

Convention on the Prevention and Punishment of the Crime of Genocide

Commentary

von

Prof. Dr. Christian J. Tams, Dr. Lars Berster, Dr. Björn Schiffbauer

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

A Commentary

by

**Christian J. Tams,
Lars Berster and
Björn Schiffbauer**

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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 Kreß

Cologne, 1 October 2013

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