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Summary

Critical Analysis and Proposal for the Revision of Art. II of the Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide became effective more than fifty years ago. Considering the fact that genocide is an "odious scourge" which has inflicted great losses to humanity at all periods of history, as pointed out in the preamble of the convention, this is a relatively short period of time. Especially the 20th century turned out to be a century of genocide. Approximately 60 million men, women and children, belonging to diverse groups, tribes, clans, peoples and nations had to die for arbitrary reasons.

The Genocide Convention is the attempt of the international community to prevent this crime on the one hand and to adequately punish the committed atrocities on the other. Unfortunately, both aims have not yet been achieved. On the contrary, the need for effective mechanisms to prevent and punish genocide is still urgent. It should not be forgotten that after the convention came into force there were numerous attempts to extinguish particular groups. For instance, for four years already we are witnessing the atrocities in Darfur/Sudan, and only about fifteen years ago the former Yugoslavia and Rwanda were sites of mass-extermination. In light of 800.000 dead in Rwanda alone, the international community promised: never again! However, in view of the fact that the UN did not recognize the atrocities in Sudan as genocide so far, this promise is hardly reliable. Other examples for the violent persecution of particular groups are the slaughters in Cambodia, Indonesia or Ethiopia which took place in the late 20th century. In contrast, only relatively few perpetrators were convicted for genocide so far.

The study at hand deals primarily with the question of the punishment of genocide, for which Art. II of the Genocide Convention is the core provision as it contains the internationally acknowledged definition of the crime. It determines, hence, which crimes have to be punished and prevented by the state parties. In the course of this thesis it is proven that Art. II of the Genocide Convention needs to be reformed if it is to be an efficient means for the prosecution of the crime. The problems connected with the definition of genocide are manifold. The prepara-

tory works of the convention show that the elements of the offence were extensively discussed from the very beginning. However, additional questions arose in the course of time. In this study all elements of Art. II of the Genocide Convention are analysed with regard to their appropriateness and the weaknesses are pointed out. Proposals for alternative wordings of the respective element are presented where necessary.

In the past, it has become obvious in various instances that it is very challenging to subsume the persecution of people belonging to a certain group under Art. II of the Genocide Convention. In this context, the criminal proceedings of the UN *ad hoc*-Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) are of special interest as they are the first examples of international criminal proceedings after the convention became effective. There has not been a more convincing state practice before. However, irrespective of the scope of the committed atrocities, the ICTR to date has convicted not more than 25 of the main perpetrators for genocide. The ICTY has rendered only two genocide convictions, against *Krstic* and *Blagojevic*, whereas the latter was reversed by the Appeals Chamber. The fact that it poses considerable difficulties for the judges to convict the perpetrators for genocide tells its own tale. Apart from the decisions of the tribunals such cases which were not prosecuted as genocide are also taken into account. Due to the commitment of the international community to protect populations from genocide, the fact that the extermination of a group is *not* acknowledged as such can also be a proof of the weaknesses of Art. II of the Genocide Convention. Additionally, national genocide legislation and jurisdiction are taken into consideration as an important reference for state practice.

The aspects which are discussed in the study are manifold and only some important questions shall be outlined in the following.

I.

The 1st part of the study presents the background necessary for an in-depth discussion of the crime of genocide. This includes, in particular, the historical context of the drafting of the Genocide Convention: The convention emerged in the wake of the attempted extermination of the European Jews by the national socialists (Nazis) during World War II. The drafting of the treaty was initiated due to the fact that it was not possible to adequately punish the Nazis for their crimes at the Nuremberg Trials. The leaders of the Third Reich were convicted for crimes against peace, war crimes and crimes against humanity. Due to the legal construction of these offences, the perpetrators could not be held re-

sponsible for the atrocities which they had committed against their own nationals before the war. Because this outcome was widely deemed unsatisfactory, the international community became aware of the acute need for action. Though criticised in some aspects, the Nuremberg Trials mark an important point in history since they paved the way for important developments in international criminal law and especially for the Genocide Convention.

Shortly after the judgements of Nuremberg, the crime of genocide appeared on the agenda of the United Nations General Assembly. Resolution 96 (I) defined genocide as the denial of the right of existence of entire human groups and affirmed that genocide is a crime under international law. The preparatory work of the Genocide Convention took approximately two years and proved to be problematic. It reveals that from the very beginning the concept of the crime of genocide was debated in extenso. In fact, many compromises had to be made to gain the support of as many member states as possible. However, the convention was – irrespective of its shortcomings – a success. For the first time in history human groups were directly protected under international law and their persecution was forbidden not only in times of war but also in times of peace. Furthermore, it is worth mentioning that Art. II of the Genocide Convention is regarded as codifying a norm of customary international law and was elevated to the level of *jus cogens*.

Apart from the historical context of the drafting of the convention part one also addresses other activities of the United Nations which were crucial for the development of international criminal law in general and the prosecution of genocide in particular. This includes the establishment of the ICTY and the ICTR. The mere existence of the tribunals was a signal of the international community not to be willing to observe severe violations of international law any longer, even if committed in the course of internal conflicts. The tribunals laid the ground for the International Criminal Court (ICC) which came into being in 2002 and which is a milestone in the development of international criminal law. The ICC is the first permanent international criminal tribunal, even though Art. VI of the Genocide Convention already provided for the establishment of such a court as early as 1951. In this context, it has to be mentioned that in the ICC-Statute as well as in the statutes of the ICTR and the ICTY the crime of genocide is one of the core provisions and that the respective articles reflect the wording of Art. II of the Genocide Convention.

II.

The 2nd part of the thesis deals with the question which groups are and should be protected by the convention. This question has led to extensive debates since the drafting of the convention. According to the wording Art. II of the Genocide Convention covers national, ethnical, racial and religious groups. However, the interpretation of the protected groups proves to be difficult because the term "national, ethnical, racial or religious group" is not clearly defined in the convention or elsewhere. Hence, it is unclear if one must differentiate between the four groups and on the basis of which criteria they are to be characterized. This ambiguity is reflected by the jurisdiction of the UN *ad hoc*-Tribunals. A comparison of the judgments reveals that not only the ICTY and the ICTR assumed different points of view in this regard in their rulings, but that especially in their earlier cases the different rulings rendered by each of the tribunals were also based on differing interpretations. For instance in the first genocide-judgment, the judgment against *Akayesu*, the four groups were defined separately based on objective criteria. This approach proved to be problematic insofar as the chamber in the end had to rely on an analogy to reach the desired conviction. Subjective criteria to define the protected groups were gradually introduced by the UN *ad hoc*-Tribunals. The decisions against *Jelesic* and *Krstic* even relied exclusively on subjective criteria. Another crucial development was the steady turning away from the necessity to distinguish between the four groups by clear-cut definitions. Almost all judgments agree on the fact that it is difficult to clearly define the four groups. The *Krstic*-judgment – obviously following the study "Genocide in International Law" written by *Schabas* – pointed out for the first time that the list was designed rather to describe a single phenomenon than to refer to several distinct prototypes of human groups. The attempt to differentiate between each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the objective and purpose of the convention. The approach of the *Krstic*-judgement is, for different reasons, the most convincing among the interpretations set forth in the judgments.

The necessity to modify the wording of Art. II of the Genocide Convention in regard to the protected groups results on the one hand from the ambiguity of the formulation and on the other from the fact that far more groups than those listed need to be covered. These are especially the often discussed political and social groups which in the course of history repeatedly fell victim to violent persecutions, but also other groups which are stigmatised due to certain characteristics.

The key-question is which groups of people should be protected and how they should be defined to solve the existing problems. The different possibilities for alternative wordings are discussed in detail in the second part. First of all, it is explained that the term "group" should be maintained in a future wording of the provision. Hence, the proposition to include any majority of individuals irrespective of their being a coherent group or not in the scope of Art. II of the Genocide Convention cannot be followed. Apart from that, it is demonstrated that majorities as well as minorities need to be protected as hitherto. A difficult question to answer is, however, whether the existing problems should be solved through the inclusion of additional precisely defined groups in the enumeration or through an abstract definition. This study arrives at the conclusion that the latter is the favourable option. The weaknesses of the current wording can only be met through a phrasing which is at least partially abstract. An enumeration can never be comprehensive enough to capture all conceivable groups of victims, because the criteria according to which the perpetrators select their victims cannot be predicted. For the same reason, the proposed abstract definition should be opened to include the "power of definition" of the perpetrator, meaning it should suffice if the respective group is perceived by the perpetrator as distinct. Another proposal is to open the definition of the group to a negative approach identifying individuals on account of their not being part of a certain group. This proposal is, however, not convincing.

Irrespective of the criticism of Art. II of the Genocide Convention, the "national, ethnical, racial or religious groups" should not be replaced but amended by the proposed abstract formulation. Due to the symbolic value of Art. II of the Genocide Convention, the chances of the realisation of a reform would thereby significantly be improved. It is true that the imperfect wording of the provision would not be fully corrected with this compromise. Nevertheless this can be accepted, because the more extensive scope of application of Art. II of the Genocide Convention would not be at risk.

III.

In the 3rd part, the *actus reus* of the crime, which is described in Art. II lit. a) - e) of the Convention, is discussed.

In the context of the alternative "causing serious bodily or mental harm", which is stipulated in lit. b), sexual violence as a means to cause such harm deserves particular attention. In this regard the *Akayesu*-judgment was ground-breaking, as it was the first judgment to acknowledge that genocide can be committed through rape and other

forms of sexual violence. This development is very positive, because even though sexual violence has been widespread in internal as well as external conflicts throughout history, it was not seen as a criminal act but as an (inevitable) by-product of war prior to this judgement. The importance to include sexual violence in the scope of the genocide convention is emphasized by the fact that it was a concerted means to terrorize and destroy the population in Rwanda as well as Yugoslavia and Sudan.

Through lit. c) – "deliberately inflicting conditions of life calculated to destroy the group" – so-called "slow-death measures" which do not kill the members of the group immediately, but can lead to their death in the long-run, are punishable as genocide. In the realm of lit. c) an emphasis is put inter alia on the question if systematic expulsions from home are per se captured by Art. II of the Genocide Convention as suggested by some parts of the jurisdiction as well as different legal scholars. However, the thesis comes to the conclusion that the mere expulsion of a group cannot suffice for a genocide conviction because expulsions sometimes only cause the destruction of the group's social existence. To fulfil Art. II lit. c) of the Genocide Convention an expulsion needs to be accompanied by aggravating circumstances which threaten the physical existence of the group as it was the case with the Armenians or the Herero.

Within the discussion of lit. d) – "Imposing measures to prevent births within the group" – rapes and forced pregnancies again play an important role. The classic means to prevent births, which were also applied by the Nazis, are for example forced sterilizations and castrations as well as compulsory abortions. Yet, the jurisprudence needs to be followed in its ruling that forced pregnancies and rapes can also constitute a means to prevent births. This is relevant especially for patriarchal societies in which the child's membership in a group is determined by the identity of the father.

With regard to a possible reform of the *actus reus* it is, amongst others, discussed whether cultural genocide and ethnic cleansing should be included. The inclusion of cultural genocide was already argued about and finally rejected during the preparatory works of the convention. This study subscribes to this outcome. Even though argued otherwise by some scholars the destruction of the cultural characteristics of a certain group which does not affect its physical integrity can, due to the severity of the crime, not justify a genocide conviction. As to ethnic cleansing, the debate whether it is a means to commit genocide intensified with the Balkan War in the 1990s and the term was repeatedly

equated with genocide. The analysis reveals that this opinion cannot be agreed upon. It may be true that ethnic cleansing can lead to genocide if committed by extreme methods, but the ethnic compulsion of a territory can also be changed through less severe means. Another suggestion in the context of lit. a) - e) is to replace the present catalogue which is conclusive by an exemplary formulation which would allow for more flexibility.

In conclusion, the reform of the *actus reus* as stipulated in Art. II lit. a) - e) of the Genocide Convention is confined to a modification of the wording. It should be clarified in the text that it suffices if the criminal act is directed against one person, i.e. that genocide does not require several people to be attacked.

IV.

The 4th part of the present thesis concentrates on the *mens rea* of genocide. The most critical determination to be made in this context is which degree of "intent" is required for the *mens rea* as defined in the chapeau of the provision. Up to this point in time the prevalent interpretation in the rulings of the UN *ad hoc*-Tribunals as well as the legal literature has been that it is not enough if the perpetrator meant to cause the destruction of a group or is aware that it will occur in the ordinary course of events. It is argued that a specific intent to destroy the group is required as a constitutive element of the crime. This goes beyond the mere committing of the criminal act and requires that the perpetrator clearly intended to produce the consequence of the criminal act charged, i.e. to destroy the group.

Contrary to the prevailing opinion, the individual goals of a perpetrator should not be decisive for a genocide conviction as long as the perpetrator was aware of and accepted the destruction of a group as a consequence of his acts. The same applies if the perpetrator acts in furtherance of a campaign knowing that the likely consequence of the campaign would be the destruction of a group in whole or in part. As regards the degree of the genocidal intent it has to be kept in mind that generally large parts of society are involved in a genocide, whereas the goals are set by the decision makers. Apart from that, as *Hannah Arendt* rightly stated, the evil is mostly done by people who are not driven by hatred but act in the performance of their duties. The resulting proposal for the revision of the genocidal intent is to include a legal definition in the provision, which stipulates that all degrees of direct intent are sufficient for the perpetration of genocide – for the decision

makers as well as the executants. Some kind of preconceived plan should, however, not become an obligatory criterion.

With regard to the element "as such" the prevailing interpretation is that the act must be committed against an individual on account of his or her membership in a specific group. Thereby, the term clarifies that the group as a separate and distinct entity is the ultimate victim of genocide although its destruction necessarily requires the commission of crimes against its members. The ambiguous wording is the result of the debates during the preparation of the convention whether or not to require a motif of the persecutors. The integration of the notion "as such" put an end to this dispute. Due to the fact that in the prevailing interpretation the words "as such" constitute an important element of genocide they should not be surrendered in a revised formulation, rather the content of the term should be clarified.

Referring to the wording "in whole or in part" it can be stated that the group needs to be destroyed in its physical existence. The integration of the destruction of the group as a social unit in Art. II of the Genocide Convention as argued by some legal experts and court decisions is not convincing. Acts seeking the destruction of the special characteristics of a group as a social unit can not be judged in the same way as acts seeking the physical destruction of the group, principally because they are not as irrevocable.

V.

In summary, the present critical analysis concludes that Art. II of the Genocide Convention needs to be reformed in different aspects. It is obvious that, in addition to hindrances connected with real politics, the provision has weaknesses which make criminal prosecutions difficult. The concluding proposal for the reform of Art. II of the Genocide Convention is as follows:

> "(1) In the present Convention, genocide means any of the following acts committed with the intent to destroy as a collectivity, in whole or in part, physically or biologically, a national, ethnical, racial or religious group, or a group defined by any arbitrary criteria:
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> (a) Killing one or more members of the group;
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> (b) Causing serious bodily or mental harm to one or more members of the group;
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> (c) Deliberately inflicting conditions of life on one or more members of the group calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures on one or more members of the group intended to prevent births within the group;

(e) Forcibly transferring one or more children of the group to another group.

(2) Intent for the purpose of this provision is given:

(a) If the perpetrator commits a crime according to paragraph 1 with the goal to destroy the group in whole or in part or if he knows that the certain result to follow from his conduct will be the destruction of the group in whole or in part;

(b) If the perpetrator commits a crime according to paragraph 1 in furtherance of a collective crime knowing that the goal or certain result to follow from the collective crime will be the destruction of the group in whole or in part."

In closing I want to express my hope that the international community will one day meet the challenge to undertake the reform of Art. II of the Genocide Convention. At the same time I am very well aware of the fact that such a reform is not likely to happen in the near future. Nevertheless, it is obvious that during the past ten years the discussion about the definition of genocide as stipulated in the convention has intensified in connection with the proceedings of the ICTR and the ICTY. In addition to the debates among legal scholars, attempts towards a modified genocide provision were made during the preparatory works of the ICC-Statute. These proposals did unfortunately not succeed due to the fear that the reopening of the historic debate could put the acceptance of the ICC-Statute at risk. Other attempts to reform the convention were made by the UN Special Rapporteurs *Ruhashyankiko* and *Whitaker* as early as 1978 and 1983. However, their recommendations have so far not been implemented. It has to be kept in mind that, yes, changes in the realm of international law take their time but still they do happen. With my thesis I intend to render a contribution to a discussion which I consider extremely important – the discussion about the concept of genocide. The jurisdiction of the UN *ad hoc*-Tribunals is a very good basis for this undertaking. The task is to learn from the experience and to develop a post-Rwandan and a post-Bosnian legal practice which builds on the experience of these criminal proceedings.