

The Genocide Convention

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The Genocide Convention

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The Genocide Convention

Article-by-Article Commentary

by

Christian J. Tams

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Preface: The Genocide Convention at 75

Seventy-five 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, with the UN General Assembly's Sixth Committee scrutinising the provisions of earlier treaty drafts. When the General Assembly adopted Resolution 260 A (III) on 9 December 1948, endorsing the final text, its President, *Herbert Vere Evatt*, hailed this as an 'epoch-making event'. With the benefit of hindsight, it is evident that he was correct. The fight against genocide has become one of the paramount causes of the international community. The Convention's 75th anniversary, on 9 December 2023, is an opportunity to renew the commitment to this cause. At the same time, it gives pause for reflection, as (in the words of a former UN Special Adviser on the Prevention of Genocide), 'despite the continued commitment to "never again", we have not eradicated genocide' (*Adama Dieng*). Clearly-documented atrocities committed, during the last decade, against Yazidi and Rohingya communities (to name but two targeted groups), serve as stark reminders that the threat of genocidal violence remains very real. Seventy-five years on, the cause endures, and the fight against genocide must go on.

In this endeavour, international law is an important tool. Many of its branches – among them international human rights law, international and transnational criminal law, and collective security law – directly or indirectly address questions of genocide. The fight against genocide is fought on many fronts, from the UN's recognition of its own 'responsibility ... to help protect populations from genocide' (in the 2005 Summit Outcome) to genocide trials before national and international criminal tribunals to the educational initiatives spearheaded by the UN and UNESCO. While the Genocide Convention does not always take centre stage in these initiatives and might at times appear somewhat antiquated, it remains at the core of the fight against genocide: it defines the crime, it formulates essential obligations of states (such as the duty to prevent and punish genocide), it establishes provisions for inter-state cooperation, and it permits states to initiate genocide-related proceedings before the International Court of Justice (ICJ). It is anything but flawless and by no means lays down a comprehensive regime against genocide. But for seventy-five 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 our attempt to engage with this 'premier document'. It is the second edition of a collaborative project begun around a dozen years ago, whose first edition was published by Beck, Hart and Nomos in 2014. Work on the second edition has allowed us to update and expand the analysis. Updated and expanded, the second edition notably comments on recent ICJ proceedings concerning genocide and provides a fuller discussion of the Convention's tools to effectively prevent and punish genocide worldwide. We have also taken this opportunity to offer more detail on the Convention's Preamble and on its temporal applicability, and covered the immensely dynamic and vibrant scholarly discourse surrounding the core elements of genocide as enshrined in Article II. At the same time, our central aim in presenting this updated and expanded Commentary remains the same as in 2014, when the first edition was published: now, as then, we are convinced that legal debates about genocide should be based on a serious

Preface: The Genocide Convention at 75

analysis of the ‘premier document’ agreed by states in late 1948. In line with this conviction, the subsequent chapters interrogate the Convention’s provisions, and seek to ascertain their meaning on the basis of the general rules of treaty interpretation. The result is a systematic, article-by-article commentary of the Convention: to the best of our knowledge, the only contemporary work of this kind, and the first published in English since *Nehemiah Robinson*’s pioneering study presented in 1960. Alongside entries analysing the respective treaty provisions and the Convention’s Preamble, we have included a General Introduction (which situates the Convention in its broader normative context), a chapter on Treaty Reservations (which 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). As is clear from the Table of Contents, the bulk of these chapters have been prepared by a single author, and reflect this author’s position only. However, we believe that the work as a whole, across its single- and co-authored chapters, coheres, and that it reflects our shared desire to take seriously one of the international community’s most important multilateral treaties. On the 75th anniversary of its adoption, the Genocide Convention warrants such thorough examination and consideration.

In preparing this second edition of the Commentary, we have incurred many debts, which we gladly acknowledge: *Daniela Derlet-Eichler, Kristopher Kunde, Chloe Young and Helena Wendt* have critically read parts of the manuscript and helped us improve it. *Raphael Beermann and Jakobine Ekkenga* have provided research assistance. At C.H. Beck, *Thomas Klich* has encouraged us to update and expand our earlier work and gently guided us towards this new, revised edition; while *Jonathon Watson* and *Aleksandra Hadžić* have seen the manuscript through to publication. Lastly, at Cologne, *Claus Kreß* has supported our work on the Genocide Convention since its beginning and has kindly agreed that we reproduce his Foreword written for the first edition of this Commentary. To all of them, we are grateful.

3 August 2023

Christian J. Tams

Lars Berster

Björn Schiffbauer

Foreword to the First Edition

Claus Kreß*

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

* This Foreword was written in 2013 and included in the first edition of this Commentary. It is reproduced here, unchanged, with the author’s kind permission.

Foreword

immediately adjacent field of international 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.



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