Christian Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, Munich/Oxford/Baden-Baden, C.H. Beck/Hart Publishing/Nomos, 2014, 468 pp., ISBN 9781849461986
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It seems like a long time ago when international law academics and practitioners alike waited in eager anticipation for the International Criminal Tribunal for Rwanda (ICTR)'s *Akayesu* Trial Judgment.[1] Indeed, it was the first time in history that an international tribunal would consider substantive provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) ('Genocide Convention') – namely, the definition of genocide as per Article II – and apply it to a concrete set of facts.[2] The year was 1998 – half a century after the Genocide Convention (1948) was finalised. Between then and the present, some 18 years have come to pass. In that time there has been a steady stream of jurisprudence emanating from international courts and tribunals that have built upon the foundations laid out in *Akayesu*. As a result, the crime of genocide is now no longer a subject of abstract academic ponderings and hypothetical curiosities – as it was in the decades before the advent of the *ad hoc* international criminal tribunals. In short, we now know far more about the intricacies and contours of the crime of genocide than we ever have before.

Running in parallel with this growth in jurisprudence came an exponential explosion of academic legal literature on the subject. Within this vast amount of literature there are a few books that stand out. In this group we can include Professor Schabas' seminal text *Genocide in International Law: The Crime of Crimes*[3] and Professor Gaeta's *The UN Genocide Convention: A Commentary*.[4] However, rather than a lengthy discussion on the criminal or State responsibility aspects of genocide (as per Professor Schabas' text) or a collection of topical essays on the broad subject of genocide (as per Professor Gaeta's text), Tams, Berster, and Schiffbauer took upon themselves the task of providing an in-depth commentary on each of the Genocide Convention's 19 Articles as well as a chapter on reservations. This Article-by-Article account of the Genocide Convention is divided among the book's three authors over a span of 402 pages: Professor Tams authors Articles I, IX–XIX (and the chapter on reservations); Dr. Berster authors Articles II–III; and Dr. Schiffbauer authors Articles IV–VIII.

At this junction it should be noted that the number of such books – Article-by-Article commentaries – on different and seminal international treaties has been

1 *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96–4-T, T. Ch., 2 September 1998.
2 One should, however, not neglect to mention that before the *Akayesu* Trial Judgement was issued, the ICJ had already considered certain provisions of the Genocide Convention (1948), albeit in the jurisdiction and admissibility phase of proceedings: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. 595. In addition, the ICJ had also previously pronounced an advisory opinion on the matter of reservations to the Genocide Convention (1948), on which there is no specific provision in the treaty: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15.
3 W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (2009).
4 P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (2009).

growing for some time in the international legal literature. One can presently find such commentaries for the Vienna Convention on the Law of Treaties (1969),[5] the United Nations ('UN') Charter (1945),[6] the Statute of the International Court of Justice,[7] and the Rome Statute of the International Criminal Court,[8] among others. The present book should thus be viewed as part of this growing trend and its arrival should not be surprising – what is surprising is that no one, it seems, has seen fit until 2014 to undertake and publish a similar project for the Genocide Convention (1948). In that respect, the book fills an important but surprisingly little-noticed gap in the literature. It also simultaneously serves as is its most distinguishing feature that sets it apart from other books on genocide that have come before. Thus, the present work is the first of its kind on the Genocide Convention, and to their credit, the authors did a commendable job.

The analysis of each Article of the Genocide Convention follows the same general pattern across the book. A general introduction is presented, followed by a discussion of the *travaux préparatoires*, then an interpretation and discussion of the provision(s), followed by concluding observations. The one exception to this structure is the analysis of reservations which is presented as an annex to Article IX, but in reality stands alone as an analysis of an Article that does not actually exist in the Genocide Convention (1948). The inclusion of this chapter is a welcome move, especially in light of the ICJ's 1951 Advisory Opinion on reservations to the Genocide Convention which marked the birth of the modern reservations regime.[9] The commentary of each Article is packed with an impressive amount of academic literature, case law as well as historical and contemporary documents. This, however, means that the discussion of some Articles far outweighs the discussion of others. For example, the commentary on Article II (definition of genocide) stretches over 77 pages (almost 20 per cent of the total number of pages dedicated to the commentaries of the various Articles), whilst Article XVIII (depository of the treaty) and Article XIX (registration of the treaty) are both confined to two pages. Of course, in all fairness, this is not truly the fault of the authors – there is obviously far more to say on Article II than on any other Article of the Genocide Convention (1948).

Nevertheless, there are omissions that set the book back. For example, there is no uniform discussion throughout the book as to which substantive provisions of the treaty form part of customary international law and thus possess binding normative force independent from that of the Genocide Convention (1948). Thus, discussion of the question of whether conspiracy to commit genocide is part of customary international law is conspicuously missing from the book, particularly in light of its absence in the Rome Statute of the International Criminal Court (1998). Similarly,

5 See M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009); O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012).
6 See B. Simma, D. Khan, G. Nolter and A. Paulus (eds), *The Charter of the United Nations: A Commentary* (2012).
7 See A. Zimmermann, K. Oellers-Frahm, C. Tomuschat, and C.J. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2012).
8 See. W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2012); O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition (2016).
9 See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15.

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to what extent the obligation to prevent genocide as per Article I is customary in nature also stands neglected. While the ICJ has previously shone a light on this obligation and described some of its contours, in doing so, it was very careful in insisting that it was 'confin[ing] itself to determining the specific scope of the duty to prevent in the Genocide Convention' only and was not purporting to go beyond that treaty's confines.[10] Yet, in a subsequent case, the ICJ appeared to suggest – perhaps inadvertently – that this obligation was part of customary international law as far back as 1948.[11]

These matters have real life practical utility – knowing which obligations are part of custom or not is relevant to entities beyond the States that are not parties to the Genocide Convention (1948). To name just one well-known case: did the United Nations ('UN') – an international organization endowed with international legal personality – have an obligation to prevent the genocide that occurred at Srebrenica during July 1995 (despite the blue helmet presence in the area) or would it be legally permissible for the UN to stand back, do nothing, and watch a massacre unfold? Since only States can be parties to the Genocide Convention (1948) (as per Art. XI), the only plausible way that such an obligation could bind the UN was if it were an existing customary-based obligation or, perhaps, one belonging to the *jus cogens* category.

That the prevention of genocide was *jus cogens* was indeed argued in *Stichting Mothers of Srebrenica and Others* v. *The Netherlands and the United Nations* ('*Mothers of Srebrenica*') in an (unsuccessful) attempt to hold the UN (and The Netherlands) responsible for failing to prevent the Srebrenica genocide before Dutch courts and eventually before the European Court of Human Rights ('ECtHR').[12] But this case also brings to light another shortcoming: the limited consideration of domestic case

10 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43, para. 429.

11 See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, para. 95 (emphasis added):

> [T]he obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question. Nothing in the text of the Genocide Convention or the *travaux préparatoires* suggests a different conclusion. *Nor does the fact that the Convention was intended to confirm obligations that already existed in customary international law.*

12 See Supreme Court of the Netherlands, *Stichting Mothers of Srebrenica and Others v. The Netherlands and the United Nations*, ECLI:NL:HR:2012:BW1999, ILDC 1760 (NL 2012), 13 April 2012; ECtHR – Third Section, *Stichting Mothers of Srebrenica and Others v. The Netherlands*, Admissibility, Application No. 65542/12, 11 June 2013. The Netherlands was being sued because it was a Dutch battalion (Dutchbat) that had been stationed in Srebrenica under the UN flag in order to protect the civilian population in July 1995. For a further discussion of the implications of this case for the use of force and humanitarian intervention, see M.J. Ventura, 'The Prevention of Genocide as a *Jus Cogens* Norm? A Formula for Lawful Humanitarian Intervention', in C.C. Jalloh and O. Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015), 289. When the case returned to the Dutch courts after having lost before the ECtHR, the plaintiffs argued that The Netherlands (since holding the UN liable was no longer possible) had failed to, *inter alia*, prevent genocide under the Genocide Convention (1948) and sought a declaratory judgment to that effect. The Hague District Court held that this provision only applied between States and did not create an individual cause of action in The Netherlands absent its implementation into Dutch law by parliament. In short, Art. I of the Genocide Convention (1948) was not self-executing. It was held that this was equally true of *jus cogens* rules. See The Hague District Court of The Netherlands, *Stichting Mothers of Srebrenica and Others v. The Netherlands and the United Nations*, ECLI:NL:RBDHA:2014:8748, 16 July 2014, paras 4.162–4.165.

law concerning genocide – particularly when they are on point. The prominent Dutch *Mothers of Srebrenica* case, for example, is not cited or discussed in the book's consideration of the prevention of genocide and neither does one find a substantive discussion of the *Jorgić* case and the domestic reasoning leading to the recognition by German courts of cultural genocide (later upheld by the ECtHR).[13] Given the book's authorship, the latter omission is particularly surprising.

In addition to the commentary, the book contains five annexes. The first is the text of the Genocide Convention (1948) in all five of its official languages: English, French, Spanish, Russian and Chinese.[14] That the Genocide Convention is equally authentic in five different languages (as per Art. X) is a fact that is often overlooked in the literature, but is not forgotten by the authors in the present work. Indeed, in a welcome move, in some parts of the commentary the relevant provision is analyzed in light of a language other than English. The second annex is a collection of the three broad historical documentary signposts of the process that eventually lead to the final treaty: UN General Assembly Resolution 96(I) (1946); the Secretariat Draft (UN Doc. E/447); and the Ad Hoc Committee Draft (UN Doc. E/AC.25/12). The third annex is a list of States who have ratified, acceded or succeeded to the treaty and the relevant dates, whilst the fourth is a complete list of States Parties who have submitted declarations, reservations and objections to the treaty, together with the accompanying texts.

The fifth annex merits special attention. It comprises a collection of State practice on genocide in the form of national definitions of genocide (both in their original language and translated into English) from across 29 countries.[15] They are divided into four categories: definitions that are largely identical to Article II; definitions that are broader in scope than Article II; definitions that are narrower in scope than Article II; and definitions that are partly broader and partly narrower than Article II. This collection will be particularly useful to researchers and others who wish to gain insights into domestic or even regional approaches to genocide. However, it is a shame and another drawback that the authors chose to include only such a small and narrow sample of State practice, particularly when they are existing books that have already included a broader array of such national definitions of genocide.[16] There is certainly scope for expanding this comparative survey.

Overall, the present work is a welcome addition to the literature on genocide and one that is unique in its scope and fresh in its approach. It certainly merits a place in the collections of serious international criminal law practitioners and/or scholars.

13 See Germany, Bundesverfassungsgericht (Federal Constitutional Court), *Jorgić*, 2 BvR 1290/99, Absatz- Nr. (1–49), 12 December 2000; ECtHR – Fifth Section, *Jorgić v. Germany*, Application No. 74613/01, 12 July 2007.

14 See Art. X, 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

15 Namely, Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Fiji, Finland, Georgia, Germany, Ghana, Hungary, Latvia, Luxembourg, Mali, Malta, Montenegro, The Netherlands, Nicaragua, Peru, Poland, Romania, Russia, Rwanda, Switzerland, Ukraine, and the United States of America.

16 See D.L. Nersessian, *Genocide and Political Groups* (2010), 267–324 (where the author does this over two appendices and five tables).

At the same time, there is room for improvement and expansion, in the form of a Second Edition, perhaps when the International Criminal Tribunal for the former Yugoslavia and the UN Mechanism for International Criminal Tribunals finish their outstanding genocide cases.

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