro non agit*, also because the commitment of this Massacre was in breach of the international law that was in force at the time of its commitment, and which is one of the sources of binding law in the Republic of Poland.

One can present a similar legal argument regarding the message in art. 1 point 1 of the Decree of 31 August 1944 on the exercising of punishment for Nazi-Fascist criminals guilty of the murder and torment of the civilian population and prisoners, and for traitors to the Polish Nation (Journal of Laws 1946 no. 69 item 377, subsequently amended). In the light of the facts presented above, the conduct of the USSR state officials who implemented or realised, at every administrative level, the decision of 5 March 1940 on the extermination of Polish prisoners of war and civilians is a fulfilment of art. 1 point 1 of the aforementioned Decree because these perpetrators participated in the killing of civilians and prisoners of war „for the benefit of the authorities of the German state or its ally.”

The acceptance of this qualification is justified by the nature of relations between the Third Reich and the USSR before the outbreak of World War II and during the extermination of the Polish prisoners of war and civilian population. These relations were based on the bilateral agreements concluded between the two states in August and September 1939. In view of the unimpeachable historical facts it is justified to recognise the USSR and Third German Reich in 1940 as states that were allied to each other and cooperating with each other.

In this case, too, the application of the qualification under art. 1 point 1 of the aforementioned Decree is not hindered by the entry into effect of the subject legal instrument on 13 September 1944, in other words after the Katyn Massacre had been committed. For the very name and purpose of this decree suggest that it is retroactive. This is fully justified by the extraordinary historical circumstances, including the type and extent of the atrocities committed during World War II; the need to apply new legal formulations to them and treat them with particular severity on account of their nature; and the simultaneous factual impossibility of the implementation of justice by the Polish State during the period when these atrocities were committed. However, it should be noted that the type of deeds included under art. 1 point 1 of the decree (participation in the killing of members of the civilian population, military personnel or prisoners of war with the intention of assisting the authorities of the German state or its ally) were already unlawful and punishable when they were committed. For the deliberate and unlawful killings satisfied the description of homicide set forth in art. 225 § 1 of the 1932 Criminal Code, therefore they were penalised on the date on which the Katyn Massacre was committed. Thus the August decree did not lay down that the deed was unlawful, but merely laid down the particular penalty for deeds that were already unlawful when they were committed. Therefore it created a new legal construction which reflected the nature of the crimes committed during World War II and facilitated the application of the appropriate legal qualification, while at the same time sharpening the penal sanctions in view of the circumstances in which the atrocity was committed. Therefore, the introduction of the August Decree with retroactive effect was limited only to the sphere of penal sanctions, and not to the extent of lawlessness. In this place it should be said that art. 5 of the August Decree defined the criminal responsibility of persons who committed crimes in the carrying out of an order in a similar way to the provisions of the Statute of the Nuremberg Tribunal – an action or omission by a perpetrator committed under threat or in pursuance of an order or directive did not release him from criminal responsibility, but could only be applied by

he court as a basis on which to apply an extraordinary commutation of the sentence. Hence, the above arguments also justify the application of art. 1 point 1 of the above Decree to the Katyn Massacre, also in a cumulative sense.

As has been shown above, it remains an indisputable fact that the murder of the Polish prisoners of war being held in war camps in Ostashkov, Starobelsk and Kozelsk, and of the civilians held in prisons in so-called Western Ukraine and Belorussia was ordered by members of the political and state leadership of the former USSR and that the direct perpetrators of this murder were officials serving at various posts in the USSR NKVD. Therefore, in view of the circle of people suspected of committing this murder and the purpose for which they undertook this criminal act, it appears totally justified to qualify the atrocity not just as a war crime, crime against humanity, and a crime penalised under art. 1 point 1 of the August Decree; but also as a communist crime within the meaning of art. 2 par. 1 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws 1998 no. 155 item 1016, subsequently amended).

There is no doubt that the persons responsible for the atrocity, both those who issued the order and those who carried it out, were officials of the communist state – the Union of Soviet Socialist Republics. At the same time, as was shown above, the Katyn Massacre was a crime under the law that was binding at the time it was committed, both on the basis of Polish and on the basis of Soviet criminal legislation.

Obviously, determining the degree of responsibility of individual disclosed perpetrators of this atrocity will be possible after the full evidence has been gathered.

In this state of affairs, in view of the justified suspicion that officials of the communist state committed the above crimes, and in connection with the application of repression and other violations of human rights towards individuals with a different political orientation – these being offences under the Polish and Soviet criminal codes that were valid at the time they were committed – in the matter at hand, acting in pursuance of art. 45 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and art 303 of the Code of Criminal Procedure, it is necessary to commence investigations in order to comprehensively clarify the circumstances of the case, establish all the persons affected, and determine the degree of responsibility of the individuals who took part in the issue and implementation of the decision of 5 March 1940.

Therefore, the decision is reached as stated in the introduction.

Departamental Commission for the Prosecution
of Crimes against the Polish Nation

Prosecutor
(Małgorzata Kuźniar-Plota)

Instruction:

Pursuant to art. 305 § 4 of the Code of Administrative Procedure, the following are to be

notified of the start of the investigations:

those who submitted the notification of the crime -- copies of files

identified persons affected: because of the large number of persons acting as executors of deceased persons affected, they should be notified by means of announcements placed in two national dailies (pursuant to art.131 § 2 of the Code of Criminal Procedure)

Departmental Commission for the Prosecution
of Crimes against the Polish Nation

Prosecutor
(Małgorzata Kuźniar-Plotka)

30.11.2004