

## When Is Genocide a Crime of Genocide? The Holodomor and the Katyn Massacre as a Crime of Genocide

Krzysztof Masło

Dr., Assistant Professor, Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw, correspondence address: , e-mail: [k.maslo@uksw.edu.pl](mailto:k.maslo@uksw.edu.pl)

 <https://orcid.org/0000-0002-9085-3589>

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**Abstract:** The Holodomor and Katyn Massacre are founding crimes of the USSR and the Eastern Bloc's state. Their common feature was an attempt to annihilate nations and prevent them from achieving independence. Quite often, both crimes are called genocide, but their legal qualification from the perspective of the then international law is extremely difficult. However, there are solid grounds for qualifying both of these crimes, and particularly the Katyn Massacre, as genocide. As a result of the development of the law of armed conflicts in international law in the 1930s and 1940s, there was a ban on committing acts that the 1948 Convention defined as genocide.

### 1. Introduction

On December 13, 2022, the European Parliament adopted a resolution recognising the Holodomor, understood as the artificial famine of 1932–1933 in Ukraine caused by a deliberate policy of the Soviet regime, as a genocide against the Ukrainian people and as a crime.<sup>1</sup> From the perspective of the 21<sup>st</sup> century, the answer to the question of whether the Holodomor and another – yet unaccounted crime of Soviet Russia – the Katyn Massacre, were genocide is evident. Any act that corresponds to the description contained in the Convention on the Prevention and Punishment of the Crime

<sup>1</sup> European Parliament resolution of 15 December 2022 on 90 years after the Holodomor: recognising the mass killing through starvation as genocide, (2022/3001(RSP).

of Genocide (hereinafter the 1948 Convention) is genocide and gives rise to individual criminal responsibility at the international level. If the Holodomor and the Katyn Massacre had been committed contemporaneously, we would have no objection to calling these acts genocide. Both crimes, however, were committed several years before the adoption of the 1948 Convention. The fundamental question, therefore, arises as to whether the year 1948 is the cut-off date, i.e. whether only acts committed after that date constitute genocide or whether acts committed before 1948 can also be considered genocide and constitute an international crime.

An immediate assumption should be made that 1948 is not a cut-off date, as it is the date of adoption of the Convention by the UN General Assembly (UNGA). The Convention did not enter into force until January 12, 1951, and by that time, only 26 states (out of 56 voting in favour at the UNGA) had become bound by it. In the realm of law, genocide emerged in 1951. However, the term had been in legal language since 1944, when it was introduced into the international debate by Raphael Lemkin in his work *Axis Rule in Occupied Europe*.<sup>2</sup> The thesis of this article is that the acts which R. Lemkin called genocide and which were subsequently defined in the 1948 Convention had been prohibited by international law since the beginning of the 20th century when the concept of the principles of humanity and the requirements of public conscience were introduced into the language of international law at the Hague Peace Conference.

This article is historical. Indeed, it is a mistake to describe the Holodomor and the Katyn Massacre from the perspective of current international law. International law, including in particular international humanitarian law and international criminal law, has undergone an enormous evolution since the Second World War. Thus, in order to give a good description of the Holodomor and the Katyn Massacre, it is necessary to look at international law as it was in the first half of the 20<sup>th</sup> century.

I will begin this article by briefly describing the Holodomor and the Katyn Massacre. The next chapter will be devoted to the prohibition of genocide in international law and, in particular, the origin of the crime of genocide from the crime against humanity and the relationship of this

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<sup>2</sup> Rafał Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New York: Columbia University Press, 1944).

crime to the law of armed conflict. The final chapter will attempt to subsume the Holodomor and the Katyn Massacre into the understanding of the crime of genocide at the time.

## 2. Historical Account of the Holodomor and the Katyn Massacre

The term Holodomor is used to describe the deliberately induced famine among the rural population of Ukraine in 1932–1933 by the highest authorities of the USSR. In its 2022 resolution, the European Parliament stressed that the famine “was cynically planned and cruelly implemented by the Soviet regime in order to force through the Soviet Union’s policy of collectivisation of agriculture and to suppress the Ukrainian people and their national identity”. The European Parliament pointed out that “the Soviet regime deliberately confiscated grain harvests and sealed the borders to prevent Ukrainians from escaping from starvation” and that in 1932 and 1933 “the Soviet Union exported grain from the territory of Ukraine while people there were starving”.<sup>3</sup>

The predominant view among historians is that the genesis of the Holodomor was the forced collectivisation of agriculture carried out by the central authorities of the USSR in the late 1920s, which was strongly resisted by the Ukrainian population, including the Poles living in the area.<sup>4</sup> Private property stood in the way of the construction of the communist system and, as the basis of the existing sociopolitical system, was to be overthrown by violence. As early as 1919, the decree of the All-Ukrainian Central Executive Committee “On Socialist Management of Land and Means of Conversion to Socialist Agriculture and the Subsequent Resolutions of the All-Russian Communist Party (Bolsheviks)” was issued and became the basis of the collectivisation policy in Ukraine. It was later supplemented by the resolution “On work in the countryside” (1927), the directive of the Central Committee of the All-Russian Communist Party (Bolsheviks) “On the increase of grain supplies” (1928) and the order of the Central Committee of the All-Russian Communist Party (Bolsheviks) “On the pace

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<sup>3</sup> European Parliament resolution of 15 December 2022 on 90 years after the Holodomor: recognising the mass killing through starvation as genocide, (2022/3001(RSP).

<sup>4</sup> Roman Dzwonkowski, “Głód i represje wobec ludności polskiej na Ukrainie (1932–1933, 1946–1947),” *Teka Komisji Historycznej* 9, (2012): 205.

of collectivisation and measures of state assistance in the building of kolkhozes” (1930).<sup>5</sup> According to the latter order, collectivisation in Ukraine was to be completed by spring 1932. The actions of the Soviet authorities were met with dissatisfaction by the peasants. Historians report that 14,000 peasant revolts were recorded in 1930 alone, opposing the forced creation of state collective farms (so-called kolkhozes).<sup>6</sup>

The process of collectivisation in Ukraine was very slow. By the end of 1929, farms covering only 8.8% of the agricultural land area had been collectivised.<sup>7</sup> Therefore, the Soviet authorities decided to solve this problem by force. A decree of August 7, 1932 on the protection of the property of state enterprises, kolkhozes and cooperatives and on the strengthening of social (socialist) property introduced the death penalty for stealing a few ears from a kolkhoz field. According to socialist doctrine, the law was drafted by Joseph Stalin.<sup>8</sup> The decree equalised criminal protection of state and kolkhoz property and ruled out amnesty for those convicted of misappropriating kolkhoz property. Already in the introduction to the decree, it was emphasised that kolkhoz property was the basis of the Soviet system, that it was sacrosanct and inviolable, and that people committing an attack on socialist property should be considered enemies of the people. The decree applied to adults and children alike, and the usual punishment for misappropriation of kolkhoz property was the death penalty by firing squad combined with confiscation of all property. This punishment could be commuted to 10 years’ imprisonment in the presence of particularly mitigating circumstances; imprisonment could be imposed without trial. Misappropriation of property was understood extremely broadly, including any form of attack on socialist property. Between August and December 1932 alone, some 125,000 people were sentenced to death under the decree,

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<sup>5</sup> Книга Пам’яті про жертви Голодомору 1932–1933 років в Україні: Хмельницька область, Український Інститут Національної Пам’яті.

<sup>6</sup> Dzwonkowski, “Głód i represje.”

<sup>7</sup> Barbara Januszkiewicz, “Tworzenie polskich kolchozów narodowościowych w ramach kolektywizacji rolnictwa na Podolu w latach 20. i 30. XX w. Przyczynek do dziejów rolnictwa na radzieckiej Ukrainie,” *Zeszyty Wiejskie*, no. 26 (2020): 116.

<sup>8</sup> Leszek Lernell, “Ochrona prawa własności socjalistycznej w radzieckim prawie karnym,” *Demokratyczny Przegląd Prawniczy*, no. 11 (1949): 25.

including 5,400 people.<sup>9</sup> As practice showed, the August 1932 decree was applied even in situations where a few ears were stolen from the kolkhoz fields. The August 1932 decree was supplemented by the introduction of compulsory deliveries of agricultural produce in December 1932. Formally, the decree ordered the collection of supplies from kulaks, Polish agents and so-called counter-revolutionary elements, but de facto, it became the basis for the removal of entire grain stocks from kolkhoz warehouses in Ukraine, as well as the basis for the confiscation and destruction of leftover food hidden in private homes.

At the same time, the Stalinist authorities banned the movement of the rural population to urban areas, and a food rationing system based on ration cards issued only to those registered in towns and cities was introduced.<sup>10</sup> In all regions where famine prevailed in the winter of 1932/1933, the sale of train tickets was banned, and GPU officers blocked the roads. The scale of the famine in the Ukrainian countryside is evidenced by the fact that, from January 1933 onwards, around 220,000 people were detained every month trying to cross into the cities. It is from this period of the construction of communism in the USSR that the infamous example of Pavlik Morozov also comes from.

The number of victims of the Holodomor is difficult to estimate; generally, between 4,000,000 and 10,000,000 victims are cited.<sup>11</sup>

The Katyn Massacre, which became the founding myth of the Polish People's Republic, is much better known to historians and lawyers. Paradoxically, German Nazism contributed to this by allowing independent observers, including doctors, from the International Committee of the Red Cross, to visit the execution sites of Poles. Of course, the activity of the Polish Institute of National Remembrance also contributed to clarifying the *modus operandi* of the Soviet-Russian authorities, including the identification of the principals and executors of the murders of Poles. While the number and identity of all the victims are not fully known, the course of this crime is quite well documented.

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<sup>9</sup> Dzwonkowski, "Głód i represje," 207.

<sup>10</sup> Ibid., 210.

<sup>11</sup> Ibid.

After Poland lost the 1939 September campaign, the Soviets took more than 200,000 Polish prisoners of war. Private soldiers were soon released, while the Soviets placed the officers in special NKVD camps at Kozelsk, Starobilsk and Ostashkov. In addition to soldiers, the detainees included uniformed officers, especially State Police officers. In the NKVD camps, prisoners were subjected to Soviet propaganda and agitation, as well as interrogation. These activities were directed by specially delegated Soviet officers who tried to recruit Poles to cooperate. The few officers who decided to cooperate with the NKVD were to be used as agents in the camps and the future in the creation of units cooperating with the Soviets. One such person was Colonel Zygmunt Berling, later commander of the 1<sup>st</sup> Kosciuszko Infantry Division and the First Polish Army.

At the beginning of 1940, the Soviet authorities decided to murder the Polish prisoners of war. On March 5, 1940, Lavrenty Beria sent a memo to Joseph Stalin, according to which he considered it necessary to order the NKVD:

1. 14,700 people in prisoner-of-war camps, former Polish officers, officials, landowners, policemen, intelligence agents, gendarmes, settlers and prison wardens,
2. as well as 11,000 people arrested and imprisoned in the western regions of Ukraine and Belarus, members of various k-r [*counter-revolutionary*] spy and sabotage organisations, former landowners, factory owners, former Polish officers, officials and fugitives  
- be dealt with in a special procedure, with the highest penalty applied to them – execution by firing squad.

[...] Handle the cases without summoning the arrestees and without presenting charges, decisions to terminate the investigation and indictment [...].<sup>12</sup>

The note bears the four handwritten signatures of four Politburo members (Joseph Stalin, Kliment Voroshilov, Vyacheslav Molotov and Anastas Mikoyan) approving Beria's proposal, as well as notations of a "yes" vote by Mikhail Kalinin and Lazar Kaganovich. Three days later, the Politburo issued a secret decision that the cases of Polish prisoners of war should

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<sup>12</sup> Katyn Decision of 5 March 1940, accessed July 16, 2023, <https://katyn.ipn.gov.pl/kat/bibliografia-i-mediatek/dokumentacja-archiwalna/12378,Decyzja-Katynska-z-5-marca-1940-r.html>.

be dealt with under a special procedure “without summoning the arrested and without presenting charges, a decision on the completion of the investigation and indictment” with the highest penalty applied to them, i.e. execution by firing squad.<sup>13</sup> On the basis of this, on March 22, Beria issued an order “on the unloading of NKVD prisons in the USSR and BSRs”. Piotr Soprunienko, head of the NKVD Prisoners of War Board, was responsible for its implementation.<sup>14</sup> He signed lists containing details of prisoners to be executed. The first three such lists were handed over on April 1. The victims of Soviet crime were not only officers but also civilians, a total of at least 21,768 people.

The tragedy of the Polish officers murdered by the NKVD was completed by the tragedy of their families. As early as March 2, 1940, the Central Committee of the Communist Party of the Soviet Union decided to deport the families of the murdered to the regions of northern Kazakhstan for 10 years.<sup>15</sup> The deportations involved some 60,000 people.<sup>16</sup> The Katyn Massacre thus resulted in the annihilation of the Polish military, social and political elite.

### 3. Prohibition of Genocide in International Law

The term genocide appeared in international law in the late 1940s and did not exist at the time of the Holodomor and the Katyn Massacre. Raphael Lemkin used it for the first time in a book published in 1944.<sup>17</sup> In the 1930s, however, he used another term, semantically similar to genocide, that is, “barbarism”. It meant oppressive and destructive acts directed

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<sup>13</sup> Karol Karski, “The Crime of Genocide Committed against the Poles by the USSR before and during World War II: An International Legal Study,” *Case Western Reserve Journal of International Law* 45, no. 3 (2013): 710–1.

<sup>14</sup> Maria Harz, “Pierwsze zeznanie Soprunienki,” in *Zeszyty Katyńskie nr 15. Zbrodnia Katyńska – Pytania pozostające bez odpowiedzi*, ed. Marek Tarczyński (Warsaw: Niezależny Komitet Historyczny Badania Zbrodni Katyńskiej. Polska Fundacja Katyńska, 2002), 136.

<sup>15</sup> Witold Kulesza, “Zbrodnia Katyńska jako akt ludobójstwa (geneza pojęcia),” in *Zbrodnia Katyńska. W kręgu prawdy i kłamstwa*, ed. Sławomir Kalbarczyk (Warsaw: Instytut Pamięci Narodowej, 2010), 56.

<sup>16</sup> Tucholski, “Katyń – liczby i motywy,” in *Zbrodnie NKWD na obszarze województw wschodnich Rzeczypospolitej Polskiej*, ed. Bogusław Polak (Koszalin: Wydawnictwo Uczelniane Wyższej Szkoły Inżynierskiej, 1995), 48.

<sup>17</sup> Lemkin, *Axis Rule*.

against members of a particular religious or racial community, consisting of pogroms, massacres and actions aimed at the existential destruction of the group in question.<sup>18</sup>

Genocide is a term used to describe certain behaviours, and its absence is not an obstacle to the emergence of an international norm that would prohibit acts of genocide. The best example of this is crimes against humanity, which were first defined at the level of international law in 1945 in the Charter of the International Military Tribunal, describing prohibited behaviour that may have been committed before the Second World War even began.

### 3.1. Prohibition of Genocide in the 1948 Convention

The first treaty to formulate an explicit and the most authoritative prohibition of genocide was the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide.<sup>19</sup> The Convention entered into force on January 12, 1951, and 153 states are now parties to it. The definition it formulated received universal acceptance from the international community and became the defining basis for the crime of genocide in all post-1990 international and hybrid criminal courts.

The 1948 Convention formulates a definition of genocide, under which it understands any of the following acts committed with the intent to destroy, in whole or in part, national, ethnic, racial or religious groups, as such: the killing of 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 and the forced transfer of children of members of the group to another group (Article 2). The Convention also identifies the prohibited perpetrators of genocide, i.e. in addition to the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide (Article 3).

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<sup>18</sup> Szawłowski, "Rafał Lemkin – twórca pojęcia „ludobójstwo” i główny architekt Konwencji z 9 XII 1948 (w czterdziestolecie po śmierci),” *Sprawy Międzynarodowe*, no. 2 (2005): 75.

<sup>19</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, 277.



The Convention contains a number of obligations addressed to contracting parties. Of primary importance is the obligation in Article I to prevent and punish acts of genocide as defined in Articles 2 and 3. One of the most effective ways to prevent genocide is to ensure that those accused of these crimes are punished and that penalties are implemented against them.<sup>20</sup> Therefore, Article 4 obliges contracting parties to ensure that any person guilty of genocide is punished, whether they are a member of the government, a public official or a private individual. The prevention of the crime of genocide implies the prohibition of its commission.<sup>21</sup>

Although the 1948 Convention affirms that genocide is a crime under international law, it cannot be a per se basis for criminal responsibility at both the national and international levels.<sup>22</sup> The condition for the former is the criminalisation of genocidal behaviour by national criminal law coupled with the obligation to establish national jurisdiction. As long as a national criminal law has not criminalised genocide and established a criminal sanction, the perpetrator of genocide cannot be held criminally responsible before a national judicial authority. This is why the 1948 Convention establishes an obligation for contracting parties to criminalise (Article 5) and establish a national criminal jurisdiction (Article 6). At the international level, the realisation of individual criminal responsibility depends on the existence of a norm prohibiting acts of genocide. This does not need to derive from written law and may be based on customary international law or a general principle. International criminal responsibility is consequential, and it only applies when an international legal norm providing for individual criminal responsibility and a sanction for the violation of this prohibition is combined with the violation of this prohibition that one can speak of an international crime for the trial of which an international criminal tribunal may be established. In international law, pinpointing the exact moment when the prohibition of acts of genocide took place and when the commission of that act turned into a crime of

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<sup>20</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, §426.

<sup>21</sup> *Ibid.*, §166–7.

<sup>22</sup> Krzysztof Masło, “Współpraca międzynarodowa państw w ściganiu najpoważniejszych zbrodni międzynarodowych,” in *Współczesne problemy procesu karnego*, eds. Marcin Wielec et al. (Lublin: Wydawnictwo Episteme, 2021): 358.

genocide, giving rise to international individual criminal responsibility, is very difficult. Some guidance may be provided by Article 6 of the 1948 Convention, according to which persons accused of genocide may be tried, inter alia, by an international criminal tribunal. This provision does not statute international criminal responsibility for the commission of an act of aggression. However, since it provides for the possibility of establishing an international criminal tribunal with the power to try the perpetrator of an act of genocide, it can be concluded that the 1948 Convention confirmed that the prohibition of genocide was already well established at the time of its adoption and that international individual criminal responsibility was linked to this prohibition. Significantly, too, the concept of international criminal tribunal used in this provision means all international criminal tribunals established after the adoption of the Convention, which have a potentially universal reach and are competent to try the perpetrators of genocide or other acts listed in Article 3 of the Convention.<sup>23</sup>

The 1948 Convention, insofar as it defines and prohibits genocide, is declaratory in nature, i.e. it confirms the existing state of international law.<sup>24</sup> This interpretation is supported in particular by the wording of Article 1, according to which states have confirmed that genocide constitutes a crime under international law. The drafters of the 1948 Convention, therefore, did not define new conduct but confirmed in treaty form conduct considered prohibited by the international law in force in 1948. This interpretation of Article 1 of the 1948 Convention is also confirmed by earlier UN General Assembly resolutions on the issue of genocide. In 1946, during its first session, the UN General Assembly unanimously adopted Resolution 96(1),<sup>25</sup> which defined genocide as a crime of international law condemned by civilised nations and a denial of the right to exist of entire human groups, for which the perpetrators and accomplices face punishment. The resolution also recommends that states implement the necessary procedures to prevent and penalise this crime and cooperate with other states to accelerate its prevention and punishment. The term

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<sup>23</sup> Karolina Wierczyńska, *Komentarz do Konwencji w sprawie zapobiegania i karania zbrodni ludobójstwa (Dz.U.52.2.9)*, LEX/el. 2008.

<sup>24</sup> Karski, "The Crime of Genocide," 742.

<sup>25</sup> A/RES/96(I), The Crime of Genocide, 11 December 1946.

used in the resolution (affirmation) shows that the General Assembly was aware that the recognition of genocide as an international crime is not constitutive and does not create or sanction a new prohibition in international law. The resolution recognized the prohibition of genocide and international criminal responsibility for its commission as existing international law. The UN General Assembly has been very consistent in this regard, as Resolution 180, adopted in 1947, included language confirming that genocide is a crime of international law and entails the international responsibility of individuals and states.<sup>26</sup>

Confirmation of the declaratory nature of the 1948 Convention's prohibition of genocide was also provided by the 1951 ICJ Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>27</sup> The Advisory Opinion was initiated by request from the UN General Assembly, in which the court was asked a number of questions concerning the position of the states that had made reservations to the 1948 Convention. Referring to Resolution 96(1), the court pointed out two consequences of the special nature of the 1948 Convention. Firstly, according to the ICJ, the principles underlying the Convention are recognized by civilised nations as binding on states, even without any convention obligations. Secondly, the ICJ emphasised the universal nature of both the condemnation of genocide and the required cooperation "in order to liberate mankind from such an odious scourge". With this somewhat enigmatic formulation, the court indicated that states are not only bound by the prohibition of genocide when they bind themselves to the 1948 Convention. The obligation to comply with the prohibition of genocidal acts is linked to membership of the international community of civilised states and is part of the principles of international law recognised by those states regardless of their convention obligations. Some representatives of international law doctrine have expressed the view in relation to this part of the Advisory Opinion that the ICJ in 1951 confirmed that the prohibition of genocide is part of customary international law.<sup>28</sup> However, regardless of

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<sup>26</sup> A/RES/180(II), Draft convention on genocide, 21 November 1947.

<sup>27</sup> *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, 15.

<sup>28</sup> Patrycja Grzebyk, "Mord katyński – problematyczna kwalifikacja," *Sprawy Międzynarodowe*, no. 2 (2011): 98; Karski, "The Crime of Genocide," 742.

whether the origins of the prohibition of genocide are to be found in customary international law or in general principles recognised by civilized nations, the ICJ reaffirmed in its 1951 Advisory Opinion that the prohibition of genocide is universal and not dependent on the fate of the Convention itself. This is also of particular relevance in the context of the clause in Article XV of the 1948 Convention that “[i]f, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force”.

### 3.2. The Origin of Genocide from Crimes against Humanity and the Law of Armed Conflict

The predominant view in international law until the 1990s was that the crime of genocide was a qualified form of crime against humanity and derived from these crimes.<sup>29</sup> As late as 1950, the International Law Commission (ILC), working on a code of crimes against the peace and security of humanity, stressed that the distinction between the two international crimes was not easy to draw and that the two concepts could overlap.<sup>30</sup> This was the view of the ILC back in the early 1980s. In the *Fourth Report on the Draft Code of Crimes against Peace and Security of Humanity*, Special Rapporteur Doudou Thiam considered that there was no doubt that the concept of crimes against humanity consisted of genocide and other inhumane acts.<sup>31</sup> Genocide was also recognised as an aggravated form of crime against humanity in the 1968 Convention on the Non-Application of Statutes of Limitations to War Crimes and Crimes against Humanity.<sup>32</sup> It was not until the activities of the ad hoc criminal tribunals for the former Yugoslavia and for Rwanda,

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<sup>29</sup> Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2012), 206; Mahmoud Cherif Bassiouni, *International Criminal Law. Third Edition. Volume I. Sources, Subjects, and Contents* (Leiden: Brill, Nijhoff, 2008), 270.

<sup>30</sup> Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur, *Yearbook of the International Law Commission (1950)*, vol. 2, para. 65.

<sup>31</sup> Fourth report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, *Yearbook of the International Law Commission (1986)*, vol. 2(1), para. 65.

<sup>32</sup> Convention on the Non-Application of Statutes of Limitations to War Crimes and Crimes against Humanity, adopted by the United Nations General Assembly on 26 November 1968, OJ. 1970 no. 26 item 208.

established in the early 1990s, that genocide was singled out as a crime in its own right, although some of the earliest decisions of these criminal tribunals still presented a view of the qualified nature of genocide.<sup>33</sup>

Recognizing that genocide originated from crimes against humanity and was originally considered a particular form of it raises very serious implications.

First and foremost, the link between the two international crimes meant that at least some of the genocidal acts were criminalised in the Charter of the International Military Tribunal (IMT Charter)<sup>34</sup> under the heading of crimes against humanity. At the time, the most authoritative definition of crimes against humanity was contained in Article 6(c) of the IMT Charter, according to which crimes against humanity were

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>35</sup>

The jurisprudence of the Nuremberg Tribunal and the subsequent work on the Nuremberg Principles made it possible to distinguish two groups of crimes against humanity. The first category, so-called *murder crimes*, was defined as including murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population. The phrase “other inhumane acts” indicates that the list of explicitly listed acts is not exhaustive. One may venture to argue that genocidal behaviour such as 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 and the forced transfer of children of members of

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<sup>33</sup> *Prosecutor v. Goran Jelisić*, A.Ch. ICTY, Judgment, 5.7.2001, IT-95-10-A, Partial Dissenting Opinion of Judge Wald, §2; *Prosecutor v. Kambanda*, ICTR TCh, Judgment and sentence of 4.8.1998, ICTR-97-23-S, §16.

<sup>34</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945, UNTS vol. 82, 279.

<sup>35</sup> *Ibid.*

the group to another group, all fall within this concept. Within the meaning of the IMT Charter, the first category of crimes against humanity was directed against any civilian population.<sup>36</sup> They could, therefore, be committed not only by belligerent forces against citizens of another belligerent state but also against the perpetrator's own countrymen.<sup>37</sup>

The second category of crimes against humanity included persecution on political, racial or religious grounds. Interestingly, the literal wording of the IMT Charter allowed for the assumption that persecution targeted not only civilians but also members of the armed forces of belligerent states.<sup>38</sup> In the 1940s, the belief was also expressed that the second category of crimes against humanity was closely related to the crime of genocide.<sup>39</sup>

The link between the two crimes also means that the origins of the prohibition of genocide – as well as crimes against humanity – should be sought in international humanitarian law and, above all, in those legal norms that restricted the freedom to conduct hostilities and the choice of methods of war.<sup>40</sup> Although the first binding rules of international humanitarian law on states appeared in the second half of the 19<sup>th</sup> century, the fundamental development of this branch of international law began with the Hague Conferences at the turn of the 20<sup>th</sup> century and the conventions adopted at that time on the laws and customs of war. It is in the legal regulations adopted at that time that the genesis of the crime of genocide should be sought.

The code of laws and customs of war regulated at the Hague Peace Conferences was certainly not exhaustive. It left outside the protection of, for example, victims of naval warfare and, as the International Military Tribunal pointed out, persons with the nationality of a belligerent state (who were not victims of war crimes). An often overlooked value of the Hague

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<sup>36</sup> Egon Schwelb, "Crimes Against Humanity," *British Yearbook of International Law* 23, (1946): 190; The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General, 1949, A/CN.4/5, 67.

<sup>37</sup> Schwelb, "Crimes Against Humanity," 190.

<sup>38</sup> *Ibid.*

<sup>39</sup> The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General, 1949, A/CN.4/5, 68.

<sup>40</sup> Cherif Bassiouni, *International Criminal Law*, 270.

Peace Conferences is the introduction of the so-called Martens Clause into the Fourth Hague Convention of 18 October 1907 on the Laws and Customs of War on Land.<sup>41</sup> According to the eighth indent of the preamble to this Convention:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>42</sup>

The Martens Clause introduced the principles of humanity and the public conscience clause into the language of international law. The principles of humanity and the requirements of public conscience extended the protections afforded to civilians and members of the armed forces of belligerent states and to those matters that were not regulated in the Fourth Hague Convention and limited the freedom of states during the armed conflict by prohibiting those methods and means of warfare that are not compatible with them.<sup>43</sup> As a result of the enshrinement of the Martens Clause in the Fourth Hague Convention of 1907, international law began to limit not only the manner of warfare against a foreign state and against enemy armed forces. The Martens Clause subjected civilian populations to protections derived from the principles of humanity and marked a break with the hitherto prevailing rule allowing a state to act freely towards its own citizens. The freedom of states to treat their own citizens was thus limited, and its scope was defined precisely by the principles of humanity and the demands of public conscience. Since the Hague Peace Conferences, inhuman treatment of human beings has been forbidden, even if tolerated, encouraged or practised by their own state, and this ill-treatment has become internationally punishable. An example is provided by the massacres

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<sup>41</sup> Hague Convention of 18 October 1907 on the Laws and Customs of War on Land, OJ. 1927 no. 21 item 161.

<sup>42</sup> Ibid.

<sup>43</sup> Teodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience," *The American Journal of International Law* 94, no. 1 (2000): 79.

of Armenians by the Turkish army during the First World War.<sup>44</sup> The Treaty of Sèvres, signed on August 10, 1920, did not, of course, call the massacres of Armenians genocide (nor did it call them crimes against humanity or war crimes), but “massacres” (Article 230). However, it is not the nomenclature that is at issue here but the fact that the mass murder of civilians in territory that was part of the Turkish Empire at the time was to be brought to account by a specially created court. The above view was also embodied in the concept of crimes against humanity enshrined in Article 6(c) of the IMT Charter and made possible the prosecution and conviction of Axis State criminals at Nuremberg and Tokyo. International law prohibited inhumane acts against any civilian population long before the start of World War II operations.

However, the Martens Clause was not unlimited, as it protected civilians and members of the armed forces in wartime and did not apply in peacetime. This meant that at the dawn of the formation of crimes against humanity and genocide, international law required that these crimes be linked to hostilities. Protection from these crimes did not extend to the civilian population in peacetime, although this conclusion may seem illogical or even inhumane from today’s perspective. Therefore, Article 6(c) of the IMT Charter required that crimes against peace be committed in conjunction with any other crime falling within the jurisdiction of the Tribunal (i.e. war crimes or crimes against peace). This limitation has led de facto to the IMT only marginally addressing perpetrators of crimes against humanity. It is worth quoting at this point the Tribunal’s general statement on crimes against humanity formulated in the verdict on major German war criminals, pronounced on September 30, and October 1, 1946 at Nuremberg.<sup>45</sup> The IMT stated that “political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty” and that the “policy of persecution, repression and murder of civilians in Germany before the war

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<sup>44</sup> Jennifer Balint, “The Ottoman State Special Military Tribunal for the Genocide of the Armenians: ‘Doing Government Business,’” in *The Hidden Histories of War Crimes Trials*, eds. Kevin Heller and Gerry Simpson (Oxford: Oxford University Press, 2013): 80–2.

<sup>45</sup> Tadeusz Cyprian and Jerzy Sawicki, *Materiały norymberskie: umowa – statut – akt oskarżenia – wyrok – radzieckie votum* (Warsaw: Spółdzielnia Wydawnicza „Książka”, 1948), 139–347.



of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out,” and that the “persecution of Jews during the same period is established beyond all doubt.”<sup>46</sup> Nonetheless, the IMT found that it had not been satisfactorily demonstrated that these acts had been committed before the outbreak of war in the execution of, or in connection with, any crime within the jurisdiction of the Tribunal. For this reason, the Tribunal stated that it was not in a position to “make a general declaration that the acts before 1939 were Crimes Against Humanity within the meaning of the Charter.”<sup>47</sup> However, the Tribunal did not exclude the possibility that crimes against humanity had also been committed before 1 September 1939. On the contrary, in its activities, it dealt, *inter alia*, with crimes against humanity committed against Austrian Jews up to the *Anschluss* of Austria by the Third German Reich.

The jurisprudential practice of the IMT made it clear that even before the start of the Second World War, there was a prohibition in international law against the extermination and persecution of entire groups of people. These acts, although they were not yet called genocide, were treated as violations of international law, to which international criminal responsibility was attached. As an example, one of the co-defendants in the Nuremberg Trial, Baldur von Schirach, was found guilty of crimes against humanity committed during and before the Second World War.<sup>48</sup> The Tribunal found that von Schirach was not accused of committing war crimes in Vienna but of crimes against humanity. Austria was occupied in accordance with a common plan of aggression. Its occupation is, therefore, a crime within the jurisdiction of the Tribunal and consequently, the murders, exterminations, enslavements, deportations and other inhumane acts and persecutions on political, racial or religious grounds in connection with that occupation constitute a crime against humanity within the meaning of this article.<sup>49</sup> Julius Streicher was also a co-accused in the Nuremberg trials for crimes against humanity. The Tribunal noted that Streicher had organised a boycott of Jews on April 1, 1933 and had encouraged the promulgation

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid., 235–6.

<sup>48</sup> Ibid., 315–6.

<sup>49</sup> Ibid.

of the Nuremberg Laws in 1935. He was responsible for the demolition of the Nuremberg Synagogue on August 10, 1938 and had spoken publicly on November 10, 1938, encouraging a pogrom against the Jews. Later, in 1938, he began to call for the destruction of the Jewish race in general.<sup>50</sup> Streicher continued to incite murder and extermination during the war effort. The Tribunal considered this to be a classic example of persecution on political and racial grounds and found him guilty of crimes against humanity.<sup>51</sup> It is clear from the Tribunal's reasoning that it also took into account the persecution of Jews in Germany during peacetime.

#### 4. Problem of the Legal Qualification of the Holodomor and the Katyn Massacre

The legal assessment of both the Holodomor and the Katyn Massacre is complicated. In Polish doctrine, there are clashing views recognising the Katyn Massacre as a war crime,<sup>52</sup> as well as a crime of genocide.<sup>53</sup> The arguments given by the doctrine for or against the adoption of one of the above concepts boil down not only to the time when both the Holodomor and the Katyn Massacre were committed. Indeed, it is clear from the considerations so far that the prohibition of the acts that the 1948 Convention called genocide had existed in international law since at least the 1930s. The problems discussed by the doctrine are also related to whether the Holodomor and the Katyn Massacre contain the necessary elements that the 1948 Convention defined as genocide.

Genocide requires, first and foremost, the demonstration of a specific *dolus directus*, i.e. the intention to destroy, in whole or in part, a national, ethnic, racial or religious group. In doing so, genocide cannot be directed against any other group (e.g. political), as the catalogue of protected groups listed in the Convention is closed.<sup>54</sup> In order to qualify conduct as genocide,

<sup>50</sup> Ibid., 295.

<sup>51</sup> Ibid., 296.

<sup>52</sup> Grzebyk, "Mord katyński."

<sup>53</sup> Karski, "The Crime of Genocide"; Kulesza, "Zbrodnia Katyńska"; Joanna Kurczab, "Zbrodnia katyńska jako ludobójstwo. Próba systematyzacji kwalifikacji prawnokarnej," *Dzieje Najnowsze [online]* 49, no. 3 (3 November 2017).

<sup>54</sup> Payam Akhavan, *Reducing Genocide to Law. Definition, Meaning, and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012), 43.

it must be proven that the accused knew or should have known that their conduct would destroy, in whole or in part, such a protected group.<sup>55</sup> Intent to destroy a protected group distinguishes it from ordinary crime and other crimes in violation of international humanitarian law. In doing so, it is clear that conduct that qualifies as the crime of genocide may be both a crime against humanity and a war crime.

The available sources leave no doubt that the highest political factors in the USSR were the initiators and executors of both the policy of the Holodomor and the Katyn Massacre. Both Joseph Stalin and Vyacheslav Molotov and Vyacheslav Menshinsky realised that the means of coercing the Ukrainian peasantry to accept collectivisation meant the biological annihilation of many people who were categorised as kulaks, shoeshiners and enemies of the people.<sup>56</sup> The victims of the Holodomor can be classified as a political group because they were not singled out on the basis of property, ethnicity or religion. They were considered enemies of the political system being built in the USSR based on the abolition of private property and religion. Breaking the resistance of the Ukrainian population to collectivisation was also to deprive Ukraine of the chance of independence.<sup>57</sup>

The Katyn Massacre is much better documented. The note condemning 22,000 Poles to death by firing squad bears the handwritten signatures of Stalin, Voroshilov, Molotov and Mikoyan, as well as notations of a "yes" vote by Kalinin and Kaganovich. It is problematic to determine to which group the Katyn victims belonged. Adopting the enumeration contained in the 1948 Convention, in order to consider the Katyn Massacre as genocide, one would have to classify the interned Poles as a national, ethnic, racial or religious group. It is argued in recent literature that the victims belonged to a national group.<sup>58</sup>

However, since genocide was a particular form of crime against humanity in the 1940s, the precise identification of the group to which the victims belonged is important, first and foremost, for proving the intent of the perpetrators, i.e. to show that the perpetrators did not act with the intention

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<sup>55</sup> Ibid., 44.

<sup>56</sup> Dzwonkowski, "Głód i represje," 206.

<sup>57</sup> Ibid.

<sup>58</sup> Kurczab, "Zbrodnia katyńska jako ludobójstwo," 33.

of depriving a large number of random people of their lives, but sought to annihilate a particular group. Much more important for the recognition of the Katyn Massacre or the Holodomor as genocide was to establish whether the victims of this crime belonged to “any civilian population,” as this was required by the international law of the time, embodied in the IMT Charter. While there is no doubt that the victims of the Holodomor fall within this term, the victims of the Katyn Massacre included members of the Polish armed forces (albeit those who did not take part in hostilities at the time), as well as officers of the State Police, the Border Protection Corps, the Border Guard and the Prison Service. In addition, civilians and police officers without prisoner-of-war status were among the victims. Back in the 1940s, it was rightly pointed out that the requirement to target crimes against any civilian population did not imply the targeting of mass murder or persecution acts against the entire population.<sup>59</sup> Moreover, since crimes against humanity could also have been committed before the start of the war, their victims could not only be civilians in the sense of the law of armed conflict. Already in 1946, commenting on the judgment of the IMT, Schwelb noted that members of the armed forces could be victims of persecution.<sup>60</sup> The jurisprudence of ad hoc international criminal tribunals had recognised as part of the inter-jurisdictional customary law such an understanding of the civilian population, which included former combatants who were not taking part in armed activities at the time of the commission of crimes against humanity because they had deserted the army and were not carrying weapons, whether or not they wore a uniform, and directed towards persons who had become incapacitated as a result of wounds or deprivation of liberty.<sup>61</sup> Indeed, it is the specific situation of the population under attack, assessed at the time the crime was committed and not its formal status, that determines whether the population under attack is

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<sup>59</sup> Schwelb, “Crimes Against Humanity,” 190–1.

<sup>60</sup> Ibid.

<sup>61</sup> International Criminal Tribunal for the former Yugoslavia, Judgment of November 11, 1998, Prosecutor v. Blaškić, IT-95-14-T, §214; similarly International Criminal Tribunal for the former Yugoslavia, Judgment of February 26, 2009, Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić, IT-05-87-T, §147.

civilian.<sup>62</sup> In conclusion, it should be stated that members of the armed forces may also be victims of crimes against humanity and genocide, provided that they do not take part in armed activities as a result of their internment. There is, therefore, nothing to prevent the victims of the Katyn Massacre from being considered as “any civilian population.”

As discussed above, in the years leading up to the Second World War, both crimes against humanity and genocide had to be linked to war crimes or crimes against peace. Indirectly, this meant linking the commission of these crimes to an armed conflict or wartime occupation. The Holodomor was perpetrated during a period of peace. In the 1930s, the Soviet Union had already come to terms with the civil war and entered a period of building an economy and society based on communist models, including the forced collectivisation of agriculture. Although this was achieved with violence and gave rise to social revolts, it is impossible to consider it as an armed conflict, all the more so because, at the time, international law understood only classical interstate war as a crime against peace and did not in any way regulate the situation of civilians during a non-international armed conflict.

The situation in the Polish lands was different, as, after the defeat of the September campaign in 1939, the eastern borderlands found themselves under Soviet occupation, which was the result of a breach of the 1928 Kellogg–Briand Pact and the 1933 Convention for the Definition of Aggression, binding in 1939 the Soviet Union. The linking of the Katyn Massacre to war crimes or crimes against peace is therefore not in doubt.

In conclusion, while the link between the Katyn Massacre and war crimes or crimes against peace is evident, the Holodomor was caused during a period of peace. Calling it a genocide is politically justifiable and morally right, but only the Katyn Massacre constituted a crime under the international law of the time.

#### 4. Conclusion

The acts of genocide described in the 1948 Convention were prohibited by international law even before the date of adoption and entry into force of

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<sup>62</sup> International Criminal Tribunal for the former Yugoslavia, Judgement of November 11, 1998, IT-96-21-T, §214.

the Convention and, moreover, constituted an international crime, giving rise to individual criminal responsibility. This was brought about by the development of the international law of armed conflict initiated by the Hague Peace Conferences, which subjected civilian populations and members of the armed forces and other armed formations of states fighting under the rule of humanity. Initially, however, the act of genocide had to be linked to an armed conflict. The adoption of the 1948 Convention began the process of extending the act of genocide to include attacks against protected groups committed in peacetime.

While the Katyn Massacre constituted genocide, the Holodomor can only be described as such in a political and moral sense. By calling it a genocide, we reflect the entire content of the unlawfulness of the conduct of the Soviet authorities and the actual intention of the Soviet authorities.

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