The Genocide Convention Sixty Years after its Adoption

Christoph Safferling

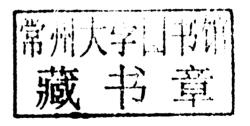
Eckart Conze

editors

THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION

edited by

Christoph Safferling and Eckart Conze



ISBN 978-90-6704-315-1

All rights reserved. © 2010, T·M·C·Asser press, The Hague, The Netherlands and the Authors

www.asserpress.nl

No part of the material protected by this copyright notice may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without written permission from the copyright owner.

PRINTED IN THE NETHERLANDS

FOREWORD

The Genocide Convention constitutes a milestone. To this day, it continues to be the principal legal instrument dealing with genocide. Motivated by the horrifying impressions left by the Holocaust, in 1948 the international community put the might of the law above the right of the mighty: For the first time, genocide was condemned in a binding document. And it was the first time that an international treaty provided for the establishment of an international criminal court.

The United Nations started preparations for the planned international criminal court as early as 1948. But the time was not yet ripe. During the first part of the 20th Century, state sovereignty in international relations meant almost everything. Consequently, it took almost 50 years before the first proceedings for genocide took place and the first sentences for genocide were passed at international level: In September 1998, for the first time, the Criminal Tribunal for Rwanda found an individual guilty of genocide. A further nine years later, the United Nations Tribunal for the first time pronounced a state guilty of violating the Genocide Convention.

It was the work of the *ad hoc* criminal tribunals for the former Yugoslavia and for Rwanda that paved the way for the establishment of the permanent International Criminal Court. It commenced work five and a half years ago now and its inception marked the beginning of a new chapter in the history of international criminal law. Crimes of the most serious nature which affect the international community as a whole can now be tried by an independent body.

Germany vigorously supported the establishment of the International Criminal Court right from the beginning. We played an active role in the drafting of the Rome Statute and joined forces with the group of like-minded states to fight for a well-functioning and thus reliable international court.

In future, too, the federal government will continue to do everything in its power to ensure that the Court can work effectively and that the support it receives from the international community is as widely based as possible – as we are convinced that it can make a substantial contribution in the struggle for peace and justice. At the Review Conference to be held in 2010, Germany will advocate establishing the crime of aggression, the details of which are currently the subject of intense debate among the Assembly of States Parties to the Rome Statute. Unfortunately, the political environment remains difficult. It appears unlikely under the Obama administration, as well, that the United States will accede to the Rome Statute any time in the foreseeable future.

The development of international criminal law as well as the establishment of the International Criminal Court have always been accompanied by a fundamental doubt: Can the law, and especially criminal prosecution, actually make any contribution to ensuring peace? Isn't it the case that punishments are more a source of disruption to new beginnings in society?

In my opinion, the answer is clearly no! Serious human rights violations must not go unpunished. Nobody should be allowed to place themselves above the law, and no perpetrator should be allowed to hide behind the protective shield of state sovereignty. This is not a question of retribution or revenge, but a question of prevention and of protection of legal interests. International criminal law and the prosecution of the most serious crimes without exception serve as a warning to all warmongers. In this way, international criminal law makes an important contribution towards asserting human rights and securing peace. I can't see any equivalent alternatives.

Amnesties, at any rate, are not a suitable means of conflict resolution. They don't resolve conflicts; at best they merely postpone them. The Spanish Amnesty Law of 1977 is a striking example of this. It meant that the crimes committed during the Franco dictatorship were prevented from being investigated for decades. This in no way contributed to any reconciliation between victims and perpetrators—as the current discussions make clear.

So-called 'truth and reconciliation commissions' can constitute a useful complement to the international criminal law system; however, they cannot replace it. Let us recall the much-cited example of the South-African Truth and Reconciliation Commission. Its successes are due to being closely interlinked with criminal prosecution. The Commission did not function outside international criminal law, but instead utilised the threat of criminal law sanctions for the purpose of carrying out its work. As a result of its authority to dispense with a criminal sanction, it was linked to the criminal procedure. And it was in fact this threat of criminal prosecution that led many members of the South-African security forces to co-operate with the Truth Commission.

Resolute criminal prosecution of serious crimes also serves another purpose that is very important to me: it gives victims a face. When a newspaper reports that someone, somewhere, has become a victim of a war crime, the human tragedy often gets almost completely lost. In a trial, however, a victim doesn't just have a name. They can also be certain that their individual view of the events, their pain and their suffering will become part of that which the international community condemns and prosecutes.

And, ultimately, establishing the facts of what happened by means of criminal proceedings also ensures that events are not ignored or forgotten.

Resolute criminal prosecution can, of course, only constitute one part of the effort to secure peace and justice. In addition to the process of coming to terms with what has happened in the past, it is essential that reconciliation takes place. Given the degree of suffering sustained, this does not always prove to be possible.

This is why it is all the more important to identify and combat the causes of such serious crimes as genocide. The United Nations have engaged a special adviser on this issue for the 'Responsibility to Protect.' It is Professor Edward Luck whom the federal government will be actively supporting.

FOREWORD VII

I would like to end by quoting Kofi Annan, who said: 'There can be no healing without peace; there can be no peace without justice; there can be no justice without respect for human rights and the rule of law.' The Genocide Convention has subjected the world's most powerful to the rule of law. The anniversary of its existence is truly an occasion to celebrate.

Berlin, March 2010

Lutz Diwell

ACKNOWLEDGEMENTS

The Genocide Convention is a remarkable document, 60 years and also 62 years after its adoption. Collecting and editing the papers presented at the Conference commemorating the 60th anniversary of the Genocide Convention, which took place from 4 to 6 December 2008 at the International Research and Documentation Centre War Crimes Trials (ICWC) and was so splendidly co-ordinated by Dr. Albrecht Kirschner, took much more time than previously envisaged. It would not have been possible at all without many helping hands. First and foremost we must express our deepest gratitude to Ms Marie Scheffler, who with the precious help of Mr Konstantin Nareyek took most of the tiresome editing work onto her shoulders and co-ordinated the assistance of several other staff members of the ICWC, Ms Alena Hartwig, Ms Wencke Meteling, Ms Andrea Wiegeshoff, Mr Patrick Donath, Mr Timo Ide, Mr Philipp Graebke, Mr Sascha Hörmann, Mr Simon Menz, Mr Sebastian Nussbaum. and Mr Tobias Scholz. The language editing was performed with the invaluable assistance of Mr Lars Büngener (ICWC), Ms Jane Britten and Ms Ulrike Seeberger. We are mostly indebted to all of the authors who have entrusted us with the publication of their papers and shown enormous patience during the editing process. Likewise, we are immensely grateful to Philip van Tongeren and Marjoliin Bastiaans at T.M.C. Asser Press for publishing this volume and in particular for their endurance in waiting for a publishable document.

Finally, we wish to thank the German Ministry of Foreign Affairs, the Ministry of Justice of the Federal State of Hesse, the city of Marburg and the Fritz-Thyssen-Foundation for sponsoring the '60th anniversary of the Genocide Convention'-Conference and giving us the opportunity to bring together such a great variety of internationally renowned researchers and practitioners. Many thanks also go to the Dr. Reinfried Pohl-Foundation, which supported the editing process financially.

Marburg, March 2010

Christoph Safferling and Eckart Conze

LIST OF ABBREVIATIONS

AJCL American Journal of Comparative Law
AJIL American Journal of International Law

All ER All England Law Reports

BFSP British and Foreign State Papers

BGBI. Bundesgesetzblatt

BGHSt Entscheidungen des Bundesgerichtshof in Strafsachen

CCL No. 10 Control Council Law No. 10 CDU Christlich Demokratische Union

CERD Committee on the Elimination of Racial Discrimination

CLF Criminal Law Forum

Cmdr. Commander Col. Colonel

Colum.L.R. Columbia Law Review
Cr. App. R. Criminal Appeal Report
CrimLR Criminal Law Review

DC-Cam Documentation Centre of Cambodia

ECCC Extraordinary Chambers in the Courts of Cambodia

ECHR European Convention on Human Rights
ECOSOC UN Economic and Social Council
ECtHR European Court of Human Rights
EJIL European Journal of International Law

ETS European Treaty Series

FDP Freie Demokratische Partei
FDR Franklin D. Roosevelt
FO Foreign Office

FRG Federal Republic of Germany FRY Federal Republic of Yugoslavia

GA General Assembly

GDR German Democratic Republic

Gen. General

Harv. HRLJ Harvard Human Rights Law Journal

HRRS Höchstrichterliche Rechtsprechung-Strafrecht
IACL International Association of Criminal Law

ICC International Criminal Court

ICCPR International Covenant on Civil and Political Rights ICCSt Rome Statute for the International Criminal Court

ICJ International Court of Justice ICLR International Criminal Law Review

ICLQ International and Comparative Law Quarterly ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the Former Yugoslavia

ICWC International Research and Documentation Centre for War Crimes Trials

IDF Israel Defence Forces

IGC Intergovernmental Committee on Refugees

ILC International Law Commission

ILC Yearbook Yearbook of the International Law Commission

ILMInternational Legal MaterialsIMTInternational Military TribunalIRAIrish Republican Army

JAG Judge Advocate General JCE Joint Criminal Enterprise

JICJ Journal of International Criminal Justice

JuS Juristische Schulung

Leiden Journal of International Law

Lt. Lieutenant

MDR Monatsschrift für Deutsches Recht MK Münchener Kommentar Strafgesetzbuch

MLR Modern Law Review

n.d. no date

New Eng. L. Rev. New England Law Review
NGO Non-Governmental Organisation
NJW Neue Juristische Wochenschrift

NSDAP Nationalsozialistische Deutsche Arbeiterpartei
OGHBrZ Oberster Gerichtshof für die Britische Zone
OMGUS Office of Military Government for Germany

OSS Office of Strategic Services

PLO Palestine Liberation Organisation

POW Prisoner of War

RGC-UN Agreement Royal Government of Cambodia - United Nations Agreement

RSHA Reichssicherheitshauptamt

RTLM Radio Télévision Libre des Mille Collines

SBZ Sowjetisch besetzte Zone SD Sicherheitsdienst (der SS)

SPD Sozialdemokratische Partei Deutschlands

SS Schutzstaffel StGB Strafgesetzbuch

UN United Nations

UNCHR United Nations Commission on Human Rights

UNSC United Nations Security Council UNTS United Nations Treaty Series

UNWCC United Nations War Crimes Commission

USLW United States Law Week

USSR Union of Soviet Socialist Republics

VRS Vojska Republike Srpske (Bosnian Serb Army)

WRB War Refugee Board WWI World War I WWII World War II

Yale Law Journal
YBIHL Yearbook of Internationa

YBIHL Yearbook of International Humanitarian Law

ZIS Zeitschrift für Internationale Strafrechtsdogmatik
ZStW Zeitschrift für die gesamte Strafrechtswissenschaft

SUMMARY OF CONTENTS

Foreword by Lutz DIWELL	V
Acknowledgements	ΙX
Table of Contents	XIII
Abbreviations	XIX
Introduction	
The Genocide Convention Sixty Years After its Adoption Christoph Safferling and Eckart Conze	3
Part One: Historical Development	
Genocide in International Law and International Relations Prior to 1948 William A. Schabas	19
Raphael Lemkin and 'Genocide' at Nuremberg, 1945-1946 John Q. Barrett	35
The United Nations and the Origins of the Genocide Convention 1946- 1948 Jost Dülffer	55
Strategies for 'Genocide Trials' after World War II – How the Allied Powers Dealt with the Phenomenon of Genocide in Occupied Germany Wolfgang FORM	69
The Holocaust and the Genocide Convention of 1948 Herbert REGINBOGIN	83
Part Two: Public Policy Considerations	
Genocide Prevention and the Dynamics of Conflict Ulrich Wagner and Thorsten Bonacker	99
War Crimes, Genocide Trials and <i>Vergangenheitspolitik</i> – the German Case Annette Weinke	109
Genocide and the Genocide Convention in Israel Moshe Zimmermann	125

Part Three: Interpretation of the Crime of Genocide	
The Policy Element in Genocide: When is it Required by International Rules? Antonio Cassese	133
The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct Stefan Kirsch	141
Different Forms of Participation in Genocide Henning RADTKE	153
The Special Intent Requirement in the Crime of Genocide Christoph Safferling	163
Part Four: Case Studies	
The Challenges of Genocide Trials: 'The Cambodian Situation' Jürgen AßMANN	183
The International Criminal Court and the Crime of Genocide Hans-Peter Kaul	195
The Crime of Genocide Applied in Practice – Selected Aspects of the Jurisprudence of the <i>ad hoc</i> Tribunals' Appeals Chambers Matthias Schuster	213
International Genocide Trials: Three Case Studies Inés Mónica Weinberg de Roca and Margaret Patten Knowlan	235
Part Five: Genocide and the International Court of Justice	
The ICJ Judgment in the Bosnian Genocide case and Beyond: A Need to Reconceptualise? Anja Seibert-Fohr	245
Genocide and the International Court of Justice Bruno Simma	259
Part Six: Historic Cases	
The Trial of Adolf Eichmann and Other Genocide Trials Justice Gabriel Bach	275
The Auschwitz Trial at the Landgericht Frankfurt and its Importance for the Prohibition of Genocide Heinz Düx	287
The Nuremberg Trial 1945-1946 Whitney R. Harris	299
List of Contributors	305
Index	300

TABLE OF CONTENTS

Forew	ord by Lutz Diwell	V
Ackno	wledgements	IX
Summ	ary of Contents	XI
Abbre	viations	XIX
	Introduction	
	enocide Convention Sixty Years After its Adoption oph Safferling and Eckart Conze	3
I. II. III. III.1 III.2 III.3 III.4 IV.	Legal remarks Historical remarks The legal and historical reflections Historical development and public policy considerations Legal issues Case studies Genocide and the International Court of Justice Historic cases: contemporary witnesses Future prospects	55 77 99 12 13 14 14
	Part One: Historical Development	
1948	ide in International Law and International Relations Prior to n A. Schabas	19
I. II. III.	Human rights, the United Nations and the drive for war crimes prosecutions Crimes against humanity and the drafting of the 1948 Genocide Convention Closing the impunity gap	22 24 30
IV. Rapha	Conclusions el Lemkin and 'Genocide' at Nuremberg, 1945-1946	32 35
	BARRETT	- 3
Í. II.	Lemkin in Washington, spring 1945 Lemkin in London, late summer 1945	36 41

371	T 7
ΛI	V

TABLE OF CONTENTS

III. IV. V.	'Genocide' in the Nuremberg Indictment, October 1945 Lemkin and 'Genocide' during the Nuremberg trial, November 1945-September 1946 Conclusion	47 47 53
The Uni 1948 Jost Düi	ited Nations and the Origins of the Genocide Convention 1946-	55
I. H. III.	Chronological outline Basic questions Great Power interests and the negotiations for the Genocide	56 57
IV.	Convention Conclusion	58 66
	tes for 'Genocide Trials' after World War II – How the Allied Dealt with the Phenomenon of Genocide in Occupied Germany ag FORM	69
I.	Preliminary remarks: defining humanity	69
II.	European experiences with mass violence	70
II.1	The path to Nuremberg	71
II.2	Institutionalisation efforts	74
II.3	The United Nations War Crimes Commission	75
III.	National jurisdictions after World War II	77
III.1	Military courts	77
III.2	Non-military courts under Control Council Law No. 10	78
III.3	The principle of non-interference in domestic affairs	79
III.4	Punishing crimes committed before the war	79
	locaust and the Genocide Convention of 1948 REGINBOGIN	83
I.	Holocaust/Shoah and the legal term Genocide	84
II.	Anti-semitism	85
HI.	1938 - the World Community and the Evian Conference	87
IV.	The conference begins	89
V.	Conference failure and the consequences	92
	Part Two: Public Policy Considerations	
Genocid Ulrich W	le Prevention and the Dynamics of Conflict VAGNER and Thorsten BONACKER	99
I.	Groups and intergroup processes	99
II.	Intergroup violence	101

	TABLE OF CONTENTS	XV
III.	Prevention and treatment of violence and genocide	104
War (Crimes, Genocide Trials and <i>Vergangenheitspolitik</i> – the German	
Case		109
Annet	te Weinke	
I.	Germany and international law after 1945: A case of 'post-	
••	Nuremberg reflex'?	109
II.	'Nuremberg' and its effects on German perceptions of genocide	103
	trials	113
III.	'Coming to terms with the past' by means of criminal law?	120
IV.	Conclusion	123
Genoc	cide and the Genocide Convention in Israel	125
Moshe	ZIMMERMANN	
Rules		133
Anton	io Cassese	
The T	wo Notions of Genocide: Distinguishing Macro Phenomena and	
	dual Misconduct	141
Stefan	Kirsch	
1.	The 'social' concept of genocide	141
II.	The 'legal' concept of genocide	143
II.1	The 'systemic' nature of genocide	145
II.2	Individual misconduct	148
II.3	Proving genocide	149
III.	Conclusion	152
	ent Forms of Participation in Genocide	153
Hennii	ng Radtke	
I.	Legal basis for complicity in international criminal law	153
II.	Differentiation of the different forms of participation	155
III.	Derivation of a limitation of participation from the criterion of	
	intention in genocide	159
IV	Result	161

	The Special Intent Requirement in the Crime of Genocide Christoph SafferLing	
I.	The basic structure and aim of the crime of genocide	165
I.1	Basic structure	165
1.2	Aim of the norm	167
II.	Subjective requirements	168
II.1	Ordinary intent	169
II.2	Special intent	170
II.2.a	Applicability of Article 30 ICCSt	170
II.2.b	Interpretation of the special intent	171
II.2.b.1	Knowledge-based interpretation	171
II.2.b.2	Will-based interpretation	173
II.2.c	Individual requirements	174
II.2.c.1	Destroy	174
II.2.c.2	In whole or in part	176
III.	The proof of special intent	177
IV.	Summary and future prospects	179
	Part Four: Case Studies	
The Cha	allenges of Genocide Trials: 'The Cambodian Situation'	183
I.	The structure of the Extraordinary Chambers	184
11.	Challenges faced by the Extraordinary Chambers	185
II.1	Political challenges	185
II.2	Legal and procedural challenges	187
II.3	Evidentiary challenges	190
II.4	Practical challenges	191
III.	Challenges confronted by Cambodian Society	191
IV.	Conclusion	193
The Inte Hans-Pet	ernational Criminal Court and the Crime of Genocide ter Kaul	195
I.	Introduction	195
II.	The crime of genocide as defined in the ICC's legal framework	197
II.1	The concept of genocide – from Lemkin to Article 6 of the Rome Statute	197
II.2	The concept of genocide as specified in the Elements of Crimes	197
HI.	The Crime of Genocide as applied in the ICC's recent practice	201
III.1	Procedural and historical background	201
111.2	The majority's decision not to include the charges of genocide in	
	the warrant of arrest	202

III.2.a The contextual element III.2.b The specific elements III.2.b.1 Existence of a protected group III.2.b.2 The specific intent requirement III.3 Judge Ušacka's 'Separate and Partly Dissenting Opinion' III.4 The Prosecutor's application for leave to appeal pursuant to Article 82(1)(d) of the Statute IV. Conclusion	203 204 204 204 206 207 209
III.2.b.1 Existence of a protected group III.2.b.2 The specific intent requirement III.3 Judge Ušacka's 'Separate and Partly Dissenting Opinion' III.4 The Prosecutor's application for leave to appeal pursuant to Article 82(1)(d) of the Statute	204 204 206 207 209
III.2.b.1 Existence of a protected group III.2.b.2 The specific intent requirement III.3 Judge Ušacka's 'Separate and Partly Dissenting Opinion' III.4 The Prosecutor's application for leave to appeal pursuant to Article 82(1)(d) of the Statute	204 206 207 209
 III.2.b.2 The specific intent requirement III.3 Judge Ušacka's 'Separate and Partly Dissenting Opinion' III.4 The Prosecutor's application for leave to appeal pursuant to Article 82(1)(d) of the Statute 	206 207 209
 III.3 Judge Ušacka's 'Separate and Partly Dissenting Opinion' III.4 The Prosecutor's application for leave to appeal pursuant to Article 82(1)(d) of the Statute 	206 207 209
III.4 The Prosecutor's application for leave to appeal pursuant to Article 82(1)(d) of the Statute	207 209
Article 82(1)(d) of the Statute	209
	209
	213
The Crime of Genocide Applied in Practice – Selected Aspects of the	213
Jurisprudence of the ad hoc Tribunals' Appeals Chambers	
Matthias Schuster	
I. Introduction	213
II. The protected group	215
III. The destruction of the group	222
IV. 'In whole or in part as such'	225
V. Proving genocidal intent	232
VI. Conclusion	233
International Genocide Trials: Three Case Studies	235
Inés Mónica Weinberg de Roca and Margaret Patten Knowlan	
I. Introduction	235
II. Ntakirutimana	235
III. Zigiranyirazo	238
IV. Bikindi	240
V. Conclusion	242
Part Five: Genocide and the International Court of Justice	
The ICJ Judgment in the Bosnian Genocide case and Beyond: A Need	
o Reconceptualise?	245
Anja Seibert-Fohr	
. Introduction	245
I. History of proceedings	246
II. Subject-matter jurisdiction of the ICJ in genocide cases	247
II.1 The scope of primary obligations under the Genocide Convention	248
II.2 The applicability of the concept of state responsibility	250
V. The Court's criminal law analysis	251
V.1 The Court's line of reasoning	251
V.2 The need to reconceptualise	253
V. The missing piece	254
VI. Conclusion and suggestions for the future conceptualisation	40

TABLE OF CONTENTS

	ide and the International Court of Justice	259
Bruno		
I.	Introduction	259
II.	On the duty to prevent genocide	261
III.	Distinguishing between a failure to prevent genocide and	
	complicity in its commission	263
IV.	The 'reinforcing' effect of provisional measures orders on	
	Serbia's obligations	264
V.	Can a state commit genocide?	264
VI.	Attribution of responsibility for genocide	265
VII.	What is an 'organ of state'?	268
VIII.	Attribution to a state of genocide committed by persons who are	
	not state organs	269
IX.	Reparation	270
X.	Conclusion	271
	Part Six: Historic Cases	
	ial of Adolf Eichmann and Other Genocide Trials Gabriel Bach	275
	schwitz Trial at the Landgericht Frankfurt and its Importance Prohibition of Genocide Düx	287
	remberg Trial 1945-1946 y R. Harris	299
List of	Contributors	305
Index		309