“Crimes that go Unpunished: Expanding the Definition of Genocide”

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INTRODUCTION

The divide that separates international law from the academic community on the topic of genocide seems to be widening. As the gap continues to grow, more and more genocide atrocities will slip through. In order for the world to respect the human right to life, liberty and security of person, regardless of distinctions such as race, color, sex, language, religion, political opinion, national origin, property, birth or other status, the definition of genocide must be expanded.

Establishing and adhering to a universally accepted, expanded definition of genocide is a formidable task, but attempting to do so is imperative for future justice in our global society. The urgency of this task is founded on the inexcusable and unnecessary loss of life that results from our serious neglect. Serious neglect in instances of genocide is a result of inaction at the forefront of conflict. Inaction at the forefront of conflict is the result of a current definition rife with inadequacies and the subject of so much debate.

If the international community truly believes that the right to life is a right afforded to every human being, it can no longer ignore governments, regimes, and individuals that seek to violate that right for the purpose of their own agendas. Genocide will continue in our world as long as we allow the perpetrators of these crimes to sidestep the consequences of their actions. In order to reverse the familiar pattern of serious neglect, inaction, and most importantly, loss of life, revision of the current definition is an absolute necessity. These crimes must not continue to go unpunished.

The purpose of this paper is to make clear the inadequacies of the current definition of genocide in order to prosecute and hold accountable those that have committed such atrocities. It is also important to realize that any hope of prevention must come from a

definition that not only *can* be prosecuted on under international law, but that *will* be prosecuted under international law. This paper will also attempt to alleviate confusion that resulted from contradictions in the few, but representative, materials reviewed. Ultimately, it will be a first effort at contributing to a field all too relevant to the world today.

The layout of this paper will begin with an examination of the current definition of genocide as defined by international law and the academic community. Based on a review of recent scholarship, I will explain why the current definition of genocide is inadequate and in need of revision. Cases that demonstrate the inadequacies found in the definition will then be presented as evidence. In conclusion, suggestions for expansion of the definition and relevance of the task will be discussed. As the details of the definition genocide are fleshed out, a specific intent of this paper will be to clarify why genocide cannot continue to be an area of serious neglect.

THE CURRENT DEFINITION

Graham Fuller said, "The scourge of terrorism cannot be dealt with either justly or effectively until we know and agree on what we are talking about."[1] What is true of terror is also true of genocide, and this quote is an accurate evaluation of the situation at hand. If the international community hopes to prevent future acts of genocide, it must know and agree on a definition that can be used to prosecute such disturbing crimes.

The Definition According to International Law

The definition of genocide according to international law is most easily recognized as Article II of the resolution adopted by the U.N. General Assembly on December 8, 1948 as part of the Convention on the Prevention and Punishment of the Crime of Genocide.

[1] Graham Fuller, *The Future of Political Islam*, (New York, N.Y.: Palgrave Macmillan, 2004), 89

Article II states, "In the present Convention, genocide means any of the following 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 II outlines the two central elements of the definition, the *mental* element of the definition as described by the phrase, "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such," and the *physical* element which includes the five acts outlined by sections a, b, c, d, and e.

Articles I and III also enumerate aspects pertinent to the application of this definition. Article I commits the contracting parties to "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Article III states, "The following acts shall be 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."

This definition is the product of a negotiating process, and as a result of political comprises made in light of concerns for ratification, it is a departure from earlier work by Raphael Lemkin, the Nuremburg principles, and Resolution 96(1).[2] These previous works included a broader definition of the groups protected from acts of genocide. For example, Lemkin's definition stated, "the objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the

[2] Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, (New York: Oxford University Press, 2001), 28

economic existence of national groups." However, it is not a completely negative departure due to the absence of the connection with war crimes or crimes against peace required at Nuremburg, and the clear language of Article II that denotes complete annihilation of a group is not required.

Complexities of the Convention's definition can be identified almost immediately in the language of Article II. There is a distinct absence of clarification for phrases such as "serious bodily or mental harm" in Article II, (b), "conditions of life" found in Article II, (c), or "measures to prevent births in Article II, (d). This absence leaves the legal definition open to differing, often contradictory, opinions of the intended meaning. In the criminal prosecution of genocide, a more sound definition will ensure that tribunals or other independent trials have little opportunity to redefine these phrases or lessen punishments due to possible political gains or losses.

Labeling an act as "genocide" has become such a sensitive issue in world politics that it determines whether or not the international community gets involved in instances of mass murder. This allows for serious debate over another complexity that must be noted here. The phrase in Article II, "in whole or in part," does not specify what number or percentage of people killed is cause for outside intervention. While determining an exact number or percentage would be inappropriate, further elaboration of the phrase would allow for action at the forefront of violent conflict, rather than after more lives have been unnecessarily taken.

The Definition According to the Academic Community

After the preceding discussion of the current definition according to international law, it is now appropriate to examine the definition of genocide formed by the academic community. The legal definition begins to look more concrete when compared with the

arguable aspects and incongruities found among scholarly work in the field. Observations in this section will be based on essays by a number of scholars, including those that study approaches to the concept of genocide, specific cases of genocide such as the Holocaust, and the psychological reasoning behind acts of genocide.

Scholars maintain two opposing theoretical approaches to genocide. The first approach suggests that genocide, similar to other human atrocities, is not an invention of the twentieth century, but that "mass killings are as old as time."[3] The second approach focuses on the modernity of the crime, insisting that there is something very new about the acts of genocide committed in the twentieth century. Regardless of which theoretical approach one subscribes to, varied interpretations and opposing constructs of genocide do not likely lead to easier prosecution.

Besides taking a theoretical approach to genocide, scholars delve into the psychological posture behind acts of genocide, more specifically, the correlations between human beings and the details of genocide atrocities. For example, Ervin Straub holds that the basic sources of genocide can be found in cultural characteristics, difficult life conditions, and the needs and motives that arise from them. He believes that discontinuity between past and present government systems as well as the role of the state in relation to social structure can be influences on a resulting case of genocide. Straub also emphasizes the existence of a continuum of destruction, which perpetrators progress along as they commit multiple crimes ending in genocide. He stresses, "Initial acts that cause limited harm result in psychological changes that make further destructive actions possible."[4] Psychological constructs that attempt

[3] Robert Gellately & Ben Kiernan, *The Specter of Genocide*, (Cambridge: Cambridge University Press, 2003), 9
[4] Ervin Straub, *The Roots of Evil*, (Cambridge: Cambridge University Press, 1989), 17

to demystify the evolutionary process, motivations and origins of acts of genocide are important to research, but their usefulness must be translated into actions leading to future prevention.

A final point to note in the ongoing struggle of the academic community to find an acceptable definition is the application of the Convention's definition to case studies of past instances. The question that seems to most impede progress toward universal agreement of application is the establishment of whether or not a case of genocide is "unique." Scholars studying in this vein even find a similar definition for the word "unique" to be a problem. The validity of assigning value to one case of genocide over another brings several arguments to mind. While understanding the distinctive qualities about a case is worthy of scholarly pursuit, how does the declaration of one act of genocide as "unique" contribute to useful analysis? Vahakn N. Dadrian believes that notions of singularity and exclusivity impede rather facilitate analysis, which is a prerequisite for prevention.[5]

THE CURRENT DEFINITION DEBATED

Inadequacies Revealed

As this paper has more than hinted at, the current definition leaves the international community in a bind when it comes to intervention and action in cases of genocide. Its inadequacies disadvantage prosecutors that seek to hold perpetrators accountable. After review of legal documents and multiple scholars, the generally accepted definition of the 1948 Convention exposes two central inadequacies, which include (1) the "intent" requirement that decides the fate of a genocidal crime, and (2) the provision of protection for only "a national, ethnical, racial, or religious group."

[5] Alan S. Rosenbaum, *Is the Holocaust Unique?*, (Boulder, CO: Westview Press, Inc., 1996), 102

The intent requirement in Article II, ""intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such," presents a serious challenge in determining the punishments of perpetrators. At this time, if an element of intent is not established, no act, regardless of its hideous nature, can constitute genocide. A variety of circumstances have been suggested as highly probative of intent such as evidence of written or oral orders, including by way of witness testimony, the labeling of a protected group as an enemy of the state, forced expulsions, acts of 'cultural genocide' or a systematic and destructive pattern of behavior with respect to a certain group. As the element of genocide that is most difficult to prove, intent can sometimes only be found in indirect or circumstantial evidence, often lessening the conviction and covering the intensity of a perpetrator's involvement.

In fact, the Yugoslavia and Rwanda Tribunals have held that the defendant himself must possess the specific intent to be guilty of genocide, otherwise he/she can only be found guilty of complicity of genocide. However, at the same time, the Tribunals have determined that the victim's intent may be found in contextual factors, including the pattern of the atrocities in association with the victims, the level of planning and the number of victims. [6] This recognition of intent is easier to establish, but having been found in just two international tribunals, there is little hope that this would be an implemented standard of the future.

Another aspect of the intent requirement that is problematic is the term "as such" in the Convention's definition. It is hard to determine whether the "as such" refers to the preceding word "group," implying the destruction of people as a communal group and not necessarily the destruction of individual members, or whether it refers to the destruction of individual members because of their membership of a protected group. If the first is applied,

[6] Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law*, 36

then a communal group may be destroyed without actual killing of any of its members, such as the case of the Australian Aborigines under the fifth concept of intent to destroy by "forcibly transferring children of the group to another group."[7]

If the second implication for "as such" is applied, as in the words of the ILC, "The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group." This interpretation rules that even if mass killings result in the death of a large portion of a protected group, the killings would not constitute genocide if they were part of a random campaign of violence or directed at another unprotected group.[8] Therefore, as in the Indonesian occupation of East Timor, genocide has not been committed because the intentional mass murder campaign falls under the guise of a political resistance movement with nationwide support?

The intent requirement is just the first of two central inadequacies found in the Convention's definition. The second is the absence of protection for various other groups outside of the "national, ethnical, racial, or religious" associations enumerated in Article II. The law is said to protect these specific groups because they share the common characteristic that individuals are usually born into such groups. Therefore, targeting a national, ethnical, racial, or religious group means that a perpetrator attempts to destroy a people not because of what they have done, but because of who they are.

One of the most likely candidates for inclusion in a more comprehensive definition of genocide is the protection of political groups. Political groups are excluded due to a person's ability to change their political persuasion and the lack of stability in the classification,

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[7] Gellately & Kiernan, *The Specter of Genocide*, 15
[8] Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law*, 38

meaning that political groups are often changing. Many cases can be presented as a challenge to the lack of protection for political groups. Saddam Hussein's campaign against the Iraqi Kurds was defended as non-genocidal due to its characterization as action against a political opposition group, whose members also happened to be Kurds.

There also is the exclusion of social groups from the protection offered by the Convention's definition. While it is true that a person can more easily abandon such a group, it may not be so easily the case if an individual is attempting to change their association with a social class. One example of how the exclusion of social groups allows perpetrators to sidestep accountability is Stalin's liquidation of kulaks in the late 1920s. Millions of lives where lost but there is still debate as to whether his intent was to physically exterminate all kulaks as individuals or rather their confiscate their property and thus eliminate them as a social class.

There is a need to explain that at the time of the 1948 Convention, negotiations for an internationally accepted definition were made in light of the recent Holocaust and the tensions of the impending Cold War. It is often argued that protection for political and social groups was excluded due to the Soviet Union's desire to protect Stalin's mass murders from being held as genocide. With such complications in mind, it is certainly appropriate to acknowledge the Convention's desire to form a definition with as much protection as would be possible for ratification by all parties. While good intentions are evident, it must be noted that in the future, other groups will need to be protected, and that cannot be accomplished unless a way is made to do so.

Cases to Examine

Hopefully the discussion thus far has made evident the inadequacies of the current definition of genocide both according to international law as defined by the 1948 Convention and according to the academic community. In this section, I want to examine specific "recognized" cases of genocide. These cases are "recognized" by the international community as criminal atrocities, but have not been prosecuted.

A first case to examine is the great famine that occurred in the Soviet Union under Joseph Stalin between 1932 and 1933. Scholars have disagreed over whether this case constitutes genocide due once again to the question of Stalin's intent. It has been argued that his purpose was not to exterminate the Ukrainian people because they were Ukrainians, but that their extermination was simply a result of his effort to rapidly industrialize Soviet society.

Under this reasoning, the millions of lives that were lost in this short time period were the dues paid for greater economic stability and more suitable living conditions in urban areas. However, it is unreasonable to believe that Stalin's coercion of the peasant population to submit to collectivization and enforcement of grain procurement quotas were not even slight attempts to be rid of a burdensome lower class. Collectivization policies ensured that those in rural areas bore the brunt of industrialization. These citizens were literally stripped of their livelihood. In the case of Ukraine, Stalin's policies meant mass murder. There was no protection to be found.

Understanding the limitations of the current definition, the most obvious question in this case is Stalin's intent. Intent, remember, is one of the two central inadequacies of the current definition. Even if Stalin did not set out to exterminate a significant percentage of the Ukrainian population, that is what inevitably happened as a result of his inhuman policies.

The argument that the Great Famine was an unpreventable occurrence is asinine. Stalin set grain procurement requirements beyond sustainable quantities from the very start of his five-year plan. When the famine set in, there was no recourse for the Ukrainian people, and insurmountable expectations continued on until Stalin realized the impossibility of achieving his set goals.

In this case there is also the difficult question of whether Stalin was directing his policies toward the Ukrainian people or if that was the result of a people group that also happened to be mostly peasants. It has already been mentioned that there is no protection for social or economic groups under the current definition. Regardless, the fact remains that this was a specifically disadvantaged people group lacking protection from the crime that Stalin committed against them. My concern for this long-past atrocity stems from the realization that a similar case of genocide is a real possibility. In the developing nations of our world today, is there not a chance for the lives of peasants to be once again lost for the sake of better economic conditions for those in positions of power?

A second case that presents a myriad of problems is the case of mass killings in Argentina in the 1970s. Unlike the case of the Great Famine, there is no possible justification for not prosecuting the criminals that were responsible for the kidnapping, torture, rape, and murder that occurred. The details differ from Stalin's terror but the terror is real just the same.

While the military most often persecuted citizens based on their ideological standpoint that might be considered liberal or left-leaning, or their social association with the welfare and rights of the poor, they were sometimes persecuted for their religious affiliation, a group obviously protected under the Convention's definition. "Although the military claimed to be defending Christianity, priests, nuns, and seminarians were among those kidnapped, tortured,

and killed."[9] It is also important to note that often the selection for killing was arbitrary and that abductions were simply in order to collect ransom or loot the property of wealth victims. This case once again points to the value of expanding the list of protected groups in the Convention's definition.

Evidence of intent to destroy is more than obvious, not only in a formal decree that directed military and police to "annihilate the activities" of all subversive elements, but by the labeling of individuals as enemies of the state. The military's actions were also guided by the Institutional Act of June 18, 1976, that awarded the junta with the "power and responsibility to consider actions of those individuals who have injured the national interest." [10] While the wording of these governmental declarations may seem ambiguous, the violent and unrestrained actions of the military revealed the intended meanings. Little confusion remains as to whether or not the government wanted to exterminate portions of the population.

In relation to this case, Ervin Straub reinforces the view of this paper that the international community must take action at the forefront of conflict. He mentions that human rights organizations made efforts to protest the government's violence but without tangible support of powerful nation-states, their influence was extremely limited. "By the time the machinery of destruction is in operation, the capacity of bystanders to influence the perpetrators has greatly weakened."[11] He believes that the international community's greatest potential for influence is in the early stages of these crimes, long before mass killings have begun.

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[9] Straub, *The Roots of Evil*, 224
[10] Ibid., 219-220
[11] Ibid., 230

A third and final case to examine is the Indonesian occupation of East Timor, launched by Indonesian armed forces in December 1975. The military occupation of East Timor was not only accepted by many of the world's leading governments, it was even condoned for decades before the international community realized the brutality of force taking the lives of the Timorese people. While East Timor would eventually be free from Indonesian rule in the late 90s, the price paid as a result of the international community's inadvertent support was almost a third of East Timor's pre-invasion population.

The Indonesian armed forces invaded East Timor when it was at the brink of gaining its independence from Portugal. After successfully capturing the capital city Dili, the Indonesian army faced quite a struggle from the Fretilin party, which had come to power after the Portuguese withdrawal. In order to eliminate all resistance to their occupation and gain complete control of East Timor, the Indonesian army resorted to acts of genocide against the Timorese people. While the first victims in this case were the ethnic Chinese minority, the larger Timorese majority was also brutalized by the armed forces without much discrimination between the two groups.

In this case, the question of why the Indonesian government has not been prosecuted for its crime of genocide is not a question of intent or lack of protection for the victimized groups under the Convention's definition. In fact, the intent of the Indonesian occupation was often mandated through official sanctions, and revealed through various policy programs such as Operasi Keamanan and Operasi Tuntas, which respectively mean Final Cleansing and Operation Eradicate.[12] Also, there is the clear persecution of groups for the purpose of

[12] Gellately & Kiernan, *The Specter of Genocide*, 167 & 176

terminating them for their ethnic or national characterization. The question in this case is centered on the issue of the international community's lack of response to known atrocities.

Once again this paper points to the issue of the point of intervention in acts of genocide. The world's leading governments watched the Indonesian occupation ravage the people of East Timor for a quarter of a century before the media stunned audiences with images of violence and destruction. Will this be the norm for such cases in the future? Will the international community stand by and watch as other nations are robbed of large portions of their people?

The central problem in this case is the fact that numerous external factors considered by the world's leaders to be more important than the people of East Timor allowed the Indonesian armed forces to act as they pleased. Excuses made by well-informed countries such as the United States, Australia, and the United Kingdom included strategic interests, arms supplies, or access to potential oil wealth.[13] What protection is offered to people groups persecuted for reasons covered by the Convention's definition, but without the resources or global influence to encourage international intervention? Is protection from genocide a popularity contest?

CONCLUSION

In this paper, I have attempted to make clear the inadequacies of the current definition of genocide under the 1948 convention, and in the process, reveal novice observations that may provide some insight into the field. In conclusion, I think it is appropriate to offer some suggestions for expansion of the current definition as well as an explanation of why concern for genocide is relevant in our society today.

[13] Gellately & Kiernan, *The Specter of Genocide*, 180

Words can be both powerful and weak at the same time. It is the interpretation and application of words that determine which they will be. It is my opinion that the words used in the Convention's definition do not have the ability to be powerfully interpreted by the international community because they lack the force necessary to truly prosecute perpetrators of genocide in so many cases. As mentioned before the Tribunals of Yugoslavia and Rwanda ruled unfavorably that specific intent must be determined for each individual in order for them to be convicted of the crime, an example of the crucial nature of wording. However, a surprising interpretation was offered by the Rwanda Tribunal's trial chamber, which asserted the list of groups in the Convention's definition was not exclusive insofar as the Conventions' drafters sought to protect any stable and permanent group.[14] The question arises is whether or not future tribunals or trials of the International Criminal Court would interpret the Convention's definition similarly and exercise the power necessary to do so. Whether by a formal process or a continued commitment to broader interpretation of the words of the Convention's definition, a change must be made.

Why is the prevention and prosecution of genocide important for our global society today? First, it is important to remember that the Convention's definition is more than five decades old. In that time, the continuously changing political and cultural sensitivities of nations have evolved in an increasingly violent manner. The drafters of the Convention's definition contributed greatly to the world by demanding that protection against genocide be at least an option in the international community. It is now time to realize that the definition must be expanded to adequately meet the needs of those who suffer immensely at the hands of those who order and carry out mass murders.

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[14] Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law*, 42

In his foreword written for "Century of Genocide," Israel W. Charny discusses what it means to care for others outside of loyalty to one's own tribe, religion, ethnic identification, and nation. He expresses a belief that is acutely aligned with the perspective I have gathered in the process of this study in genocide. "It is entirely natural to care the most deeply about one's self and one's own people, and to care more intensely for some other peoples with whom one feels a more immediate kinship, but ultimately the challenge of human development, both for the benefit of individual mental health and happiness, and for the benefit of humanity, is for more people to care about all of human life."[15]

[15] Samuel Totten, William S. Parson, Israel W. Charny, *Century of Genocide,* (Garland Publishing, 1997), xix