TIPPING THE SCALE FROM MASS MURDER TO GENOCIDE: WHAT DOES IT TAKE?

“Genocide is the responsibility of the entire world.”

“For the dead and the living, we must bear witness.”
— Elie Wiesel

KATIE SELLERS

I. INTRODUCTION

Genocide has long been described as the “deliberate and systematic extermination of an ethnic, racial, religious, or national group.” In the wake of the Holocaust, the Convention on the Prevention and Punishment of the Crime of Genocide (“Convention”) was established to hold States accountable for the well being of their citizens. Since its entrance into international law, the world has witnessed this atrocity on several accounts, specifically, the mass killings in Cambodia. From 1975 to 1979, nearly two million Cambodians were exterminated under the Khmer Rouge in an “extreme plan to turn Cambodia into an agricultural utopia.” This bookmark in history sheds light on the limitations of the definition of genocide, as this campaign was politically motivated rather than ethnically, religiously, nationally, or racially. Politically motivated mass killings have since been referred to as “auto-genocide,” which is currently not punishable under the Convention.

This Article will first discuss the history of genocide by addressing the Nuremberg Trials, Raphael Lemkin’s role in its

3 Id. at 2.
5 See Id. (describing specific examples of genocide in history for purposes of describing a common theme).
6 Peter J. Stoett, This Age of Genocide: Conceptual and Institutional Implications, 50 Int’l Journal, 594, 601-02 (1995) (highlighting that there are limitations to the definition of genocide which are demonstrated when campaigns are not ethnically or racially motivated).
7 Id. at 602. (Pol Pot, the leader of the Khmer Rouge, could not be charged with genocide because his motives were not ethnically or racially motivated. Instead, his campaign was referred to as auto-genocide) (emphasis added).
definition, the establishment of the Convention, and its application into international law. Next, this Article will describe the events that took place in Cambodia and the establishment of the Extraordinary Chambers in the Courts of Cambodia. This Article will then discuss “auto-genocide” and argue why expanding on the definition of genocide would prevent mass killings, such as the one in Cambodia, from going unaccounted for in the future. Finally, this Article will conclude with a summary of the Argument and support the position that the definition of genocide should be expanded to include politically motivated mass killings.

II. BACKGROUND

A. THE NUREMBERG TRIAL

Today, “[t]he Holocaust is still considered the ultimate example of genocide because of the massive numbers involved and the administrative efficiency of such systematic murder.” The Holocaust began in 1933 when Adolf Hitler ordered the implementation of the “Final Solution” which called for the extermination of Jews throughout Europe. Upon the conclusion of World War II in 1945, more than six million Jews had been murdered based on the German's racial belief that Jews, “deemed inferior,” were an alien threat to the so-called German racial community. Once the Allies uncovered the enormity of the atrocities that had occurred in Nazi Germany, it was determined that the high level German leaders needed to be held responsible for the crimes they had committed. Accordingly, on August 8, 1945, the International Military Tribunal for the Trial of German Major War Criminals (“IMT”) was officially established pursuant to The London Agreement.

The IMT indicted twenty-four Nazi leaders on charges of war-crimes. The Nazi leaders were charged with “conspiracy to commit war crimes . . . planning, preparing, initiating or waging aggressive war . . . violation of the laws and customs of war . . . and . . . crimes against humanity.” On October 1, 1946, twelve of the leaders were

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8 See infra notes 12-45 and accompanying text.
9 See infra notes 46-71 and accompanying text.
10 See infra notes 72-101 and accompanying text.
11 See infra notes 11-101 and accompanying text.
12 Stoett, supra note 6, at 595.
15 Id.
16 Id.
18 Quincy Wright, The Law of the Nuremberg Trial, 41 Am. J. Int'l L. 38, 41 (1947) (The Americans prosecuted every defendant on the charge of
convicted and sentenced to death; seven were sentenced to imprisonment for various terms; three were acquitted; one committed suicide prior to trial; and one was convicted and sentenced to death in absentia. As such, the result of the Nuremberg Trials set international precedent for years to come. Warren R. Austin, Chief Delegate of the United States, addressed the General Assembly of the United Nations on October 30, 1946, stating:

Besides being bound by the law of the United Nations Charter, twenty-three nations, members of this Assembly, including the United States, Soviet Russia, the United Kingdom and France, are also bound by the law of the Charter of the Nuremberg Tribunal. That makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished.

While the indictment did not specifically mention genocide, it was the first to encompass the idea as the major war criminals were accused of “conducting deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations . . . in order to destroy particular races and classes of people and national, racial or religious groups.” Thus, following the conclusion of the Nuremberg Trials, the United Nations (“UN”) began the daunting task of enforcing genocide as a punishable crime under international law.

B. Raphael Lemkin’s Role in the Establishment of “Genocide”

While the IMT Charter essentially covered genocide, that element of the crimes committed by the major war criminals was ultimately classified as “crimes against humanity.” It was Raphael Lemkin (“Lemkin”) who first devised the word “genocide” in his book *Axis Rule in Occupied Europe*. Lemkin “introduced a new term ‘to denote an old practice in its modern development,’ derived from the

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19 Schaack, supra note 15, (describing the charges and sentences of the twenty-four Nazi leaders brought before the IMT). (see also Wright, supra note 18, at 38)
20 Wright, supra note 18, at 38.
21 Id.
22 Schaack, supra note 15, at 449. (referencing Indictment of Herman Göring et al., 1 Trial of the Major War Criminal before the International Military Tribunal 43-44 (1947). (internal citations omitted)
23 Id.
25 Id.
Greek word for race or people, *genos*, and the Latin *caedere*, or *cide*, which means to kill.”

Lemkin, who fled to Sweden after Germany, invaded Poland, believed that genocide was more than “the individual acts, though they may be crimes themselves . . . [he believed] that the broader aim [of genocide was] to destroy entire human collectivities.” It was not until the UN drafted a resolution following the Nuremberg Trials in 1946 that genocide would be punishable under international law. The General Assembly affirmed that the “civilized world” condemns genocide whether it is religious, political, racial, or otherwise motivated. Lemkin’s push to punish those guilty of genocide led to the establishment of a Genocide Convention where the definition would undergo a series of amendments before becoming enforced as international law.

C. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

On December 9, 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide through Resolution 260 (III) A. The objective of the Convention was to affirm that genocide, under international law, is a crime in times of peace or in times of war. The latter was included to distinguish it from crimes against humanity. The Convention went into effect on January 12, 1951 after it obtained the required twenty ratifications as defined under Article XIII.

It took three steps to create the Convention. Initially, the UN Secretariat drafted a collection of “concepts meant to assist the General Assembly.” Second, an ad hoc committee was established as part of the Economic and Social Council to take the Secretariat’s draft and transform it into a document to be used by the Convention. Finally, the Sixth Committee of the General Assembly

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26 Stoett, supra note 6, at 599.
27 Schaack, supra note 15, at 449.
28 Id. at 450.
29 Id.
30 Id. at 450. (The General Assembly affirmed that “genocide” is a crime under international law. The civilized world condemns genocide whether the crime is committed on religious, racial, political or any other ground.”): see also G.A. Res. 96 (IX), at 188-89, U.N. Doc. A/64/Add. 1 (Dec. 11, 1946).
33 Schabas, supra note 24 at 2.
34 Id. at 1.
35 Id.
36 Id.
37 Id.; see also Schaack, supra note 15, at 450.
used the draft to finalize the text of the Convention. The draft described genocide as the “destruction of racial, national, linguistic, religious, or political groups of human beings.” However, it was during the third phase that the definition of genocide underwent several changes and redactions. The final text under Article II of the Convention adopted the definition of genocide:

Any of the acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

Article III then made the following acts punishable:

a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Attempt to commit genocide;
e) Complicity in genocide.

The Convention put the power of policing in the hands of individual States to prevent and punish those who have committed genocide by “trying suspects ‘in the territory of which the act was committed,’ or turning to the international community.” The International Criminal Court (“ICC”) has included the language of the Convention in its statutes, which applies to its ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). However, the redaction of protected groups in the final text, most

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38 Schabas, supra note 24, at 1.
40 Schabas, supra note 24 at 1-2.
44 Schaack, supra note 15, at 450.
notably political groups, has proved to be a critical change, limiting the liability of war criminals that have violated the Convention.45

III. CAMBODIA 1975-1979: THE NEED FOR CHANGE

A. CONFLICT IN CAMBODIA: A BRIEF HISTORY

While communist roots began taking hold in the early 1900s, it wasn’t until the 1970s that things really began to change in Cambodia.46 On April 17, 1975 the Communist Party of Kampuchea (“CPK”) took control of Cambodia in what would lead to a spree of radical changes throughout the country over the next four years.47 The CPK, also known as the Khmer Rouge, established “policies that disregarded human life and produced repression and massacres on a massive scale.”48

Cambodia gained its independence from France in 1954 under the leadership of the King Norodom Sihanouk for the next sixteen years.49 In 1970, General Lon Nol created an army to seize power in order to combat communism in the country.50 Lon Nol had full support from the United States “in order to obtain a geopolitical ally who both adamantly opposed communism and would lend support in the Vietnamese conflict.”51 However, Lon Nol’s reign was cut short when in April 1975 the Khmer Rouge, under the leadership of Pol Pot, seized control of the Cambodian government.52

The Khmer Rouge turned Cambodia into the state of Democratic Kampuchea and remained in power until 1979.53 It was during this four-year period that the country was turned into an enormous “detention center”54 in an effort to create a “New Cambodia.”55 The Khmer Rouge sought to “dismantle[] Cambodian society and install[] a brutally repressive state.”56 To do so, the Khmer Rouge established three categories in which they would purify the new state: “waves of massacres: individual executions following imprisonment and interrogations; and arbitrary and summary

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45 Stoett, supra note 6, at 601-02.
47 Id.
48 Id.
50 Id.
51 Id.
52 Schaack, supra note 15, at 162.
54 Id.
55 Schaack, supra note 15, at 163.
56 Schaack, supra note 15, at 163.
executions.” Summarily, the Khmer Rouge believed that doing so would purge Cambodia of those who were deemed “tainted and corrupted.”

These measures were put into effect to rid Cambodia, first, of those who were loyal to the Lon Nol army. The officers of the defeated army were identified, isolated, and executed, followed by high-ranking civil servants, and some of the individuals’ entire families. However, as the Khmer Rouge identified a growth in class struggles, it was their objective to rid the society of the elite and educated. After a series of city evacuations, destruction of public centers, and abolition of the economy, the Khmer Rouge determined it needed to purge the state of those who were “real or political opponents.” The most notable purge occurred in the Eastern Zone where the majority of those massacred were victims simply based on their residence as the regime deemed this territory to be a disloyal political jurisdiction. Ultimately, transformation, as a result of the “systematic and deliberate torture and murder of Cambodian citizens,” led to the death of nearly two million Cambodians, amounting to nearly thirty percent of the population.

The reign of the Khmer Rouge finally came to an end in 1979 after liberation by the Vietnamese. Once the Vietnamese established a new Cambodian government, the country turned to hold former leaders of the Khmer Rouge accountable for their actions. Pol Pot, the leader of the Khmer Rouge and his accomplice Leng Sary were tried in what has been regarded as a poor attempt at bringing the two to justice. “The two leaders were tried in abstentia without a defense presented, found guilty of the commission of genocide, and sentenced to death by a domestic tribunal.” Because of the improperness of the proceedings, the U.N. called for the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea to ensure a fair and impartial trial. Ultimately, however, charges of genocide could not be brought against Pol Pot because his intentions were not ethnic, religious, racial, or nationally motivated. As a result, most of the killings

58 Id.
59 Schaack, supra note 15, at 163.
60 Hannum, supra note 57 at 89-90.
61 Schaack, supra note 15, at 163: see also Hannum, supra note 57, at 90.
63 Hannum, supra note 57, at 90.
64 Luftglass, supra note 49, at 900.
66 Luftglass, supra note 49, at 902.
67 Id.
68 Id.
70 Stoett, supra note 6, at 602.
qualify as auto-genocide because the “executions were based on political or educational affiliation[s].”

B. REDEFINING GENOCIDE

During the negotiations between the UN and Cambodia to establish the ECCC, Cambodia strongly pursued a new definition of genocide to be presented at the trials of the Khmer leaders. This definition added political and economic groups to the list of protected groups. However, if the definition was constructed to specifically fit the crimes of the Khmer Rouge this would involve retroactivity, which directly violates international agreements. The jurisdiction of the ECCC existed between the years of 1975 to 1979 and governed accordingly by the Genocide Convention of 1948. Although genocide could not be founded for much of the killings, the Assistant Secretary of the UN pointed out that the crimes would fall under crimes against humanity.

In the international community there is a strong argument, that like what was resolved in the Cambodian conflict, auto-genocide is “more akin to a crime against humanity” and should keep “genocide limited to the most extreme atrocities and retain it as a distinct crime.” Further, during preparations of the Genocide Convention, it was perceived that only “stable” groups should be considered to fall under the definition of genocide, thus, excluding political groups. For these reasons, among others, the definition of genocide has withstood calls for expansion and has remained true to the intent of the Convention.

In spite of the longstanding definition of genocide, scholars still strive to advance a new definition to encompass Lemkin’s original intent. One such scholar, Barbara Harff of the U.S. Naval Academy, has advanced the term “politicide” to address instances where there politically defined victims concluding that “mass killings of political groups show similarities in their causes, organization and

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73 Luftglass, supra note 49, at 911.
74 Etcheson, supra note 72, at 511-2.
75 Luftglass, supra note 49, at 925 (noting that since the Genocide convention does not protect political groups, the term “crimes against humanity” is used to focus on the intent of the perpetrator rather than the victims).
76 Kelly, supra note 43, at 149.
77 Id. at 158.
78 Schabas, supra note 24, at 3.
79 See generally Eng, supra note 3.
m motives." Harff has expanded on the Convention's definition of genocide to include cases that arise out of civil wars when a "territorially based nationalist or revolutionary movement" pursues to destroy, in whole or in part, an ethnic or political group. For this reason, Harff has advanced the definition of genocide and politicide as: "[t]he promotion, execution, and/or implied consent of sustained policies by governing elites or their agents – or, in the case of civil war, either of the contending authorities – that are intended to destroy, in whole or part, a communal, political, or politicized ethnic group."

Another concern regarding the status quo of the definition of genocide is its close ties with the Holocaust. Because the idea of genocide came about in the aftermath of the Holocaust, it carries with it the "symbol of the world waking to indiscriminate mass murder against a group." There is fear that by separating the connection between genocide and the Holocaust, the significance of genocide, and politicide alike, may be impaired. While the Holocaust may be viewed as the "ultimate model of genocide," it must be acknowledged that genocide against political groups was occurring long before the Holocaust. There were approximately two million victims killed in Pakistan in 1971; over 500,000 in Sudan between 1956 and 1972; at least half a million in South Vietnam from 1965-1975; and nearly 20,000 in Rwanda from 1963-1964.

Yet, the exclusion of political groups from the list of protected groups was itself political in nature. At the Convention the parties compromised on the inclusion of political groups to ease concerns of the Great Britain delegates and former Soviet Union Republics who feared that its inclusion would weaken the entirety of the Convention. Ultimately, they were concerned that doing so would "expose nations to external intervention in their domestic concerns." Scholar P.N. Drost viewed the exclusion of political and social groups as a means for governments to "exploit this obvious loophole" in the future. Drost believed that victims of genocide should not be limited

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83 Id.
84 Eng, supra note 4, at 4.
85 Id.
86 Id.
88 Harff, supra note 82, at 60 (referencing Table 1. Genocide and Politicide 1955-2001).
89 Simeon Sungi, Redefining Genocide: The International Criminal Court's Failure to Indict on the Darfur Situation, 1 J. THEORETICAL & PHIL. CRIMINOLOGY 63, 64 (2011).
90 Id.
91 Id.
92 Id. at 67.
to the four protected groups, he proposed that the definition of genocide should read as "the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such." 93

The devastating events took place in Cambodia are no less tragic than the Armenian death marches from 1915 to 1918 which resulted in over one million deaths by the Turkish government, the six million Jews exterminated during the Holocaust, the events in Rwanda, or the seven million Ukrainians from 1932 to 1933 under Stalin’s orders. 94 Regardless of the group to which the victims belonged or the time and place which the atrocities occurred, these events were rooted in “the indiscriminate and systematic destruction of the members of a group, simply because they belonged to that group." 95 Simply put, as scholar Helen Fein believes, genocide it none other than “organized state murder.” 96

Accordingly, the UN missed an opportunity to expand on the definition of genocide during negotiations with the Cambodians to establish the ECCC. 97 The UN reasoned that the need for redefining genocide in this matter was unnecessary because those executions that were political in nature would be captured under the charges of crimes against humanity. 98 However, the purpose of establishing the Genocide Convention was to establish that genocide could occur in both times of peace and war, unlike crimes against humanity, which are unlikely to occur outside of an armed conflict. 99 As such, to successfully advance charges against the Khmer Rouge for crimes against humanity, the prosecution would have to overcome the heavy burden of proving that 1975-1979 was a time of war or was an armed conflict. 100 Ultimately, this is a risk regarding whether or not the crimes of the Khmer Rouge would be brought to justice. 101

IV. CONCLUSION

Since the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and other serious offenses, precedent will be greatly impacted by the proceedings before the ECCC. The issue of retroactivity, which is prohibited in international law, prevented the Cambodians from seeking justice for the massacres of political affiliates at the hands of the Khmer Rouge. However, the UN had the opportunity to use the events that took place in Cambodia to expand on the definition of genocide to include political groups to the list of protected groups, but failed to do so. Doing so would have set precedent for years to come so that the travesty that occurred in

94 Eng, supra note 4, at 5.
95 Id.
96 Stoett, supra note 6, at 603.
97 Schaack, supra note 15, at 164.
98 Luftglass, supra note 49, at 925.
99 Schabas, supra note 24, at 2.
100 Luftglass, supra note 49, at 922.
101 Id. at 923.
Cambodia may be deterred in the future. In the unfortunate event that political genocide would occur in the future, as it likely will, the international community could have benefitted from the expansion to hold war criminals accountable for their actions. The basic premise of genocide is a “denial of the right of existence of entire human groups.”\textsuperscript{102} The Khmer Rouge denied the “right of existence” to at least two million citizens through a series of massacres, which will largely escape a genocide conviction.\textsuperscript{103} It is time for the international community to evolve with the events and atrocities occurring around the world and protect the lives of innocent victims.

\textsuperscript{102} Schaack, \textit{supra note 15}, at 450.
\textsuperscript{103} \textit{Id.}