PROTECTION OF "EXCLUSIVE" GROUPS ONLY – AN ESSENTIAL ELEMENT OF GENOCIDE

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DOI: 10.17589/2309-8678-2018-6-3-100-124

The crime of genocide, as one of the most complex crimes ever to be examined and prosecuted, is often referred to as the "crime of crimes." It is never the result of a tragic accident, but always a deliberate, conscious, and intentional act. It is never a single act, but a collection of acts committed by a number of people acting in consort. Several elements of genocide prescribed by the Convention on the Prevention and Punishment of the Crime of Genocide (1948) distinguish it from other core crimes. The first one is the intention to destroy a protected group – the very specific intention that brings into question the core existence of the group itself. The second element is the focus of the perpetrator's intent on a particular group; his intent on destruction has to be directed against a national, ethnical, racial, or religious group. No other groups are included on that list. Given the significance to the protected group, this paper will focus on some important issues relating to the protected groups and their identifications, both in legal theory and jurisprudence of international courts. It will also cover some considerations on the exclusion of some other groups that are left unprotected from genocide.

Keywords: genocide; crime of crimes; ethnical group; national group; racial group; religious group.

Recommended citation: Sandra Fabijanić Gagro, *Protection of "Exclusive" Groups Only – An Essential Element of Genocide,* 6(3) Russian Law Journal 100–124 (2018).

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The law must be stable, but it must not stand still.
Roscoe Pound

Introduction

Genocide is often described as "the crime of crimes"; it represents the manifestation of atrocious violence and the conception of evil that deeply shocks the conscience of human kind. Although many examples of horrifying crimes have been revealed throughout history, the legal term of genocide has not been recognized until the middle of the 20th century. That was a time when the "crime without a name"[1] was given the name "genocide," a term coined by *Raphael Lemkin*.[2] In its original form, genocide referred to the "destruction of a nation or of an ethnic group."[3] Although its meaning has somewhat changed through the future development, *Lemkin*'s word eventually conquered the world and became one of "the most powerful in any language."[4]

In 1946, the term appeared as a crime under international law when the UN General Assembly, in expressing its condemnation of crimes committed during the World War II, adopted the resolution titled "The Crime of Genocide" and invited the UN member states to enact the necessary legislation for its prevention and punishment. The seriousness of the crime was clearly emphasized. When compared

[1] "We are in the presence of a crime without a name," Winston Churchill once said when referring to crimes committed by the Nazis during World War II. His speech inspired Raphael Lemkin to coin the term "genocide" from the ancient Greek word *genos* (which means race or clan) and the Latin suffix *cide* (which means killing).

[2] For more information regarding Lemkin's work *see, e.g.*, Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* 403–404 (Antwerp: Intersentia, 2002); Sergey Sayapin, *Raphael Lemkin: A Tribute*, 20(4) European Journal of International Law 1157, 1157–1162 (2009).

[3] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944) reprinted in *New Introduction by Samantha Power* 79 (Clark, N.J.: Lawbook Exchange, 2005).

[4] David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7(1) Chicago Journal of International Law 1, 5 (2006).

to homicide, which represents the denial of the right to life of an individual human being, genocide was marked as a more serious crime. It was recognized as contrary to the moral law, spirit, and aims of the United Nations.[5] In its core, it represents a denial of the right of existence to entire human groups. But, as will be shown in this paper, the destruction of entire human groups in the contemporary understanding of genocide does not refer to just *any* group of people that could be identified as the target of genocide. Although the UN General Assembly Resolution refers to the destruction of racial, religious, political and other groups, the concept of genocide was tailored slightly differently in its further development.

The Convention on the Prevention and Punishment of the Crime of Genocide[6] (hereinafter Genocide Convention), representing one of the first international documents on human rights and humanitarian law provided by the UN, was adopted two years later. As confirmed by the International Court of Justice (hereinafter ICJ), it was "manifestly adopted for a purely humanitarian and civilizing purpose… its object, on the one hand, is to safeguard the very existence of certain human groups and, on the other, to confirm and endorse the most elementary principles of morality."[7] Nowadays, its provisions are considered a part of the international customary law and *jus cogens* norms.[8] Nevertheless, discussions about this crime have been on-going ever since. Its extent and magnitude, connected with the emotional idea of destroying entire human groups, makes genocide the "crime of crimes," the most horrifying of all known crimes nowadays, and – as the case law of international criminal courts often confirms – one that is the most difficult to prove.

1. Why Is Genocide Being Referred to as the "Crime of Crimes"?

The widespread profane opinion favours the belief that genocide exists *whenever* a mass extermination, mass murder, or some other grave violations of human rights are accomplished. However, such a wide understanding of genocide is not correct in its entirety, even though sometimes it is quite incomprehensible that mass exterminations on some area are not recognized as genocide. On the other hand, a very similar situation in the same area or in some distant place could be

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5 UN General Assembly, Resolution on the Crime of Genocide, 11 December 1946, A/RES/96(I).

6 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277.

7 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23.

8 That opinion was confirmed in the case law of both *ad hoc* criminal tribunals: *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 495; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999, para. 60; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence in the Trial Chamber, 6 December 1999, para. 46; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016, para. 539.

described as genocide. Despite some similarities, either regarding the way the crime had been committed or the number of victims, there is a line of distinction between genocide and some other crimes, especially crimes against humanity. What is then the difference between these crimes that some could be recognized as genocide, while others could not? What is that particular element that elevates genocide to the throne of the most serious crimes?

The answer is hidden within the definition and concept of genocide. The crime of genocide is divided into two elements. The first one is the commission of particular acts or *actus reus*. This represents a physical element of genocide, i.e. the commission of concrete acts directed *against the group* and described as: a) killing the members of the group; b) causing serious bodily or mental harm to the 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, and e) forcibly transferring children of the group to another group.[9]

The second element of genocide is *dolus specialis* – the intent to destroy, in whole or in part, a protected group, as such. Looking carefully at the perpetrator's intention and his ultimate goal not (just) to commit a murder but to exterminate a protected group in whole or in part, the conclusion on the existence of the "crime of crimes" could be easily draw. *Dolus specialis* is that exclusive, significant part of elements that makes genocide an exceptionally grave crime. Moreover, the challenge to determine *dolus specialis* before the international courts[10] makes genocide a crime difficult to prove, albeit not impossible.

As the apparent, significant element of the genocide definition is the object of its protection – a national, ethnical, racial, or religious group; no political, sexual, cultural, linguistic, or any other group is included on the list. The protection derived from the Genocide Convention refers only to these four groups, although the possible

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[9] Genocide Convention, Art. 2.

[10] Genocide is incorporated into the statutes of the main international criminal courts: Art. 2 of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY); Art. 4 of the International Criminal Tribunal for Rwanda (hereinafter ICTR); Art. 6 of the Rome Statute of the International Criminal Court (hereinafter ICC). Genocide has been thoroughly examined before *ad hoc* international criminal tribunals; their contribution to that field is without a doubt remarkable, sometimes even ground-breaking. The conclusions from some of these cases are going to be presented in this paper. Contrary to many cases of genocide prosecuted before the *ad hoc* tribunals, only one case before the ICC has been referred to as a crime of genocide so far, but the accused remains at large in spite of the arrest warrants issued against him. *See Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/0 (*see* more at https://www.icc-cpi.int/darfur/albashir/Documents/albashirEng.pdf). Furthermore, although indisputably perpetrated by individuals, the involvement of the state as the real orchestrator of the crime and the existence of state responsibility for the genocide has also been analysed before the International Court of Justice and two judgments were delivered in: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 43 and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, 2015 I.C.J. 3.

inclusion of some others has been discussed during the drafting process. Both *dolus specialis* and *actus reus* are directed against a particular protected group and all elements must be met cumulatively.

These are the elements that differentiate genocide from other serious crimes. For example, when compared to murder as part of a widespread or systematic attack directed against *any* civilian population (which could be defined as a crime against humanity), genocidal murder is not an "ordinary" murder. It is determined by two elements. The first one is manifested in a limitation on the victim's side – while the victim of crime against humanity is *any* civilian population, the victim of genocide has to fulfil the condition of being a member of a *protected* group. The second element refers to the perpetrator's special intention to destroy a protected group in whole or in part, as such. Therefore, if any mass murder is not aimed at individuals on the account of their belonging to a particular group, and if there is no existing intention to destroy that group, one cannot speak of genocide within the terms of the Genocide Convention. Although the magnitude of killings, or the number of victims, or the scale of extermination can be similar in both cases and indisputably indicate a serious breach on human rights, these crimes are not the same.

Therefore, when genocide is in question, it is essential to prove that the perpetrator not only wanted to commit acts enumerated as *actus reus* of genocide with the special intention to bring destruction to a group, but more importantly that he was primarily focused on destruction of specific national, ethnical, racial or religious group in whole or in part, as such.

2. Protected Groups Within the Meaning of the Genocide Convention

The term "group" within the definition of genocide is quite narrowly determined by simple reference to the type of the protected group: national, ethnical, racial, and religious. Although that list provoked significant debate during the drafting process, no criteria have been provided for an easier identification of the group. As *LeBlanc* concluded, the drafters of the Genocide Convention "made no serious attempt to do so" mostly because "it is unlikely that acceptable definitions could have been agreed on."[11] As will be presented more thoroughly in this paper, finding the elements of some groups was not an easy task to achieve; in fact, debates about some groups have resulted in their exclusion from the list.

Given the significance of the protected group as one of the essential elements required for the existence of genocide, this paper focuses on some important issues relating to the group itself. Knowing the facts from the drafting process of the Genocide Convention and bearing in mind the development of human rights

[11] Lawrence J. LeBlanc, *The United States and the Genocide Convention* 60 (Durham: Duke University Press, 1991).

in general, as well as the "explicit global dimension of genocide,"[12] the following questions arise: does the enumeration of only four groups protected by the Genocide Convention make its protection too narrow and insufficiently effective? One could state that the protection from a crime that has such a horrifying impact on the existence of the human group itself should be inherent to all human groups, not only to those enumerated in the document. If all other elements are fulfilled, but a particular group of victims does not fall within the enumeration of the protected group, can one even talk about genocide? Although such a hypothetical situation is possible, it is not covered by the Genocide Convention. For example, the case of mass murders followed by the perpetrator's intention to destroy an opponent political group or a group of women or homosexuals does not constitute genocide if the victims are not identified as the members of one of the protected groups. In accordance with the provisions of the Genocide Convention, such particular extermination is not genocide, regardless of how frightening and inhuman it might be. The inapplicability of the Genocide Convention in such situations, merely because the victims do not represent a "proper" group, could be recognized as one of the major flaws of the Convention.

2.1. Identification of the Protected Group

When referring to the crime of genocide, one has to be very cautious not to lose the focus from the object of the genocidal plan; it is the destruction of the *protected group*. Although is perfectly clear even from the text of the Genocide Convention that the destruction of the group necessarily requires commission of prescribed acts against individuals – members of the particular group[13] – the action taken against individuals is not focused on their individual capacity; it represents the action taken against the group itself.[14] Even though it is quite understandable that a group does not exist if individuals are not involved, when genocide is in question, the role of individuals has to be observed as their exclusive membership to the group. As confirmed by the case law of international criminal tribunals, an individual victim of genocide is chosen not because of his identity or position,[15] but

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[12] *See* more at Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* 161 (Cambridge: Cambridge University Press, 2013).

[13] *Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija*, Case No. IT-95-8-T, Judgment on Defence Motion to Acquit, 3 September 2001, para. 89.

[14] Lemkin 1944, at 79.

[15] It does not matter whether the person is a soldier or a civilian. As concluded before the ICTY: "…a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort thereafter was made to distinguish the soldiers from the civilians." *Prosecutor v. Radoslav Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 547. *See also Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Case No. IT-05-88-T, Judgment, 10 June 2010, paras. 833 and 866.

rather on account of his group membership.[16] All actions taken against individuals should be viewed as the means used to achieve the ultimate genocidal goal – the destruction of a protected group.

It is widely accepted that genocide does not entail a single, spontaneous or isolated act; it is a "coordinated plan of different actions"[17] committed by a number of people acting in consort with the intention of achieving the ultimate genocidal aim.[18] In most cases, the gravity and the scale of genocide presume involvement of several protagonists.[19] It is often connected with other types of social conflicts and represents a "phenomenon of political and military conflict."[20] Before the act is committed, the group must be identified. It means that the collectivity of the members of a protected group is being marked as the victims and objects of genocidal acts.[21] This can be done by means of either positive or negative identification criteria.

It is a common and widely accepted opinion that the identification of a genocide victim requires the so-called positive approach. The intention to destroy is focused against a collective of people who have a particular group identity[22] – national, ethnical, racial or religious – and not a lack thereof.[23] These particular unique characteristics distinguish the group from others,[24] and the focus on these groups exclusively distinguishes genocide from other crimes.[25] As confirmed before the ICJ, it is a "matter of who those people are, not who they are not."[26] Starting from

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16 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, paras. 124 and 125; *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 551. *See also* Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2(2) International Criminal Law Review 93, 93 (2002).

17 Lemkin 1944, at 79.

18 Katherine Goldsmith, *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach*, 5(3) Genocide Studies and Prevention: An International Journal 238, 252 (2010).

19 *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 549.

20 Shaw 2013, at 147.

21 Victims could be determined in some kind of a genocidal plan or the actions taken against them represent a part of the policy. Although the existence of any kind of genocidal plan or policy has not been included into the definition of genocide, it is mostly unlikely that the crime could be performed without them.

22 *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017, para. 3436; *Prosecutor v. Radovan Karadžić*, *supra* note 8, para. 541.

23 *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 21. *See also Prosecutor v. Vujadin Popović et al.*, *supra* note 15, para. 809.

24 *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 557; *Prosecutor v. Milomir Stakić*, *supra* note 23, paras. 16–28.

25 Amann 2002, at 93.

26 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 10, para. 193.

Lemkin's idea, it is clear that genocide was originally conceived as the destruction of a race, tribe, nation, or another group with a particular positive identity, not as the destruction of various people lacking a distinct identity.[27] Positive identification of the group was requested in many cases before criminal tribunals, as well as before the ICJ. As confirmed before the ICJ, the drafters of the Genocide Convention gave close attention to the positive identification[28] of groups "with specific distinguishing characteristics in deciding which groups would include and which (such as political, economic, cultural, sexual or social groups) they would exclude."[29] Therefore, positive identification of the group focuses on specific distinguishing well-established and immutable characteristics. As the ICJ emphasized, the decision of the drafters not to include political and cultural groups on the list of protected groups, because they lack such characteristics represents further argument for the necessity of positive identification.[30]

In contrast to the positive determination of "who the people are," the negative approach is based on what these people are not. That approach consists 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." All individuals rejected in this way would "by exclusion, make up a distinct group."[31] This approach has been thoroughly elaborated before the international courts. For example, as confirmed in the *Jelisić* case, if the genocidal act of the perpetrator who belongs to the group A is directed against several victim groups (B, C, and D), and each of them is protected, it may be "within the spirit and purpose of the Genocide Convention to consider all the victim groups as a larger entity"[32] marked as "non-A group." Nevertheless, the negative approach has been widely rejected. Although it has been recognized that the provisions of the Genocide Convention also protect groups "defined by exclusion where they have been stigmatized by the perpetrator in this way,"[33] the negative approach has been considered as not appropriate to define relevant protected

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27 *Prosecutor v. Milomir Stakić*, *supra* note 23, para. 21; *Prosecutor v. Vujadin Popović et al.*, *supra* note 15, para. 809; *Prosecutor v. Ratko Mladić*, *supra* note 22, para. 3436.

28 *See* Antonio Cassese, *Genocide* in *The Rome Statute of the International Criminal Court: A Commentary* 335, 336 (A. Cassese et al. (eds.), Oxford: Oxford University Press, 2002). *See also Prosecutor v. Milomir Stakić*, *supra* note 23, para. 22.

29 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 10, para. 194.

30 *Id.*

31 *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 71.

32 *See* quote of the Final Report of the Commission of Experts formed pursuant to UN S.C. Res. 780, at *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 71, footnote 97.

33 *Id.* para. 71.

group[34] as "non-someone." That approach was recognized before the ICJ as well. While confirming the necessity of positive identification, the ICJ clearly emphasized that the targeted group must not be defined as a "non-Serb national, ethnical or religious group…"[35] As *Kreβ* emphasizes, by supporting the positive approach to the concept of the protected group, the ICJ "guards against the transformation of genocide into an unspecific crime of group destruction based on a discriminatory motive."[36]

The following question is how to make a clear identification of a national, racial, religious, or ethnic group. Even though they are mentioned, these groups have neither been defined in the Genocide Convention nor have their particular characteristics been given. As it has been pointed out,

> the preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized before the Second World War as national minorities, rather than to refer to several distinct prototypes of human groups.[37]

That does not mean that the terms are useless, but rather that such applicability was the drafters intention in the first place. This view has been supported by some authors. As *Schabas* concluded, despite the lack of definitions, the four groups overlap and help to define each other. They operate much as four corners which connect the area within which the groups find protection, and that could be seen as the perception of the drafters of the Genocide Convention – their correspondence in a dynamic relationship, when each group contributes to the construction of the other. Therefore, a search for their autonomous meanings could "weaken the overarching sense of the enumeration as a whole."[38]

Nevertheless, the drafter's conclusions and discussions on the particular characteristic of groups and reasons for their inclusion or exclusion can be useful for their identification in practice. An important platform for a further elaboration

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[34] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, para. 685; *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 72; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003, para. 512; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012, para. 735; *Prosecutor v. Vujadin Popović et al.*, *supra* note 15, para. 809; *Prosecutor v. Radovan Karadžić*, *supra* note 8, para. 541.

[35] *See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 10, paras. 66, 185, 191, 194, 196. That approach has been confirmed in cases before the ICTY, *e.g.*, *Prosecutor v. Goran Jelisić*, *supra* note 8, paras. 71 and 72; *Prosecutor v. Milomir Stakić*, *supra* note 23, paras. 16–27; *Prosecutor v. Radovan Karadžić*, *supra* note 8, para. 541.

[36] Claus Kreβ, *The International Court of Justice and the Elements of the Crime of Genocide*, 18(4) European Journal of International Law 619, 624 (2007).

[37] *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 556.

[38] William A. Schabas, *Genocide in International Law: The Crime of Crimes* 124, 129–131 (2nd ed., Cambridge: Cambridge University Press, 2009).

on the group identification is the jurisprudence of international courts. The concept of protected groups has been "researched extensively," but with no generally and internationally accepted definitions thereof.[39]

The basic approaches to providing the definitions and determining the members of a protected group could be divided into objective and subjective ones. The objective approach is based on the idea that the membership to a group represents a "social fact,"[40] while the subjective approach recognizes that membership is a "social construct" and that the perceptions of both the victim and the perpetrator must be taken into account. This distinction does not have a purely theoretical value, but also includes a practical significance.[41]

An objective approach relies on verifiable facts, regardless of the view of the victim, or the perpetrator, or any third party.[42] Such an approach, based on scientifically verifiable parameters, was supported in *Akayesu* case before the ICTR. The Tribunal tried to identify some essential, objective elements of the protected group, but that view was not widely accepted, and "nearly all later judgments by international criminal tribunals chose to rely on subjective elements."[43] Moreover, as some authors concluded, these definitions "possess their own inherent weaknesses and continue to cause problems of interpretation for the tribunals."[44]

As noted in the *Akayesu* case, with a reference on the *travaux préparatoires* of the Genocide Convention, genocide was allegedly understood "as targeting only 'stable' groups."[45] The main characteristic of a stable group is permanency; its membership would seem to be normally "not challengeable by its members, who belong to it automatically, involuntarily[46] and by birth."[47] The problem with the objective approach

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39 *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, *supra* note 8, para. 56; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 161.

40 On the basis of objective criteria, the Nazis had elaborated detailed rules on who was and was not Jewish, with no regard for the individual's belief about his/her own status or if the person denies his/her belonging to the group (Schabas 2009, at 125). As will be shown later, Tutsis in Rwanda were identified (and killed) on the basis of their identity cards, which represented the proof of their ethnicity.

41 Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunal*, 49(3) International & Comparative Law Quarterly 578, 579, 588 (2000).

42 Carola Lingaas, *Imagined Identities: Defining the Racial Group in the Crime of Genocide*, 10(1) Genocide Studies and Prevention: An International Journal 79, 89 (2016).

43 Carola Lingaas, *Defining the Protected Groups of Genocide Through the Case-law of International Courts*, ICD Brief (December 2015), at 9 (Jul. 20, 2018), available at http://www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf.

44 Claire De Than & Edwin Shorts, *International Criminal Law and Human Rights* 70 (London: Sweet & Maxwell, 2003).

45 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 511.

46 According to some authors, membership of religious group may be voluntary. Antonio Cassese, *International Criminal Law* 97 (Oxford: Oxford University Press, 2003).

47 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 511.

is "that rules on the membership of groups are nearly always disputed,"[48] and "as the law stands at present there are no definitive objective criteria for determining the special features of each protected groups."[49] Nowadays, the membership to a protected group is sometimes difficult to establish. Even the stability and the permanency of the group is being recalled as the grounds for its determination, some groups nowadays are not necessarily stable or permanent given that overlapping is present in many situations. Members of these non-stable and non-permanent groups are quite "flexible" in their roles; they may decide to join the group or to leave it. Furthermore, it is not strange for a person to be a member of more than one group, starting from birth.[50]

As noted, the objective approach has not been widely supported and subsequent ground-breaking case law of the *ad hoc* tribunals shows a progressive shift from the objective towards the subjective approach,[51] giving the focus to the self-identification or identification by others. The reasons for this shift have relied on conclusions that the membership of a group in applying the Genocide Convention was more of a subjective rather than an objective concept[52] and that the objective approach is "inconsistent with the object and purpose of the Convention."[53] Furthermore, the ICTY in the *Jelisić* case has expressed the fear that the objective approach and scientifically irreproachable criteria for the determination of a protected group would be "a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization."[54] The Tribunal recognized that the preparatory work of the Genocide Convention demonstrates the intention of drafters to protect only "stable" groups objectively defined and whose members belong to the group regardless of their own desires.[55] However, although the objective approach is applicable in determining a religious group, the subjective criterion is considered more appropriate in determining the status of other protected groups – national, ethnical, or racial.[56] Taking into account further

48 Verdirame 2000, at 588.

49 De Than & Shorts 2003, at 70.

50 *Id.*

51 *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 70; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, *supra* note 8, para. 56. *See also* Robert J. Currie, *International & Transnational Criminal Law* 112 (Toronto: Irwin Law, 2010).

52 *See Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, *supra* note 8, para. 56; *Prosecutor v. Alfred Musema*, *supra* note 39, para. 161.

53 *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 556.

54 *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 70.

55 *Id.* para. 69.

56 The ICTY refers to these three groups since it previously expressed the opinion that an objective determination of a religious group still remains possible. *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 70.

case law of tribunals, the membership of the protected group has been evaluated either from the perpetrator's[57] or the victim's[58] point of view. As *De Than* and *Shorts* accentuate, the victim is the one who should decide into which category he/she belongs, since the membership to a group is often inherited by birth. On the other hand, the group is targeted by the perpetrator for reasons he/she is aware of.[59] As confirmed in the *Jelisić* case,

> it is the stigmatization 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.[60]

In *Verdirame*'s opinion, the perpetrator's perception is "after all more important for establishing individual criminal responsibility than the putative 'authentic' ethnicity of the victim."[61] The subjective approach was therefore considered more appropriate and more "appealing, especially because the perpetrator's intent is decisive element"[62] of the crime. Therefore, from the initial rigid and objective approach to collective identities, the two *ad hoc* tribunals have thus progressively moved towards the subjective position. As *Verdirame* concluded, it is a "welcome shift that takes into account the mutable and contingent nature of social perceptions, and does not reinforce perilous claims to authenticity in the field of ethnic and racial identities."[63]

Nevertheless, in further elaboration on determining the protected group, international courts have decided to embrace a combination of both approaches and consult both objective and subjective criteria,[64] because "subjective criteria alone

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57 *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 70; *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 557.

58 *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, *supra* note 8, para. 56; *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 559; *Prosecutor v. Radoslav Brđanin*, *supra* note 34, para. 683.

59 *See* more at De Than & Shorts 2003, at 70–71.

60 *Prosecutor v. Goran Jelisić*, *supra* note 8, para. 70. The Trial Chamber emphasized that it partly follows the position taken in *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, para. 98. *See also Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, para. 667; *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 557.

61 Verdirame 2000, at 594.

62 William A. Schabas, *Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda*, 6(2) ILSA Journal of International & Comparative Law 375, 384 (2000).

63 Verdirame 2000, at 594.

64 *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, *supra* note 60, para. 667; *Prosecutor v. Radoslav Brđanin*, *supra* note 34, para. 684; *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para. 811; *Prosecutor v. Zdravko Tolimir*, *supra* note 34, para. 735; *Prosecutor v. Radovan Karadžić*, *supra* note 8, para. 541; *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgment and Sentence, 12 September 2006, para. 484.

may not be sufficient to determine the group targeted for the destruction."[65] That approach was welcomed in the jurisprudence of the ICJ, as well.[66] Supporting that view, it could be concluded that the correct determination of the relevant protected group has to be made on a case-by-case basis,[67] consulting thereby both objective and subjective criteria, and that it should be "assessed in the light of particular political, social, historical and cultural context."[68]

2.1.1. National Group

Although the term "national" was favoured by *Lemkin*[69] and originally included in the draft of the General Assembly Resolution 96(I), it has been eliminated from its final text with no particular explanation. In the process of its reintroduction and incorporation into the text of the Genocide Convention, some explanations for the exclusion of national groups were offered before the Sixth Committee.[70] They generally referred to the lack of clarity, the ability of people to freely join or leave that group, possibility of being confused with political groups, etc.[71] The last argument was the reason why ethnical groups were subsequently added to the list.[72] Regardless, the term national was included in the final text of the Genocide Convention and enumerated as the first on the list of protected groups. As *LeBlanc* concluded, it was "apparently assumed by everyone concerned that national group should be covered."[73]

In the attempt to find an objective definition of national group and by citing the judgment from the *Nottebohm* case before the ICJ,[74] the ICTR defines a national

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65 *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, *supra* note 8, para. 57; *Prosecutor v. Radoslav Brđanin*, *supra* note 34, paras. 683 and 684; *Prosecutor v. Zdravko Tolimir*, *supra* note 34, para. 735, footnote 3095.

66 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 10, para. 191.

67 *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 513; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, *supra* note 60, para. 646; *Prosecutor v. Zdravko Tolimir*, *supra* note 34, para. 738; *Prosecutor v. Radovan Karadžić*, *supra* note 8, para. 541.

68 *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, *supra* note 8, para. 58; *Prosecutor v. Alfred Musema*, *supra* note 39, para. 163; *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001, para. 65; *Prosecutor v. Radoslav Krstić*, *supra* note 15, *supra* note 15, para. 557.

69 Schabas 2009, at 136.

70 The provisions of the General Assembly Resolution 96(I) were invoked in the two committees before the Genocide Convention has been adopted: the *Ad Hoc* Committee of the Economic and Social Council and the Sixth Committee of the UN G.A. Different opinions were expressed in both committees on what kind of groups should be protected by the Convention. *See* more at Lawrence J. LeBlanc, *The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?*, 13(2) Yale Journal of International Law 268, 271 (1988).

71 Schabas 2009, at 134.

72 Boot 2002, at 425.

73 LeBlanc 1991, at 59.

74 *Nottebohm case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4.

group as a "collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[75] But, as *Schabas* emphasized, the reference of the ICTR to the *Nottebohm* judgment is incomplete, since the ICJ was interested in establishing "nationality" and focused on the correspondence between the state and the individual on granting nationality, while the ICTR's task was to decide on the membership in a "national group." These two nationalities should not be confused.[76] Furthermore, nationality seems to be set quite widely if it includes citizenship of the state,[77] but, besides citizenship, it could also refer to the inhabitants of the national territory and, in that case, "it hardly differs from the concept of a civilian population in the definition of crimes against humanity."[78]

Looking this way, especially the definition set out in the *Akayesu* case, one can ask whether the term nationality is in conformity with the requirement of stability and permanency? Since the ICTR has concluded that genocide "was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth,"[79] then the reference to the "legal bond based on a common citizenship" in the definition of national group set out in *Akayesu* case could hardly be perceived as a stable element. Nevertheless, the issue of a national group as a protected group seemed to be of no particular interest before the ICTR since the protected group in its case law has been classified as ethnical group.

2.1.2. Ethnical Group

Similar to the notion of the national group, ethnical groups have been included in the draft of the General Assembly Resolution 96(I), but were later excluded from its final text as well as from the draft of the Genocide Convention. It seems that some drafters found term quite blurry and unclear,[80] while others supported the protection for that particular group, which is smaller than a nation "but one whose existence could nevertheless be of benefit to humanity."[81] The term was proposed by the Swedish delegation in the attempt "to avoid the exclusion of groups with the same cultural and historical heritage or language that would not be considered

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75 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 512. By *Boot*, the conclusion might be drawn that the ICTR had in mind the existence of a common culture or a common language in contrast to some other groups. Boot 2002, at 430.

76 Schabas 2009, at 135.

77 LeBlanc 1991, at 60.

78 Luban 2006, at 16.

79 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 511.

80 For example, several delegations emphasized that the words "ethnic" and "racial" practically mean the same thing. *See* more at LeBlanc 1991, at 59.

81 Schabas 2009, at 144, in citing Soviet argument in the Sixth Committee, footnote 165.

to be national groups."[82] In order to "better define the types of groups protected by the Convention and ensure that the term 'national' would not be understood as encompassing purely political groups,"[83] the reference to an ethnic group was consequently (yet narrowly) adopted and added to the Genocide Convention.[84]

The first identification of an ethnic group was provided in the *Akayesu* case, revealing thereby the enumeration of protected groups as being too restrictive, as will be shown in the continuation of this paper. An ethnic group was generally defined as a group "whose members share a common language or culture."[85] However, the Tribunal has faced a specific problem while trying to apply that definition to Rwandan atrocities and to define the protected group. When faced with the problem of identifying the differences between the members of the Hutu and Tutsi tribes, the ICTR had to conclude that they actually speak the same language, believe in the same myths, and share the same territory and culture, so "one can hardly talk of ethnic groups."[86] It was clear that Tutsis "did not closely match any of the four definitions."[87] Nevertheless, even though it was hard to perceive their differences "in the context of the period in question," they were considered both by the authorities and themselves as belonging to two distinct ethnic groups. Their ethnicity was clearly determined in official classifications since their identity cards[88] contained a reference of person's ethnicity.[89] Furthermore, the former Constitution of Rwanda also "identified Rwandans by reference to their ethnic group."[90] Moreover, as confirmed before the ICTR, all the Rwandan witnesses who appeared before the ICTR invariably answered "spontaneously and without hesitation" on the question of their ethnic identity[91] and they expressed general knowledge on ethnicity of their friends or neighbours.[92] Finally, Tutsis were understood as an ethnic group "by those who targeted them for killing."[93] Accordingly, Tutsis were regarded as a stable and permanent group,

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82 Boot 2002, at 425.

83 *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 555.

84 Boot 2002, at 425.

85 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 513.

86 *Id.* footnote 56. *See also Prosecutor v. Clément Kayishema and Obed Ruzindana*, *supra* note 60, para. 34.

87 Verdirame 2000, at 592.

88 Nevertheless, the possibility to pay for the change of one's ethnicity on the identity card was mentioned in Kayishema and Ruzindana case. *See Prosecutor v. Clément Kayishema and Obed Ruzindana*, *supra* note 60, para. 12.

89 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, footnote 56.

90 *Id.* para. 170.

91 *Id.* para. 702.

92 *Id.* para. 171.

93 *Id.*

identified as such by all. It was added that Rwandan customary rules regarding the ethnicity followed the patrilineal heredity line;[94] ethnicity of a Rwandan child is therefore derived from the ethnicity of the father.[95] The identification of persons is therefore "embedded in Rwandan culture."[96]

In the process of shifting from the objective to the subjective approach of identification, the definition of the ethnic group from the *Akayesu* case has been subsequently extended. As *Verdirame* concluded, the tribunals were beginning to acknowledge that collective identities, ethnicity in particular, represent social constructs which are "dependent on variable and contingent perceptions" and do not represent social facts which are "verifiable in the same manner as natural phenomena or physical facts."[97] By embracing that shift, the ICTR offered additional definitions based on the subjective self-identification that an ethnic group is a group which distinguishes itself from others, as well as on the identification by others, when the role of the perpetrator and his view of the protected group is crucial.[98]

Self-identification is quite understandable since the individual is aware of his own ethnicity. However, the question is how stable and permanent this factor can be. As *Alison Desforges*, an expert witness in the *Akayesu* case concluded:

> The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time… the definition of the group to which one feels allied may change over time. But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time.[99]

Basically, if we agree with that conclusion, which refers specifically to the ethnic group, we can also further conclude that this approach can be applied to most of the groups protected by the Genocide Convention.

On the other hand, the role of the perpetrator in committing genocide is indisputable. He undertakes genocidal acts with the belief to destroy a particular group on which his intention is focused. It makes sense to view ethnicity from his point of view; he knows his enemies. Nevertheless, the determination of ethnicity established by others implies that the ethnic group "may exist only in

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94 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 171.

95 *Prosecutor v. Clément Kayishema and Obed Ruzindana*, *supra* note 60, para. 523.

96 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 171. Three officially recognized ethnic groups in Rwanda are Hutus, Tutsis and Twas.

97 Verdirame 2000, at 592.

98 *Prosecutor v. Clément Kayishema and Obed Ruzindana*, *supra* note 60, para. 98.

99 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 172.

the imaginations of its persecutors."[100] It could lead to an unusual situation. As *Boot* concluded, if a perpetrator thought that a victim is of a different national, racial, ethnical, of religious group than he is, but the victim is not, it could result in finding a perpetrator guilty of genocide.[101] Although he is mistaken in his actions and the goal, his unfortunate belief (along with other genocidal elements) makes him responsible for genocide.

2.1.3. Racial Group

During the drafting process of the Genocide Convention, the term racial seemed to be easy to understand and it was the only category that did not lead to a debate.[102] Nevertheless, according to some authors the concept of race "has changed considerably"[103] in past few decades. Back then, it was to a large extent a synonym for national, religious, and ethnic groups, but this no longer corresponds to its contemporary usage.[104] Nowadays the "conflation of race with nationality has ceased."[105] The value of the term race is now disputed from a purely scientific standpoint. One could even argue that the scientific progress in genetics and biology of the past decades has determined that since there is no gene for race, it is then scientifically incorrect to speak of different human races. In colloquial language, however, the understanding of race is still very much connected with the physical appearance of people, skin color in particular, and is still being commonly used to determine members of a racial group.[106]

The intention of the ICTR to provide a definition of a racial group in the *Akayesu* case has resulted in its focus on the "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[107] That definition was given with no particular reference to any authority.[108] Among other definitions offered in *Akayesu*, it has been viewed as "unnecessarily narrow"[109] since hereditary physical traits may be difficult to distinguish in many cases, and reference to heredity "preserves an outdated and contentious method

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100 Luban 2006, at 16.

101 Boot 2002, at 435.

102 Schabas 2009, at 121, 139.

103 Lingas 2016, at 84.

104 Schabas 2009, at 140, 143.

105 Lingas 2016, at 84.

106 *Id.*

107 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, paras. 514.

108 Lingas 2016, at 93.

109 Boot 2002, at 433.

of classifying people."[110] With global miscegenation being present worldwide, it could seem quite challenging nowadays to determine the racial affiliation.

On the other hand, although the term racial group may be obsolete, this concept persists in science, popular usage, and international law. It is understandable that progressive jurists search for a meaning that is consistent with contemporary values. Nevertheless, as *Schabas* emphasizes, when it comes to the stability and permanency, it seems that it is the only group, when defined genetically, to which the person belongs or not; the question of race is not changeable. All other groups seem to be neither stable nor permanent and could be modified as a result of border changes or a simple decision of the individual, etc.[111]

2.1.4. Religious Group

Religious groups could be described as those "whose members share the same religion, denomination or mode of worship."[112] Although they are listed as protected in the General Assembly Resolution 96(I), some questions regarding their inclusion in Genocide Convention have been raised during the drafting process,[113] provoking the most serious disagreement.[114] Religious group has been considered similar to ethnic or national group. During the drafting process, some underlined that religious group should be considered as a subgroup of a national group, since "in all the known cases of genocide committed for a religious motive, that motive had always been connected with others – those of racial or national character."[115] Other delegations opposed that view with the argument that genocide could be committed against religious groups within one nation, which finally led to the rejection of that proposal.

Specific confirmation of that close connection between religious and national groups has been given before the ICTY in the *Krstić* case with regards to Muslims. Although originally seen as a religious group, Bosnian Muslims were also recognized as a nation in the Constitution of the former Yugoslavia adopted in 1963. Thirty years later, during the armed conflict in Bosnia and Herzegovina, the Bosnian Serb authorities considered Bosnian Muslims as a specific national group.[116]

The importance of religious identity is visible and recognizable in contemporary armed conflicts, which create recipient surroundings for genocide. Furthermore, some new examples of conflicts worldwide, such as the development of the phenomenon

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110 Lingas 2016, at 93.

111 Schabas 2000, at 382.

112 *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 515.

113 Schabas 2009, at 147.

114 LeBlanc 1988, at 271.

115 LeBlanc 1991, at 58.

116 *Prosecutor v. Radoslav Krstić*, *supra* note 15, para. 559.

of terrorism, are (too) often rooted in religion, which further confirms the significance of the issues of religious affiliation and differences in the contemporary world.

3. Considerations of Possible Extension of the List of Protected Groups

A further important question related to the determination of the group is whether the protection from the Genocide Convention should be limited to these four groups expressly mentioned? Is it possible to discuss genocide if the group, although stable and permanent, does not meet the criterion for being determined as national, ethnic, racial, or religious? Moreover, is it even necessary for the protected group to be stable and permanent? If not, does the enumeration of the group in the meaning of the Genocide Convention represent a limiting factor? The fact is that, in some cases, it is quite difficult to determine the clear differences between the opposed parties, as it was the case between the Hutus and Tutsis in Rwanda. Furthermore, one could ask whether the omission of some other groups is incompatible with the "mission" embraced by the General Assembly Resolution 96(I) – to protect the existence of entire human groups and prevent the destruction of racial, religious, political, and other groups. It is undisputed that the General Assembly's interpretation of the groups has transformed from a non-exhaustive list to an exhaustive four-group list in the Genocide Convention through the period of only two years.[117]

The willingness to extend the enumeration of protected groups was noticeable in the early case law of the ICTR. When considering whether the protected group should be limited to the four groups enumerated in the Genocide Convention or "whether any group, similar to the four groups in terms of its stability and permanence, should also be included," the Tribunal in the *Akayesu* case emphasized the necessity "to respect the intention of the drafters of the Genocide Convention." According to the *travaux préparatoires*, their intention was "clearly to protect any stable and permanent group."[118]

Some authors support the opinion that the drafters intention was focused on the protection of stable groups only – those "having an enduring identity."[119] Given the historical context in which the drafters were operating, that would make sense.[120] The ICTR's decision in the *Akayesu* case was closely connected with the before-mentioned doubt whether the Hutu and Tutsi could be considered as distinct on ethnic or

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[117] David Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding Under Customary International Law?*, 2(1) Notre Dame Journal of International & Comparative Law 167, 174 (2011).

[118] *Prosecutor v. Jean-Paul Akayesu*, *supra* note 8, para. 701.

[119] LeBlanc 1991, at 60–61.

[120] LeBlanc 1988, at 273.

racial grounds, and it was designed to justify the Tribunal's finding that the Tutsi were an ethnic group.[121] But, on the other hand, in *Boot*'s opinion, by doing that, the Tribunal went beyond the terms of the Genocide Convention and the Statute of the ICTR, violating thereby the *nullum crimen sine lege* principle.[122] As *Schabas* observed, that conclusion from the *Akayesu* case was a "somewhat extravagant reading of the *travaux*."[123] Its role is to assist in clarifying unreasonable, ambiguous, or obscure terms, not to add some new elements to the definitions.[124] *Bettwy* emphasized that even though the conclusion from *Akayesu* was bold and controversial, it nevertheless brought attention to the importance of elements of stability and permanence, and also reinforced the significance of respecting the purpose and object of the Genocide Convention.[125] In the Tribunal's opinion, that object and the purpose with regards to the protected groups is threefold: a) in order "to respect the prestige of the crime of genocide" the scope of protected groups must be exhaustive and exclusive; b) the groups included are those substantially valuable to the mankind and their loss would have a strong impact on the human race as a whole; c) the stability and permanency of the group is requested to the degree that its membership is, for the most part, involuntary. Therefore, an extension of the list and the inclusion of some other groups[126] with no characteristics of being stable, permanent, or easily identifiable would create uncertainty and ambiguity and could be considered as disregarding the object and purpose of the Convention.[127] Hence, some would say that despite the passing of time and criticism expressed throughout, the definition of genocide is well established, clearly understandable, and supported as such.

However, *Schabas* emphasizes that the intention of the drafters confirmed in the *Akayesu* case was actually not clear at all.[128] The opinion raises the following question: if the intention of the drafters was to protect all stable and permanent groups, why did they simply did not do so and incorporate those words into the text?[129] The fact is that the determination of "stable and permanent groups" has not been subsequently

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121 Currie 2010, at 112.

122 *See* more at Boot 2002, at 431.

123 Schabas 2009, at 152.

124 Schabas 2000, at 380.

125 However, he further points out, the capture of the purpose and object was only partial, because the decision in *Akayesu* "did not acknowledge that the drafters clearly intended to keep the list of protected groups exhaustive." Bettwy 2011, at 181.

126 Following groups were considered by drafters, but excluded from the final text: ideological, linguistic, economic and political. *See* more at Bettwy 2011, at 169, 176.

127 *Id.* at 195. *See also* De Than & Shorts 2003, at 67.

128 Schabas 2000, at 382.

129 *Id.* at 380.

followed within domestic legislation as a possible extension of the protected group or in the further jurisprudence of international courts.

On the other hand, the support for the inclusion of other groups within the meaning of genocide is visible in academic circles and substantiated by experiences in practice.[130] Moreover, some national legislatures confirm the idea of expanding the list of groups protected by the Genocide Convention.[131] Being aware of the horrifying consequences of genocidal intent, while taking into consideration the existence of the human group that is at stake and difficulties which the ICTR faced with the determination whether Tutsis represent an ethnic group or not, one could argue that it would be justified and logical to extend the protection from that scourge to all groups of people regardless on their name and qualifications. One could further agree that there is no longer a principled reason for insisting that only those groups enumerated in the Convention adopted many years ago deserve protection on the basis of their "exclusiveness" of just being on the list. When discussing stability and permanency of the protected group as its basic elements, the question arises whether any of the protected groups is stable and permanent enough to be included on that exclusive list in the Genocide Convention? Could we support the conclusion that a religious group is more stable than a group of women chosen, for example, for destruction only because of their gender? As mentioned before, some of the protected groups seem to be neither stable nor permanent, and with no particular definition set forth for their clear determination, they overlap and could be changed as a result of different reasons.[132] One could say that such group "exclusivity" and narrowness of the Convention regarding the object of protection represents a clear restrictive element. By embracing that narrow enumeration while excluding some other groups, the protection from genocide may be perceived as not sufficient enough; it leaves many unprotected.

Special attention in this field has to be given to the issue of political groups. Although they were included in the General Assembly Resolution 96(I) and the draft of the Genocide Convention, political groups have been excluded from the final text. Some authors argue that it was a "deliberate omission"[133] which has led to the one of the "major flaws"[134] of the genocide definition. When looking for the element of stability in defining the protected group, such exclusion could be considered reasonable. Political groups lack the element of permanency; they have no stability

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130 *See* more at Schabas 2009, at 166.

131 In accordance with the French Penal Code from 1992, genocide is defined as intentional destruction of any group based on arbitrary criteria; Romanian Criminal Code includes "community" on the list of protected groups. *See* more at Bettwy 2011, at 182; Schabas 2000, at 375–376.

132 Schabas 2000, at 382.

133 Cassese 2003, at 96.

134 Boot 2002, at 403.

or clear-cut characteristics,[135] and being a member of political groups is a fruit of decision. In relation to other protected groups, whose membership does not change over a relatively long period of time, political groups are not perceived to be stable or permanent.

However, this is not the only reason for their exclusion from the list. The question is also raised how political groups could be defined in a first place.[136] A further and perhaps the most important reason, which states would almost certainly wish to avoid,[137] is the fear that the inclusion of political groups could lead to foreign interference in internal political affairs. It could also create difficulties for a legally established government to take preventive measures against subversive elements on its own territory.[138] Another argument was also that the protection of political groups ought to be considered in the broader context of human rights, rather than the narrower one of genocide.[139] In *Bettwy*'s opinion, by excluding political and other groups, drafters tried "to avoid groups whose inclusion would be unnecessary or impractical, favouring instead the tightest enumeration possible."[140] Furthermore, the *travaux préparatoires* indicate that the drafters were mindful of the intention to include in the final text only those groups "whose loss would have a negative impact, and that this requirement may have been fatal to the inclusion of political groups."[141]

On the other hand, many persons, scholars, and non-scholars alike argue that the inapplicability of the Genocide Convention to situations similar to genocide, but not characterized as genocide because the victims are political opponents and they could not be recognized as members of protected groups, is deeply disturbing. This is not the question of being a member of a protected group, but rather the question of being a victim. Political groups are perceived as enemies of the state, or perhaps of a particular leader or a group of "others." The nature of the group in such situations is not of so much importance, but the horror and magnitude of the political crimes that we have been witnessing through history "have persuaded some that it would have been desirable to extend protection to political groups."[142] Accordingly, few national penal systems worldwide had a reference to political genocide.[143]

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135 Boot 2002, at 426.

136 LeBlanc 1988, at 295.

137 De Than & Shorts 2003, at 68.

138 Boot 2002, at 426.

139 LeBlanc 1988, at 274.

140 Bettwy 2011, at 176.

141 *Id.* at 179.

142 LeBlanc 1991, at 85.

143 *See* the list at Bettwy 2011, at 184, footnote 117.

Nevertheless, the exclusion of political, economic, or any other groups of civilians does not mean that such groups are left unprotected. Their destruction could be seen as a crime against humanity when the persecution of members of some other groups (other than national, ethnic, religious, and racial) is in question. In that case even though it does not represent a case of genocide the perpetrator could still be punished, but for some other crime.

Conclusion

When the term genocide is being discussed in everyday language and among people who lack specific knowledge of the elements of the definition, that crime seems to be easy to understand – every single case of mass murder or grave breaches of human rights, looking from the eye of non-juristic public or media, could be perceived as genocide. Nevertheless, the legal situation is not so simple and, even though some similarities with other core crimes exist, genocide is clearly defined and distinguished from other crimes. Lack of some prescribed elements in the definition brings into question the existence of genocide. However, it does not mean that the commission of the crime in question is being denied; it merely needs to be recognized by some other name.

That underlines two main challenges that prosecution for genocide is faced with. The first challenge is the necessity for *dolus specialis* to be established. That particular ultimate intention of the perpetrator to destroy a group of people is the element that makes genocide an exceptionally grave crime and distinguishes it from other core crimes. For example, killing as an element of genocidal *actus reus* is not "just an ordinary" killing – it has a higher and more horrifying purpose of destroying a group in whole or in part, as such. The second challenge, and one of the most controversial aspects of the genocide definition, is the object of the perpetrator's intent. It is essential to prove that the perpetrator does not want to destroy just any group he is focused on, but that the main goal of his actions and the object of his intention is a specific national, ethnical, racial, or religious group. His victims have been chosen because they belong to a specific previously enumerated group. However, if the victims could not be identified as members of a protected group, but have instead been chosen because of their political beliefs, sexual orientation, or gender, one could not speak about genocide, regardless of the number of victims or the scale of atrocities, or any other reason. The Genocide Convention was adopted exactly seventy years ago, but the enumeration of four protected groups with no particular definitions or explanations of the elements of each of them, still remains the subject of discussions.

With regards to the lack of definitions of protected groups, one could further argue that it is not even likely that some acceptable definitions could be agreed upon. Therefore, it is up to the courts to draw conclusions on a case-by-case basis. Dealing with such a rule actually allows the law to modify and stay flexible and applicable in

various situations and in a different period of time. When considering the differences between social, religious, cultural, or any other surroundings that genocide may occur within, the rules can be more efficiently applicable if there is no existence of a strict definition. That being said, it does not mean that terms without explanations are useless, but rather that it had been the deliberate intention of the drafters of the Genocide Convention. However, as much as the exclusion of definitions could be understood as a visionary achievement and a deliberate intention of the drafters, the fact is that the identification of a protected group is one of the essential elements of genocide itself. Moreover, one could note that it is the starting point. If no identification of a protected group is made, one cannot speak of genocide either. Therefore, the importance of identification must not be put aside.

Regarding the fact that only four human groups are protected and given significance for their exclusiveness, the Genocide Convention becomes inapplicable in situations in which genocide-like acts have occurred, but the national, ethnic, racial, or religious identity of the victims is not an issue. However, it does not mean that individuals or even groups of people will be left unprotected. It just means that some other means should be used in dealing with other types of atrocities. Looking carefully at the drafter's debate on the inclusion/exclusion of groups on the list of protected ones, it seems that the exhaustive list was their true intention; they have supported the tightest enumeration. After a number of groups have been examined and taken under consideration, several were excluded from the final text. One could argue that the implementation of the Genocide Convention confirms that the enumeration of these particular groups serves its purpose and no further extensions are to be made.

On the other hand, "struggling" with the idea of exclusiveness of the protected groups, while bearing in mind the horrifying consequences of genocidal intent and that the existence of a human group is at stake, one could argue that all human groups should be protected from genocide. The members of the group have been chosen as victims, killed, transferred, bodily or mentally harmed only because they belong to the particular group chosen by the perpetrator. When observed from this perspective, the perilous and intimidating idea of destruction that lies behind the crime and the perpetration of acts focused on the group exclusively should be essential, regardless of the name and definition of the group. That is what should matter the most – the possibility of a group being eliminated and the responsibility of the community to prevent and punish actions aimed at this goal.

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