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Note

The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot

Beth Van Schaack

At long last, the international community is moving toward the fulfillment of certain promises made at the close of the Nuremberg trials.¹ Since that time, human rights abusers have escaped accountability for their international crimes, in large part due to the lack of enforcement mechanisms at the international level.² Three contemporary initiatives, however, suggest that the Nuremberg legacy of holding individuals accountable for human rights violations is not mere history. First, the establishment of the International Tribunals for Yugoslavia³ and Rwanda,⁴ both under the auspices of the

1. In the aftermath of World War II, the Allied nations established the United Nations and convened the Nuremberg and Tokyo Tribunals in an effort to create an international regime that would restrain aggression and the use of force, protect individuals from governmental atrocities, and ensure world peace. The tribunals, which were empowered to prosecute perpetrators of war crimes, crimes against the peace, and crimes against humanity, held out the promise that individuals would henceforth be held accountable before the international community for their acts of aggression and their crimes against humanity. "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in* 41 AM J INT'L L 172, 221 (1947).

2. After the dissolution of the two ad hoc tribunals, the international community failed to "create structures in international society that would ensure that [the Nuremberg P]rinciples were not mere rhetoric but were operative upon behavior in times of peace as well as in the aftermath of military defeat." RICHARD FALK, *REVITALIZING INTERNATIONAL LAW* 224 (1989).

3. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex, reprinted in 32 I.L.M. 1192 (1994) [hereinafter *Yugoslav Statute*]; S.C. Res. 827, U.N. SCOR, 3217th mtg. U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203 (1994) (adopting *Yugoslav Statute*).

4. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 3453d mtg. at 3, U.N. Doc. S/RES/955, Annex (1994), reprinted in 33 I.L.M. 1598, 1602 (1994) [hereinafter *Rwandan Statute*]. The establishment of the two tribunals under the Security Council's Chapter VII powers, which are activated when the Council determines "the existence of any threat to the peace, breach of the peace, or act of aggression," marked the alleviation of the Cold War paralysis that had for years beset the Council. U.N. CHARTER art. 39.

United Nations, represents a genuine first attempt by the international community to enforce international criminal law. Second, in 1994, the United States Congress passed the Cambodian Genocide Justice Act, an unprecedented domestic statute which announces that, "[c]onsistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979."⁵ Third, the United Nations recently convened a preparatory committee to draft a final statute for a permanent International Criminal Court.⁶ Although the first two endeavors, the two ad hoc tribunals and the U.S. legislation, envision prosecutions for the international crime of genocide, neither the tribunals' constitutive statutes nor the legislative text critically considers the definition of genocide provided by the controlling international treaty: the Convention on the Prevention and Punishment of the Crime of Genocide.⁷ With regard to the establishment of the International Criminal Court, however, some delegates to the preparatory meeting have specifically noted that they "want a sharper definition of the crimes of genocide, although the [Genocide Convention] defines it."⁸

The Genocide Convention, drafted by the United Nations soon after the Nuremberg trials, represented a significant step toward the establishment of a regime of individual accountability for violations of international law. The Convention compels its signatories to prevent and punish certain enumerated acts committed with the intent to destroy, in whole or in part, a national, ethnic, religious, or racial group.⁹ Given that the 1948 Convention to be applied formally for the first time since its drafting almost fifty years ago, an

5. Pub. L. No. 103-236, § 572(a), 108 Stat. 486, 486-87 (1994). The Act authorizes, inter alia, the establishment of the Office of Cambodian Genocide Investigation to "develop the United States proposal for the establishment of an international criminal tribunal for the prosecution of those accused of genocide in Cambodia." *Id.* § 573(b)(4).

6. See *General Assembly Establishes Preparatory Committee to Draft Convention for International Criminal Court*, FEDERAL NEWS SERV., Dec. 12, 1995, available in LEXIS, News Library, FNS File. It is anticipated that the draft statute will be complete in 1998. See Lauren Comiteau, *UN Plans to Create World Criminal Court*, CHRISTIAN SCI. MONITOR, Dec. 31, 1996, at 7.

7. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

8. *Israeli U.N. Delegation Concerned over International Criminal Court Proposal*, JERUSALEM POST, Aug. 13, 1996, at 12.

9. See Genocide Convention, *supra* note 7, art. I, 78 U.N.T.S. at 280. Article II of the Genocide Convention reads in full:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], 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.

Id. art. II, 78 U.N.T.S. at 280.

examination of how it governs modern episodes of genocidal killing deserves critical attention.

Much of the killing in Bosnia and Rwanda constitutes genocide pursuant to the terms of the Genocide Convention; however, this is not the case with respect to the killing in Cambodia during the Khmer Rouge era (1975–78), in which almost a fifth of the population was executed or killed by being worked or starved to death. Even though the Cambodia massacre is widely considered a paradigmatic case of genocide,¹⁰ a close reading of the Genocide Convention leads to a surprising and worrisome conclusion. The Genocide Convention, unlike other international legal instruments,¹¹ limits the protected classes to national, ethnic, racial, and religious groups.¹² As such, it does not cover a significant portion of the deaths in Cambodia.¹³ This example illustrates the critical shortfall of the Genocide Convention.

After protracted debate, the drafters of the Genocide Convention expressly excluded “political groups” from Article II. An examination of the *travaux préparatoires* of the Convention reveals the compromises—born of politics and the desire to insulate political leaders from scrutiny and liability—that can occur when political bodies attempt to reduce customary law principles to positivistic expression. The exclusion of political groups from the Genocide Convention represents one such compromise. No legal principle can justify this blind spot.

In this Note, I argue that the Genocide Convention is not the sole authority on the crime of genocide. Rather, a higher law exists: The prohibition of genocide represents the paradigmatic *jus cogens* norm, a customary and peremptory norm of international law from which no derogation is permitted.¹⁴ The *jus cogens* prohibition of genocide, as expressed in a variety

10. See Terence Duffy, *Toward a Culture of Human Rights in Cambodia*, 16 HUM. RTS. Q. 82, 83 (1994) (“For the world community, the very mention of Cambodia has become synonymous with genocide.”); see, e.g., Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 906, reprinted in 27 I.L.M. 715, 756 (1988) (“[T]he persecution of the Cambodian people under the Khmer Rouge rule, [when] the bulk of the Khmer people were subjected to life in an Asian Auschwitz, constituted one of the clearest examples of genocide in recent history.”).

11. See discussion *infra* Section III.C.

12. The Genocide Convention’s exclusion of political groups was one of the obstacles to its ratification by the United States. See 132 CONG. REC. S1355 (daily ed. Feb. 19, 1986) (statement of Sen. Symms) (indicating that treaty as written “turns our backs” on genocide in Cambodia).

13. This Note selects Cambodia as a representative case for understanding the limitations of the Genocide Convention for several reasons: The atrocities of the Khmer Rouge are historically well-documented and widely assumed to be genocide; a determination of liability for genocide is immediately pressing given the enactment of the Cambodia Genocide Justice Act; and some of the atrocities in Cambodia do coincide with the Convention’s definition, which demonstrates the disparate results that would obtain for perpetrators and victims alike were such a trial to be held. The arguments for recognizing political genocide are equally applicable to the massacres in Indonesia, Uganda, Stalinist USSR, and Equatorial Guinea, and some of the killings in Rwanda. See LEO KUPER, *THE PREVENTION OF GENOCIDE* 126–47 (1985) (discussing case studies). In none of these countries, however, is there as developed an effort to prosecute the crimes of the prior regime as is occurring in Cambodia. On current efforts to prosecute political genocide in Ethiopia, see discussion *infra* note 140.

14. Under international treaty law doctrine, *jus cogens* norms constrain the substance of treaties.

of sources, is broader than the Convention's prohibition¹⁵ as has been demonstrated with respect to the jurisdictional principle applied to acts of genocide.¹⁶ Notwithstanding that the framers of the Genocide Convention attempted to limit the prohibition of genocide by deliberately excluding political groups from Article II, this provision is without legal force to the extent that it is inconsistent with the *jus cogens* prohibition of genocide. Therefore, when faced with mass killings evidencing the intent to eradicate political groups in whole or in part, domestic and international adjudicatory bodies should apply the *jus cogens* prohibition of genocide and invoke the Genocide Convention vis-à-vis signatories only insofar as it provides practical procedures for enforcement and ratification.¹⁷

In Part I of this Note, I detail and critique the political compromises that occurred during the drafting of the Genocide Convention. In Part II, I describe the atrocities perpetrated by the Khmer Rouge in Cambodia to demonstrate the shortfalls of the definition of genocide in the Genocide Convention. In Part III, I describe the scope of the *jus cogens* prohibition of genocide, and I argue that treaty provisions such as Article II carry no legal weight when they conflict with a *jus cogens* norm as a higher form of law.

I. THE ORIGINS OF THE GENOCIDE CONVENTION AND ITS BLIND SPOT

"Genocide is a modern word for an old crime."¹⁸ When the Allies unveiled the Nazi concentration camps, revealing the horrific full scope of the Nazi Final Solution, the world community was faced with the challenge of how to understand and explain the enormity of the Holocaust. As an initial response, and in reply to Winston Churchill's portrayal of the Nazi extermination program as a "crime without a name,"¹⁹ the Polish scholar and jurist Raphael Lemkin coined the term "genocide"²⁰ to describe what happened to the Jews and other so-called undesirable groups at the hands of the Nazis. Lemkin's well-accepted definition of genocide encompassed efforts to eradicate human collectivities defined along many dimensions. For Lemkin, the critical element of genocide was that while singular acts are aimed at

because these norms cannot be "opted out of." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 [hereinafter Vienna Convention]. For a more detailed discussion of the concept of *jus cogens*, see discussion *infra* Section III.A.

15. For more on these sources, see discussion *infra* Section III.D.

16. See discussion *infra* Section III.C.

17. This approach should be adopted by, inter alia, the International Criminal Tribunal for Rwanda when it considers acts of genocide perpetrated against "moderate Hutus," by an international or domestic tribunal inspired by the Cambodia Genocide Justice Act to try members of the Khmer Rouge, and by the impending International Criminal Court when confronted with individuals accused of political genocide.

18. Louis René Beres, *Justice and Realpolitik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123, 124 (1988) (misquoting the Genocide Convention).

19. WARREN FREEDMAN, *GENOCIDE: A PEOPLE'S WILL TO LIVE* 11 (1992) (quoting Winston Churchill).

20. The term is derived from the Greek word *genos* (race, tribe) and the Latin word *caedo* (to kill).

individuals, the broader aim of genocide is to destroy entire human collectivities.²¹ The indictment of October 8, 1945 against the major Nazi war criminals was the first international document to employ this neologism. It accused the defendants of conducting "deliberate and systemic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups."²²

Lemkin was the first to advocate the promulgation of a comprehensive convention attesting to the international community's universal condemnation of the crime of genocide.²³ On November 9, 1946, in its first session, the General Assembly referred a draft resolution condemning the crime of genocide to the Sixth (Legal) Committee. The Committee returned the following resolution, which was unanimously adopted by the General Assembly at its 55th session:²⁴

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the consciences of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, *political* and other groups have been destroyed, entirely or in part.

The punishment of the crime of genocide is a matter of international concern.

The General Assembly, therefore,

Affirms that genocide is a crime under international law which the civilized world condemns . . . whether the crime is committed on religious, racial, *political* or any other grounds²⁵

21. See RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944)

22. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 43-44 (1947). Although the indictment does not mention *political* groups as such, it does mention "classes of people," in contrast to the Genocide Convention, and clearly designates an expansive view of protected human collectivities. Furthermore, the subsequent and unanimous United Nations resolution explicitly denotes political groups in its classification of genocide. See *infra* text accompanying note 25

23. See Raphael Lemkin, Current Note, *Genocide as a Crime Under International Law*, 41 AM J INT'L L. 145 (1947); see also Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 3-4 (1994) (describing Lemkin's invention of "genocide" neologism). Some members of the committee that was convened to draft the Convention resisted this effort on the ground that the crime was already prohibited by customary international law. The United Kingdom delegate argued that codification was appropriate only where the law was uncertain, and "if a Convention were drawn up, it was quite conceivable that not all states would adhere to it, and that would cast doubts on an already recognized principle. Genocide was already a crime under international law. A convention on the matter would weaken the principle rather than strengthen it." U.N. GAOR 6th Comm., 2d Sess., 39th mtg. at 20-21 (1948)

24. See *Legal and Administrative Decisions*, UNITED NATIONS WKLY BULL., Dec. 31, 1946, at 17, 18.

25. G.A. Res. 96, 1 GAOR, 1st Sess., 55th mtg. at 188-89, U.N. Doc. A/64/Add. 1 (1947) (first and third emphases added).

From this start, an Ad Hoc Committee²⁶ of the Economic and Social Council drafted a Convention on Genocide which was forwarded to the Sixth Committee of the General Assembly. The draft convention announced that its express purpose was "to prevent the destruction of racial, national, linguistic, religious, or *political* groups of human beings," because genocide "inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed."²⁷ The Sixth Committee, although it was handed responsibility for writing the final Convention, reneged on its original mandate. After protracted debate, the Committee fell sway to political compromises, and political groups dropped out of the equation. As such, the definition of genocide embodied within the final version of the Genocide Convention differs significantly from that of the preceding General Assembly resolution, the draft convention, and from the original Lemkinian conception.

The content of Article II was one of the most highly debated provisions of the original document.²⁸ Delegates who opposed the inclusion of political groups in the Convention based their arguments on the perceived essence or character of the groups to be included. In other words, political groups were to be excluded "since they lacked the necessary homogeneity and stability."²⁹ The Polish delegate to the drafting committee noted: "While it was true that definitions [have] . . . a certain elasticity, there were certain essential features which formed part of an entity to which a label was attached. Genocide was basically a crime committed against a group of people who had certain stable and characteristic features in common."³⁰

Several delegates insisted that political groups did not require the same measure of protection as other human groups. The Brazilian delegate claimed that genocide against political groups was foreign to the countries of Latin America

since in those countries there did not exist that deep-rooted hatred which in due course led to genocide. Political struggle in Latin America was sometimes violent, sometimes emotional, but it was above all ephemeral. It was impossible in that part of the world to

26. The Ad Hoc Committee was composed of seven members: China, France, Poland, the Union of Soviet Socialist Republics, the United States, Lebanon, and Venezuela.

27. Draft Convention on Genocide, U.N. GAOR 6th Comm., 2d Sess., Annex 3, at 214-15, U.N. Doc. A/362 (1947) (emphasis added) [hereinafter Draft Convention on Genocide].

28. The others were the prohibition of "cultural genocide" and the reference to an international tribunal.

29. U.N. GAOR 6th Comm., 3d Sess., 63d mtg. at 6 (1948). For example, the Egyptian delegation argued that it would be "dangerous" to extend protection to political groups "in view of the frequent and inevitable changes of political opinion." *Id.* at 7. Quotations attributed to delegates at the drafting meetings are derived from the summarizations of their testimony that appear in the official records of the third session of the General Assembly.

30. *Id.*, 64th mtg. at 19.

envisage such an intensification of political animosity as would lead to movements of a pogrom-like character.³¹

These delegates clearly accepted that the exclusion of political groups would limit the scope of the protection of the Convention.

Another camp argued for the inclusion of political groups within the ambit of the Convention. These delegates challenged the distinction between political and other groups. The Dutch representative emphasized that

while the Nazis had destroyed millions of human beings in the Netherlands and elsewhere on account of their race or their nationality, they had also destroyed a great many others for their political opinions. In Germany itself they had attacked the members of the Socialist and Communist parties as well as their parliamentary representatives.³²

Delegates also noted that political groups may be considered as permanent as racial or ethnic groups and that the distinction between ascribed and elected group membership was imprecise.³³ The United Kingdom delegate noted that the "essence" rationale did not explain the inclusion of national or religious groups in the Convention: "[T]he convention should also provide protection to groups the members of which were as free to leave them as they were to join them. National or religious groups were obvious instances of that kind."³⁴ The Swedish delegate agreed in that the "profession of a faith did not result only from ancestral habit; it was a question to which each person gave a personal answer. That fact established a bond between the religious group and the groups based on community of opinion, such as political groups."³⁵

Forecasting the events of the Cold War, delegates asserted that the nature of conflict had evolved and that "strife between nations had now been superseded by strife between ideologies. Men no longer destroyed for reasons of national, racial, or religious hatred, but in the name of ideas and the faith to which they gave birth."³⁶ According to the testimony of the Cuban representative, "[p]assions were more and more apparent in political struggles, and it could be said that political groups were in danger just as other groups, perhaps even in greater danger."³⁷ Other delegates recognized that the exclusion of political groups provided perpetrators with a defense to a charge of genocide, because leaders of repressive states could use the pretext of

31. *Id.*, 69th mtg. at 56.

32. *Id.*, 74th mtg. at 100.

33. *See id.*, 69th mtg. at 60 ("[I]n certain States, the ruling political parties would insist that [political groups] possessed an existence as stable as some religious or racial groups.").

34. *Id.*

35. *Id.*, 75th mtg. at 114.

36. *Id.*, 74th mtg. at 103.

37. *Id.* at 108.

oppressing political groups to persecute racial or religious groups. Finally, representatives noted that no nations objected to the inclusion of political groups in the earlier General Assembly resolution condemning genocide,³⁸ and expressed concern that “[p]ublic opinion would not understand it if the United Nations no longer condemned in 1948 what it had condemned in 1946.”³⁹

The “innateness” rationale articulated by some delegates does not entirely explain the exclusion of political groups from the ambit of the Genocide Convention. The discussion among the delegates regarding which jurisdictional principle should be embraced by the Convention suggests another rationale for the inclusion of certain groups and not others, a rationale that belies the ostensible innateness explanation. The original draft convention had based jurisdiction on the universality principle, which would have allowed any state to prosecute perpetrators of genocide regardless of the nationality of the perpetrator or victim.⁴⁰ Concerns for protecting state sovereignty prompted the Committee to replace the principle of universal jurisdiction with the principle of territorial jurisdiction.⁴¹ Proponents of this substitution observed that states are “jealous of [their] sovereignty”⁴² and feared that nations might bring politically motivated charges of genocide against nationals of foreign states.⁴³ At the same time, the paradox of providing for jurisdiction within the state in which the offenses occurred was not lost on the Committee. One delegate noted that the choice of territorial jurisdiction as opposed to universal jurisdiction would virtually guarantee impunity for perpetrators of genocide because states will rarely prosecute their own.⁴⁴

Similar efforts to guarantee immunity from international scrutiny are apparent in the discussion about the groups protected under Article II. In particular, delegates expressed fears that politically “[s]ubversive elements

38. *Id.* at 101.

39. *Id.*

40. See Draft Convention on Genocide, *supra* note 27, art. VII, at 214–15 (“The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or the place where the offence has been committed.”).

41. The Convention now reads: “Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction” Genocide Convention, *supra* note 7, art. VI, 78 U.N.T.S. at 280.

42. U.N. GAOR 6th Comm., 3d Sess., 100th mtg. at 403 (1948).

43. According to testimony by the Egyptian delegate, “[i]t would be very dangerous if statesmen could be tried by the courts of countries with a political ideology different from that of their own country.” *Id.* at 398. To counter the apprehension about scurrilous charges of genocide, the Ecuadorian delegate reminded the Committee that, “[a]ny penal provision might give rise to slanderous accusations; it was the duty of the law courts to examine and reject such accusations.” *Id.*, 74th mtg. at 101.

44. The Iranian delegate argued that international law and order which the Committee was trying to establish must be based upon a universal conception of justice. . . . [Genocide] involved not only the law and order of the State on whose territory the crime was committed, but also the law and order of all the States constituting the family of nations. *Id.*, 100th mtg. at 396.

might make use of the convention to weaken the attempts of their own Government to suppress them.”⁴⁵ The Iranian delegate acknowledged the political motivations behind this stance: “Certain States feared that the inclusion of political groups in the convention might enable an international tribunal to intervene in the suppression of plots or insurrections against which they had to defend themselves.”⁴⁶ Other delegates anticipated that states would not ratify the Convention if it extended protection to political groups, because states would reject “such limitations to their right to suppress internal disturbances.”⁴⁷

When the issue was first voted upon, the Committee—without the support of the Soviet bloc and several Latin American delegations—retained political groups within Article II of the Convention. Many meetings later, three delegates proposed that the issue be reopened on the ground that the inclusion of political groups presented an obstacle to the full ratification of the Convention.⁴⁸ The United States delegate supported this proposal, in a “conciliatory spirit” and with the hope that as many states as possible would ratify the Convention.⁴⁹ At the same time, he recognized that the Convention as it stood was incomplete and calculated that “[o]nce those ratifications were secured, it might be possible, should occasion arise, to make certain improvements in the convention and, in particular, to include political groups.”⁵⁰ The second vote eliminated mention of political groups.

Almost immediately after this vote, discussion turned to the proposal, which had been rejected in the 100th meeting, to include reference in the Convention to an international tribunal to try individuals accused of genocide. The Belgian delegate noted:

[T]he United States delegation had made the first great sacrifice by agreeing to the exclusion of political groups in order to ensure a wider ratification of the convention. It was evident, on the other hand, that the United States delegation had certain wishes, in particular, that mention of the international tribunal should not be entirely omitted.⁵¹

Other delegates justified the reexamination of this debate on the ground that delegates may have opposed reference to an international tribunal when the Convention covered political groups.⁵² A vote reinstated mention of the

45. *Id.*, 69th mtg. at 58.

46. *Id.*, 74th mtg. at 99.

47. *Id.*, 65th mtg. at 21. In response, another delegate wryly countered that, “[u]nless a State was determined to eliminate certain groups because of their political convictions, it would not object to adhering to the convention.” *Id.*, 69th mtg. at 61.

48. *See id.*, 128th mtg. at 661–63.

49. *Id.* at 662.

50. *Id.*

51. *Id.*, 129th mtg. at 667.

52. *See id.* at 669.

international tribunal, but it did not have the support of the Soviet bloc.⁵³ In other words, delegates “traded” the protection of political groups for mention of an international tribunal.

As a result of these eleventh-hour drafting changes, Article II of the Genocide Convention offers protection to only certain human groups—racial, ethnic, religious, and national groups—that have experienced persecution. It does not protect political groups. Article II thus embodies the classic “checkerboard”⁵⁴ regime, a regime that provides disparate protection to victims of massive human rights violations on arbitrary grounds.

This examination of the *travaux préparatoires* of the Genocide Convention and the concomitant scope of the instrument reveals the way in which political bodies may attempt to limit their obligations under international law when they reduce customary law norms to positivistic expression in multilateral treaties.⁵⁵ In this case, the Convention had to respond to the tragedy of the Nazi Holocaust. At the same time, however, the Convention could not implicate member nations on the drafting committee. Perhaps the leading motivating factor in this regard was the imperative to avoid having the Convention inculcate Stalin’s politically motivated purges of the *kulaks* (the petty bourgeois) during the forced collectivizations of agriculture in the late 1920s and early 1930s.⁵⁶

Taken together, the Convention’s two major drafting compromises, the exclusion of political groups and the elimination of universal jurisdiction over the crime of genocide, resulted in a legal regime that insulates political leaders from being charged with the very crime that they may be most likely to commit: the extermination of politically threatening groups.⁵⁷ As such, the Genocide Convention is more pertinent as a retrospective condemnation of the Nazi enterprise than as a forward-looking guide for the application of the full international prohibition of genocide.⁵⁸ In the following Part, I describe the atrocities that occurred in Cambodia under the Khmer Rouge to demonstrate the limitations of the Genocide Convention. This brief history reveals that in

53. To this, the United States delegation added:

The United States delegation had spared no effort to obtain unanimous approval for the convention on genocide. It was for that reason that it had agreed to the omission of political groups among the groups to be protected by the convention; and the abstention of the Soviet Union and certain other States when the vote was taken (128th meeting) had come as a surprise.

Id., 133d mtg. at 704.

54. See RONALD DWORKIN, *LAW’S EMPIRE* 179–80 (1986) (coining term).

55. See *infra* note 93 (discussing sources of international law).

56. See LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 146–50 (1981) (describing these purges).

57. See KURT GLASER & STEFAN T. POSSONY, *VICTIMS OF POLITICS* 38–39 (1979) (“Through the dropping of political groups from the victim list, the most severe form of discrimination currently practiced is, in effect, tolerated and, in a sense, ‘legalized’ by omission.”).

58. Even though the Convention purports to secure the prospective prevention and punishment of the crime of genocide, it is in effect only a “registration of protest against past misdeeds of individual or collective savagery.” L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 751 (H. Lauterpacht ed., 8th ed. 1955).

Cambodia, political persecution accompanied other forms of persecution, so that the victims and perpetrators of the Khmer Rouge era would receive disparate justice as a result of the Genocide Convention's blind spot.

II. THE CAMBODIAN EXPERIENCE

The history of the Khmer Rouge era in Cambodia shows that while some of the atrocities of the Khmer Rouge fit the legal definition of genocide under the Convention, the mass extermination of ethnic Khmers falls outside the defined scope of the Convention because these victims do not constitute a national, ethnic, racial, or religious group. In fact, as this history reveals, the Khmer Rouge's genocide campaign began and ended with political persecution: first against individuals affiliated with the *ancien régime* and later against supposedly treasonous members of the Khmer Rouge itself.

The largely French-educated Khmer Rouge, otherwise known as the Party of Democratic Kampuchea, seized power in Cambodia from the American-backed Lon Nol on April 17, 1975, in the absence of virtually any political or military resistance.⁵⁹ The Khmer Rouge encountered a nation destabilized by a still fresh civil war, frequent invasions by neighbors, periodic *coups d'état*, and a full scale American "incursion" that dropped over 250,000 tons of bombs.⁶⁰ Under the leadership of Pol Pot, the Khmer Rouge immediately dismantled Cambodian society and installed a brutally repressive state. This junta marks "year zero"⁶¹ in what turned out to be a four-year campaign to create the "New Cambodia." By the time a Vietnamese invasion opened the killing fields for the world to see, "a greater proportion of the population [had] perished than in any other revolution during the twentieth century."⁶²

The draconian measures instituted by the Khmer Rouge regime in the quest for the "New Cambodia" included the liquidation of the Lon Nol army and members of the former regime; the extermination of the elite and educated; a complete evacuation of the urban centers; the incineration of books, libraries, banks, places of worship, and university facilities; the criminalization of the usage of foreign languages; the abolition of money, private property, markets, wages, and salaries; the dissolution of families and the separation of children from their parents; the execution of ethnic minorities; the prohibition of religious practice and education; and the systematic hunt for real and imagined

59. See BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79*, at 34 (1996).

60. See ELIZABETH BECKER, *WHEN THE WAR WAS OVER* 19-36 (1986).

61. FRANÇOIS PONCHAUD, *CAMBODIA YEAR ZERO* 214-15 (Nancy Amphoux trans., Allen Lane 1978) (1977).

62. Karl D. Jackson, *The Khmer Rouge in Context*, in *CAMBODIA, 1975-1978 RENDEZVOUS WITH DEATH* 3, 3 (Karl D. Jackson ed., 1989).

political opponents.⁶³

The first stage of the revolution witnessed the brutal and systematic execution of former military officers and their families. In all, 100,000 to 200,000 people were reportedly killed during this initial purge.⁶⁴ These victims were identified at check points or summoned by announcements over loudspeakers instructing people with administrative or military experience to identify themselves.⁶⁵ After supplying elaborate "biographies" attesting to any number of treasonous and seditious activities, these individuals and their families were executed.⁶⁶ Others who were eliminated immediately included individuals affiliated with the previous regime, the Western-educated, and large and small landowners.⁶⁷

A fundamental tenet of Khmer Rouge ideology was that "[a]ll citizens had to be proper Khmers, as defined by the revolution."⁶⁸ Thus,

[t]he radical transformation of Cambodia envisaged by the Khmer Rouge required the racial, social, ideological, and political purification of the Cambodian nation, through the sociological and physical liquidation of a variety of groups considered to be irremediably tainted by their association with the old social order or otherwise unsuited to the intended new order.⁶⁹

Consequently, the Khmer Rouge issued a decree "banning" all minorities: "There is one Kampuchean revolution. In Kampuchea there is one nation, and one language, the Khmer language. From now on the various nationalities . . . do not exist any longer in Kampuchea."⁷⁰ This "purification" required the extermination or forced assimilation of all non-Khmer ethnic groups, including ethnic Vietnamese, Chinese, Chaim, Thai, and indigenous hill communities. In some provinces, this decree was interpreted to require pogroms and mass killings of non-Khmers; in others, non-Khmer people were allowed to remain in the newly formed collectives as long as they abandoned their distinctive

63. For a detailed account of the Khmer Rouge era, see generally BECKER, *supra* note 60; CAMBODIA, 1975-1978: RENDEZVOUS WITH DEATH, *supra* note 62; DAVID P. CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY (1991); DAVID P. CHANDLER ET AL., POL POT PLANS FOR THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA (1988) [hereinafter CHANDLER, LEADERSHIP DOCUMENTS]; and KIERNAN, *supra* note 59.

64. See Serge Thion, *Genocide as a Political Commodity*, in GENOCIDE AND DEMOCRACY IN CAMBODIA 163, 166 (Ben Kiernan ed., 1993).

65. See KIERNAN, *supra* note 59, at 45; Kenneth M. Quinn, *The Pattern and Scope of Violence*, in CAMBODIA: 1975-1978: RENDEZVOUS WITH DEATH, *supra* note 62, at 179, 184-86.

66. See BECKER, *supra* note 60, at 205.

67. See Karl D. Jackson, *The Ideology of Total Revolution*, in CAMBODIA, 1975-1978: RENDEZVOUS WITH DEATH, *supra* note 62, at 37, 51.

68. BECKER, *supra* note 60, at 253.

69. Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 85 (1989).

70. BECKER, *supra* note 60, at 253 (quoting Khmer Rouge propaganda).

culture and language.⁷¹

Eventually, the Khmer Rouge exhausted “the other” and turned upon itself. Propaganda began to warn that, “[w]hat is infected must be cut out” and “[w]hat is too long must be shortened.”⁷² An alleged coup attempt in 1976 prompted fullscale purges aimed at all party leaders, local officials, military officers, and citizens supposedly associated with the political “opposition.”⁷³ Khmer Rouge cadres recruited a vast network of spies throughout society to identify dissidents and enemies of the state. Friends and family of the accused were instantly guilty by association, and children were encouraged to denounce their parents. The intensified repression that followed was justified on the ground that the revolution was at all times in jeopardy of sabotage by counterrevolutionary forces. Former Khmer Rouge cadres accused of sedition, treachery, and collusion with Vietnam were taken to detention centers where they were tortured to extract putative “confessions.”⁷⁴ Archives from Tuol Sleng, the apex of the torture and extermination system, indicate that 20,000 people were “smashed to bits” within the prison,⁷⁵ and four out of five executed were Khmer Rouge cadres.⁷⁶

The Khmer Rouge regime was finally halted when Vietnam invaded Cambodia on January 7, 1979, and installed the People’s Republic of Kampuchea. The events described above are widely considered—by historians, sociologists, journalists, and lay persons—to be a classic case of genocide without regard to the political nature of the groups targeted for extermination.⁷⁷ Yet much of what occurred in Cambodia under the Khmer Rouge does not match the limited definition of the crime provided by the Genocide Convention. Only the extermination of ethnic minorities, such as the Vietnamese and the Chaim, constitutes genocide pursuant to the Genocide Convention; other groups of victims, such as former Lon Nol supporters and alleged Khmer Rouge dissidents, constitute political groups that are not covered by the Convention. As such, a trial of members of the Khmer Rouge leaders employing the Genocide Convention’s limited definition of genocide would not account for the full magnitude of their crimes and would potentially exonerate perpetrators of political genocide.⁷⁸ Yet all of the Khmer Rouge’s

71. See generally KIERNAN, *supra* note 59, at 251–309.

72. FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 404 (1990).

73. See Duffy, *supra* note 10, at 88; Quinn, *supra* note 65, at 194–95. See generally *Report of Activities of the Party Center According to the General Political Tasks of 1976*, in CHANDLER, *LEADERSHIP DOCUMENTS*, *supra* note 63, at 177 (quoting speech, probably by Pol Pot, describing Khmer Rouge party as riddled with traitors).

74. See CHANDLER, *LEADERSHIP DOCUMENTS*, *supra* note 63, at xii; David Hawk, *The Photographic Record*, in *CAMBODIA 1975–1978: RENDEZVOUS WITH DEATH*, *supra* note 62, at 209, 210.

75. Hawk, *supra* note 74, at 210.

76. See Quinn, *supra* note 65, at 198.

77. See *supra* note 10 (discussing examples).

78. No internationally recognized trial of the Khmer Rouge has been conducted to date. Almost immediately after seizing power in 1979, the People’s Republic of Kampuchea established the People’s Revolutionary Tribunal to try Pol Pot and Ieng Sary for genocide. The trial was conducted in absentia “with

victims were subject to a campaign of extermination, the terrifying scope of which had not been seen since the Holocaust.

The application of the Genocide Convention to the atrocities in Cambodia provides a primary example of the critical shortfall of the Convention: the exclusion of political groups. This blind spot was the result of a political compromise that occurred when the intergovernmental organization charged with drafting the Convention attempted to curtail the more expansive scope of the crime that had already been recognized by the trials at Nuremberg and a unanimous General Assembly resolution. In the next Part, I argue for the primacy of an alternative source of law—the *jus cogens* prohibition of genocide—and maintain that international law negates such contractual attempts to limit the full scope of *jus cogens* norms. Because the diminution of the full scope of the prohibition of genocide contained in the Genocide Convention directly contradicts the customary *jus cogens* prohibition of genocide, I argue that it should be without legal consequence.

III. THE CUSTOMARY *JUS COGENS* PROHIBITION OF GENOCIDE IS BROADER THAN THE PROVISIONS OF THE GENOCIDE CONVENTION

A. *Jus Cogens Norms Constrain the Substance of International Treaties*

While the Genocide Convention establishes a particular regime to prohibit genocide, “it does not represent the entirety of international law on the subject.”⁷⁹ Rather, the *jus cogens* prohibition of genocide, which predates the drafting of the Genocide Convention, provides broader protection than the Convention itself. Political compromises, such as those that occurred during the drafting of the Genocide Convention, cannot limit *jus cogens* norms.

International law operates according to a hierarchical framework that helps resolve conflicts between principles.⁸⁰ *Jus cogens* (“cogent” or “compelling” law) norms sit at the apex of this system. The concept of *jus cogens* developed as a doctrine of treaty law and was codified in Article 53 of the 1969 Vienna Convention on the Law of Treaties.⁸¹ The Convention states: “A treaty is

reference to” the Genocide Convention and pursuant to Decree No. 1 of July 15, 1979, which defined genocide at Article 1 as “[p]lanned mass killing of innocent people, forced evacuation of the population from cities and villages, concentration of the population and forcing them to work in physically and morally exhausting conditions, abolition of religion, destruction of economic and cultural structures and of familial and social relations.” See PEOPLE’S REVOLUTIONARY TRIBUNAL HELD IN PHNOM PENH FOR THE TRIAL OF THE GENOCIDE CRIME OF THE POL POT-ENG SARY CLIQUE, at I-35 (1988).

79. Lori Lyman Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT’L L. & TRADE 193, 211–12 (1993) (arguing that customary law of humanitarian intervention allows for states to defend groups subjected to genocide).

80. See Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 3–4 (1986).

81. The Vienna Convention provides a set of rules for the interpretation of treaties, and it is widely accepted that the Convention codifies customary international law. See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 387 (2d ed. 1987).

void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”⁸² In other words, a *jus cogens* norm is a binding and nonderogable “rule of law which is peremptory in the sense that it is binding irrespective of the will of the individual parties, in contrast to *jus dispositivum*, a rule capable of being modified by contrary contractual engagements.”⁸³ In this way, *jus cogens* norms constrain the otherwise virtually unlimited power of states to enter into treaties.⁸⁴ These norms also are insulated from the process of customary law formation in that state practice contrary to the norms cannot change or weaken their legal force.⁸⁵

Jus cogens norms represent a narrow subset of customary law norms that reflect interests that the “legal conscience of mankind deem[] absolutely essential to coexistence in the international community.”⁸⁶ Jurists have consistently resisted expanding the category of *jus cogens* beyond those few norms that are unequivocally accepted as such by the international community.⁸⁷ The general criterion for these rules “consists in the fact that

82. Vienna Convention, *supra* note 14, 1155 U.N.T.S. at 344. In other words, “any act or treaty that conflicts with a *jus cogens* norm is void—such a conflicting document does not legally exist.” Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 451 (1989). This concept is related to the municipal law maxim: *ius publicum privatorum pactis mutari non potest* (“public law cannot be altered by a private contract”) See Alfred P. Rubin, *Recueil des Cours de l’Académie de Droit International de La Haye*, 81 AM. J. INT’L L. 254, 254 (1987) (book review).

83. Parker & Neylon, *supra* note 82, at 416 n.21 (citing ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 201 (C. Parry ed., 1986) (quoting G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 5 (1971))).

84. See Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937); see, e.g., 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [hereinafter CONTROL COUNCIL NO. 10 TRIALS], at 1327, 1395 (U.S. v. Krupp) (1950) (voiding agreement authorizing use of POWs in armament industry as contrary to law of nations) Like *jus cogens* norms, the U.N. Charter may also limit the subject matter or application of subsequent treaty provisions. According to Article 103, obligations under the Charter prevail over contrary preexisting treaty obligations. See U.N. CHARTER art. 103; see, e.g., Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 126 (Apr. 14) (Request for the Indication of Provisional Measures) (finding that Libya’s obligations under Security Council Resolution 748 overrode its obligations under Montreal Convention).

85. See A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1, 19 (1995).

86. Parker & Neylon, *supra* note 82, at 415 (quoting U.N. Conference on the Law of Treaties, 1st & 2d Sess., Vienna, Mar. 26–May 24, 1968, U.N. Doc. A/CONF/39/11/Add.2 (1971) (statement of Mr. Fattal (Lebanon))); see also Stefan A. Riesenfeld, Comment, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT’L L. 511, 513 (1966) (quoting German Supreme Constitutional Court, which held that *jus cogens* norms are “those norms that are indispensable to the existence of the law of nations as an international legal order”).

87. See *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994) (Wald, J., dissenting) (“*Jus cogens* norms are a select and narrow subset of the norms recognized as customary international law. Sitting atop the hierarchy of international law, *jus cogens* norms enjoy the greatest clout, preempting both conflicting treaties and customary international law.”) (citations omitted); see also *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5) (holding that right of state to intervene on behalf of national shareholders does not constitute *jus cogens* norm along with prohibition of genocide). For example, the German Supreme Constitutional Court rejected a claim that the principle that foreigners cannot be compelled to contribute to the raising of war revenue represented a *jus cogens* norm that would void an international agreement, because

[o]nly a few elementary legal mandates may be considered to be rules of customary

they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community.”⁸⁸

While there is some dispute over the full content of *jus cogens* norms, international legal scholars and jurists unanimously agree that the prohibition of genocide constitutes a *jus cogens* norm.⁸⁹ The International Court of Justice (I.C.J.) made this clear when it considered the effect of reservations to the Genocide Convention and ruled that the prohibition of genocide is “binding on states, even without any contractual obligation.”⁹⁰ The Court reasoned:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . [Its] object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.⁹¹

In other words, a *jus cogens* obligation is an obligation held *erga omnes*, or “among all.”⁹²

B. Customary Law Norms May Trump Contrary Treaty Provisions

The sources of international law are multifaceted.⁹³ As a result, a

international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations.

Riesenfeld, *supra* note 86, at 513 (quoting Bundesverfassungsgericht [BVerfGE] 18, 441 (448) (1965)).

88. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966).

89. In drafting the Vienna Convention on the Law of Treaties, the International Law Commission did not specify particular norms as *jus cogens* norms, but left the content to later development. It did, however, suggest a few norms, one of which was the prohibition of genocide. *See* Report of the Commission to the General Assembly, 2 Y.B. INT'L L. COMM. 187, 198–99 (1963); *see also* Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 28 (1994) (“The prohibition against genocide, as one of the most established of peremptory norms, represents the wish of the collective legal and moral conscience to condemn and suppress an act which is the antithesis of coexistence. . . . [Genocide] undermines the international system itself by systematically destroying its constituent parts.”).

90. Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (May 28).

91. *Id.*

92. The I.C.J. reaffirmed this position in *Barcelona Traction*, 1970 I.C.J. at 32 (stating that *erga omnes* obligations derive in contemporary international law “from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”).

93. According to Article 38(1) of the Statute of the International Court of Justice, the following constitute sources of international law: international conventions and treaties, custom (general practice accepted as law (*opinio juris*)), and general principles of law. Judicial decisions and the writings of jurists constitute subsidiary sources. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1), 59 Stat.

particular norm may find expression in disparate sources. The I.C.J. has considered the relationship between customary international law and treaty law in other realms and held that customary law precepts may supersede conflicting or less expansive treaty provisions. In the case of *Military and Paramilitary Activities*, for instance, the I.C.J. asserted that it could consider the rules of customary international law that happened also to be enshrined in the texts of multilateral conventions, despite a U.S. attempt to nullify through a unilateral treaty reservation its multilateral obligation to accept the jurisdiction of the Court.⁹⁴ The Court observed that "[t]he fact that . . . principles . . . have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."⁹⁵ In other words, "these norms retain a separate existence,"⁹⁶ even when conventions and treaties seek to codify them⁹⁷ and when "the States in question are bound by these rules both on the level of treaty-law and on that of customary law."⁹⁸

In many ways, customary international law constrains the ability of states to limit their international obligations.⁹⁹ In particular, unless a state constitutes

1055, 1060 (1945).

94. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Merits). The Court's application of this principle to the facts of the case has drawn some criticism. According to Judge Jennings in dissent, the Court simply ignored the U.S. treaty reservation, applied the treaty provisions, and called the latter "customary law." *Id.* at 532 (Jennings, J. dissenting). Commentators have argued that the Court conducted a diminished investigation of the elements of general customary law: state practice and *opinio juris*. See, e.g., Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 977 (1986). At the same time, it has been observed that in humanitarian law, courts tend to look more to *opinio juris* than to state practice to affirm the content of a particular norm. See Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 239 (1996); see, e.g., Prosecutor v. Tadić, Case No. IT-94-I-AR72, Appeal on Jurisdiction (Appeals Chamber, Int'l Crim. Trib. Former Yugo., Oct. 2, 1995), reprinted in 35 I.L.M. 32, 55-68 (1996) (relying on verbal evidence, such as statements, resolutions and declarations from states, rather than actual state practice, to determine customary law of armed conflict).

95. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, 424 (Nov. 26) (Jurisdiction of the Court and Admissibility of the Application), reprinted in 24 I.L.M. 59 (1985).

96. *Military and Paramilitary Activities*, 1986 I.C.J. at 95.

97. In this way,

the essential significance of a norm's customary character under international law is that the norm binds even those states that are not parties to a pertinent codifying instrument or convention, e.g., the Genocide Convention. Indeed, with respect to the bases of obligation under international law, even where a customary norm and a norm restated in treaty form are apparently identical, the norms are treated as separate and discrete.

Louis René Beres, *After the Gulf War: Iraq, Genocide and International Law*, 69 U. DET. MERCY L. REV. 13, 16 n.7 (1991).

98. *Military and Paramilitary Activities*, 1986 I.C.J. at 95. The implications of this are that a conventional rule may be "superseded" by a customary rule identical in content but "subject to different methods of interpretation and applicable when the treaty rule would not apply." Oscar Schachter, *Entangled Treaty and Custom*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 717, 720 (Yoram Dinstein ed., 1989); see also Tadić, Case No. IT-94-I-AR72, at 63 (finding that "there exists a *corpus* of general principles and norms on internal conflict embracing common Article 3 [of the Geneva Conventions] but having a much greater scope").

99. See generally Schachter, *supra* note 98, at 727-28 (discussing interaction between treaty and

a "persistent objector,"¹⁰⁰ states cannot avoid their customary law obligations by withdrawal or reservation as they can their treaty obligations.¹⁰¹ Customary law also does not present problems associated with nonratification in systems in which treaties are non-self-executing.¹⁰² Finally, the recognition that a norm has become part of the corpus of customary law strengthens the moral claim of the norm. "[T]he invocation of a norm as both conventional and customary adds at least rhetorical strength to the moral claim for its observance and affects its interpretation."¹⁰³

Despite the importance of customary law, treaties such as the Genocide Convention remain an important source of international law in other respects. Treaties can publicly confirm the illegality of certain actions under international law. For instance, the drafters of the Genocide Convention recognized that they were not inventing a new international criminal prohibition. According to Article I of the Convention, "The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and punish."¹⁰⁴ In this way, treaties provide an important forum for eliciting from governments public statements of support for a particular norm.

Treaties may also outline a set of implementation procedures that will be in effect between the parties pursuant to the doctrine of *pacta sunt servanda*.¹⁰⁵ By signing the Genocide Convention, parties accept additional multilateral commitments¹⁰⁶ that include the requirement to enact

customary law).

100. See generally Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985) (discussing persistent objector rule); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (same).

101. See Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 349 (1987).

102. For example, the Israeli Supreme Court ruled that the Geneva Conventions were inapplicable to Israel's activities in the West Bank, because these instruments had not been incorporated into domestic law. See *id.* at 349 n.4.

103. *Id.* at 350. For example, to indicate the gravity of the norms involved, the I.C.J. in the Hostages Case noted that the international legal obligations violated by Iran were "not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law." United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 31 (May 24).

104. Genocide Convention, *supra* note 7, art. I, 78 U.N.T.S. at 280. The General Assembly Resolution that preceded the Convention also recognized that customary law already prohibited genocide. "The General Assembly . . . affirms that genocide is a crime under international law . . . whether the crime is committed on religious, racial, political or any other grounds . . ." G.A. Res. 96, 1 GAOR, 1st Sess., 55th mtg. at 188-89, U.N. Doc. A/64/Add. 1 (1947).

105. Vienna Convention, *supra* note 14, art. 26, 1155 U.N.T.S. at 339 (indicating that doctrine of *pacta sunt servanda* holds that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

106. The I.C.J. observed in the *Nicaragua* case that "[a] State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 95 (June 27) (Merits). Even though customary law already governs a particular area of law,

[a] convention may be useful in focusing the attention of national bodies on the subject,

implementing legislation,¹⁰⁷ the acceptance of the compulsory jurisdiction of the I.C.J.,¹⁰⁸ and the pledge not to regard genocide as a "political offense" for the purposes of extradition.¹⁰⁹

During the drafting of the Genocide Convention, the United Nations Secretariat contemplated these factors and the interplay between the customary *jus cogens* prohibition of genocide and the Genocide Convention:

[A] convention on genocide, without weakening the condemnation of crimes against humanity under international common law, which is valid for all the members of the international community, will organize a practical system for the punishment of the crime of genocide which will be implemented by the States that have ratified the convention. It will not be the first time that a convention has been concluded on *a matter on which rules of common law already exist*. *Common law retains its full force for the States which have not signed the convention*, but the States parties to the convention define and develop the rules of common law in order to secure certain practical results.¹¹⁰

In other words, the "common law" prohibition of genocide that preceded the Convention still holds force for signatories and nonsignatories alike. What the Convention added to the existing prohibition of genocide was a contract-based set of procedures for the punishment of offenders.

C. *The Application of Universal Jurisdiction Demonstrates that the Genocide Convention Establishes Only a Basic Minimum*

My argument that governments cannot "contract out" of a *jus cogens* norm is supported by the analogous legal history relating to another aspect of the Genocide Convention. The drafters of the Genocide Convention attempted to

particularly in respect of any action which may have to be taken by them; it may also be helpful in clarifying and settling details required to implement the main principle, or more generally for the purpose of laying down a regime for dealing with the illegality in question.

Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 866 (1996) (Shahabuddeen, J., dissenting).

107. See Genocide Convention, *supra* note 7, art. V, 78 U.N.T.S. at 280 ("The Contracting Parties undertake to enact . . . the necessary legislation to give effect to the provisions of the present Convention and . . . to provide effective penalties for persons guilty of genocide . . .")

108. See *id.* art. IX, 78 U.N.T.S. at 282 ("Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the [I.C.J.] . . .").

109. See *id.* art. VII, 78 U.N.T.S. at 282 ("Genocide . . . shall not be considered as [a] political crime[] for the purpose of extradition.").

110. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, AD HOC COMMITTEE ON GENOCIDE, RELATIONS BETWEEN THE CONVENTION ON GENOCIDE ON THE ONE HAND AND THE FORMULATION OF THE NURNBERG PRINCIPLES AND THE PREPARATION OF A DRAFT CODE OF OFFENCES AGAINST PEACE AND SECURITY ON THE OTHER 7, U.N. Doc. E/AC.25/3 (1948) (emphasis added).

limit the jurisdictional terrain that applied to the crime of genocide.¹¹¹ Nevertheless, courts in the subsequent trials involving accusations of genocide have invoked the principle of universal jurisdiction, which allows *any* country to try an alleged violator of the prohibition of genocide. In this way, in the matter of criminal jurisdiction, the international community has recognized that the broader customary *jus cogens* norm against genocide trumps contrary provisions of the Genocide Convention.

The application of universal jurisdiction to a particular international crime rests on two propositions. First, certain crimes are so grave or heinous that they are part of the *jus gentium* ("law of nations"). "An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."¹¹² Second, individuals committing certain offenses lose their national character and become, in effect, *hostes humani generis* ("common enemies of mankind"), subject to any state's jurisdiction.¹¹³

Most notably, the Israeli Supreme Court in *Attorney General of Israel v. Eichmann*¹¹⁴ tried the defendant on the basis of universal jurisdiction, reasoning that it was "logically applicable . . . to all such criminal acts of commission or omission which constitute offenses under the law of nations (*delicta juris gentium*)."¹¹⁵ As such, the "power to try and punish a person for an offense . . . is vested in every State regardless of the fact that the offense was committed outside its territory by a person who did not belong to it"¹¹⁶ The court explained the relationship between conventional and customary law:

Article 6 [of the Genocide Convention] imposes upon the parties contractual obligations with future effect This obligation, however, has nothing to do with the universal *power* vested in every State to prosecute for crimes of this type committed in the past—a power which is based on *customary* international law.¹¹⁷

111. See *supra* text accompanying note 41.

112. 11 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 757, 1241 (U.S. v. List) (1949).

113. This principle is not new. According to Vattel,

[w]hile the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race.

Beres, *supra* note 18, at 141 (citing EMMERICH DE VATTEL, *THE LAW OF NATIONS* § 233 (1758)). The pirate was the original *hostis humani generis*, and the epithet now applies to the human rights violator. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.").

114. 36 I.L.R. 5 (D.C. Jm. 1961), *aff'd*, 36 I.L.R. 277 (S. Ct. Isr. 1962).

115. 36 I.L.R. at 299.

116. *Id.* at 298.

117. *Id.* at 304; see also Yoram Dinstein, *International Criminal Law*, 5 ISRAEL Y.B. ON HUM. RTS. 55, 62 (1975) ("[T]he crime of genocide exists under both customary and conventional international law,

In this way, the Court determined that provisions of the Convention may be overridden by contrary customary international law.¹¹⁸

In *Demjanjuk v. Petrovsky*,¹¹⁹ a U.S. federal court approved the defendant's extradition even though none of his offenses had been committed in the requesting state. The court explained that "some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law"¹²⁰ Recent events demonstrate the vitality of this principle; genocide trials arising out of the conflict in Bosnia have been commenced in Austria¹²¹ and Germany¹²² against individuals who are alleged to have committed genocide in Bosnia.

Similarly, the Restatement (Third) of the Foreign Relations Law of the United States states: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes"¹²³ This text explains that "[u]niversal jurisdiction to punish genocide is widely accepted as a principle of customary law."¹²⁴ The application of universal jurisdiction has also been endorsed by

and, whereas no universal jurisdiction pertains to it under conventional law . . . there is—and continues to be—a universal jurisdiction under customary law").

118. In the words of the district court, "Article 6 established a compulsory minimum, which did not affect the existing jurisdiction of States under customary international law." *Eichmann*, 36 I L R at 11. In support of the application of the universal jurisdiction principle, the circuit court also observed that countries that could have tried Eichmann under the territorial principle did not protest Israel's exercise of jurisdiction. *See id.* at 6.

119. 776 F.2d 571 (6th Cir. 1985).

120. *Id.* at 582.

121. In 1994, an Austrian court commenced criminal proceedings against Dusko Cvjetkovic, who was charged with committing genocide in Bosnia. *See Austria to Charge Bosnian Serb with Genocide*, REUTERS WORLD SERV., Aug. 3, 1994, available in LEXIS, World Library, Allwld File, *Serb in Dock in First War Crimes Trial Outside ex-Yugoslavia*, AGENCE FRANCE PRESSE, Oct. 20, 1994, available in LEXIS, World Library, Allwld File. The jury acquitted the defendant. *See Steve Pagani, Serb Cleared of War Crimes, Prosecutor Appeals*, REUTERS WORLD SERV., May 31, 1995, available in LEXIS, World Library, Allwld File. Austria is a signatory to the Genocide Convention.

122. Germany recently brought suit against Nikola Jorgic, a Bosnian Serb, on genocide charges stemming from allegations that he led death squads that massacred Moslems. *See Serb Accused of Genocide on Trial in Germany*, REUTERS N. AM. WIRE, Feb. 28, 1997, available in LEXIS, World Library, Allwld File. In a similar trial, Novislav Djajic has been charged with being an accessory to genocide. *See Trial of Serb Charged with Complicity in Genocide Opens in Germany*, DEUTSCHE PRESSE-AGENTUR, Feb. 25, 1997, available in LEXIS, World Library, Allwld File. Before Dusko Tadic was extradited to the International Criminal Tribunal for the Former Yugoslavia in the Hague, proceedings in which he was charged with "complicity in genocide" had been commenced against him in Germany. *See Melinda Crane-Engel, Germany vs. Genocide*, N.Y. TIMES, Oct. 30, 1994, at 56 ("Tadic's arrest represented the first time Germany had elected to exercise . . . 'universal jurisdiction'—jurisdiction that does not directly depend on links of territory or nationality—to bring charges of genocide."); *Serb to Face Genocide Trial in Germany*, REUTERS N. AM. WIRE, Feb. 28, 1995, available in LEXIS, News Library, US File. Germany is a signatory to the Genocide Convention.

123. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). The Restatement is published by the American Law Institute, a nongovernmental body, to "express the law as it would be pronounced by a disinterested tribunal." *Id.* at xi.

124. *Id.* § 404 (reporters' note 1).

both the United Nations Yugoslav Commission of Experts¹²⁵ and international law scholars.¹²⁶

These sources indicate that the *jus cogens* prohibition of genocide is broader than that embodied in the Genocide Convention. While the Convention indicates that domestic prosecutions for genocide are to be based on the territorial principle of jurisdiction, courts have confirmed that the *jus cogens* prohibition allows for prosecutions on the basis of universal jurisdiction, even though the framers of the Convention specifically rejected the application of universal jurisdiction to the crime of genocide.¹²⁷ In this way, the *jus cogens* prohibition, as a higher source of law, trumps the provisions of the Convention that suffered political compromises at the hands of the drafters.

D. *The Jus Cogens Prohibition of Genocide Includes Political Groups*

The exclusion of political groups from the Genocide Convention contravenes the customary *jus cogens* prohibition of genocide, which protects political groups in addition to national, ethnic, racial, and religious groups. Support for this argument comes from positive law sources, the application of analogous international legal norms, the dictates of public sentiment, and the lack of a legally justifiable principle to justify the exclusion of political groups. In this Section, I address each of these sources in turn.

The full scope of the *jus cogens* prohibition finds expression in the original and unanimous General Assembly resolution condemning the crime of genocide that was to serve as a foundation for the Genocide Convention.¹²⁸ Although resolutions retain an ambiguous position in international law,¹²⁹

125. See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, Annex, at 13 [hereinafter Final Report] ("[T]he only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide . . .").

126. See, e.g., Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 570 (1995) ("These are the offenses [including genocide] that are recognized by the community of nations as of universal concern, and as subject to universal condemnation.") (citation omitted); Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away with It*, 11 MICH. J. INT'L L. 90, 91 n.1, 92 n.2 (1989) (citing supporting authority and scholars); Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 837 (1988) ("Universal jurisdiction over genocide under customary law can coexist with territoriality jurisdiction under treaty law; the former relates to a jurisdictional right, the latter to a jurisdictional obligation. . . . The parties [to the Convention] . . . simply have obligated themselves to prosecute offenses specifically committed within their territory.") (citations omitted).

127. See *supra* text accompanying note 41.

128. See *supra* text accompanying note 25.

129. The classic position is that "[r]esolutions 'are capable, like many other things, of contributing to the formation of *lex communis*, and can in that sense constitute material influencing the content of the law, but not creating it.'" Gregory J. Kerwin, Note, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 880 n.26 (quoting Gerald Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, in *LIVRE DU CENTENAIRE, 1873-1973*, at 196, 269 (1973)).

they are not without a certain force.¹³⁰ In particular, it has been argued that international and domestic tribunals may invoke resolutions as a source of international law under certain well-defined conditions: when such resolutions are unanimous;¹³¹ consistent with *jus cogens* norms;¹³² well-subscribed by states representing the various world legal systems;¹³³ or declaratory of the state of international law.¹³⁴ For example, the United States tribunal in the *Justice Case*, one of the domestic prosecutions of Nazi war criminals following the conclusion of the Nuremberg trials, noted the importance of General Assembly Resolution 96(I) as an expression of an already developed international prohibition of genocide: "The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an

130. The General Assembly has confirmed that its resolutions may be a source of international law "[T]he development of international law may be reflected, inter alia, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice." G.A. Res. 3232, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975); see also Oscar M. Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, 73 PROC. AM. SOC'Y INT'L L. 324, 325 (1979) (discussing growing weight accorded to General Assembly resolutions, especially in Third World).

131. See, e.g., *Filaritiga v. Pena-Irala*, 630 F.2d 876, 882-83 (2d Cir. 1980) (finding that "international consensus" on prohibition of torture in customary international law is evidenced by Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 51, at 73, U.N. Doc. A/810 (1948), which states "no one shall be subjected to torture," and Declaration on the Protection of All Persons from Being Subject to Torture, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975)).

132. See Christopher Osakwe, *Contemporary Soviet Doctrine on the Sources of General International Law*, 73 PROC. AM. SOC'Y INT'L L. 310, 321 (1979) (citing INTERNATIONAL LAW 66-67 (G. Ignatenko & D. Ostapenko eds., 1978)).

133. In *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 53 I.L.R. 389 (Int'l Arb. Trib. 1977), an arbitrator invoked General Assembly Resolution 1803 to determine the appropriate standard of compensation under international law for expropriations of foreign-owned assets. See *id.* at 27. In assigning legal value to General Assembly resolutions, the arbitrator looked to the "circumstances under which they were adopted and . . . the principles which they state," and observed that Resolution 1803 was widely subscribed to by "a majority of Member States representing all of the various groups." *Id.* at 30. The arbitrator indicated that the resolutions did not create custom, but confirm or describe it: "[O]n the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly express their views. The consensus by a majority of states belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated . . ." *Id.* For example, the I.C.J. has held that resolutions condemning nuclear weapons do not reflect a universal *opinio juris*, because Western states dissented to them. See Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (1996) (noting that resolutions can "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true it is necessary to look at its content and the conditions of its adoption.").

134. See Prosecutor v. Tadić, Case No. IT-94-I-AR72, Appeal on Jurisdiction (Appeals Chamber, Int'l Crim. Trib. Former Yugo., Oct. 2, 1995), reprinted in 35 I.L.M. 32, 60-61 (1996) (invoking General Assembly Resolution 2444 to elaborate principles governing protection of civilian populations and property in armed conflict); see also *The Nuclear Tests Case* (Austl. v. Fr.), 1974 I.C.J. 253, 267 ("It is well recognized that declarations [by states] . . . may have the effect of creating legal obligations"), Stephen M. Schwab, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROC. AM. SOC'Y INT'L L. 301, 303 (1979) (citing OLIVER LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 34-36 (1965)) ("Statements or declarations not binding as treaties may also give rise to reasonable expectations . . . [If they] emanate from a large number of States and purport to deal with a legal matter, they may be regarded in some circumstances as indications of a general consensus amounting to a norm of international law.").

international crime is persuasive evidence of the fact. We approve and adopt its conclusions."¹³⁵ The I.C.J. cited Resolution 96(I) as evidence of the General Assembly's intention to "condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind."¹³⁶ More recently, during the first contentious case to come before it under Article IX of the Genocide Convention,¹³⁷ the I.C.J. cited Resolution 96(I) for the proposition that the crime of genocide "shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations."¹³⁸ In this way, the unanimous and declaratory General Assembly resolution on genocide, as an embodiment of the *jus cogens* prohibition of genocide, represents a source of legal authority in adjudicating claims of genocide.

The *jus cogens* prohibition of political genocide is also expressed in national legislation. International tribunals have examined national law to determine the existence of custom or a general principle of law.¹³⁹ There are several states whose penal codes specifically include "political groups" in the enumerated protected groups. For example, Article 281 of the Ethiopian Penal Code, which forms the basis for trials currently underway in Ethiopia for political genocide committed under the Mengistu regime, provides that whosoever commits certain acts with the intent to destroy a national, ethnic, racial, religious, or political group shall be guilty of genocide.¹⁴⁰ Likewise, Article 311 of the Panamanian Penal Code¹⁴¹ and Article 373 of the Costa Rican Penal Code¹⁴² prohibit genocide perpetrated on account of the victims' political creed. Other national laws, such as Peru's¹⁴³ and Portugal's,¹⁴⁴

135. 3 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 3, 983 (U.S. v. Altstoetter) (1951).

136. Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

137. *See supra* note 108.

138. *See* Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro), 1993 I.C.J. 3, 23 (Apr. 8).

139. *See supra* text accompanying note 93 (listing sources of international law); *see also* Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 21-24 (Apr. 6) (examining municipal nationality law); North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 128-30, 174-76, 225-29 (Feb. 20) (examining national laws regarding continental shelf exploration).

140. *See* Julie V. Mayfield, *The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act*, 9 EMORY INT'L L. REV. 553, 572-73 (1995) (citing PENAL CODE OF THE EMPIRE OF ETHIOPIA OF 1957, art. 281 (NEGARIT GAZETA, Extraordinary Issue No. 1 of 1957)). Under this law, Ethiopia is prosecuting members of the Dergue, a military body established to enforce government policy and ideology and to eliminate members of opposition groups that were deemed "enemies of the Revolution." *Id.* at 559 (quoting DAWIT WOLDE GEORGIS, RED TEARS: WAR, FAMINE AND REVOLUTION IN ETHIOPIA 6 (1989)). The Ethiopian Office of the Special Prosecutor (SPO) indicated that it would "apply only those rules of international humanitarian law which are beyond any doubt part of customary law." *Id.* at 572 (citing Rodolfo Mattarollo, *SPO Working Paper No. 4*, Nov. 25, 1993, at 1). Ethiopia is a signatory to the Genocide Convention.

141. REPUBLICA DE PANAMA CD. PEN., 1993, art. 311.

142. REPUBLICA DE COSTA RICA CD. PEN., 1992, art. 373.

143. PERU CD. PEN. ANOTADO, 1995, art. 129.

144. CD. PEN. PORTUGES, 1986, art. 189 ("[W]hoever, with the intention of destroying in whole or in part, a community or a national, ethnic, racial, religious, or social group" shall be guilty of genocide).

criminalize genocide perpetrated against "social groups," which offers protection to political groups. Similarly, certain national laws provide a "catch all" category. For example, the French legislation outlawing genocide defines the crime as the "carrying out [of] a common plan tending to the destruction in whole or in part of a national, ethnic, racial or religious group, or of a group determined by any arbitrary criteria,"¹⁴⁵ which allows for prosecutions of genocide perpetrated against political groups. And, the Romanian penal code prohibits the destruction of a "collectivity."¹⁴⁶

Discarding political groups from the Genocide Convention created an internally inconsistent human rights regime, because other major international agreements include this category. The prohibition of crimes against humanity prohibits persecutions on "political, racial or religious grounds."¹⁴⁷ Likewise, the provisions of the Refugee Convention protect individuals from persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion."¹⁴⁸ These longstanding instruments reflect the guiding international legal prohibition on the extermination or persecution of individuals on the basis of their political affiliations or opinions. This same principle operates in the *jus cogens* prohibition of genocide at the level of the collectivity.¹⁴⁹ The loophole created by the drafting committee's exclusion

145. C. PÉN. 1995, art. 211-1, 1995 (Law No. 92-684 of July 22, 1992).

146. PENAL CODE OF THE ROMANIAN SOCIALIST REPUBLIC, 1976, art. 357 (defining genocide as "[t]he commission of any of the following acts for the purpose of completely or partially destroying a collectivity or a national, ethnic, racial, or religious group"); see also CÔD. PEN. PORTUGUÊS, art. 189 (prohibiting destruction of "a community").

147. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544. Article 6(c) defined crimes against humanity as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated

Id., 59 Stat. at 1547 (citation omitted). In some ways, the prohibition of crimes against humanity overlaps with that of genocide. The definition in Article 6(c) of the former offense, however, suggests some definitional difficulties, viz., to what extent the offense is still linked to a state of war, applicable only to civilian populations, or a function of state action. See also *infra* note 157; see generally M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 235-62 (1992) (discussing definitional difficulties). Moreover, the *dolus specialis* that distinguishes the crime of genocide—the specific intent to destroy the group—is not an element of the offense of crimes against humanity. See M. N. Shaw, *Genocide and International Law, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY*, *supra* note 98, at 797, 805 (noting that without intent requirement, "the distinction between genocide and ordinary murder would be eroded, as well as that between genocide on the one hand and war crimes and crimes against humanity on the other") (citing U.N. GAOR, 3d Sess., pt. 1, 6th Comm., 69th, 72d, & 73d mtgs. (1948)).

148. Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 137, 139 [hereinafter Refugee Convention]. The Convention was succeeded by the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268, 19 U.S.T. 6223. One scholar has inferred that the Refugee Convention protects more groups than the Genocide Convention as a reaction to criticism that the protection of latter convention were too narrow. See Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 42 n.20 (1983).

149. Political groups may be identified on the basis of their "i) criticism of; ii) interference with; iii) refusal to participate in; [or] iv) refusal to cooperate with, the political activities, or the realization of the political aims, of a persecutor." Sachin D. Adarkar, *Political Asylum and Political Freedom: Moving*

of political groups does not hold up in this context. In contrast, the *jus cogens* prohibition is coextensive with these other norms and provides for a uniform international penal system.

The customary *jus cogens* prohibition of genocide is consistent with the popular understanding of the crime.¹⁵⁰ Lay persons generally assume that genocide means the intentional targeting for destruction of identifiable human groups on a vast scale, in keeping with Lemkin's original conception of the crime,¹⁵¹ and without regard to the "nature" of the protected group. Moreover, victims of severe political persecution consider their experience to be genocide.¹⁵²

Such community standards carry significant legal force under international law. The foundational documents delineating the laws of war include a provision known as the Martens Clause, which preserves a role for the public

Towards a Just Definition of "Persecution on Account of Political Opinion" Under the Refugee Act, 42 UCLA L. REV. 181, 211 (1994) (citations omitted). In identifying political groups, it is important to consider the perceptions of the persecuting authority involved. See Saam Yagasampanthar Murugesu, Immigration Appeal Board Decision M82-1142, Sept. 30, 1983, at 9 (G. Loiselle) ("[T]he crucial test in interpreting political activities is whether the ruling government in the country from which the refuge is sought considers the conduct in question as political activity."), cited in JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 154-55 n.139 (1991); see also HATHAWAY, *supra*, at 154-56 (citing cases regarding claims of imputed political opinion or activity). Victims may be targeted on the basis of their "membership in a political organization, or expression of a political opinion through party membership, political demonstrations, and propaganda distribution." Linda Dale Bevis, "Political Opinions" of Refugees: Interpreting International Sources, 63 WASH. L. REV. 395, 401-02 (1988). At the same time, victims of political genocide need not occupy leadership positions or even manifest membership in formal political organizations. Indeed,

'[w]hile one might expect the authorities to arrest and persecute the leaders and the high profile members of an organization, more often that not, to avoid adverse publicity and political ramifications, the leaders are left alone and the brunt of the persecution is borne by the rank and file members whose rights are easily violated.'

HATHAWAY, *supra*, at 153 (quoting Bakhshish Gill Singh, Canadian Immigration Appeal Board Decision, V87-6246X, July 22, 1987, at 12) (Singh, J., dissenting). Refugee law also recognizes that the decision to remain neutral can constitute a political opinion for the purposes of asylum determination. See HATHAWAY, *supra*, at 155 n.145 ("It is apparent that the applicant has gone out of his way to avoid expressing a dangerous political opinion, but nevertheless . . . he has been deemed . . . to hold political opinions antagonistic to the regime.") (quoting Mario Roberto Gudiel Medina, Immigration Appeal Board Decision V83-6313, Mar. 28, 1984, C.L.I.C. Notes 69.2, at 4-5) (Howard B.). Moreover, individuals have been granted asylum on the basis of imputed political opinion or the belief that they were merely harboring or sympathetic to an opposition political group. See Bevis, *supra*, at 412 ("Opinions can be attributed to persons who do not actually hold them.").

150. See, e.g., B. WHITAKER, REVISED AND UPDATED REPORT ON THE QUESTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, U.N. Doc. E/CN.4/Sub.2/1985/6, at 20 (1985) [hereinafter GENOCIDE REPORT] ("'[G]enocide' in popular modern usage covers many more cases of mass killings than those covered in the Convention."). Sociologists and historians have for the most part abandoned the definition of genocide in the Genocide Convention on the ground that it is too limited as a tool of general analysis and is more relevant as a description of the Holocaust. See CHALK & JONASSOHN, *supra* note 72, at 12-27 (discussing alternative definitions of genocide).

151. Lemkin originally considered the crux of the crime to be the extermination of definable human groups. See LEMKIN, *supra* note 21.

152. See *supra* note 78 (discussing trial in absentia of Pol Pot for genocide). As is the case in Cambodia, the mass killing of suspected guerrilla sympathizers in Latin America was widely considered by the families of victims to be "genocide." See MARK DANNER, THE MASSACRE AT EL MAZOTE 89 (1993); see also GENOCIDE REPORT, *supra* note 150, at 10 ("It could seem pedantic to argue that some terrible mass-killings are legally not genocide . . .").

conscience in shaping the contours of the international norms governing the exercise of war.¹⁵³ The clause highlights the legal and moral bases of humanitarian obligations¹⁵⁴ by making reference not only to law, but “to pre-judicial principles [and] to the sentiments of humanity.”¹⁵⁵ As such, the Martens Clause also provides a principle of interpretation. If “faced with two interpretations—one in keeping with the principles of humanity and moral standards, and one which is against these principles—then we should of course give priority to the former interpretation.”¹⁵⁶

Adjudicatory bodies have invoked the dictates of public conscience when positivistic expressions of humanitarian norms contradict customary law formulations of the same norms. For example, the tribunal in the *Justice Case* appealed to “the moral pressure of public opinion” when it ruled that crimes against humanity may be perpetrated in a time of peace as well as in a time of war.¹⁵⁷ The I.C.J. invoked these principles in the *Military and*

153. The Martens Clause, named after the Russian delegate to the first Hague Conferences, indicates that inhabitants and belligerents remain under the protection of “the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2279–80 (1907). It appears in the preamble of the Hague Conventions of 1899 and 1907, in the main text of Protocol I, and then again in the 1949 Geneva Conventions. See, e.g., Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1805 (1899), Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2279–80 (1907); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3152, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3254, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3424, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3622, 75 U.N.T.S. 287, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1, 1125 U.N.T.S. 3, 7.

154. See HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS* 187 (1990).

155. *The Attitude of States Toward the Development of Humanitarian Law*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT: PROCEEDINGS OF THE 1976 AND 1977 CONFERENCES* 221, 257 (Antonio Cassese ed., 1980) [hereinafter *PROCEEDINGS*] (emphasis omitted). This “language was revolutionary in its recognition that the codified laws of war were incomplete and could supplement and interact with customary laws of war.” Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. REV. 41, 45 (1994).

156. *The Attitude of States Toward the Development of Humanitarian Law*, in *PROCEEDINGS*, *supra* note 155, at 257. In this way, the Martens Clause

is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.

9 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 1327, 1341 (U.S. v. Krupp) (1950)

157. 3 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 954, 979 (U.S. v. Alstoeffer) (1951) Article 6(c) of the Charter of the International Military Tribunal at Nuremberg originally permitted prosecutions for crimes against humanity only for acts that were committed during wartime. In this case, brought under Control Council Law No. 10 which governed domestic prosecutions of Nazi war criminals, the tribunal discarded the war nexus. See Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, art. II(c) (1945), reprinted in 3 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at xviii, xix (1951).

Paramilitary Activities case, noting that the 1948 Geneva Conventions express customary legal principles such that their denunciation

shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil [sic] by virtue of the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.¹⁵⁸

Most recently, the I.C.J. reaffirmed that principles of international law can be derived from the dictates of the public conscience in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.¹⁵⁹

E. *No Principle Exists to Exclude Political Groups from the Prohibition of Genocide*

These sources of international law—the General Assembly resolution condemning the crime of genocide, examples of national legislation criminalizing genocide, and the sentiments of the public conscience—reflect an understanding that no legally justifiable principle exists to distinguish political groups from the other groups in the Genocide Convention. The drafters of the Genocide Convention expressly justified the exclusion of political groups on the ground that political groups were not sufficiently “immutable” or “innate.”¹⁶⁰ This rationale does not explain the inclusion of national and religious groups, whose membership is arguably more voluntary than racial or ethnic groups. For example, while an individual may not change her religious heritage, she may certainly decide whether to engage in religious observances or rituals.

Characteristics that are perceived to be innate need not be biologically based. Membership in political groups may be transmitted by rules of descent that do not involve physical traits, and persecutors may target the children of members of political groups, who are obviously involuntarily affiliated with these groups.¹⁶¹ Moreover, under Article II, the Convention prohibits the

158. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 4, 113 (June 27) (citation omitted).

159. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 809, 827–28 (1996); see also *id.* at 900 (Weeramantry, J., dissenting) (noting that Martens Clause recognizes “the need . . . [for] strongly held public sentiments in relation to humanitarian conduct [to] be reflected in the law”).

160. See *supra* text accompanying note 29.

161. See CAMBODIA, 1975–1979: RENDEZVOUS WITH DEATH, *supra* note 62, app. B, 278 (“If they die, [the opposing forces] will have instructed their children to keep struggling against communists.”) (citing Khmer Rouge propaganda found in *Sharpen the Consciousness of the Proletarian Class to Be as Keen and Strong as Possible*, REVOLUTIONARY FLAGS, Sept.–Oct. 1976, at 33–97); *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935* (1994), U.N. SCOR, 49th Sess., Annex at 16, U.N. Doc. S/1994/1405 (1994) (“Before dawn on 7 April, members of the Presidential Guard went

forced transfer of children, which implies that certain characteristics of the protected groups are not inherent and can be altered through upbringing (especially in religious or national groups). More importantly, immutability is in the eye of the beholder. Persecutors may believe that affiliation with a particular political party, movement, or opinion ascribes certain immutable attributes.¹⁶² As a result, such affiliation may indelibly brand someone as a “dissident” or political enemy, even after disassociation. “[P]ast political affiliation can be as ineradicable a stigma, and as irrevocable a warrant for murder, as racial or ethnic origin.”¹⁶³ In other words, one’s history or past status is not within one’s power to change.

Domestic courts applying the provisions of the Refugee Convention¹⁶⁴ have recognized that groups affiliated by race, religion, ethnicity, or political opinion are related conceptually. In elaborating on the meaning of the term “particular social group” in the Refugee Convention, the United States Board of Immigration Appeals applied the doctrine of *ejusdem generis*¹⁶⁵ and interpreted the term to encompass

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or *in some circumstances it might be a shared past experience such as former military leadership* [W]hatever the common characteristic that defines the group, *it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.*¹⁶⁶

to the homes of moderate opposition members and then killed them and their families”); DANNER, *supra* note 152, at 75 (noting that government forces in El Salvador reported to have ordered massacre of children of suspected guerrilla sympathizers, because “[i]f we don’t kill them now . . . they’ll just grow up to be guerrillas”); KUPER, *supra* note 13, at 127 (noting “there were many executions of families in the Indonesian anticommunist massacres”); François Ponchaud, *Social Change in the Vortex of Revolution, in CAMBODIA, 1975–1978: RENDEZVOUS WITH DEATH*, *supra* note 62, at 151, 165, *see also supra* text accompanying note 66.

162. This point was noted during the drafting of the Genocide Convention. *See supra* note 33. In Cambodia, the Khmer Rouge believed that it would be impossible to assimilate members of the prior regime into the new political order. *See supra* text accompanying note 69.

163. KUPER, *supra* note 13, at 127; *see also id.* at 129 (indicating that Communists in Indonesia “were readily identified from party lists of members, and, particularly in the villages, by intimate knowledge of political affiliation”). Likewise, members of the Lon Nol regime were identified at checkpoints established by the Khmer Rouge. *See supra* text accompanying note 65.

164. Refugee Convention, *supra* note 148. This convention, which entered into force in 1951, is a contemporary of the Genocide Convention.

165. *Ejusdem generis* is a rule of statutory construction that literally means “[o]f the same kind, class, or nature.” BLACK’S LAW DICTIONARY 517 (6th ed. 1990). According to this canon, “where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.” *Id.*

166. *In re Acosta*, No. A-24159781 (Bd. of Immigr. Appeals), 1985 BIA LEXIS 2, at *54 (Mar. 1, 1985) (emphasis added).

This analysis recognizes by way of implication that political groups possess characteristics of immutability and fundamentality in common with racial, religious, and national groups.¹⁶⁷ Political affiliations and the espousal of political opinions are "so fundamental to [individual] identity or conscience that [they] ought not be required to be changed."¹⁶⁸ In other words, regardless of whether one's membership in a political group is voluntary or innate, individuals should not be forced to surrender their political affiliations or renounce their political beliefs in order to avoid persecution, as political expression represents a core human right.¹⁶⁹

The inclusion of political groups within the *jus cogens* prohibition of genocide also reflects the fact that complex and multifaceted motives may underlie persecution.¹⁷⁰ Persecution on the basis of race, religion, or nationality may embody a political dimension.¹⁷¹ In this way, "people persecuted on account of race, religion, or nationality generally become targets

167. See, e.g., *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-27 (1st Cir. 1985) (finding that individuals associated with former government of Ghana could be members of particular social group for purposes of asylum, because they were identifiable by characteristics that were beyond their power to change); *In re Fuentes*, No. A-24841098 (Bd. of Immigr. Appeals), 1988 BIA LEXIS 24, at *9 (Apr. 18, 1988) (stating that past status as police officer is immutable characteristic).

168. *Acosta*, 1985 BIA LEXIS 2, at *54-55.

169. See HATHAWAY, *supra* note 149, at 150-51; see, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) (declaring at Article 18 that "[e]veryone has the right to freedom of thought, conscience and religion"; at Article 19 that "[e]veryone has the right to freedom of opinion and expression"; and at Article 20 that "[e]veryone has the right to freedom of peaceful assembly and association").

170. The U.N. High Commissioner on Refugees has recognized that refugees may be subject to persecution on overlapping grounds. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 1, 19 (1979); see, e.g., *In re Fuentes*, 1988 BIA LEXIS 24, at *9 (holding that persecution can stem from multiple motives). Recognizing multiple grounds of persecution would avoid the perverse reasoning of the Indicting Chamber of the Court of Appeals of Lyons, who ruled that Klaus Barbie could not be prosecuted for his persecution of Professor Marcel Gompel, who was both Jewish and a member of the Resistance, because it was not clear if Gompel was targeted "'in his capacity as a Jew,' or in his capacity as a member of the Resistance." Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 339 (1994) (quoting Judgment of Dec. 20, 1985, ¶ 18).

171. For example, the characterization of the killing in Rwanda as "age old tribal animosities" disguises the role played by the two extreme political groups, the National Republican Movement for Development and Democracy and the Coalition for the Defence of the Republic, who many believe orchestrated the killing in Rwanda in order to consolidate political power and eliminate political opposition. See Alex de Waal, *Genocide in Rwanda*, 10 ANTHROPOLOGY TODAY 1 (1994). The *interahamwe*, militias trained by the Presidential Guard and the Rwandan armed forces, committed violations against moderate Hutus and Hutus who opposed the regime of Rwanda's former President. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, 49th Sess., Annex at 15-16, U.N. Doc. S/1994/1405 (1994); see also HUMAN RIGHTS WATCH/AFRICA, GENOCIDE IN RWANDA: APRIL-MAY 1994, at 3 (1994) ("Within an hour of the plane crash, the Presidential Guard had set up roadblocks around the capital of Kigali and had begun liquidating key members of the moderate opposition."). See generally HUMAN RIGHTS WATCH, PLAYING THE "COMMUNAL CARD": COMMUNAL VIOLENCE AND HUMAN RIGHTS, at viii (1995) ("[W]e have seen that a government's willingness to play on existing communal tensions to entrench its own power or advance a political agenda is a key factor in the transformation of those tensions into communal violence." (i.e., violence between ethnic, racial or religious groups)).

for persecution because the persecuted group as a whole—whether it be a racial, religious, or ethnic group—is perceived by the government as unreliable or disloyal.”¹⁷² Finally, despite the blithe assurances of the Brazilian delegate to the Ad Hoc Committee,¹⁷³ conflicts between groups defined primarily by their political affiliations or opinions may be as intractable as conflicts between groups defined primarily along racial or ethnic lines, as studies of the violence in Latin America during the Cold War demonstrate.¹⁷⁴

Framers of the Genocide Convention opposed the inclusion of political groups on the ground that it would hinder states’ abilities to oppose internal rebellion.¹⁷⁵ States possess legitimate rights to enforce and protect their territorial integrity in situations of civil wars of secession or liberation.¹⁷⁶ At the same time, however, states are not free to employ any means necessary to accomplish this end.¹⁷⁷ Rather, the means of waging war (“*jus in bello*”) have for generations been governed by humanitarian law¹⁷⁸ and more generally applicable international human rights norms. The laws of genocide in particular constrain the actions that take place under these circumstances.¹⁷⁹

172. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L. J. 505, 551 (1993); see also KUPER, *supra* note 56, at 39 (“[G]enocides against racial, national, ethnic or religious groups are generally a consequence of, or intimately related to, political conflict.”).

173. See *supra* text accompanying note 31.

174. See generally THE CENTRAL AMERICAN CRISIS READER (Robert S. Leikin & Barry Rubin eds., 1987); EL SALVADOR: CENTRAL AMERICA IN THE NEW COLD WAR (Marvin E. Gettleman et al. eds., 1981).

175. See *supra* text accompanying note 45.

176. See, e.g., Duncan B. Hollis, Note, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 806–07 (1995) (arguing that Russia has legally recognized claim to oppose Chechen separatism).

177. See 1907 Hague Convention (IV), Regulations Respecting the Laws and Customs of War on Land, art. 22, 36 Stat. at 2301 (“The right of belligerents to adopt means of injuring the enemy is not unlimited.”).

178. See Jean Pictet, *International Humanitarian Law: Definition*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW at xix, xix (Jean Pictet ed., 1988) (“The purpose of international humanitarian law is to regulate hostilities in order to attenuate hardship.”). In addition to general international law, civil wars are governed by Article 3 common to the four Geneva Conventions and Protocol II. See *supra* note 153 (citing four Geneva Conventions); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13, 1125 U.N.T.S. 609, 615. Working together, these instruments afford armed rebels “with the fundamental guarantees of humane treatment.” Robert Kogod Goldman, *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT’L L. & POL’Y 49, 63 (1993).

179. The Genocide Convention at Article I makes clear that the prohibition of genocide is operative in times of peace or conflict: “[G]enocide, whether committed in time of peace or in time of war, is a crime under international law.” Genocide Convention, *supra* note 7, art. I, 78 U.N.T.S. at 280; see also Final Report, *supra* note 125, at 24 (“[I]rrespective of the context in which it occurs (for example, in peacetime, internal strife, international armed conflict or whatever the general overall situation) genocide is a punishable international crime.”). This principle was reaffirmed by the I.C.J. in its Advisory Opinion on the Threat or Use of Nuclear Weapons when the Court noted that the prohibition of genocide would be invoked with respect to war if the element of intent was demonstrated. See Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (1996). Moreover, some human rights conventions allow for limited derogation in times of war, but not with respect to the core *jus cogens* norms such as the prohibition of genocide. See Dietrich Schundler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 935, 938 (1982).

Arbitrary justice is the result if victims of political genocide are prohibited from bringing claims of genocide. The impulse to exterminate a human group is the same in political genocide as in other types of genocide, and yet victims of political genocide are denied redress under the Genocide Convention alone.¹⁸⁰ Likewise, the inclusion of political groups in the purview of the prohibition would deny perpetrators the opportunity to recharacterize the victim group or obscure their actions behind the defense of political friction or opposition.¹⁸¹ Political genocide may be all the more dangerous, because states can camouflage their actions with the color of legitimacy by declaring a "state of emergency" or "state of siege" justifying the exercise of special powers.¹⁸² As a result, individual perpetrators responsible for political genocide, such as "Deuch," the administrator of Tuol Sleng prison,¹⁸³ could escape liability through this loophole in the Genocide Convention.

IV. CONCLUSION

This discussion of the origins of the Genocide Convention reveals the manner in which states may attempt to limit the full force and scope of *jus cogens* norms when drafting human rights treaties.¹⁸⁴ By definition, *jus cogens* norms are a higher source of law and, as such, must take precedent over contradictory provisions in treaties—even if those treaties purport to codify the norm. In this way, when faced with a claim of genocide, judicial fora should apply the full customary *jus cogens* prohibition of genocide, as evinced in the General Assembly Resolution condemning the crime.

The scope of the prohibition of genocide is of great practical importance. Events of the last few years indicate a resurgent international commitment to the creation of judicial institutions to try individuals for international crimes. Applying the customary *jus cogens* prohibition of genocide, for example, would allow for the charges of genocide to be brought in the International Criminal Tribunal for Rwanda against the killers of "moderate" Hutus in Rwanda, a mass murder campaign which the Genocide Convention alone would not cover. Likewise, as nations incorporate the international prohibition

180. The redress of victims is a primary goal of international human rights law. See Velasquez Rodriguez Case, Inter-Am Ct. H.R. 43, OEA/ser. L./V./3.19, doc. 13 (1988), reprinted in 9 HUM. RTS. L.J. 212, 233 (1988) ("The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages . . .").

181. See Shaw, *supra* note 147, at 808 (observing that states may "seek to defend themselves against charges of genocide by re-defining the target group as political and not, for example, as ethnic or religious").

182. See KUPER, *supra* note 13, at 145.

183. See KIERNAN, *supra* note 59, at 314–16 (describing massacres of suspected traitors at Tuol Sleng prison); Duffy, *supra* note 10, at 88; see also *supra* text accompanying note 76.

184. This potentiality was anticipated by the United Kingdom delegate to the Ad Hoc Committee on Genocide who questioned the propriety of a convention on the subject of genocide, given that genocide was already a crime under international law. See *supra* note 23.

of genocide in their domestic law and as members of the international community draft subject matter jurisdiction statutes for international fora—for example, for the impending International Criminal Court or for an ad hoc tribunal to try members of the Khmer Rouge for their genocidal acts in Cambodia—they should incorporate the full scope of the *jus cogens* prohibition of genocide as opposed to the more limited definition of genocide provided by the Genocide Convention. In this way, judicial fora faced with claims by victims of human rights abuses under international law will not ratify the results of political compromises by state leaders intent on protecting their own interests ahead of those of individuals at risk and the perpetrators of political genocide will be held accountable for the full scope of their crimes.