The term “genocide” is inseparably connected with German history. When Raphael Lemkin² coined this concept he had in mind the most heinous atrocities committed by Nazi Germany against the Jews, Poles, Gypsies and other groups during the National Socialist dictatorship and World War II which he intended to cover with one single word. But although the representatives of the National Socialist regime were held responsible for their deeds, none of them was punished for “genocide”, neither by the International Military Tribunal in Nuremberg in 1946 nor later on by German courts. There are two reasons for this – at first glance – astonishing fact:

When the high rank perpetrators were charged, tried and sentenced – some of them to death – by the International Military Tribunal in Nuremberg in 1946,³ the term “genocide” had already been used during the trials, but it had not been written down in the Statute of the IMT itself. Thus no judgement made explicit reference to the notion of genocide;⁴ the legal basis for those convictions was the offence of crimes against humanity.⁵

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² Lemkin, Axis Rule in Occupied Europe (1944), pp. 79 et seq.; see also in detail to the origin of the concept Gil Gil, El Genocidio y Otros Crímenes Internacionales (1999), pp. 125 et seq.; Werle, Völkerstrafrecht (2003), para. 536.
³ As to the trials in Nuremberg see Ahlbrecht, Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert (1999), pp. 59 et seq.; Werle, supra note 2, para. 14 et seq.
⁵ Art. 6 lit. c) IMT Statute; congruent Art. 5 lit. c) IMTFE Statute.
Shortly thereafter, in December 1946 the General Assembly of the United Nations explicitly addressed “genocide”; two years later in 1948 the Genocide Convention was adopted. From that time at least the concept of “genocide” can be considered as well established in international criminal law.

In 1954 the Federal Republic of Germany ratified the Genocide Convention and transformed the international regulation – in accordance with their legal obligation to punish perpetrators of genocide – into a new offence of genocide in s. 220a of the German Criminal Code (Strafgesetzbuch; StGB). But even then German courts dealing with National Socialist criminality faced constitutional obstacles. According to Article 103 paragraph 2 of the Basic Law for the Federal Republic of Germany (Grundgesetz) criminal law may not be applied retroactively. The German courts could therefore operate only with rules which had been in force at the time when the atrocities were committed; so it was only possible to punish the accused for murder or other ordinary crimes, not for the ex post enacted offence of genocide.

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6 UN Doc. A/Res. 96 (I) of 11 December 1946; see also UN Doc. A/Res. 95 (I) of the same day which confirmed the principles of Nuremberg.
11 The Federal Court of Justice (Bundesgerichtshof) notes crimes against life (s. 212 et seq, Reichstraftafzestzbuch [RStGB]) crimes against bodily integrity (s. 223 et seq, RStGB) and deprivation of liberty (s. 239 RStGB); see Amtliche Entschiedungssammlung des Bundesgerichtshofs in Strafsachen (BGHSt) 45, pp. 64–91, at p. 83.
12 Jähnke in Jähnke/Laufhütte/Odersky (eds.), Leipziger Kommentar zum Strafgesetzbuch, 11th ed., s. 220a (1993) para. 7; Kreß, supra note 2, s. 220a StGB/s. 6 VStGB para. 20; Werl, supra note 2, para. 610.