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David Shea Bettwy

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**THE GENOCIDE CONVENTION AND UNPROTECTED GROUPS:  
IS THE SCOPE OF PROTECTION EXPANDING UNDER CUSTOMARY  
INTERNATIONAL LAW?**

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*David Shea Bettwy\**

**INTRODUCTION**

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention) provides that genocide is a crime that is perpetrated on “a national, ethnical, racial or religious group, as such.”<sup>1</sup> The exhaustive list of protected groups is the product of considerable deliberation and forethought by the drafters and has sustained itself through subsequent corresponding codification at both the domestic and international levels. At the same time, the list has been the subject of considerable criticism and debate concerning its narrowness.<sup>2</sup> By virtue of the fact that norms of customary international law, apart from conventional law, are binding on all states that have not persistently objected, it is worth investigating whether there exists a trend toward a larger scope of protected groups as a matter of customary law. International case law and state practice, for example, have in several instances challenged the exclusiveness of the Genocide Convention’s list. Such an investigation reveals that sources of custom contain only scattered suggestions of a broader interpretation of protected groups. So, it does not appear that customary international law has enlarged the scope of protected groups set forth in the Genocide Convention, with the possible exception of indigenous peoples.

Part II of this Article explains the relevance and importance of monitoring customary international law concerning genocide. Then, using the *ejusdem generis*<sup>3</sup> approach, Part III analyzes the characteristics of protected groups under the Genocide Convention to derive three primary common characteristics. Part IV applies customary international law to those characteristics to determine whether additional groups are entitled to protection. The Article concludes, as stated above, that customary

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\* LL.M., International Human Rights Law, National University of Ireland, Galway; B.A., University of Notre Dame. The article was written in partial satisfaction of the LL.M. degree. The author wishes to thank William Schabas, former Director of the Irish Centre for Human Rights, for his guidance.

<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

<sup>2</sup> See WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 117 (2d ed. 2009).

<sup>3</sup> See *id.* at 150 (“General rules of interpretation would suggest an *ejusdem generis* approach; . . . ‘[additional] groups’ must in some way be similar to or analogous with those that are enumerated.” (footnote omitted)).

international law is not developing toward protection of additional groups, with the possible exception of indigenous peoples.

## I. THE RELEVANCE OF RE-EXAMINING CUSTOMARY LAW

### A. Conception of Genocide

The nature of the term's conception strongly suggests that genocide, the destruction of "human groups,"<sup>4</sup> is a violation of customary international law, which international convention confirms. In other words, the concept of genocide is not an invention of international legislation. Genocide has been described as "contrary to moral law"<sup>5</sup> and its translation into the legal positivist sphere has involved a continuous struggle to devise a universal definition that has practical application. The crime has been prevalent "at all periods of history"<sup>6</sup> and the term "genocide" was not popularized until after the 20th century atrocities in Nazi Germany. The "crime without a name"<sup>7</sup> was first labeled "genocide" in print in 1944 by Raphael Lemkin in *Axis Rule in Occupied Europe*.<sup>8</sup> The term subsequently gained universal recognition by way of the prosecutions of responsible Nazi members at the International Military Tribunal, which led to the codification of its legal prohibition by the United Nations.<sup>9</sup>

The fact that the inception and subsequent defining of genocide—a crime prevalent in all periods of history—in the 1940s was influenced primarily by a single historical event raises questions at the present time regarding the definition of genocide, given the prevalence of widespread atrocities in our contemporary world. Indeed, the *travaux préparatoires* of the Genocide Convention confirm that the drafters used the events of the Jewish Holocaust as guidance in devising the legal definition.<sup>10</sup> Max du Plessis notes that the definition of genocide provided in Article II of the Genocide Convention reflects "a preoccupation among the drafters of the Convention

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<sup>4</sup> G.A. Res. 96 (I), U.N. Doc. A/64/Add.1 (Dec. 11, 1946) [hereinafter G.A. Res. 96 (I)].

<sup>5</sup> *Id.*; see Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) [hereinafter I.C.J. Advisory Opinion].

<sup>6</sup> Genocide Convention, *supra* note 1, at 278.

<sup>7</sup> Sergey Sayapin, *Raphael Lemkin: A Tribute*, 20 EUR. J. INT'L L. 1157, 1159 (2009) (quoting Winston Churchill).

<sup>8</sup> See SCHABAS, *supra* note 2, at 31–34.

<sup>9</sup> See *id.* at 43–49; Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 147 (1947) ("The evidence produced at the Nuremberg trial gave full support to the concept of genocide." (footnote omitted)).

<sup>10</sup> See Basic Principles of a Convention on Genocide Proposed by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948, Ad Hoc Comm. on Genocide, art. I, U.N. Doc. E/AC.25/7 (1948) ("The crime of genocide is organically bound up with Fascism-Nazism . . ."); U.N. ECOSOC, Report of the Ad Hoc Comm. on Genocide, 4th mtg. at 10–11, U.N. Doc. E/AC.25/SR.4 (Apr. 15, 1948) ("The aim of the convention was to prevent a repetition of the atrocities perpetrated during the last war.").

with the Nazi extermination of the Jews in World War II.”<sup>11</sup> David Nersessian suggests the possibility that, in becoming protected groups under conventional law, racial and religious groups in particular may have benefited from the convenience of the historical context provided by the Jewish Holocaust.<sup>12</sup> If accepted that the genocide is contrary to “moral law,” then its legal prohibition is an evolving concept influenced by a continuous effort to address the truest sense of the crime. Since the Genocide Convention is a codification of genocide law as it existed in customary law<sup>13</sup> half a century ago, customary law today may define genocide more broadly. As John Quigley notes, “a conclusion that a particular situation involves genocide is not tantamount to equating it with the Holocaust of World War II.”<sup>14</sup>

Another compelling reason to reconsider customary law to investigate the scope of protected groups is that a number of groups were excluded from the protection of the Genocide Convention and their inclusion has been debated by scholars and legislators as early as the drafting of the Convention. Drafters did consider ideological, linguistic, economic, and political groups before ultimately excluding them.<sup>15</sup> One of the first codifications of customary law on the subject, U.N. General Assembly Resolution 96 (I), established a non-exhaustive list of protected groups in 1946.<sup>16</sup> The resolution has been referenced widely and deemed a relevant source of customary law.<sup>17</sup> Furthermore, many scholars from a variety of disciplines have proposed definitions of genocide that entail a larger scope of protected groups.<sup>18</sup>

## B. Conventional *vis-à-vis* Customary International Law

The consideration of customary law in addition to conventional law is essential in international legal practice and, considering what is at stake, it is certainly no less essential when trying to determine the scope of the definition of the crime of genocide. Steven Ratner et al. note that “[t]he status of genocide under customary international law is significant because it determines

<sup>11</sup> Max du Plessis, *ICC Crimes, in THE PROSECUTION OF INTERNATIONAL CRIMES* 35, 36 (Ben Brandon & Max du Plessis eds., 2005).

<sup>12</sup> See DAVID NERSESSIAN, *GENOCIDE AND POLITICAL GROUPS* 62 (2010).

<sup>13</sup> See Genocide Convention, *supra* note 1, art. I (confirming the crime of genocide under international law); I.C.J. Advisory Opinion, *supra* note 5, at 12 (“the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”).

<sup>14</sup> John Quigley, *Introduction to GENOCIDE IN CAMBODIA* 1, 2 (Howard J. De Nike et al. eds., 2000) [hereinafter *GENOCIDE IN CAMBODIA*].

<sup>15</sup> See SCHABAS, *supra* note 2, at 117.

<sup>16</sup> See G.A. Res. 96 (I), *supra* note 4 (“[G]enocide is a crime . . . whether the crime is committed on religious, racial, political or any other grounds . . .”).

<sup>17</sup> See SCHABAS, *supra* note 2, at 56; see generally *id.*, at 56 n.207 (listing instruments and case law citing G.A. Res. 96 (I)).

<sup>18</sup> See generally ADAM JONES, *GENOCIDE* 15–18 (2006) (listing proposed definitions from notable scholars from 1959 to 2003, most of which describe targets of genocide as “groups” or “collectivities” with flexible or no qualification).

the obligations of all states . . . whether or not they are party to the Convention.”<sup>19</sup> Oppenheim’s *International Law* affirms that “treaties have to be interpreted and applied against the background of customary international law.”<sup>20</sup> The International Court of Justice (ICJ) asserted that the codification of principles “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.”<sup>21</sup> In regards to the relationship between convention and custom, Nersessian’s proposition that international law tends to set “*minimum* standards for human rights”<sup>22</sup> suggests that convention establishes, as Beth Van Schaack puts it, “only a basic minimum”<sup>23</sup> that customary law may build upon. If the prohibition of genocide—specifically the scope of protected groups—in customary law does not match squarely the provisions of the Genocide Convention, then it follows that the legal prohibition of genocide cannot rely solely on the provisions of the Genocide Convention.

Van Schaack, a proponent of the inclusion of political groups among the protected groups, points out that the practice of exercising universal jurisdiction in prosecuting genocide suspects is an indication that at least one significant aspect of the Genocide Convention has undergone expansion in customary law. The drafting committee discussed the issue of jurisdiction and ultimately rejected universal jurisdiction over crimes of genocide.<sup>24</sup> Article VI of the Convention states that genocide suspects must be tried “by a competent tribunal of the state in the territory of which the act was committed” thereby establishing the principle of territorial jurisdiction for genocide adjudication and attempting to preclude the exercise of universal jurisdiction.<sup>25</sup> Schabas describes this as a “great shortcoming,” noting that “where there was political will, prosecutions on [the] basis [of universal jurisdiction] have proceeded.”<sup>26</sup>

The Supreme Court of Israel asserted, in *Israel v. Eichmann*, that, in spite of Article VI, States possess “the universal *power* . . . to prosecute for crimes of this type” under customary international law.<sup>27</sup> Rather than purporting to overrule a provision of the Genocide Convention, the *Eichmann* court described Article VI, in line with Nersessian’s proposition, as establishing only “a *compulsory minimum*” as regards to jurisdiction “which

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<sup>19</sup> STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 42–43 (3d ed. 2009).

<sup>20</sup> 1 OPPENHEIM’S INTERNATIONAL LAW 31 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>21</sup> See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, 424 (Nov. 26).

<sup>22</sup> See NERSESSIAN, *supra* note 12, at 128–29.

<sup>23</sup> See Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 YALE L.J. 2259, 2277 (1997).

<sup>24</sup> See SCHABAS, *supra* note 2, at 84, 411–16.

<sup>25</sup> See Genocide Convention, *supra* note 1, art. VI.

<sup>26</sup> See SCHABAS, *supra* note 2, at 426.

<sup>27</sup> See *Attorney-Gen. of Isr. v. Eichmann*, 36 I.L.R. 277, 303–04 (Isr. S. Ct. 1962) (emphasis added).

did not affect the existing jurisdiction of States under customary international law.”<sup>28</sup> As Schabas notes, the *Eichmann* court’s “audacious proclamation of a customary norm has gone relatively unchallenged,” and “[a]uthority continues to grow in support of the proposition that . . . States may exercise universal jurisdiction over the crime of genocide.”<sup>29</sup> This transition from territorial to universal jurisdiction suggests that, where the Genocide Convention contains deficiencies, customary law is capable not only of filling in the gaps but also of exerting overriding legal force.

Recognizing that a discrepancy between the provisions of the Genocide Convention and customary law is more than an academic exercise is vital, since the consequences of applying deficient conventional law could hamper the prosecution of perpetrators of genocide. If in fact customary law suggests a broader interpretation of the scope of protected groups, strict application of the Genocide Convention without regard to customary law will result in the failure to prosecute the crime. Schabas argues that the “so-called lacunae” of the Genocide Convention have been filled by the law on crimes against humanity,<sup>30</sup> which covers a non-exhaustive list of groups.<sup>31</sup> On the other hand, Caroline Fournet argues that, since crimes against humanity and genocide are “two distinct legal qualifications,” classifying a case of genocide as a crime against humanity “is simply an aberration and an absurdity.”<sup>32</sup> Certainly, the label of genocide is more shocking and attaches a greater stigma,<sup>33</sup> if only by virtue of its association with the atrocities of the Jewish Holocaust. If in fact a crime constitutes genocide under “moral law,” it would be inadequate to label it as a lesser crime. The legal application of the prohibition of genocide would fall short of fulfilling its objective. Chalk points out that the exclusion of political and social groups from the Genocide Convention ignores millions of deaths that would otherwise count as deaths by genocide.<sup>34</sup>

<sup>28</sup> See *id.*, 36 I.L.R. 5, 11 (Summary) (Isr. S. Ct. 1962).

<sup>29</sup> See SCHABAS, *supra* note 2, at 429.

<sup>30</sup> See *id.* at 119.

<sup>31</sup> See generally United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–17, 1998, *Rome Statute of the International Criminal Court*, art. 7(1), U.N. Doc. A/CONF.183/9 (Jul. 17, 1998) [hereinafter Rome Statute].

<sup>32</sup> See CAROLINE FOURNET, *THE CRIME OF DESTRUCTION AND THE LAW OF GENOCIDE* 50 (2007).

<sup>33</sup> See, e.g., Rep. of the Int’l Comm’n of Inquiry on Darfur to the U.N. Secretary General, ¶ 2,

U.N. Doc. S/2005/60 (Jan. 31, 2005) (“The conclusion that no genocidal policy has been pursued and implemented . . . should not be taken in any way as detracting from the gravity of the crimes perpetrated.”) [hereinafter Darfur Report]; U.N. Econ. & Soc. Council, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, ¶ 14, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (by B. Whitaker) (“Genocide is the ultimate crime and the gravest violation of human rights it is possible to commit”) [hereinafter Whitaker Report].

<sup>34</sup> See Frank Chalk, *Redefining Genocide*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 50 (G.J. Andreopoulos ed., 1997) (“ignor[es] 15 to 20 million Soviet civilians

### C. Protected Groups Are Not Adequately Defined

Another reason to re-investigate customary law is to find clarity. The Genocide Convention's list of protected groups, although restrictive, contains vague terms without supplementary criteria. Antonio Cassese criticizes the Convention's lack of criteria for protected groups as a "serious" omission.<sup>35</sup> The International Criminal Tribunal for Rwanda (ICTR) stated that "the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof."<sup>36</sup> Likewise, the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that "to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise" and, accordingly, suggested that targeted groups be categorized based on the specific context of each case.<sup>37</sup> As the categories of protected groups are "social constructs, not scientific expressions,"<sup>38</sup> enumerated in the Convention, unaccompanied by suggested definitions, customary law is needed to clarify the scope of protected groups.

### D. The Sources of Customary International Law

The two elements of customary international law are state practice and *opinio juris sive necessitatis*<sup>39</sup> or *opinio juris*, the "recognition that a rule of law or legal obligation is involved."<sup>40</sup> Pursuant to article V of the Genocide Convention, a clear majority of states adopted the "racial, ethnic, religious, and national" formula verbatim or merely inserted a reference to article II of the Convention.<sup>41</sup> Still, state practice does not constitute customary law without

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liquidated . . . between 1920 and 1939; . . . roughly 300,000 mentally impaired and mentally ill Germans and others murdered by the Nazis; . . . thousands of homosexuals killed by the Nazis because of their sexual orientation; . . . [and a] million or more Khmer murdered by the state and the Communist party of Kampuchea . . . from 1975 to 1978.").

<sup>35</sup> See Antonio Cassese, *International Criminal Law*, in INTERNATIONAL LAW 739 (Malcolm Evans ed., 2006).

<sup>36</sup> See Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 55 (Dec. 6, 1999), <http://www.unictr.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf>; Prosecutor v. Musema, Case No. ICTR-96-13-I, Judgment and Sentence, ¶ 161 (Jan. 27, 2000), <http://www.unictr.org/Portals/0/Case/English/Musema/judgement/000127.pdf>.

<sup>37</sup> See Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), <http://www.icty.org/x/cases/jelisc/tjug/en/jel-tj991214e.pdf>.

<sup>38</sup> See SCHABAS, *supra* note 2, at 129.

<sup>39</sup> See Vienna Convention on the Law of Treaties, art. 38, May 23, 1969, 1155 U.N.T.S. 332 [hereinafter Vienna Convention].

<sup>40</sup> See North Sea Continental Shelf (Ger. v. Den; Ger. v. Neth.), Judgment, 1969 I.C.J. 4, ¶ 74 (Feb. 20).

<sup>41</sup> See NERSESSIAN, *supra* note 12, at 112–13.

evidence of *opinio juris*. The ICJ noted that instances of state compliance with the 1958 Geneva Conventions on the Continental Shelf exhibited “acting . . . in the application of the Convention” without demonstrating a recognition of being bound by a rule of law. This could not be taken to infer “a new rule of customary international law.”<sup>42</sup> Similarly, the copy-and-pasting of the four protected groups of the Genocide Convention into domestic code does not necessarily demonstrate recognition of having to limit the enumeration to those groups under a rule of law.

As Mansell explains, detecting *opinio juris* is first and foremost complicated by the inherent difficulty of deriving a “mental element” from a “non-sentient legal personality.”<sup>43</sup> Examples of state practice required to evidence *opinio juris* include: “official government statements, diplomatic exchanges between governments, the opinions of national legal advisers, national legislation, bilateral treaties, decisions of national courts, and possibly also voting patterns of a state in an international organisation.”<sup>44</sup>

Therefore, a most useful source providing evidence of customary law consists of legislative and judicial work at the international level. Nersessian notes, for example, that state participation in “multilateral drafting conventions can evidence customary international law.”<sup>45</sup> The drafting of the Genocide Convention in particular provides useful evidence of state practice as it was adopted by the General Assembly, an international body composed of representatives from every United Nations member State. The ICTY has listed the following sources as guides for interpreting the crime of genocide in international law: the Genocide Convention; “the object and purpose of the Convention as reflected in the *travaux préparatoires*,” case law from domestic adjudication and international *ad hoc* tribunals; the publications of international authorities; the preparatory work of the Report of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind; and the preparatory work of the Rome Statute for the International Criminal Court.<sup>46</sup>

### III. PROTECTED GROUPS AND UNDERLYING CHARACTERISTICS

If customary legal practice is to enlarge the scope of protected groups provided by the Genocide Convention, it must select groups whose addition would be in line with the object and purpose of the Convention. Thus, these

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<sup>42</sup> See North Sea Continental Shelf, *supra* note 40, ¶ 74.

<sup>43</sup> See WADE MANSELL, PUBLIC INTERNATIONAL LAW 43 (Univ. of London External Press 2006).

<sup>44</sup> See *id.*

<sup>45</sup> See NERSESSIAN, *supra* note 12, at 98.

<sup>46</sup> See Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 501 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 541 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

new groups would have to be characteristically similar to the four groups—national, ethnic, racial and religious—listed.<sup>47</sup> According to the ICJ, “[t]he drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which . . . they would exclude.”<sup>48</sup> Schabas’s “four-corner” depiction posits that the drafters of the Genocide Convention “viewed the four groups in a dynamic and synergistic relationship” and that the “search for autonomous meanings” is therefore impractical.<sup>49</sup> Similarly, the ICTY notes that “the preparatory work of the [Genocide] Convention shows that setting out such a list was designed more to describe a single phenomenon.”<sup>50</sup> While Schabas advances his theory in opposition to an expansive interpretation of the scope of protected groups, he at least signifies that the four groups are united by underlying characteristics that would have to comprise additional protected groups for the object and purpose of the Genocide Convention to be preserved.

### A. Keeping the Crime of Genocide Prestigious

The interest in maintaining the prestige of the crime of genocide is an ongoing force that limits the scope of protected groups. The fact alone that the General Assembly’s interpretation of groups protected under international law transformed in only two-years’ time from a non-exhaustive list in Resolution 96(I) to the exhaustive four-group list of the Genocide Convention is telling.<sup>51</sup> The ICTY prosecutor, Mr. Eric Ostberg, in his opening statement asserted that, “in the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation” and that a strict interpretation is needed to “justify the appellation of genocide as the ‘ultimate crime.’”<sup>52</sup> The *travaux préparatoires* of the Genocide Convention and subsequent sources of custom reflect an ongoing vigilance in limiting the scope of protected groups as a means of avoiding too broad an interpretation of genocide under international law.

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<sup>47</sup> See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 511–16 (Sep. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (using the same sequence of logic to find that the Tutsi constituted a protected group under the Genocide Convention); See SCHABAS, *supra* note 2, at 150.

<sup>48</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 194 (Feb. 26).

<sup>49</sup> See SCHABAS, *supra* note 2, at 129–31.

<sup>50</sup> See Prosecutor v. Krstić, *supra* note 46, ¶¶ 555–56.

<sup>51</sup> See U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., U.N. Doc. A/C.6/SR.75 (Oct. 15, 1948) (discussing the inclusion of “political” grounds in the General Assembly resolution).

<sup>52</sup> See Prosecutor v. Karadžić and Mladić, Case No. IT-95-18-I, Transcript of Hearing, Opening Statement of Eric Ostberg, Prosecutor of the ICTY at 25 (Int’l Crim. Trib. for the Former Yugoslavia Jun. 27, 1996), <http://www.icty.org/x/cases/karadzic/trans/en/960627it.htm>.

### 1. *Exclusion of Groups from the Genocide Convention*

Most fundamentally, the Genocide Convention and the *travaux préparatoires* strongly suggest that, contrary to Van Schaack's proposition that the Convention merely sets a "basic minimum,"<sup>53</sup> the enumeration of protected groups was intended to be exhaustive. Article II sets both the minimum and the maximum scope of protected groups. The extensive discussion over potential protected groups and their subsequent exclusion<sup>54</sup> in the course of drafting suggests caution and selectivity in developing the list. Schabas points out that "there is no question the drafters intended to list the protected groups in an exhaustive fashion"<sup>55</sup> and that the Convention "does not even invite application to what might be called analogous groups."<sup>56</sup>

As to the exclusiveness of the enumeration of protected groups, the debate over including political groups illustrates the general effort to keep the list narrowed to only those groups indisputably protected under international law. The inclusion of political groups—a type of group the General Assembly had listed in Resolution 96 (I)—sparked considerable debate among the drafters of the Genocide Convention. Ultimately, after at first deciding to retain political groups<sup>57</sup> and then reopening the debate,<sup>58</sup> the committee erased political groups from the enumeration. Adam Jones notes that the inclusion of political groups was ruled out even in "the twilight of the Stalinist era" when "it was clear that political groups would play a prominent if not dominant role as targets for destruction."<sup>59</sup> Indeed, the *travaux préparatoires* show that delegates were well aware of the historical and impending justifications for addressing the protection of political groups from genocide.<sup>60</sup> Although it has been suggested that the exclusion of political groups was based on efforts by the Soviet Union in the drafting stages to "put Soviet practices beyond the realm of inquiry,"<sup>61</sup> the *travaux préparatoires* suggest that the Soviet Union was only one of several opposing States<sup>62</sup> in a debate that was concerned predominantly with legitimate practical issues. Schabas ruled out the

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<sup>53</sup> See Van Schaack, *supra* note 23, at 2277.

<sup>54</sup> See U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., *supra* note 51, at 115.

<sup>55</sup> See SCHABAS, *supra* note 2, at 151.

<sup>56</sup> See *id.* at 117.

<sup>57</sup> See U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., *supra* note 51, at 115.

<sup>58</sup> See U.N. GAOR, 6th Comm., 3d Sess., 128th mtg., U.N. Doc. A/C.6/SR.128 (Nov. 29, 1948).

<sup>59</sup> See ADAM JONES, GENOCIDE 11 (2006).

<sup>60</sup> See, e.g., U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., *supra* note 51, at 114 ("The historical examples which had been given showed that the political group really stood in need of protection, for political hatred was now tending to replace religious hatred.").

<sup>61</sup> See NERSESSIAN, *supra* note 12, at 106.

<sup>62</sup> See SCHABAS, *supra* note 2, at 160 ("The Soviet views were shared by a number of other States for whom it is difficult to establish any geographic or social common denominator: Lebanon, Sweden, Brazil, Peru, Venezuela, the Philippines, the Dominican Republic, Iran, Egypt, Belgium, and Uruguay.").

possibility, arguing that there is insufficient evidence for the theory that the committee's exclusion of political groups stemmed from Soviet ulterior motives.<sup>63</sup> For this particular discussion, it is noteworthy that the committee voted unmistakably in favor (29 to 13, with 9 abstentions)<sup>64</sup> of excluding political groups, even faced with the reality that political groups constituted an especially vulnerable group.

In further support of the exclusiveness of protected groups, the drafters excluded a number of other groups that had at some point been brought to the table for consideration. These included ideological,<sup>65</sup> linguistic,<sup>66</sup> and economic groups.<sup>67</sup> Overall, the drafters tried to avoid groups whose inclusion would be unnecessary or impractical, favoring instead the tightest enumeration possible.<sup>68</sup> As a whole, the *travaux préparatoires* demonstrate a dominant interest in setting a scope of protected groups in the Convention defined by only those groups unquestionably and most widely accepted by the international community as protected under international law.

## 2. *Subsequent Refusal to Include Additional Groups*

Political and other groups have re-entered the debate on protected groups in the drafting of international documents and faced the same result as in the drafting of the Genocide Convention. The International Law Commission (ILC), in developing the Draft Code of Offences Against the Peace and Security of Mankind, entertained a non-exhaustive list of protected groups,<sup>69</sup> but eventually decided on the original four-group exhaustive list for

<sup>63</sup> See *id.*

<sup>64</sup> See U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., *supra* note 51, at 115.

<sup>65</sup> See *Prevention and Punishment of Genocide, Comments of Governments on the Draft Convention Prepared by the Secretariat* (Document E/477), U.N. Econ. & Soc. Council, U.N. Doc. E/623/Add.4, reproduced in 1 HIRAD ABTAHI & PHILIPPA WEBB, *THE GENOCIDE CONVENTION* 639–40 (2008); See also U.N. GAOR, 6th Comm., 3d Sess., 74th mtg. at 98, U.N. Doc. A/C.6/SR.16-140 (1948).

<sup>66</sup> See U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, § 2, art. 1, U.N. Econ. & Soc. Council, U.N. Doc. E/447 (Jun. 26, 1947) [hereinafter *Draft Convention*]; U.N. Secretary-General, *Report and the Draft Convention of the General Secretariat*, U.N. Doc. A/AC.10/41 (Jun. 26, 1947); *Draft Convention on the Crime of Genocide*, U.N. GAOR, 6th Comm., 2d Sess., appendix II, art. 1, U.N. Doc. A/362 (Aug. 25, 1947); U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., *supra* note 51, at 115.

<sup>67</sup> See *United States of America: Amendments to the draft Convention for the prevention and punishment of the crime of genocide (E/794)*, U.N. GAOR, 6th Comm., 3d Sess., U.N. Doc. A/C.6/214 (Oct. 4, 1948); U.N. GAOR, 6th Comm., 74th mtg. at 100, 103, U.N. Doc. A/C.6/SR.74 (Oct. 14, 1948).

<sup>68</sup> See, e.g., U.N. ECOSOC, Report of the Ad Hoc Comm. on Genocide, 4th mtg. at 11–12, U.N. Doc. E/AC.25/SR.4 (Apr. 15, 1948) (“Mr. LIN (China) suggested the inclusion of . . . political groups . . . , but warned against making the definition needlessly lengthy. There was, in fact no good reason why social, economic and other groups should not be included, or even why no mention of sex distinction should be made, because there again it was possible to envisage separate groups.”).

<sup>69</sup> For example, see Rep. of the Comm'n to the General Assembly of Its Forty-First Session, , 41st Sess., May 2–July 21, 1989, ¶ 160, [1989] 2 Y.B. Int'l L. Comm'n, U.N. Doc.

the same reason underlying the removal of political groups from the final enumeration in the Genocide Convention. In its forty-third session, the Commission decided “in favour of [an exhaustive enumeration] . . . in view of . . . the need not to stray too far from a text widely accepted by the international community.”<sup>70</sup> In its forty-sixth session, the Commission, in exploring the crimes which would constitute the subject-matter jurisdiction of an international criminal court, stated that genocide was “[t]he least problematic” to define, as it had been clearly and “authoritatively defined in the [Genocide Convention], . . . which envisages that cases of genocide may be referred to an international criminal court.”<sup>71</sup> The latest version of the Draft Code in 1996 reaffirms the exhaustive, four-group enumeration of protected groups in the Genocide Convention.<sup>72</sup> The drafters of the Rome Statute for the International Criminal Court gave consideration to the protection of social, political, and cultural groups,<sup>73</sup> but ultimately settled on the Convention’s four-group enumeration.<sup>74</sup> Plessis states that “[i]n respect of the Rome Statute, the drafters have evinced a clear intention to limit the groups to the four identified by the Genocide Convention.”<sup>75</sup>

In *Jelisić*, the Trial Chamber at the ICTY boldly asserted that a perpetrated group may be defined by negative criteria.<sup>76</sup> As the court explained, such an approach would “consist of identifying individuals as not being part of the group to which the perpetrators . . . belong and which to them displays specific national, ethnical, racial or religious characteristics.”<sup>77</sup> This approach would have had a drastic impact on the application of article II had it

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A/CN.4/SER.A/1989/Add.1 (Part 2) (1989) (“[The] draft provision on genocide [submitted by the Special Rapporteur was] favourably received by members of the Commission . . . [because] . . . unlike that in the 1948 Convention, the enumeration of acts constituting the crime of genocide proposed by the Special Rapporteur was not exhaustive.”).

<sup>70</sup> See Rep. of the Int’l Law Comm’n, 43rd Sess., April 29–July 19, 1991, art. 19, cmt, §2, [1991] 2 Y.B. Int’l L. Comm’n 102, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) (1991).

<sup>71</sup> See Rep. of the Int’l Law Comm’n, 46th Sess., May 2–July 22, 1994, 37, [1994] 2 Y.B. Int’l L. Comm’n 38, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) (1994).

<sup>72</sup> See Rep. of the Int’l Law Comm’n, 48th Sess., May 6–July 26, 1996, art. 17, [1996] 2 Y.B. Int’l L. Comm’n 44, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) (1996) [hereinafter ILC 48th Session].

<sup>73</sup> See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome, It., *Text of the Draft Statute for the International Criminal Court*, 2 UN Doc. A/AC.249/1998/CRP.8 (Mar.–Apr. 1988) (“The Preparatory Committee took note of the suggestion to examine the possibility of addressing ‘social and political’ groups in the context of crimes against humanity.”); Plessis, *supra* note 11, at 39 (“The idea of including a ‘cultural group’ in the ICC Statute was rejected at the Rome Conference.”).

<sup>74</sup> See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 13, n.2, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

<sup>75</sup> See Plessis, *supra* note 11, at 39.

<sup>76</sup> See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 71 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

<sup>77</sup> *Id.*

been subsequently supported, since it implied a very loose and expansive interpretation of the Genocide Convention's protected groups. The requirement to simply display national, ethnic, racial or religious characteristics sets a much lower standard for protected groups than does being a single national, ethnic, racial or religious group as article II requires. Predictably, the Tribunal later rejected this approach in *Stakić*, contending that "it is not appropriate to define the group in general terms, as, for example, 'non-Serbs.'"<sup>78</sup>

### B. Recognizing the Great Loss to Mankind Caused by Group Extermination

Since the inception of the legal codification of genocide, its prestige has been supported by the idea that genocide involves not only the loss of many individual lives but, more importantly, of the broader entity encompassing those individuals, the loss of which significantly detracts from the human race as a whole. Raphael Lemkin in his landmark *Axis Rule in Occupied Europe* conceives of genocide as the act of destroying "essential elements of the world community."<sup>79</sup> He argues that "[t]he destruction of a nation . . . results in the loss of its future contributions to the world," consisting of "genuine traditions" and "genuine culture."<sup>80</sup> A. Dirk Moses, reflecting on 19th century Polish romantic nationalism, writes that protecting national, racial, religious, and ethnic groups under genocide law is based on the idea that "nations and nationhood are intrinsically valuable because, unlike human collectivities such as political parties, they produce culture, endow individual life with meaning, and comprise the building blocks of human civilization."<sup>81</sup> This concept is reflected in Resolution 96 (I), which declares that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."<sup>82</sup> Also, the Genocide Convention preamble recognizes that "genocide has inflicted great losses on humanity."<sup>83</sup>

The class of people that was originally associated with this concept of cultural loss was minority groups, the "principal beneficiaries of genocide law."<sup>84</sup> According to the ICTY, the list of protected groups in the Genocide Convention "was designed . . . to describe a single phenomenon, roughly

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<sup>78</sup> See Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 512 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 31, 2003).

<sup>79</sup> See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 91 (1944).

<sup>80</sup> *Id.*

<sup>81</sup> See A. Dirk Moses, *Raphael Lemkin, Culture, and the Concept of Genocide*, in *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* 19, 23 (Donald Bloxham & A. Dirk Moses eds., 2010).

<sup>82</sup> See G.A. Res. 96 (I), *supra* note 4.

<sup>83</sup> See Genocide Convention, *supra* note 1, pmb1.

<sup>84</sup> See SCHABAS, *supra* note 2, at 123.

corresponding to . . . ‘national minorities.’”<sup>85</sup> Protection of national minorities as a means of protecting the diversity of mankind has been supported by customary international human rights law.<sup>86</sup> The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, to which 123 States are party,<sup>87</sup> states in its preamble that “damage to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”<sup>88</sup> Article I of the United Nations Educational, Scientific and Cultural Organization Declaration of the Principles of Cultural Co-operation recognizes that “each culture has a dignity and *value* which must be respected and preserved.”<sup>89</sup> Furthermore, the ICTY suggested in *Krstić* that “those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide.”<sup>90</sup> In *Stakić* the Appeals Chamber shared Lemkin’s sentiment that “the world loses ‘future contributions’”<sup>91</sup> when the crime of genocide is executed.

This standard for protected groups was also alluded to in the drafting of the Genocide Convention. The Polish delegation of the Sixth Committee argued that while racial, religious and national groups needed protection for the sake of upholding equality, political groups “were often the most destructive elements of the community, as in the case of the [N]azi and fascist parties” and that “[i]t was debatable, therefore, whether political groups should enjoy the same rights as other groups.”<sup>92</sup> The *travaux préparatoires* of the Genocide Convention therefore indicate that the drafters were mindful of the intention to include only those groups whose loss would have a negative impact, and that this requirement may have been fatal to the inclusion of political groups.

The implication that genocide detracts from mankind is a decisive element in determining the proper scope of protected groups. The concept is

<sup>85</sup> See Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 556 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001),

<sup>86</sup> See generally Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity*, 22 EUR. J. INT’L L. 17 (2011) (recounting the development of international law for the protection of minorities, which “fuelled the recognition of the crimes of persecution and genocide”).

<sup>87</sup> See UNESCO, *Legal Instruments*, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, <http://portal.unesco.org/la/convention.asp?KO=13637&language=E> (last visited Nov. 2, 2011).

<sup>88</sup> See Convention for the Protection of Cultural Property in the Event of Armed Conflict, pmb., May 14, 1954, 249 U.N.T.S. 240.

<sup>89</sup> See UNESCO Declaration of the Principles of Cultural Co-operation, art. I, UNESCO Doc. 14C/Resolutions, Nov. 1966 (emphasis added).

<sup>90</sup> See Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 36 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>.

<sup>91</sup> See Prosecutor v. Stakić, Case No. IT-97-24-T, Appeals Judgment, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), <http://www.icty.org/x/cases/stacic/acjug/en/sta-aj060322e.pdf>

<sup>92</sup> See U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., *supra* note 51, at 111.

found at the origin of genocide law and is supported in genocide adjudication as well as human rights law protecting national minorities. It is also an essential component of genocide conceptually, because it supplies the term with its inherently negative connotation. Without it, genocide would be a neutral term, meaning that protected groups would not be ascertained according to their value but merely according to their “distinguishability.” The groups protected under genocide law must be valuable enough to the human race that their extermination would constitute the most devastating international crime.

### C. Including Only Permanent and Stable Groups

Permanence and stability are qualities that have clearly guided the determination of protected groups in the drafting stages of the Genocide Convention and beyond. As explained above, lack of permanence and stability was a primary reason for excluding political groups from the Convention’s list of protected groups. The *travaux préparatoires* show that the nature of political groups was judged against the background of the included groups, which were considered to be more permanent and stable since membership was less voluntary. The Lebanese delegation of the *Ad Hoc Committee* made the distinction between the “inalienable character” of racial, national, and religious groups and the “far less stable” character of political groups.<sup>93</sup> The Polish delegation pointed out that “[a] racial, national or religious group did not disappear simply because its head was eliminated or as a result of reprisals against its leaders.”<sup>94</sup> In the Sixth Committee, the Iranian delegation similarly expressed opposition to retaining political groups because of their lack of “permanence” relative to racial, religious, and national groups:

If it were recognized that there was a distinction between those groups, membership of which was inevitable . . . [and] whose distinctive features were permanent; and those, membership of which was voluntary, such as political groups, whose distinctive features were not permanent, it must be admitted that the destruction of the first type appeared most heinous in the light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together . . . . Although it was true that people could change their nationality or their religion, such changes did not in fact happen very often.<sup>95</sup>

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<sup>93</sup> See U.N. ECOSOC, Report of the Ad Hoc Comm. on Genocide, 4th mtg., *supra* note 68, at 10.

<sup>94</sup> See *id.*

<sup>95</sup> U.N. GAOR, 6th Comm., 74th mtg., *supra* note 67, at 99.

The Ecuadorian delegation, although in favor of including political groups, admitted that the political group was “of course less stable in its characteristics than the others [and] could be joined and left at will.”<sup>96</sup> Again, in determining whether to include political groups, the Polish delegation argued that “[t]hose who needed protection most were those who could not alter their status.”<sup>97</sup> The International Law Commission later concluded that the drafters of the Genocide Convention had excluded political groups because they were “not considered to be sufficiently stable for the purposes of the [crime of genocide].”<sup>98</sup> Whether political groups were excluded for reasons of principle, as discussed here, or in light of prudential considerations, permanence and stability were unquestionably important factors weighing on the minds of both those opposing and those favoring the inclusion of political groups.

The ICTR acknowledged the intention of the Genocide Convention drafters to include only permanent and stable groups and used it as a guide.<sup>99</sup> While *Akayesu*'s final determination, which seemed to justify the inclusion of any permanent and stable group in the scope of protected groups, was bold and controversial,<sup>100</sup> it reinforced the importance of respecting the object and purpose of the Convention and brought attention to the importance of the permanence and stability characteristics. The shortfall of the decision was in capturing only part of the object and purpose of the Convention, as it did not acknowledge that the drafters clearly intended to keep the list of protected groups exhaustive.

#### IV. STATUS OF UNPROTECTED GROUPS UNDER CUSTOMARY LAW

In the pursuit to find groups protected from genocide in customary international law that are not covered in the Genocide Convention, it is immediately a bad sign that the Convention's precise enumeration has been reproduced verbatim in subsequent—also recent—authoritative sources of international law. The Rome Statute of the International Criminal Court (ICC)<sup>101</sup> and the Statute of the ICTR<sup>102</sup> stipulate that genocide is committed on a “national, ethnic, racial, or religious group, as such.” On the other hand, domestic legislation and the *Akayesu* interpretation of the Genocide

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<sup>96</sup> *Id.* at 100.

<sup>97</sup> See U.N. GAOR, 6th Comm., 3d Sess., 75th mtg., *supra* note 51, at 111.

<sup>98</sup> See ILC 48th Session, *supra* note 72, at 44.

<sup>99</sup> See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 511, 516 (Sep. 2, 1998); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 57 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-I, Judgment and Sentence, ¶¶ 162–63 (Jan. 27, 2000).

<sup>100</sup> See FOURNET, *supra* note 32, at 47. Even Fournet, a proponent of a more expansive scope of protected groups, characterized the *Akayesu* decision as “a most improbable interpretation of the Convention.”

<sup>101</sup> See Rome Statute, *supra* note 31, art. 6.

<sup>102</sup> See S.C. Res. 955, art. 2, U.N. DOC. S/RES/955 (Nov. 4, 1994).

Convention suggest that the exhaustiveness of this enumeration is not universally accepted.<sup>103</sup>

### A. All Groups (Non-Exhaustive Formulations)

The domestic codes of Romania and France have broadened the scope of protected groups to cover potentially any group. The French code stipulates that genocide can be perpetrated against “[a] particular group, apart from other arbitrary criteria.”<sup>104</sup> Similarly, the Romanian code includes “community” under the protected groups.<sup>105</sup> As the first part of this article establishes, the drafters of the Convention intended for the list of protected groups to be both exhaustive and exclusive. The criteria for determining these groups form a high standard that the Romanian and French codes, by stipulating non-exhaustive and all-inclusive lists of protected groups, disregard. One might characterize France as a persistent objector to the Convention’s scope of protected groups, considering that the French delegation pushed for a more expansive list of protected groups in the drafting stages.<sup>106</sup> Still, by failing to embody the fundamental characteristics of the Convention’s protected groups, the French code’s list of protected groups goes against the object and purpose of the Convention, which is forbidden under customary international law for States party to an international treaty.<sup>107</sup> As support for a rule of customary law departing from the Convention, the non-exhaustive formulation is too rare in state practice and arguably a breach of treaty obligations by those states party to the Convention that use it.

The *Akayesu* decision at the ICTR suggested that genocide can be perpetrated against any permanent and stable group.<sup>108</sup> This interpretation is stricter than that of France and Romania, as it applies one of the three fundamental characteristics of the Genocide Convention’s enumeration. Also, the interpretation was made in an effort to fit the Tutsi within the definition of an existing protected group (ethnic),<sup>109</sup> not to unearth a brand new protected group. The International Commission of Inquiry on Darfur (Darfur Commission) recognized this, stating that “this expansive interpretation does not substantially depart from the text of the Genocide Convention and the

<sup>103</sup> See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 511, 516.

<sup>104</sup> See CODE PÉNAL [C. PÉN.] art. 211-1 (Fr.) available at [http://195.83.177.9/pdf/code\\_33.pdf](http://195.83.177.9/pdf/code_33.pdf) (last visited Nov. 5, 2011).

<sup>105</sup> See *Romanian Criminal Code*, art. 172 (Rom.), LEGISLATIONONLINE.ORG, <http://legislationline.org/download/action/download/id/1695/file/c1cc95d23be999896581124f9dd8.htm/preview> (last visited Nov. 2, 2011).

<sup>106</sup> See *Annexes to the Summary Records of Meetings* 13–14, (France: Draft Convention on Genocide), UN GAOR, 3rd Sess., Part 1, U.N. Doc. A/C.6/211 (1948) (suggesting “nationality, race, religion or opinions” as criteria for protected groups).

<sup>107</sup> See Vienna Convention, *supra* note 39, art. 19.

<sup>108</sup> See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 516.

<sup>109</sup> See *Regina v. Munyaneza*, (2009) 2009 QCCS 2201 (Can. Que.); see also *Prosecutor v. Semanza*, Judgment and Sentence, Case No. ICTR-97-20-T, ¶ 422 (May 15, 2003), <http://www.unictr.org/Portals/0/Case/English/Semanza/decisions/index.pdf>.

corresponding customary rules, because it too hinges on four categories of groups [national, ethnic, racial, or religious].”<sup>110</sup> Still, general application of this interpretation is in danger of justifying the addition of new protected groups. It is therefore not in accordance with the General Assembly’s intention to maintain an exhaustive and exclusive list. The Darfur Commission argued that the Tribunal was “obliged” to apply “an innovative interpretation” as a result of “the limitations of current international rules on genocide.”<sup>111</sup> Boldly, the Commission stated that the interpretation has not been matched with state opposition and concluded “that interpretation and expansion has become part and parcel of international customary law.”<sup>112</sup> A more realistic conclusion would have added: “[I]nsomuch as its application does not depart from the four-group enumeration of the Genocide Convention.” As Schabas suggests, the expansive application of the Convention is probably a product of frustration resulting from the difficulty in fitting the perpetrated group neatly in one of the Convention’s four categories.<sup>113</sup> Indeed, the ethnic distinction between the Tutsi and the Hutu in Rwanda at the time of the Rwandan Genocide was not entirely clear.<sup>114</sup> Fournet writes that the Tutsis and Hutus “shared the same language, and probably the same culture” and were not separate ethnic entities.<sup>115</sup> The game-changer for genocide adjudication at the Tribunal was the distribution of identity cards that evidenced a “permanent distinction” between ethnic groups in Rwanda and guided the Hutus in their pursuit of genocide.<sup>116</sup>

In sum, a non-exhaustive application of the Genocide Convention’s protected groups is not substantially supported in customary international law. Since it goes against the basic intentions of the Convention’s drafters, it is unlikely that such a formulation has a future in international law. Since courts would have to challenge the object and purpose of the Convention to implement such a formulation, supporting state practice is unlikely to reach a level sufficient to create a new rule of customary law. The interpretation of the ICTR that affords permanent and stable groups protection is more in line with the Convention’s object and purpose, but only inasmuch as it is applied in protecting existing groups (national, ethnic, racial, or religious). Noteworthy is the fact that, despite its expansive application, the Tribunal demonstrated *opinio juris* with regard to the Convention’s enumeration. Instead of attempting to sidestep or outright refute the Convention, the Tribunal cleverly interpreted the Convention to render a decision that, though progressive, at least claimed to be in accordance with the object and purpose of the Convention.

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<sup>110</sup> Darfur Report, *supra* note 33, ¶ 501.

<sup>111</sup> *Id.* ¶ 498.

<sup>112</sup> *Id.* ¶ 501.

<sup>113</sup> See SCHABAS, *supra* note 2, at 117.

<sup>114</sup> See *id.* at 125.

<sup>115</sup> See FOURNET, *supra* note 32, at 47–48 & n.3.

<sup>116</sup> See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 83 (Sep. 2, 1998).

## B. Political Groups

Despite their exclusion from the Genocide Convention, political groups have found explicit protection in several domestic codes prohibiting genocide.<sup>117</sup> While these states represent a clear minority, as most states have excluded political groups,<sup>118</sup> the states demonstrate that the protection of political groups under genocide law is not a dead concept. Nersessian further notes that “no state has objected to the broader formulations,” although there is no evidence of *opinio juris*; the inclusion of political groups in these instances demonstrates nothing more than utilizing an optional feature of domestic law.<sup>119</sup> As Nersessian concedes, the survival of political groups in domestic protection is at best an “emergent” norm of customary international law.<sup>120</sup>

The *travaux préparatoires* of the Genocide Convention demonstrate that political groups lacked wide international support from the beginning of codification of genocide law. Delegations such as those from Egypt, Iran, Uruguay, and the United States feared the inclusion of political groups among the protected groups would result in a lower number of ratifications and therefore a less forceful convention.<sup>121</sup> While much of the discussion surrounding the inclusion of political groups was over the appropriateness of including political groups among more permanent and stable protected groups, the committee was certainly mindful of the practical consequences of including these groups. The United States delegation explicitly distinguished between drafting a “convention founded on just principles” and one “ratified by the greatest possible number of Governments”<sup>122</sup> and suggested that both interests should be reconciled.

It might be argued that, because political considerations played a significant role<sup>123</sup> in excluding political groups, the Convention does not necessarily convey the truest definition of genocide. The meaning of genocide under “moral law” is not compromised by political considerations. Nersessian writes that, “[I]t is fair to characterize the exclusion of political groups as a negotiated political compromise[,] impact[ing] the legal significance of the exclusion.”<sup>124</sup> Ironically, the political compromise affecting the enumeration of protected groups makes the Genocide Convention a more legally significant document. Thus, customary law does not necessarily reflect moral law. The

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<sup>117</sup> See NERSESIAN, *supra* note 12, at 112 & n.188 (listing Bangladesh, Cambodia, Columbia, Costa Rica, Côte d’Ivoire, Ecuador, Ethiopia, Lithuania, Panama, Poland and Slovenia as states found to “overtly recognize” political groups in their domestic code).

<sup>118</sup> See *id.* at 112–13.

<sup>119</sup> See *id.* at 128–29.

<sup>120</sup> See *id.* at 128.

<sup>121</sup> See U.N. GAOR, 6th Comm., 3d Sess., 128th mtg., *supra* note 58, at 661–62 (“inclusion of political groups would be a serious obstacle to the ratification of the convention by a large number of States.”).

<sup>122</sup> See *id.* at 662.

<sup>123</sup> See SCHABAS, *supra* note 2, at 160.

<sup>124</sup> See NERSESIAN, *supra* note 12, at 111.

greatest concern for the drafters was developing a document that would most accurately reflect customary law and thereby have effective international legal application. The practical considerations leading to the exclusion of political groups suggested in the *travaux préparatoires* reflect proactive efforts to align the Convention with customary law. Maximal ratification is indicative of greater international acceptance and therefore provides stronger evidence of customary law.

### 1. *Bangladesh*

Nersessian surveys domestic case law for evidence of customary law supporting the protection of political groups. He first looks at the 1970s conflict between East and West Pakistan that led to the establishment of Bangladesh, since Bangladesh intended to prosecute captured West Pakistanis on genocide charges under genocide law that covered political groups.<sup>125</sup> The Bengalis, situated in East Pakistan, were “ethnically, linguistically, and culturally distinct” from West Pakistan, and East Pakistan deployed its military to suppress a potential secession. This is not what Nersessian is saying. He said 195 POWs were not released because of genocide charges.<sup>126</sup> After conflict that resulted in approximately three million killings,<sup>127</sup> India intervened and captured 93,000 Pakistani soldiers, 195 of whom were to be prosecuted on genocide charges.<sup>128</sup> Nersessian points out that India was willing to extradite the Pakistani soldiers to Bangladesh, perhaps “reflect[ing] tacit support by India of the decision to include political groups as a category.”<sup>129</sup> This is a stretch of the imagination, however, considering that the protection of political groups under genocide was not central—perhaps irrelevant—to the situation at hand. Although Nersessian suggests that “one might speculate” that the conflict was “motivated by political retribution,”<sup>130</sup> the conflict was primarily a result of efforts by West Pakistan to suppress the Hindi minority, which was concentrated in East Pakistan.<sup>131</sup> Nersessian’s brief consideration of this conflict in the context of protection of political groups nevertheless brings to light the possibility that a political group may find indirect protection under the Genocide Convention, not “as such” but insofar as it overlaps with the type of protected group that is being perpetrated.

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<sup>125</sup> See Bangladesh International Crimes (Tribunals) Act, 1973 art. 3(c) (Jul. 20, 1973), [http://bdlaws.minlaw.gov.bd/pdf\\_part.php?act\\_name=&vol=XVII&id=435](http://bdlaws.minlaw.gov.bd/pdf_part.php?act_name=&vol=XVII&id=435) (last visited Nov. 2, 2011).

<sup>126</sup> See Michael J. Kelly, *Can Sovereigns be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milošević Trial*, 76 ST. JOHN'S L. REV. 257, 292 (2002).

<sup>127</sup> See *id.* at 291.

<sup>128</sup> See NERSESSIAN, *supra* note 12, at 114.

<sup>129</sup> See *id.* at 115.

<sup>130</sup> See *id.* at 115 & n.208.

<sup>131</sup> See Kelly, *supra* note 126, at 290–92; see also Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41, 61–66 (2003).

## 2. *Spain*

Spanish genocide adjudication suggests a trend toward maintaining the scope of protected groups in the Genocide Convention. In two 1998 cases concerning crimes committed in Argentina and Chile in the 1970s and 1980s, the Criminal Division of the Spanish National Appellate Court considered a broad interpretation of the Genocide Convention before coming to the conclusion that both series of crimes constituted genocide.<sup>132</sup> In the Argentinean case, the defendants had argued that the repression had been politically motivated, and could therefore not constitute genocide as defined by the Genocide Convention.<sup>133</sup> The court acknowledged that the Convention did not include political groups, but reasoned nevertheless that “*el silencio*” (silence or omission, in this case) does not necessarily imply exclusion. Nersessian points out that the court’s holding demonstrated *opinio juris* regarding political genocide since it applied international law.<sup>134</sup> The court’s reasoning, however, goes against the object and purpose of the Genocide Convention, since the drafters proactively excluded groups, including political groups, from the enumeration. The court stated that, regardless of the drafters’ intentions, the “Convention gains life through the successive signatures and ratifications of the treaty,” mistakenly assuming that ratifying countries have the option of pushing the boundaries established by the Convention. Any departures, as with treaty reservations, from the Convention must not stray from its object and purpose.<sup>135</sup> Nersessian concedes that “[n]o other state has approved of the methodology underlying the case of the result in the decision.”<sup>136</sup> The Spanish Supreme Court in 2007 revisited the Argentina case and recognized that the drafters had *purposefully* excluded political groups from protection.<sup>137</sup> It decided that the events under question constituted crimes against humanity, but not genocide.<sup>138</sup>

## 3. *Inter-American Court of Human Rights*

In *Diaz v. Colombia*, the Inter-American Court of Human Rights, a regional human rights protection mechanism for the Organization of American States (OAS), dealt squarely with the protection of political groups under

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<sup>132</sup> See S.A.N., Nov. 4, 1998 (R.J.D. No. 84/98) (Spain), <http://www.derechos.org/nizkor/arg/espana/audi.html> (discussing the Argentine case) [hereinafter S.A.N. Argentina]; see also S.A.N., Nov. 5, 1998 (R.J.D. No. 173/98) (Spain), <http://www.derechos.org/nizkor/chile/juicio/audi.html> (discussing the Chilean case) [hereinafter S.A.N. Chile].

<sup>133</sup> See S.A.N. Argentina, *supra* note 132.

<sup>134</sup> See NERSESIAN, *supra* note 12, at 121.

<sup>135</sup> See Vienna Convention, *supra* note 39, at arts. 18, 19.

<sup>136</sup> See NERSESIAN, *supra* note 12, at 121.

<sup>137</sup> See S.A.N. Chile, (R.J.D. No. 173/98).

<sup>138</sup> See *id.*

international law on genocide.<sup>139</sup> Petitioners alleged that the Colombian government had committed genocide by trying to eliminate the Patriotic Union, a political party.<sup>140</sup> They asked the court to consider the definition of genocide under customary international law. The court stated that the Genocide Convention “codifies customary international law”<sup>141</sup> and that it “explicitly excluded” political groups from protection.<sup>142</sup> Significantly, the court decided that the conflict under question did not fit “within the *current* definition of genocide provided by international law,” even though the facts “might be understood in common parlance to constitute genocide.”<sup>143</sup> Without frustration, the court acknowledged that international law as it stands may not cover all instances of genocide. Thus, instead of exercising judicial creativity and attempting to force the protection of political groups into customary law, the court applied international law realistically and appropriately.

#### 4. *Other Domestic Trials*

Nersessian brings up a few more national genocide cases that support the protection of political groups, but as Nersessian acknowledges, closer analysis of these cases reveals questionable and unconvincing jurisprudence.<sup>144</sup> For example, a 1979 court in Equatorial Guinea tried Francisco Macias for “offences against political opponents and others” and found him guilty of genocide.<sup>145</sup> Issues such as applicable law, lack of the requisite *mens rea*, and “procedural irregularities” rendered the case illegitimate support for the protection of political groups.<sup>146</sup> Also, a Romanian court found Nicolae and Elena Ceausescu guilty of genocide “clearly driven by political ideology.”<sup>147</sup> The genocide law applied included collectivities among protected groups.<sup>148</sup> Still, Nersessian notes a “rush to judgment” that brings into question the fairness of the trial.<sup>149</sup> As with the genocide trial in Equatorial Guinea, Nersessian concludes that the Romanian trial did not constitute legitimate state practice.<sup>150</sup>

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<sup>139</sup> See *Diaz v. Colombia*, Rep. on Admissibility, Inter-Am. Comm’n. H.R. No. 5 (Mar. 12, 1997), <http://cidh.org/annualrep/96eng/Colombia11227.htm>.

<sup>140</sup> See *id.* ¶¶ 4–5.

<sup>141</sup> See *id.* ¶ 22.

<sup>142</sup> See *id.* ¶ 24.

<sup>143</sup> See *id.* ¶ 25 (emphasis added).

<sup>144</sup> See NERSESIAN, *supra* note 12, at 127–28.

<sup>145</sup> See *id.* at 116–17.

<sup>146</sup> See *id.* at 117.

<sup>147</sup> See *id.*

<sup>148</sup> See Romanian Penal Code, *supra* note 105, art. 356.

<sup>149</sup> See NERSESIAN, *supra* note 12, at 118.

<sup>150</sup> See *id.*

## 5. Conclusion

In all, state (and regional) practice on genocide prosecution is insufficient to support the protection of political groups under customary international law. According to the ICJ, “State practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”<sup>151</sup> State practice for the protection of political groups from genocide hardly approaches this standard. It is curious that the protection of political groups, which continues to be rejected under international law, was included in General Assembly Resolution 96 (I), one of the original and most authoritative sources on genocide law. Schabas attributes this to “superficial” and “preliminary” discussion during the drafting of the resolution.<sup>152</sup> Nersessian comments that the reason for adding political groups in the drafting of the resolution is unknown, and that the committee’s report contains no discussion on the matter.<sup>153</sup> It is especially curious since Lemkin originally defined genocide as the destruction of “a nation or of an ethnic group,”<sup>154</sup> and purposely left out political groups, as later confirmed by his opposition to their inclusion during the drafting of the Convention.<sup>155</sup>

### C. Social and Economic Groups (Cambodia)

Crimes in Cambodia during the Khmer Rouge from 1975 to 1979<sup>156</sup> were perpetrated on a massive scale against what have been labeled political, social, and economic groups,<sup>157</sup> all of which were intentionally excluded from the Genocide Convention’s protection. Hurst Hannum describes the Khmer Rouge campaign as a “radical transformation” involving “racial, social, ideological, and political purification of the Cambodian nation.”<sup>158</sup> Some of the crimes may fall neatly under the Convention, as there is evidence that the Khmer Rouge targeted Muslim Chams, indigenous Vietnamese, Buddhist monks, and other minority groups, but “the vast majority of killings took place

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<sup>151</sup> See *North Sea Continental Shelf (Ger. v. Den; Ger. v. Neth.)*, Judgment, 1969 I.C.J. 4, ¶ 74 (Feb. 20).

<sup>152</sup> See SCHABAS, *supra* note 2, at 171.

<sup>153</sup> See NERSESSIAN, *supra* note 12, at 101.

<sup>154</sup> See LEMKIN, *supra* note 79, at 79.

<sup>155</sup> See *Draft Convention*, *supra* note 66, at 22 (“Professor Lemkin . . . pointed out . . . that political groups have not the permanency and the specific characteristics of the other groups referred to . . . [and] that in practice the human groups most likely to suffer from genocide as history as shown, are racial, national and religious groups.”).

<sup>156</sup> See Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, 11 SING. Y.B. INT’L L. 195, 195 (2007).

<sup>157</sup> See *id.* at 230; SCHABAS, *supra* note 2, at 166.

<sup>158</sup> See Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 85 (1989).

on political and social grounds.”<sup>159</sup> A national court found Pol Pot and Ieng Sary guilty of genocide in 1979, but as legitimate State practice this judgment has been disregarded.<sup>160</sup> Decree Law No. 1, which states in the preamble that “the Pol-Pot-Ieng Sary clique have . . . forced the entire Kampuchean people to live in genocidal conditions,” presumes that genocide occurred even before actual adjudication.<sup>161</sup> Moreover, Nersessian notes that the definition of genocide applied in the case “bore little resemblance to the Convention.”<sup>162</sup>

The impending trials at the Extraordinary Chambers in the Courts of Cambodia (Extraordinary Chambers), a tribunal established by an agreement between the state of Cambodia and the United Nations,<sup>163</sup> may provide an updated status of the protection of social and economic groups from genocide under international law. In regards to the applicable law, Cambodia attempted to enlarge the scope of protected groups to include those defined by “wealth, level of education, sociological environment (urban/rural), allegiance to a political system or regime (old/new people), social class or social category (merchant, civil servant, etc.),”<sup>164</sup> evidently conforming the crime of genocide to address the Khmer Rouge atrocities. The United Nations rejected this proposal in favor of article II of the Genocide Convention.<sup>165</sup> The Group of Experts for Cambodia briefly visited the topic of genocide,<sup>166</sup> but ultimately left the determination up to the Extraordinary Chambers.<sup>167</sup> The Law on the Establishment of the Extraordinary Chambers stipulates that the tribunal shall interpret genocide as it is defined in the Genocide Convention, and repeats the four-group formulation of article II of the Convention.<sup>168</sup> Beyond identifying the extermination of the aforementioned ethnic and religious groups as genocide, the Extraordinary Chambers will probably have to depart from the

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<sup>159</sup> See NERSESSIAN, *supra* note 12, at 116.

<sup>160</sup> See *id.* at 116; Linton, *supra* note 156, at 208–13; William Schabas, *Cambodia: Was It Really Genocide?* 23 HUM. RTS. Q. 470, 471–72 (2001).

<sup>161</sup> See GENOCIDE IN CAMBODIA, *supra* note 14, at 45 (Decree Law No. 1: Establishment of People’s Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide).

<sup>162</sup> See NERSESSIAN, *supra* note 12, at 116; Schabas, *supra* note 160, at 472.

<sup>163</sup> See G.A. Res. 57/228, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/228 (Feb. 27, 2003).

<sup>164</sup> See SCHABAS, *supra* note 2, at 166 (citing Draft Law on the Repression of Crimes of Genocide and Crimes Against Humanity).

<sup>165</sup> See *id.* at 167 (citing Draft Law on the Establishment of a Tribunal for the Prosecution of Khmer Rouge Leaders Responsible for the Most Serious Violations of Human Rights, Aug. 1999).

<sup>166</sup> See U.N. Group of Experts on Cambodia, Rep., transmitted by identical letters dated Mar. 15, 1999 from the U.N. Secretary-General concerning the Group of Experts for Cambodia established pursuant to resolution 52/135 (1997) addressed to the President of the General Assembly and the President of the Security Council, Annex, ¶¶ 61–62, U.N. Docs. A/53/850, S/1999/231 (Mar. 16, 1999).

<sup>167</sup> See *id.* ¶ 62.

<sup>168</sup> See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 4, No. NS/RKM/1004/006 (Oct. 27, 2004) (Cambodia).

Convention to label the Khmer Rouge atrocities genocide. There appear to be two possible routes. One option is to classify the Khmers as a national group, and find that the Khmer Rouge committed “auto-genocide”<sup>169</sup> with intent to destroy, “in part,” the Khmers as a national group. Quigley took this route to support his determination of genocide in Cambodia.<sup>170</sup> The other route is to outright expand the Genocide Convention to include the protection of social, economic, and/or political groups. As the Extraordinary Chambers form a hybrid tribunal under the auspices of the United Nations, any significant departure from the Genocide Convention seems unlikely. Had *Jelisić*’s “negative approach” not been subsequently defeated in *Stakić*,<sup>171</sup> this would have been the most applicable and sensible approach considering that the Khmer Rouge targeted “the other”<sup>172</sup> more so than any one particular national, ethnic, racial, or religious group, as such.

#### D. Groups Perceived by the Perpetrator

International judicial practice regarding genocide has provided substantial support for the “subjective approach” in identifying members of a perpetrated group. The subjective approach, as opposed to the objective approach, relies on the perception of the perpetrator in determining whether a protected group was targeted as such. The objective approach judges whether the perpetrated victims constitute a protected group based solely on objective criteria. As the International Law Commission (ILC) asserted at its 48th session, “the intention must be to destroy the group ‘as such,’ meaning as a separate and distinct entity.”<sup>173</sup> Similarly, the drafters of the Genocide Convention noted that “[t]he destruction of the human group is the actual aim in view.”<sup>174</sup>

The subjective approach was adopted consistently by the ICTR in finding the Tutsis to be a distinct ethnic group. Whereas objectively the Hutus and Tutsis were not perfectly distinguishable, subjectively the Tutsis had been viewed as distinct. In *Bagilishema*, the Tribunal held that

[T]he perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such

<sup>169</sup> See Whitaker Report, *supra* note 33, at 16, ¶ 31.

<sup>170</sup> See GENOCIDE IN CAMBODIA, *supra* note 14, at 518.

<sup>171</sup> See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 213 (2nd ed. 2010) (“[I]t is now well established that . . . a group cannot be defined ‘negatively.’”).

<sup>172</sup> See Van Schaack, *supra* note 23, at 2271.

<sup>173</sup> See ILC 48th session, *supra* note 72.

<sup>174</sup> See U.N. Econ. & Soc. Council, Ad Hoc Comm’n on Genocide, Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, 6, by the Secretariat, U.N. Doc. E/AC.25/3/Rev.1 (Apr. 12, 1948).

a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.<sup>175</sup>

This view finds support in a number of other cases at the Tribunal<sup>176</sup> and also in *Jelisić* at the ICTY.<sup>177</sup>

The implication for the scope of protected groups is potentially significant, but is ultimately balanced by the simultaneous application of the objective approach. Schabas notes that under the subjective approach, genocide could be committed “against a group that does not have any real objective existence.”<sup>178</sup> Or, hypothetically, genocide could be committed against a group that is objectively defined as an unprotected group but somehow viewed by the perpetrator as a protected group. This possibility was ruled out in *Semanza*, which asserted that the determination of a group’s protection under the Genocide Convention should be made using both objective and subjective criteria.<sup>179</sup> As long as the subjective approach is complemented with the objective approach and carried out with respect to the Convention’s enumeration of protected groups, it will have no impact on the scope of protected groups.

### E. Groups with International Human Rights

While customary law concerning the definition of genocide tends to reinforce the Genocide Convention’s enumeration of protected groups, it may be the case that general group rights in international human rights law support the addition of new groups to the enumeration. After all, the four protected groups each possess rights under international human rights law. For example, in the International Covenant on Civil and Political Rights (ICCPR), article 18

<sup>175</sup> See Prosecutor v. Bagilishema, Case No. ICTR 95-1-A, Judgment, ¶ 65 (Jun. 7, 2001), <http://www.unict.org/Portals/0/Case/English/Bagilishema/judgement/judgement/index.pdf>.

<sup>176</sup> See Prosecutor v. Ndinbahizi, Case No. ICTR 01-71, Judgment and Sentence, ¶ 468 (Jul. 15, 2004), [http://www.unict.org/Portals/0/Case/English/Ndindabahizi/judgement/150704\\_Judgment.pdf](http://www.unict.org/Portals/0/Case/English/Ndindabahizi/judgement/150704_Judgment.pdf); Prosecutor v. Musema, Case No. ICTR-96-13-I, Judgment and Sentence, ¶ 161 (Jan. 27, 2000), *supra* note 36, ¶ 161; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 55 (Dec. 6, 1999), *supra* note 36, ¶ 55; Prosecutor v. Kayishema, Case No. ICTR 95-1, Judgment, ¶¶ 522–30 (May 21, 1999), [http://www.unict.org/Portals/0/Case/English/kayishema/judgement/990521\\_judgement.pdf](http://www.unict.org/Portals/0/Case/English/kayishema/judgement/990521_judgement.pdf).

<sup>177</sup> See Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), *supra* note 37, ¶ 69.

<sup>178</sup> See SCHABAS, *supra* note 2, at 127–28. See generally William Schabas, *The ‘Odious Scourge’: Evolving Interpretations of the Crime of Genocide*, 18 LEIDEN J. INT’L L. 871, 877–80 (2005).

<sup>179</sup> See Prosecutor v. Semanza, Judgment and Sentence, Case No. ICTR-97-20-T, ¶ 317 (May 15, 2003).

establishes freedom of religion, and article 27 establishes the right of ethnic minorities to enjoy their own culture and use their own language.<sup>180</sup> The International Convention on the Elimination of All Forms of Racial Discrimination forbids discrimination against racial groups.<sup>181</sup> While the status under international human rights law of the national groups listed in the Genocide Convention is less certain, since the definition of these groups is unclear,<sup>182</sup> the most relevant stipulation is probably that of article 1 of the ICCPR, which establishes the rights of peoples to “freely determine their political status and freely pursue their economic, social, and cultural development.”<sup>183</sup>

### 1. *Political Groups*

Nersessian supports his argument for the inclusion of political groups using this line of reasoning. He cites in international law “the right to hold opinions,” “freedom of political association and assembly,” “freedom to express political opinion,” “rights to participate in government,” and “freedom from unlawful discrimination based on political opinion” established in core human rights documents, including the Universal Declaration of Human Rights, the ICCPR, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.<sup>184</sup> Having established the prevalence of political freedom under international law, Nersessian argues that genocide “can pervert the actual or potential exercise of these rights.”<sup>185</sup> In the context of international human rights law, it appears that Nersessian’s comparison of political groups to the core-four protected groups of the Genocide Convention is well-supported. Special Rapporteur Benjamin Whitaker notes that the drafters of the Genocide Convention that were in favor of including political groups found religious groups and political groups to be comparable by virtue of being defined by “common beliefs that unite their members.”<sup>186</sup> What is less compelling about Nersessian’s argument is the connection between political *groups* and the *individual* political freedoms expressed in international law. He argues that genocide involves a “two-fold” rights violation, involving the “rights of the individual and the group’s right to exist ‘as such.’”<sup>187</sup> The key point here is that the Genocide Convention stipulates that the perpetrator attempts to destroy

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<sup>180</sup> See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>181</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

<sup>182</sup> See SCHABAS, *supra* note 2, at 134–39.

<sup>183</sup> See ICCPR, *supra* note 180, art. I.

<sup>184</sup> See Nersessian, *supra* note 12, at 77.

<sup>185</sup> See *id.* at 78.

<sup>186</sup> See Whitaker Report, *supra* note 33, ¶ 36.

<sup>187</sup> See Nersessian, *supra* note 12, at 78.

a particular type of group “as such.”<sup>188</sup> Indeed, Nersessian concedes that “it is not important not to overstate the point because it is not the violation of the *individual* rights alone that warrants treatment as genocide.”<sup>189</sup>

## 2. *The Right to Self-Determination*

The right to self-determination, as established in article 1 of the ICCPR, is clearly a group right under international law that may have implications for the scope of protected groups in genocide law. Not only is the right to self-determination a *group* right; it is, conceptually, closely related to genocide. International practice of the right to self-determination demonstrates that its fundamental purpose is to acknowledge distinct peoples’ right to exist by giving them an adequate level of autonomy. Genocide seems to have the opposite result; the attempt to destroy a people is in the pursuit of eliminating that people from existence. Accordingly, David Lisson calls genocide the “direct inverse” of self-determination.<sup>190</sup>

This inverse relationship leads to the challenge of determining whether there are any specific groups possessing the right to self-determination that are not listed in the Genocide Convention. Such a finding would uncover an inconsistency in international law since—accepting that genocide is the “inverse” of self-determination—the existence of such a group(s) would make for the possibility, *reductio ad absurdum*, wherein the elimination of a group that possesses the right to self-determination does not constitute genocide. Lisson advances this argument in support of a broader understanding of “national” groups that is more in line with the definition of national groups possessing the right to self-determination.<sup>191</sup> The biggest challenge in matching the Genocide Convention’s protected groups with groups that possess the right to self-determination is the fact that the difficulty of defining “peoples” mentioned in article 1 of the ICCPR is even more problematic than attempting to define each of the Genocide Convention’s protected groups.

Related convention and customary practice clarify the scope of “peoples” under article 1 of the ICCPR. Article 73 of the U.N. Charter urges the development of self-government of “peoples” that “have not yet attained a full measure of self-government.”<sup>192</sup> General Assembly Resolution 1541 states that article 73 of the Charter “should be applicable to territories . . . of the colonial type.”<sup>193</sup> The resolution further suggests that article 73 should

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<sup>188</sup> See Genocide Convention, *supra* note 1, art. II.

<sup>189</sup> See Nersessian, *supra* note 12, at 78.

<sup>190</sup> See David Lisson, Note, *Defining “National Group” in the Genocide Convention: A Case Study of Timor-Leste*, 60 STAN. L. REV. 1459, 1472, 1495 (2008) (“Given this relation, it seems logical for international law to protect from destruction those same groups on which it bestows one of its most fundamental rights.”).

<sup>191</sup> See *id.* at 1473.

<sup>192</sup> See U.N. Charter art. 73.

<sup>193</sup> See G.A. Res. 1541 (XV), Annex, Princ. I, U.N. Doc. A/RES/1541 (XV) (Dec. 15, 1960).

apply to peoples that are “distinct ethnically and/or culturally from the country administering.”<sup>194</sup> Customary practice of self-determination reflects the General Assembly’s 1960 characterization of peoples with a right to self-determination. The right has predominantly supported the creation of independent states for colonial peoples that were ethnically or culturally distinct from the colonizing state. Beyond this type of situation, the right to self-determination has demonstrated little applicable value, probably because the creation of new States threatens the principle of territorial integrity established in the UN Charter.<sup>195</sup> Indeed, Manfred Nowak comments that the right’s application is restricted “to peoples under alien subjugation, colonial domination and exploitation.”<sup>196</sup>

In light of the status of the right of self-determination under international law, it appears that the “inverse” theory of genocide and self-determination does not support the addition of any new protected groups to the Genocide Convention’s enumeration in article II. The peoples possessing the right to self-determination under customary law already fit within the enumeration, most likely as ethnic or racial groups. As the exercise of the right to self-determination has primarily involved the creation of new states, it is unlikely to have substantial post-colonial application since it is at odds with the principle of territorial integrity. It is therefore unlikely that any type of people other than colonized peoples will ever possess the right under customary law.

### 3. *Indigenous Peoples*

The consideration of groups possessing the right to self-determination makes for a smooth segue into the consideration of indigenous peoples as a protected group under the Genocide Convention, since the General Assembly in 2007 declared in the Declaration on the Rights of Indigenous Peoples that indigenous peoples possess both the right of self-determination<sup>197</sup> and the “collective right to live in freedom, peace and security as distinct peoples and *shall not be subjected to any act of genocide.*”<sup>198</sup> Indigenous peoples’ right to self-determination is nascent, as it needs a substantial level of customary practice to establish the General Assembly’s declaration as a rule of international law. Nevertheless, the inception of this right for indigenous people in international convention makes for the prospect that someday the “inverse” theory may find application for indigenous peoples.

Although the General Assembly explicitly noted indigenous peoples as a group protected from genocide, the Declaration is a General Assembly

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<sup>194</sup> See *id.* at Princ. IV.

<sup>195</sup> See U.N. Charter, *supra* note 192, art. 2, para. 4.

<sup>196</sup> See MANFRED NOWAK, CCPR COMMENTARY 8 (2nd ed. 2005).

<sup>197</sup> See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

<sup>198</sup> See *id.* at art. 7(2) (emphasis added).

resolution and is therefore not legally binding. Also, the explicit reference to indigenous people may have little impact because indigenous peoples already fit within the Genocide Convention's enumeration. Schabas notes that tribal groups, which are commonly associated with indigenous peoples,<sup>199</sup> are certainly "cognates of the four terms used in article II of the Convention," a determination supported both by Lemkin's original conception of genocide and, more recently, by the Darfur Commission.<sup>200</sup> Still, in light of the General Assembly's recent and particular concern over the protection of indigenous peoples under international law, it may be practical to update the Convention's enumeration of protected groups with the addition of indigenous peoples to affirm their protection from genocide under customary law.

## CONCLUSION

In accordance with article II of the Genocide Convention of 1948, national, ethnic, racial, and religious groups are protected. A reading of the Convention's *travaux préparatoires* and consideration of subsequent international practice demonstrate that the scope of protected groups is governed by three fundamental rules: (1) the scope of protected groups must be exhaustive and exclusive so as to respect the prestige of the crime of genocide; (2) the groups included must be substantially valuable to mankind, so that their loss would be a great loss to the human race as a whole; and (3) the groups included must be permanent and stable to the degree that membership is, for the most part, involuntary. Since these rules constitute the object and purpose of the Convention with respect to the scope of protected groups, departure from the Convention's enumeration is in danger of disregarding the object and purpose of the Convention. As doing so would constitute a violation of customary international law by states party to the Convention, customary practice after 1948 has rarely recognized the protection of groups not enumerated in the Convention.

As for the future of international law on protected groups, social and economic groups, purposely excluded from the Convention, have the potential to return to the debate in the impending Khmer Rouge trials taking place in the Extraordinary Chambers, but the outlook is bleak since the Tribunal will interpret genocide as it is defined in the Genocide Convention. The future protection of political groups is also improbable. Considering that political groups have been continuously and widely denied protection in international practice, perhaps only a world event capable of rebooting the concept of genocide would provide the needed window for political groups through which to find protection. As the Jewish Holocaust single-handedly inspired the legal definition of genocide that is upheld today, an event of similar significance perpetrated exclusively on a political group would be required to validate the

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<sup>199</sup> See Schabas, *supra* note 2, at 130 (providing the *Oxford English Dictionary* definition of a tribe as "[a] group of families, esp[ecially] of an ancient or indigenous people").

<sup>200</sup> See *id.*

protection of political groups. It appears that indigenous peoples have the best shot at obtaining specific protected group status as a rule of international law in the future, considering recent efforts to recognize indigenous peoples' collective rights under international law.