

The Genocide Convention

Tams / Berster / Schiffbauer

2. Auflage 2024
ISBN 978-3-406-81272-9
C.H.BECK

schnell und portofrei erhältlich bei
beck-shop.de

Die Online-Fachbuchhandlung beck-shop.de steht für Kompetenz aus Tradition. Sie gründet auf über 250 Jahre juristische Fachbuch-Erfahrung durch die Verlage C.H.BECK und Franz Vahlen. beck-shop.de hält Fachinformationen in allen gängigen Medienformaten bereit: über 12 Millionen Bücher, eBooks, Loseblattwerke, Zeitschriften, DVDs, Online-Datenbanken und Seminare. Besonders geschätzt wird beck-shop.de für sein umfassendes Spezialsortiment im Bereich Recht, Steuern und Wirtschaft mit rund 700.000 lieferbaren Fachbuchtiteln.

Tams/Berster/Schiffbauer
The Genocide Convention


beck-shop.de
DIE FACHBUCHHANDLUNG

beck-shop.de
DIE FACHBUCHHANDLUNG

The Genocide Convention

Article-by-Article Commentary

by

Christian J. Tams

Lars Berster

Björn Schiffbauer

beck-shop.de
DIE FACHBUCHHANDLUNG

Second Edition

2024



Published by

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

Co-published by

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3–5, 76530 Baden-Baden, Germany,
email: nomos@nomos.de

Published in North America by Hart Publishing

An Imprint of Bloomsbury Publishing 1385 Broadway, New York, NY 10018, USA
email: mail@hartpub.co.uk

Suggested citation:

Tams/Berster/Schiffbauer, *Genocide Convention* (2nd edn., 2024), Art. [#] mn. [#]

beck-shop.de
www.beck.de

ISBN Print 978 3 406 81272 9 (C.H.BECK)
ISBN E-Book (ePDF) 978 3 406 63572 4 (C.H.BECK)
ISBN 978 1 5099 7668 3 (HART)
ISBN 978 3 7560 1440 8 (NOMOS)

© 2024 Verlag C.H.Beck oHG,
Wilhelmstr. 9, 80801 München
Printed in Germany by
Westermann Druck Zwickau GmbH,
Crimmitschauer Straße 43, 08058 Zwickau

Typeset by
Reemers Publishing Services GmbH, Krefeld
Cover: Druckerei C.H.Beck Nördlingen

CO₂
neutral

chbeck.de/nachhaltig

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. The publisher also reserves the right to use reproductions of this work for the purpose of text and data mining.

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.



beck-shop.de
DIE FACHBUCHHANDLUNG

Table of Contents

Preface: The Genocide Convention at 75.....	V
Foreword to the First Edition	VII
Notes on References and Annexes	XV
Authors	XVII
List of Abbreviations and Acronyms	XIX
Table of Cases	XXIII
Bibliography	XXXI
General Introduction	1
A. The Convention and the international fight against genocide.....	1
B. The way towards the Convention	5
I. Background	5
II. General Assembly Resolution 96(I)	7
III. The Secretariat Draft	8
IV. The Ad Hoc Committee Draft	10
V. The Sixth Committee debate (autumn 1948)	11
C. The Convention and general rules against genocide.....	12
I. The Convention's scope	12
II. Treaty, custom, and <i>jus cogens</i> rules against genocide	14
D. The Convention over time: textual continuity, adaptation, interpretation	16
I. Textual continuity	16
II. Extra-conventional rules	17
III. Treaty interpretation between continuity and change	17
E. The Convention over time: retroactivity and intertemporality	22
I. Implications of retroactivity	23
II. A presumption against retroactivity	23
III. Retroactivity and the Genocide Convention	25
IV. The Convention's intertemporal significance	28
F. Concluding observations	30
Preamble	33
A. Introduction	33
B. Drafting history	34
C. Interpretation	35
I. 'Having considered ...'	36
II. 'Recognizing ...'	36
III. 'Being convinced ...'	37
D. Concluding observations	37
Article I	39
A. Introduction	39
B. Drafting history	41
C. Interpretation	44
I. Genocide as a crime under international law	44
II. The obligations of treaty parties	46

Table of Contents

III. ‘The Contracting Parties <i>confirm...</i> ’	81
D. Concluding observations	82
Article II	83
A. The basic structure of the crime	84
B. Legal development prior to the drafting process	84
C. Drafting history	91
I. Group	91
II. Acts of genocide	93
III. Intent to destroy	99
D. Interpretation	104
I. Protected values	104
II. Material elements	112
III. Mental elements.....	144
E. Relationship to customary international law	172
Article III	175
A. Introduction	175
B. Drafting history.....	176
I. ‘Genocide’	176
II. Conspiracy to commit genocide.....	177
III. Direct and public incitement to commit genocide.....	178
IV. Attempt to commit genocide	179
V. Complicity in genocide	179
VI. Further modes of responsibility	180
C. Interpretation	181
I. Article III lit. (a) – genocide	181
II. ‘Inchoate crimes’ affiliated to genocide	185
III. Complicity in genocide	191
IV. Superior responsibility.....	195
V. Commission of genocide by omission	199
VI. ‘Joint criminal enterprise’	203
Article IV	207
A. Introduction	207
B. Drafting history.....	208
C. Interpretation	209
I. Personal scope.....	210
II. Explicit legal consequences.....	212
III. Implied legal consequences	217
D. Relationship to other provisions of the Convention	233
I. Link with Articles II and III.....	233
II. Articles IV, V and VI: the tripartite chain of primary state duties <i>vis-à-vis</i> <i>génocidaires</i>	233
E. Relationship to customary international law	234
F. Concluding observations	234
Article V	237
A. Introduction	237
B. Drafting history.....	238

Table of Contents

C. Interpretation	239
I. Personal scope: ‘contracting parties’	240
II. Procedural and material scope: implementation and enactment of legislation	240
III. Consequences of non-compliance with ‘undertake to enact’	252
D. Relationship to other provisions of the Convention	252
E. Relationship to customary international law	252
F. Concluding observations	253
Article VI	255
A. Introduction	255
B. Drafting history	256
C. Interpretation	258
I. Personal scope	259
II. Explicit legal consequences	260
III. Implied legal consequences	271
D. Relationship to other provisions of the Convention	277
E. Relationship to customary international law	277
F. Concluding observations	278
Article VII	281
A. Introduction	281
B. Drafting history	282
C. Interpretation	283
I. Extradition in terms of Article VII	283
II. Paragraph 1: genocide and political crimes	284
III. Paragraph 2: extradition in accordance with national laws and international treaties	285
D. Relationship to other provisions of the Convention	288
I. Link with Articles II and III	288
II. Article VII and the Genocide Convention as a whole	288
E. Relationship to customary international law	289
F. Concluding observations	289
Article VIII	291
A. Introduction	291
B. Drafting history	292
C. Interpretation	294
I. The utility of Article VIII: ‘call upon ... to’	294
II. Personal scope: ‘any contracting party’	297
III. Substantive scope	299
IV. Procedure	304
D. Relationship to other provisions of the Convention	305
I. Link with Articles II and III	305
II. Distinction from Article IX	305
E. Subsequent developments	307
I. International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)	308
II. International criminal law	308
III. UN initiatives on genocide prevention and ‘Responsibility to Protect’	309
IV. Further recent developments	311

Table of Contents

F. Relationship to customary international law	312
G. Concluding observations	312
Article IX	313
A. Introduction	313
B. Drafting history	318
C. Interpretation	320
I. General features of ICJ proceedings	321
II. Specific features of Article IX	330
III. The outcome of ICJ proceedings	335
D. Relationship to other provisions of the Convention and customary international law	337
E. Concluding observations	338
Reservations to the Convention	339
A. Introduction	339
B. Background: the general regime of reservations	340
I. The ICJ's <i>Reservations</i> opinion	340
II. The contemporary regime	341
C. Assessing reservations made in respect of the Genocide Convention	347
I. Distinguishing reservations from other unilateral statements	348
II. Assessing reservations proper	350
III. Withdrawal of reservations	358
D. Concluding observations	359
Article X	361
A. Introduction	361
B. Drafting history	362
C. Interpretation	363
I. The legal implications of multilingual treaty drafting	363
II. The 'correction' of the authentic Chinese text	365
D. Concluding observations	365
Article XI	367
A. Introduction	367
B. Drafting history	368
C. Interpretation	369
I. Eligibility to participate	369
II. Modalities of expressing consent to be bound	370
III. The depositary	377
D. Concluding observations	377
Article XII	379
A. Introduction	379
B. Drafting history	380
C. Interpretation	381
I. Declarations under Article XII	381
II. The territorial scope of obligations imposed by the Convention	383
D. Concluding observations	386

Table of Contents

Article XIII	389
A. Introduction	389
B. Drafting history	390
C. Interpretation	390
I. Entry into force of the Convention as such	390
II. The Convention's entry into force for states consenting to be bound subsequently	392
D. Concluding observations	394
Article XIV	395
A. Introduction	395
B. Drafting history	396
C. Interpretation	397
I. Duration in force	397
II. Withdrawing from the Convention	398
III. Other grounds entailing loss or suspension of treaty membership	399
D. Concluding observations	399
Article XV	401
A. Introduction	401
B. Drafting history	401
C. Interpretation	402
D. Concluding observations	403
Article XVI	405
A. Introduction	405
B. Drafting history	406
C. Interpretation	406
I. The content of Article XVI	407
II. Options for dealing with revision requests	407
III. Effects of revisions on the Convention	409
D. Concluding observations	410
Article XVII	411
A. Introduction	411
B. Drafting history	412
C. Interpretation	412
I. General considerations	412
II. Notification of states' expressions to become bound – lit. (a)	414
III. Other depositary notifications – lit. (b)–(f)	416
D. Concluding observations	417
Article XVIII	419
A. Introduction	419
B. Drafting history	419
C. Interpretation	420

Table of Contents

Article XIX	421
A. Introduction	421
B. Drafting history	421
C. Interpretation	421
Annexes to the Commentary	423
Annex 1: Authentic Treaty Version	423
Annex 2: The Way Towards the Convention	437
Annex 3: Treaty Participation	446
Annex 4: Treaty Action	454
Annex 5: Definitions of Genocide in the National Legislation of Member States	466
Index	483

**beck-shop.de**
DIE FACHBUCHHANDLUNG