

Tams / Berster / Schiffbauer

# Convention on the Prevention and Punishment of the Crime of Genocide

## A Commentary

C.H. Beck · Hart · Nomos

Tams/Berster/Schiffbauer  
Convention on the Prevention and Punishment of  
the Crime of Genocide: A Commentary



# Convention on the Prevention and Punishment of the Crime of Genocide:

– A Commentary –

by

Christian J. Tams,  
Lars Berster and  
Björn Schiffbauer

C. H. Beck · Hart · Nomos  
2014

*Published by*

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,  
eMail: bestellung@beck.de

*Co-published by*

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,  
online at: [www.hartpub.co.uk](http://www.hartpub.co.uk)

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5

76530 Baden-Baden, Germany

eMail: [www.nomos.de](http://www.nomos.de)

Published in North America (US and Canada) by Hart Publishing,  
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,  
Portland, OR 97213-3786, USA, eMail: [orders@isbs.com](mailto:orders@isbs.com)

ISBN 978-3-406-60317-4 (Beck)  
ISBN 978-1-84946-198-6 (Hart Publishing)  
ISBN 978-3-8329-7269-1 (Nomos)

© 2014 Verlag C. H. Beck oHG  
Wilhelmstr. 9, 80801 München

Printed in Germany by  
fgb · freiburger graphische betriebe GmbH & Co. KG  
Bebelstraße 11, 79108 Freiburg

Typeset by  
Reemers Publishing Services GmbH, Krefeld

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Verlag C. H. Beck, or as expressly permitted by law under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to C. H. Beck at the address above.

## 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 *Andrey 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 Kress*, 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 Kreß

Cologne, 1 October 2013

## Table of Contents

Preface .....	V
Foreword by Claus Kreß .....	VII
List of Abbreviations and Acronyms .....	XI
Table of Cases .....	XV
Bibliography .....	XXV
General Introduction ( <i>Tams/Berster/Schiffbauer</i> ) .....	1
Article I ( <i>Tams</i> ) .....	33
Article II ( <i>Berster</i> ) .....	79
Article III ( <i>Berster</i> ) .....	157
Article IV ( <i>Schiffbauer</i> ) .....	191
Article V ( <i>Schiffbauer</i> ) .....	217
Article VI ( <i>Schiffbauer</i> ) .....	235
Article VII ( <i>Schiffbauer</i> ) .....	261
Article VIII ( <i>Schiffbauer</i> ) .....	271
Article IX ( <i>Tams</i> ) .....	293
Reservations to the Convention ( <i>Tams</i> ) .....	319
Article X ( <i>Tams</i> ) .....	343
Article XI ( <i>Tams</i> ) .....	349
Article XII ( <i>Tams</i> ) .....	359
Article XIII ( <i>Tams</i> ) .....	369
Article XIV ( <i>Tams</i> ) .....	375
Article XV ( <i>Tams</i> ) .....	381
Article XVI ( <i>Tams</i> ) .....	385
Article XVII ( <i>Tams</i> ) .....	391
Article XVIII ( <i>Tams</i> ) .....	399
Article XIX ( <i>Tams</i> ) .....	401
Annexes to the Commentary .....	403
Annex 1: Authentic Treaty Versions .....	403
Annex 2: The Way Towards the Convention .....	419

## Table of Contents

Annex 3: Treaty Participation .....	427
Annex 4: Treaty Action .....	434
Annex 5: Definitions of Genocide in the National Legislation of the Member States .....	446
Index .....	463

## 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
AucklULRev .....	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
NYUJLR .....	New York University Law Review
OhioNULRev .....	Ohio Northern University Law Review
p. .....	page
para. .....	paragraph
paras .....	paragraphs
PCIJ .....	Permanent Court of International Justice
PoYIL .....	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

