Developments

Conference Report – "The Genocide Convention" International Conference: Commemorating its 60th Anniversary (4 – 6 December 2008 Marburg, Germany)

By Robin Hofmann [*]

A. Introduction

In 1944 Raphael Lemkin wrote in his book titled *Axis Rule in Occupied Europe:* "By Genocide we mean the destruction of a nation or an ethnic group."[1] Four years later, on 9 December 1948 the term "genocide" coined by Lemkin simply by merging the Greek word "*genos*" (people) and the Latin word "*caedere*" (to kill) was adopted by the General Assembly of the United Nations in the Genocide Convention. Now, six decades later an international conference on the occasion of the 60th anniversary of the Genocide Convention took place from the 4th – 6th December in Marburg and the city of Frankfurt in Hesse/Germany sponsored mainly by the German Foreign Office and the Fritz-Thyssen Foundation. The main purpose was to discuss the implications of the genocide convention from 1948 on an international platform with scholars from different countries and disciplines.

Even 60 years after its official adoption, genocide as a crime remains highly controversial. The reasons for this are various. Nevertheless the still ongoing debate can be taken as clear evidence for the fact that genocide, its prosecution and prevention is as pressing an issue as ever.

Though "genocide" is perceived as the "crime of all crimes" its application is still not clear today. The main controversies concerning the term revolve, for example, around the requirement of a special "genocidal intent" as well as the definition of "protected group" as it is stated in the convention. In addition a certain conflict between genocide as a criminal offence and its prohibition under public international law remains unresolved. But also the use of "genocide" as a political term in international relations especially when it

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[1] Raphael Lemkin, Axis Rule In Occupied Europe: Laws Of Occupation, Analysis Of Government, Proposals For Redress (Carnegie Endowment for International Peace, Division of International Law 1944).

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comes to the stigmatization of human rights violations is still controversially discussed. Facing these debates the International Research and Documentation Centre for War Crimes Trials (ICWC) at the Philipps-University Marburg organized an international conference. The idea was to give these debates a platform, contribute to the discussion and derive results for the future particularly when it comes to the most vital of all faced challenges: the future prevention of genocide.

For these purposes the ICWC invited a broad range of international scholars from different fields of research including history, social sciences and law as well as current and former practitioners from international and national courts. This ambitious interdisciplinary approach, a concept which the Philipps-University has become widely known for in the past years, led to controversial debates and fruitful discussions among some 30 speakers. The conference took place in the old Aula (ceremony hall) of the Philipps-University with its impressive paintings. The final day of the conference then took place in the Bürgerhaus Gallus (municipal hall) in Frankfurt where the so-called Auschwitz trial was held in 1963-65. The Conference was an historic event not only by virtue of these locations but also because of the special appearance of three speakers: On the first day of the conference, Whitney R. Harris, former member of the American prosecution during the Nuremberg trial and prosecutor of Ernst Kaltenbrunner, head of the Third Reich Security Police gave an extraordinary speech, recollecting his memories of the Nuremberg trial. On the second day Gabriel Bach, former prosecutor of Adolf Eichmann in Jerusalem in 1961 gave personal insights from the investigation and prosecution against Eichmann, the chief architect of the holocaust. Finally, there was a very memorable speech by Dr. Heinz Düx, former judge at the District Court of Frankfurt/Main and pre-trial judge of the Auschwitz trial. This trial took place in the Gallus municipal hall, the very place Heinz Düx held his speech, talking about the use of law in post war Germany in an attempt to cope with its Third Reich past.

B. Thursday, 4 December 2008

After the welcome addresses the first plenum discussion started with the topic "The emergence of the Genocide Convention." The controversy centered on the interpretation of the term genocide. All speakers agreed that the term is broad and vague. Each scientific discipline developed its own understanding of genocide. Furthermore the content of the term has changed over the past decades so that today a narrow definition of genocide cannot be achieved from its historic interpretation.

First speaker William A. Schabas (Galway/Ireland) dealt with the topic of "Genocide in International Relations and International Law before 1948." He stated that the importance of a distinction between crimes against humanity and genocide, though slightly diminished is still of great symbolic significance today. He was followed by Jost Dülffer, (Cologne/Germany) who spoke about "The United Nations and the Drafting of the Genocide Convention." Dülffer argued that the outcome of the negotiations concerning the Genocide Convention between 1946 to 1948 was strongly influenced and more

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importantly, determined by national interests of the United States, Great Britain and the Soviet Union. As a result one can speak of a "hibernation of the Convention" during the Cold War until one year before the fall of the Berlin Wall and the ratification of the Convention by the U.S. on November 25, 1988. John Q. Barrett, Professor at St. Johns University New York gave a speech titled "Many Fathers: Charging and Prosecution Genocide at Nuremberg" in which he dealt with Raphael Lemkins' widely accepted role as the "father" of the Genocide Convention. Barrett criticized what he called the "Lemkin-centric" accounts of "genocide" which overstate his significance at Nuremberg and overlook the genocide concept at Nuremberg and in the International Military Tribunal judgment. The last speaker of this first session, Herbert R. Reginbogin (Lefke/Cyprus) talked about "The Holocaust and the Genocide Convention." His main point was that the experiences from the holocaust had a strong influence on the content of the Convention. This is evident from the fact that already in 1946, one year after the war and while the Nuremberg trials were still under way, the General Assembly declared genocide an international crime.[2] Reginbogin critically remarked that, though most countries of the international community harshly reproached Germany and its treatment of Jews during the Third Reich, they still refused to open up their doors for Jewish refugees. This was mainly due to the fact that the Genocide Convention was not accompanied by a legal statute for refugees.

The afternoon session was opened by Whitney R. Harris, the former prosecutor of the Nuremberg trials and U.S. delegate to the Rome Conference that resulted in the treaty establishing the International Criminal Court. In his speech titled "Experiences from Nuremberg," Harris gave a priceless recollection of his personal experiences and memories from the Nuremberg trials. He described the genocide committed by the Nazis as "the greatest crime on earth" and referred to Robert H. Jackson's famous opening statement of the Nuremberg trials by citing that "civilization cannot tolerate their being ignored, because it cannot survive their being repeated."[3] Above all, the descriptions from "behind the scenes" of the trial, the personal insights and details of the defendants and the prosecutors made this speech one of the undeniable highlights of the conference.[4]

Afterwards Eckart Conze (Marburg) chaired the session dealing with the topic "Genocide, the Genocide Convention and Genocide Trials since 1948 in the historical perspective." First Speaker Wolfgang Form, (ICWC) talked about "British Genocide Trials in Germany

[2] *See* HELMUT SATZGER, INTERNATIONALES UND EUROPÄISCHES STRAFRECHT 193 (Nomos Verlagsgesellschaft 2005).

[3] Robert H. Jackson, Opening Statement before the International Military Tribunal, *available at* http://www.roberthjackson.org/Man/theman2-7-8-1/.

[4] *See* WHITNEY R. HARRIS, TYRANNY ON TRIAL - THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945–1946 (Southern Methodist University Press 1999). In German: TYRANNEN VOR GERICHT: DAS VERFAHREN GEGEN DIE DEUTSCHEN HAUPTKRIEGSVERBRECHER NACH DEM ZWEITEN WELTKRIEG IN NÜRNBERG 1945-1946 (Juristische Zeitgeschichte, Abt. 4, Band 11 Berliner Wissenschaftsverlag 2008).

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(Control Council Courts)" and was followed by Moshe Zimmerman from the Hebrew University of Jerusalem. He gave an account of "Genocide and the Genocide Convention in Israel" by describing the self-image of the Jewish people as dominated by "self-victimization." This led to a deprivation of the terminology of the Genocide Convention to slogans merely used for political purposes directed against or in favor of Israeli politics. The session was closed by Annette Weinke whose lecture was headlined "War Crimes/Genocide Trials and Vergangenheitspolitik – The German Case." Weinke gave an assessment of how Western Germany dealt with the Genocide Convention since its adoption in 1948. She concluded that extensive research on this area in Germany has still not taken place. A reason for this deficit might be the fact that though there seemed to be a growing willingness to deal with the Nazi genocide in some sort of German public recollection after war, it was paralleled by a decline of the memory of the Nuremberg trials.

The evening session dealt with the topic of punishing genocide. At this time, the practical problems of working with the Genocide Convention were addressed. First Speaker Inés Weinberg de Roca, Judge at the ICTR spoke about "The Rwandan Genocide: The ICTR Trials." Weinberg de Roca gave an introduction to the Genocide that took place in Rwanda during the 1990s to illustrate major difficulties of prosecuting genocide. She concluded by stressing an even more important purpose of these genocide trials: to give the victims a face and to let them tell their story. Mathias Schuster from the ICTY then gave a lecture about "The Jurisprudence on the Crime of Genocide of the Appeals Chambers of the ICTY and ICTR" and provided interesting insights on the daily work with the Genocide Convention. The last speaker of the session and of the day was Jürgen Assmann, Advisor to the Co-Prosecutor at the Extraordinary Chambers in the Courts of Cambodia, who gave a talk on "The Cambodian Situation" by stressing the political and symbolic implications of prosecuting genocide and the challenges those trials face in the future. All of the three speakers made it clear that the application of genocide to individual cases is difficult and the reality of prosecuting under the convention is facing various problems.

C. Friday, 5 December 2008

The morning session on the second day of the controversy was headlined "Genocide as a Criminal Norm: Legal Issues." The morning debate was supposed to mainly deal with the legal issues concerning the Convention, namely the special intent requirement, problems of participating in genocide and difficulties of interpreting "destruction of an ethnic group."

Christoph Safferling (Marburg) started with a lecture about "The Special Intent Requirement" of genocidal conduct. He argued that the crucial criterion, separating genocide from other crimes, is a mental criterion. Therefore attempts to read the crime of genocide in a purely objective manner must fail and one has to carefully discriminate between mental requirements and the problem of proving them being fulfilled. According

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to Safferling, a prosecution for genocidal conduct must prove clear person-centered evidence indicating that the defendant did embrace the goals of a genocidal policy. Afterwards Henning Radtke (Hanover) then examined "Different problems of Participating in Genocide," arguing that a qualified differentiation between participation and participation through complicity, as it is stated in Art. 25 ICC Statute is difficult and a reliable distinction can only be made by factual criteria. Moreover the question of whether the requirement of a special intent to commit genocide or a "had reason to know" requirement of the participant can be sufficient, remains a still unresolved problem. Antonio Cassese (Florence) answered these special intent problems by advocating a "middle of the road opinion" in his lecture about "The Policy Element in Genocide." In his view the establishment of two schools of thoughts of which one does not necessarily consider a special policy plan to commit genocide while the other requires the policy plan as an indispensable element of the crime, are mainly based on a historical and sociological argument. That a special policy plan always occurred and stood behind the historic examples of genocide does not mean that it has to be a necessary element of genocide, Cassese stated. Stefan Kirsch (Frankfurt) argued the crime of genocide requires that the perpetrator knows for a fact that he is acting in furtherance of a typically - pre-planned and organized - attack which will lead to the destruction of a distinct group within the civil population. Consequently, the major difficulty of prosecuting genocidal conduct is to identify individual misconduct that is equally part of a collective attack on a protected group and not only occurs on the background of such an attack.

Moreover, the question of how an ethnic group is defined and which criteria qualify the destruction of such a group was raised. Some of the Scholars argued that committing genocide requires a physical destruction through the planned killing of the members of a specified ethnic group. Other speakers considered a social destruction meaning the destruction of an ethnic group as a social entity for example by expulsion as sufficient. Safferling alluded that the German *Bundesgerichtshof* (High Court of Justice) in particular has ruled that in order to fulfill the requirements of genocidal intent it is enough to attempt the destruction of the social existence of a group.[5] In contrast the international tribunals adhere to a narrow interpretation stating that "the expulsion of a group or part of a group does not in itself suffice for genocide."[6]

The second panel on this morning, moderated by Antonio Cassese addressed the discrepancies between criminal law and public international law. Anja Seibert-Fohr (Heidelberg) the first lecturer of the panel with a presentation on the "ICJ Decision on

[5] *See* BGHSt 45, 64 (80); BVerfG NJW 2001, 1848 (1850); Safferling JuS 2001, 738. No violation of Art. 7 § 1 ECHR could be found, *see* Jorgic v. Germany, 2007 Eur. Ct. H.R. ¶¶ 113 et subs (July 12).

[6] *See* Prosecutor v. Krstic, Case No. IT-98-33, ¶ 580 (Aug. 2, 2001); *see also* Bosnia and Herzegovina v. Serbia and Montenegro ("Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide"), ¶ 190, 2007 I.C.J. (Feb. 26).

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Genocide and Beyond" formulated a critique for its criminal law analysis which raised unduly the threshold to establish state responsibility for genocide.[7] To adequately grasp the protective obligations undertaken by the contracting states under the Genocide Convention she advocated a human rights perspective. Distinguishing between state responsibility and individual criminal responsibility she agreed with Paola Gaeta (Florence/Geneva) who suggested that under international law the criminal liability of individuals and state responsibility for genocide are not triggered by the violation of the same primary rule. While the crime of genocide can be committed regardless of the existence of a state genocidal policy, the state's international responsibility necessarily requires such a policy. As a factual matter there is no need to demonstrate that the state as such or one or more officials harbored genocidal intent in the criminal sense.[8] The thesis by Gaeta that the rules on state responsibility and individual criminal responsibility should not be treated uniformly was reconfirmed by Seibert-Fohr who argued that this is not a matter of fragmentation of international law but a sign of sophistication comparable to different areas of domestic law. Andreas Zimmermann (Kiel), third speaker in the row, added in his speech, that a treaty-based generalized responsibility of third states under international law to prevent genocide exists. This statement was criticized by Gaeta as it would necessarily imply the obligation for states themselves to not commit genocide a finding which is not convincing as it misinterprets the convention by inferring a new obligation from it.[9]

The afternoon session was opened by Albrecht Kirschner (Marburg) with a brief retrospective of the town of Marburg during National Socialism. Afterwards Justice Gabriel Bach, former prosecutor of Adolf Eichmann, spoke about his personal experiences from the Eichmann-Trial. Besides giving an interesting account of personal details of the perpetrator during his imprisonment, Bach related his experiences and problems of the trial to current issues of the prosecution of genocide. He focused mainly on the difficulties in collecting evidence and finding witnesses who were willing and able to testify against Eichmann. The technicality and cold-bloodedness with which Eichmann fought his personal war against Jews became apparent by Gabriel Bach's impressive words.

The last session of this day dealt with the question of the future of the Genocide Convention. Here Ulrich Wagner (Marburg) and Harald Welzer (Essen/Germany) gave social-psychological insights to genocide as a social phenomenon. It became clear from their presentations that mechanisms have to be developed to intervene at an early stage in a group conflict. In a situation where violence has already erupted it is far more difficult to

[7] *See* Bosn. & Herz. v. Serb. & Mont., 2007 I.C.J. (Feb. 26).

[8] *See* Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide*, 18 Eur. J. Int'l L. 631-648 (2007).

[9] *See id.*

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persuade the actors to end the conflict. Judge Hans-Peter Kaul from the ICC in The Hague tried to sum up "in a nutshell" the implications of the inclusion of genocide in the Rome Statute mainly by referring to the current Darfur Case. Genocide as a crime potentially punishable under the Rome Statute by the ICC raised the attention of the states to this "mother of crime" particularly via concerns of state responsibility. The Genocide Convention is based on the free consent of the international community and has raised the accountability for genocide over the years. Nevertheless, Kaul argued that the ICC, based on the Rome Statute and created by the same consent of the International Community to prosecute genocide, still suffers from structural weaknesses. Norman Farrell, prosecutor from ICTY and the last speaker of the day, described this state responsibility i.e. the accountability for committing genocide as the best identified effect of deterrence.

D. Saturday, 6 December 2008

The last day of the conference began, after short welcome addresses among others by Thomas Schäfer, State Secretary for the Ministry of Justice in Hesse and Judge Siegfried Broß from the Federal Constitutional Court, with Heinz Düx presenting his speech "The Auschwitz Trial at the Landgericht Frankfurt and its Importance for the Prohibition of Genocide." Once more the audience heard the report of a contemporary witness depict with personal insights and details about the Auschwitz trials and the German Federal Republic's coming to terms with its own Third Reich past from a legal perspective. Afterwards, Judge Bruno Simma (ICJ) picked up in his speech about "Sanctioning Genocide – International Law under the Influence of the Genocide Convention" the controversy of liability of states under international criminal law and argued in favor of a merely legal responsibility of states under international public law.

The Closing address of the day and Conference was delivered by Guenter Nooke from the Federal Foreign Office. In his speech he focused on genocide from a more political point of view in terms of International Relations. In his opinion punishing genocide is more than an effective tool of prevention but a strategy of resolving conflicts all over the world. There can be no sustainable and lasting peace without justice and unpunished genocide has to be considered as a serious threat to peace. But above the purpose of punishment the victims of the crime have to be given the deserved attention and support.

E. Conclusion

The conference showed that the controversies surrounding the Genocide Convention are far from being amicably resolved. Still there are problems and difficulties that are of a more legal-dogmatic nature as well as in the application and prosecution of genocide in individual cases. One might consider it frustrating that, due to these problems, after more than 60 years genocide is not frequently prosecuted under international criminal law. One might consider these problems as flaws and major obstacles to the indictment of perpetrators still existing in appalling and shamefully high numbers all over this world. And

even the allegation against the convention of being more of a political symbol than a legal hard fact still persists and was more than once mentioned during the conference.

Nevertheless one has to consider the fact that genocide and its legal treatment under international criminal law is not only a matter of merely symbolic policies but a fundamental matter of our times. If there has been a "hibernation" of genocide during the Cold War era it has definitely ended at the latest with the adoption of the Rome Statute in 1998. Occasions like the International Conference in Marburg are valuable contributions to the academic discussion. Moreover, there are good reasons to hope that events like this strengthen the awareness and support the political dialogue about genocide.

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