

Tams / Berster / Schiffbauer

**Convention on the
Prevention and Punishment
of the Crime of Genocide
A Commentary**

C.H. Beck · Hart · Nomos

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– A Commentary –

by

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Lars Berster and
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Preface

65 years ago, in the autumn of 1948, the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide entered its final phase. When the General Assembly adopted Resolution 260 (III) A on 9 December 1948, endorsing the final text, its President, *Herbert Vere Evatt*, spoke of an ‘epoch-making event’. With the benefit of hindsight, we can say that he was correct. The fight against genocide has become one of the international community’s essential causes.

In this fight, international law is an important tool. Many of its branches – among them international human rights law, international criminal law, collective security law – directly or indirectly address questions of genocide. The Genocide Convention however is at the heart of the fight: it defines the crime, it formulates essential obligations of states (such as the duty to prevent and punish genocide), and it establishes provisions for inter-state cooperation. It is anything but flawless and by no means lays down a comprehensive regime against genocide. But for 65 years, it has been the ‘premier document’ (*Daniel Rothenberg*) of the fight against genocide: it is the rock on which the international regime against genocide is built.

The present book is an attempt to engage with this ‘premier document’. Our aim throughout has been to interrogate the Convention’s text, and to ascertain its meaning in line with the general rules of treaty interpretation. The result is an article-by-article commentary on the Convention’s provisions – the first, to our knowledge, in the English language since *Nehemiah Robinson*’s pioneering work published in 1960. Alongside entries analysing the respective treaty provisions, we have included a General Introduction (which situates the Convention in its broader normative context), a chapter on Treaty Reservations (as they raise problems of a cross-cutting nature) and a number of Annexes (setting out all five authentic languages and providing detail on treaty participation, treaty actions and national legislation on genocide). While most of the entries have been written by one of the three co-authors individually, we believe the work as a whole is a coherent attempt to engage with a treaty that deserves to be taken seriously 65 years after its adoption.

In writing his book, we have incurred many debts, which we gladly acknowledge: *James Devaney*, *Amber Maggio* and *Athene Richford* have critically read parts of the manuscript and helped us improve it; *Gloria Dulich* and *Melanie Fey* have provided research assistance on national genocide laws; *Daniel Sprick* and *Andrej Umansky* have given advice on problems relating to the Chinese and Russian versions of the Convention. At Beck, Dr. *Wilhelm Warth* has encouraged the project from its inception and guided it towards its completion with patience and commitment. Finally, the newly-established *Institute for International Peace and Security Law* at the University of Cologne has provided us with an excellent research environment; we are grateful to its Director, Professor *Claus Krefß*, for his hospitality and support, and glad that he has generously accepted to contribute a foreword.

Cologne/Glasgow, 1 October 2013

Christian J. Tams

Lars Berster

Björn Schiffbauer

Foreword

As a technical legal matter, Genocide was not among the crimes within the jurisdiction of the International Military Tribunal at Nuremberg whose judgment marks the breakthrough of the concept of individual criminal responsibility directly under international law. Also from a substantive perspective, the ‘denial of existence of entire human groups’ by the Nazis, which shocked the conscience of mankind, did not figure too prominently in the Nuremberg judgment – due to a heavy jurisdictional restraint and the political emphasis on the crime of aggressive warfare. The picture changed, however, in the immediate aftermath of Nuremberg. On 9 December 1948, and still under the impact of the horrors of the holocaust, the Convention on the Prevention and Punishment of the Crime of Genocide embraced *Raphael Lemkin’s* idea to define genocide as a distinct crime under international law. In doing so, the Genocide Convention became the first international treaty which unambiguously recognised the very concept of a crime *under* international law.

In that sense, the Genocide Convention constituted an important confirmation of the precedents set in Nuremberg and Tokyo. In at least two other important respects, the Genocide Convention went beyond the legacy of the two International Military Tribunals and foreshadowed the stormy legal development which began in the first half of the 1990s and culminated in the establishment of the International Criminal Court: first, the Convention extended the application of international criminal law to times of peace and to atrocities committed within a state, and second, the Convention constitutes the first attempt comprehensively to spell out the elements of a crime under international law. From the beginning, the Convention’s definition of the crime of genocide has received criticisms for being ‘exceedingly narrow’. But ever since, states have been treating their early agreement almost as a ‘sacred text’.

Due to the more recent renaissance of international criminal law with its rapid evolution of a rich body of international and national case-law, the debate about the definition of what is often being referred to as the ‘crime of crimes’ has grown much richer and much more complex. Apart from setting out the definition of the crime of genocide, the Genocide Convention establishes a set of important state obligations in order to effectively repress and, even more importantly, prevent the commission of the crime. Less visibly, but perhaps most importantly, the Genocide Convention also implies the obligation for states not to themselves commit genocide. As one would expect it from a treaty adopted in 1948, it does not complement all these obligations by sophisticated enforcement mechanisms. But at least after the International Court of Justice’s 2007 judgment in the *Bosnian Genocide* case this should not mislead anybody to consider these obligations as lofty rhetoric. For all these reasons already, the Genocide Convention constitutes a legal document of crucial importance. But what is more, the Genocide Convention, through its ‘humanitarian and civilizing purpose’, as recognised by the International Court of Justice as early as in 1951, inspired the development of public international law more broadly, be it in the immediately adjacent field of interna-

Foreword

tional human rights law or, as the more recent debate on the ‘Responsibility to Protect’ demonstrates, in the realm of the law of international peace and security.

Professor *Christian Tams*, Dr. *Lars Berster* and Dr. *Björn Schiffbauer* have formed a team of authors, which very usefully unites recognised expertise both in public international law and in (international) criminal law, in order to fully explore, through an article-by-article commentary, the contemporaneous significance of the Genocide Convention. The commentary offers a meticulous analysis of the content of each individual provision and, through a detailed General Introduction, it situates the Genocide Convention within its broader normative context. Throughout, the text is based on rigorous research and displays carefully balanced judgment. The three authors deserve to be commended for having significantly enhanced our understanding of the law against genocide which, so unfortunately, continues to be of burning importance.

Claus Kieß

Cologne, 1 October 2013

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List of Abbreviations and Acronyms

AC	Appeals Chamber
ACHR	American Convention on Human Rights (1969)
add.	addendum
Add. Prot. I	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
AFDI	Annuaire français de droit international law
AJIL	American Journal of International Law
ArizonaJICL	Arizona Journal of International and Comparative Law
ASILSILJ	Association of Student International Law Societies International Law Journal
ASR	Articles on State Responsibility
AuckULRev	Auckland University Law Review
AVR	Archiv des Völkerrechts
BerkILPub	Berkeley International Law Publicist
BGH	Bundesgerichtshof (German federal supreme court)
BUIntLJ	Boston University International Law Journal
BVerfG	Bundesverfassungsgericht (German federal constitutional court)
BYIL	British Yearbook of International Law
CallRev	California Law Review
CanYbIL	Canadian Yearbook of International Law
CaseWResJIL	Case Western Reserve Journal of International Law
CityULR	City University of Hong Kong Law Review
ColumbiaLRev	Columbia Law Review
CrimLPhil	Criminal Law and Philosophy
Diss. Op.	Dissenting Opinion
e.g.	exempli gratia; for example
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights (1950)
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
ed.	editor/edition
eds	editors
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
et al.	et alii/and others
et seq.	et sequentes
fn.	footnote
fns	footnotes
GA	General Assembly
GC	Geneva Convention
GenocideSP	Genocide Studies and Prevention
GoJIL	Goettingen Journal of International Law
GPN	Genocide Prevention Network
GYIL	German Yearbook of International Law
HarvardILJ	Harvard International Law Journal
HoL	House of Lords
HousJIL	Houston Journal of International Law
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
i. e.	id est; that is
ibid.	ibidem
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly

Abbreviations

ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILR	International Law Reports
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East (Tokyo)
IntCrimJustRev	International Criminal Justice Review
IntCrimLRev	International Criminal Law Review
IrishSLR	Irish Student Law Review
IRRC	International Review of the Red Cross
JCLC	Journal of Criminal Law & Criminology
JIntCrimJust	Journal of International Criminal Justice
JuS	Juristische Schulung
KritJ	Kritische Justiz
LeidenJIL	Leiden Journal of International Law
lit.	littera(e)
LPICT	Law and Practice of International Courts and Tribunals
MarylandJILT	Maryland Journal of International Law and Trade
MichJIL	Michigan Journal of International Law
MichJRacEL	Michigan Journal of Race and Law
mn.	marginal number
mns	marginal numbers
MPEPIL	Max Planck Encyclopedia of Public International Law
MPYUNL	Max Planck Yearbook of United Nations Law
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
NPoLS	New Political Science
NStZ	Neue Zeitschrift für Strafrecht
NYUJILP	New York University Journal of International Law and Politics
NYULR	New York University Law Review
OhioNULRev	Ohio Northern University Law Review
p.	page
para.	paragraph
paras	paragraphs
PCIJ	Permanent Court of International Justice
PolYIL	Polish Yearbook of International Law
PTC	Pre-Trial Chamber
R2P	Responsibility to Protect
RdC	Recueil des Cours (The Hague Academy of International Law)
RdDI	Rivista di diritto internazionale
RDISDP	Revue de droit international, de sciences diplomatiques et politiques
Res.	Resolution
RIDP	Revue internationale de droit pénal
RTDH	Revue trimestrielle de droits de l'homme
SC	Security Council
SCSL	Special Court for Sierra Leone
SeattleULRev	Seattle University Law Review
Sep. Op.	Separate Opinion
StanLRev	Stanford Law Review
STL	Special Tribunal for Lebanon
TC	Trial Chamber
TempIntCLJ	Temple International and Comparative Law Journal
UN	United Nations
UN Doc.	UN Document (as to the UN's Official Document System)
UNTS	United Nations Treaty Series
v.	versus
VCDR	Vienna Convention on Diplomatic Relations (1961)
VCLT	Vienna Convention on the Law of Treaties (1969)
VirginiaJIL	Virginia Journal of International Law
viz.	videlicet (namely)
vol.	volume

Abbreviations

WashUGSLRev	Washington University Global Studies Law Review
WashULQ	Washington University Law Quarterly
WisconsinILJ	Wisconsin International Law Journal
YaleJIL	Yale Journal of International Law
YaleLJ	Yale Law Journal
YbILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

