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# Is the Genocide Convention Built on Ashes of Trauma?

- Understanding the Genocide Definition in International Law from a  
Trauma and Law Perspective

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# Summary

The central argument of the thesis is, by using the example of the genocide definition, to understand the often forgotten impact of the traumas of humankind in International law. Trauma and Law is a theoretical understanding or a hypothesis on international law related to the concept Crisis Law. The theory contains the idea that international law often is formed as a consequence of human tragedies or failures and that this have certain consequences and impacts on the formation of the black letter of the law as the application of the law. The theory understands the role of traumas within the legislative history of International law as both catalytic and distracting. By analysing the legislative history of the Genocide Convention and its construction of actus reus of Genocide, and the doctrines critique of its wordings from a trauma law perspective, the thesis aims to provide a better understanding of the definition itself and discuss how international law is formed.

The general historic overview of the legislative process of the Genocide Conventions describes a legal development from the recognition of minorities' existence, and later rights, via the atrocities of the 18<sup>th</sup> century, Raphaël Lemkin's ideas and the creation of the United Nations into the establishment of the Convention. Regarding the actus reus element of the Genocide Convention, the Thesis presents material from the legislative process showing a clear impact of the Holocaust on the formation of the definition. The thesis also provides the reader with an overview of doctrinal as well as non-legal critique if the defined genocidal acts in the convention.

The analysis concludes that it is possible to claim that the actus reus element is a "Trauma Law" and that primarily the Holocaust, served as a catalyst for the legislation. Furthermore, it concludes that the Holocaust may have played a distracting role when genocide was defined as physical destruction. Finally is the benefit of a Trauma and Law perspective critically discussed.

# Preface

This Master Thesis is dedicated to my mothers late uncle, Allan Garellick; a man passionate about the history of humankind and the first lawyer of my family.

In memory of my grandparents Fradjla and Lipa Macznik, survivors of the Holocaust.

With special thanks to my mother Ann Garellick and to my very loyal and supportive friends, without you, no Master Thesis.

With the hope that legal activism for human dignity, like Raphaël Lemkin's, will continue to inspire and prevail.

24<sup>th</sup> of May 2017

Jonatan Macznik

# Abbreviations

ECOSOC	United Nations Economic and Social Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
LoN	League of Nations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General

# 1 Introduction

## 1.1 Background

The Holocaust added a significant word to the world's vocabulary: genocide.<sup>1</sup>

As stated in the quote above, at first sight, the historic connection between the Holocaust and the term *genocide* might appear as obvious and clear. But is this an observation that survives closer research?

The creation of the United Nations, UN, has been described as a direct consequence of the First and Second World War and its human tragedies.<sup>2</sup> Human rights, as developed through the UN-system, have been specifically understood as a response to the atrocities in the Third Reich.<sup>3</sup> For example the preamble of the Universal Declaration on Human Rights, UDHR explains the need of universal human rights:

Whereas disregard and contempt for human rights have resulted in barbarous acts, which have outraged the conscience of mankind, and the advent of a world, in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people<sup>4</sup>

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<sup>1</sup> Bazylar, 2016, p. xxiii.

<sup>2</sup> Authers & Charlesworth, 2014 p. 25 – 28.

<sup>3</sup> Goldstone 2009.

<sup>4</sup> Preamble of UDHR.

The Convention on the Prevention and Punishment of the Crime of Genocide<sup>5</sup> was adopted by the General Assembly of the United Nations, UNGA, just about four years after the liberation of the Auschwitz-Birkenau Camp. The preamble of the Genocide Convention reads: “Recognizing that at all periods of history genocide has inflicted great losses on humanity”.

As the examples above shows, the historic events of the first half of the 20<sup>th</sup> century was present in the development of international legislation. But if international law can be seen as a direct response, a mirror one can say, of the common traumas of humankind, what are the consequences? Is it only beneficial for the purposes of international law? Following this enumeration of more or less obvious links between the Holocaust and international human rights instruments, one can ask in what way this, if at all, is an important part of international human rights law.

Disregarding the short period of time between the Holocaust and the formation of the Genocide Convention, what are the ideological and historical connections between them? Did the fact that the Genocide Convention was formed in the shadow of the systematic extermination of Europe’s Jews affect the international norms that where created?

As the Director of the Centre for International and Public Law, Faculty of Law, Australian National University, Hillary Charlesworth, have expressed:

A concern with crises skews the discipline of international law. Through regarding ‘crises’ as its bread and butter and the engine of progressive development of international law, international law

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<sup>5</sup> From here on: Genocide Convention.



becomes simply a source of justification for the status quo.<sup>6</sup>

This quote does in a clear way present the tension of the ambit of this thesis. The international legislation, that exists today, is and was not created in a vacuum. If history is the starting point of international legislation, in what way can a historical method help lawyers when understanding law?

When the member states of the UN urged themselves to agree upon a prohibition on genocide they faced a number of challenges. One of the main challenges was to determine the scope of genocide, and specifically what acts would be considered to be genocidal when committed with a genocidal intent. This thesis focuses on how the states of the world responded to this question, just moments, in perspective of humankind's history, after the Holocaust.

The Genocide Convention did legally define *genocide* as an international crime. Included in the definition, article 2 of the convention, is an enumeration of acts, the actus reus of genocide in terms of Criminal law. This thesis studies the creation of this enumeration of acts deemed to be genocidal.

## **1.2 Objective and Purpose**

The purpose of this essay is to contribute to the larger understanding of the formation of international law. The essay likewise aims to present the theoretical scope of the concept of Trauma Law and tries to use it as a lens to widen the understanding of international law and how it is formed. By understanding why parts of international law was formed and on what understandings of the world and moral connotations it was based,

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<sup>6</sup> Charlesworth, 2002, p 391.

acknowledgments and insights can assist the future development of international law to increase adequacy and applicability.

### **1.3 Research question**

This essay aims to answer the following question: *Is the actus reus definition of the crime of Genocide a result of “Trauma Law”?* and if so *is there a nexus between critique regarding the actus reus definition and the Genocide Conventions nature as Trauma Law?* A subsequent question is also to critically investigate in what way a focus on Trauma and Law can benefit legal history research in international law.

### **1.4 Methodology and Material**

The methodology used to answer the research question is that of legal history, closely connected to general historical method. By critically analysing both primary sources, such as treaties, statements by legislators and lawyers, and secondary sources such as both legal as non-legal literature on the subject or related subjects the gathered material is used to present the history and analyse it.

The analysis of the found material is done from the perspective Trauma and Law, presented in the theoretical chapter of the thesis. Clearly the information presented and the analysis will be strongly impacted by the given research question. For the theoretical part the thesis uses previous research of legal scholars on the relationship between trauma and international law but does independently defines “Trauma Law”. The method is applied with a critical approach to the use of the Trauma and Law method.

Due to the nature of the aim, this thesis cannot be seen as presenting a full overview of the legal history of the Genocide Convention, even if the

ambition of the author is that the analysis will benefit from the chosen method and therefore contribute to the understanding of the genocide definition within the Genocide Convention. It is also important to note that the thesis does not have the ambition to present the content of law in force and its applicability in general.

The chapters covering the history of the Genocide Convention primarily use the *Travail Préparatoire* of the Genocide Convention as the main source of information. The *Travail Préparatoire*<sup>7</sup> consists of a large number of various documents related to the creation of the Genocide Convention. Therefore a focus is made by the author to limit the research material to the main reports and convention drafts of main organs of the United Nations. The reports and drafts, with commentaries summaries proceedings, debates and submission of external parties and member states and does therefore serve as excellent material to study from the perspective of the thesis. Secondary sources by legal scholars are used to supplement the picture and put the primary sources in its historical context.

## **1.5 Delimitations**

While studying history, and especially legal history, the subject of study have to be clearly defined to avoid both unlimited sources to analyse and lack of precision in the conclusions. While the history of the Genocide Convention covers both an extensive legislative process within the United Nations as well as over 50 years of possible application there is a clear need to determine the boundaries of the research question to enable a coherent thesis. Already in the research question the field of study is delimited to only cover the *actus reus* element of the genocide definition. Even though often mentioned in the essay, the parts covering the objectors and subjects

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<sup>7</sup> Also compiled by Hiram Abtahi and Philippa Webb, 2008, Brill Publishing, however, this thesis uses the official database of the United Nations to find primary sources of the *Travail Préparatoire*, see Bibliography.

of genocide is delimited of the focus partly and the mens rea, the question of genocidal intent is not covered by the thesis. The theoretical scope of the thesis also provides in a delimitation of material studied to focus on the legislative process.

## **1.6 Structure**

This introductory chapter aims to provide the reader with the subject of the thesis and its context. It presents the research question with method, delimitations and materials used. An overview of previous research on the subject is also presented.

The second chapter is the theoretical backbone of the essay. The chapter presents previous and related research of the relation between international law and trauma as well as defines “Trauma Law” as used in this thesis.

The third chapter provides the study of the general legislative history of the genocide convention focusing on ideological standpoints and major events in the legislative process.

The fourth chapter describes in detail the formation of the actus reus of the crime of genocide.

The fifth chapter presents the legal discussion regarding the definition of the actus reus of the crime of genocide as well as presents non-legal academic discussions on the same matter.

The sixth and concluding chapter contains an analysis of the research question and tries to provide the reader with an understanding of the role of Trauma law from a critical perspective.

## 1.7 Previous Research

The previous research on Traumas in international law is presented in depth in chapter two and is therefore not presented in this chapter.

The history of the genocide convention is studied and presented in a number of books and studies. Often it is done synoptically, as an introduction to an in-depth study of the articles of the convention. However *Genocide in International Law, The Crime of Crimes* by William A Schabas<sup>8</sup> includes a more profound presentation of the drafting of the Genocide Convention as well as closer presentation of the history of article II of the convention, defining genocide.

Regarding legal studies in the role of the Holocaust in Law, Michael Bazzyler<sup>9</sup>, in his book *Holocaust, Genocide and the Law*, presents a comprehensive and up to date overview on Holocaust legal studies. He divides the types of research into separate divisions; first there is the research on the Holocaust as a legal event, where the legal rules of the Third Reich and law as a part of atrocities is investigated and told as legal history. Secondly there is research in law and legal actions created as a response to the Holocaust, as international treaties, courts. Thirdly, there is research in the field of legal philosophy studies where the Holocaust has played a vital role.<sup>10</sup>

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<sup>8</sup> Professor of Human Rights Law, National University of Ireland (*cover*, Schabas, 2009).

<sup>9</sup> Professor of Law, Fowler School of Law, Chapman University (*cover*, Bazzyler, 2016).

<sup>10</sup> For a more in-depth introduction of legal Holocaust research see *Introduction*, Bazzyler 2016.

## 1.8 Terminology

When conducting historical research the use of terminology and wording is important. It is important to remember that what someone wrote 1944 must be understood in the context of that time and in the definitions of terms of that time to avoid misconceptions and false interpretations of old statements. On the other hand, the terms must be presented in a way such that a reader of today can understand the usage of terms. However, due to the nature of the thesis, some terms have to be defined differently and understood in the context it is presented in. One clear example is the concept of *Nations*, as understood differently by Lemkin in 1943 than the readers of today.

The thesis defines Holocaust as Bazylar defines it: “the systematic, state-sponsored plan to murder all Jews”<sup>11</sup>.

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<sup>11</sup> Bazylar, 2016, p. 21.

## **2 Theoretical framework – Trauma and International Law**

### **2.1 Is there a relationship between the formation of International Law and the tragedies of humankind?**

The archetypal answer regarding the question what international law is based on is consent given by sovereign states. Every state, in its sovereignty, has its full power to, for itself as an entity, conclude international treaties and agreements and by that create international law and binding norms for states.<sup>12</sup> This view of international law, as just a result of powers and relations between formally equal parties is a strict legal view. Due to the aim of this essay, to explore the origin of the genocide definition, the convention is not studied from a legal positivistic approach, but rather through a historic lens. This chapter presents and discusses the role of tragedies in human history and its role in the creation of international law drawing on the “Law and Crisis”-concept in the context of the traumas of humankind.

### **2.2 Law and Society**

The basic understanding that law must be understood within its societal context underlines this essay. This conception, which uses an interdisciplinary approach to law, has its roots within the critical legal field

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<sup>12</sup> Abass, 2014, p. 15 – 16.

of “Law and Society”.<sup>13</sup> This thesis operates in the realm of Law and Society where law is not understood as a self-contained regime:

Law is not autonomous, standing outside of the social world, but is deeply embedded within society. While political scientists recognize the fundamentally political nature of law, the law and society perspective takes this assumption several steps further by pointing to ways in which law is socially and historically constructed, how law both reflects and impacts culture, and how inequalities are reinforced through differential access to, and competence with, legal procedures and institutions.<sup>14</sup>

The role of legal history in Law and Society has been described as a “critical influence” in the field. Especially Professor Hurst’s<sup>15</sup> understanding of “law as deeply grounded in the social and economic context of its time” is an underlying principle of the theory of this thesis.<sup>16</sup>

## 2.3 Law and Crisis

Charlesworth<sup>17</sup> and Authers<sup>18</sup> have in an article presented the idea that crisis as a phenomenon plays a central role in the forming and creation of

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<sup>13</sup> Lynn in: Goodin (ed.) 2008, p. 682

<sup>14</sup> Lynn in: Goodin (ed.), 2008, p. 681.

<sup>15</sup> Willard Hurst, 1910 – 1997, Professor of Law, University of Wisconsin Law School (Stanley N. Katz, *Proceedings of the American Philosophical Society*, Vol. 144, No. 4 (Dec., 2000), pp. 459-463)

<sup>16</sup> Lynn in: Goodin (ed.), 2008, p. 691.

<sup>17</sup> Hilary Charlesworth, Professor of international law, Australian National University (<https://researchers.anu.edu.au/researchers/charlesworth-hcm>, gathered the 20<sup>th</sup> of may 2017).



international human rights law. In their understanding a *crisis* is “malleable and ambiguous, a generic term for a type of transition, one framed by particular urgency” but they also state that it is hard to exactly define the content of the word crisis: “it is precisely its lack of definition that gives the idea of crisis its discursive force”.<sup>19</sup> The professors describe crisis as both a *catalyst* as well as a *distraction* of International Human Rights Law.<sup>20</sup>

In discussing the preamble of UDHR<sup>21</sup> the authors of the article uses it as an example of when atrocities in history have been a *catalyst* for the need of a universal declaration of human rights. They show, by referring to other scholars, that the reference to atrocities in the preamble is connected and continues to be connected with the Holocaust. They claim the Holocaust to be the main event foregoing the need of a human rights instrument, even if it is not explicitly mentioned in the preamble. The view of the authors is that crisis was used to both motivate the creation of the declaration as well as to motivate the declaration’s proactive nature to respond to future coming crises. By referring to a number of other international human rights instruments the authors show that “human rights law emerges as a response to crisis: crisis acts as a catalyst for normative development”. The authors express that what they call the “crisis-response pattern in international human rights law” in some way implies that the need of new laws underlines that previous laws failed with their promised protection of humankind. On the other hand the authors also present the more negative aspect of crises impact on human rights law, as a *distraction*. They present the idea that the quotidian atrocities, the violence and abuses that is maybe low-intensive and occurring on a daily basis, and that is not

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<sup>18</sup> Benjamin Authers, Postdoctoral Fellow, Australian National University (<http://regnet.anu.edu.au/our-people/visitors/benjamin-authers>, gathered the 20<sup>th</sup> of may 2017).

<sup>19</sup>Authers and Charlesworth, 2014, p. 23 – 24.

<sup>20</sup>Ibid.

<sup>21</sup> cited in the introductory chapter.

seen as crisis, is not addressed by international human rights law and therefore this crisis focus is limiting the possibilities of international human rights law. To summarise the author's state: "crises galvanise, sustain and undermine international human rights law". As a recommendation the authors suggest a critical approach to crisis, and that it must be recognised that crises are produced as negotiable narratives, possible to be used in different ways, and that this must be reminded; "when we respond to crises of human rights with international law".<sup>22</sup>

The actuality of the subject in the academic world can be exemplified with that the Humboldt University in Berlin's Law and Society institution in the Law Faculty have, beside three other subjects, "Law and Crisis" as its research focus at the moment. The Institute describes the area of research as:

(...)the legal implications of current and past crises. It revolves around the question of how law reacts to crisis – and vice versa. Although crisis – literally the moment of decision in a precarious situation – is not a legal term, it already stood in close connection with the law in ancient Greece. The research focus takes up this tradition and juxtaposes the currently ubiquitous talk of crisis with a theoretically informed concept thereof.<sup>23</sup>

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<sup>22</sup> Authers & Charlesworth, 2014, p. 28 – 30.

<sup>23</sup> <https://plone.rewi.hu-berlin.de/en/lf/oe/lsi/research/law-and-crisis>, gathered on the 20<sup>th</sup> of May 2017

## 2.4 The usage of “Law and Trauma” and “Trauma Law” in the thesis

The above-mentioned recommendation of Charlesworth and Authers serves as a fundament of this Thesis aim. However, it is the view of the author that naming the Holocaust as a Crisis contains several problems. But by virtue of the nature of the Holocaust, the author to differentiate from “Law and Crisis” has used the more appropriate term “Law and Trauma”. The concept of “Trauma Law” is a notion presented in this Thesis. Its content is not separated from that of “Crisis Law” but the use of Trauma is here made to highlight not only on-going crisis and its impact on law but especially by historical traumatic events.

Firstly, even though the Holocaust in many ways can be called a crisis by the definition of crisis presented above, it would play a risk of diminishing the Holocaust, and its victims and the oppressors to call the Holocaust, as well as other events today described as genocide as crisis. Secondly, the term crisis, does not, as clear, contain the nature of the atrocities during the Holocaust as the term Trauma does. The common human nature of the term Trauma is also very suitable in describing the Holocaust, in some way the use of Trauma links the Holocaust to being an event in history leaving remarkable traces in humankind.

It is however important to note that the fields Law and Trauma is not a commonly recognized concept among legal history scholars. The hypothesis tried out in this essay is that international law often is based on historical traumas<sup>24</sup> of humanity and that this connection between historical tragic events and international law affects the law, the legislative process and its implication. Within this hypothesis two terms that need to be defined is

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<sup>24</sup> Hence: *Trauma and Law*

used. Firstly, “Law and Trauma” is used as the wider concept discussing the relationship between law and trauma as such. The term Trauma Law is a law, argued being based, maybe not solely, but to a major part, on one or several traumas. A Trauma Law is not a specific law or a provision concerning something particular, but referring solely to the nature, arguments and context the particular law was based on.

# **3 The Genocide Definition – from Lemkins idea to the Genocide Convention**

## **3.1 Introduction**

What is genocidal? What is Genocide? Can anything be more morally wrong than homicide? Before the entry into force of the Genocide Convention 1951 no prohibition on the destruction of a defined group of people as a whole existed in international law. Even if international humanitarian law, the Hague and Geneva-treaties, partly regulated indiscriminate killings of civilians,<sup>25</sup> no previous regulations on extermination of specified populations as a whole can be found. This chapter aims to describe the general ideas behind the genocide definition and the process of its formation and the impact of the definition for international law and international criminal law. An underlying principle of international human rights law of today is the prohibition of prosecution of minority groups.<sup>26</sup> This chapter describes how the principle of minority protection within international law developed into the prohibition of genocide within international law.

## **3.2 Before the First World War**

As with many other parts of international law the Westphalian Peace of 1648 can be said as laying the foundation of minority protection in

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<sup>25</sup> For example; the *principle of distinction*.

<sup>26</sup> Schabas, 2009, p. 18.

international law, by recognising religious minorities. Even though this and other 18<sup>th</sup> century treaties<sup>27</sup> only recognised very limited rights for the protection of religious minorities it can be said as laying the foundation of the notion within international law that a sovereign cannot, unlimitedly, ill-treat its population. The outrageousness of the European wars in the 16<sup>th</sup> and 17<sup>th</sup> centuries resulted in the creation of international humanitarian law where, under wartime, civilians in general were protected but also their religious beliefs and practices gained some protection. However no specific protection of minorities was set out in the early Hague Regulations of 1907.

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### **3.2.1 The Legislative Reactions after the First World War**

The First World War and its aftermath are naturally of interest regarding international law and the protection of minorities. Especially the Turkish state's massacre of Armenians came to result in international legal action. The actions of the Turkish state against its Armenian citizens resulted in a joint statement of France, Great Britain and Russia proclaiming the actions to constitute *crimes against humanity*<sup>29</sup>, and stated criminal responsibility as well as state responsibility for the actions and the possibility for the states to prosecute responsible individuals for the massacres.<sup>30</sup> USA proclaimed later, after the approval of the Genocide Convention, in a statement before

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<sup>27</sup> Such as i.a. the Peace Treaty of Utrecht 1743.

<sup>28</sup> Schabas, 2009, p. 18 -28, 30.

<sup>29</sup> At this time, Crime against humanity, was a legally undefined crime in war time directed towards a states own citizens, however undefined in treaty law until the Nuremberg process. (<http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity>, gathered thw 19<sup>th</sup> of may).

<sup>30</sup> Schabas, 2009, p. 19-20 and Shany in: Gaetta, 2009 p. 5.

the International Court of Justice that, the Turkish massacre of Armenians was an outstanding example of Genocide.<sup>31</sup>

The British government did after the First World War attempt to prosecute the responsible Turkish nationals of, then named, massacres on Armenians. The British government based this on that it had promised to prosecute the actions based on “the common law of war” or “the customs of war and rules of international law”<sup>32</sup> on the basis of universal jurisdiction on occupied land. However these prosecutions were never put in place due to political reasons. The peace treaty of Sévres, regarding the future of the defeated Ottoman empire included what have been called a legal innovation; an obligation of Turkish government to hand over, to the allied powers, those responsible for massacres on the Turkish territory. The treaty also gave the right of the allied parties to prosecute the ones handed over in a special tribunal. However the treaty was never ratified and therefor did never enter into force. This has been described as an abandonment of victims – as the Sévres treaty was replaced with the Lausanne Treaty of 1923 where amnesty was given for the perpetrators of the massacres.<sup>33</sup>

Even though the above attempts to prosecute for the massacres on Armenians, states within the framework of the newly established League of Nation, LoN, continued the effort to create judicial mechanisms to protect minorities. One important development as a consequence of the First World War was the creation of the so-called *Minority treaties*. In order to secure a strong peace in Europe, with new borders and recognition of minorities within those borders, attempts were made to create legislative protection. Attempts to include rights and protection of minorities within the founding

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<sup>31</sup> Written statement of the United States of America, Reservations to the Convention on the Prevention of Genocide (advisory opinion), Pleadings, Oral Arguments, Documents, pp. 23.– 47 at p. 25 (cited in Schabas 2009, p. 19).

<sup>32</sup> Foreign office 371/4174/129560 (folios 430-1) (Cited in Schabas, 2009 p 25).

<sup>33</sup> Schabas, 2009 p 25 – 26.

treaty of the LoN, failed when the state's interest to protect their sovereign integrity prevailed. However within the framework of the LoN, a number of bilateral treaties, peace treaties and unilateral declarations<sup>34</sup> created a network of protection of minorities. The rights set out in the minority treaties were equality of treatment, access to public offices as well as partly autonomy for minorities regarding civil society. The minority treaties included a mechanism of review within the LoN. The system collapsed in the rise of nationalism in inter-war time, as a consequence of the states' view that the minority protection system intruded on various states' sovereignty. The weak protection of the system provided has in positive terms been described as "an attempt" that put the minority protection question on the international agenda.<sup>35</sup>

### **3.3 The Father of the Genocide Convention<sup>36</sup> – Raphaël Lemkin**

The genocide definition is of special character in international law as it can be said that the origin of the idea behind the definition is not state-made, but man-made. Not only by several men in general but by a special man, the so-called father of the genocide-definition, Raphaël Lemkin.<sup>37</sup> To fully understand international criminal law in general and the genocide definition in specific it is important to understand the thoughts and actions of Lemkin in his efforts for a prohibition of what he called genocide.

Lemkin's interest in international legislation on specific acts of massacre arose during his study time at the university of Lvov, Poland, where he

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<sup>34</sup> For a full overview see Rehman, 2000, p. 38 – 39.

<sup>35</sup> Rehman, 2000, p 37 – 42.

<sup>36</sup> Named this by many, among others Bazylar, 2016, p 35.

<sup>37</sup> Bazylar, 2016, p. 34 – 36.



studied the genocide on Armenians during the First World War. This interest came to result in his first lobbying effort to the world community, proposing two new crimes to the then on-going Fifth conference for the Unification of Penal Law in 1933. He wanted to criminalize what he called *Vandalism*, that was directed towards destruction of art and culture in general, and *Barbarie* (French), a crime including actions towards a “defenceless racial, religious or social collective” with acts such as “massacres, pogroms, collective cruelties directed against women and children and treatment of men that humiliates their dignity”. Regarding barbarie Lemkin defined it as: systematic and organized acts of violence with anti-social and cruel motives towards not an individual but a population or a racial or religious group. Lemkin claimed that the other lawyers at the conference did not approve his purpose due to fact that the crime took place very seldom.<sup>38</sup>

In the book *Axis Rule in Occupied Europe*<sup>39</sup> from 1944, Lemkin described the actions of the Third Reich from his refuge first in Stockholm and later in the USA from the Nazi-persecution in the occupied Poland<sup>40</sup>. It is an extensive work with both statistical data and information regarding treatment of different categories of people under German occupation. The chapter, by Lemkin named Genocide, is today known as the very starting point of the road to the genocide convention. By describing actions of Germany, during the war, while still on-going, Lemkin tried to establish what was the elements of his concept of genocide he tried to define, and what needed to be prohibited.<sup>41</sup>

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<sup>38</sup> Schabas, 2009, p. 28 – 30.

<sup>39</sup> From here on: *Axis Rule*.

<sup>40</sup> For a more in-depth study of Lemkin’s life in exile: Klamberg, 2016.

<sup>41</sup> Lemkin, 1944, p. 82-90.

### 3.3.1 The Birth of the Term Genocide

The term Genocide was according to Lemkin: “(c)oined by the author to denote an old practice in its modern development”. He argued that: “New concepts require new terms”<sup>42</sup>. The term *genocide* comes from the antique Greek word *genos*, meaning race, nation or tribe and the Latin word *caedere*, to kill.<sup>43</sup>

Lemkin defined Genocide as:

(...)the destruction of a nation or a ethnic group (...)  
Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups<sup>44</sup>

It is of special interest to understand what Lemkin meant when he used the word *nation* in his definition. Clearly he was not referring to States in the meaning of international law when he made the Jews, a people then without

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<sup>42</sup> Lemkin, 1944, p.79.

<sup>43</sup> Schabas, 2009, p. 29.

<sup>44</sup> Lemkin, 1944, p. 79.

a State, as an example of a nation intended to be destroyed by Germany.<sup>45</sup> It is also clear that Lemkin separates the notion of nations from nationalism.<sup>46</sup> Instead it has to be read between the lines that Lemkin, when it comes to nations and national groups means a collective joined by mutual “genuine traditions, genuine culture, and a well-developed national psychology”.<sup>47</sup> This definition of the subjects of genocide, *nations*, can be criticised for being unclear and to not fully incorporate all possible groups subject to persecution as groups, especially religious and political groups or minorities. As will be shown below the definition of subjects of genocide would become one of the most extensive debates when drafting the convention.

### **3.3.2 Lemkin's understanding of Genocide as a societal phenomenon**

In order to be able to understand Lemkin's definition of Genocide, it is important to study his understanding of *destruction of nations* from a non-legal perspective. In *Axis Rule* he presents his views on how such destruction is carried out. Lemkin argues that genocide is two-phased. The first phase is directed towards destroying the “national pattern of the oppressed group” and the second phase is the “imposition of the national pattern of the oppressor”.<sup>48</sup> The second phase, Lemkin argues, is made either on the oppressed population left or on the “territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals.”<sup>49</sup> Lemkin argued that the in debate at the time used term denationalisation<sup>50</sup> did not fully include what he wanted to claim

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<sup>45</sup> Lemkin, 1944, p 91.

<sup>46</sup> Lemkin, 1944, p. 90.

<sup>47</sup> Lemkin, 1944, p.

<sup>48</sup> Lemkin, 1944, p 79

<sup>49</sup> Lemkin, 1944, p. 79

<sup>50</sup> Compare; Germanization i.a.

as genocide because it did not include and make visible the biological aspect of genocide, only the nationalistic and cultural aspects. Lemkin claimed, with the example of the Poles being oppressed by occupying Germans, that *Germanization* did not describe the intent by the Germans to biologically decline the Poles. Lemkin stated that Genocide, on the other hand, described “a process in which the population is attacked, in a physical sense, and is removed and supplanted by populations of the oppressor nations”.<sup>51</sup>

When describing genocide, Lemkin turned on the then on-going actions by the Third Reich. He claimed that the German occupiers carried out a *policy of genocide*<sup>52</sup>. He claimed that Germany did not accept the principle of humanitarian law of distinction<sup>53</sup> between civilians and combatants, between states and populations and Germany was, according to Lemkin, driven to fight the war against other populations and not primarily the subjects of international law, states. Even though the desire of the Third Reich was to entirely extinct the Jews, this is not the sole group mentioned in Lemkin’s understanding of his examples of Genocide during the then on-going war. In *Axis Rule*, Lemkin portrays Hitler as a man who wants to biologically change Europe, and make it totally Germanised.<sup>54</sup>

When describing genocide, and the offensive acts of the crime, Lemkin describes techniques in seven fields of genocide:

Regarding genocide in the *political* field, Lemkin argues that the German overtake of actual political power in occupied territories was a part of the intended genocide. This process did not only apply to the actual governance, but also to that “every reminder of former national character was

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<sup>51</sup> Lemkin, 1944, p. 79 – 80.

<sup>52</sup> Lemkin, 1944,, p 81

<sup>53</sup> Expressed by Lemkin as the Rousseau-Portalis Doctrine.

<sup>54</sup> Lemkin, 1944, p. 83.

obliterated”<sup>55</sup>. Lemkin notes that genocidal acts on a political level are performed in various scales from just *Germanization* of names to actual displacements in favour of German inhabitants.<sup>56</sup>

In the *social* field Genocide takes place, according to Lemkin, by attacking the judicial system and its professions of the occupied countries and directing persecution towards the intelligentsia of the countries to “weaken the national spiritual recourses”.<sup>57</sup>

Regarding *culture* Genocide takes place as actions towards use of other languages than German as well as exclusion of non-Germans to higher education. Also, the Germans execute control of performers of art to not perform expressions of “national spirit”. This, Genocide in the field of culture, included destruction of national monuments and libraries and other cultural institutions. In this case Lemkin especially mentions the German destruction by fire of the Jewish Theological Seminary Library in Lublin, Poland as an example of Genocide in the field of Culture.<sup>58</sup>

In the field of *Economy*, Lemkin explains: “The destruction of the foundations of the economic existence of a national group necessarily brings about a crippling of its development, even a retrogression”<sup>59</sup>. He also notes that imposition of starvation and lowering of standard of living can be used as a weapon on both the possibility to fulfil “cultural-spiritual requirements” as well as “thinking in both general and national terms”. In this field Lemkin notices the total deprivation of Jews economic elements of

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<sup>55</sup> Lemkin, 1944, p. 82.

<sup>56</sup> Lemkin, 1944, p. 82 – 83.

<sup>57</sup> Lemkin, 1944, p. 83.

<sup>58</sup> Lemkin, 1944, p. 84 – 85.

<sup>59</sup> Lemkin, 1944, p. 85.

existence but also the shifting of resources from Poles to Germans and from those non-willing to be germanised in the occupiers eyes.<sup>60</sup>

Genocide in the *biological* field is carried out by what Lemkin calls “depopulation”. This is done by applying policies intended to decrease childbirth by non-Germans and improve the birth rate by Germans. This is done, according to Lemkin by both laws regulating non-German marriages as well as subsidies for “German-families” with several children.<sup>61</sup>

Regarding *Physical* Genocide Lemkin describes three ways Genocide is performed: “Racial discrimination in feeding”, “Endangering in Health” and “Mass killings”.<sup>62</sup> In this part Lemkin uses by that time known statistics and facts about the situation of mainly Jews in the area controlled by the Germans. Notable is that Lemkin already in 1944 describes, if not an entire picture of the Holocaust, but a close description of the system of ghettos and train transportations with the sole purpose to perform Physical Genocide of the Jews.<sup>63</sup>

Lemkin also described Genocide techniques in the *religious* field to restrict access to religious institutions as a part of national influence of the suppressed. Lemkin also described techniques for Genocide in the field of *Morality*. He claimed that one method to destroy a nation is to weaken the moral of its individuals encouraging usage of alcohol and pornography as a method to weakening the national spirit.<sup>64</sup>

It is obvious that Lemkin, in general, while describing what he claims to be an on-going Genocide, views Genocide in a broader approach than just what

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<sup>60</sup> Lemkin, 1944, p. 85 - 86.

<sup>61</sup> Lemkin, 1944, p. 86 - 87.

<sup>62</sup> Lemkin, 1944, p. 87 - 89.

<sup>63</sup> Ibid.

<sup>64</sup> Lemkin, 1944, p. 89.

is today called the Holocaust. He was in his argumentation targeting what the Third Reich tried to do to Europe's populations in general as a whole and not only targeting the Jews.<sup>65</sup> Rather, in Lemkin's eyes 1944, what Hitler did to the Jews was only a part of a larger *policy of genocide*. It is interesting that Lemkin, while describing techniques of genocide, only refers to the then on-going actions by the Germans and do not for example mention the Genocide of Armenians, that he previously had studied in detail. With both Lemkin's definition of Genocide, and his examples of the technique of Genocide at hand, it is easier to understand the conception of actions that Lemkin wanted to target in his argumentation.

### **3.3.3 Lemkins recommendation – to prohibit genocide by international law**

The most interesting part of Axis Rule, from the perspective of this thesis, is the third subsection of the chapter of Genocide: *Recommendations for the future*. It is noteworthy that Axis Powers were published before the war was over and the rise of the international community within the United Nation had not yet started. The primary recommendation of Lemkin was a *prohibition of genocide in war and peace*. He introduces this recommendation with a reference to the actions by the Germans in Europe during World War II. His argumentation has its starting point with the Hague Regulations and conclude that the German acts have “surpassed in their unscrupulous character any procedures or methods imagined a few decades ago by the framers of the Hague Regulations”.<sup>66</sup> Explicitly Lemkin made visible the shortage of the then in force humanitarian law that did only partly cover the acts of the Germans when an individual is subject to the treatment but not “take into consideration the interrelationship of such rights

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<sup>65</sup> Also discussed by Shaw, 2007, p 21.

<sup>66</sup> Lemkin, 1944, p. 90.

with the whole problem of nations being subjected to virtual imprisonment”<sup>67</sup>. He also noted that the Hague regulations did recognise the sovereignty of a state but not “the integrity of a people”. In this regard Lemkin mentioned the protection of the above described *minority treaties* and the national constitutions, derived out of the peace after the First World War, as a legal development with protection of minorities. He claimed that genocide is worse than murder and targeted the feeling of “our morality and justice”.<sup>68</sup>

Lemkin argued that Genocide contains several different acts of persecution and destruction and that some of these already were prohibited under the Hague Regulations, such as targeting civilians. Other parts, however, as transferal of children and genocidal techniques mentioned above directed towards culture or social elements were not covered by the legislation in force. He argued that Genocide had to be “dealt with as a whole” with prohibition of genocide amended to the Hague regulations. Even though Lemkin expressed the hope of no more wars; he argued that it was not enough with the hope and that legislation that expressly prohibited genocide was needed. He expressed the need of a prohibition on Genocide not only in times of war but also during peace, especially considering the plurality of peoples living in Europe and considering the possibility that some nations would become minorities within state boundaries. Lemkin did note however that international law is not enough to stop Genocide, there is a need of efficient national judiciary institutions to realise the prohibition in reality and protect all nations. Lemkin argued for an international multilateral treaty introducing protection of minority groups because of their nationhood, religion or race as well as an introduction of a criminalization of Genocide on national level, “inflicting penalties for genocide practices”. Wanting the crime to be criminalised with international repression he argued

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<sup>67</sup> Ibid.

<sup>68</sup> Lemkin, 1944, p. 91.



that genocide should be added to the list of *delicta juris gentium*, crimes under international law.<sup>69</sup>

Lemkin's understanding of Genocide have been criticised for being both narrow and broad. Narrow in the sense that it only included protection of nations but broad because it did not only include physical destruction as described above, also included i.a. cultural and political destruction.<sup>70</sup>

### **3.4 Sociological understanding of Lemkins Concept of Genocide**

While Lemkin was a lawyer and primarily wrote *Axis Powers*, in a de-lege-ferenda perspective, to change and adopt new laws, his understanding of Genocide have been scrutinised from other disciplines. Martin Shaw, professor of international relations and Politics at University of Sussex, has studied Lemkin's understanding of genocide from a sociological perspective. Shaw confirms in his writing the connection between Lemkin as a person and today's general understanding of the concept of Genocide. He claims that "recovering the meaning of genocide for Lemkin is a necessary beginning for serious study". Shaw highlights Lemkin's view of genocide as not just a series of crimes, but also a long-term policy to exterminate a national group. This is, from Shaw's explanation, describing genocide as a sociological process. Shaw defined Lemkin's definition of Genocide as Socio-historical, including not only physical killing of a group, but also social and cultural destruction of a group. Shaw argues that it is important to remember Lemkin's broad approach, and to not fall into the legal definition described below within the convention to fully understand genocide and be able to prevent and punish it. Shaw argues, Lemkin's work

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<sup>69</sup> Lemkin, 1944, p. 90 – 95.

<sup>70</sup> Schabas, 2009, p 30.

should be seen as the essential starting point for sociological understanding for genocide.<sup>71</sup>

### **3.5 The post-war trials and Genocide as a new crime**

Previous research of internal documents from the United Kingdom have exposed that the British government did know about the German plan to exterminate Jews. Therefore they discussed if these acts would fall under the concept of war crimes. Within the British administration there were debates on whether or not the persecution of German Jews would fall under the laws of war, due to underlining opinion that war crimes only could be perpetrated towards foreigners, and not, as the German Jews, citizens of the perpetrator.<sup>72</sup>

The allied powers did however in the Moscow Declaration of 1 November 1943 manifest that atrocities carried out by the Nazi regime were to be reattributed and warned those responsible that “they will be brought to book for their crimes”<sup>73</sup>. This can be seen as a promise of the later winning states of the Second World War that came to be realized in the below described Nuremberg Trials.

One ground-breaking change in this regard was the statement of the United States in 22nd January 1945 recognizing that the German state had committed atrocities against its own citizens during time of peace, before the war, and that these acts, even though not war crimes or in breach with

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<sup>71</sup> Shaw, 2007, p. 18 – 36.

<sup>72</sup> Schabas, 2009, p. 36-38

<sup>73</sup> Declaration on German Atrocities, department of state publication 2298. Washington: Government Printing Office, 1945, pp 7-8 (cited in Schabas, 2009, p. 35).

international law, would be punished. The United States described this need of punishment as in “the interest of post-war security and a necessary rehabilitation of German Peoples, as well as the demands of justice”.<sup>74</sup> It is of interest to note that this opening for a broader way of tackling the acts by the Nazi regime was not only done from a perspective of justice, but also in the interest of security and to rehabilitate the German population from Nazi beliefs. Even though the interest of justice was expressed, the interest of the victims of the Nazi atrocities was not mentioned, neither where the interest to protect minority rights. However, in 1 February 1945 the United States expressed an intention to punish leaders of the Nazi regime:

for the whole broad criminal enterprise devised and executed with ruthless disregards of the very foundation of law and against minority elements, Jewish and other groups and individuals<sup>75</sup>

It is important to note that these statements were statements by executive governments and not issuing with the power and intention to create international binding norms.

During the London Conference, which established the rules for the coming Nuremberg trials, the allied parties discussed the problem of punishing acts committed by the German Nazi regime on Jewish German citizens with the concern of the principle of sovereign integrity; to not interfere with internal affairs of another state. There was, in the conference, a will by the allied parties to internationalize the acts and therefore make them punishable internationally. The United States expressed that the international factor in the German State of extinction of German Jews was that this was part of the

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<sup>74</sup> Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals (Cited in Schabas 2009, p. 39).

<sup>75</sup> Cited in Schabas 2009, p.39.

war policy of the German regime. There was a common agreement among all the parties of the conference to establish a *nexus* between the war, especially acts of aggression, and the Nazi persecution of Jews. This has been described as done for the reason to not make ill treatment of minorities in the allied territories an international crime, instead of internal affairs of the Allied states. Only France raised awareness that his nexus may be false and hard to prove as a concern and referred to the principle of humanitarian intervention.<sup>76</sup>

These discussions came to result in the *Charter of the International Military Tribunal*<sup>77</sup> – *Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* of the 8 August 1945. The charter included, i.e, in article 6(c) the crime against humanity, defined as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions 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.

With regard to Lemkin and his lobbying for the use of the term of genocide regarding the acts of the Third Reich, it can be noted, that it had no success in having the term included in the charter. However, in the explanation of crimes perpetrated, the accusation by the prosecutors of the Tribunal accused the defendants Nazi Leaders with crimes against humanity by:

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<sup>76</sup> Schabas, 2009, p. 39 – 43.

<sup>77</sup> From here on: Tribunal.

(...)deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles and Gypsies.<sup>78</sup>

The Prosecutors of the allied countries referred to genocide as something that took place in Nazi controlled areas, not only to Jews but also to other non-German populations.<sup>79</sup> The inclusion of the concept of genocide in the prosecution is among scholars considered as a result of Lemkin's intense lobbyism as well as an attempt of introduction of the new international crime of Genocide.<sup>80</sup>

The final judgment of the Tribunal<sup>81</sup> did however not use the term genocide at all.<sup>82</sup> Nevertheless, in the eyes of Lemkin himself the final judgment sentencing the highest surviving and captured Nazi leaders "gave full support to the concept of genocide".<sup>83</sup> The nexus to war, necessary to prove crimes against humanity and war crimes according to the statutes of the Tribunal, where established by the court, but the question if the German acts against Jewish German Citizens before war time was considered a breach of international law was never answered in any verdict by the Tribunal.

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<sup>78</sup> France et al. v. Goering et al. (1946) 22 IMT 203, pp. 45-46. (cited in Schabas, 2009, p. 43)

<sup>79</sup> Schabas, 2009, p. 43-44.

<sup>80</sup> Schabas, 2009, p. 43.

<sup>81</sup> Final judgment of IMT, 30 September 1946.

<sup>82</sup> Schabas, 2009, p. 43.

<sup>83</sup> Lemkin, 1947, p. 147.

## 3.6 The Birth of the Genocide Convention

### Within the UN-System

During the first session of UNGA, within the newly established UN, the matter of Genocide was discussed after a suggestion by Panama, Cuba and India. The UNGA decided to direct the question to the Sixth Committee where the three above-mentioned states put forward a draft resolution on Genocide<sup>84</sup>. In the argumentation for the draft resolution, the Cuban representative noted that the act perpetrated by the German Nazi regime towards German Jews was not under the jurisdiction of the IMT and therefor precluded from the judgement. Cuba for this reason argued that Genocide would be considered an international crime under international law. The consequence of the draft resolution was the emerging thought among the UN delegates that the crime of genocide should be the object of a convention. Saudi Arabia did consequently put forward a new draft resolution with a draft of a Genocide Convention.<sup>85</sup> Disagreement occurred and the question was referred to an ad hoc group of 11 countries preparing a new draft resolution to the UNGA. The 11 of December 1946 the UNGA unanimously adopted Resolution 96(I). The resolution expressed genocide as a “denial of existence of entire human groups” contrary to moral law and the purposes of the United Nations. The resolution affirmed genocide as a crime under international law, as a matter of international concern, committed by private or state actors on “racial, religious, political and other groups”. The resolution *invited* Member states to prevent and punish genocide by law, and recommended international co-operation to be organized to prevent and punish Genocide. Finally, and importantly, it requested the United Nations Economic and Social Council, ECOSOC, to

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<sup>84</sup> UN Doc. A/Bur.50

<sup>85</sup> UN doc. A/C,6/86.

present a draft of a genocide convention to the next assembly of the UNGA.<sup>86</sup>

The 1946 96(I) resolution came to play a vital role in the formation of the international prohibition on genocide and its legal framework. The resolution bears clear reminders of Lemkin's thought in *Axis Power*. He coined the wording Genocide in his book published only three years before the resolution. Also, the resolution fulfilled two of his main recommendations regarding the crime of genocide; criminalization under international law and prohibiting and punishing genocide on national level.<sup>87</sup>

From the time of adoption of the resolution to the adoption of the Genocide Convention there was a two-year process within the UN-system. The process, which was substantial, did involve the UNGA, the ECOSOC but also an ad hoc drafting committee and the secretary of the UN<sup>88</sup>. The creation of the genocide convention is studied in detail in a number of publications.<sup>89</sup> It is not of the interest in this Thesis to in detail describe the entire technical formation of the convention. In the subsequent chapter the legal history of the actus reus of genocide as defined in the convention will be studied in detail.

On the 9 of December 1948 the UNGA adopted a resolution including the Convention. The adoption was done by a roll-call vote, with the number fifty-six to none, in favour of adoption. According to article XIII of the convention, it entered into force the 12 of January 1951; the ninetieth day

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<sup>86</sup> UNGA Resolution 96(1) 1946 and Schabas, 2009, p. 57.

<sup>87</sup> Shany, in Gaeta, 2009, p. 8.

<sup>88</sup> assisted by Raphael Lemkin himself.

<sup>89</sup> Shany, in Gaeta, 2009, p. 8. (see also Schabas, 2009, p. 59 – 116).

after the twenty instruments of ratification was deposited to the Secretary-General of the United Nation.<sup>90</sup>

### **3.7 Legal developments after the entry into force of the convention**

Today 147 states constitute the parties of the Genocide Convention.<sup>91</sup> A very brief summary of the subsequent developments after the entry into force of the Genocide Convention shows that the convention have had an impact on both national and international level. On national level Article 5 of the convention obliged the parties to punish and prevent genocide by the virtue of implementing domestic criminal legislation on genocide.<sup>92</sup>

On an international level, the convention, which formed a treaty based prohibition on genocide, has subsequently been followed up by emerging international customary law introducing the obligations for states to prevent and punish acts of genocide. This obligation is today a jus cogens norm and the crime of genocide fall under the scope of universal jurisdiction.<sup>93</sup>

In 1951 the International Court of Justice, ICJ gave an advisory opinion on the Reservations to the Genocide Convention. Without going into detail of the content on the treaty reservations law it discussed, the ICJ put down several clarifications regarding the convention. Firstly it concluded the crime of Genocide to be part of customary international law, and as such binding for all states. Secondly the ICJ also concluded that all states *erga*

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<sup>90</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=en), gathered on the 19<sup>th</sup> of May

<sup>91</sup> Ibid.

<sup>92</sup> Although falling outside of the scope of this essay, Schabas, 2009, p 403 – 409 provides a good overview of state practices implementing these obligations as well as persecution by national jurisdiction genocide relating to the Genocide convention.

<sup>93</sup> Shany, in Gaeta, 2009, p. 25



*omnes* have the obligation to prevent and punish Genocide. Thirdly, the ICJ referred to the humanitarian nature of the convention, and therefore limited states' possibility to reserve their obligation to parts of the convention.<sup>94</sup>

On the international level three subsequent multilateral instruments have been related to the interpretation and application of the provisions of the Genocide convention. These are the treaties containing the statutes of the two ad-hoc tribunals formed by the UN Security Council, UNSC, and the statute of the International Criminal Court, ICC.

Regarding the ICC it is noteworthy that article 6 of the Genocide Convention provided criminal jurisdiction for an international body recognized by state consent. Even though the work to create an international criminal court was initiated at the time of the birth of the genocide convention it was not finalized until 1998 when the Rome Statute of the ICC established a permanent court with jurisdiction over, among other international crimes, the crime of genocide. Regarding the definition of genocide it was copied from the Genocide Convention without any changes, or debates regarding changes. In the same manner the statutes of the two ad hoc tribunals, formed previous of the ICC, regarding Yugoslavia and Rwanda, included the genocide definition from the Genocide Convention.<sup>95</sup>

From these international bodies a series of judgements (and statements from prosecutor in case of the ICC) have applied and interpreted the genocide definition. However, the application and interpretation of the *actus reus* of the genocide definition have not been in dispute or focus of any of the international tribunals trying criminal responsibility for Genocide. The focus of the courts has lied in determining the *Mens Rea* of genocide and

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<sup>94</sup> ICJ, Advisory Opinon, 28 May 1951, Reservations to the Convention on Genocide.

<sup>95</sup> Schabas, 2009, p. 90 – 116.

the scope of protected groups under the convention.<sup>96</sup> All individuals that have been tried for genocide have been tried under the subsection (a) killing of individuals of a protected group. However in one case, Akayesu in the International Criminal Tribunal for Rwanda, ICTR, the accused also was charged with the allegation of rape as genocide under subsection (b).<sup>97</sup>

In regard of the scope of the thesis one quote of the International Tribunal for Rwanda, ICTR is noteworthy; the court did not refrain from proclaiming the direct relationship between the genocide definition and the Holocaust:

The Chamber notes in this regard that the crimes prosecuted by the Nuremberg Tribunal, namely the holocaust of the Jews or the "Final Solution", were very much constitutive of genocide, but they could not be defined as such because the crime of genocide was not defined until later.<sup>98</sup>

### **3.8 Summary**

The historical development from total state sovereignty over its citizens to international unalterable fundamental laws protecting groups from being destroyed is visible in the studied material.

As Shany puts it “we have come a long way from Lemkin in certain aspects”.<sup>99</sup> Today international law prohibits genocide and the actual possibility to enforce this prohibition, on both domestic level and international level, is increasing. Siding with the convention, international

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<sup>96</sup> Guglielmo, 2000, p. 578-598.

<sup>97</sup> Bazyler p 42

<sup>98</sup> Prosecutor v. Kambanda (Case No. ICTR 97-23-S), Para 14.

<sup>99</sup> Shany, in Gaeta, 2009, p. 26

customary law today creates a network of international norms that by help of the international criminal institutions, such as the ICC, is miles away from the world Lemkin lived in.

It is remarkable that what can be claimed to be the indefatigable work of one man for his idea, to prevent genocide by international law, today continues to result in developing international norms. Less than half a century after the launch of his ideas in his book *Axis Powers*, the international crime genocide form part of a *Jus Cogens* norm; a norm that cannot under any circumstances be overruled and that poses obligations *Erga Omnes* on all states to prevent genocide.

From the perspective of Trauma and Law, it is obvious that not only the Holocaust, but also other historical events, with tragic character, have played an important role as catalyst for new law to emerge. In the following chapter this relationship between law and trauma will be studied in detail regarding the formation of the *actus reus* of genocide.

# 4 Why did some acts become defined as genocidal under international law?

## 4.1 The actus reus of the Genocide Convention

The focus of this chapter is to present a case study of the legislative history of the provision covering the definition of specific acts, the actus reus, constituting genocide as presented in article 2 of the Genocide convention. The actus reus of genocide is the limited acts enumerated in subsection (a) to (e) of the mentioned provision. It is noteworthy that the list does not include only physical destruction by killing, but also other persecution on individuals of specific groups. However, it is important to note that the provision state that a special intent, a *mens rea* and a *dolus specialis*, is needed to consider any of the enumerated acts as genocide, as well as the acts being directed to any of the three mentioned subjects; “the protected groups”.<sup>100</sup>

The wording of article 2 of the genocide convention:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

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<sup>100</sup> Bazylar, 2016, p. 40 – 49.

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

## **4.2 The genocidal acts - from Lemkin's Idea to the Black Letter of the Law**

Schabas argues that the ideas of Lemkin above described in chapter 3 was linked to the then on-going genocide<sup>101</sup> carried out by the Germans in German territory on German citizens and in the, by Germany, occupied territories.<sup>102</sup> As described above Lemkin's approach to Genocide was broader than the one presented in the convention. This chapter explains how Lemkin's understanding of Genocide came to be expressed in the present convention and how the forming parties of the convention's ideas impacted on the legislative process.

In the very first draft of a genocide convention, submitted to the UNGA by Saudi Arabia in the process of adopting the first resolution, the actus reus or nature of genocide was closely similarly defined to the definition proposed by Lemkin, however also including terrorism as an act of genocide.<sup>103</sup>

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<sup>101</sup> By Lemkin's own words.

<sup>102</sup> Schabas, 2009, p. 173.

<sup>103</sup> UN doc. A/C.6/86.

The starting point of the formal legislation process of the convention text was the UNGA resolution 96(I) of 1946. In the wordings of the resolution there is a clear connection with the physical dimension mentioned by Lemkin, as genocide is described as the “denial of the right of existence” for groups, and this is compared to the denial of life that homicide contains. As Schabas notes, the resolution also mentions culture, but does say that the loss of culture is a result of physical genocide, and not a genocide in itself.<sup>104</sup>

In 28<sup>th</sup> of March 1947 the ECOSOC instructed the United Nations Secretary General, UNSG, to, with the assistance of international and criminal law experts, draft a convention in the light of UNGA resolution 96(1). The ECOSOC instructed the UNSG to consult the General Assembly’s committee of development and codification and *the Commission of Human Rights*, and refer the draft to all UN member states, and after that submit the convention draft to next session of the ECOSOC.<sup>105</sup>

#### **4.2.1 The draft convention by the UNSG**

Three months later the UNSG submitted the *Draft Convention of the Crime of Genocide* to the ECOSOC. The UNSG requested the UNGS’s Division of Human Rights to write a draft of a convention and ask for legal advice from three legal experts; Raphaël Lemkin, Donnedie de Vabres and Professor Pella. After the input of his office and the experts the UNSG did submit the draft to the ECOSOC.<sup>106</sup>

Before analysing the draft of the UNSG and the definition of the actus reus of genocide presented therein, it is important to note that the purpose chosen

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<sup>104</sup> Schabas, 2009, p. 173.

<sup>105</sup> UN. Doc. E/325

<sup>106</sup> UN doc. E 447.

by the UNSG was not to present a political solution or a compromise that all member states could accept, but rather to present a draft that could serve as a “basis for full discussion and bring out all the points deserving to note”<sup>107</sup>. Therefor the following understanding of genocide and what acts it entails, provide the reader of today with a look into the pre-conventional debate among the member states regarding the definition.

The commentary of the draft’s starting point in the discussion on the definition of genocide is “Genocide is the deliberate destruction of a human group”<sup>108</sup>. The UNSG called for a narrow interpretation of genocide to avoid it being too inclusive, and therefor meaningless. He argued that international law must be built on exact definitions to “avoid confusion”. Beside this, the UNSG also raised a warning for a too broad understanding of Genocide. He claimed that a too inclusive definition could cause suspicion from states and lead to an increasing number of reservations or abstentions from ratification of the final convention, and therefor could undermine the effective result of a genocide prohibition. The UNSG referred to other branches of International Law, such as human rights law, the law of war and even protection of minorities, and stated that “genocide have many point of contact with them” but they should not “completely, or even partially coincide”.<sup>109</sup> This understanding, that genocide is something different, and something that should be held separately from the rest of international law is interesting, coming from a time of merging new international law within the UN-system.

The commentary of the draft raises the question “what is genocide” as one of the six *chief problems* in the process towards international punishment of Genocide.<sup>110</sup> By referring to Lemkin’s understanding of physical, biological

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<sup>107</sup> UN doc. E 447p. 16.

<sup>108</sup> UN doc. E 447p. 16.

<sup>109</sup> UN doc. E 447p. 16 – 17.

<sup>110</sup> UN doc. E 447, p. 17.

and cultural genocide the UNSG asks if all three of these should be included in the convention. He points out that the concept of cultural genocide (understood by him as “brutal destruction of the specific characteristics of a groups”) as too uncertain to be included, but includes it in the draft to let the deciding organs of the UN have their say in the question.<sup>111</sup>

While referring to Lemkin’s ideas, the draft goes further and enumerates *material means* for the three types of genocide. The argumentation behind the enumerated acts is more or less outspoken directly connected to the events of the Holocaust:

Regarding *physical genocide*, the UNSG defines it as: “to cause the death of members of a group or injuring their health or physical integrity”. Regarding the need to prohibit *biological experiments* as genocidal the UNSG claimed that: “These practices were current in Hitlerite Germany”. Regarding the use of subjection to bad conditions of life likely to result in death or debilitations of individuals the UNSG refers to the example of concentration camps with a high annual death rate as an example of genocidal act. The same can be said regarding the example of denial of elementary means of existence even if no reference to the Holocaust is explicitly mentioned.<sup>112</sup>

Regarding *biological genocide* the acts defined were sterilization and/or compulsory abortion, segregation of the sexes and obstacles to marriage.<sup>113</sup>

Regarding to *cultural genocide* the UNSG notes that the experts had differing opinions on this part of the genocide definition in the draft. Lemkin, who held on to his belief that cultural destruction of a group was

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<sup>111</sup> UN doc. E 447, p. 17.

<sup>112</sup> UN doc. E 447 p 25 – 26.

<sup>113</sup> UN doc. E 447 p 26.



genocidal, was opposed by the other two experts who stated the opinion that “cultural genocide represented an undue extension of the notion of genocide” and referred to protection of minorities rather than genocide punishment to protect the cultural integrity of a group.<sup>114</sup> Notable is however that the UNGS defined forced transferrals of children to another human group as cultural genocide. However all the experts agreed that this nonetheless should be included as a mean of genocide, even if cultural genocide were to be excluded.<sup>115</sup> The more controversial means of cultural genocide were: forced exile of individuals important of the culture of a group, prohibition on private usage of language, destruction of books or destruction of monuments artefacts or other objects of value for a group.<sup>116</sup>

The reactions from member states regarding the UNSG draft were few, and regarding the actus reus the comments were even more rare. Denmark argued to not explicitly mention means of genocide because “as the one indicated in the draft – although detailed – cannot be complete and exhaustive”<sup>117</sup>. The United States on the other hand called for a more narrow enumeration of acts and expressed the want to enclose the list of means of genocide from “such acts consist of”<sup>118</sup> to “any of the following acts”<sup>119</sup>. Beside small suggested changes of wording the United States opposed the idea of including cultural genocide<sup>120</sup> in the definition. The United States argued that the creation of the crime of genocide was of importance and that it should only be used for acts directed against human beings. The United States argued that this was in line with “the basic concept of public opinion” and that what would fall within the concept of cultural genocide would be

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<sup>114</sup> UN doc. E 447 s. 27.

<sup>115</sup> UN doc. E 447 s. 27.

<sup>116</sup> UN doc. E 447 s. 27.

<sup>117</sup> UN doc. Un doc a/623.

<sup>118</sup> UNSG suggestion.

<sup>119</sup> United States suggestion.

<sup>120</sup> except for transferring of children.

protected by minority rights. France submitted similar thoughts on cultural genocide. However they did also argue that an international regulation of this could result in intrusion of internal political affairs of states.<sup>121</sup>

At the second session of the UNGA the draft convention of the UNSG was discussed by the delegates. After formal and organizational discussion the UNGA in Resolution 180(II) from 21 November 1947 declared genocide as an international crime and noted the lack of observations from member states on the convention draft. In the resolution the UNGA informed the ECOSOC to continue the process of drafting a convention, without having to wait for all member state's observations and present a convention on genocide to the coming third assembly of the UNGA.<sup>122</sup>

#### **4.2.2 The Draft Convention by the ECOSOC Ad Hoc Committee on Genocide<sup>123</sup>**

Following the UNGA Resolution 180(II) the ECOSOC, by the virtue of a resolution, formed an ad hoc committee on genocide<sup>124</sup> and gave the committee the task to present a new draft of a convention on genocide taking into account the draft by the UNSG, input from member states and the Commission on Human Rights.<sup>125</sup> The Ad hoc Committee decided to not use the earlier draft by the UNGA as the basis for the actual drafting, but to take the draft into consideration when creating a new draft together with earlier input from states in the previous process. The Ad Hoc Committee concluded its work with submitting a report to the ECOSOC the 24 of May 1948, including a draft of a Genocide Convention. The draft defined

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<sup>121</sup> Un doc. a/623.

<sup>122</sup> GA Res. 180(II).

<sup>123</sup> UN doc. E/794.

<sup>124</sup> Consisting of China, France, Lebanon, Poland, US, Soviet and Venezuela.

<sup>125</sup> UN doc. E/734.

genocide as physical, biological and cultural and included political groups as protected. In regard to the question on what acts to be defined as genocidal a listing of specific acts the draft commentary was claimed as “unsound”. However the committee stated that due to the criminal law nature of the law it was necessary to enlist acts to “know what was envisaged”.<sup>126</sup>

By referring to acts by Japan towards Chinese citizens during the Second World War, China argued for Genocide by Narcotics to be included in the definition. The representative of the USSR did vote against the article covering the scope of genocide, and did motivate this by its opposition of including political groups as protected but also by criticising the enumeration of acts in the draft. The USSR instead wanted the actus reus of genocide to be defined as “The physical destruction in whole or in part of such groups; The deliberate creation of conditions of life aimed at the physical destruction in whole or in part of such groups”<sup>127</sup>. The argumentation of this was that “any enumeration of possible acts would necessarily be incomplete”.<sup>128</sup>

Even though cultural genocide was included in the Ad Hoc Committee draft the United States and France voted against this. They argued that the concept of cultural genocide had several problems: they raised concern regarding difference between actual annihilation of individuals of a group and destroying of cultural traits. They also argued that cultural genocide intruded on general human rights protection and minority protection and therefore the development of those areas of international law. They also raised the argument that inclusion of cultural genocide could result in states

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<sup>126</sup> UN doc. E/794 p. 15.

<sup>127</sup> UN doc. E/794 p 16.

<sup>128</sup> UN doc. E/794 p 16.

restraining from becoming parties of the treaty, due to non-acceptance of its content.<sup>129</sup>

### **4.2.3 The Sixth Committee of UNGA draft**

Upon accepting of the ad hoc committees draft of genocide convention, the ECOSOC referred the draft to the UNGA.<sup>130</sup>

The UNGA did refer the subject to its Sixth Committee, a permanent committee focusing on legal matters. The Sixth Committee identified three problems regarding the definition of genocide: Firstly it asked whether or not the acts of genocide should be enumerated in the convention or as proposed by some countries defined more generally (see for example the USSR suggestion in the Ad Hoc Committee Report presented above). The Sixth Committee did however decide on enumeration when France withdrew a suggested amendment with a more general definition. However the Sixth Committee agreed with China's proposed inclusion of Genocide by Narcotics and inserted "Causing mental harm" as an act of genocide. Secondly it, against the will of the ad hoc committee, decided to exclude political groups from protection from Genocide. The protected groups in the sixth committee draft came to be "ethnic, racial or religious groups as such". Regarding the now for a long time debated notion of cultural genocide, the Sixth committee decided to exclude it from the convention draft. The general argument for doing so was that "the action to protect against this form of genocide might more appropriately be taken with the sphere of human rights".<sup>131</sup> The draft of the sixth committee came to be the convention on Genocide. No reservations to article two of the Genocide Convention have been lodged by any state parties of the convention, except

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<sup>129</sup> UN doc. E/794 p 17.

<sup>130</sup> UN doc. E/1049.

<sup>131</sup> UN Doc. A/760, p. 1- 3.

from a declaration from the United States regarding that mental harm have to be permanent to be considered genocidal.<sup>132</sup>

### 4.3 Summary

To conclude, the formation of the actus reus definition on genocide was clearly impacted by the, in time, closeness to the Holocaust. Beside the comments on the drafts of the process that explicitly mentions acts of the Third Reich, the presence of Lemkin himself in the process as well as other actors of the drawing of the formation led to it being impossible to not let the Holocaust stand as some form of role model of what intended to be regulated, prohibited and criminalized. There were some concerns raised during the writing of the convention of the possible applicability of the enumerated acts in the future but the consensus of what needed to be prohibited seemed to prevail this in the legislative debates. One significant turning point was the exclusion of cultural genocide as a concept quite late in the process, limiting the actus reus to only cover physical and biological genocide, to use Lemkin's terminology. The main argument of the exclusion was that cultural genocide intercepted with the on the same time emerging human rights law, but one can not decline the effect of powerful states, such as the United States, warning for non-ratification of several states if it were to be included.

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<sup>132</sup> Verdirame, 2000, p 580.

# 5 The academic discourse regarding the Actus reus of the Genocide Definition

As Bazylar notes, the actus reus definition of the Genocide Convention have been criticized: “Ironically (...) being to broad or to narrow”.<sup>133</sup> This chapter aims to present this criticism from both legal scholars and scholars of other disciplines.

In Antonio Cassese’s textbook on International Criminal Law, the definition of genocide in the convention is said to define what previous was not legally defined. However, he takes on a critical position towards the exhaustive enumeration of acts constituting the actus reus of genocide, claiming it to be a hinder for a development of the definition in customary international law. He asks for the possibility of a broader definition on genocide, as it might be needed as the society develops. He determine the definition to be a “formation of a text based on compromise”, referring to that the black letter of the convention is the result of a negotiation between states and what they could agree on in 1948.<sup>134</sup> His critique against the definition is clearly connected to its disability to adopt to the society today, and, therefor connected to the time it was framed and this is especially clear when it comes to the conventions list of acts:

”difficult to understand why genocide can be carried out only through one of the enumerated acts, since there

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<sup>133</sup> Bazylar, 2016, p 41.

<sup>134</sup> Cassese, 2013, p. 109ff.

may be other acts that can be resorted to with a view to destroying one of the protected groups”<sup>135</sup>

The legal academic discussion regarding the actus reus definition has focused on physical destruction as a needed element for an act to constitute genocide. As Bazylar states it: “Genocide is first and foremost the crime of group destruction”.<sup>136</sup> However, Bazylar notes that the enumerated list of acts does not limit the actus reus to acts that only “result in complete physical destruction”. Bazylar does however present the theory that no prosecutor would ever charge an individual for the crime of genocide if not people had been killed with the exception of destroying a group with biological means by replacing children or preventing births. Bazylar notes the common critique from non-lawyers regarding that the enumerated list of acts is too narrow. However he is clear in his legal analysis, genocide is group destruction, hence delimiting discrimination from being genocidal. Bazylar pictures this by quoting Lemkin “To be unequal is not the same as to be dead”.<sup>137</sup> Bazylar also describes the debate concerning the quantitative needs for an act to be genocide, concluding that there are no quantitative limits. If the elements of the crime genocide are fulfilled, Genocide has taken place, even if there is only one person being killed. Regarding the omission of cultural genocide from the convention Bazylar states that this “does not rise to the level of physical destruction, which is the main aim of the convention” departing from the original thoughts of Lemkin.<sup>138</sup>

In his article *Redefining Genocide*, Chalk, while focused on problematizing the enumerated subjects of genocide, raises a number of important questions needed to be posed when scrutinizing the genocide definition in general. While being a professor of History, Chalk mentions the objectives an

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<sup>135</sup> Cassese, 2013, p. 113.

<sup>136</sup> Bazylar, 2016, p. 42.

<sup>137</sup> As quoted in Bazylar, 2016, p. 443.

<sup>138</sup> Bazylar, 2016, p. 43 – 48.

international lawyer needs for studying the genocide definition, partly different from that of a social scientist or a historian; for a lawyer he claims “defining genocide means defining a crime (...) appropriate for legal prosecution” that is able to “withstand review by judges and lawyers for the accused”. While discussing the Actus reus definition Chalk raises the question “If we include every form of war, massacre, or terrorism under genocide, then what is it that we are studying”. It is important to understand that Chalk here discusses the numbers of alternative definitions of genocide presented by lawyers as well as scholars of other disciplines. Even though Chalk is explicit in his defence of the convention’s definition his main discussion is on the mens rea part, the intent, and links the idea of states intent to destroy a group, as the main ideological common ground from the ideas of Lemkin to the modern jurisprudence on genocide.<sup>139</sup>

To conclude, the genocide convention and its actus reus element, has since its entry into force, not existed without critique. While other parts of the convention have emerged and developed through customary norms, the exhaustive list of acts, have been more or less static and in some way a hinder for further development into the context the convention governs today. In the following analysis, the question, regarding if this proposed flaw of the convention, can be referred to its possible nature as a law based on trauma will be examined.

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<sup>139</sup> Chalk, 1997.



# 6 Concluding Analysis

As have been shown above, the legislative history of the Genocide Convention shows both explicit as well as underpinning connections between the Holocaust, a trauma, and the genocide definition. This chapter aims to analyse this relationship from a Trauma and Law perspective as well as critically understand the benefit of focusing on the role of Trauma in research of the history of international law.

## 6.1 The Actus Reus element of Genocide – a “Trauma Law”

As already concluded above the Holocaust played a significant role during the entire legislative process of the Genocide Convention. From a Trauma Law perspective, as discussed in the theoretical chapter, traumas can act as both *catalysts* and *distractions* for the development of international law. The sole answer that the Holocaust played a role is not enough for understanding what role the Holocaust played, which is discussed below.

Even though the research question is limited to study the actus reus element of the genocide definition, the history of the creation of the complete Genocide Convention must be understood to be able to draw conclusions on the process of creation of specific provisions within the convention. As shown in this thesis the first path of the Genocide Convention did not start in the General Assembly of the United Nations. Neither did Raphaël Lemkin, no matter his great personal effort, start from scratch when he proposed a prohibition of his term genocide when he published *Axis Powers* in 1943. The studied material of this Thesis demonstrate that the legal concept to protect entire peoples from destruction has its roots in the minority protection that slowly started to be built up in international law in the 17<sup>th</sup> century. This recognition of minorities, initially religious minorities,

that was a consequence of religious conflicts in Europe of that time, can from a Trauma and Law perspective, in this context, be seen as the first trauma catalysing development in international law, serving as a fundament for later developments of law on group destruction.

The role of Lemkin as a catalyst for the Genocide Convention is evident from the studied material both as a lobbyist and legal expert for the UNSG. While it can be discussed if Lemkin's personal efforts to prohibit genocide internationally were driven by his role as an exile of the Holocaust, the Armenian Genocide previous to the Second World War initially ignited his interest in the matter of group destruction. Clearly, therefore the Armenian Genocide, another trauma, also can, to some extent, be considered as a catalyst for the creation of the convention. However when Lemkin coined the term Genocide he was impacted by the actions by the German regime towards Jews as well as other peoples under German occupation that he studied in detail. It can therefore be concluded that the role of the Holocaust as a catalyst for legal development started already while it was carried out.

The material presented of official statements of governments on non-impunity of atrocities as well as the subsequent proceedings in Nuremberg shows that there was an interest among the winning Allied States to be able to prosecute the atrocities that Nazi Germany had conducted. The following post-war creation of the United Nations and the early actions within the organisation to create a treaty on the crime of genocide shows a commitment within the global society explicitly motivated by the atrocities of the Second World War, the Holocaust included.

Drawing from this, the actus reus element of the genocide convention, must be seen as due to traumas of the past in general, and the Holocaust specifically as catalysts. Regarding the exhaustive enumeration of acts that came to constitute the actus reus of the crime of genocide, as shown in chapter four, the Holocaust served as an example, for a genocide, and therefore a direct catalyst.

From the material studied in this Thesis it is not possible to decide on a general level to what extent the Holocaust have been used by the legislator, as a *distraction* from attention of other atrocities that might not be as devastating and comprehensive as destruction of groups as such. For answering that question further studies are needed regarding the focus of the creation of international law from that specific period of time.

However, turning to the specific definition of the actus reus element, it might be relevant to ask if the Holocaust also was used as a *distraction* in the legislative process within the UN. An example of this is the question of cultural genocide that was not included in the final genocide definition. All though it was proposed by several states and Lemkin and remained in all drafts but the last one it was excluded from the text of the convention. The arguments for the exclusion presented where not explicitly connected to the Holocaust, but it is not unthinkable, that when the UNSG legal experts call cultural genocide and *undo extension of genocide*, that they have in mind the more traumatic physical genocide, that had just taken place in the Holocaust, as the primary acts to prohibit. However, it is important to note that the Holocaust also included the process of cultural genocide, as Lemkin did define it. The states that strongly opposed cultural genocide as the crime of genocide may have invited this use of the physical Holocaust as what needed to be criminalized from a perspective of self-interest. Previous research have shown that the argument for nexus between war and crimes against humanity was argued for to protect the Allied states own actions in its colonies or towards their minorities, possibly was the argumentation for delimiting cultural genocide from criminalisation used in the same way. By referring to the big trauma, the physical acts of genocide in the Holocaust; there was a *distraction* in the legislative process from other atrocities, maybe less traumatic 1948. However, it also has to be noted that the definition Lemkin proposed was entirely built on the then on-going Holocaust, and therefor, acts that had previous or that he could think of could be used in the future, is not included in his definition. Here it is also

important to remember that Lemkin's concept cultural genocide was excluded from the actus reus on behalf to be part of development of other parts of international law, as a promise that general human rights law would protect minorities' cultural rights. It is outside of the scope of this Thesis if this promise has been fully fulfilled.

To conclude, the actus reus of the genocide definition in the genocide convention can be seen as a law based on traumas, mainly the Holocaust, but also other historical events. The Holocaust was used primarily as a catalyst for the legislation per se and the definition of actus reus in an exhaustive enumerated list of acts. Questions can also be raised if the Holocaust was made to play the role to delimit the notion of Genocide to the most traumatic part, the physical destruction of a group.

## **6.2 Criticism of the actus reus element of genocide and a trauma perspective**

The critique against the actus reus element in the Genocide Convention have described the exhaustive list of acts as delimiting the possible legal development of the definition of the crime of genocide. Following that the exhaustive list of enumerated acts has a clear relationship to the acts of the Holocaust, the will of the legislator to create a more dynamic definition can be questioned. As shown, during the legislative process voices of critic were heard, most explicit expressed by Denmark, regarding the impossibility to create an all-covering exhaustive list of genocidal acts. However, as mentioned in the legislative debate, due to the criminal law nature of the convention, there was a need to define the new crime, to make it applicable. Even though the principle of legality is not mentioned, it is clear that it played an important role. The legislator wanted to define the crime; a crime at the time clearly connected to the Holocaust, hence the list of acts perpetrated by the Nazi regime towards the Jews.

Even though the Genocide Convention as such had no retroactive applicability, the legislators' will was to prevent a new Holocaust to any similar group by prohibiting the new crime of genocide. The price of the *catalytic* role of the Holocaust was in this case, that it, *distracted*, the creation of a possible more dynamic actus reus element. Perhaps a more aware understanding of the Holocaust's impact, as a trauma on the legislative process among the states, would have changed the black letter of the law or at least answered the questions that later critique raised in this matter.

### **6.3 Can a Law and Trauma focus benefit Legal History Research in International Law?**

As a reader of this Thesis might notice, historic legal research from a very specific perspective, will impact on the research outcome. Following the method of this thesis, the material presented cannot be viewed as presenting a full historical overview of the legal history of the Genocide Convention and all reasons and motivations of the legislator. Neither does it present the full impact of the trauma the Holocaust have had on the entire legal development of International Law. So how can this perspective benefit legal research, and legal history research especially? The opinion of the author is that the Law and Trauma perspective, beside the Law and Crisis perspective, can contribute to a greater understanding of how international law is formed and the theories it contains can be a part of an explanation of why the black letter of the law is shaped the way it is shaped. The perspective also raises interesting questions regarding the nature of international law, where unlike domestic law, equal states have to agree upon the creation of international law to create binding norms. International law is created differently from domestic law, and therefor the motivations for and regarding international law is different. It is very sensitive to compare the traumatic level of different historic events and sometimes even

impossible. Conclusively, the Trauma and Law theory of traumas as a distraction in the development of international law puts lights on the negative side of the notion “never again” may have, if not implemented carefully.

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