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# The power of words — on how the definitions of crimes in international criminal law lie at the crossroads of semiotics and manifest evil

**Abstract:** The power of words — on how the definitions of crimes in international criminal law lie at the crossroads of semiotics and manifest evil

Legal language is paradoxical: it is both open to interpretation and strict, often broad in meaning and specific in semantic content at the same time. Moreover, the legal language of criminal law is a reflection of axiological and moral values and assessments. The paper embraces that paradox and discusses two issues that stem from it in relation to international criminal law: the semantic challenges inherent in legal language pertaining to atrocity crimes and the entwined evolution of their criminal legal definitions. Its outset is the realization, that while the application of law by a court is predominantly an linguistic exercise, it must also provide specific, clear and axiologically sound solutions, absolutely necessary in the process of ascertaining the criminal responsibility of the individual. This phenomenon is especially evident in the legal language relating to international crimes, as it faces not only the challenge of being a strict definition of a crime, and thus bound to be clear and precise; it also must contend with the need to express manifest evil, as international crimes are often and rightly viewed as being singular in their heinousness. In eight parts, this article strives to present the challenges and evolution of the aforementioned issues.

**Keywords:** criminal law, international public law, genocide, war crimes, atrocity, legal interpretation, legal language, semantics, armed conflict

## Outlining the notion

There is something captivating in the relation between semantics and the law. In reality, a lawyer's work is primarily based on the perpetual discovery of word designation, the logic and syntax of language, and the systemic relations between linguistic intuition and legally prescribed meaning. This phenomenon is present in every legal discipline, and in fact it permeates much of modern legal philosophy, whether positivist, naturalist, or critical legal analyst.<sup>1</sup> Yet an overwhelming emotional and semantic value is prescribed by legal sciences to some terms more than others, and that mode applies primarily to the definitions of crimes utilized by international criminal law. Each concept defined therein — war crimes, crimes against humanity, crimes against peace, and most certainly genocide — evokes strong emotional responses, injects the recipient with powerful imagery and their commission is thought to be the ultimate stigma.<sup>2</sup> In essence, the very names given to the most severe of crimes induce a perlocutionary effect in their recipient. And while their semantic impact in common speech is profound, one must be mindful that their academically (by both legal and social sciences) prescribed meanings are obfuscated and controversial. This article strives to present an outline of their definitions and a few problems contained therein, as well as illuminating an overarching theme present in international law.

## The challenge of expressing manifest evil in normative terms

While common criminal acts are often viewed as shocking and traumatizing, they can never be truly compared to the heinous offences committed during armed conflict, ethnic cleansing, and illicit warfare. Man's capacity for evil realizes itself fully in acts designated as "international crimes," and yet international law only recently arrived at some semblance of meaning in their definitions. It is the case because such acts are as old as the world itself and their commission violates essential human values in breach of the prin-

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<sup>1</sup> See: H.L.A. HART: *The Concept of Law*. 3rd Edition. Oxford 2012, pp. 13—14, 124—131; R. DWORKIN: *Taking Rights Seriously*. Harvard 1979, pp. viii—ix, 1—13; J. NOWACKI, Z. TOBOR: *Wstęp do prawoznawstwa*. Kraków 2002, pp. 222—226; T. SPYRA: *Granice wykładni prawa: Znaczenie językowe tekstu prawnego jako granica wykładni*. Warszawa 2007, pp. 179—184.

<sup>2</sup> M.A. DRUMBL: *Atrocity, Punishment, and International Law*. Cambridge 2007, pp. 182—187.

principles of international humanitarian law and fundamental opposition to basic human rights.<sup>3</sup> Only recently has law, and specifically criminal law, become capable of expressing such evil in normative terms. Atrocities of the Boer War, the Herero Genocide of 1905, the Balkan Wars, and World War I and II should be treated as impulses which influenced the international community and compelled the latter to adopt a series of legislative acts and found the institutions intended to counteract those extraordinary crimes. In order to combat manifestations of mass criminality the international community established a dedicated legal branch, new types of crime definitions along with the names which proved necessary to describe the unusual acts and conduct, i.e. international crimes. Rafał Lemkin, while coining the notion of genocide, the most serious of such offences, rightly argued that new concepts require new terminology.<sup>4</sup> It would be difficult not to agree with his statement since it was only conceptualization and specification of old phenomena in terms of legal nomenclature that allowed to intertwine them into a system of rules and bans and describe with precision what exactly is permissible in the context of an armed conflict. This approach is all the more justified in light of the fact that violations of international humanitarian law and international criminal law are ever more often identified as relating to “systemic criminality” or “collective wrongdoing,”<sup>5</sup> which calls for the inclusion of such a widened and mass characterization in the definitions of respective crimes. In addition, these features are generally absent from definitions of crimes as prescribed in national criminal law systems, which makes them exceptional and points to an extraordinary character and complexity of international crime definitions.

Thus 20th century legal semiotics needed to adapt to the criminological uniqueness of international crimes, to their massive and atrocious character, as well as to the ultimate moral stigma linked to their perpetrators. And while some scholars propose to utilize general or generic names such as “atrocious crimes,” those notions are of no practical legal use, as the law needs a precise and differentiated terminology for the purposes of determining international and individual responsibility.<sup>6</sup>

The classification, terminology, and legal definitions relating to international crimes have remained controversial until the present day, even though

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<sup>3</sup> M. PŁACHTA: *Międzynarodowy Trybunał Karny*. Vol. 1. Kraków 2004, p. 358.

<sup>4</sup> R. LEMKIN: *Axis Rule in Occupied: Laws of Occupation — Analysis of Government — Proposals for Redress*. Washington 1944, p. 79.

<sup>5</sup> E. VAN SLIEDREGT: *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*. The Hague 2003, pp. 4—5; M.A. DRUMBL: *Atrocity, Punishment...*, pp. 3—6, 15, 26—29.

<sup>6</sup> D. SCHEFFER: “Atrocity Crimes Framing the Responsibility to Protect.” *Case Western Reserve Journal of International Law* 2008, Vol. 40 (1), p. 118.

they have been present in the legal language of international law since the middle of the 20th century.<sup>7</sup> For example, in Poland, one highly controversial issue is the legal qualification of the Katyn massacre. This controversy relates to an old dispute whether that massacre should be treated as a war crime, crime against humanity, or genocide. The Resolution by the Sejm of the Republic of Poland of 23 September 2009 commemorating the Soviet Union's invasion of Poland on 17 September 1939,<sup>8</sup> while referring to the victims and the situation of Middle and Central European countries, reads: *The organization of the system, the length and scale of the phenomenon attributed to those crimes, including the Katyn massacre, the features of genocide*. One must be aware, that in the Resolution, the Katyn massacre was not expressly called genocide. The text merely reads that it bore the *features* of genocide. In a similar vein, the declaration of the Delegation to the EU-Russia Parliamentary Cooperation Committee of 11 May 2010, sponsored by Polish Members of the European Parliament, accordingly refers to the Katyn massacre as *a war crime having the character of genocide*.<sup>9</sup> However, some earlier texts took a different and more measured approach. For example, in the Resolution by the Senate of the Republic of Poland of 14 September 2007, adopted on the 68th anniversary of the Soviet invasion of Poland,<sup>10</sup> it was pointed out that the Senate: "reminds of that tragic chapter in Polish-Russian relations, and rejects the attempts at counterfeiting history, trivializing communist crimes, refusing to call the Katyn massacre genocide." In another resolution by the Senate of the Republic of Poland adopted one year earlier on 26 April 2006 commemorating the anniversary of the Katyn massacre,<sup>11</sup> it was referred to merely as crime, without any additional qualification. In spite of some academic opinion to the contrary,<sup>12</sup> one would be extremely hard pressed to ascertain features of the crime of genocide in the Katyn atrocity. However, the legal, historical and political conundrum relating to the correct assessment of this one specific event clearly illustrates all of the dangers and normative pitfalls present in international criminal law.

The problem of correct nomenclature in relation to international crimes has also been encountered in the political debate on the Volhynia massacre.

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<sup>7</sup> T. IWANEK: *Zbrodnia ludobójstwa i zbrodnie przeciwko ludzkości w prawie międzynarodowym*. Warszawa 2015, pp. 25—30.

<sup>8</sup> *Monitor Polski* 2009 r., No. 63, item 831.

<sup>9</sup> [Available from: <http://www.europarl.europa.eu/delegations/en/d-ru/publications.html> (accessed: 14.03.2015)].

<sup>10</sup> *Monitor Polski* 2007, No. 64, item 723.

<sup>11</sup> *Monitor Polski* 2006, No. 32, item 349.

<sup>12</sup> See: K. KARSKI: "The Crime of Genocide Committed Against the Poles by the USSR Before and During WWII: An International Legal Study." *Case Western Journal of International Law* 2013, Vol. 45 (3).

The Resolution by the Sejm of the Republic of Poland of 12 July 2013 commemorating the 70th anniversary of the Volhynia crime and paying tribute to its victims<sup>13</sup> reads: “The organized and mass dimension of the Volhynia massacre attributed to it the character of ethnic cleansing with genocide features.” It is noteworthy that the crime was reported to have a mass and systematic character, two crucial characteristics of all atrocity crimes. At the same time, the cited Resolution does not refrain from calling the Volhynia massacre both ethnic cleansing and genocide. The concept of “ethnic cleansing,” however, is totally unknown to international criminal legislation and does not in itself constitute an autonomous international crime. It is but another concept grounded in social sciences that, while extremely useful for the purposes of genocide studies and conflict analysis, can be misused to warp prescribed legal meanings. Recently, the issue of the Volhynia atrocity again resurfaced in the Polish Sejm and amongst heated political debate new attempts have been made to label it as genocide.

Similarly strong international tensions have also been aroused by the 1915 massacre of Armenians, wherein Turkey is still reluctant to admit that the crime had the character of genocide, an evaluation that is both self-evident and long-since established academically.<sup>14</sup> The European Parliament has on multiple occasions voiced its position in the said issue. Inter alia, in the report of 28 February 2002,<sup>15</sup> the Parliament confirmed its previous stance towards the problem, which recognized the massacre of Armenians as genocide, and made it clear in the Resolution of 28 September 2005<sup>16</sup> that the acknowledgement of this fact by Turkey is a necessary condition for opening of the negotiations concerning the country’s accession to the European Union. The Council of Europe took a similar position, by considering, in the written declaration of 24 April 2001,<sup>17</sup> the Turkish admission that the massacre of Armenians constituted genocide as a prerequisite for development of good relations with Turkey.

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<sup>13</sup> *Monitor Polski* 2013, item 606.

<sup>14</sup> Among others, see: R. MELSON: *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*. Chicago 1992; V.N. DADRIAN: “The Turkish Military Tribunal’s Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Cases.” *Holocaust and Genocide Studies* 1997, Vol. 11 (1), 1997; IDEM: “The Armenian Genocide: Review of its Historical, Political, and Legal Aspects.” *University of St. Thomas Journal of Law & Public Policy* 2010, Vol. 4 (2).

<sup>15</sup> Report on the communication from the Commission to the Council and the European Parliament on the European Union’s relations with the South Caucasus, under the partnership and cooperation agreements (COM(1999) 272 — C5-0116/1999 — 1999/2119(COS)), EU doc. A5-0028/2002, of 28 February 2002.

<sup>16</sup> European Parliament resolution on the opening of negotiations with Turkey, EU doc. P6 TA(2005)0350, of 28 September 2005.

<sup>17</sup> Written Declaration of the Parliamentary Assembly of the Council of Europe of 24 April 2001, doc. 9056.

Parallel controversies have been raised up to the present day in connection with the crimes committed in Darfur, which were referred to by the UN expert commission as crimes against humanity, and yet a significant group of academics described the events as genocide.<sup>18</sup>

The problems with discerning and naming specific international crimes are faced not only by the domains of legal academia, politics, semantics and media.<sup>19</sup> Even the specialized courts which enforce international criminal law must cope with difficulties concerning the distinction and application of the existing legislation. In the case of General Radislav Krstic, pertaining to genocide in Srebrenica in 1995, the Trial Chamber of the ICTY attributed to the defendant perpetration of the crime of genocide, however, the Appeals Chamber altered that judgment and attributed to him complicity in the commission of the said crime.<sup>20</sup> While this verdict may raise questions from a purely dogmatic point of view, as the change of the crime attributed (complicity) and the crime charged (commission) may pose problems when one understands that those are two very different forms of criminal liability, the most important feature to consider here is that even specialist courts are often at a loss when dealing with international crimes and the normatively correct way of gauging and punishing individual contribution in their perpetration.

A different problem can be illustrated by the case of Radovan Karadžić, examined by the same court, in which, on 19 October 2009, the third modified indictment was issued, covering, *inter alia*, the count of committing genocide in locations other than Srebrenica, namely municipalities in Bosnia and Herzegovina. Then, in mid-2012, the Trial Chamber of the ICTY passed an acquitting judgment, invoking the absence of sufficient evidence for perpetration of the crime in pursuance of Art. 98*bis* of the ICTY Statute.<sup>21</sup> This judgment was set aside as a result of appeal lodged by the Prosecutor, and the entire case was remanded for re-examination.<sup>22</sup> Ultimately the Karadžić Case was finalized on the 24 March 2016, when the ICTY Trial Chamber

<sup>18</sup> Among others, see: W.A. SCHABAS: "Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide." In: *The Criminal Law of Genocide. International, Comparative and Contextual Aspects*. Eds. R. HENHAM, P. BEHRENS. Ashgate 2007, p. 39; C. KRESS: "The Darfur Report and Genocidal Intent." *Journal of International Criminal Justice* 2005, Vol. 3 (3), pp. 577—578; D. LUBAN: "Calling Genocide by Its Rightful Name: Lemkin's Word, and the UN Report." *Chicago Journal of International Law*, 2006 Vol. (7), *in extenso*.

<sup>19</sup> T. IWANEK: *Zbrodnia ludobójstwa...*, p. 25.

<sup>20</sup> Respectively, c.f. *Prosecutor v. Krstic*, Trial Chamber Judgment of 2 August 2001, case IT-98-33-T and *Prosecutor v. Krstic*, Appeals Chamber Judgment of 19 April 2004, case IT-98-33-A.

<sup>21</sup> *Prosecutor v. Karadzic*, Trial Chamber Judgment of 28 June 2012, case IT-95-5/18-T.

<sup>22</sup> *Prosecutor v. Karadzic*, Appeals Chamber Judgment under Art. 98*bis* of 11 July 2013, case IT-9S-S118-AR98*bis*.1.

delivered its judgment in the first instance.<sup>23</sup> The defendant was found guilty on ten counts, but one count of the indictment was dismissed. The alleged act, of which Karadžić was found innocent, was a campaign of persecution against Bosnian Muslims in several municipalities. In the eyes of the Prosecution, the level of violence and atrocities committed enabled the designation of that campaign as “genocide.” The ICTY did not share the Prosecution’s opinion. While the specifics, and indeed the question of this part of the judgment being correct or not, are irrelevant for this paper, one must acknowledge that the proper distinction and designation of certain international crimes proves to be problematic even for the best-equipped international tribunals.

## International crimes defined

The basic term which makes a foundation for all further deliberations, is the notion of “international crime.” It may be defined in two ways:

- As an act prohibited under a penalty, attributable to an individual on the basis of fault, and the commission of which directly violates norms of international law; i.e. under the conception allowing for the application of criminal law principles in international law;
- As an act contrary to international law and attributable to a state as a type of *delictum iuris gentium* which gives rise to international responsibility of the state, whether under the presently abandoned conception of so-called international “crimes of state” (former Art. 19 of the Draft Articles on Responsibility of States of 1976) or according to the more modern conception of serious violations to peremptory norms of international law (Art. 40 and Art. 41 of the Draft Articles on Responsibility of States of 2001); i.e. under the conception of international responsibility.

An international crime is, in essence, a specific subtype of a crime, and it follows that one must first acknowledge what is generally understood by a “crime” to be able to proceed further into legal intricacies.<sup>24</sup> In the colloquial sense of the word, a crime is a serious offence, e.g. murder, counterfeiting of money or legal tender, human trafficking or kidnapping, which at the same time, from the ethical point of view, is deserving of the most severe condemnation. The current Polish Criminal Code, while dividing offences into crimes (felonies) and misdemeanors, sets out in Art. 7 §2 that: *Crime*

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<sup>23</sup> *Prosecutor v. Radovan Karadžić*, Trial Chamber Judgment of 24 March 2016, case IT-95-5/18-T.

<sup>24</sup> T. IWANEK: *Zbrodnia ludobójstwa...*, pp. 35—41.

(felony) is a prohibited act subject to penalty of imprisonment of not less than 3 years or to a more severe penalty. A similar solution is offered by the French *Code Pénal*, which in Art. 111 No. 1 and Art. 111 No. 2 uses the term gravity (*gravité*) of prohibited acts and, along its lines, differentiates between felonies (*crimes*), misdemeanors (*délits*) and contraventions (*contraventions*), the criterion between the first two classes being the level of penalty. Also the system of US law knows the division into felonies and misdemeanors, and the demarcation line is likewise based on the seriousness of the offence. In most US states felonies are sanctioned with death penalty or imprisonment of no less than one year.<sup>25</sup> In consequence, a crime makes an act formally qualified by the applicable legislation as a serious offence, which as such deserves to be opposed, condemned and combated, and which is subject to more severe penalty than lesser offences (American *misdemeanors* or French *délits*). Reference to the divisions of offences introduced in national criminal legislations seems necessary and relevant as international criminal law is dogmatically based on national studies in criminal law. Besides, domestic statutory regimes make one of the most essential elements of international criminal law origins, and specific references to legal dogmatics, doctrine and rulings can be found in the case-law of international tribunals.<sup>26</sup>

It is more problematic to make an attempt at formulating the concept and definition of an “international crime.” Although it is beyond dispute that the basic criterion for distinction of international crimes is their exceptional gravity (such crimes encroach on a number of the most important legal interests and take the form of systematic, repeated actions), references to only the severity of criminal sanction as their distinguishing criterion may not be sufficient. It should be added, following A. Cassese’s opinion, that, international crimes are composed of four elements: they make direct violations to the norms of public international law (whether enshrined in treaties or ordinary); their penalization is to protect the interests and values which are crucial for the entire international community; the prohibitions to commit them are directly binding on all states and individuals (universal character); there is a universal interest in their prosecution and punishing.<sup>27</sup>

<sup>25</sup> L.J. SIEGEL: *Introduction to Criminal Justice*. Belmont 2009, pp. 143—145.

<sup>26</sup> A. CASSESE: *International Criminal Law*. Oxford 2008, p. 6; R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMHURST: *An introduction to International Criminal Law and Procedure*. 2nd Edition Cambridge 2010, pp. 5—6, 11—12; M. BOOT: *Genocide, Crimes Against Humanity, War Crimes. Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. Antwerpen—Oxford—New York 2002, p. 15; I. BANKTEKAS, S. NASH: *International Criminal Law*. London 2003, p. 15; C.C. JOYNER: *International Law in the 21st Century*. Rowman&Littlefield 2005, p. 134; M. KRÓLIKOWSKI, P. WILIŃSKI, J. IZYDORCZYK: *Podstawy prawa karnego międzynarodowego*. Warszawa 2008, pp. 26—29.

<sup>27</sup> A. CASSESE: *International Criminal...*, p. 12.

While the understanding of “international crimes,” a more general and broader term, is crucial from a legal theory point of view and is supremely important for the efficient application of criminal justice, it also serves as an important context for the definitions of the crimes themselves.

Because of the absence of a uniform code of international criminal law, and specifically the absence of a consolidated general part of that legal branch, it would not be possible to exhaustively and decisively construct a catalogue of international crimes. Legal sources, including the statutes of international and internationalized tribunals, provide for highly diversified catalogues of international crimes, which means that any proposals of such catalogue put forward by the doctrine must involve various combinations of elements derived from significantly varying sources of law and definitions, however, always with a reference to the conception of peremptory norms of public international law. It is argued that among all acts recognized as international crimes there are those labeled *core international crimes*, crimes that occupy the top position in the normative hierarchy of international law and that can be distinguished by their extraordinary character, gravity, their atrocious nature.<sup>28</sup> The distinctive criterion of this broader category of international crimes is their much more severe character and the need for penalization by international law in the light of unwillingness or impossibility to punish under national jurisdictions.<sup>29</sup> English language literature uses precisely the term *core international crimes*, which covers the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>30</sup> The most essential contemporary international criminal law instrument, the Rome Statute of the International Criminal Court of 1998, determines the catalogue of acts subject to the Court’s jurisdiction in a way aligned with doctrinal postulations and inclusive of the most severe crimes of international importance:

- crime of genocide (Art. 6);
- crimes against humanity (Art. 7);
- war crimes (Art. 8);
- crime of aggression (Art. 8*bis* introduced as of 1 January 2017).

While the acceptance of the notion of *core international crimes* allows some clarity in the subject, another facet of their criminology must be exposed. Most international crimes are committed in the context of an armed conflict and are at least partially entwined with military operations. Ferencz rightly

<sup>28</sup> T. IWANEK: *Zbrodnia ludobójstwa...*, pp. 38—39; W.N. FERDINANDUSSE: *Direct Application of International Criminal Law in National Courts*. Haga 2006, pp. 177—180.

<sup>29</sup> W.A. SHABAS: *Introduction to the International Criminal Court*. Cambridge 2007, p. 83.

<sup>30</sup> C.f. e.g. C. DAMGAARD: *Individual criminal responsibility for core international crimes*. Heidelberg 2008, p. 60; W.N. FERDINANDUSSE: *Direct Application...*, pp. 10—11, 89—126; 177—207.

considers that military language, its dictionary and over usage of acronyms (the QRFs, ICBMs, OPSECs and OPFORs, as well as COMSATs and DOAs), make the language relating to atrocities incomprehensible and diluted.<sup>31</sup> And yet international crimes are intrinsically linked with war and warfare, though not all legal definitions require them to be committed in a time of war. The sole exception being *war* crimes, which must always be committed in a context of an armed conflict. Other core international crimes do not share this requirement. Times of war are often thought to breed new moral (or even supra-moral) boundaries, a proposition that is rightfully thought of by both jurists and philosophers as misguided.<sup>32</sup> Nonetheless, the introduction of war into the questions of international crimes requires one to not only be mindful of the precision and semiotics of language from a legal standpoint, but moreover to never lose sight of the moral distinction such language envisages.

However, long before a war erupts or an atrocity is committed, a hateful sprite flourishes and adds another layer one must be aware of when discussing the power of words in the context of international crimes. This particular phenomenon takes the form of the twisted language of dehumanization, words that gnaw constantly on the bones of a perceived enemy, words that make the aggressor feel not only permitted, but empowered to violence and atrocity — hate speech. While hate speech ultimately precedes international crimes, sowing the seeds of genocide and dehumanizing victims in the eyes of their future assailants, it takes many forms and should be closely monitored. The relation between hate speech and genocide had long-since been established by scholars, who view it as a necessary prerequisite, that disengages the victim group from the whole of society and often the whole of humankind.<sup>33</sup> However, hate speech is not only a prerequisite to atrocity, and it may itself constitute a separate and autonomous crime against humanity, as the ICTR held in the famous *Media Case*.<sup>34</sup> In essence, extreme cases of the abuse of language will be penalized not only as libel or defamation, but when found to contain incitement to national or ethnic hatred will be punishable as one of one of the most severe crimes.

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<sup>31</sup> B.B. FERENCZ: *A Common Sense Guide to World Peace*. Oceana 1985, p. 62.

<sup>32</sup> D. LUBAN: "War Crimes. The Law of Hell." In: *War. Essays in Political Philosophy*. Ed. L. MAY. Cambridge 2008, pp. 266—273.

<sup>33</sup> F. CHALK, K. JONASSOHN: *The History and Sociology of Genocide*. Yale 1990, p. 28; H. FEIN: *Accounting for Genocide. National Responses and Jewish Victimization During the Holocaust*. Chicago 1979, pp. 4—8; H.T. KING JR., B.B. FERENCZ, W.R. HARRIS: "Origins of the Genocide Convention." *Case Western Reserve Journal of International Law* 2008, No 40, p. 26.

<sup>34</sup> J.M. ALLEN, G.H. NORRIS: "Is Genocide Different? Dealing with Hate Speech in a Post Genocide Society," *Journal of International Law and International Relations* 2011, Vol. 7 (1), p. 151—154; G. DELLA MORTE: "De-Mediatizing the Media Case. Elements of a Critical Approach." *Journal of International Criminal Justice* 2005, Vol. 3 (4), pp. 10—22.

It must be pointed out that there sadly is no uniform legal definition of hate speech, even in international law documents. Instead, legal doctrine proposes the following understanding: *hate speech is a written, oral or symbolic utterance which attacks an individual or group of individuals based on the criterion of race, ethnic or national origin, religion, language, sex, age, disability, external characteristics, sexual orientation or sex identity, social status or political conviction. Hate speech may daunt, threaten, degrade, offend or reinforce stereotypes and lead to discrimination, or even physical violence.*<sup>35</sup> At the same time, it should be emphasized that hate speech does not necessarily have to be confined to verbal conduct, such as insult, defamation, slander, punishable threat, incitement to hatred or violence, denial, praise or trivialization of a crime of genocide, crime against humanity, war crimes.<sup>36</sup>

And thus, at the very outset of conceptualizing the ways in which criminal law deals with atrocity and manifest evil, we arrive at the conclusion that no clear definition of atrocity crimes exists and that its very content, i.e. which acts are considered to be “international crimes,” is controversial. Still, the notion of core international crimes is commonly accepted and seen as a useful tool. However, even the definitions of the crimes labeled as “core international crimes” are not set in stone, and their semantic content evolves and remains ever varied.

## War crimes

It would not be possible to point to a single definition exhausting the entire concept of “war crimes,” however, legal science and case-law have not experienced many difficulties concerning their usage, and the intuitive, linguistic understanding of such phenomena is close to their true designatum. It is the case since the law does not use any uniformly understood category of a “war crime” just as it simply does not use the category of “crime” but a whole catalogue of very specifically defined individual crimes, such as torture, sexual violence or murder. Most definitely, war crimes display the closest affinity with ordinary crimes known to national criminal laws, however, they are characterized by a distinct idiosyncratic trait — the requirement of

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<sup>35</sup> A. ŚLEDZIŃSKA-SIMON: “Decyzja ramowa w sprawie zwalczania pewnych form i przejawów rasizmu i ksenofobii jako trudny kompromis wobec mowy nienawiści w Unii Europejskiej.” In: *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*. Eds. A. BODNAR, A. GLISZCZYŃSKA-GRABIAS, R. WIERUSZEWSKI, M. WYRZYKOWSKI. Warszawa 2010, pp. 93—95.

<sup>36</sup> Ibidem.

a link between the perpetrator's acts and an armed conflict (i.e. the *nexus* between a crime and armed conflict).<sup>37</sup> Under the provision of, inter alia, Art. 8 of the Rome Statute of the ICC, one may distinguish four main categories of war crimes, namely:

- Serious violations of the 1949 Geneva Conventions for the Protection of War Victims;
- Other serious violations to rights and customs of international law which are applicable to armed conflicts of international character;
- In reference to armed conflicts without an international character, serious violations to Art. 3, common for the four Geneva conventions;
- Other serious violations of rights and customs of international law which are applicable to armed conflicts without an international character.

Nevertheless, it must be made clear that definitions of specific war crimes (murder, rape, pillage, deprivation of liberty, etc.) do not trigger as much controversy as the remaining international offences classified as core international crimes. Most of them correspond directly to similar offences known by national legal systems and are more widely understood. Moreover, war crimes as a category of crimes do not require as many specific “international” elements as their brethren in the “core international crimes” category.

## Crimes against humanity

M.C. Bassiouni seeks the origins of the concept of “crimes against humanity” in the impact of fundamental principles and values of humanism, which restricted the admissible conduct of combatants during a war. These values were present in each human community, at every stage of mankind's history. According to Bassiouni, in public international law these values are expressed to the fullest extent in the Martens Clause.<sup>38</sup> An earlier, pioneering reference to the *rights of humanity* as a factor motivating restrictions with regard to specific types of conduct in wartime can be found in the body of the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.<sup>39</sup> It is pointed out therein that, in

<sup>37</sup> R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMHURST: *An Introduction to International...*, p. 279.

<sup>38</sup> M.C. BASSIOUNI: *Crimes Against Humanity in International Criminal Law*. The Hague 1999, pp. 44—60.

<sup>39</sup> M.C. ROBERGE: “Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda Over Crimes Against Humanity and Genocide.” *International Review of the Red Cross* 1997, No. 321.

order to *mitigate the scourge of war*, it is necessary to impose restrictions on the use of certain types of missiles the use of which would defy the *rights of humanity*. The Martens Clause and its antecedents provide evidence for what values were accepted by the international community during the formation of sources of international criminal law. The earliest usage of the notion was found in the communication of governments of the Entente allies of 24 May 1915.<sup>40</sup> The text firmly condemned Turkish crimes against Armenians and for the first time in history used the term *crimes against humanity and civilization* in reference to those offences. For the said crimes *all members of the Turkish government along with its* [the government's — author's note] *agents involved in the massacre shall be held liable*.<sup>41</sup>

It should be indicated that the word “humanity” was used here in relation to a certain human community rather than a huge amount of people. “Humanity” in English, as well as “humanité” in French and “ludzkość” in Polish denotes an intangible feature of human nature — humaneness. Consequently, crimes against humanity are crimes against all humans in the world and against the fundamental rights of all such individuals. The very collective name draws attention to the extraordinary, mass and fundamental character of its penalization.<sup>42</sup>

The concept of crimes against humanity evolved since 1915 and its current shape only to a small extent reminds what was originally contemplated under the same label. Pursuant to Art. 7 of the Rome statute of the ICC, crime against humanity *means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*. Next, the said provision offers a list of as many as 11 acts qualified as crimes against humanity: *murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment; torture; rape; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*.

It is noteworthy that the provision expressly points to the mass and systematic character of crimes against humanity, and, in the same way, makes

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<sup>40</sup> C. DAMGAARD: *Individual Criminal Responsibility for Core International Crimes*. Berlin 2008, s. 94; L.S. SUNGA: *Individual Responsibility in International Law for Serious Human Rights Violations*. Dordrecht—Boston—London 1992, p. 42.

<sup>41</sup> F.F. MARTIN, S.J. SCHNABLY, R.J. WILSON, J. S. SIMON, M. V. TUSHNET: *International Human Rights And Humanitarian Law Treaties, Cases And Analysis*. Cambridge 2006, p. 494.

<sup>42</sup> *Commentary on the Rome Statute of the International Criminal Court*. Ed. O. TRIFFTERER. Munich 2008, p. 168.

a response to the previously signaled mass criminological characteristic of *atrocious crimes*. While the specific acts of an individual perpetrator may be singular in nature, they nonetheless must form part of broad phenomenon, in which multiple assailants commit numerous crimes. Simply put, a single act of a single human may never amount to a crime against humanity.<sup>43</sup>

## Genocide<sup>44</sup>

*A crime without a name*, as Winston Churchill characterized genocide, was finally named after a couple of years following his memorable speech on the atrocities committed by Nazi Germany — modern international law refers to that type of atrocity as genocide. The term *genocide* was coined by Rafał Lemkin (1900—1959), a Polish criminal law practitioner and scholar of Jewish origin, by combining the Greek word *genos* (race, tribe) with the Latin word *cide* (derivative of *caedere*, murdering, killing).<sup>45</sup> Lemkin's formulation of the international law definition of the crime of genocide had been preceded by his proposals to introduce two new international crimes: the crime of *barbarity* and the crime of *vandalism*. Such a project was announced at the V Conference for the Unification of Criminal Law (October 1933, Madrid).<sup>46</sup> According to Lemkin, the international crime of *barbarity* was to cover intentional attacks on an individual as member of a given group understood as a collectivity of racial, religious or social character; the crime of *vandalism* was to be conceived as destruction of cultural and artistic achievements of groups of people mentioned above.<sup>47</sup>

In the now classical words of Lemkin, *genocide* was defined in the following way: “By »genocide«, we understand destruction of a nation or an ethnic group. This new expression, coined by the author with the intention

<sup>43</sup> T. IWANEK: *Zbrodnia ludobójstwa...*, pp. 204—222.

<sup>44</sup> Apart from other cited works, see: T. IWANEK: *Zbrodnia ludobójstwa...*, pp. 257—369; IDEM: “Zbrodnia ludobójstwa w prawie międzynarodowym. Problemy skuteczności i efektywności.” In: *Zbrodnia i kara. Ludobójstwo — zbrodnie wojenne — zbrodnie przeciwko ludzkości*. Eds. W. WACŁAWCZYK, K. ŻARNA. Toruń 2011.

<sup>45</sup> More on the matter: R. SZAWŁOWSKI: „Archiwum dyplomatyczne: Rafał Lemkin (1900—1959). Polski prawnik twórcą pojęcia »ludobójstwo«.” *Sprawy Międzynarodowe* 2005, nr 2, p. 103 ff.; T. IWANEK: “Zbrodnia ludobójstwa w prawie...”, p. 94.

<sup>46</sup> M. KORNAT: “Barbarzyństwo wandalizm terroryzm ludobójstwo. O Rafale Lemkinie i idei zdefiniowania „zbrodni w obliczu prawa narodów.” *Polski Przegląd Dyplomatyczny* 2008, No. 3 (43), pp. 86—88.

<sup>47</sup> R. LEMKIN: “Genocide as a Crime Under International Law.” *American Journal of International Law* 1947, Vol. 41 (1), p. 146.

to describe an old practice in its modern form of development, originates from the Greek word *genos* (race, tribe) and the Latin *cide* (to kill), and, accordingly, corresponds in its form to such words as *tyrannicide*, *infanticide*, etc. Generally speaking, genocide does not necessarily involve direct destruction of a nation, except for situations in which it is accomplished by mass murders of all members of that nation. It is rather supposed to denote a coordinated plan [combined — author's note.] of various activities aimed at destruction of the fundamental basis of life of national groups with the intention to annihilate such communities. The aim of such plan would be to disintegrate political and social institutions, culture, language, national feelings, religion and economic subsistence of national groups, as well as demolition of personal safety, freedom, health, dignity, or even life of their individual members. Genocide is directed against national groups as beings, and the activities are taken against individuals not in relation to their personal roles but as members of the national group.<sup>48</sup> In Lemkin's opinion, the previously used expression *mass murder* failed to cover the entirety of the loss inflicted on human civilization which consisted in the depletion of the cultural contribution attributed to the given unique group of people united by common racial, religious or social characteristics.<sup>49</sup> Genocide was to consist in the destruction of the *national pattern* of a group falling victim to that crime and its subsequent replacement by the national pattern of the aggressors' group, which could take two forms: the victim group remaining in the occupied territory or the obtruding group's colonization.<sup>50</sup>

Lemkin's work was finalized in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948. While its normative content was groundbreaking in the sense that it introduced *genocide* as a legal concept, enabling the attribution of responsibility, it was not flawless. Indeed, most scholarly work pertaining to the crime of genocide focuses on its shortcomings.<sup>51</sup> The opportunity to deal with the most glaring problems was wasted during the drafting of the Rome Statute.<sup>52</sup> No modernization of the 1948 definition was adopted and Art. 6 of the Rome Statute defines genocide the same

<sup>48</sup> R. LEMKIN: *Axis Rule...*, p. 79.

<sup>49</sup> R. LEMKIN: *Genocide as a Crime...*, p. 147.

<sup>50</sup> R. LEMKIN: *Axis Rule...*, p. 79.

<sup>51</sup> See for example: W.A. SCHABAS: *Genocide in International Law*. Cambridge 2009; C. KRESS: "Genocide Under International Law." *International Criminal Law Review* 2006, Vol. 6 (4); F. KABATSI: "Defining or Diverting Genocide: Changing the Component of Genocide." *International Criminal Law Review* 2005, Vol. 5 (3); C. FOURNET: *The Crime of Destruction and the Law of Genocide*. Ashgate 2007.

<sup>52</sup> See for example: W.A. SCHABAS: "Origins of the Genocide Convention: From Nuremberg to Paris." *Case Western Reserve Journal of International Law* 2008, Vol. 40, p. 46.

was as the previous convention (indeed, as virtually every other international criminal law source), stating that genocide is understood as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

In literature, one can constantly encounter opinions indicating a motif of impossibility to describe the features and the inexpressibility of the crime of genocide, whose commitment is unthinkable, unimaginable and fundamentally contrary to all moral rights.<sup>53</sup> Arendt wrote in this spirit, arguing that any attempt to tailor Nazi demographic policies to criminal law conceptions of murder and persecution may not prove sufficient in the face of the enormity of such crimes, and that any penalty is going to be inadequate.<sup>54</sup> This perspective is flawed from a legal point of view. It stems from the endless fear that labeling genocide in plain language might lead to its trivialization, since as far as it is feasible to word unspeakable evil, such evil is capable of becoming an ordinary and widespread phenomenon, which does not call for any special treatment.<sup>55</sup> This is an expression of deep mystification of the crime of genocide and is derived from the conviction of its axiological, rather than ontological, character. A logical consequence of grasping genocide as a moral being is the conclusion that from the ontological point of view it is categorically and absolutely inadmissible to commit genocide. Such judgement is grounded on objectively existing norms which define genocide as evil without any further qualifications or reservations. However, from the pragmatic (legal, criminological) perspective, the crime of genocide is just as cruel and banal as crimes against humanity or war crimes and must be dealt with accordingly — that is by the dispassionate application of criminal justice with due regard for the principles and guarantees it affords to both the victim (in this case often the victims legal successor) and the accused himself. Thus, the banality of referring to genocide by the name *genocide* seems inevitable for a lawyer. During the Nuremberg trial, the crime of genocide was referred to as “crime which had been so monstrous that it had not been dreamed of in the Christian era until the beginnings of Hitlerism, and that the term »genocide«

<sup>53</sup> B. MISZTAL: “Protect, but from What? Genocide as a Concept of Moral and Legal Universalism.” In: *Rafal Lemkin. A Hero...*, pp. 292—296.

<sup>54</sup> J. KLABBERS: “Possible Islands of Predictability: The Legal Thought of Hannah Arendt.” *Leiden Journal of International Law* 2007, Vol. 20 (1), p. 310.

<sup>55</sup> C. FOURNET: *The Crime of Destruction...*, pp. 4—5.

had to be coined in order to define it.”<sup>56</sup> As a result, despite the legitimate absolute moral judgements condemning genocide, it is necessary to apply the term *genocide* for legal purposes, as it seems only necessary.

Social and historical sciences adopted their own definitions of genocide, vastly different from legal ones. Varied characterizations of the crime of genocide have been proposed, which not only exist in parallel to the ones deriving from legal sciences but frequently serve as the basis for formulating legal definitions and prove helpful in the successful understanding and application of international law provisions. Despite the relation depicted above, the difference between the two grasps of the same phenomenon needs to be characterized as fundamental. Thus, two separate ideas for the same word designata exist in parallel, in two adjacent branches of science. The basic dissimilarity between the legal definition of the crime of genocide and the other approaches is the emphasis in the latter on such acts intended to achieve elimination of the protected group which are not physical in nature.<sup>57</sup> The legal grasp of genocide is frequently criticized in social sciences as too narrow, too limited and unable to render in full the scope and scale of the phenomenon and completely detached from the original understanding of genocide as proposed by R. Lemkin. The synthetically rendered fundamental differences between the definitions offered by social and legal scholars boil down to:<sup>58</sup>

- emphasis being put by international law on the specific intention to destroy the protected group;
- types of protected groups;
- peculiar extension of the legal definition to acts other than murders of members of the group, which contradicts the presumptions made by social sciences, which focus precisely on the element of murdering members of a group in the physical form of genocide.

## Crimes against peace and the crime of aggression

Lastly, crimes against peace exhibit a special case of semantic evolution in international criminal law. The very name, under which this offense is

<sup>56</sup> W.A. SCHABAS: *Origins of...*, p. 42.

<sup>57</sup> L. VAN DEN HERIK: “The Schism Between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect.” In: *The Criminal Law of Genocide. International, Comparative and Contextual Aspects*. Eds. R. HENHAM, P. BEHRENS. Ashgate 2007, pp. 75—76; 93—95.

<sup>58</sup> T. IWANEK: *Zbrodnia ludobójstwa...*, p. 96.

known, underwent substantial reform. The classic (indeed the first) definition of *crimes against peace*, as enshrined by Art. 6 (a) of the 1945 Nuremberg International Military Tribunal Charter understood them as the ‘planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing’. The language used by the IMT Charter was based on the concepts introduced in 1928 by the Briand-Kellogg Pact, known as The General Treaty for the Renunciation of War. However, in the 1950s the language changed and *crimes against peace* morphed into *aggression* and that in turn ultimately took the form of either an *act of aggression* attributable to a state as an internationally wrongful act, or a *crime of aggression* attributable to an individual as an international crime under principles of criminal law.<sup>59</sup> An important historical turning point took place in 1974, when the definition of *aggression* was adopted in the UN General Assembly Resolution 3314.<sup>60</sup> It must be noted that aggression as defined in the previously mentioned acts differs semantically from its common meaning. In the language of international law, *aggression*, is not only harmful and overt interference in the affairs of others. Instead, it is a *war of aggression*, or the use of military force in international relations. As per Art. 1 of GA res. 3314, aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. While the semantic discrepancy between the common designation of aggression and the way international law prescribes its meaning is distinct, it does, however, stem from a similar linguistic source and indicates a form of attack. One must bear in mind, that *aggression* is also used in the context of individual criminal responsibility and this may cause confusion as to its semantic content. That is only exacerbated with the fact, that aggression is rightly understood in common language as assault, battery or any form of physical harm, while in international law it delineates interstate conflict.

Even though the crime of aggression is of the utmost international concern and was enshrined in the Rome Statute in Art. 5 sec. 1 (d) as a crime over which the Tribunal has jurisdiction, it was not defined in the Statute itself, making it effectively void.<sup>61</sup> In 2010 an amendment to the Statute was passed, entering into force in 2017, which defines the crime of aggression. The adopted Art. 8*bis* states in sec. 1 that the “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position

<sup>59</sup> R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMHURST: *An Introduction to International...*, pp. 313–318.

<sup>60</sup> Resolution 3314 (XXIX) of 14 December 1974, Definition of Aggression.

<sup>61</sup> *Commentary on the Rome Statute...*, p. 135.

effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. Section 2 in turn states that an “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

This shows that a new term was coined to give name to a crime that was already defined and that some individuals were convicted of. The evolution of crimes against peace into the crime of aggression must show that modern international law puts emphasis on a different facet of the same conduct. While the name and wording of the features of the crime of aggression are more in line with the law of international state responsibility (which utilizes the term *aggression* at least since the adoption of UN GA resolution 3314) it might also confuse criminal lawyers and laymen who may often wrongly understand *aggression* as equal to assault or battery.

## In lieu of a summary

International criminal law faces a daunting task. Not only is it responsible for expressing the prohibitions of committing heinous acts in a normative, general and abstract way, but it is also set to contend with significant discrepancies in lexical and semantic use of language. Distinct differences form not only on the line between common and legal language, but the very terms, definitions, and notions introduced by legal sciences are in themselves controversial and often open to varying degrees of interpretation. The legal elements of crimes coalesce and intertwine with hate speech and incitement, the perlocutionary and formative acts that either precede or in rare cases constitute the commission of international crimes. This again raises the question that law, or more accurately — the application of law by a court, is an exercise in linguistics and semantics, in discovering a logical and axiologically sound meaning not only of crimes themselves, but more importantly of their constituent elements. And while critical, this challenge is not uniquely found in international criminal law, as every other branch of criminal law faces the same hurdles. However, in international criminal law the semantics of application and morality are thwarted by more than one difficulty. This especially applies to “false friends,” homonymous but semantically varied terms, existing at the border between legal and common languages, but also between international criminal law and domestic criminal law. That is in part

caused by the very creation of international criminal law, which is founded on transposing to the international level and merging doctrines, institutions and concepts derived from domestic criminal law systems.<sup>62</sup> Thus a process of internationalization of criminal law takes place and creates a relatively new discipline, one bound to encounter challenges. Furthermore, two additional grounds for the development of international criminal law and its language can be outlined — international human rights law and international humanitarian law.<sup>63</sup> Bearing that in mind, the century long evolution in the definitions of core international crimes seems only justified and necessary. Moreover, this leads to the conclusion that the interpretation of international criminal law faces possibly more challenges than in other legal disciplines and should be exercised with restraint and erudition.

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<sup>62</sup> M.A. DRUMBL: “Collective Violence and Individual Punishment: the Criminality of Mass Atrocity.” *Northwestern University Law Review*, Winter 2005, p. 567; M. BOOT: *Genocide, Crimes...*, p. 15.

<sup>63</sup> A. CASSESE: *International Criminal Law*. 2008, pp. 4—6.

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