ABSTRACT

South Africa v. Israel has drawn international attention as the International Court of Justice considers South Africa's request to apply the Genocide Convention to the violence in the Gaza Strip. Many observers question how South Africa can claim standing in this case. International law recognizes genocide as a peremptory norm (*jus cogens*), a classification that significantly shapes how the legal system assigns obligations. Under the *erga omnes* doctrine, this status allows any state to claim standing when such norms are violated. My research examines how genocide came to occupy this distinct legal space. By analyzing the *travaux préparatoires* of the 1948 Genocide Convention, I trace how the drafters used human-centered language that shaped subsequent legal developments. My analysis shows that the drafters introduced terms some delegates dismissed as frivolous or immaterial, yet these very words enabled meaningful progress in international law. These developments have empowered cosmopolitan political theorists to advance cosmopolitanism as a serious alternative to realism and liberalism in international political theory.

THE GENOCIDE CONVENTION AND THE COSMOPOLITAN TURN IN INTERNATIONAL LAW

A Thesis Presented for

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by Hailee Pitschke

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TABLE OF CONTENTS

INTRODUCTION

The Genocide Convention opened a door, empowering cosmopolitan political theorists to present statespeople with a viable alternative to realism and liberalism. As statespeople are forced to confront issues realism provides no productive answer to, cosmopolitan political theorists can now offer these actors practical, cosmopolitan paths to addressing such issues through international law. Cosmopolitanism assumes a high degree of universal moral solidarity amongst human beings and approaches issues of politics with the understanding that states are not necessarily always going to be the dominant political unit. Immanuel Kant was one of the first to use the term cosmopolitanism in this context, referring to the idea that all humans are a part of a single moral community.[1] States derive power by virtue of being associations of people, but people hold power without the state. Cosmopolitanism can often involve visionary thinking around international governance, such as speculation on a single world government. In the manner cosmopolitanism is being discussed in this paper it is not being seen as promoting any specific international regime system, but rather is being used to describe a premium being placed upon the inherent moral and political value of humanity as a collective. In this thesis I will be proving that advancements such as these would not be as achievable without language such as

[1] Immanuel Kant. *Political Writings*. 1970. Translated by H.B. Nisbet, edited by Hans Reiss, Second, enlarged ed., Cambridge, Cambridge University Press, 1991.

what was used in the Genocide Convention and that the *travaux préparatoires* demonstrates both the cosmopolitan victories in the formation of the convention and the shortcomings of realism.

Advocating for and advancing individual rights is in itself a difficult task, but doing so in the name of an inherent human moral solidarity seems near impossible within the confines of the present nation-state system. Still, there have been major advancements in promoting such an agenda throughout human history. In modern times, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) stands as a distinct, vital document in creating a foundation for this legal field. The cosmopolitan rhetoric being used in the development of the convention allowed space for substantive international legal developments which shifted international jurisprudence in favor of inherent human rights. A realist might look at the human-centered language used in international regimes and call it virtue-signaling, superfluous, or empty, but an analysis of the *travaux préparatoire* of the Genocide Convention reveals that realists made similar assertions in that time— and the use of that human-centered language had significant effects on international law. According to the interpretation by the ICJ today, the Genocide Convention represents the codification of an international norm which supercedes all other forms of international law, a peremptory norm (*jus cogens*). This convention laid the groundwork for the advancement of protections afforded to people on the basis of other peremptory norms, and on the basis of their inherent rights as humans. In the international legal system peremptory norms acknowledge a moral condition that is inherent in humanity, an idea which, albeit limited, is inherently cosmopolitan.

Within the topic of peremptory norms, the Genocide Convention has had a lasting impact on the advancement of human rights agendas within international law. Human-centered language within international law has often appeared in conjunction with mentions of the crime of

genocide and legal opinions relating to the convention. The convention carved a path for these norms to become a fundamental component of international law, and ICJ opinions arising out of the convention created additional space for the advancement of cosmopolitan aspirations. Some may suggest that changing international law in this way has been near meaningless, but the recent advancement of the *erga omnes* doctrine has allowed the ICJ to hear and investigate cases regarding peremptory norm violations. This has advanced truth-seeking measures and allowed for more pointed naming and shaming from an authority with a reputation for being above bias. The ICJ being able to take cases concerning peremptory norms is a serious advancement for humanity, particularly given the gridlock often seen in the Security Council.

Conversely to cosmopolitanism, realism and liberalism center nation-states as the primary actor in international politics. Generally speaking, realism has been dominant in international political theory. However, realism is inadequate for addressing many collective human issues. Realism, given that it assumes a low degree of universal human solidarity, will never seek to strive towards a universally just international system. Rather, realism would declare that goal impossible. This has a paralytic impact on both theorists and international actors. If it is assumed that there is no universal human community of any kind, there are no real rights and obligations which can be derived from the condition of being a human. This absolves international actors, statespeople, and world citizens from feeling any obligation towards their fellow people across borders and leaves the international system unwilling and uninterested in seeking global justice. Liberalism has allowed for global cooperation, but centers nation-states in such a way that progress beyond the nation-state system is unlikely to occur. While liberalism has created great progress in the area of human rights, that progress has been constrained by a near-unmitigated respect for sovereignty under the nation-state system.

Plan of the Thesis

The nation-state system's entrenchment can be traced back to the Peace of Westphalia. For a long period of time, the idea that global cooperation was a possibility had been more of a philosophical claim than a true political possibility, resulting in realisms near-absolute dominance during this time. In the first chapter I will be tracing the way international politics developed from the Peace of Westphalia to the formation of the United Nations. Liberalism triumphed over realism when the League of Nations was established. The idea of inter-state cooperation in the pursuit of a common good was no longer an easy one to dismiss, and international political theorists were given the opportunity to explore liberalism in a critical way. In a similar fashion, the Genocide Convention alongside the formation of the United Nations opened a door for cosmopolitan international political theorists in the area of international law.

The Genocide Convention used human-centered language which was extensively debated over, but the moral and political gravity of the Holocaust swayed opinions in favor of its use. The second chapter will trace the use of human-centered and cosmopolitan language and argumentation throughout the *travaux préparatoires* of the Genocide Convention. Some said that this language was entirely pointless, but the more idealistic minds prevailed on the topic. The statesmen working on the convention all seemed aligned in their commitment to the cause of eradicating genocide, but there was a clash between realist ideas and more aspirational ones. By looking at the precise lines of argumentation and the exact language used by the statesmen in their development of the convention, I will demonstrate the ways in which the clash between realism and cosmopolitanism defined the drafting process.

The language used in the Genocide Convention was markedly human-centered, and international law has been greatly shaped by that triumph of aspirations. In the final chapter I

will be exploring the ripple effects that the use of this language ended up having. As a consequence of the Genocide Convention's inclusion of human-centered language, many notable developments in international law have been able to take shape. In recent years, the doctrine of *erga omnes partes* and its applications in the cases of *The Gambia v. Myanmar* and *South Africa v. Israel* have demonstrated the impact of the Genocide Convention on international legal procedures. The development of peremptory norms as a whole can be traced to the Genocide Convention, and the use of human-centered language in the International Law Commission has often been accompanied by discussion around genocide and the Genocide Convention.

Conceptual Framework

The basis for legal theory hinges upon the rights and obligations which developed out of schools of law established on the basis of justice. As defined at the start of Justinian's *Institutes,* justice is "*constans et perpetua voluntas ius suum cuique tribuens*" or "the set and constant purpose which gives to every man his due."[2] Cicero popularized the use of the phrase *suum cuique* in *De Natura Deorum* when he said, in the original Latin, "*Iustitia suum cuique distribuit*"[3] or that justice assigns each his due. At its core, law presupposes an intent on righting wrongs or delivering punishment based on what is due. The framing of justice in De Natura Deorum is notably similar to the fulfillment of a debt. *Lex talionis*, the principle of exact retaliation, parallels the Roman conception of justice. *Lex talionis* supposes that for taking a life, a murderer may justly be sentenced to death; their life may be taken as what is "due" for their crime. While scattered with potential issues of how a judicial entity determines what is due, the foundation of much legal thinking is the idea that justice is seeking to assert what is due.

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[2] Caesar Flavius Justinian, *The Institutes of Justinian*, trans. John Baron Boyle (533 AD; repr., Project Gutenberg, 2013), 1.1.0, https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0002; Justinian, Caesar Flavius. *The Institutes of Justinian*. 533 AD.

[3] Marcus Tullius Cicero, *De Natura Deorum*, trans. H. Rackham (Harvard University Press, 1933), 3.38.

Cosmopolitanism asserts that what is owed to a person is inherent in their personhood, not a byproduct of citizenship. If the end goal is to have a universally just system, cosmopolitan attitudes must become foundational for all governing institutions.

Cosmopolitan legal thinking assumes that what is just is giving each person their due, and that each person retains key rights and obligations in the international system. Political and moral rights are not owed simply based on citizenship, nor are they limited in scope by borders. Cosmopolitan legal thinking claims that legal rights and obligations in the international system should not simply be owed by one state to another, but are owed between all humans, as their rights are not derived from their proximity to or membership in a state, but rather their rights are derived simply from their status as human beings. The lens of cosmopolitanism provides state actors with the ability to expand international legal thinking in order to center individuals as the primary political or legal unit.

Roman law and other frameworks for legal analysis have contributed to the language of prominent early international legal scholars, resulting in a perpetual influence upon international legal thinking that still appears often today. In order to ascertain a deeper understanding of the theoretical framework upon which international law (and, subsequently, peremptory norms) have been built, it is critical to first define some key terms and concepts.

Having established justice as a paramount feature of legal thinking, the concepts of obligations and rights are irrevocably tied to discussions of legal theory. Under any governing entity– within any "just" society– the concept of what is owed is the key to law, while the interpretation of what is owed might vary greatly. Justinian's *Institutes* defines an obligation as "a legal bond,"[4] which, in the case of a people claiming rights owed by the state, is a bond

[4] Caesar Flavius Justinian, *The Institutes of Justinian*, trans. John Baron Boyle (533 AD; repr., Project Gutenberg, 2013), 3.13.0, https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0002.

between sovereign and subject. People within a society have rights and the sovereign has corresponding obligations. Assuming that the most basic sovereign entity is given consent to govern by its subjects based on being afforded a degree of protection, there is a contractual obligation that both parties enter. The subjects agree to obey in exchange for the right to claim protection, and the sovereign is required to afford those protections.

Rights without corresponding obligations or remedies (or *actiones*) are ineffective.[5] If there is nothing that is owed (no remedy; no *actio* to be undertaken by the arbiter of justice) justice cannot be delivered and no right can be claimed. The study of justice has treated rights claiming as a "rectificatory" movement, centering the *actio* as the basis for the right in and of itself.[6] This is a popular idea within legal study, but the confines of traditional legal thinking do not allow lawyers to reckon with theoretical concepts of morality. Within the fields of ethics and politics, beyond conventional legal structures, these rights may still hold weight, and therefore can exist without a practical or literal corresponding *actio*. Within the context of this paper I will be considering rights devoid of remedies to be valid, at least insofar as those rights might hold moral weight.

Throughout the analysis of the development of legal theory, definitions of concepts such as *ius naturale*, *ius gentium*, and *ius inter gentes* have been strongly distinguished, conflated, and reoriented. This continual redefinition complicates reading analysis on the topic, particularly so when crossing multiple eras of scholarship.

Ius gentium has consistently referred to the law of nations. Due to the fact that it could potentially denote the law governing relations between nations, "as well as the law shared in

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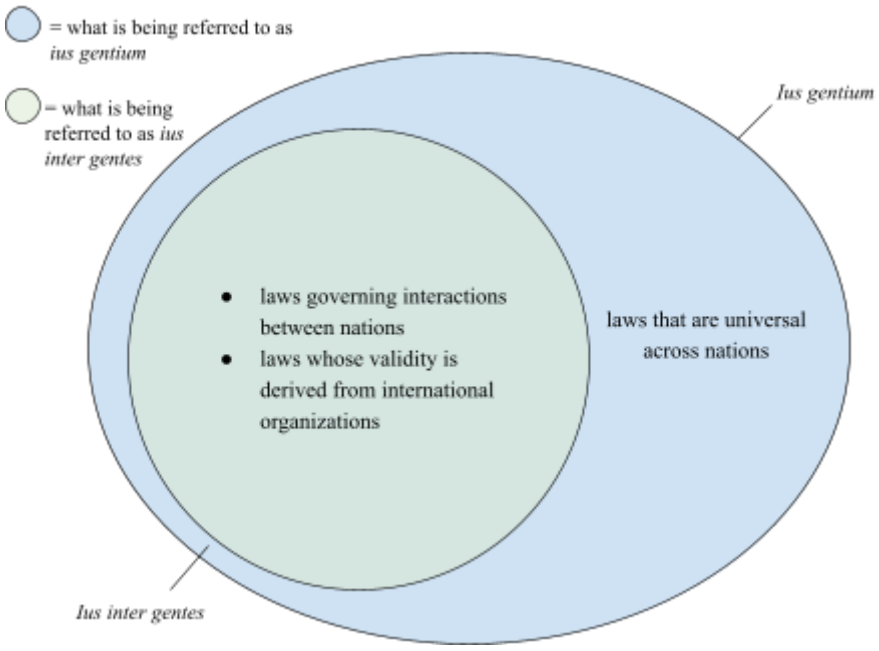
[5] Daniel Lee, *The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations* (Oxford University Press, 2021), 68.
[6] Aristotle, *Nicomachean Ethics*, trans. W.D. Ross (Batoche Books: Kitchener: Aristotle, 1999), https://historyofeconomicthought.mcmaster.ca/aristotle/Ethics.pdf, 5.4.

common by all nations," ius gentium was subject to a significant amount of scrutiny.[7] Directly presenting a solution to this problem, Jeremy Bentham utilized the term international law, or *ius inter gentes*.[8] This term specifically refers to laws governing interactions between nations or laws whose validity is derived from international organizations. For the sake of clarity, when I use the term *ius gentium* or "the law of nations" I will be referring specifically to laws that are universal across nations. *Ius inter gentes* or international law will refer specifically to the laws governing the interactions between nations or laws based upon the authority of international organizations. While *ius inter gentes* will be understood in this text as a subcategory of *ius gentium* which may be read as including both international law and the law common to nations, I will not use the terms interchangeably, nor will I be using *ius gentium* to refer to laws governing interactions between states.



[7] Daniel Lee, *The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations* (Oxford University Press, 2021), 182.
[8] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1999; repr., Kitchener: Batoche Books, 1789. Proquest Ebook Central), 10.

In some cases, *ius naturale* is considered to contain some or all of *ius gentium*. Grotius defined natural law as "the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature."[9] Others might believe that there is little difference between *ius gentium* and *ius naturale*. This argument is predicated on the notion that laws common to all nations must arise from the rationality that is natural to all men.

Therefore if the laws of nations are dictated by the common natural reason, the idea of natural law and the law of nations must be irrevocably connected. Grotius "distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the consent of nations."[10] Thinkers such as Thomas Hobbes, Gaius, and Samuel von Puffendorf, believe that the only distinguishing quality between the law of nations and natural law is that the former refers to the laws of states and the latter refers to the laws of individuals. Justinian's *Digest* claims that "*Jus Gentium* is the law used by the various tribes of mankind, and there is no difficulty in seeing that it falls short of natural law, as the latter is common to all animated beings, whereas the former is only common to human beings in respect of their mutual relations."[11] Ulpianus argued that according to *ius gentium*, manumission would be considered irrational, and that the distinction between *ius naturale* and *ius gentium* becomes strikingly clear in the case of slavery, as all men are born free per the laws of nature.[12] In turn, this paper chooses to consider the laws of nature as conceptually distinct from the laws of nations.

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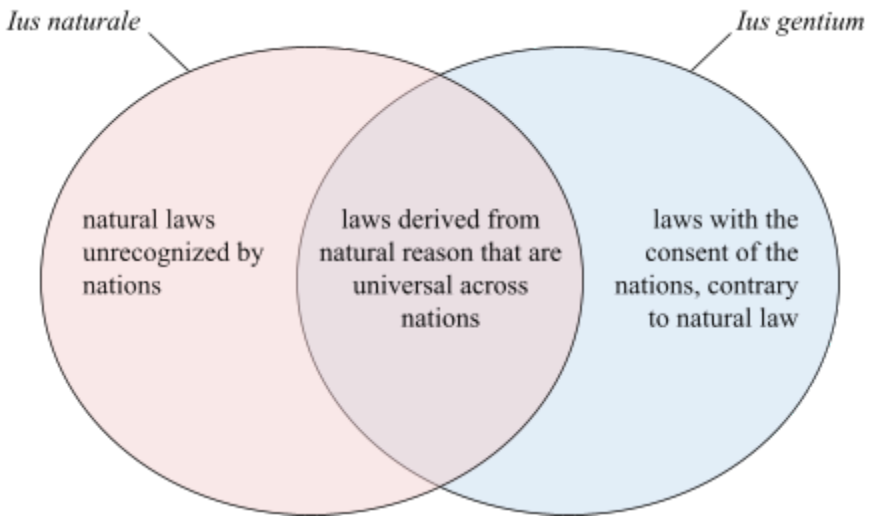
[9] Henry Wheaton, Richard Henry Dana Jr., and George Grafton Wilson. *Elements of International Law*. (Publications of the Carnegie Endowment for International Peace, Division of International Law. The Clarendon press, 1936), 4, citing Hugo Grotius.
[10] Ibid.
[11] Justinian, *The Digest of Justinian*, trans. Charles Henry Monro, vol. 1 (Cambridge: Cambridge At the University Press, 1904), 1.1.1.
[12] Ibid, 1.1.4.



A key concept that must be addressed in any examination of international legal institutions is sovereignty and the complications posed as a result of its continued dominance in the international system. The sovereign is the "supreme authority in a state."[13] A modern conception considers the sovereign's right to rule to be a key component of sovereignty. A sovereign without the right to rule is reduced to a tyrant, and their legitimacy is weak compared to those who have a perceived validity of their claim to power. Within the modern international system, the prevailing notion is that each state's government must first and foremost preserve their rights as a sovereign state. This means that many key states (particularly those who are the most powerful and therefore have the least to gain by enhancing the strength of international organizations) are unwilling to give international organizations such as the United Nations increased authority over them. They are resistant to ceding rights as sovereigns even if it is to the benefit of humanity as a whole.

Many sovereign powers (an administration either as an amalgamation of people and institutions or an individual sovereign ruler) have to contend with conflicting obligations as a

[13] "Sovereignty." In *A Dictionary of Law*, edited by Law, Jonathan. Oxford University Press, 2018. https://www.oxfordreference.com/view/10.1093/acref/9780198802525.001.0001/acref-9780198802525-e-3701.

sovereign and as members of humanity. A common conception in political theory is that a sovereign's power is based upon their right to rule, but that right is contingent upon a contract subjects enter into with the sovereign. The subjects allow for the sovereign's authority presuming that the sovereign upholds certain obligations. As a consequence of this, the sovereign owes their subjects obligations that most people are not bound by. For example a sovereign is obligated to protect its subjects from external threats. This obligation can come in direct contention with a human obligation to react in cases of human suffering. This is what I will be referring to as the sovereign's dilemma. In cases where there is a human obligation to intercede on the behalf of human interests, what is a sovereign to do if bound by an obligation to protect its people from external forces? For example, if there is a human obligation to prevent another state leader from perpetrating mass crimes against their subjects, that obligation to intercede might conflict with a sovereign's obligation to not bring unnecessary risks to its people through entering external conflicts. This dilemma plagues human rights discussions, as well as moral debates pertaining to justice and interventionism.

The inter-state state of nature is a byproduct of sovereignty. Hedley Bull coined the term domestic analogy. Thinkers such as Thomas Hobbes and Immanuel Kant laid the groundwork for this theory, which was derived from social contractarianism, which explains the existence of wars. The domestic analogy asserts that, just as there had been between individuals, there is a state of nature which is inherently anarchical and exists between states.[14] Just as human beings experience anarchy as their state of nature when left without a social contract, states are left in a similar state of anarchy absent a world government. Attempts to create such an organization have arrived at roadblocks with regards to enforcing the decisions of the body. States are reluctant to

[14] Hedley Bull. "Hobbes and the International Anarchy." *Social Research* 48, no. 4 (1981): 717–38. http://www.jstor.org/stable/40970843; Hedley Bull. "Society and Anarchy in International Relations," (H. Butterfield and M. Wight, eds.), Diplomatic Investigations (London: 1966), 35.

concede sovereignty, therefore there has not been any comprehensive enforcement mechanism successfully created and the states have remained in a near anarchical condition.

Peremptory norms, or *jus cogens,* have unique moral and legal weight. These norms are considered to be fundamental to international law and are universally accepted as norms that are not to be violated. The United Nations, in a report of the International Law Commission, defined peremptory norms as follows:

> A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[15]

The basis for peremptory norms (as theoretical constructs) has been laid out through the history of international legal theory. Writings on natural law have been interpreted as forming the basis for peremptory norm arguments. Peremptory norms have their conceptual roots reaching as far back as the foundations of international legal theory with the emergence of *ius naturale*. Thomas Aquinas (d.1274) identifies natural conclusions with moral sanctity of the highest level and claims they emerged from natural law.[16] Vattel (d.1767) wrote about similar ideas, fundamental norms in 1754.[17] Hart (d. 1992) describes these kinds of norms as the "minimum content of natural law."[18] The theoretical underpinnings of peremptory norms are observable in the basis of many foundational international legal thinkers, and it is no wonder that the validity of these norms had become enshrined in international organizations such as the United Nations.

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[15] United Nations, "Report of the International Law Commission: Seventy-Third Session (18 April–3 June and 4 July–5 August 2022)," (2022). https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf, 12.
[16] H.L.A. Hart, *The Concept of Law* (Oxford, United Kingdom: Oxford University Press, 1961).
[17] Emer de Vattel. *The Law of Nations*. Indianapolis, IN: Liberty Fund, Incorporated, 2008. Accessed September 15, 2024. ProQuest Ebook Central. Christian Wolff. *Jus gentium methodo scientifica pertractatum- Ed. caeteris accuratior, et nitidior*. Francofurti [etc.]: [s.n.], [1764]. *The Making of the Modern World* (accessed September 15, 2024). https://link.gale.com/apps/doc/U0103901579/MOME?u=mlin_w_mounthc&sid=bookmark-MOME&xid=3976b902&pg=1.
[18] H.L.A. Hart, *The Concept of Law* (Oxford, United Kingdom: Oxford University Press, 1961).

The idea that there were norms or laws that superseded sovereignty was first recognized by an international court in the Permanent Court of International Justice's *S.S. Wimbledon* case, wherein the judicial body states that some laws come before sovereignty.[19] From there, peremptory norms continued to develop in international jurisprudence. The United Nations and many international legal and rights-based organizations have further recognized peremptory norms as being "hierarchically superior to other rules of international law."[20] While there is no clear exhaustive list detailing peremptory norm violations, there is a non-exhaustive one acknowledged by the United Nations, which names the following:

(*a*) The prohibition of aggression;
(*b*) the prohibition of genocide;
(*c*) the prohibition of crimes against humanity;
(*d*) the basic rules of international humanitarian law;
(*e*) the prohibition of racial discrimination and apartheid;
(*f*) the prohibition of slavery;
(*g*) the prohibition of torture;
(*h*) the right of self-determination.[21]

For the purposes of this paper I will be specifically examining the prohibition of genocide. In order to avoid straying from this scope, I will be limiting my discussion of peremptory norms to the list above; it is important to note that this list is not only considered non-exhaustive by scholars, but also by the United Nations itself.

The United Nations is an international organization whose intended purpose is to "maintain international peace and security."[22] Through international cooperation, the United Nations works to resolve inter-state disputes and collective issues. With 193 member states, the United Nations is the world's largest international organization, receiving the most significant

[19] Permanent Court of International Justice, "Case of the S.S. 'Wimbledon', United Kingdom, France, Italy & Japan v. Germany, Judgment, 17 August 1923, Permanent Court of International Justice (PCIJ)," 1923, https://www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm.
[20] United Nations, "Report of the 1mission: Seventy-Third Session (18 April–3 June and 4 July–5 August 2022)," (2022), 11.
[21] Ibid, 16.
[22] United Nations. "UN Charter." United Nations, June 26, 1945. https://www.un.org/en/about-us/un-charter.

respect internationally from existing sovereign states. There are six organs of the United Nations; "a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat."[23]

The International Court of Justice (ICJ) is the judicial organ of the United Nations, and is responsible for the adjudication of inter-state disputes. The ICJ operates according to its own statute,[24] which is "annexed to the UN Charter."[25] As a judicial body, the ICJ is meant to be a relatively apolitical interpreter of what is due according to recognized international law. Furthermore, the International Court of Justice has a significant degree of legitimacy as an arbiter of justice due to its connection to the United Nations. This means that while the ICJ is meant to be an apolitical, unbiased institution, it is simultaneously tied to the United Nations' politicized position. As a result of this condition, any significant analysis of a crime's legal condition within international law should account for both political treatment from the United Nations as well as judicial responses from the International Court of Justice.

As this paper will be primarily focused on legal considerations afforded to the crime of genocide by the international system, the political conditions surrounding the crime of genocide cannot be overlooked. The focus of this paper is on the United Nations and the International Court of Justice because there are no other comparable entities receiving the same degree of acceptance as international arbiters of justice. While it must be acknowledged that there is dissent pertaining to particular details surrounding the UN's and ICJ's treatment of the crime of genocide, these entities' rhetoric will be considered as the dominant attitudes within the international system's legal system.

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[23] Ibid.
[24] United Nations, "Statute of the International Court of Justice," United Nations, 1945, https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice.
[25] United Nations. "UN Charter." 1945.

Genocide is defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) in the following terms:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[26]

For the purposes of this paper, this is the definition I will be using. However, genocide is not the only crime listed under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). In Article 3, the following are listed as punishable crimes:

> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.[27]

The listing of complicity in genocide as a crime has led to a significant amount of debate pertaining to the legality of international responses to genocide. For example, is it a crime for a powerful nation to not take immediate economic, legal, and military action against a nation committing genocide? What constitutes complicity? What are a nation's exact obligations under these guidelines?

I will be examining additional materials produced by the United Nations and International Court of Justice to further understand genocide as a crime. An analysis framework laid out by the Office of the UN Special Advisor on the Prevention of Genocide (OSAPG)

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[26] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 276 (entered into force 12 January 1951), Article 2.
[27] Ibid, Article 3.

includes eight categories examining the potential risk of genocide.[28] The OSAPG gives the United Nations and, consequently, the International Court of Justice, a framework of genocide risk factors that allow it to be understood if deep, systemic issues within a given region make the risk of genocide imminent. Among other factors, the Analysis Framework from the OSAPG suggests that a record of discrimination against a group, the presence of armed forces, leading actors being motivated to further inflame divisions, and triggering factors are all signs of genocide risk.[29] Other documents emerging from offices in charge of addressing such crimes will be considered in order to gain a fuller understanding of the international organization's political or legal approach to addressing the crime of genocide.

The concept of morality and the framework of moralism are closely tied together, and moralism's influence on legalism and legalization is notable with regards to the concern of this paper. The centering of a remedy as a fundamental component to any valid right is not in line with the manner in which this paper will be examining questions of justice, rights, and obligations. This remedy-centric perspective on rights leaves no room for the theoretical legal power of morality. This paper will examine the path through which genocide has come to exist in a unique legal and political space. Universal moral sense (morality) has had a significant contribution to the crime of genocide's occupation of this space. The dichotomy between legal and moral sciences regarding rights and obligations is laid out clearly by political scientist Daniel Lee:

> It might even be said that the jurist's obsessive focus on identifying remedies (in contrast to the moral philosopher's focus on rights, the remedies notwithstanding) was exactly what separated the legal science of jurisprudence from the moral science of ethics.[30]

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[28] Office of the UN Special Advisor on the Prevention of Genocide (OSAPG), "OSAPG Analysis Framework," *United Nations*, 2014, https://www.un.org/ar/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf.
[29] Ibid.
[30] Daniel Lee, *The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations* (Oxford University Press, 2021), 71.

When examining the crime of genocide and its occupation of a unique legal and political space, it is important to understand the legal minds' traditional attitudes around such concepts, but to ignore the moral science's contribution would be a significant error. In the international community's treatment of genocide as a crime, there are notable irregularities when compared to typical legal attitudes. Genocide is considered to be an issue that transcends typical legal and political thinking due to its relationship with morality. The universal reaction to the idea of genocide originates from a natural rationality that is acknowledged in legal sciences as a source of law in the concept of *ius naturale*. As such, moral sciences will be explored in this paper in order to understand the legal arguments made around genocide.

Moralism is a distinct school of thought that has (as this paper will, in part, demonstrate) increased in relevance over the course of recent history. Robert Keohane defines moralism as "the belief that moral principles provide valuable, if not necessarily sufficient, guides to how political actors should behave, and that actions by those in power can properly be judged on the basis of their conformity to general moral principles developed chiefly to govern the actions of individuals."[31] Under moralism, moral principles create a path for normative international conduct. This path informs the institutions' processes of legalization. It must be said that moralism is not without its critics. Keohane suggested that moralism can create a dangerous degree of arrogance in institutional leaders through the distortion of analysis, which can be used to conceal ulterior motives when enacting interventionist policies.[32] On the other hand, moralism has provided criteria on what is acceptable and what is unacceptable behavior, giving substance to international societal expectations.

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[31] Robert O. Keohane, "Twenty Years of Institutional Liberalism," *International Relations* 26, no. 2 (June 2012): 129, https://doi.org/10.1177/0047117812438451.
[32] Ibid.

Legalism has also had an uptick in presence in the minds of international actors throughout recent times. Legalism, according to Keohane, "is the belief that moral and political progress can be made through the extension of law."[33] This notion suggests that issues such as genocide are best handled through legal means. This paper will not be explicitly prescribing methods through which moral progression should be made, but it is worth noting that legalism is not above criticism. By undermining other avenues for political and moral progress, those who subscribe strictly to legalism neglect to understand the potential for change on a social level. Legalism can create structures for arbitration, creating guardrails for the acceptable conduct within the international system. It can have substantive impacts, allowing for certain crimes to be punished. This does not necessarily mean, however, that the implementation of a legalist framing is solely to credit for such developments. Underlying power dynamics, the circumstances of international polity, and the needs of superpowers all may either allow for, support, or shut down such progress at their wills.

This paper will closely study the crime of genocide and the process of legalization. International institutions from the Permanent Court of International Justice to the International Court of Justice will be studied critically. The anti-genocide moral sentiments of the public after the Holocaust allowed for international institutions to create clear arrangements for the prohibition and punishment of genocide. Legalization "is a property of *institutions.* The rules of legalized institutions are precise and obligatory…In some domains, notably human rights and criminal responsibility, there has been a remarkable increase in legalization over the past two decades."[34] Moral beliefs became legalized in the case of genocide, and the conditions of that

[33] Ibid.
[34] Ibid, 128.

legalization have given rise to the specific area of international law that I am considering to be cosmopolitan in nature.

For the purposes of this work, cosmopolitanism is defined as the perspective that asserts that there is a universal sense of moral solidarity, something which binds humanity together. Under this school of thought, I will be exploring language that indicates an underlying belief that there is a human community that transcends state borders and can rise above the notion of sovereignty.

Kant considers cosmopolitan law to be a component of public law, defining it as "the law of world citizens, considered not as members of their state, but as members, beside states, of a universal state of humankind."[35] Much of cosmopolitan law has, as a consequence of this definition, centered around the laws which apply to refugees or people outside of the protections afforded to them by their states. This approach to cosmopolitan law allows academics to examine the minimum standards for the treatment of people outside of the protection extended to them as a consequence of membership of a state. Essentially, a refugee or an asylum seeker or anyone who has for some reason been deprived of the protections of their home state receives the barest of rights as a human. By examining the ways the international legal system operates with these people, academics can gain insight into what the legal systems regard as rights extended to all humans. Beyond cosmopolitan law, Kant understood a cosmopolitan right to transcend "particular claims of nations and states," asserting that these rights are to belong to "all in the 'universal community.'"[36] This understanding of a cosmopolitan right is in line with the definition this paper will be utilizing as a framework for analysis.

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[35] S.N. Sckell (2017). A Cosmopolitan Law Created by Cosmopolitan Citizens: The Kantian Project Today. In: Altman, M. (eds) The Palgrave Kant Handbook. Palgrave Handbooks in German Idealism. Palgrave Macmillan, London. https://doi.org/10.1057/978-1-137-54656-2_26

[36] David Held, *Cosmopolitanism: Ideals and Realities* (Cambridge: Polity Press, 2010), 43.

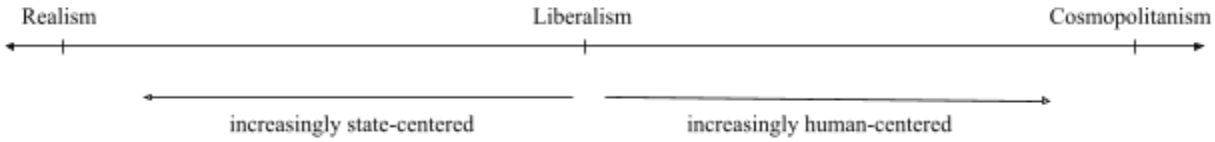
This paper will not be examining the rights extended to those who are stateless, nor will it deal with the rights of people residing outside of the state which they are citizens of. I will be focusing on protections which are held as transcending sovereignty, not just those which are regarded as existing in the absence of a sovereign protector. I will be specifically looking at peremptory norms and the crime of genocide as a class of norms which are held above statehood, not simply maintained in its absence. David Held defines the connotative meaning of cosmopolitanism as "the ethical and political space which sets out the terms of reference for the recognition of people's equal moral worth, their active agency and what is required for their autonomy and development."[37] David Hirsh considers the distinguishing characteristic of cosmopolitan criminal law to be the origins of its authority, which are based "in a set of supra-national principles, practices and institutions" and the nature of its concerns, which are "with a specific set of crimes that are so huge that they transcend national boundaries both spatially and conceptually: genocide, ethnic cleansing and crimes against humanity."[38] This is the school of thought on cosmopolitanism that this paper is the most concerned with. Cosmopolitanism in these circumstances is the idea that humanity holds certain inherent moral and political solidarities and that this universal connection can manifest itself in the form of recognized rights and obligations which transcend statehood.

Explicitly cosmopolitan language is narrowly defined. As such, it becomes necessary to elucidate a framework for discourse analysis that this paper can use to illustrate a track towards cosmopolitanism. Given that cosmopolitanism is being framed on a spectrum alongside more state-centered schools of thought (realism and liberalism) it is important to explain the role that

[37] Ibid, 49.
[38] David Hirsh. *Law against Genocide: Cosmopolitan Trials*. The GlassHouse Press, Cavendish Publishing, 2003.

state-centered and human-centered forms of rhetoric play in progressing towards an increasingly cosmopolitan framework for international legality.

Realism, liberalism, and cosmopolitanism as they exist on a spectrum can be explained as assuming different degrees of belief in universal moral solidarity between humans. While realists might assume a low degree of universal moral solidarity between all of humanity, cosmopolitans take the opposite stance. While a realist or a liberal might consider rights of people to be derived from status as a citizen or from special acknowledgement from a state, a cosmopolitan would frame rights discussions along the lines of a person's inherent rights as a human-being. Cosmopolitan thought is marked heavily by human-centered language. Realism claims that the nation-state system is dominated entirely by self-interested nation-states which are concerned almost exclusively with power and security, and that this is essentially unchangeable. Liberalism and cosmopolitanism are more closely related, as liberalism also places a significant emphasis on human rights. However, liberalism operates within the confines of the nation-state system and does not consider a future beyond the nation-state framework, making it far more limited in the kinds of progress it considers viable. Cosmopolitanism is far more inclined than either to imagine a future wherein there is a universally just international system formed on the basis that all people have inherent rights and obligations as global citizens, as a part of the collective human community.



In the context of this paper I will be tracing international legal developments that are allowing space for a cosmopolitan-minded international legal framework. Due to the fact that I am tracing a development *towards* cosmopolitanism, human-centered language will be

considered to be evidence of an increasingly cosmopolitan attitude. To simplify, a cosmopolitan-minded international legal system is a destination, and the road is paved by increasingly human-centered language. Decoupling attachment to a state from the origins of the rights of human-beings is the objective of cosmopolitan thinkers. Centering a state in discussions of rights flies in the face of that thinking.

State-centered language has a lot of overlap with the language of sovereignty. States are taken as the ultimate arbiter of power, with an absolute monopoly on all legitimate uses of violence and with no higher authority. Language orienting inherent rights along the framework of a system such as this is what I define as state-centered language. Implying that rights are derived from status as a citizen, or are endowed upon a person by a state is taken as a state-centered approach to rights discussions.

Examples of Human-Centered Language	**Examples of State-Centered Language**
➢ Humankind ➢ Mankind ➢ Humanity ➢ World citizens ➢ Human rights ➢ Universal rights ➢ Universal moral sense ➢ Universal moral conscience	➢ Sovereignty ➢ Sovereign state ➢ Nation ➢ Country ➢ Governments ➢ Citizens (of a particular state) ➢ Non-intervention ➢ Territorial integrity, territory

CHAPTER ONE: Preceding the Genocide Convention

The Westphalian System

The Peace of Westphalia set up an international legal system that was deeply state-centered. The concept of sovereignty was irremovable from the international legal system as a consequence, resulting in the need for the uphill battle for a human-centered approach to international law that persists today. After the Thirty Years War, the Westphalian System was instituted and would shift the framing of the international system's focus. States would go from using moral arguments to justify self-interested actions to states being relatively free to "pursue their own interests in an enlightened way and within a minimum legal framework," claiming a right to do so.[1] While there is a significant amount of controversy around the origins of this system, as well as its connections to the Peace of Westphalia, there is no doubt that during this time period the international system became notably more centered around sovereign states, decentering both individuals and ethical considerations.

The state-centered system referred to as the Westphalian System was one wherein each state government assumed absolute authority over its people and its territory. Rules on an international level were in service of allowing coexistence when that would benefit individual state interests, and conflict would be resolved, in the end, by force. It was considered the

[1] Hirsh. *Law against Genocide: Cosmopolitan Trials*, 2003, 8-9.

prerogative of state governments to act in their own interests, prioritizing those interests above the interests of collective humanity. Non-state actors were written off, and the right to partake in decision making processes in the international system became seemingly irrevocably attached to statehood. The model practically codifies the international system's anarchical nature, setting the stage for the international legal system leading all the way up to 1945.

Just because this anarchical system has persisted through that era does not mean progress was not made. The First Peace Conference in The Hague (1899) marked some significant milestones in the way of further working towards the collective interests of humanity. Three specific declarations were made prohibiting the use of certain kinds of weapons in warfare, marking a movement in the interests of the collective human well-being.[2] This conference also set up the Permanent Court of Arbitration as a direct result of the Convention for the Pacific Settlement of International Disputes. Within this document the signatories would be able to submit those people who would be particularly qualified to act as arbiters. From there, states could bring cases and select a panel of judges to act as arbiters. This court was created "[w]ith the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy."[3] This was the first time in the international system where a group of judges were meant to be making decisions in order to settle international disputes, and the court was widely accepted as a success. The Permanent Court of Arbitration still exists today.

There were additionally notable proposals in a similar vein that came out of the Second Peace Conference, wherein discussions took place around the creation of an International Prize

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[2] "Final Act Of the International Peace Conference." July 29, 1899. *International Humanitarian Law Databases.* https://ihl-databases.icrc.org/assets/treaties/145-IHL-9-EN.pdf.

[3] "The Convention for the Pacific Settlement of International Disputes." July 29, 1899. *The Permanent Court of Arbitration.* https://docs.pca-cpa.org/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf.

Court and a Judicial Arbitration Court.[4] This conference further popularized the idea of a standing body of judges that could develop a system of international jurisprudence. This idea likely would have been discussed in the Third Peace Conference. The Third Peace Conference had been scheduled for 1915, but was not held as a consequence of the First World War, which took place from 1914 to 1918. Though the ideas from the Second Peace Conference were not realized within the Peace Conferences, architects of peace coming out of the First World War embodied these ideas in the 14th Article of the Covenant of the League of Nations.

The League of Nations

Contrary to what might be assumed by many, the creation of the League of Nations set back cosmopolitanism in certain regards. While it created more space for international legal work, it also further entrenched the Westphalian System. Admittance into the international community became predicated on status as a sovereign state. Hannah Arendt argued that after World War I, the idea of a state changed dramatically. While previously governments had been based on law, on unifying principles which could allow space for just application to a heterogenous population, the nation-state was based upon homogeneity. Under such a system, the minority populations are pressured into assimilation, rather than being integrated into the system of law.[5] This led to the increasing popularity of the idea that rights can be obtained through nationalist movements, with minority groups considering creating their own nation-states in order to be treated justly. The claim of human rights became something to be resorted to in the absence of rights derived through citizenship, which were the most substantive rights. The idea of citizenship was most blatantly conflated with ethnicity in the case of the

[4] Registry of the Permanent Court, *The Permanent Court of International Justice* (1939; repr., The Hague: Registry of the International Court of Justice, 2012), https://www.icj-cij.org/sites/default/files/documents/the-permanent-court-of-international-justice-en.pdf.
[5] Hannah Arendt, *The Origins of Totalitarianism* (1951; repr., San Diego: Harvest, 1975), 125.

Nazis, who relegated the status of those not in the majority to non-citizens. These consequences of the Westphalian System served to undermine cosmopolitan notions of unity, as the idea of homogeneity became more closely conflated with freedom and notions of security became more closely tied to citizenship.

The prevalence of the Westphalian System has still allowed some space for work to be done in the way of international legal development. International law was defined by agreements made among states, and any agreements states chose not to agree to were considered not applicable. Despite the prioritization of sovereignty and the furthering of the nation-state system, the League of Nations did provide some substantive developments in the way of creating a mechanism for cosmopolitan rhetoric and action. Cosmopolitan law allows international lawyers to use international legal structures to engage in cosmopolitan ventures. The League of Nations was not only the first substantive intergovernmental organization (a major victory on its own), but it also allowed for the creation of the Permanent Court of International Justice, a major milestone in international legal development.

The League of Nations was founded at the end of the First World War, with the Covenant being drafted during the peace negotiations. The League of Nations' objective was to "promote international cooperation and to achieve international peace and security."[6] In order to achieve that goal, the League of Nations functioned as the earliest attempt at creating a collective security system of an international character. Within this system member-states would consider any act of aggression against one member-state as aggression against all. In doing so, the League of Nations sought to create a circle of peace within the member-states and to deter non-member states from attacking any member. There were 41 states in attendance at the first gathering of the

[6] League of Nations, "The Covenant of the League of Nations" (Geneva: The United Nations Office at Geneva, February 1920), https://libraryresources.unog.ch/ld.php?content_id=32971179.

Assembly, representing over 70% of the world's population at that point in time.[7] This was a substantive development in creating a coherent international system capable of acting in the collective interests of humanity. The three main organs of the League of Nations were the Assembly, the Council, and the Secretariat. The International Labour Organization and the Permanent Court of International Justice were both independent from the League of Nations, but their budgets were incorporated into the League of Nations' budget.[8]

The Permanent Court of International Justice (PCIJ) was established by Article 14 of the Covenant of the League of Nations, which stated the following:

> The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.[9]

The establishment of the PCIJ created a foundation for the development of international jurisprudence. This distinguished the PCIJ from the Permanent Court of Arbitration. The Permanent Court of Arbitration focused on arbitrating and mediating conflicts between states, primarily providing administrative and procedural support in such cases. Distinguishing itself from the Permanent Court of Arbitration, the PCIJ settled legal disputes with judges trying cases. The Permanent Court of Arbitration is a body that supports arbitration processes between states, while the PCIJ adjudicates cases as a formal judicial body. This meant that PCIJ decisions could establish precedents and develop a recognized, legitimate system of jurisprudence within the international system.

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[7] United Nations, "The League of Nations," The United Nations Office at Geneva, 2023, https://www.ungeneva.org/en/about/league-of-nations/overview.
[8] United Nations. "The League of Nations." The United Nations Office at Geneva, 2023. https://www.ungeneva.org/en/about/league-of-nations/organs.
[9] League of Nations, "The Covenant of the League of Nations" (Geneva: The United Nations Office at Geneva, February 1920), https://libraryresources.unog.ch/ld.php?content_id=32971179.

Within the PCIJ, a number of strides were made that created the foundation for international cosmopolitan legal theorists. Most notably was the S.S. Wimbledon case (1923), which had massive implications in codifying a new definition of sovereignty. The *Wimbledon*, an English ship chartered by a French company, had been loaded with munitions and artillery stores. Upon its arrival at the entrance of the Kiel Canal it was refused permission to pass based on the German neutrality orders relating to the Russo-Polish war. It would eventually be determined that the Kiel Canal was an international waterway and denial of passing based on neutrality was not valid.

In the judgment of this case, the PCIJ outlined a definition of sovereignty that was both well-accepted and left room for international law to grow. German jurist Georg Nolte, who now sits as a Judge on the International Court of Justice, wrote that "the Permanent Court of International Justice, in the 1923 case of The Wimbledon, conceived sovereignty simply as the liberty of a state within the limits of international law."[10] Nolte further elucidates how this interpretation of sovereignty provides unique advantages:

> This formal concept of sovereignty not only enables states to restrict their liberty in exchange for advantages, but it can also tolerate international law conceiving of rules which bind states without their consent. It precludes the use of sovereignty as a trump card against the law; it prevents the mistaking of sovereignty for raw power; and it protects states by requiring that restrictions of their liberty must be based on a more or less specific legal rule and not on the interpretation of a vague concept driven by particular world visions.[11]

The codification of this interpretation of sovereignty into the international legal system imposed vital guardrails on the previously seemingly unmitigated dominance of sovereignty over all else. This decision marked a significant step forward in allowing for a new conception of sovereignty to take hold that allowed space for international law. This case thereby foregrounds

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[10] Georg Nolte. "Sovereignty as Responsibility?" *Proceedings of the Annual Meeting (American Society of International Law)* 99 (2005) 389; S.S. Wimbledon, 1923 PCU (ser. A) No. 1, at 15.
[11] Nolte. "Sovereignty as Responsibility?" (2005) 389

all other cases pertaining to sovereign rights that have allowed for more human-centered, collectively-minded decisions in international law. Any international legal case that deals with rights and obligations owed by a state that are not written in a binding contract signed by the state in question could not be considered without the reframing of sovereignty that occurred as a result of the S.S. Wimbledon case.

The League of Nations Covenant was signed in 1919, at which point the Armenian Genocide had been ongoing for approximately four years. The genocide would go widely unaddressed by the League of Nations, likely as a result of the gravity of the First World War overshadowing concerns about the conduct within an enemy state. The Armistice of Mudros (1918) resolved the conflict in the Middle Eastern theater during the First World War, prior to the League's beginnings. Article 4 of the Armistice demanded that interned and imprisoned Armenians be handed over to the Allies, who would eventually form the League of Nations.[12] This in and of itself is evidence that the League was aware of the crisis.

The League of Nations had been the first international organization of its kind, and was therefore treading lightly on issues of sovereignty. The primary goal of the League of Nations had been preventing war after the horrors that had ensued during the waging of the First World War, which had a significant impact on the international community. Norms around managing conduct within war, what constitutes a just abridgement of sovereignty, and the role of organizations like the League had yet to come into clear understanding. The League of Nations had a goal of preventing war between states, and the issue of managing the internal affairs of a state was one that was pushed to the side. Therefore, the genocide against the Armenians not necessarily viewed as being within the League's mandate.

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[12] Rauf Bey and Somerset Gough-Calthorpe, "Mudros Agreement: The Armistice Convention with Turkey," *German History in Docs and Images*, October 30, 1918, https://germanhistorydocs.ghi-dc.org/pdf/eng/armistice_turk_eng.pdf.

It is additionally important to note what *did* fall within the League's mandate relating to the Armenian Genocide. Article 23 of the League of Nations Covenant gave the League the goal of supervising "the execution of agreements with regard to the traffic in women and children."[13] The Commission of Enquiry for the Protection of Women and Children in the Near East would be established by the League of Nations in 1921, and was responsible for informing the League of Nations on the status of deported women and children both in relation to the Armenian Genocide and other surrounding conflicts. The League would empower the organization to liberate women and children who had been taken and forcibly converted.[14] Approximately 2000 Armenian women and children were liberated as a result.

The Treaty of Sèvres was signed by some members of the Allies and the Ottoman Empire, but was not ratified. The language within it contained acknowledgements of the atrocities committed against Armenians. The treaty positioned the League of Nations as those responsible for handling the post-genocide transitional justice. Article 142 stated the following:

> The Turkish Government undertakes to facilitate the operations of mixed commissions appointed by the Council of the League of Nations to receive the complaints of the victims themselves, their families or their relations, to make the necessary enquiries, and to order the liberation of the persons in question.[15]

This both acknowledges that wrongdoings had been committed and creates a system for the management of liberation efforts. The League was directly party to the transitional justice effort that failed to be seen through regarding the Armenian Genocide. The measures levied against the Ottoman Empire in the Treaty of Sèvres would have been even more harsh than those placed upon Germany. This treaty, having failed to be ratified, could have been a significant

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[13] League of Nations, "The Covenant of the League of Nations" (Geneva: The United Nations Office at Geneva, February 1920), https://libraryresources.unog.ch/ld.php?content_id=32971179.
[14] Edita Gzoyan and Regina Galustyan. 2021. "Forced Marriages as a Tool of Genocide: The Armenian Case." *The International Journal of Human Rights* 25 (10): 1724–43. doi:10.1080/13642987.2021.1874361.
[15] Allied Powers and Ottoman Empire, "Treaty of Sevres: Internet Archive," Internet Archive, August 10, 1920, https://archive.org/details/TS00113/page/n49/mode/2up, 33.

show of moral strength that may have deterred subsequent crimes of a similar nature. Furthermore, Article 230 of the Treaty of Sèvres demanded trials take place for the perpetrators of the genocide:

> The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being *responsible for the massacres committed*…
> The Allied Powers reserve to themselves the right to *designate the tribunal* which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.
> In the event of the *League of Nations* having created in sufficient time a *tribunal competent to deal with the said massacres*, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognize such tribunal.[16]

The proposition of convening a tribunal in order to try the perpetrators of the genocide would eventually occur in the creation of the Charter of the International Military Tribunal (The Nuremberg Charter). The Allies would fail to come to a true agreement regarding the partitioning of the Ottoman Empire. Eventually, the Turkish War of Independence would lead to the complete abandonment of the Treaty of Sèvres, and the image for justice after the Armenian Genocide would go unfulfilled.

At the end of the Second World War, the United Nations and the International Court of Justice were both established. For a short period of time both the United Nations and the League of Nations coexisted. In the 21st (and final) Assembly session for the League of Nations in April 1946 there was a strong consensus in favor of dissolving the League. It was around the details of the dissolution that all the agenda items revolved. Thirty-four member states unanimously voted in favor of the resolution dissolving the League of Nations. This resolution dealt heavily with the United Nations as the natural successor for the League, expressing so in numerous places.

[16] Ibid, 51; emphasis added.

In the Seventh Meeting of the First Committee, during the last session of the League of Nations Assembly, the chairman, in his closing remarks claimed that the *leit-motif* of the discussions dissolving the League was "the idea that the League of Nations is disappearing only in order to reappear in a new form."[17] Though the League of Nations failed in fulfilling its mandate, it did succeed in significantly contributing to creating a positive framework for international governance. The Permanent Court of International Justice remains recognized as one of the most sound successes of the League of Nations, having effectively become the International Court of Justice, adopting the same emblem and having drawn heavily from the framework laid out by the PCIJ. In the closing remarks of the final ordinary Assembly session, the President of the Assembly of the League of Nations C.J. Hambro stated that:

> It has been said in a memorable book by one of the parents of the League of Nations that the League was a great experiment. It has been something far more—not only an experiment, not only an experience, it has been an accomplishment and an achievement, and we have heard this underlined in the speeches we have listened to this very day. We have heard it in the message from the President of the new International Court of Justice, testifying that only the name has been changed, that the League has done something that could never be forgotten.[18]

The United Nations Charter

As was evident in the attitudes of the League of Nations at its closing session, the United Nations became the new regime for international relations. The United Nations Charter (signed June 26, 1945) was the founding document of the organization, and drew heavily from the successes and failures of the League of Nations. The PCIJ, having been one of the most structurally sound components from the League of Nations' time, became the International Court of Justice. The International Court of Justices' structure was nearly identical to the PCIJ's, but

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[17] League of Nations Official Journal, "Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly," UNGeneva.org (United Nations Library & Archives Geneva, April 1946), https://archives.ungeneva.org/uploads/r/unog-registry-records-and-archives-unit-2/4/4/9/449c3b40882df14aeceeb0513d208123945e3de51e68398fc70139422054090a/A.CTE.1.1946_EN.pdf?token=712f59b2496b7c8b8da47b0aacad6c7996352083b1090389ccf00d741c171ed0, 101.

[18] Ibid, 67.

outside of that the United Nations was relatively distinct from the League of Nations. With similar missions, the United Nations sought to build upon lessons learned from the Leagues' failures. In order to foster international consensus, the United Nations' Charter was structured with deeply state-centered principles in mind. While there were human-centered aspirations outlined, the design of the charter left little room for doubt: the United Nations would be a system of sovereign states.

A long history precedes the creation of the UN Charter. The Atlantic Charter was signed in 1941 by United States President Franklin D. Roosevelt and the United Kingdom's Prime Minister Winston Churchill. The Atlantic Charter was intended to "make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world."[19] In its eighth point, the charter suggests the "establishment of a wider and permanent system of general security."[20] While the document outlined values that were progressive for its time, it framed rights within the context of a nation-state system. In seven of the eight outlined points of the Atlantic Charter state-centered language (as defined in this paper) is used. This document, therefore, is more institutional liberalist than cosmopolitan in its image of the future. As the preceding document to the UN Charter, this would have significant implications for the foundation laid within the United Nations.

In 1942, the Declaration by United Nations was made by twenty-six original signatories. This declaration uses the language of "governments" and not of people, individuals, or humans. Obligations are owed by governments to one another under the framework elucidated by the declaration. The Declaration by United Nations does, however, refer to a "common struggle"

[19] Franklin D. Roosevelt and Winston Churchill, "Atlantic Charter," Yale Law School: The Avalon Project (originally 1941; Yale Law School Lillian Goldman Law Library, 2019), https://avalon.law.yale.edu/wwii/atlantic.asp.
[20] Ibid.

with a goal of preserving "human rights and justice."[21] These values are human-centered in nature, and were considered critically by this document and by other documents of the time as a consequence of the Holocaust. Regardless, the framing of the subjects as the governments creates an inherently state-centered document. Twenty-six states originally signed this document, which was made a prerequisite for admittance to the San Francisco Conference of 1945. Twenty-one additional states would sign the document at a later date.[22] This made the Declaration of United Nations a foundational text preceding the creation of the charter for the United Nations.

The UN Charter, therefore, is built upon a foundation that has admirable, human-centered goals but uses a state-centered approach to achieving those goals. The preamble is notably human-centered, and elucidates a vision for a common future, goals and aspirations, which might be considered to be fairly progressive and even cosmopolitan in nature. The United Nations, in the Preamble of the UN Charter, state the following determinations:

> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
> to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
> to promote social progress and better standards of life in larger freedom[23]

This message centers the human beings which had been victims of the World Wars, with the nations being placed below the needs of a collective humanity. Under this framing dignity and rights are derived from personhood, not from citizenship.

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[21] United Nations. "Declaration by the United Nations." Yale Law School: The Avalon Project. Yale Law School Lillian Goldman Law Library, originally 1941; rep. 2019. https://avalon.law.yale.edu/20th_century/decade03.asp.
[22] United Nations, "Preparatory Years: UN Charter History," United Nations (The United Nations), accessed November 9, 2024, https://www.un.org/en/about-us/history-of-the-un/preparatory-years.
[23] United Nations. "UN Charter." United Nations, June 26, 1945. https://www.un.org/en/about-us/un-charter.

Procedurally, however, the UN Charter outlines a system that centers states as the actors within international society, and leaves out those who possess personhood but are not a part of a state. In Chapter 1 Article 2 of the UN Charter it states that the United Nations as an organization is "based on the principle of the sovereign equality of all its Members."[24] Consequently, the notion of eroding sovereignty in the pursuit of expanding protections for individuals runs contrary to the basic principles of the United Nations.

As was previously established in discussing the Westphalian System and Hannah Arendt's understanding of the state, after World War 1 there was a shift in the conception of statehood in favor of nation-states. Minority groups sought liberation through independence movements, not through institutional reform or through expanded protections. The formation of a new state with a homogeneous populace of a previously incorporated minority group was seen as more viable in the pursuit of liberation. Therefore, the language of self-determination became critical to the philosophy of the United Nations.[25] Marginalized groups were meant to secede from their oppressive states and claim a right to self-determination if they wanted protections. To infringe upon the sovereignty of a state would be impermissible, international society did not have a right to regulate the relationship between a state and its people. The path to liberation was to be found in statehood. Thus, statehood became centered in discussions of protections for minority groups.

This proved to be problematic, particularly for groups who'd experienced a diaspora. Minority groups contained to a specific region were easier to organize into a state (such as in the case of Armenia). In the case of the foundation of Israel, that project was a massive undertaking. The Jewish population experienced a global diaspora that had been exacerbated as a consequence

[24] Ibid.
[25] Ibid, Ch. 1, Art. 1.2.

of the Holocaust. As a result, no land was already inhabited by a sizable enough population of Jewish people to constitute a state. Therefore, the project of building the state of Israel was more complicated than if, say, there had been a region in Europe that was already inhabited by a predominantly Jewish populace and could be easily granted independence. The project of creating the state of Israel was justified as necessary under the framework of statehood being the only viable path for the liberation of minority groups.

Beyond the surface-level proclamation of respect for sovereignty as a factor contributing to the United Nations' clear vesting of authority to states, the UN Charter created a framework for international society which further centers statehood as the unit of governance in the international system. The UN Charter, by emphasizing self-determination and independence as paths towards rights-claiming, is centering statehood. Marginalized groups seeking to make rights claims are meant to claim those rights through the means of working towards statehood. Further, the organization of the UN in its centering of states as the unit of participation is inherently excluding those who exist outside of states, thereby making the right to partake in international society predicated upon citizenship.

The Nuremberg Trials

On October 18th, 1945 twenty-four Nazi members were indicted by the International Military Tribunal regarding crimes perpetrated during the Holocaust.[26] Some neglect to acknowledge the document that gave the International Military Tribunal the power to do so. The UN Charter was signed June 26th, 1945. The London Conference went from June 26th to August 2nd, 1945. The United States, France, United Kingdom, and the Union of Soviet Socialist

[26] International Military Tribunal, *Nurnberg Military Tribunals: Indictments* (Office of Military Government for Germany (US): Nuremberg 1946, 1946), https://tile.loc.gov/storage-services/service/ll/llmlp/NT_Indictments/NT_Indictments.pdf; United States Holocaust Memorial Museum , "International Military Tribunal at Nuremberg," Holocaust Encyclopedia (United States Holocaust Memorial Museum, 2019), https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg.

Republics all negotiated and signed onto the London Agreement, which created the International Military Tribunal in order to try war criminals according to the Nuremberg Charter.

The International Military Tribunal was imbued with the authority to deliver justice to the perpetrators of the Holocaust. The organization was "empowered to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just."[27] The task of being the arbiter of justice rested solely in the hands of the International Military Tribunal. Three crimes were outlined as falling under the authority of the International Military Tribunal in the Nuremberg Charter: crimes against peace, war crimes, and crimes against humanity.

The outlining of crimes against humanity and war crimes would have significant implications for the future defining of genocide, and of the future trajectory of cosmopolitan law. The following are definitions of the two crimes as written in the Nuremberg Charter:

> *War crimes:* Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
> *Crimes against humanity:* Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated[28]

Both of these written definitions of categories of law would have significant implications for the future of human rights and the laws associated with them. It is important to note that a significant distinction between the two crimes is the apparent source of the law. In the case of war crimes the law is sourced from conventions or customs. There is a significant connection between custom and legality, wherein custom is used to justify the codification of international

[27] United Nations -- General Assembly, International Law Commission, ed. "The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum Submitted by the Secretary-General." United Nations: Legal Documents. The United Nations, 1949. https://legal.un.org/ilc/documentation/english/a_cn4_5.pdf, 5.
[28] Ibid, 4.

legal norms. A norm in international society can be proven through the tracing (or invention of) custom. A legal architect, under the typical international legal framework, can invent a path of custom and use that to prove it as a *jus gentium*-esque norm, proving its need to be codified. This process can also be used in areas wherein there is no written law to justify the enforcement of a norm that might not have been written, but does exist. Norms which have a clear customary understanding can serve as a basis for the legal definition of a war crime. For example, it was a norm that children were not to be targeted in conflicts. If that norm were to be violated, there would not necessarily need to be a written statement disavowing the targeting of children. There is a historical custom that dictates it is wrong to do so, giving it the weight of a war crime outside of written law through international custom.

This definition of crimes against humanity is important to critically examine, particularly so in the manner in which the crimes are framed. In the case of this document, there is an explicit statement being made about the notion that these crimes transcend the laws of the domestic state. Unlike most international legal frameworks, the framing of crimes perpetrated during the Holocaust is notably human-centered. Humanity is prioritized beyond respect for sovereignty. The seemingly universal rejection of the notion that such crimes should ever be allowed to happen again resulted in a rare acknowledgement that, in this case, the state cannot be used to shield perpetrators of these crimes. This section also began the process of developing what would eventually become the definition of genocide "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population…persecution on political, racial or religious grounds."[29] This process would continue on beyond the Nuremberg Trials, particularly due to the understanding that there had been no understood definition of genocide prior to the Holocaust.

[29] Ibid, 4.

CHAPTER TWO: The Travaux Préparatoires of the Genocide Convention

In order to understand how the Genocide Convention (1948) came to be, I will be examining the *travaux préparatoires* of the convention. A *travaux préparatoires* is the official record of negotiation in the development of a treaty and contains major resolutions directing the creation of the convention, notes compiled as a part of the official record, and any drafts publicly available. These documents are often used to gain insight into the intentions of the writers and to clarify the meaning of the treaty in question.

Addressing Genocide

Less than two months after the end of the Nuremberg Trials, on November 22, 1946, the Sixth Committee of the United Nations came together to begin drafting a resolution on the crime of genocide. At this point, the reformation of the international system was still in progress, and the tensions between state sovereignty and international laws would be evident from the beginning. The objectives of the United Nations were outlined in the earliest stages by the Sixth Committee (the dedicated legal committee within the United Nations General Assembly), the last to work on the draft in 1948.

It was at a Sixth Committee meeting on November 22, 1946 that the initial goal for the United Nations regarding the crime of genocide was presented:

> At the Nünberg trials, it had not been possible to punish certain cases of genocide because they had been committed before the beginning of the war. Fearing that such crimes might remain unpunished owing to the principle of *non crimen sine liege*, the representative of Cuba asked that genocide be declared an international crime. This was the purpose of the resolution.[1]

A notable figure throughout the development of the Genocide Convention is Sir Hartley Shawcross. He demonstrated distinctly realist attitudes towards the more aspirational aspects of the draft and seemed to present critical analysis of drafts from a legal perspective. Sir Hartley Shawcross presented powerful legal arguments which critiqued the potential efficacy of the convention. While he did dismiss the more overly aspirational language used by the committee, Shawcross could not have anticipated the long-term implications for international criminal law that this language would have. During the Nuremberg Trials, Shawcross served as the Chief Prosecutor for the United Kingdom and was well-respected for his tone, which seemed to value the true rule of law in his balancing of due process and victor's justice.[2] Bearing in mind his trial experience with the prosecution of crimes of genocide, it is understandable that his claims erred on the side of realism, and his criticism of the practical nature of the convention in relation to the international legal system are valid ones, many of which hold true today.

Shawcross presented his ideas throughout the development of the Genocide Convention, starting in the November 22 meeting of the Sixth Committee. He agreed that the prohibition of genocide should not be left up to individual states, and specifically pointed to the reality that certain offenders could not be punished because that would require the use of *ex post facto* legislation.[3] Shawcross openly stated that it was “necessary that the evolution of new ideas in

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[1] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 1 (BRILL, 2008); p. 8.
[2] The Avalon Project, ed., “The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany,” avalon.law.yale.edu (Lillian Goldman Law Library, 1946), https://avalon.law.yale.edu/imt/07-26-46.asp.
[3] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 1 (BRILL, 2008); p. 9.

human society should be followed up closely by the relevant legislation and that international law should limit the omnipotence of certain States over their citizens and in certain cases protect them from their own Government."[4] His subsequent invocation of Grotius brought him to an even bolder point "If humanitarian intervention by war was sometimes justified, humanitarian intervention by international law was even more definitely warranted."[5]

Shawcross' ambitions, from the start of the proceedings, straddled the line between a realist and cosmopolitan tone. He was aspirational in terms of his goals regarding the convention, but approached the drafting process with a high degree of skepticism that more closely resembled a realist attitude. The notion that humans were owed protection to a degree that could override the sovereignty of a state was a relatively new one, and Shawcross stood on the cutting edge of this idea. Still, his style of crusading for this cause led him to provide critiques of the more aspirational sentiments imbued in the Genocide Convention. Those critiques erred on the side of realism. Had Shawcross been aware of the influence the specific language used in the convention would have, he likely would have pushed for an even heavier use of such language. This makes Shawcross the perfect counterpart to the aspirational, cosmopolitanist thinkers, someone with similarly moral intentions, with an understandable degree of skepticism, who failed to predict the unpredictable.

United Nations General Assembly Resolutions 95 & 96 - December 1946

United Nations General Assembly Resolutions 95 (I) and 96 (I) were adopted at the 55th plenary meeting, December 11, 1946. This was just over two months after the Nuremberg Trials officially came to an end, with the General Assembly convening just three weeks after the

[4] Ibid.
[5] Ibid.

International Military Tribunal finished the Nuremberg Trials.[6] Both resolutions had significant consequences for the manner in which international law would be treating the crime of genocide. Resolution 95(I), titled *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, sought to recognize the goals set out in the Nuremberg Trial. Resolution 96(I), titled *The Crime of Genocide* provided a definition of genocide and a formal acknowledgement of genocide as a crime under international law.

The Secretary-General said, in a report on the International Military Tribunal's work, that "it will be of decisive significance to have the principles which were employed in the Nürnberg trials made a permanent part of the body of international law as quickly as possible."[7] Resolution 95(I) was the enactment of this idea. Resolution 95 (I) directed the codification of the ideals outlined in the Nuremberg Charter and the establishment of an international legal regime capable of incorporating those ideals.[8] This recognition held the international legal community to the promises made regarding aspirations for the international legal regime envisioned as taking the place of the International Military Tribunal.

The combined force of Resolutions 95 (I) and 96 (I) allowed for the eventual creation of the Genocide Convention. Resolution 96 (I) defined genocide in a firm manner, saying the following on the matter:

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

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[6] Antonio Cassese and United Nations, "Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal General Assembly Resolution 95 (I)," United Nations Audiovisual Library of International Law (United Nations, Office of Legal Affairs, 2023), https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html.
[7] United Nations -- General Assembly, International Law Commission, ed. "The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum Submitted by the Secretary-General." United Nations: Legal Documents. The United Nations, 1949. https://legal.un.org/ilc/documentation/english/a_cn4_5.pdf.
[8] United Nations General Assembly, "Resolutions 95(I) and 96(I)," United Nations Digital Library (United Nations, December 11, 1949), https://digitallibrary.un.org/record/209873?ln=en&v=pdf, 1.

> Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.[9]

This definition of genocide allowed for genocide to be codified as an international crime prior to the creation of the Genocide Convention or any of the subsequent developments of international law regarding genocide. This definition affirmed the condemnation of perpetrators of genocide on the behalf of the international community. Notably, the remark that genocide "shocks the conscience of mankind" has lent itself to cosmopolitan legal claims, confirming the existence of a universal morality that rejects genocide as an acceptable practice.[10] This phrase appears in the earliest pages of the *travaux préparatoires* and the sentiment expressed through the phrase stands throughout the documents, even though it did not end up in the final iteration of the Genocide Convention.[11] By referring to the conscience of *mankind* and not of *all states* or *the international community*, this document both represents a collective pact for nations and describes a moral solidarity that transcends statehood. The use of the phrase "moral law" further punctuates this point, affirming to the international community that there are seemingly universally accepted moral truths that are meant to be enshrined in the legal regimes of international society.[12] The use of this terminology was accepted widely amongst the United Nations members concerned with the convention's development. The first Secretary-General of the UN (Trygve Lie) would quote sections of these resolutions to the Chairman of the Committee on the Development and Codification of International Law in a letter updating the Chairman on progress of the UN on the issue of genocide.[13]

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[9] Ibid, 1-2; emphasis added.
[10] Ibid..
[11] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); p. 3, 34.
[12] Ibid, 2.
[13] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); 134.

Beyond this, Resolution 96 (I) directed the Economic and Social Council to convene in order to create a draft convention on the crime of genocide, requiring it be submitted at the next regular General Assembly session. Resolution 96 (I) specifically called for the international community to organize in order to facilitate "the speedy prevention and punishment of the crime of genocide."[14] This directive resulted in an Ad Hoc Committee of the Economic and Social Council being formed, which began the process of developing the Convention on the Prevention and Punishment of the Crime of Genocide (The Genocide Convention). In short, the resolutions passed by the United Nations General Assembly would have major implications for framing the international legal approach to addressing the crime of genocide. Given the significant credence paid to the Nuremberg Trials and the Nuremberg Charter, it is critical to acknowledge the developments which allowed for significant developments in this area which would eventually create the space needed for cosmopolitan law.

Economic and Social Council Resolution 47 (IV) - March 1947

The Economic and Social Council responded to the General Assembly's directive in Resolution 47 (IV), wherein they addressed plans for drafting the convention. Leading up to Economic and Social Resolution 47 (IV) there were extensive discussions on who should be drafting the Convention. Delegates considered handing the responsibility over to the Commission on Human Rights, an open acknowledgement that criminal law as it relates to genocide is profounding connected to human rights law.[15] In the final resolution, they decided that international lawyers and the Commission on Human Rights needed to be consulted when creating the convention "if feasible."[16] Feasibility was acknowledged as a concern due to the fact

[14] United Nations General Assembly, "Resolutions 95(I) and 96(I)," United Nations Digital Library (United Nations, December 11, 1949), https://digitallibrary.un.org/record/209873?ln=en&v=pdf, 2.
[15] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); 45-60.
[16] Ibid, 60.

that the Commission on Human Rights was "overburdened with the tremendous task of drafting an International Bill of Human Rights."[17] Members of the Economic and Social Council announced their intention to present the draft convention on the crime of genocide at the next session.

In response to United Nations General Assembly Resolution 96 (I) and Economic and Social Council Resolution 47 (IV), the representative of France submitted a memorandum on the subject of genocide. This memorandum was written with an acknowledged understanding of how significant the implications for the development of international law could potentially be. The French delegation said the following in this memorandum:

> Action "on behalf of humanity" has long been a commonplace of international practice. It is in line with modern evolution, characterized by the United Nations, that instead of the political character which it has borne up to the present, this action should now assume a more judicial and punitive character. There should therefore be no question of excluding indictments for crimes against humanity.[18]

The French delegation then went on to develop a framework for international law, of which we can see shadows of in the current international legal system. Prior to the representative of France writing this memorandum, the General Assembly and the Economic and Social Council had only passed resolutions which dealt with the issue in broad strokes, and had mainly referred the matter to the next UN entity. This memorandum, alongside a number of other documents generated after the first few resolutions, marked a shifting tone as the international actors began grappling with the international legal framework they were rapidly developing around the issues of crimes against humanity, war crimes, and genocide.

General Assembly Draft Conventions - June 1947

[17] Ibid, 45.
[18] Ibid, 140.

The General Assembly developed a number of draft conventions for the prevention and punishment of genocide in June of 1947. They outlined detailed definitions of genocide, enumerated specific crimes under the statute, and called for the establishment of an international criminal court. A notable difference between the draft conventions and the eventual end product is the sheer length. The Convention on the Prevention and Punishment of the Crime of Genocide (1948) is relatively concise, while the draft convention contained extensive, detailed instructions establishing a court system to try cases of genocide.

The draft conventions from this time tell an interesting tale about international legal thinking at the time it was written. Genocide is presented in the following manner in the preambles of both of the June 1947 drafts from the General Assembly:

> The High Contracting Parties proclaim that Genocide, which is the intentional destruction of an entire group of human beings, *defies universal conscience*, inflicts irreparable loss on *humanity* by depriving it of the cultural and other contributions of the group so destroyed, and is in violent contradiction with the spirit and aims of the United Nations.[19]

Given that these draft conventions were created prior to the drafters receiving notes from member governments, it is interesting to reflect upon the drafted version of the genocide convention that existed prior to national interest becoming more clearly present. The acknowledgement of a universal conscience is notably cosmopolitan, illustrating the argument that there is something unique about genocide as a crime. Unlike other crimes, genocide is one that managed to provoke a declaration of a universal conscience. Genocide as a crime managed to incite such a resounding condemnation from the international community that international boundaries usually acknowledged as insurmountable were confronted.

Committee on the Progressive Development of International Law - June 1947

[19] Ibid, 115 and 124.

As these documents continued to develop in conjunction with documents like the Nuremberg Principles, those working on the convention seemed to become increasingly aware of its importance in international law. The General Assembly's Committee on the Progressive Development of International Law and its Codification had extensive, detailed discussions on the subject of the Genocide Convention. The committee seemed strongly invested in studying the draft conventions and providing recommendations regarding the use of specific language within it.

According to the summary record notes of the committee from June 16, 1947, the most recent draft convention had been made available to committee members with insufficient time for them to have consulted their states for instructions or guidance. As a consequence of this, committee members wrestled with how to best address the document. In a discussion on where to refer the document, the committee expressed concern that referring advising on the document to the International Law Commission (which had yet to be established) would be interpreted as dismissing the draft convention. Dr. Hsu (the representative of China) stated that "genocide was very important also for the development of international law" and expressed frustration at not being able to address the document adequately at that moment.[20] Professor Donnedieu de Vabres, the representative of France stated that "the problem of genocide was connected with the crimes against peace and humanity and with the matter of an international criminal jurisdiction."[21] The committee inadvertently outlined the group of developments which would impact the formation of international criminal law into the present day, taking note of the International Law Commission's development, the codification of the Nuremberg Principles, and the Genocide

[20] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); 176.
[21] Ibid, 177.

Convention in the span of a singular conversation. These legal scholars would continue to advise on the creation of these international legal achievements throughout their development.

Economic and Social Council Resolution 77 (V) - August 1947

Resolution 77 (V) from the Economic and Social Council in August of 1947 contained another draft convention. In the development of the convention, the Economic and Social Council attempted to expedite the process of developing the draft by creating special sessions. The representative from Chile mentioned that in two years the UN had "not succeeded in signing one Convention relating to the obligations imposed by the Charter concerning respect for human rights."[22] The Economic and Social Council made a concerted effort to generate the draft convention, and managed to turn up with Resolution 77 (V) seven days later. While the two draft conventions from the General Assembly had mentioned jurisdiction in the international legal system, Resolution 77 (V) contained a more carefully outlined construction for the management of crimes of genocide by international legal regimes.

Annex I contains 43 articles on the establishment of an "international criminal court," laying out procedures for the trying of genocide cases.[23] This supports the argument that human-centered ideas, ideas for the betterment of humanity as a collective, are often elicited by discussions around genocide. The idea of an International Criminal Court with an authority to "punish any offender under this Convention within any territory under any jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed" is a proposition for a transcending of sovereignty in order to address a crime that is offensive enough to a universal moral sense to warrant such a radical change in the status quo.[24]

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[22] Ibid, 291.
[23] United Nations Economic and Social Council, "77 (V). Genocide," United Nations Digital Library System (United Nations, August 6, 1947), https://digitallibrary.un.org/record/212004?v=pdf, 28-34.
[24] Ibid, 24.

Another draft convention on the crime of genocide would come just over two weeks later, from the Secretariat.

Draft Convention on the Crime of Genocide - August 25, 1947

The August 25th draft convention on the crime of genocide was prepared by the Secretariat, and transmitted to the General Assembly in alignment with the call to action that came at the beginning of Economic and Social Council Resolution 77 (V).[25] This draft convention is incredibly similar to the one proposed by the Economic and Social Council, with a few notable differences. Both have the first annex create guidelines for the establishment of a permanent international criminal court and a secondary annex which outlines the immediate creation of an ad hoc international criminal court to handle cases in the meantime. Both describe genocide as an "odious crime."[26] Both draft conventions describe a call to move beyond sovereignty by asking the contracting parties to pledge themselves to punish offenders regardless of jurisdiction.[27] It seems as though, in most ways, the Secretariat was in alignment with the Economic and Social Council on what a draft convention required in this case. Both conventions also use the following language:

> acts of genocide defined by the present Convention are crimes against *the law of nations*, and that *the fundamental exigencies of civilization*, international order and peace require their prevention and punishment[28]

Firstly, the mention of the law of nations is seemingly intentional. Prior to this convention, there is no exact law of nations that explicitly prohibits committing genocide,

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[25] United Nations Secretariat, "Draft Convention on the Crime of Genocide," United Nations Documents, August 25, 1947, https://documents.un.org/doc/undoc/der/nl4/701/13/pdf/nl470113.pdf, 1-2.
[26] Ibid, 3; United Nations Economic and Social Council, "77 (V). Genocide," United Nations Digital Library System (United Nations, August 6, 1947), https://digitallibrary.un.org/record/212004?v=pdf, 22.
[27] United Nations Economic and Social Council, "77 (V). Genocide," United Nations Digital Library System (United Nations, August 6, 1947), https://digitallibrary.un.org/record/212004?v=pdf, 24; United Nations Secretariat, "Draft Convention on the Crime of Genocide," United Nations Documents, August 25, 1947, https://documents.un.org/doc/undoc/der/nl4/701/13/pdf/nl470113.pdf, 5.
[28] Ibid, 22 and 3, emphasis added.

meaning that this is not referencing a law of nations as in codified international law. It is therefore possible– and even fairly likely given the overall language used in the preambles– that the reference is alluding to the idea that genocide is a crime that triggers a universal moral sense (which is also mentioned in the preamble of both drafts "universal conscience"[29]) which is offensive to all nations. This suggests that the preamble of these two draft conventions is acknowledging a kind of *ius gentium* which is emerging from natural law and therefore has a basis. The inclusion of *ius gentium* as a basis for the legitimate need of this law further entwines natural law and the international legal system.

Additionally, the use of the phrase "fundamental exigencies of civilization" is critical to note. The notion that the crime of genocide is one that triggers a deeply ingrained sense of urgency from civilization will be expressed time and time again throughout the legal addressing of genocide. Due to the very nature of the crimes, there is an understanding that the crime itself triggers a strong reaction from civilization. The moral outrage of collective humanity at the crime demands its prevention and punishment.

Due to the fact that the Secretariat was building upon the work of the Economic and Social Council, it is interesting to closely examine the changes made from Economic and Social Council Resolution 77 (V) to the draft convention that was presented to the General Assembly just weeks later. Amendments would have had to be discussed rapidly, and it is fair to assume that there was a reason for each change. Resolution 77 (V) used the phrase "defies universal conscience," while the version from the Secretariat presented to the General Assembly stated in its place that genocide "is an outrage against the universal conscience."[30] Since this paper defines

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[29] Ibid.
[30] United Nations Economic and Social Council, "77 (V). Genocide," United Nations Digital Library System (United Nations, August 6, 1947), https://digitallibrary.un.org/record/212004?v=pdf, 22; United Nations Secretariat, "Draft Convention on the Crime of Genocide," United Nations Documents, August 25, 1947, https://documents.un.org/doc/undoc/der/nl4/701/13/pdf/nl470113.pdf, 3.

cosmopolitanism as having the belief in a strong degree of moral solidarity among humankind, the phrase *universal conscience* is already notable given how expressly cosmopolitan it is. The use of the phrase across both draft conventions would impress upon any analyst the significance of its use. The change from "defies" to "is an outrage against" may be construed as allowing for more readability. While "defies" may have been construed in an ambiguous manner, "is an outrage against" clarifies the intended message: genocide is a crime which is so reprehensible is causes a universal moral outrage. This idea, being so fundamental throughout the drafting process as to merit a statement in the preambles, can be clearly seen in narratives around genocide and international society since the Genocide Convention.

The Sixth Committee - October 1947

In the meetings of the Sixth Committee in October of 1947 there was an in depth analysis of the draft conventions previously presented. Notably, there was an explicit discussion regarding how the establishment of an international criminal justice system could clash with the sovereignty of states. The representative from the Union of Soviet Republics stated that "[t]he creation of an international criminal court was a delicate matter, as it touched on the sovereignty of States."[31] This sentiment was echoed by fellow committee members, yet representatives of several states suggested they held favorable views towards a convention that infringed on principles of state sovereignty. The representative from the Philippines stated that they "favoured a convention whereby the crime of genocide would be punished by an international criminal court rather than by national courts, even if to do so implied a waiver of sovereignty."[32] The representative from Haiti claimed that "[n]ations should renounce the principle of sovereignty for

[31] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); 396.
[32] Ibid.

the sake of humanity."[33] These calls to action were cosmopolitan beyond the norm in international society today. These claims were firmly based in the belief that the needs of humanity could and should come before the needs of states. The calls were rooted in an attitude that would be considered substantively cosmopolitan in contrast to most approaches to international cooperation.

The differing approaches to addressing issues of idealism and practicality in the conventions were further complicated by the specific legal visions the many jurists held. Some committee members believed the convention to be unnecessary because national laws prohibited homicide, with the argument being that genocide was simply mass homicide. Specific representatives argued that the convention had to constitute positive law, or it would serve no practical purpose.[34] Sir Hartley Shawcross presented his concerns about the convention most clearly and comprehensively:

> [Sir Hartley Shawcross] would have been ready to support a convention had it dealt only with physical genocide, although he did not see the need of one; the value of codification was in those fields where there is uncertainty about an existing law… It was unrealistic to suppose that the Sixth Committee, or any sub-committee thereof, would be able to approve a convention during the present session… He cited instances where certain States would be reluctant to relinquish domestic jurisdiction by ratification of the convention… It was highly improbable that any State would be prepared to surrender its citizens, or submit itself for trial by such an international court. What sanctions was such a court to apply? The only real sanction against genocide was war. The draft convention was unrealistic.[35]

His perspective makes sense with the understanding that he was the lead British prosecutor at the Nuremberg trials. He approached the conventions with realistic, practical critiques. Many of the flaws within the convention which Shawcross pointed to still exist, and remain some of the most challenging hurdles for international human rights lawyers. Still,

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[33] Ibid, 397.
[34] Ibid.
[35] Ibid, 403-4.

Shawcross' view, while rational, did not take into account the indirect role the convention has played in creating space for other developments in international human rights law. There are echoes of these kinds of critiques in the modern day which seek to undermine arguments which favor support for international legal institutions. Shawcross' goals seemed to favor seeking a mechanism to address genocide, but he was less idealistic about the regimes which existed and their ability to effectively handle the issue. The expression of these beliefs was notable considering the fact that the international community elected to continue the endeavor despite being fully cognizant about the potential impracticalities.

General Assembly Resolution 180 (II) - November 21, 1947

General Assembly Resolution 180 (II) did not propose another draft, but did contain significant information as to the trajectory of the movement towards the creation of the Genocide Convention. Most importantly, the fact that it should continue. In the hundred and twenty-third plenary meeting of the General Assembly, on November 21, 1947, the Genocide Convention had found itself in a precarious position. The language being used in a draft resolution called upon the Economic and Social Council to "study therewith the question whether a convention on genocide is desirable and necessary."[36] Should the General Assembly have passed Resolution 180 with this language, the Genocide Convention may have been abandoned. After its proposition, there were a series of rousing statements from various representatives. These statements were ambitious, aspirational, and packed with human-centered language. Panama's representative, Mr. Alfaro, gave a long statement positing that it was their obligations as international leaders to push for this convention:

> Just as the *conscience of mankind* was horrified by the repeated perpetration of the crime of genocide in the heyday of Nazi power, so the whole world saw, with enthusiastic approval the action taken by the United Nations with the aim of avoiding the repetition of

[36] Ibid, 443.

> that ghastly crime…We cannot in this manner stultify ourselves. *We cannot so disappoint the opinion and sentiment of the world.* Let us stand by a resolution which is an honor to the General Assembly and *a hope for mankind*… Let us vote for the amendment and maintain a firm unflinching stand against crime in its most abominable form.[37]

Mr. Alfaro's statement positions genocide as a key issue for the United Nations as an institution, and utilizes notably human-centered language throughout. The idea that this convention would constitute a hope for humanity as a collective treats the notion that genocide is an existential threat to humanity as axiomatic, an idea which would set a foundation for the very concept of peremptory norms. The clash between practical realism and moral aspirations played a key role in constructing the circumstances which put the convention's continued development in jeopardy. The representative from the Dominican Republic, Mr. Henriquez Ureña, gave a statement which explored the reasons for the hesitation around going forward with the convention:

> In the committees I have also heard some distinguished colleagues express their scepticism with regard to the drawing up of the convention on genocide, and one of them went so far as to say, 'If it can be proved to me that the convention will save even a single human life, I would be the first to vote for its adoption as an urgent measure.' I personally do not feel any such pessimism. I think the convention would at least carry great moral weight and might, by that moral weight alone, prevent many errors and excesses, because the convention, whether multilateral or not, and whether ratified or not, would be the most forceful denunciation of that heinous crime, and would therefore mean the final condemnation of its instigators before the moral tribunal of the world[38]

While members may have been united in wishing to prevent genocide, those with practical experiences in the legal field were unconvinced that such a convention could serve any practical purpose. Mr. Henriquez Ureña pointed to the moral weight alone as being worth the effort to create the convention. It is with the benefit of hindsight that we can claim that the moral weight defined in the convention has allowed for significant international legal developments.

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[37] Ibid, 444-5; emphasis added.
[38] Ibid, 460.

The moral weight, decades beyond the time the convention was written, still serves as a basis through which international legal developments have arisen.

In the end, those who wished to see the convention continue to develop without delay won. In Resolution 180 (II), the General Assembly gave the Economic and Social Council permission to move ahead with the drafting process despite the fact that other member-states had yet to submit notes on the draft conventions. The resolution also mentions that the International Law Commission (ILC), which will be discussed more extensively throughout this project, is in the process of being set up, and has been charged with "the formulation of the principles recognized in the Charter of Nürnberg Tribunal, as well as the preparation of a draft code of offences against peace and security."[39] These principles would be completely outlined by 1950.

Ad Hoc Committee on Genocide Draft Convention - April-May 1948

The General Assembly directed the Economic and Social Council to continue its work on the convention, leading the Economic and Social Council to enact Resolution 117 (VI), which established an Ad Hoc Committee on Genocide, which prepared another draft convention.[40] The committee had members from the United States, the Union of Soviet Socialist Republics, Lebanon, China, France, Poland, and Venezuela. This draft convention was far more condensed than the others, with an emphasis on the document being written with practicality in mind.

In the series of meetings during the development of the draft, one notable discussion pertained to the use of *sine qua non* within the language of the convention. The United States representative had suggested that they add the words "with the complicity of the Government" to the definition of genocide.[41] The representative argued that the complicity of government was a

[39] United Nations General Assembly, "Resolution 180 (II). Draft Convention on Genocide.," United Nations Digital Library System, November 21, 1947, https://digitallibrary.un.org/record/210007?ln=en&v=pdf.
[40] United Nations, "Notes on the Convention on the Prevention and Punishment of the Crime of Genocide," *United Nations Office of Legal Affairs* (United Nations , 2008), https://legal.un.org/avl/pdf/ha/cppcg/cppcg_ph_e.pdf.
[41] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); 712.

condition *sine qua non* of genocide. Other representatives posited imagined scenarios in which genocide may be committed without the complicity of government, such as in cases where the government may not possess the power to stop it or if their complicity were deniable. The group viewed government complicity as a component of most genocides, but chose not to include it as a required part of the definition due to a reluctance to further constrict the definition.

Paragraph 1 of the draft declared that genocide is "a grave crime against mankind," a phrase which provoked a significant amount of discourse amongst committee members.[42] In the report from the rapporteur, regarding the development of this phrasing, we can see an insistence from Pierre Ordonneau, the representative of France, upon using this kind of language. Ordonneau specifically requested the phrase *crime against humanity* be used initially.[43] The committee discussed the fact that the development of the International Law Commission's Nuremberg principles would be defining the categories of crimes against humanity, crimes against the peace, and war crimes. These principles were meant to separate crimes against humanity from war crimes, making them their own distinctive category under international law. It was thought that linking genocide as a crime directly to crimes against humanity would be beneficial, but other members opposed the inclusion of such language on the grounds that crimes against humanity "had acquired a well-defined legal meaning" in the Nuremberg Charter.[44] The formulation of a "crime against mankind" was unanimously agreed to by committee members on the basis that it constituted an expression of what was a popular idea regarding the legal categorization of the crime of genocide.[45] The idea of a crime against the whole of humanity is an idea that is inherently cosmopolitan. While there are some crimes that can physically impact

[42] United Nations Economic and Social Council, Ad Hoc Committee on Genocide, and Karim Azkoul, "Report of the Committee and Draft Convention Drawn up by the Committee," United Nations Digital Library System (United Nations, May 10, 1948), https://digitallibrary.un.org/record/604195?ln=en&v=pdf, 7.
[43] Ibid.
[44] Ibid.
[45] Ibid.

the whole of the human population (such as a crime which causes an egregious climate-related disaster), the crime of genocide has a direct impact on a group, but is so morally reprehensible that it constitutes a crime against everyone.

Also notable is the fact that a faction within the committee opposed the inclusion of the categorization of genocide as a crime against humanity on the grounds that it "was not necessary to insert in the Preamble of the Convention *doctrinal considerations* of *no practical utility*."[46] These members would eventually agree to the language of mankind as opposed to humanity, but it is important to call attention to the way that this dissenting attitude had to be overwhelmed by calls for the need of language of this kind. In the modern day many more realist thinkers often dismiss cosmopolitan language in much the same way, asserting that it lacks practical utility and therefore is unimportant. The inclusion of this language would have long term implications for genocide law that we are still seeing the impacts of today. While the category of *crimes against mankind* as a distinctive category from *crimes against humanity* would not take hold, the underlying idea that genocide is a crime that adversely impacts mankind as a collective would end up in the final, binding iteration of the Genocide Convention.

The Sixth Committee - September 1948

The General Assembly delegated the task of considering and reporting on the item "Genocide: draft Convention and report of the Economic and Social Council" to the Sixth (legal) Committee at their 142nd plenary meeting in September 1948.[47] This committee considered the draft from the 63rd to 110th and 128th to 134th meetings of the third General Assembly session in 1948. The language around the importance of the convention during this time was notably

[46] Ibid; emphasis added.
[47] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); p. 1284.

cosmopolitan, and confrontations between realists' senses of practicality and cosmopolitan aspirations were clearly apparent throughout the dialogues.

The adoption of the convention, in and of itself, was considered to be a monumental feat of the human-centered agenda for the international community. At the opening of the 63rd meeting, the representative for the United States, Ernest Gross, explicitly referred to the adoption of a convention such as the draft convention "mark[ing] an epoch in the history of civilization."[48] Contextualizing the arguments within the understanding that the committee members were aware of the potential power of the convention for shaping history is notable in two ways. First, an analysis of the arguments presented throughout the work can assume that the representatives were consciously aware of the potential long-term implications of the arguments they presented, or, at the very least, the language used in finalized convention. Second, this understanding, acknowledging the molding of a collective history, has inherently cosmopolitan implications. Immanuel Kant conceptualized a form of cosmopolitanism where he discussed the idea of multilateral institution formation as a mechanism for pursuing a collective human development.[49] A similar theme was echoed in this case by Gross, in his statement that suggested the adoption of a multilateral convention would mark a significant development in the history of civilization.

There were several moments where the realist, practical mentality reared its head throughout the discussions, but, unlike what one might expect to see in international legal discourse today, many such thinkers within the Sixth Committee confessed that the language, while serving little purpose in practical reality, might make a point to the international community that does have meaning. Sir Hartley Shawcross (United Kingdom representative)

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[48] Ibid; A/C.6/SR.63, p. 1289.
[49] Kant, Immanuel. *Political Writings*. 1970. Translated by H.B. Nisbet, edited by Hans Reiss, Second, Cambridge University Press, 1991, 45; Immanuel Kant, "Perpetual Peace," Gutenberg, 1795, https://www.gutenberg.org/files/50922/50922-h/50922-h.htm, 130.

argued that the Genocide Convention would have little impact on international law, saying that "genocide was already generally recognized as a crime punishable by law… simply a new word to describe a particular form of murder."[50] However, instead of allowing this idea to justify not continuing on with the creation of the convention in good faith, Shawcross stated that "[w]hile making no significant contribution to international law, the convention might set forth more clearly the detestation with which genocide should be regarded."[51] Instead of the (distinctly realist) lack of faith in the convention preventing action, Shawcross was able to justify the convention on the basis that it might send a message about the moral solidarity in the international community. Genocide, therefore, inspired a willingness to engage in developing strong international moral solidarity in the form of the Genocide Convention, emphasizing the point that the crime of genocide is so detestable to humanity that it creates space for cosmopolitan aspirations. While Shawcross' remarks were not inherently cosmopolitan, he was willing to set aside the notion of practicality and justified the creation of the convention on the basis of the message itself being critical to communicate as an international community.

The Sixth Committee also continued to have conversations about topics that would be critical to fundamental international regime formation. Discussions about the International Criminal Court were ongoing during this period. Some states argued against the formation of such a court, claiming that, in cases wherein there was a court system capable of holding its own trials, this could be an abridgement of sovereignty. France, specifically, argued in favor of the establishment of such a court, and the amendments proposed in the Sixth Committee by France would end up being starkly similar to the International Criminal Court as we see it today.[52] In the debates, the USSR representative argued that the "principle of an international penal court was

[50] Ibid; A/C.6/SR.64, p. 1306.
[51] Ibid; A/C.6/SR.64, p. 1307.
[52] Ibid; A/C.6/211, p. 1964-5.

incompatible with that of the sovereignty of the States."[53] As a consequence of the complications presented by balancing the states' rights to sovereignty and international legal frameworks, these aspirations failed to manifest themselves in the final draft, but the continued trend of international criminal law's procedural arguments being connected to discussions of genocide is remarkable.

National interest did result in the convention being significantly warped, misaligned with cosmopolitan moral convictions. It is important to recognize the influence of the Union of Soviet Socialist Republics' on determining the definition of genocide and the blindspot the USSR had developed. The previous draft convention had considered genocide to be defined by the intention to "destroy a national, racial, religious, or *political group*, on grounds of the national or racial origin, religious belief, or *political opinion* of its members."[54] In the Sixth Committee, the USSR representative suggested the following:

> The majority of the members of the Ad Hoc Committee had also included political groups among those mentioned in the definition of genocide. Such groups were entirely out of place in a scientific definition of genocide and their inclusion would weaken the convention.[55]

In her paper on the blindspot of the Genocide Convention for political genocides, Beth van Schaack suggested that "[p]erhaps the leading motivating factor in this regard was the imperative to avoid having the Convention inculpate Stalin's politically motivated purges of the *kulaks*."[56] Political genocides being omitted from the convention was a clear consequence of

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[53] Ibid; A/C.6/SR.129, p. 1878.
[54] United Nations Economic and Social Council, Ad Hoc Committee on Genocide, and Karim Azkoul, "Report of the Committee and Draft Convention Drawn up by the Committee," United Nations Digital Library System (United Nations, May 10, 1948), https://digitallibrary.un.org/record/604195?ln=en&v=pdf,13; emphasis added.
[55] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); A/C.6/SR.64, p. 1302.
[56] Beth van Schaack. "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot." *The Yale Law Journal* 106, no. 7 (1997): 2259–91. https://doi.org/10.2307/797169, 2268.

national interests forcing concessions on moral issues. Still, the Genocide Convention's content stood as a remarkable milestone in the development of cosmopolitan law.

While the Sixth Committee did, in some ways, allow for the permeation of national interests to corrupt the moral integrity of the draft, the Sixth Committee also sought to expand upon the goals of the convention with regards to the prevention aspect of the convention. Milan Bartos, the representative from Yugoslavia, "concluded that the text of the draft did not fulfill its essential object, namely, the prevention of genocide."[57] Discussions around methods for strengthening the prevention component of the convention persisted throughout the Sixth Committee sessions. In the draft convention, the group unanimously agreed on the inclusion of Article IV, point e, deeming "complicity in any of the acts enumerated in this Article" a punishable act.[58] The Economic and Social Council claimed that this referred to "accessoryship before and after the fact and to aiding and abetting in the commissions of crimes enumerated in this article."[59] Article IV of the draft convention would become Article III in the final convention. The Sixth Committee's intentions approaching this section on complicity was to enhance the clarity in order to make the act more clearly punishable. The draft had stated that complicity in the enumerated acts would be punishable, which made complicity in incitement of genocide punishable, a concept which was deemed vague by the committee.[60] After protracted debate around the exact language that should be used in amendments proposed by Belgium and the United Kingdom, the final amendment by the United Kingdom read "complicity in any act of

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[57] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); A/C.6/SR.63, p. 1297.
[58] United Nations Economic and Social Council, Ad Hoc Committee on Genocide, and Karim Azkoul, "Report of the Committee and Draft Convention Drawn up by the Committee," United Nations Digital Library System (United Nations, May 10, 1948), https://digitallibrary.un.org/record/604195?ln=en&v=pdf, p. 20-1.
[59] Ibid, p. 21.
[60] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); A/C.6/SR.87, p. 1581.

genocide."[61] The complicity element to the Genocide Convention has been subject to substantial criticism, but the fact that it was so clearly at the forefront of international legal discourse is a testament to the values of the convention drafters.

The Genocide Convention: Finalized Language

In the final version of the preamble of the Convention on the Prevention and Punishment of the Crime of Genocide, the contracting parties claim that "[b]eing convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required."[62] According to a binding contract recognized by the vast majority of governments, genocide is so deeply reprehensible that mankind is meant to be liberated from it. This liberation, according to the signatories, can only be obtained through international cooperation.

The idea that a crime against a limited population can have such a strong ripple effect, so much so that it constitutes an affront to mankind, something which all of humanity must be liberated from, is an important moral and legal idea that has deep cosmopolitan implications. It is understood that there is not necessarily a direct material harm coming from an act of genocide against the whole of humanity. A genocide across an ocean with a relatively isolated nation would not necessarily result in a tangible, physical impact on those outside of the state. This means that the harm being caused to the wider humanity is a more abstract one. Acknowledging a degree of moral solidarity that allows for a moral injury against the whole of humanity is a cosmopolitan acknowledgement.

In connecting the liberation of humanity to the harm done by genocide to international cooperation, the convention recognizes that there are certain moral agendas so central to

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[61] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); A/C.6/SR.87, p. 1587.
[62] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 276 (entered into force 12 January 1951).

humanity that they not only *may* be, but *must* be worked towards by the international society. The convention states that "international co-operation is required" in order to liberate mankind from genocide.[63] This claim sets forth a key belief: the suggestion that there are circumstances under which international cooperation is necessary and independent states may, at times, be required to infringe upon previously acknowledged sovereign boundaries. International cooperation, envisioned as international regime formation such as the United Nations, sometimes must be used to combat crimes so egregious they are something humanity must be liberated from.

The suggestion of the convention is that international regimes (states working in conjunction with one another) must work towards preventing and punishing the crime of genocide in the pursuit of liberating humanity from the mere existence of the crime. This sets forth a demand of the international regimes that is both ambiguous and powerful. Firstly, it is unclear to what degree international regimes are meant to interfere in the affairs of other states with regards to preventing and punishing the crime. It is also unclear what mechanisms would be most suited to allowing for this. Given the highly moralistic language used, one should read this as a *demand* being imposed upon international regimes to free humanity from genocide. However, the exact boundaries of this responsibility are absent from the language of the text. Still, using language such as this calls in international actors, framing the responsibility as a collective one which is further underscored in later articles.

The power of framing the responsibility as a collective one is critical, as it makes genocide distinct from all other crimes up to this point. The international community did not have a moral obligation to stop other kinds of killings, with the only possible exception being the

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[63] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 276 (entered into force 12 January 1951).

obligation to minimize war. Still, in the case of war there were clear exceptions. War was only permissible under certain circumstances, and states had pledged themselves to working towards diplomatic resolutions or towards attempting to maintain peace. The League of Nations, in particular, was a testament to the commitment of certain nations to prevent war. Genocide is not a crime which is permissible under certain circumstances. No exceptions to the crime are listed as being acceptable under the convention. This means that genocide occupies a distinct moral and legal space in the international community. It is a crime that is unacceptable under all circumstances, which the international community has a responsibility to work to prevent and punish. Furthermore, this sentiment has been signed into international law through a binding covenant that was developed throughout the foundational stages of the United Nations' development. The international community rallied around a single issue in both the development of the League of Nations and the United Nations. In the former the international community honed in on the abolition of war after the horrors of the First World War; the United Nations came together on the issue of genocide after the Holocaust.

This transcendent responsibility, chief amongst the qualities that make the crime of genocide distinct in international law, is even more deeply embodied in Article III of the convention. Paragraph (e) of Article III (which states the acts punishable under the convention) would become "Complicity in genocide" in the final version of the genocide convention.[64] Complicity in the crime of genocide being a crime is critically important to recognize because of how limited international criminal law had generally been envisioned. No strict scope is defined for what constitutes complicity, and that is notable given the potential implications for international responsibility. If a genocide is committed in "State A" by its leadership, and "State

[64] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (BRILL, 2008); A/C.6/289 and A/C.6.289/Corr.1, p. 2012: *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 276 (entered into force 12 January 1951).

B" has a sovereign leader who is aware of the genocide and continues to support State A's leadership, could State B's leader be charged with complicity in genocide? The door seems to be open based on a strict interpretation of the text. And the question of what degree people have an obligation to work to prevent genocide has been a recurring one in both legal and moral dialogues. If a regular citizen sees crimes committed against their neighbors, what are their obligations? No answers are provided in the text of the convention and that seems to be intentional. Freeing humanity from genocide is a collective endeavor which all have an obligation to uphold, which is what makes genocide unique in international criminal law.

Immunity *ratione materiae* is an international legal doctrine which grants immunity to heads of state and government officials when engaged in official state acts. This international legal concept exists to preserve sovereign interests. However, the Genocide Convention specifically states that this protection does not exist in the case of genocide. Article IV of the Genocide Convention states the following:

> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private citizens.[65]

This further defines the crime of genocide as one with inherently unique qualities, with moral weight that requires exceptional conditions be applied to its case. The burden of preventing and punishing the crime of genocide falls on the shoulders of state leaders just as much as private citizens.

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[65] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 276 (entered into force 12 January 1951).

CHAPTER THREE: Implications - Jus Cogens & Erga Omnes

The cosmopolitan ideas instilled in the Genocide Convention would have major ramifications for the formation of international law. Cosmopolitanism, assuming a high degree of moral solidarity in humankind, manifests itself in the legal idea of collective responsibility for the prevention and punishment of the crime of genocide. In the convention states are called to cooperate in order to pursue this collective human aim. Parties can be charged with being complicit in an act of genocide, imposing a collective responsibility on all people and states. These ideas of collective responsibility brought genocide its status as a foremost *jus cogen* norm.

The Nuremberg Principles (1950)

The language used in the Genocide Convention and the surrounding sentiments espoused by the international community during and after its development would solidify genocide as a peremptory norm. The International Law Commission had been directed to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal."[1] In 1950, the International Law Commission would finish developing this summary.[2] The report *Principles of International Law Recognized in the Charter*

[1] United Nations International Law Commission, "Document A/CN.4/L.2 Text of the Nürnberg Principles Adopted by the International Law Commission - Formulation of the Nürnberg Principles," *International Law Commission* (United Nations, 1950), https://legal.un.org/ilc/documentation/english/a_cn4_l2.pdf.
[2] United Nations International Law Commission, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal," 1950, https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf.

of the Nürnberg Tribunal and in the Judgement of the Tribunal (henceforth: "Nuremberg Principles") would create a basic framework for international legal action, including outlining crimes against the peace, war crimes, and crimes against humanity. The ideas surrounding these crimes within the document are modeled along the lines of the vision encapsulated in the Genocide Convention. The Nuremberg Principles, having been written at the same time as the Genocide Convention, clearly drew significantly from the Genocide Convention's ideas. The Nuremberg Principles were drafted and accepted with the intention of allowing for the Nuremberg Charter's ideas to live on in international law, and the Genocide Convention paved the way for its codification.

The Nuremberg Principles are an embodiment of principles enumerated in a tribunal responding to the crimes committed during World War II, with the gravity of the moral crimes committed in the Holocaust being so damning that the international community rallied to respond. As such, the Genocide Convention, the Nuremberg Principles, and the reimagining of international legal regimes are all irrevocably tied to one another. As such, the Nuremberg Principles, as in the case of the Genocide Convention, impose a burden of responsibility upon the collective humanity. Principle VII of the document states that "[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."[3] This closely parallels paragraph (e) of Article III of the Genocide Convention.[4] Just as in the case of the Genocide Convention, the Nuremberg Principles impose a collective responsibility upon populations. All citizens and government officials are responsible for upholding the basic moral laws prohibiting these crimes.

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[3] Ibid.
[4] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 276 (entered into force 12 January 1951).

Immunity *ratione materiae* is once again stated as not applying in the case of international legal obligations under the Nuremberg Principles. In principle III, the Nuremberg Principles state that being a head of state or being a government official does not release an individual from their obligations under international law. In the Nuremberg Principles, the only items listed under international law are crimes against peace, war crimes, and crimes against humanity. These crimes are the ones which do not allow room for immunity dependent on status as a sovereign leader. The choice to include this notion in both documents speaks to the understanding that sovereignty could not be left entirely unrestricted by the revised international system. Furthermore, principle IV states that an individual having acted in accordance with an official order from their government or superior does not absolve them from their crime "provided a moral choice was in fact possible."[5] Not only is this important because it dismisses the notion of legal protections for those "just following orders," but it also explicitly uses the phrase *moral choice*. This explicitly recognizes a universal moral understanding for the international community at large relating to these crimes.

In the Genocide Convention's *travaux préparatoires* there is a demonstrated understanding by the drafters of the convention that the categories being defined by the drafters of the Nuremberg Principles may complicate defining categories of crimes within the Genocide Convention. The Genocide Convention drafters chose not to refer to genocide as a crime against mankind for fear of creating a category of crimes against mankind which may further complicate the outlining of categories by the drafters of the Nuremberg Charter. As such, the Genocide Convention contains no explicit statement that genocide is a crime against humanity or any other kind of crime.

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[5] United Nations International Law Commission, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal," 1950, https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf.

The definitions for crimes against humanity and war crimes within the Nuremberg Principles include murder, extermination, ill-treatment, and deportation of civilian populations as crimes.[6] These definitions clearly include acts of genocide. The Nuremberg Principles further include the persecuting of civilian populations on "political, racial or religious grounds" as being a crime against humanity.[7] Unlike in the case of the Genocide Convention itself, the Nuremberg Principles were able to bring limited protections for political groups. This built upon the ideals that were in the scope of the Genocide Convention.

Peremptory Norms (Jus Cogens)

After the Genocide Convention, state governments with questions pertaining to the convention submitted a request for an advisory opinion from the International Court of Justice. This request was submitted by the General Assembly in November 1950.[8] The International Court of Justice responded by granting an advisory opinion titled *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (the advisory opinion known henceforth as "Advisory Opinion on Reservations").[9] This opinion would serve to further flesh out the meaning of the ideals encapsulated in the Genocide Convention, and would end up being used to advance the cosmopolitan legal principles set forth in the initial convention.

The Advisory Opinion on Reservations makes plain reference to the "special characteristics of the Genocide Convention," recognizing that there is a definitive connection between the moral impact of the crime of genocide and the unique legal qualities it was granted in the convention. The Advisory Opinion on Reservations explicitly acknowledges the

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[6] Ibid; principle VI, paragraphs (b) and (c).
[7] Ibid; principle VI, paragraphs (b) and (c).
[8] United Nations General Assembly, "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Request for Advisory Opinion" *International Court of Justice* (The Hague: International Court of Justice, November 17, 1950), https://www.icj-cij.org/sites/default/files/case-related/12/10855.pdf.
[9] International Court of Justice, "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion," *International Court of Justice* (The Hague: International Court of Justice, May 28, 1951), https://www.icj-cij.org/sites/default/files/case-related/12/012-19510528-ADV-01-00-EN.pdf.

cosmopolitan ideas underpinning the Genocide Convention, most notably in the following passage:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the *conscience of mankind* and results in great losses to humanity, and which is contrary to *moral law* and to the spirit and aims of the United Nations…[10]

The Advisory Opinion on Reservations makes references to an idea of a universally binding human moral sense in phrases as seen above in "the conscience of mankind" and "moral law."[11] The International Court of Justice further makes references to "elementary principles of morality" and "the authority of the moral and humanitarian principles."[12] The language used in the Genocide Convention, which was debated about being included over the thought that it would be legally pointless, would be used as groundwork for making the case that genocide is universally prohibited under international law, regardless of if a state had specifically signed onto the convention. The International Court of Justice made this argument in the Advisory Opinion on Reservations, using the language of morality that was first brought into international law through the Genocide Convention's language.

These ideas would form the basis for the idea that genocide is cardinal amongst peremptory norms. The crime of genocide is often referenced in dialogues about peremptory norms by the ICJ or ILC. In 2022 the International Law Commission Report specifically addressed peremptory norms in international law in an 80-page section. This section came to a number of definitive conclusions regarding the status of peremptory norms in international law. With regards to the nature of peremptory norms of general international law, peremptory norms or general international law (*jus cogens*) were said to "reflect and protect fundamental values of

[10] Ibid, 23; emphasis added.
[11] Ibid, 23.
[12] Ibid, 23-24.

the international community," and that they "are universally applicable and are hierarchically superior to other rules of international law."[13] The commentary on this assertion justified this specifically on the basis of the Genocide Convention and the Advisory Opinion on Reservations. The specific references to morality, moral law, universality, and a collective human conscience were used to affirm not only genocide as a peremptory norm, but to set a clear precedent for peremptory norms holding legal status as such. Within the report, the word "genocide" is used 62 times, compared to other peremptory norms recognized within the report (torture- 27; aggression- 18; slavery- 3; crimes against humanity- 13) genocide is referenced significantly more frequently. This is heavily because even when the crime of genocide is not being discussed, the Genocide Convention and opinions issued in its name are consistently referenced. The Genocide Convention not only created its own distinct legal space with its unique moral weight, but it paved the way for the recognition of other fundamental moral norms and values within international law.

Human-Centered Language and Genocide: ILC Annual Reports

This theme of discussions on genocide and human-centered legal thinking in international law coincide is not isolated to a singular report. The International Law Commission issues an annual report detailing the following to the General Assembly:

> the progress of work and the future work of the Commission on the topics given substantive consideration during the session, the texts of draft articles and commentaries adopted by the Commission during the session, any procedural recommendations of the Commission calling for a decision on the part of the General Assembly as well as other decisions and conclusions of the Commission[14]
>
> Reports vary in length, with the general trend being that they grew to be longer over time.

The two following charts detail the use of human-centered language and mentions of genocide

[13] International Law Commission, *United Nations: Report of the International Law Commission* (United Nations, 2022), https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf.
[14] International Law Commission, "Annual Reports — International Law Commission," United Nations - Legal, September 11, 2017, https://legal.un.org/ilc/reports/.

across the annual reports. Generally, discussions about human or universal moral issues or rights tend to coincide with discussions of genocide. Certain peaks in these discussions could be linked to the three recognized genocides by the United Nations from the time since the Holocaust. The Cambodian Genocide took place from 1975 to1979, but world powers were reluctant to call it a genocide, with the United States discouraging even the use of the word, believing it to be "counterproductive to finding peace."[15] In 1994, the position of the United States would shift, with Bill Clinton signing the Cambodian Genocide Justice Act.[16] In 1997, Cambodia would ask for the United Nations to aid in prosecuting perpetrators.[17]

The second and third genocides recognized by the United Nations would occur in 1994 (the Rwandan Genocide) and 1995 (the Srebrenica Genocide). Gregory Stanton, one of many international legal scholars seeking justice for the Cambodian Genocide, founded the Cambodian Genocide Project in 1982. Work such as what would be done within the project would benefit the process of recognizing the Rwandan and Srebrenica Genocides. Stanton's work on the Cambodian Genocide Project included presentations, lectures, record-keeping, and published works. He laid out an argument that the Genocide Convention gave all states the ability to bring genocide-related complaints to the ICJ on the basis of "mutual obligations" incurred under the convention.[18] This work was foundational in developing frameworks relating to genocide in international law such as the *erga omnes* doctrine. This flurry of activity around the recognition

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[15] Elizabeth Becker, "DEATH of POL POT: THE DIPLOMACY; Pol Pot's End Won't Stop U.S. Pursuit of His Circle (Published 1998)," *The New York Times*, April 17, 1998, sec. World, https://www.nytimes.com/1998/04/17/world/death-of-pol-pot-the-diplomacy-pol-pot-s-end-won-t-stop-us-pursuit-of-his-circle.html.

[16] United States Holocaust Memorial Museum, "A Tribunal for Cambodia - United States Holocaust Memorial Museum," United States Holocaust Memorial Museum, accessed January 13, 2025, https://www.ushmm.org/genocide-prevention/countries/cambodia/tribunal.

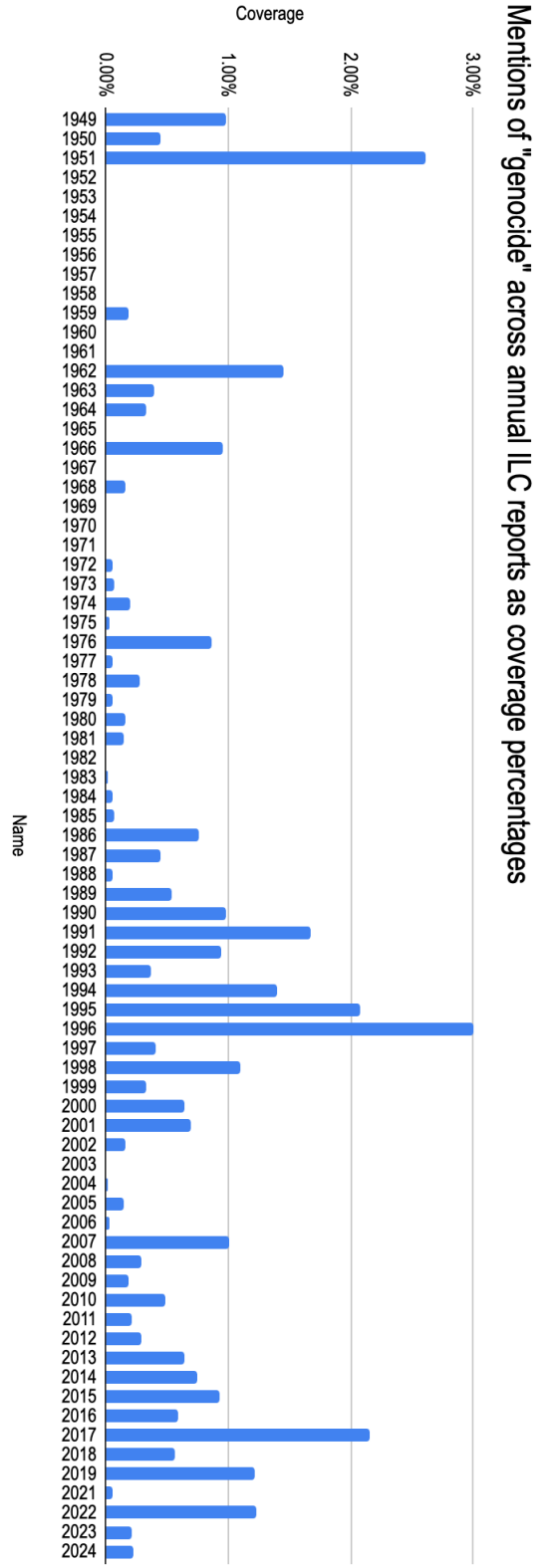
[17] Ibid.

[18] Gregory Stanton, "The Cambodian Genocide and International Law" (Yale Law School, February 22, 1992), https://d0dbb2cb-698c-4513-aa47-eba3a335e06f.filesusr.com/ugd/e5b74f_453fc57f60a647f78efc79cfe5254191.pdf, 4.

of genocide within the United Nations that occurred in the 1990s explains the period of strong discussions of genocide and use of human-centered language in the ILC Reports from that timeframe.

Using NVivo 14 to code for human-centered language and mentions of genocide, the utilization of such language can be measured as coverage percentages.[19] The reports from the ILC varied in length, with the earlier ones generally being shorter. Measuring the use of the coded language as coverage percentages places the coded sections as percentages of the total content, making the data far more legible. For reference, human-centered language is defined on page 21. By charting these sets of data we can find areas where these peaks coincide. Often where the ILC discusses a universal human right, genocide is cited either as an example of issues wherein protections are important or the Genocide Convention and related documents are used to develop the basis for such rights. This further underscores the point that the Genocide Convention served as a catalyst for developments in the shift towards centering of humanity in international law.

[19] I would like to thank Jim Burke, a research librarian at Mount Holyoke College, who was instrumental in showing me how to generate this data through NVivo 14. Additionally, I would like to thank Maria Igartua, a media consultant at Mount Holyoke, who aided me in turning the data into readable graphs.


Mentions of "genocide" across annual ILC reports as coverage percentages
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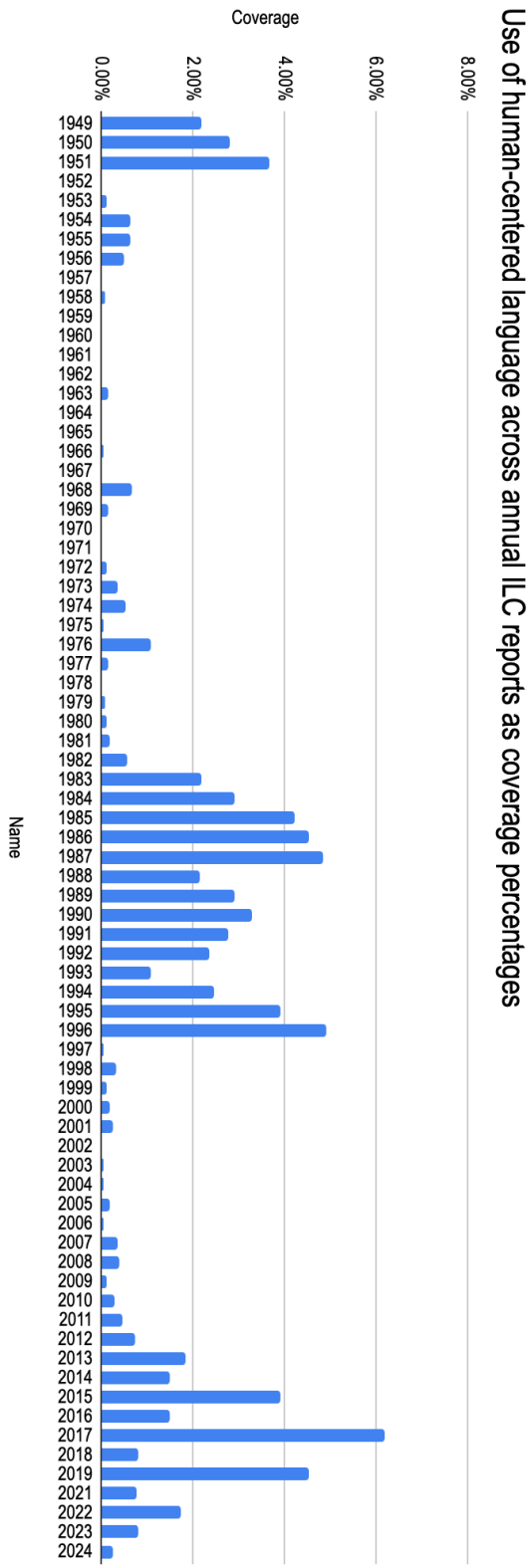
Use of human-centered language across annual ILC reports as coverage percentages
Coverage
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Erga Omnes

In the 2001 ILC Draft Articles on State Responsibility the ILC gives an overview on the invocation of responsibilities by states that are not the directly injured party. While in most situations a state invoking a responsibility by bringing a legal case would need to have standing by being directly impacted, this document outlines an exemption under the following circumstances:

> (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (*b*) the obligation breached is owed to the international community as a whole.[20]

These obligations are considered to be obligations *erga omnes partes*. In this article, the ILC was intending on clarifying and codifying the message within the ICJ's *Barcelona Traction* (1970) case. In the 1970 judgement handed down by the International Court of Justice, the court stated the following:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*... Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of *genocide, as also from the principles and rules concerning the basic rights of the human person*… Some of the corresponding rights of protection have entered into the body of general international law…; others are *conferred by international instruments of a universal or quasi-universal character*.[21]

This excerpt demonstrates a number of important international legal thoughts. First and foremost, it outlines an understanding of obligations owed to the international community. By overtly stating that there are obligations to the international community which are the concern of

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[20] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001," *United Nations Legal* (United Nations, 2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, 126.
[21] International Court of Justice, "Case Concerning the Barcelona Traction, Light and Power Company, Limited - (Belgium v. Spain) Judgement," *International Court of Justice* (The Hague: International Court of Justice, February 5, 1970), https://www.icj-cij.org/sites/default/files/case-related/50/050-19700205-JUD-01-00-EN.pdf, 32; emphasis added.

all states, there is an implication that there are near-universal obligations. Although it is framed in the International Court of Justice's state-centered international legal vernacular, the content of what constitutes such obligations gives cosmopolitan purpose to the state-centered legal thinking. The ICJ poses these obligations as state concerns, which is reflective of the jurisdictional restraints the ICJ must contend with. However, the bulk of the obligations which are named or pointed to are basic human rights and freedom from genocide, which hold a more human-centered framework for morality. In this case, the ICJ is implicitly claiming that obligations such as those concerning the rights of humans are a part of an international collective interest, a belief which is cosmopolitan in nature.

Secondly, this cosmopolitan idea is underscored by pointing to a universal (or quasi-universal) character coming from international institutions. These international institutions, such as the United Nations, are conferring moral and legal obligations upon the universal collective. This further entrenches a collective moral and legal sense, which is codified in international law in a number of formats. Finally, the ICJ specifically points to the outlawing of genocide as a source for these obligations which are universal or near-universal, and are thereby obligations *erga omnes*. This clearly demonstrates the point of this work: the Genocide Convention was foundational for cosmopolitan law, holding unique qualities which helped lay groundwork for international legal developments such as in the case of these *erga omnes* obligations.

The implications of the *erga omnes* concept has the potential to continue to evolve for years to come. In January of 2020 *erga omnes* was applied for the first time in the case of genocide in the case of *The Gambia v. Myanmar*, where The Gambia was declared to have prima

facie standing on the basis of *erga omnes* obligations emerging from the Genocide Convention.[22] The Gambia was able to bring this case on behalf of the Rohingya victims because of the *erga omnes* developing strength as a basis for standing. In the case of *The Gambia v. Myanmar* 57 states from the Organization for Islamic Cooperation came together to support The Gambia bringing the case to the ICJ. Kant's conception of a future for the international system involved federations of states, with collective laws of nations being defined by a federation of free states.[23] The idea that an association of states can bring a case on behalf of groups (that are not a part of their state organization) is in alignment with Kant's endorsement of federations of states working in conjunction to define the collective law of nations. The case of *The Gambia v. Myanmar* does not fall perfectly in line with Kant's federation of republican states, but it does mark a step towards empowering associations of states in the international system, which has implications for federations of states of all characters.

At the present moment, in the case of *South Africa v. Israel*, obligations *erga omnes* have allowed for the Palestinian people to be given a voice in the ICJ through South Africa and the states joining in the case against Israel.[24] Many cosmopolitan thinkers regard stateless peoples such as the Palestinians to be strong case studies for examining the strength of protections for human rights. Given the fact that such people do not have a state affording them the protections of citizenship, their rights under international law are derived from their status as human. Previously it has been difficult or nearly impossible for these people to have their complaints heard by the ICJ because the state they would territorially be defined as falling under the

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[22] International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (the Gambia v. Myanmar)," International Court of Justice (International Court of Justice, January 23, 2020), https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.
[23] Immanuel Kant, "Perpetual Peace," Gutenberg, 1795, https://www.gutenberg.org/files/50922/50922-h/50922-h.htm, 130.
[24] International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)," International Court of Justice (International Court of Justice, January 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

jurisdiction of is unlikely to care to bring their complaints to the ICJ (especially in cases where that state would be bringing a case against itself). The utilization of *erga omnes* by associations of states or unrelated states to give a voice to the stateless has expanded international law's capacity to address peremptory norm violations for all peoples.

CONCLUSION

The state leaders who pushed for the inclusion of human-centered language in the Genocide Convention were told that their words would be meaningless, and yet those words went on to shape international legality. They pushed for this language on a morally cosmopolitan basis, standing by their convictions even when they were told those aspirational sentiments would have no substantive impact. While some may look at developments like the codification of peremptory norms and doctrines such as *erga omnes* and see these international legal changes as inconsequential in the face of power-dominated politics, any viable path towards a more just international system will require powerful actors to face that adversity. It is a path to be walked not with the expectation of a sudden dramatic switch towards that cosmopolitan vision, but with the understanding that incremental developments over the course of human history can bring us closer to that goal.

The statesmen who brought humanity the League of Nations sought to end war, a mission they failed to accomplish. Still, the members, in their closing session, recognized the League as a successful experiment in the pursuit of international society. They passed the torch to the United Nations, which was shaped by the reprehension the international community felt towards the events of World War II and the Holocaust. The United Nations viewed the Permanent Court of

International Justice as a great triumph of the League, and replicated it in the form of the International Court of Justice. By learning from and building upon the lessons learned during the time of the League, the UN founders demonstrated a willingness to learn from the past in the pursuit of building a better future.

Gradual, incremental changes have defined the pursuit of a universal history with a cosmopolitan purpose. Successes and failures come with the territory. The Genocide Convention allowed for major developments in the areas of human rights and cosmopolitan pursuits. The Genocide Convention's *travaux préparatoires* included arguments near identical to those commonly seen between realists or liberals and cosmopolitans today, but the realists acknowledged that the potential frivolity of the language would, at the very least, be harmless and at its best would communicate a moral position for the international community. The ripple effects of the inclusion of this language have been critical to international law, and it is a good thing that the drafters agreed to use it, regardless of the potential frivolity.

It is for the reasons above that international actors need to accept that aspirational, moral, human-centered language is not always pointless. Sometimes those impacts will not be seen for many years. Sometimes those impacts may not come to fruition. Sometimes those impacts might be unpredictable or unimaginable. However, it is the responsibility of visionaries within the international system to continue to aspire to that which is good for the collective humanity, even if those aspirations may not produce substantive results anytime soon. The development of international law would not be the same if not for the visionaries of the past.

In international relations, academics are often called to identify problems and speculate as to what gave rise to them. This places a tremendous focus in academia on exploring where developers of international systems failed. In international relations, some theorists may not

acknowledge where minute, limited, or incremental successes originate from. However, the source of such successes and the intentions of those who made victories possible is important to highlight. As academics, we find scrutinizing failures in international regimes to be key to learning how to avoid repeating those mistakes. It is axiomatic that identifying historically successful progressive paths is critically important to ensuring we continue to walk them.

The use of human-centered language in the development of international conventions such as the Genocide Convention has allowed space for international legal developments that have, in some ways, outpaced the United Nation's capacity for enforcement. This does not mean that the project is without merit or should be abandoned. The League of Nations was not perfect, but the legal foundations established in the PCIJ created the bedrock of international jurisprudence which the International Court of Justice builds upon. The Genocide Convention, full of political and moral ambitions, in some way gave the ICJ the ability to accelerate the development of international human rights laws. Approaching international polity with an understanding that there is no terminal point at which collective human development expires is key to working towards an end goal most of us will never live to see. Just as individuals may work towards actualizing, all those who are global citizens should push towards this abstract horizon.

The limitations of realism and liberalism have constrained academics from acknowledging progress and has had a paralyzing effect on many of those who study international relations. This must be combated by the exploration of the progressive developments made in international institutions through cosmopolitan language and action. Cosmopolitan and human-centered legal developments have allowed international institutions and law to work towards a recognition of human rights, which have provided critical space for

the claims of those who have no protections from status as citizens. While the United Nations and its development after World War 2 has been a liberal institution more than anything else, the ideological strands of cosmopolitanism are embedded within the foundational aspirations of the institution itself. Due to the moral outcry after the Holocaust, the United Nations centered preventing genocide in its goals. The Genocide Convention's moral roots being cosmopolitan in nature has lent itself to a unique legal and moral space which has expanded the viability of cosmopolitan legal objectives in the international system.

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