# DEFINING THE PROTECTED GROUPS OF GENOCIDE THROUGH THE CASE LAW OF INTERNATIONAL COURTS

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www.internationalcrimesdatabase.org

ICD Brief 18

December 2015

## ABSTRACT

In defining the four protected groups of genocide, the international criminal tribunals have gradually shifted from an objective to a subjective approach, or a combination of these approaches with an emphasis on the subjective approach. The group membership is accordingly not determined by means of dubious objective parameters such as skin color, but by the perception of the group's differentness. Predominately, the courts determine the perpetrator's perception of the group that he wishes to single out and destroy. The Genocide Convention, however, exclusively protects four groups and a broadening of this protection to include any group created by the imagination of the perpetrator has consistently been rejected. The perpetrator's perception has therefore to be limited to what he understands to be a racial, national, ethnical or religious group. This analysis is primarily based on the case law of the international criminal courts, in particular the *ad hoc* tribunals for Rwanda and the Former Yugoslavia. It considers furthermore the case law of the International Criminal Court, the International Court of Justice and also includes the findings of the Darfur Commission.


## I. INTRODUCTION

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948 protects four exclusive groups: the national, ethnical, racial and religious group.[1] However, the Convention fails to define these groups. Its Art. II reads:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (…).[2]

This definition of genocide is reproduced verbatim in Art. 6 Rome Statute of the International Criminal Court (ICC),[3] Art. 2 Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[4] and Art. 4 Statute of the International Criminal Tribunal for Rwanda (ICTR)[5]. They all encounter the same definitional difficulties in identifying the members of the protected victim groups of genocide.[6]

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1 ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (2 August 2001), para. 554.
2 Convention on the Prevention and Punishment of the Crime of Genocide, UN GA Res. 260 (III) A (1948).
3 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998).
4 International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993).
5 International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994).
6 The author published an article with the title: "The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law", 3 *International Criminal Law Review* 2015) on which this brief partially builds.

While the crime of genocide is characterized by an intent to destroy a group, the question of who is protected within the ambit of these groups is one of the most complicated ones.[7] Indeed, it has been claimed that the "major problem with the convention is its narrow definition of what constitutes a victim group"[8] and a United Nations (UN) Study on Genocide accordingly noted that "[t]he lack of clarity about which groups are, and are not, protected has made the Convention less effective and popularly understood than should be the case".[9] In recent years, however, the jurisprudence by international and domestic criminal tribunals has significantly transformed the understanding of the protected groups. From initially defining the groups in an objective manner, courts increasingly determine the group membership subjectively, by relying on the perception of the group's differentness. This groundbreaking shift, which will be analyzed in the following sections, radically changed the approach to the group definition of genocide. In particular, it will be demonstrated how a reliance on perception challenges the exclusivity of the four protected groups. Simultaneously, a perpetrator-based subjective approach to defining the victim group is in coherence with any pre-genocidal process. This Brief ends by suggesting a release of the group notion from the *actus reus* and instead to fully incorporate it into the *mens rea*.

### A. Group Membership

The crime of genocide distinguishes itself from other international crimes by protecting a group.[10] It is not the victim in his[11] individual capacity, but as a member of a certain group that determines the crime of genocide. For the perpetrator, the individual victim is "a means to an end: a step further along the path of destroying the group".[12] The perpetrator believes that his victims have an enhanced value to the physical or biological survival of the group and therefore wants to destroy them.[13] The victim of the crime of genocide is therefore the group itself and not the individual alone; the individual is just an element of the group.[14]

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7 Scott Straus, "Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide", *Journal of Genocide Research*, Vol. 3 (2001), p. 365.

8 Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide* (New Haven/ London: Yale University Press, 1990), p. 11.

9 Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, para. 30.

10 It is to be noted that the crime against humanity of apartheid (Art. 7(2)(h) Rome Statute) and the crime against humanity of persecution (Art. 7(1)(h) Rome Statute) also protect victims as members of a group.

11 For reasons of readability and simplicity, the masculine form will be used when referring to unspecific individuals. This shall, however, have no implications as to the gender of a victim or perpetrator.

12 International Law Commission (ILC), Draft Code of Crimes (1996), UN Doc. A/51/10, Art. 17, Commentary 6.

13 David Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010), p. 45.

14 ICTR, *The Prosecutor v. Musema*, Case No. ICTR- 96-13-A, Trial Judgment (27 January 2000), para. 165. Furthermore: "the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group" (*ibid.*).
Already in 1946, the General Assembly proclaimed genocide a deprivation of a group's right to exist (GA Res. 96 (I), UN Doc. A/64/Add. 1 (1946), p. 188).

The ICTY explained the importance of group identity:

> Article 4 (…) defines genocide as one of several acts 'committed with intent to destroy in whole or in part a national, ethnical, racial or religious group *as such*'. The term "as such" has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity.[15]

The International Law Commission (ILC) in its Draft Code of Crimes against the Peace and Security of Mankind of 1996 rightfully emphasizes that it was the membership of an individual in a particular group rather than the identity of the individual that was the decisive criterion in determining the immediate victims of the crime of genocide.[16] The individual's destruction becomes a stepping stone on the path to eliminating the group he belongs to.

### B. Group Selection: a Historical Review

The Polish-Jewish lawyer Raphael Lemkin coined the term genocide in 1944 in response to still ongoing crimes committed against Jews and other minorities by the Nazi regime during the Second World War.[17] He aimed at protecting individuals from actions against them "not in their individual capacity, but as members of the national group".[18] Lemkin advocated for the creation of an international multilateral treaty protecting "minority groups from oppression because of their nationhood, religion, or race".[19]

In 1946, Lemkin's call for an international treaty criminalizing genocide was heard. The General Assembly Resolution 96 (I) affirmed genocide as an international crime, whether "committed on religious, racial, political or any other grounds".[20] This Resolution provided the basis for the first draft of the Genocide Convention by the UN Secretariat. By including "racial, national, linguistic, religious or political groups of human beings", it was designed to offer the widest possible protection for groups.[21] Subsequently, the Ad Hoc Committee on Genocide prepared a second draft that limited the protection to national, racial, religious and political groups.[22] Political groups were inserted following a tight vote of four to three.[23] This group was criticized for not being permanent

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15 ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment (22 March 2006), para. 20 (emphasis in original).
16 ILC, Draft Code of Crimes Against the Peace and Security of Mankind (1996), UN Doc. A/51/10, Art. 17, Commentary No. 6, p. 45.
17 John Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot: Ashgate, 2006), pp. 4-5.
18 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, Division of International Law, 1944), p. 79.
19 *Ibid.*, p. 93.
20 UN Doc. A/RES. 96 (I) of 1947.
21 First Draft of the Genocide Convention, Prepared by the UN Secretariat, UN Doc. E/447 (1947), Art. I(I).
22 Report of the Ad Hoc Committee on Genocide, UN Doc. E/794 (1948).
23 UN Doc. E/AC.25/SR.13 (1948), p. 4.

and for being "based on a body of theoretical concepts whereas sentiment or tradition bound the members of a national, racial or religious group".[24] The Sixth Committee thereafter chose to exclude political groups from the protection of the Genocide Convention.[25]

The racial and the national group were subject only to a limited debate during the drafting of the Convention. These two categories were included at an early stage and thereafter endorsed in Art. II without a vote, their meaning apparently being self-evident to the drafters.[26] It was purposely decided to only enumerate the protected groups, leaving a more detailed definition to the implementing legislation as foreseen in Art. V of the Convention.[27] The Genocide Convention was approved by unanimous vote in the General Assembly on 9 December 1948 and came into force in January 1951 with its twentieth ratification.[28] As per December 2015, 147 States have ratified the Convention.[29]

Ever since the creation of the Genocide Convention, the definition of the four protected groups has remained unclear for three reasons. First, the Genocide Convention was long believed to be a dead letter. It was not applied until fifty years after its creation, when in 1998 for the first time an international tribunal convicted a person for the crime of genocide.[30] Second, the understanding of race, ethnicity, nationality and religion has changed parallel with technological, scientific and sociological developments. Thirdly, as has been shown above, the interpretation of the protected groups was on purpose left to the implementing governments of the Genocide Convention.

The following section will analyze the first ever genocide trial and how it defined the racial, ethnical, national and religious group.

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24 UN Doc. E/AC.25/SR.13, p. 2.
25 UN Doc. A/C.6/SR.128, pp. 659-661.
26 Fanny Martin, "The Notion of 'Protected Group' in the Genocide Convention and Its Application", in Paola Gaeta (ed.), *The UN Genocide Convention – A Commentary* (Oxford: Oxford University Press (2009), pp. 114-115.
27 Lawrence LeBlanc, "The United Nations Genocide Convention and Political Groups", 13 *Yale Journal of International Law* (1988), pp. 271-272.
28 William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2. ed. 2009), p. 3.
29 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=e (last accessed 14 December 2015).
30 ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998).

## II. *AKAYESU*: DEFINING THE FOUR PROTECTED GROUPS

In 1998, with the judgment against *Akayesu* by the ICTR, for the first time ever an international criminal tribunal convicted an individual for the crime of genocide.[31] *Akayesu* set a number of important legal precedents and is still now considered a yardstick for the definition of genocide, as frequent references to it prove.[32] Being the first genocide trial in history, the ICTR was forced to analyze the requirements of the genocide provision and went into great detail in defining the four protected groups. The Tribunal reasoned that since the special intent to commit genocide lied in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, it was necessary to objectively determine the meaning of these social categories.[33] The objective determination of the protected groups of genocide, however, proved to be a challenge. For the outcome of the trial, it was of paramount importance to correctly define the Tutsi victim group. Had the Tutsis not been classified as members of one of the four protected victim groups, the atrocities committed in Rwanda in 1994 could not have been legally qualified as genocide. The primarily objective definition of the protected groups by the Tribunal was later heavily criticized.

### A. The Definition of a National Group

The ICTR in *Akayesu* defined a national group as follows:

> Based on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.[34]

Interestingly, the Trial Chamber based its definition on the *Nottebohm* decision by the International Court of Justice (ICJ), as well as on the perception of a shared legal bond. It thereby combined objective (*Nottebohm* approach) with subjective (perception) criteria. In *Nottebohm*, nationality was determined on effective factual ties between the person and the State concerned.[35] The ICJ thus

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31 ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998).

32 Virtually every single judgment of the ICTR refers to the *Akayesu* trial judgment. See for example: ICTR, *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment (21 May 1999), para. 95; ICTR, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment (1 December 2003), para. 804 or ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (6 December 1999), para. 47.
Also the ICTY referred to *Akayesu* in several cases: ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment (14 December 1999), para. 51; ICTY, *The Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment (1 September 2004), para. 728. Further references are found, amongst others, in the Report of the International Commission of Inquiry on Darfur, UN Doc. S/2005/60 (25 January 2005), para. 501.

33 ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), para. 510.

34 ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T. Judgment (2 September 1998), para. 512.

35 ICJ, *Nottebohm* Case (*Liechtenstein v. Guatemala*), Second Phase, Judgment (6 April 1955), ICJ Reports 1955, p. 22.

took an objective view of nationality that prevailed over the subjective views of the individual. By referring to *Nottebohm*, the ICTR apparently juxtaposed nationality with citizenship. This approach is not uncontested. Indeed, there are discrepancies with regard to the definition of a national group, which range from national minorities to citizenship and even to homeland as a broader concept.[36] Historically, nation simply meant a group of people. It is only in modern times that it has become associated to the nation-state.[37] The Spanish National Court, for example, ruled that a national group was not limited to a collectivity formed by people belonging to the same nation, but instead was a national human group, comprised by a larger community of people.[38] Similarly, scholars have claimed that national groups were not required to have the nationality of the State they live in, but could also be the inhabitants of a nation's territory, which would further challenge the *Akayesu* definition.[39] At its extreme, even "auto-genocide", viz. the destruction of the perpetrator's own group, has been suggested included into the protection of a national group.[40]

Lemkin's notion of nationality embraced a wider concept than citizenship, whereby the destruction of the national pattern of the oppressed group was essential for the commission of the crime of genocide.[41] To Lemkin "the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology".[42] By merging nationality with tradition and culture, Lemkin approaches the notion of ethnicity. Its definition will be discussed subsequently.

### B. The Definition of an Ethnical Group

According to the ICTR in *Akayesu*, "an ethnic group is generally defined as a group whose members share a common language or culture".[43] The Tribunal determined that the Tutsi victims were an ethnical group, despite the fact that they shared a common language and culture with the predominantly Hutu perpetrator group. This conclusion was only possible due to the Tribunal's creation of a 'stable and permanent' threshold, which was made in an attempt to assign the group

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36 David Lisson, Defining "National Group" in the Genocide Convention, 60 *Stanford Law Review* (2008), pp. 1459-1496; David Luban, Calling Genocide by Its Rightful Name, 7 *Chicago Journal of International Law* (2006), p. 318; M.N. Shaw, "Genocide in International Law", in Yoram Dinstein, Mala Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1989), p. 807

37 Eric Weitz, *Genocide: Utopias of Race and Nation* (Princeton and Oxford: Princeton University Press 2003), p. 17.

38 Maria Del Carmen Marquez Carrasco, Joaquin Alcaide Fernandez, "*In Re* Pinochet", 93 *American Journal for International Law* (1999), p. 693

39 Claus Kress, "The Crime of Genocide Under International Law", 6 *International Criminal Law Review* (2006), p. 476; Luban, *supra* n. 36, p. 318.

40 Caroline Fournet, The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory (Aldershot: Ashgate, 2007), p. 49.

41 Lemkin, *supra* n. 18, pp. 79-80 and 91.

42 Lemkin, *supra* n. 18, p. 91.

43 ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), para. 513.

some objectivity.[44] It has been heavily criticized for expanding the definition of genocide, thereby breaching the principle of legality.[45] Only a few later judgments followed the *Akayesu* approach, thereby limiting the effect of this newly created generic category.[46]

Ethnic groups are composed of individuals who conceive themselves "as being alike by virtue of their common ancestry, real or fictious, and who are so regarded by others".[47] While ethnicity largely depends on self-identification of its members, dominant groups may also assign ethnic labels pejoratively to other groups with the aim of denying them participation in the system.[48] Ethnicity is a permeable and fluid form of identity, since outsiders are usually able to assimilate into an ethnic group.[49]

The inclusion of ethnic groups into the Genocide Convention was narrowly accepted with eighteen to seventeen votes and eleven abstentions.[50] The concept of an ethnical group has continuously developed, as will be demonstrated in Section III.

### C. The Definition of a Religious Group

In *Akayesu*, the ICTR defined a religious group as "one whose members share the same religion, denomination or mode of worship".[51] Others have defined religious groups as a community united by a single, spiritual ideal.[52] Atheistic or agnostic groups challenge the concept of religion, because they precisely do not share a denomination or mode of worship, but instead denounce or deny the existence of any deity. Some legal scholars assert that they were not included since the freedom *not* to practice a religion was not protected by human rights law.[53] However, it has to be questioned whether a reference to recognized human rights in dealing with the protected groups of genocide is useful. Other scholars include atheistic, agnostic or sectarian groups under the protection of the

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44 Barbara Lüders, *Die Strafbarkeit von Völkermord nach dem Römischen Statut für den Internationalen Strafgerichtshof* [The Criminal Liability for Genocide in the Rome Statute of the International Criminal Court] (Berlin: Berliner Wissenschafts-Verlag, 2004), p. 53

45 Gerhard Werle, Florian Jessberger, *International Criminal Law* (Oxford: Oxford University Press, 3. ed. 2014), para. 794; William Schabas, "The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", in Horst Fischer, Claus Kress, Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin: Berliner Verlag, 2001), pp. 451-452.

46 Alexander Zahar, Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008), p. 161; William Schabas, "Genocide", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (München: Verlag C.H. Beck, 2. ed. 2008), p. 149.

47 Tamotsu Shibutani and Kian Kwan, *Ethnic Stratification: A Comparative Approach* (New York: Macmillan Company, 1965), p. 42.

48 Thomas Hylland Eriksen, *Ethnicity and Nationalism* (London: Pluto Press, 3rd edition 2010), p. 39.

49 Weitz, *supra* n. 37, p. 21.

50 UN Doc. A/C.6/SR. 75, pp. 115-116.

51 ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), para. 515.

52 Matthew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide", 15 *Arizona Journal of International and Comparative Law* (1998), p. 456.

53 Werle, Jessberger, *supra* n. 45, para. 802.

Genocide Convention if they are an organized congregation of people with primarily spiritual beliefs, thus not dominated by economic, political or other characteristics.[54]

### D. The Definition of a Racial Group

Lastly, the Tribunal defined a racial group:

> The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.[55]

According to a dictionary, hereditary means "genetically transmitted or transmittable from parent to offspring".[56] By relying on hereditary physical traits, the ICTR seemingly suggests the identification of people by means of their physical appearance. However, it has long been recognized that there is no gene for race.[57] Referring to the genetic transmission of physical traits is not only scientifically wrong, it also preserves contentious and antiquated means of classifying people. The Tribunal weakens its statement by referring to "the conventional definition", without taking any position as to its accuracy. At the same time, "identified with a geographical region" points to a subjective approach, with the perpetrator's perception of the racial affiliation of another group relating to its geographical origin. The *Akayesu* definition of a racial group has been criticized for its objective reading of race by relying on physical and biological criteria, instead of considering the group's social and historical context.[58] It will subsequently be shown that the larger societal context of a group has become increasingly more important and currently dominates the legal determination of the victim group membership for the crime of genocide.

The meaning of a 'racial group' has changed dramatically. In 1948, the drafting parties did not perceive the term as problematic. Nowadays, however, it is considered highly controversial. Its meaning at the time of drafting of the Genocide Convention was significantly broader and to a large extent synonymous with national, ethnic and religious groups.[59] The term was affected by the then

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54 Nersessian, *supra* n. 13, p. 24.

55 ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), paras. 514 and 516.

56 http://www.merriam-webster.com/dictionary/hereditary (last accessed 17 December 2015).

57 Michael Yudell, *Race Unmasked: Biology and Race in the Twentieth Century* (New York: Columbia University Press, 2014), p. 204; Richard S. Cooper et al., "Race and Genomics", *The New England Journal of Medicine*, (20 March 2003), pp. 1166-1170; Leda Cosmides, John Tooby, Robert Kurzban, "Perceptions of Race", 7 *Trends in Cognitive Sciences* (April 2003), p. 173.

58 Richard Ashby Wilson, "Crimes against Humanity and the Conundrum of Race and Ethnicity at the International Criminal Tribunal for Rwanda", in Ilana Feldman, Miriam Ticktin (eds.), *In the Name of Humanity: The Government of Threat and Care* (Durham/ London: Duke University Press, 2010), pp. 33 and 37.

59 William Schabas, "Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda", 6 *ILSA Journal of International & Comparative Law* (2000),

common understanding of race. Lemkin's study "Axis Rule in Occupied Europe" demonstrates that European subgroups such as the Germans, Poles and Jews were seen as different races.[60] But the concept of race was also influenced by the recent Nazi experience. As such, the Dutch and Norwegians were considered of related blood to the Aryan 'race' and therefore worthy of live, whereas the Jewish 'race' was to be destroyed completely.[61] With significant achievements in DNA-coding, we can now ascertain that there are no biologically different human races.[62]

## III. THE OBJECTIVE AND SUBJECTIVE APPROACH IN DEFINING THE PROTECTED GROUPS

While *Akayesu* employed a predominately objective approach in defining the protected groups of genocide, nearly all later judgments by international criminal tribunals chose to rely on subjective elements. The reason for this gradual shift was correctly recognized by the ICTY Trial Chamber in the case of *Jelisić*:

> to attempt to define a national, ethnical, racial or religious group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation.[63]

This progressive move towards a subjective approach entails the avoidance of objective, scientifically verifiable parameters. Instead, the currently prevailing (partially) subjective approach refers to the perpetrator's perception of the victim group. The perpetrator defines the victim as a member of one of the protected groups of genocide.[64]

The perpetrator's perception of a group thereby becomes the defining element for the crime of genocide and as such considerably challenges international criminal jurisprudence. The reason for this is the principle of legality that demands a clear and specific designation of the victim groups. The elements of specificity and foreseeability of criminal norms contradict a subjective perpetrator-based approach. Indeed, a reliance on the perpetrator's mental state hinders tribunals in an objective and uniform determination of the victim group because each perpetrator will perceive his

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p. 381; Diane Amann, "Group Mentality, Expressivism, and Genocide", 2 *International Criminal Law Review* (2002), p. 98.

60 Lemkin, *supra* n. 18, pp. 87-88. Amann confirms that race was used in the then-current fashion to describe European subgroups, like the Germans, Poles and the Jews (Amann, supra n. 57, p. 98).

61 Lemkin, *supra* n. 18, p. 81, pp. 86-87.

62 The 1950 UNESCO Statement on Race emphasizes: "For all practical social purposes, 'race' is not so much a biological phenomenon as a social myth", in UNESCO, Four Statements on the Race Question (1969), p. 33.

63 ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment (14 December 1999), para. 70.

64 Nersessian, *supra* n. 13, p. 28; Schabas, *supra* n. 28, p. 125; Werle, Jessberger, *supra* n. 45, p. 297; Guglielmo Verdirame, "The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals", in 49 *International and Comparative Law Quarterly* (2000), p. 589.

victims differently. Since the provisions on genocide assign protection to the national, ethnical, racial and religious group only, the perception of the perpetrator cannot go beyond these four categories. In other words: if the perpetrator, for example, perceives blue-eyed people as inferior and wishes to destroy them, his victims would not fall under one of the four categories, unless they also manifest national, ethnical, racial or religious characteristics.

The international judicial trend towards a subjective perpetrator-based approach is coherent with any pre-genocidal process. Essential to every genocidal act is the perpetrator's prejudice towards a group other than his own. The perpetrator identifies, names and stigmatizes the members of this out-group.[65] He then aims at their destruction. This phenomenon is widely-recognized as "othering" in the social sciences.[66] With the recognition of the perpetrator-based approach, the pre-genocidal process of othering has been translated into law. It is therefore of significance who the perpetrator perceives as victim. The examples in the next section will demonstrate how international criminal tribunals have come to favor the perpetrator-based subjective approach.

### A. Defining the Protected Groups Post-Akayesu: The Subjective and Objective Approaches taken by the ICTR and ICTY

In 1999, the ICTR pronounced two judgments that gradually distanced themselves from the primarily objective approach taken by *Akayesu*. The first case, *Rutaganda*, highlighted:

> the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context.[67]

The membership of a group was a subjective rather than an objective concept. The Tribunal went on to note:

> The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.[68]

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65 Alexander Laban Hinton, "The Dark Side of Modernity", in Alexander Laban Hinton (ed.), *Annihilating Difference: the Anthropology of Genocide* (Berkeley/ Los Angeles/ London: University of California Press, 2002), pp. 6 and 13.

66 Anthonie Holslag, "The Process of Othering from the "Social Imaginaire" to Physical Acts: an Anthropological Approach", 9 *Genocide Studies and Prevention* (2015), p. 96.

67 ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (6 December 1999), para. 55.

68 *Ibid.*

The ICTR performed a case-by-case analysis, accounting for the relevant evidence as well as its political, cultural and social setting.[69] It did not openly reject the *Akayesu* approach, but instead made a subtle shift towards a subjective approach, thereby setting aside some important precedents.[70] In essence, *Rutaganda* allowed for either a perpetrator- or a victim-based perception (subjective approach) with due consideration of objective elements. A subjective definition alone was deemed not sufficient, because the groups had to be relatively stable and permanent.[71]

The other judgment of 1999, *Kayishema and Ruzindana*, suggested either an objective or a subjective definition of an ethnic group:

> An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification of others).[72]

The use of semicolons and the word 'or' show that three distinct methods of identifying an ethnical group were deemed possible: an objective approach (common language and culture), a victim-based subjective approach (self-identification) or a perpetrator-based subjective approach (identification by others). This innovative subjective definition of the protected groups promptly led to criticism amongst legal scholars for letting the perpetrator's intent define the crime of genocide.[73] Others welcomed the Tribunal's approach of taking into account the socio-historic environment, such as the criteria of stigmatization employed by the perpetrator, even if the victim group objectively was not one of the four protected groups of genocide.[74]

In *Jelisić,* the ICTY chose to follow the subjective approach taken by the ICTR in *Kayishema and Ruzindana*.[75] It emphasized that

> [i]t is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.[76]

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69 ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (6 December 1999), para. 57. ICTR, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment (1 December 2003), para. 811 uses the same criterions as the *Rutaganda* case in determining the protected group.

70 Lisson, *supra* n. 36, p. 1465; Verdirame, *supra* n. 64, pp. 592 and 594. It is to be noted that the same bench of judges who decided *Akayesu* also rendered the *Rutaganda* judgment. This explains their cautiousness in applying a more progressive approach.

71 ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (6 December 1999), para. 57.

72 ICTR, *The Prosecutor v. Kayishema and Ruzindana*., Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98.

73 As examples: Zahar, Sluiter, *supra* n. 46, p. 162; Kress, *supra* n. 39, p. 474.

74 Ronald Slye and Beth Van Schaack, *International Criminal Law: The Essentials* (Austin/ Boston/ Chicago/ New York/ The Netherlands: Wolters Kluwer, 2009), p. 226.

75 ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment (14 December 1999), para. 70, footnote 95.

76 ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment (14 December 1999), para. 70.

The Trial Chamber acknowledged that instead of using objective and scientifically irreproachable criteria, "it is more appropriate to evaluate the status of a (...) group from the point of view of those persons who wish to single that group out from the rest of the community".[77]

Thus, the perpetrator's perception of the group was considered the defining element. The ICTY Trial Chamber in *Brđanin* confirmed the *Jelisić* decision, but went further by noting that the protected group:

> may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived (…) characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.[78]

The Court thereby approached *Kayishema and Ruzindana* by allowing for a subjective approach by the perpetrator or the victim. It nevertheless demanded certain objective criteria.[79]

The ICTY *Tolimir* case of 2012 referred to both *Brđanin* and *Jelisić.* It confirmed that the group must have a particular, distinct identity and be defined by its common characteristics rather than a lack thereof.[80] The Tribunal failed to specify whether the perpetrator or the victims defined these characteristics. However, with its reference to *Brđanin*, in which the perpetrator's identification of the group members was decisive, it can be concluded that *Tolimir* equally favors a subjective perpetrator-based approach.[81]

The ICTR judgment in the case against *Bagilishema* of 2001 confirmed the difficulties of an objective group definition:

> the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally (…). In such a case (…) the victim could be considered (…) as a member of the protected group (…).[82]

The judgment emphasized the social, political, historical and cultural context of the four protected groups. An individual's membership to a particular group - and the group itself - had to be objective factors of the society. In other words, the group is considered a distinct racial, ethnical, national or religious group by the society at large and therefore becomes a social reality. In addition to the overarching societal context, the perpetrator's perception of the group becomes crucial: he intends

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77 *Ibid*.
78 ICTY, *The Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgment (1 September 2004), para. 683.
79 ICTY, *The Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgment (1 September 2004), para. 684..
80 ICTY, *The Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Judgment (12 December 2012), para. 735.
81 ICTY, The *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment (12 December 2012), p. 325, footnote 3095.
82 ICTR, *The Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment (7 June 2001), para. 65.

to destroy its members for perceived or real characteristics. *Bagilishema* thereby primarily applied subjective elements and further consolidated this new approach.

The *Kajelijeli* judgment by the ICTR confirmed the difficulties of objectively defining the protected groups:

> the said concept [of national, religious, racial or ethnical groups] enjoys no generally or internationally accepted definition, rather each concept must be assessed in the light of a particular political, social, historical and cultural context (…) [M]embership of a group is (…) a subjective rather than an objective concept [where] the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. A determination of the categorized groups should be made on a case-by-case basis, by reference to both objective and subjective criteria.[83]

The Tribunal applied a primarily subjective approach with the perpetrator's perception as the decisive element. It nevertheless demanded a case-by-case categorization, with due reference to the objective elements. It remains unclear whether these objective elements are the political, social, historical and cultural context that the Trial Chamber refers to, or whether there are other relevant criteria.

In *Semanza*, the ICTR acknowledged the incoherence in its jurisprudence regarding the protected groups:

> The Statute of the Tribunal does not provide any insight into whether the group (…) is to be determined by objective or subjective criteria or by some hybrid formulation (…) [T]he determination (…) ought to be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria.[84]

The ICTR in *Gacumbitsi* used a similar wording:

> Membership of a group is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, but the determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria. Indeed, in a given situation, the perpetrator, just like

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83 ICTR, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A, Trial Judgment (1. December 2003), para. 811. The *Kamuhanda* judgment of 2004 uses nearly the exact same wording (ICTR, *The Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment (22 January 2004), para. 630).

84 ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment (15 May 2003), para. 317 (emphasis in original).

> the victim, may believe that there is an objective criterion for determining membership of an ethnic group (…).[85]

*Gacumbitsi* initially seems to take a purely perpetrator-based subjective approach, but then nevertheless demands certain objective criteria. It further confuses things by referring to the victim's perception, thereby seemingly opening to a victim-based subjective approach too.

Similarly to *Gacumbitsi*, the ICTR Trial Chamber in *Muhimana* demanded either an objective determination of the victim group or a reliance on the perpetrator's perception of the group. Rightfully, it recognized that the classification of the victim group was essentially a matter of proof:

> The Prosecution also has the burden of proving either that the victim belongs to the targeted ethnic, racial, national, or religious group or that the perpetrator of the crime believed that the victim belonged to the group.[86]

This analysis ends with the *Krstić* case. The ICTY acknowledged that the differentiation of the victim groups on the basis of scientifically objective criteria would be inconsistent with the object and purpose of the Genocide Convention.[87] Instead, the victim group's characteristics should be identified within the socio-historic context in which it resides. The Tribunal identified the relevant groups on the basis of their stigmatization, especially by the perpetrator's perception of the group as being national, racial, ethnic or religious.[88] With a partial reliance on subjective elements, the *Krstić* case applied a mixed approach, with both subjective and objective criteria.[89]

### B. Positive and Negative Definition of a Protected Group

A protected victim group can be defined positively or negatively, as *Jelisić* describes:

> A group may be stigmatised (…) by way of positive or negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A "negative approach" would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics.[90]

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85 ICTR, *The Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 254.
86 ICTR, *The Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T (28 April 2005), para. 500.
87 ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (2 August 2001), para. 556.
88 ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (2 August 2001), para. 557.
89 Agnieszka Szpak, "National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the *Ad Hoc* International Criminal Tribunals", in 23 *European Journal of International Law*, (2012), p. 169.
90 ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment (14 December 1999), para. 71.

In other words: a positive approach refers to a group's characteristics - and a negative approach defines the group by what it is not. The negative approach has consistently been rejected, as the following examples will illustrate.

In *Brđanin*, the ICTY did not allow for group identification by exclusion, viz. by using negative criteria.[91] This conclusion was later confirmed by the ICJ in the *Case on the Application of the Genocide Convention* (*Bosnia and Herzegovina v. Serbia and Montenegro*):

> It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them (…) [T]he crime requires an intent to destroy a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not".[92]

The ICJ thereby confirmed the positive identification of the four protected groups. It remarked that the ICTY in *Stakić* had reached the same conclusion for the same reasons. Correctly so:

> The term "as such" has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet when a person targets individuals because they lack a particular national, ethnical, racial, or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics.[93]

The ICTY Appeals Chamber concluded that a negative group definition would be incompatible with the drafting history of the Genocide Convention.[94] Similarly, the majority of the judges in the ICC Pre-Trial Chamber in the *Al-Bashir* case concluded that the targeted group of genocide must have particular characteristics and not a lack thereof.[95] In accordance with the prevailing jurisprudence it can be concluded that the protected groups of genocide have to be defined positively: they are protected for their identity, not for their lack of characteristics.

### C. Darfur Commission

The International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur (Darfur Commission) was established by the UN Secretary-General pursuant to Security Council Resolution 1564 adopted under Chapter VII of the UN Charter, which

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91 ICTY, *The Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgment (1 September 2004), para. 685.
92 ICJ, *Case on the Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment (2007), para. 193.
93 ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment (22 March 2006), para. 20.
94 *Ibid.*, para. 22.
95 ICC, *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al-Bashir (4 March 2009), para. 135.

requested an inquiry into atrocities, especially genocide, committed in the Western region of Darfur in Sudan.[96] The Commission's report suggested that crimes against humanity and war crimes had been committed in Darfur and recommended a referral of the situation to the ICC. The UN Security Council referred the situation to the ICC Prosecutor by Resolution 1593.[97] Although the Darfur Commission was not a legal body and as such did not issue legally binding conclusions, its report would turn out to be influential on scholarly writing and have a legal impact by later reference. In particular, the ICC used the Darfur report as a fundament to build a case against the President of Sudan, Omar Al-Bashir.

The Commission was challenged by the fact that crimes had been committed between tribal groups, which were difficult to categorize as either racial or ethnical groups. It concluded that tribes were not a protected group, unless they also constituted a distinct racial, national, ethnical or religious group.[98] The Commission decided that in case of doubt it should be established whether (i) a set of persons were perceived and in fact also treated as belonging to one of the protected groups and (ii) whether they considered themselves as belonging to such a group.[99] In its further analysis, the Commission clearly took a subjective approach when defining that two groups perceived each other and themselves as constituting distinct groups.[100] The rebel tribes were perceived as 'Africans' and their enemies as 'Arabs', notwithstanding the lack of objective grounds for such a distinction.[101] Indeed, both groups were Muslims, spoke Arabic, and a high level of inter-marriages blurred the distinctions between them.[102] Despite opting for a subjective approach, the Commission nevertheless discussed the "outward physical appearance" of the tribes, thereby reverting to questionable, objective parameters.[103]

The Commission stated that the Genocide Convention

> hinges on four categories of groups which, however, are no longer identified only by their objective connotations but also on the basis of the subjective perceptions of members of groups.[104]

It thereby relied on a primarily subjective approach, allowing either a perpetrator or victim perspective.

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96 Security Council Resolution 1564 (18 September 2004), S/RES/1564 (2004).
97 Security Council Resolution 1593 (31 March 2005), S/RES/1593 (2005).
98 Report of the International Commission of Inquiry on Darfur (Darfur Report), UN Doc. S/2005/60 (25 January 2005), para. 496.
99 *Ibid.*, paras. 498-499.
100 *Ibid.*, paras. 500 and 509.
101 *Ibid.*, para. 509.
102 *Ibid.*, para. 508.
103 *Ibid.*, para. 508.
104 *Ibid.*, para. 501.

### D. Jurisprudence of the ICC: the Situation of Darfur

In March 2005, the Security Council referred by Resolution 1593 (2005) the situation in Darfur (Sudan) to the ICC Prosecutor.[105] The referral was largely based on the findings of the Darfur Commission. The Prosecutor opened an investigation on genocide against President Al-Bashir.

The Pre-Trial Chamber found that the three targeted tribes all appeared to have "Sudanese nationality, similar racial features, and a shared Muslim religion",[106] and could therefore not be qualified as distinct national, racial or religious groups. The tribes were, however, seen as different ethnicities "as there are reasonable grounds to believe that each of the groups (…) has its own language, its own tribal customs and its own traditional links to its lands".[107] The judges refrained from further exploring the issue of "whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach"[108] should be adopted.

Judge Ušacka's dissenting opinion promises further debate on the contours of the protected groups.[109] She noted that subjective criteria, like stigmatization of the group by the perpetrators, as well as objective criteria, like the particulars of a given social or historical context, had to be considered.[110] Ušacka dissented with the classification of the targeted groups as three distinct ethnicities. Instead, she suggested defining them as one single ethnic group of the 'African tribes', because all three groups were a "perceived unitary entity, which is in turn comprised of smaller groups, including the Fur, Masalit and Zaghawa".[111] The future development of the group definition by the ICC is to be awaited.

## IV. CONCLUSION

The first ever genocide judgment, in the case of *Akayesu* before the ICTR, attempted to define the national, racial, ethnical and religious groups in a primarily objective manner. Following criticism, the ICTR, ICTY, as well as the ICC departed from an objective determination of the protected groups under the Genocide Convention. Instead, they increasingly rely on a subjective approach, with an emphasis on the perpetrator's perception of the victim group. Thus, the definition of the four

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105 S/RES/1593 (2005) of 31 March 2005.
106 ICC, *The Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al-Bashir (4 March 2009), para. 136.
107 *Ibid.,* para. 137.
108 *Ibid.*
109 ICC, *The Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al-Bashir (4 March 2009), Separate and Partly Dissenting opinion of Judge Anita Ušacka, paras. 24-26.
110 *Ibid.,* para. 23.
111 *Ibid.,* paras. 25-26.

protected groups depends on perception, a subjective element that is difficult to establish and to verify. The perpetrator's perception of the targeted group becomes a matter of proof. It has to be recalled that every crime has two elements: the *actus reus* and the *mens rea*. In the past, the protected groups of genocide were subsumed under both elements. This caused definitional difficulties with regard to the *actus reus* by demanding an objective determination of the victim group. Time has come to release the group notion from that hold. By defining the protected groups as part of the *mens rea* only, an adherence to the subjective approach will be allowed. It has, however, to be recalled that the Genocide Convention protects four exhaustive groups only. The subjective approach should therefore not lead to a broadening of the protected categories. Instead, a reliance on the perpetrator's stigmatization because of perceived – or even real – national, ethnical, religious or racial characteristics of the victim group is the right way to go. Once the stigmatization leads to discriminatory acts, the group becomes identifiable. Coupled with its pre-genocidal existence, in order to avoid the protection of completely imaginary groups, the group has acquired the objectivity that international criminal law is seeking for and thereby becomes a protected group under Art. II of the Genocide Convention.