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## **DEFINING THE PROTECTED GROUPS IN THE LAW OF GENOCIDE: LEARNING FROM THE EXPERIENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

Alison Hopkins\*

### **INTRODUCTION**

April 6, 2009, marked the fifteenth anniversary of the beginning of the Rwandan Genocide. In 1994, international outcry was not immediately forthcoming, but the commitment made by the United Nations Security Council for an international criminal tribunal to bring those who were responsible for the genocide to justice was an important statement condemning the actions of many Rwandans. The International Criminal Tribunal for Rwanda (“ICTR”) had many legal issues to face, but the most important, by far, was an exploration of the law of genocide at international law. The ICTR was the first international court to try an individual for genocide, and it has continued with an unprecedented number of genocide charges.

Jean-Paul Sartre argued that “[genocide] itself is as old as humanity.”<sup>1</sup> The international law that prohibits genocide, though, is only sixty-one years old. It took fifty of those years before an individual was found guilty under the relatively young international law.<sup>2</sup> The contributions of the ICTR to developments in the law of genocide are unquestionably significant. And while judicial decisions are considered a subsidiary means for determining rules of international law,<sup>3</sup> they are essential to any understanding the law’s application.

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<sup>1</sup> Jean Paul Sartre, Statement “On Genocide” at the Second Session of the Bertrand Russell International War Crimes Tribunal on Vietnam, (November 1967).

<sup>2</sup> See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber 1), online: ICTR <<http://ictr.org>> [*Akayesu*].

<sup>3</sup> *Statute of the International Court of Justice*, Article 38(1)(d).

Genocide has been described as “the crime of crimes.”<sup>4</sup> “Attacks on groups defined on the basis of race, nationality, ethnicity and religion have been elevated [...] to the apex of human rights atrocities”<sup>5</sup> through international law. This elevated status exists because of the special intent required for an individual to be responsible for the commission of genocide. The legal analysis of this “special intent” is one of the most important aspects of all ICTR jurisprudence. Concern arose early within the ICTR that the Tutsi of Rwanda did not constitute a “protected group” under the *1948 Genocide Convention*. Determining what did constitute a “protected group” under the *Convention* became an ongoing concern for the Tribunal.

Ultimately, the question to be answered is what is the appropriate way to define “protected groups” under the *1948 Genocide Convention*, and how will this definition impact proceedings before the International Criminal Court (“ICC”). By analyzing the jurisprudence of the ICTR, the accompanying jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and academic commentary, this article will explore the issue of protected groups. More specifically, the four terms used in the *Convention* will be analyzed, followed by a discussion on the use of an objective or subjective approach to defining genocide. Although ICTR case law tends not to be as well-reasoned as much of the ICTY case law, the former is still significant and may more accurately represent the ongoing debate regarding the precise and appropriate meaning of the terms found in the *Convention*.

The world turned a blind eye to Rwanda in 1994. As Boutros Boutros-Ghali stated, “[f]or us, genocide was the gas chamber - what happened in Germany. We were not able to realize that with the machete you can create a genocide.”<sup>6</sup> The experience in Rwanda and the jurisprudence of the ICTR will forever shape notions of genocide at international law and will hopefully protect groups like the Tutsi of Rwanda from such atrocities in the future.

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<sup>4</sup> *Prosecutor v. Jean Kambanda*, ICTR 97-23-S, Judgment and Sentence (4 September 1998) at para. 16 (International Criminal Tribunal for Rwanda, Trial Chamber 2), online: ICTR <<http://ict.r.org>> [*Kambanda*].

<sup>5</sup> William Schabas, “Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda” (2000) 6 *J. Int’l & Comp. L.* 375 at 386.

<sup>6</sup> Boutros Boutros-Ghali, Front-line Interview (PBS) (January 21, 2004).

## I. BACKGROUND

### 1. Rwanda and the Genocide

On April 6, 1994, the President of Rwanda, Juvenal Habyarimana, was killed when his plane was shot down outside of Kigali. The ensuing undercurrent of ethnic conflict rose very quickly, and a campaign for the systematic elimination of the Tutsi population began. Over the next three months, approximately 800 000 Rwandans died, with five times the number of murders per day than were carried out in Nazi death camps.<sup>7</sup> The daily death rate in April and May averaged 11 500, sometimes surging as high as 45 000.<sup>8</sup> The history behind this atrocity is far from unique, and demonstrates how easily the worst side of humanity can emerge.

Hutu and Tutsi make up the two major “ethnic” groups in Rwanda. The divide between these two groups was traditionally based on economics, as the majority Hutu farmed the land and the minority Tutsi raised cattle.<sup>9</sup> Prior to colonization, the Tutsi controlled the country through a caste system. Movement between the two groups was fluid, through marriage or economic prosperity or downturn. During the colonial period, under both German and Dutch rule, this divide was strengthened and exploited. The colonizers encouraged the historical myth of difference and proposed a “scientific” racial theory. This theory, which eventually became part of the official history of Rwanda, asserted that the Tutsi were a Nilo-Hamitic race from Egypt and Ethiopia who naturally ruled over the Bantu Hutu population from south and central Africa.<sup>10</sup>

When the Dutch left Rwanda in 1959, their system of identity cards was maintained, identifying carriers as either Hutu or Tutsi based on the “scientific” methods of identification.<sup>11</sup> During decolonization in the 1960s and 1970s, a revolution marked the slaughter of 10 000 Tutsi as the Hutu majority took control under the First Republic. As

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<sup>7</sup> Scott Peterson, *Me Against My Brother: At War in Somalia, Sudan and Rwanda* (Cavendish UK: Rutledge, 2001) at 247.

<sup>8</sup> *Ibid.* at 247.

<sup>9</sup> William Schabas, *Genocide in International Law* (Cambridge UK: Cambridge University Press, 2000) at 109.

<sup>10</sup> Alexandra Miller, “From the ICTR to the ICC: Expanding the Definition of Genocide to Include Rape” (2003) 108:1 Penn. St. L. Rev. 349 at 352.

<sup>11</sup> *Supra* note 4 at 379.

well as those dead, an estimated 270 000 - 370 000 Tutsi had fled to neighbouring countries.<sup>12</sup> Major-General Habyarimana gained control of Rwanda and ruled until his death in 1994.

On October 1, 1990, a group of Tutsi refugees known as the Rwandan Patriotic Front (RPF) invaded northern Rwanda from a refugee camp in southern Uganda. The Arusha Accords, signed in 1993, responded to this invasion through provisions for shared military and civilian power. By this time though, the seeds were planted for the genocide. The extremist Hutu Mouvement Revolutionnaire National pour le Developpement (MRND), led by President Habyarimana, held power and was already forming the Interahamwe, a youth militia. With the death of the President in 1994, the MRND's genocidal plan was formally implemented. In one hundred days, over 800 000 Tutsi and moderate Hutu were slaughtered; up to 500 000 women were raped; and, up to 100 000 children were left orphaned.<sup>13</sup>

## 2. Genocide at International Law

In 1943 Raphael Lemkin, outraged at the recent history of Jewish persecution and prior to that, the persecution of the Armenians, coined the term "genocide." He included a definition, as well as a significant discussion on prevention, in his seminal book, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*, in 1944.<sup>14</sup> He defined genocide as "the destruction of a nation or of an ethnic group,"<sup>15</sup> and he called for the development of "provisions protecting minority groups from oppression because of their nationhood, religion or race."<sup>16</sup>

On December 11, 1946, the General Assembly of the United Nations adopted General Assembly Resolution 96(1), which explicitly recognized genocide as an international crime.<sup>17</sup> The resolution stated, "[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human

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<sup>12</sup> *Supra* note 7 at 247.

<sup>13</sup> Survivor's Fund Statistics, online: <<http://survivors-fund.org.uk>>.

<sup>14</sup> Raphael Lemkin, *Axis Rule in Occupied Europe* (Clark, NJ: The Lawbook Exchange, 2005).

<sup>15</sup> *Ibid.* at 80.

<sup>16</sup> *Ibid.* at 92.

<sup>17</sup> *The Crime of Genocide*, GA Res. 96(I), UN GAOR, 1<sup>st</sup> Sess., 188-189.

beings.”<sup>18</sup> However, even following the passing of General Assembly Resolution 96(1), both the Nuremberg and Tokyo Tribunals labeled the extermination of the Jewish population and other ethnic or religious minorities as persecution, rather than genocide.<sup>19</sup>

In 1948, the world came together to sign the *Convention on the Prevention and Punishment of the Crime of Genocide*. Currently, the *Convention* has 141 party states. It defines genocide as:

the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>20</sup>

The *Convention* also identifies a number of inchoate crimes as punishable acts.<sup>21</sup> No immunity is granted for public officials.<sup>22</sup>

In 1961, the first individual was convicted of the crime of genocide: Adolf Eichmann was convicted in an Israeli court of genocide under Israeli law, for crimes committed during World War II. It was not until the creation of the *ad hoc* tribunals in 1993 and 1994 that the crime of genocide was actually put forward before an international criminal court.

### **3. The International Criminal Tribunal for Rwanda**

On November 8, 1994, the Security Council of the United Nations, under Chapter VII,

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<sup>18</sup> *Ibid.*

<sup>19</sup> Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008) at 127.

<sup>20</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948), article 2 [Genocide Convention].

<sup>21</sup> *Ibid.*, article 3.

<sup>22</sup> *Ibid.*, article 4.

passed Resolution 955(1994) creating an international tribunal

for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.<sup>23</sup>

The ICTR was given jurisdiction to prosecute genocide, crimes against humanity, and war crimes occurring in Rwanda or by Rwandans in surrounding countries in 1994.<sup>24</sup> The purpose of the Tribunal was to contribute to national reconciliation while also contributing to the restoration and maintenance of peace in the Great Lakes Region.<sup>25</sup> Finally, the Tribunal was to assist in ending (and seeking redress through the prosecution of those persons responsible for) genocide and other serious violations of international humanitarian law.<sup>26</sup>

The ICTR was the first international court to try an offender for genocide, and “the ICTR remains the international criminal jurisdiction with the most elaborate case law on the crime of genocide.”<sup>27</sup> The Trial Chamber in *Akayesu* was faced with the task of interpreting a convention written fifty years prior, with no guidance from any international jurisprudence; its decision marked an important point in the development of the international law of genocide. Jean-Paul Akayesu was convicted on September 2, 1998, of genocide, crimes against humanity, direct and public incitement to commit genocide, and in October of that year, was sentenced to life imprisonment.<sup>28</sup> Since this first trial, the ICTR has tried fifty individuals on charges of genocide, with another twenty-four cases currently underway.<sup>29</sup>

In order to effectively interpret and apply the law of genocide, the ICTR has taken a

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<sup>23</sup> Establishment of an International Tribunal and Adoption of the Statute of the Tribunal SC Res. 955 UN SCOR, 1994, UN Doc. S/RES/955 at para. 1.

<sup>24</sup> *Statute of the International Tribunal for Rwanda*.

<sup>25</sup> *Supra* note 23.

<sup>26</sup> *Ibid.*

<sup>27</sup> Claus Krieb, “The Crime of Genocide Under International Law” (2006) 6 Int’l Crim L. Rev. 461 at 467.

<sup>28</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Sentence (2 October 1998) (International Criminal Tribunal for Rwanda, Trial Chamber 1), online: ICTR <<http://www.ictr.org>>.

<sup>29</sup> Online: ICTR <<http://www.ictr.org>>.

number of jurisprudential approaches. The Tribunal depended heavily upon preparatory documents of the 1948 *Genocide Convention*.<sup>30</sup> As the *Vienna Convention on the Law of Treaties* stipulates, “recourse to supplementary means of interpretation, including the preparatory work of the treaty,” may be used to supplement interpretation of treaties.<sup>31</sup> The ICTR treated this provision as empowering it to use of the preparatory documents of the *Convention* as an interpretation tool for its own statute. This technique guided much of the jurisprudence.

## II. SPECIAL INTENT

What elevates the enumerated acts listed in the *Convention* to genocide is the special intent that the crime requires; it is what makes genocide the “crime of crimes.”<sup>32</sup> The common law concept of special intent corresponds with the *dol special* or *dolus specialis* of Romano-Germanic systems.<sup>33</sup> The special intent of genocide lies in the intent to destroy a protected group through one of the prohibited acts. Put simply, it is the intention to achieve a specific result that is prohibited by the *Convention*, and therefore by the Statute of the ICTR.

This added mental element is what translates the active elements of the crime into genocide. As Schabas points out, “a specific intent offence requires performance of the *actus reus* but in association with an intent or purpose that goes beyond the mere performance of the act.”<sup>34</sup> The ICTR in *Kayishema and Ruzindana* decided that this special intent must have been formed prior to the commission of the act.<sup>35</sup> Although the special intent must be formed prior to the genocidal acts, there is no requirement of premeditation for the individual acts.<sup>36</sup>

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<sup>30</sup> William Schabas, *The United Nations International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 95.

<sup>31</sup> *Vienna Convention on the Law of Treaties* (1969) Article 32.

<sup>32</sup> George Mugwanya, *The Crime of Genocide at International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (London: Cameron May Ltd., 2007) at 130.

<sup>33</sup> *Supra* note 9 at 217.

<sup>34</sup> *Ibid.* at 218.

<sup>35</sup> *Prosecutor v. Clement Kayishema and Obed Ruzindana*, ICTR-95-1, Judgment and Sentence (21 May 1999) at para. 91 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictr.org>> [*Kayishema and Ruzindana*].

<sup>36</sup> Ilias Bantekas & Susan Nash, *International Criminal Law 3<sup>rd</sup> ed.* (Cavendish UK: Routledge, 2007) at 144.



Establishing special intent has been one of the most difficult problems that the ICTR has had to grapple with. Objectively determining the subjective understanding of a perpetrator has proven extremely onerous. Some have argued that the ICTR did not adhere to this high standard for special intent.<sup>37</sup> This allegation was largely a result of the difficulty in proving the subjective intention without accompanying material proof. In *Rutaganda*, the ICTR Appeals Chamber determined that the special intent could be inferred from relevant facts and circumstantial evidence in order “to [prevent] perpetrators from escaping convictions simply because such manifestations (of special intent) are absent.”<sup>38</sup> This finding has many interesting implications for the responsibilities of both the prosecution and defence regarding the proving of special intent.

### III. PROTECTED GROUPS

#### 1. Group Victim

The “depersonalization of the victim” is one of the most important aspects of genocide; genocide is not a crime against just the individual but, rather, a crime against the group.<sup>39</sup> In *Krstic*, the ICTY contrasted genocide with persecution and focused on the fact that the victim in genocide is the group, whereas in persecution, it is the individual.<sup>40</sup> In genocide, “the victimization of the group members in their individual capacities takes second place.”<sup>41</sup>

In *Akayesu*, the Trial Chamber argued that the group and the individual are joint victims, as the act victimizes the individual, but, because of the special intent, the victimization extends to the group as a whole.<sup>42</sup> In *Rutaganda*, though, the Trial Chamber agreed with the assertion that the group was in fact the ultimate victim of

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<sup>37</sup> L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Netherlands: Martinus Nijhoff Publishers, 2005) at 121.

<sup>38</sup> *Prosecutor v. George Rutaganda*, ICTR-96-3, Appeal on Judgment (26 May 2003) at 525 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.ictt.org>>.

<sup>39</sup> *Supra* note 19 at 137.

<sup>40</sup> *Prosecutor v. Radislav Krstic (Srebrenica-Drina Corps)*, IT-98-33, Trial Judgment (2 August 2001) at para. 553 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org>> [*Krstic*].

<sup>41</sup> *Supra* note 36 at 139.

<sup>42</sup> Nin Jorgensen, “The Definition of Genocide: Joining the Dots in the Light of Recent Practice” (2001) 1 Int’l Crim. L. Rev. 285 at 304.

genocide.<sup>43</sup> This latter position articulates the preferable view, as the general intent element affects the individual, but the special intent – the element that makes genocide genocide – is what victimizes the group. Genocide is a crime against a group and therefore the victim is the group as a whole.

As genocide is a crime with a group as its victim, it is essential to identify who constitutes a protected group. According to traditional treaty interpretation principles, a protected group must fall under one of the four enumerated groups: national, ethnical, racial or religious groups. This approach was problematic for the ICTR Trial Chambers: the Tutsi of Rwanda did not *clearly* fit into any of the four enumerated groups.<sup>44</sup> But, if the Tutsi do not form a group that was intended to be protected, then who does?

ICTR jurisprudence suggests two main issues to be determined in defining the protected groups under the *1948 Genocide Convention* and the ICTR Statute. The first issue is defining what was intended by the four enumerated terms. The second issue is whether an objective or subjective approach should be taken in identifying these groups. Interestingly, the ICTR now generally satisfies this element by taking judicial notice of the fact that in Rwanda in 1994 the Tutsi were recognized as an ethnic group.<sup>45</sup> Nevertheless, looking forward to the work of the ICC, it is clear that the task of understanding and interpreting these terms will be essential for the effective functioning of the Court.

## **2. Determining the Protected Groups**

### ***Seriatim Construction***

Treating the ICTR Statutes as a direct implementation of the *1948 Genocide Convention* would theoretically bind the chambers to the *Vienna Convention on the Law of Treaties*. Article 31 of that Convention states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

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<sup>43</sup> *Prosecutor v. George Rutaganada*, ITTR-96-3, Trial Judgment (6 December 1999) at para. 59 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictor.org>> [*Rutaganada*].

<sup>44</sup> *Supra* note 10 at 360.

<sup>45</sup> *Supra* note 30 at 168.

context and in the light of its object and purpose.”<sup>46</sup> The ordinary meaning seems obvious – the *Genocide Convention* is worded in a way that protects four enumerated groups: national, ethnical, racial or religious peoples. It does not invite application of what could be called analogous reasoning to find other non-enumerated groups.<sup>47</sup> This contrasts to General Assembly Resolution 96(I) that included “other groups” in its definition of genocide.<sup>48</sup>

If the four enumerated groups are treated as an exhaustive list, then it is important to determine a functional definition for each. Perhaps it is at this stage that the ICTR Trial Chamber in *Akayesu* erred. As Schabas points out, “[i]n attempting to impose contemporary usage on [terms] whose meaning was different in 1948, it has the curious result of narrowing the *Convention’s* scope.”<sup>49</sup> Looking to Raphael Lemkin’s writings, “national” had a much more broad scope in 1948, corresponding to the concept of “minority” or “national minority,” which, according to Schabas, could theoretically be broad enough to encompass racial, ethnic, and religious groups.<sup>50</sup> Although treaty interpretation requires the ordinary meaning of the terms to guide the interpretation, language usage changes. Looking to the usage of such terms at the time of drafting becomes imperative in properly interpreting the treaty. If this had been done by the ICTR, then the problem of fitting the Tutsi into a box would not have occurred. Looking to the 1948 usage, the Tutsi could have been defined as national (as a national minority), racial (which included both physical and cultural characteristics), and ethnical (synonymous with both racial and national) groups.<sup>51</sup> Each of these terms has been narrowed over the past fifty years, but it was the broader interpretation that was intended by the drafters of the *Convention* and that should guide tribunals in genocide trials.

Although taking a *seriatim* approach is the norm at international law, it also has its faults in relation to the *Genocide Convention*. The ICTR took the approach in *Akayesu*

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<sup>46</sup> *Supra* note 31 at article 31(1).

<sup>47</sup> *Supra* note 9 at 102.

<sup>48</sup> *Supra* note 17.

<sup>49</sup> *Supra* note 9 at 118.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* at 120-125.

that the enumerated groups were too restrictive.<sup>52</sup> *Rutaganda* noted the problem that there is no internationally recognized, objective definition of these four terms, in either 1948 or now.<sup>53</sup> Although the intentions of the drafters are one aspect to be looked at in the interpretation, by aligning this approach with the ordinary meaning interpretation doctrine, it freezes the *Convention* in time. Using today's interpretations of the terms would actually narrow the definition, which is also unacceptable. Thus, by limiting the notion of protection to a seriatim construction, the *Convention* would either be frozen in time or be limited beyond the intentions of the drafters, neither of which should be encouraged by international law. The ICTR was therefore correct in rejecting an exclusive approach to the interpretation of the 1948 *Convention*.

### ***Stable and Permanent by Birth***

As was discussed above, one of the major problems faced by the Trial Chamber in *Akayesu* was that the enumerated groups appeared to exclude the Tutsi from protection by the *Convention*. In an attempt to remedy this dilemma, the Trial Chamber looked to the preparatory works of the *Convention* and determined that the drafters had intended to include all stable and permanent groups whose membership was determined by birth.<sup>54</sup> Article 32 of the *Vienna Convention on the Law of Treaties* allows reference to preparatory work of a treaty to

confirm the meaning resulting from the application of Article 31, or  
to determine the meaning when the interpretation according to  
Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.<sup>55</sup>

It could be argued that in determining the definition of protected groups, time and location had changed the definition, leaving the preparatory works available under sub-section (a). Alternatively, the exclusion of the Tutsi as a protected group under a seriatim approach could be seen to be “manifestly absurd or unreasonable” and therefore would leave the preparatory documents available under sub-section (b).

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<sup>52</sup> *Supra* note 2 at para. 516.

<sup>53</sup> *Supra* note 43 at 56; *supra* note 37 at 130.

<sup>54</sup> *Supra* note 2 at para. 511.

<sup>55</sup> *Supra* note 31.

In assessing the preparatory documents, the Trial Chamber in *Akayesu* determined that, the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.<sup>56</sup>

This “stable and permanent, by birth” assessment would protect the Tutsi under the *Convention*.

The decision in *Akayesu*, although based on acceptable international interpretation methods, has been much criticized and generally not applied in subsequent jurisprudence. Most notably, in *Kayishema and Ruzindana*, the Trial Chamber accepted the qualification of the Tutsi as an “ethnic group,” a characterization that has since been accepted through judicial notice in other cases.<sup>57</sup> Defining the Tutsi as an enumerated, protected group removed the need to expand the definition to include all “stable and permanent, by birth” groups. What is puzzling is that, in *Akayesu*, the Trial Chamber convicted the accused of crimes against humanity based on ethnic grounds.<sup>58</sup> By taking a more purposive approach to defining the protected groups, there was no need to resort to the supplementary interpretation methods.

One of the most obvious problems with the *Akayesu* extension is that only one of the four enumerated terms is truly “stable and permanent, by birth.” Even with a limited definition of the four groups, racial groups are the only group that is manifestly impossible to change and determined from birth. Furthermore, this definition of “stable and permanent” is in direct contradiction with the *Universal Declaration of Human Rights*:

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<sup>56</sup> *Supra* note 2 at para. 511.

<sup>57</sup> *Supra* note 35 at para. 291.

<sup>58</sup> *Supra* note 2 at para. 652.

Article 15(2) gives everyone the right to have a nationality and change it if they so choose.<sup>59</sup> Article 18 gives everyone the right to freedom of thought, conscience and religion and the freedom to change his religion or belief.<sup>60</sup> Ethnicity, like religion and nationality, may be a choice made by individuals in relation to their culture and language. Generally it is taken from one's parents, but a choice may exist in identifying with a given ethnic group. Defining the protected groups as only those that are "stable and permanent, by birth" inherently contradicts the words of the *Genocide Convention* and has the potential to remove three of the four enumerated groups from protection.

There has also been criticism of the interpretation techniques of the Trial Chamber. Relying on the preparatory documents of the *Convention*, the Chamber fleshed out the intentions of the drafters in determining the groups intended to be protected. The problem is that the purpose of the interpretation methods is to clarify ambiguous or obscure terms or those that are manifestly absurd or unreasonable, not add elements that were not included in the *Convention*. Had the intention been to protect all stable and permanent groups determined by birth, then the *Convention* should have read as such. The approach in *Akayesu* quite obviously broadens the definition of protected group under the *Convention*. The use of preparatory documents should be restricted to clarification rather than expansion.

The expansion of the definition also creates a significant problem because of the nature of the offence. Schabas points out that "reading in terms that are not already present in the text is also particularly objectionable when the treaty define[s] a criminal offence, which should be subject to restrictive interpretation and respect the rule *nullum crimen sine lege*."<sup>61</sup> A crime should be defined in an explicit way and should not be expanded arbitrarily. In many ways, the definition that was endorsed in *Akayesu* defines the crime of genocide so broadly as to "risk trivializing the horror of the real crime when it is committed."<sup>62</sup>

Defining protected groups as "all groups that are stable and permanent and whose

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<sup>59</sup> *Universal Declaration of Human Rights* (1948), article 15(2).

<sup>60</sup> *Ibid.* at article 18.

<sup>61</sup> *Supra* note 9 at 132.

<sup>62</sup> *Supra* note 4 at 387.

membership is determined by birth” is an unjustified broadening of the protected groups under the *1948 Genocide Convention*. The broadening of the definition by reliance on a favourable reading of preparatory documents was performed in order to ensure that the Tutsi of Rwanda did, in fact, fit into the protected groups. However, categorizing the Tutsi as a protected group could have been accomplished in a number of other, more acceptable ways, including a more purposive reading of the enumerated groups. “[The Akayesu decision] quite brazenly goes beyond the actual terms of the *Convention* definition, invoking the intent of the drafters as a justification.”<sup>63</sup>

### ***Ensemble Construction***

The ensemble approach to interpreting the list of protected groups focuses on one group that is characterized by one or more of the four terms listed in the *Convention*.<sup>64</sup> The enumerated terms are seen as adjectives describing one thing, rather than as four separate and unique groups. Most notably, Schabas and the ICTY in *Krstic* have espoused this approach. A purposive interpretation of the protected groups is preferred over a deconstructive interpretation according to the ensemble approach. The result is that “the four terms in the *Convention* not only overlap, they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the *Convention* find protection.”<sup>65</sup>

Schabas looks to the preparatory documents of the *Convention* as well, although with a very different reading than in *Akayesu*. The approach also focuses on a historical understanding in order to determine the object and purpose of the *Convention*.<sup>66</sup> This historical analysis begins with Raphael Lemkin’s writings. According to Schabas, Lemkin’s writings

indicate he conceived of the repression of genocide within the context of the protection of what were then called “national minorities”. Use of terms such as “ethnic”, “racial” or “religious” merely flesh out the idea, without at all changing its essential

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<sup>63</sup> *Supra* note 4 at 380.

<sup>64</sup> *Supra* note 37 at 133.

<sup>65</sup> *Supra* note 9 at 111.

<sup>66</sup> Article 31 of the *Vienna Convention on the Law of Treaties* states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

content.<sup>67</sup>

Lemkin was, arguably, intending to protect the national minorities that had, until then, been the targets of such campaigns.

Beyond Lemkin's pioneering writings, it is also important to find grounding for an ensemble approach in the actual *Convention*. The ensemble construction interprets the four groups as something different than a list; the four terms overlap and help to define each other, in opposition to the *seriatim* construction discussed earlier. Although not the "ordinary meaning" that comes to mind, this interpretation also relies on the "ordinary meaning" of the terms. Often, a racial and ethnical group constitute the same people, religious and ethnical the same, national and religious the same. These terms are so intimately related that seeing them as individual, separate, and distinct terms is a false construction of the words. Arguably, the intentions of the drafters were to see these terms in a "dynamic and synergistic relationship, each contributing to the construction of the other."<sup>68</sup> The terms, when taken together, convey a meaning, protecting groups like those that had been targeted in the then recent history.

Applying this doctrine to the events of the 1990s, in *Krstic*, the ICTY adopted a similar approach to that of Schabas:

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 [S]econd [W]orld [W]ar, as "national minorities", rather than to refer to several distinct prototypes of human groups.<sup>69</sup>

The Trial Chamber looked to the fact that some terms were included early on and other terms later in order to clarify what types of groups were intended to be protected.<sup>70</sup> An example of this is the inclusion of "ethnical" to ensure that "national" would not be understood as including purely political groups. The ICTY determined that to attempt to differentiate between the four terms and to give each an objective definition and corresponding criteria would be inconsistent with the object and purpose of the

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<sup>67</sup> *Supra* note 9 at 105.

<sup>68</sup> *Ibid.* at 112.

<sup>69</sup> *Supra* note 40 at para. 556.

<sup>70</sup> *Ibid.* at para. 555.



*Convention*. As has been previously discussed, the words of a treaty must be given their ordinary meaning *consistent with* the object and purpose, which the ICTY clearly attempted to do and, arguably, succeeded in doing.

The result of this approach to the groups protected under the *1948 Genocide Convention* is more restrictive than the “stable and permanent, by birth” approach while being more broad than the seriatim construction. One key benefit of an ensemble construction over the seriatim construction is that gaps between the terms cannot occur. The four terms create the edges of a net, which is then able to catch other groups that may not fit specifically into one of the terms defined individually, as is done in the seriatim approach. Although this approach may result in a “we know what was intended on being protected and we will tell you when we see it” tactic, it is much better than having events such as those in Rwanda slip through because they do not easily fit into a conceptual box. Furthermore, there is a danger that searching for autonomous meanings for the four terms will “weaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed.”<sup>71</sup>

The “stable and permanent, by birth” approach also contrasts with the ensemble construction. These approaches have many similarities in interpretive reasoning: both approaches look to the preparatory documents of the *Convention*, as well as the purpose and objective of the *Convention*. They have also both found support from within international criminal jurisprudence. The most obvious difference between the approaches is in their support from the academic community and support in future international decisions. The approach taken by the ICTR in *Akayesu*, although not explicitly rejected, has not been followed by other decisions, including others at the ICTR. The approach broadens the protected group to an untenable point. Not only does it make the group difficult to distinguish, more problematically, it possibly leaves out some of the groups explicitly enumerated in the *Convention*. On the other hand, an ensemble construction broadens the protected group beyond the narrow seriatim construction but finds its grounding in the four listed terms. It uses the terms to demarcate a boundary of protection.

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<sup>71</sup> *Supra* note 4 at 386.

Like the *Akayesu* approach, the ensemble approach falters on predictability, but this may be an acceptable outcome. It took fifty years from the creation of the *Convention* for the first international trial of genocide to take place from the creation of the *Convention*; this delay demonstrates the expanse of time that the *Convention* must be able to deal with. It needs to be interpreted in a way that can grow with world realities. Using the ensemble construction prevents the *Convention* from becoming a relic of the past, maintaining its relevancy. Although predictability is important, the *Convention* may require some ambiguity in order to protect groups that may not fit into some artificial box.

The ensemble construction looks to the protected groups as one entity. Had this approach been applied by the ICTR, then there would have been no debate about whether the Tutsi were a protected group. Although not fitting the objective criteria of ethnical or racial per se, the meaning of the terms taken together definitively covers the Tutsi population. This more holistic approach respects the terms of the *Convention* while also respecting the realities of the world and the impossibilities of fitting groups into restrictive categories.

### **3. Definition Perspective**

Defining the group(s) protected by the 1948 *Genocide Convention* can occur from two perspectives, or a combination of both. An objective approach gives definite criteria for the terms listed in the *Convention*. A subjective approach takes into account the perspective of the community, the victim(s) and/or the accused. The problem that arises is that under the *Convention*, there is no guidance as to whether membership of a group is an objective factor or if perception of membership is crucial.<sup>72</sup>

#### ***Objective Perspective***

In *Akayesu*, the ICTR Trial Chamber undertook the monumental task of defining the four groups listed in the *Convention*.<sup>73</sup> The purpose was to create objective criteria through which a protected group could be identified. The Chamber sought to give each

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<sup>72</sup> *Supra* note 36 at 145.

<sup>73</sup> *Supra* note 2 at paras. 512-515.

term its own definition: a “national group” being “a collection of people who are perceived to share a legal bond of common citizenship, coupled with reciprocity of rights and duties”;<sup>74</sup> an “ethnic group” as a “group whose members share a common language or culture”;<sup>75</sup> a “racial group” as a group “based on hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”;<sup>76</sup> and a “religious group” as a group “whose members share the same religion, denomination or mode of worship.”<sup>77</sup> Interestingly, “national group” has a subjective element included; the other three terms are clearly defined in objective terms, allowing groups to be easily identified as either belonging to the *Convention’s* protected groups, or not.

An objective analysis has one very important benefit: groups are easily identified by set criteria. An analysis will not have to delve into the same depth of anthropological and sociological data that is required with a subjective approach. Objective criteria create greater stability, consistency, and predictability in the application of the *Genocide Convention*.

One major concern regarding a purely objective approach is its lack of flexibility, as was clearly demonstrated in *Akayesu*. The objective criteria that the Trial Chamber set out did not cover the Tutsi under any of the enumerated heads, even though the people of Rwanda recognized the Hutu and Tutsi as being distinctive ethnic groups. The “fix” that was proposed was to give an “expansive interpretation of the expression.”<sup>78</sup> The objective approach was unable to deal with the realities of the community by giving definitive criteria to be met for protection.

Even more difficulty arises in trying to establish the objective criteria that should be used for each of the terms. There is no consensus internationally on the definition of the terms, or on how each group should be measured against the term.<sup>79</sup> Although the Trial Chamber in *Akayesu* did a thorough analysis of the definitions of the terms, at least one

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<sup>74</sup> *Ibid.* at para. 512.

<sup>75</sup> *Ibid.* at para. 513.

<sup>76</sup> *Ibid.* at para. 514.

<sup>77</sup> *Ibid.* at para. 515.

<sup>78</sup> *Supra* note 30 at 168.

<sup>79</sup> See *Rutaganda*, *supra* note 42 at para. 56.

understanding of the word “ethnicity” was not included - the local, Rwandan understanding. In *Jelisić*, the ICTY stated,

to attempt to define a national, ethnic or racial 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.<sup>80</sup>

An absence of this understanding proved to be a significant hurdle for the *Akayesu* Chamber. Usages of certain language in international treaties may always be difficult, but in a case such as this, a limited, objective analysis could prove fatal to the *Convention* as a whole. An objective perspective does not adequately suffice in establishing the special intent of genocide.

### ***Subjective Perspective***

In *Kayishema and Ruzindana*, a different ICTR trial chamber adopted a purely subjective approach, noting that an ethnic group could be “a group identified as such by others, including perpetrators of the crimes.”<sup>81</sup> Furthermore, because of the subjective approach, the Chamber was able to find that the Tutsi were an ethnic group, based on the use of official identity cards identifying them as such.<sup>82</sup> The use of a subjective approach manages some of the difficulties arising out of the objective criteria; importantly, it enables the use of local understandings of the terms. In fact, the four listed terms *require* a degree of subjectivity because their meaning is inherently determined in a social context.

There are a number of nuances that exist within the subjective approach. The most important when it comes to determining the protected groups is whether the subjective analysis should be done from the perspective of the victim, the community, the perpetrator, or a combination of these. In *Bagilishema*, the perpetrator’s appeared to be the most important perspective: “if a victim was perceived by a perpetrator as belonging to a protected group, the victim should be considered by the Chamber as a

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<sup>80</sup> *Prosecutor v. Goran Jelisić (Brcko)*, IT-95-10, Judgment (14 December 1999) at para. 70 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org>> [*Jelisić*].

<sup>81</sup> *Supra* note 35 at para. 98.

<sup>82</sup> *Ibid.* at para. 523.

member of the protected group, for the purposes of genocide.”<sup>83</sup> At some level, this makes sense, as the special intent required must be that of the perpetrator. The ICTY has also advanced this reasoning in *Jeliscic*.<sup>84</sup>

It is important to take into account the perspectives of the individual victim of the act, the group victim, and the community as a whole, as well. As was stated from the outset of the ICTR’s existence, reconciliation is one of the key goals of the Tribunal. Recognizing the perspective of the victims and the community will assist in the healing process. Allowing the victims and the communities to play a role in group identification is as important as the perpetrator’s perspective, but for very different reasons.

In practice, the subjective approach may come down to using all three of the perspectives identified. Cassese has created a two-step analysis here: first, were the people treated as belonging to one of the protected groups (community and perpetrator perspective); and second, did they consider themselves as belonging to one of the protected groups (victim perspective).<sup>85</sup> At the ICTR, this approach was identified in *Rutaganda* as being appropriate in some instances.

[T]he Chamber notes that for the purposes of applying the *Genocide Convention*, membership of a group is, in essence, a subjective rather than an objective concept. 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.<sup>86</sup>

There are also concerns with a purely subjective approach. Allowing individuals to determine the protected groups from a subjective perspective has the potential to extend the protection to abstract groups.<sup>87</sup> The drafters of the *Convention* intended to

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<sup>83</sup> *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T, Judgment (7 June 2001) at para. 65 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictt.org>> [*Bagilishema*].

<sup>84</sup> “[I]t is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community.” *Jeliscic*, *supra* note 80 at para. 70.

<sup>85</sup> *Supra* note 19 at 139.

<sup>86</sup> *Supra* note 43 at 56.

<sup>87</sup> See Mugwanya, *supra* note 32 at 73.

protect a certain type of group. Although there has been much discussion about what this group includes, it is clear that it is not boundless. Allowing a purely subjective approach could create a limitless number of protected groups. Schabas states, “[t]he flaw is allowing, at least in theory, genocide to be committed against a group that does not have any real objective existence.”<sup>88</sup> Kreb has gone even further, stating that,

a subjective approach would not only circumvent the drafters’ decision to confine the protection of certain groups, but would convert the crime of genocide to an unspecific crime of group destruction based on a discriminatory motive.<sup>89</sup>

Another criticism is that subjective analysis allows the perpetrator to define his own crime.<sup>90</sup> The law cannot permit a crime to be defined by offender alone. However, including the perspective of the community and the victim would show some consensus on the existence of a protected group.

A subjective analysis of whether a group is protected allows for the social, cultural, and political realities of a community to be considered. It also creates some difficulties in determining the groups intended to be protected by the *1948 Genocide Convention*. By including some element of a subjective analysis, though, it ensures a more pragmatic perspective of the crime.

### ***Combined Perspective***

Mugwanya argues that, when faced with the reality of present day conflicts where there is an interrelationship and overlap between many of the terms, a failure to consider both objective and subjective approaches could create absurd results, as could have arguably happened in Rwanda.<sup>91</sup> The objective criteria help to define the groups from the international perspective, while the subjective component recognizes that membership is often a product of local social or political construction.

The balance to be met between the two approaches is complicated. Van den Herik sees

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<sup>88</sup> *Supra* note 9 at 110.

<sup>89</sup> *Supra* note 27 at 474.

<sup>90</sup> See Schabas, *supra* note 9; see also van den Herik, *supra* note 37.

<sup>91</sup> *Supra* note 32 at 84.

the objective approach as being purely complimentary.<sup>92</sup> Jorgensen, on the other hand, argues that the group must be defined objectively before delving into the subjective, because of a risk of getting lost amongst the subjective elements.<sup>93</sup> Reaching this balance is the key to creating an effective analysis. One approach is to proceed on a case-by-case basis, taking into account the evidence offered, and the context of the community, both culturally and politically. This approach does not create a law that is predictable in its application, but it is probably the best approach in order to respect the purpose and objective of the *Convention*. Each analysis should include both modes, allowing the local perspective to work alongside international perspectives.

The ICTR has generally followed a combination approach in determining the protected groups. The approach taken varies with the case, as well as with the individual Trial Chamber. In general though, the Trial Chambers have adopted a blending of the two from the outset of the analysis. The analysis starts from a reference to the objective particulars, moving on to the subjective perspective, most commonly of the perpetrator.<sup>94</sup>

There are some criticisms, however. First is the obvious exclusion in the subjective aspect of the experience of the community as a whole and the group victim, as well as the individual victim. In *Kajelijeli*, the Trial Chamber expressly stated that the victims either had to belong to the group objectively, or the perpetrator had to believe that the victims belonged to the group that he targeted.<sup>95</sup> Further, a case-by-case analysis could create a requirement for excessive, repetitive analysis. If it is the same group of people, once they have been identified as a protected group at that time, should they not continue to be a protected group for the purposes of the *Convention*? It is important to prove that the perpetrator targeted the individual victims because of their membership in that group, but there is no need to reprove that the group is a protected group for every case.

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<sup>92</sup> *Supra* note 37 at 135

<sup>93</sup> *Supra* note 40 at 289.

<sup>94</sup> Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) at 173.

<sup>95</sup> *Prosecutor v. Juvenal Kajelijeli*, ICTR-98-44A, Judgment (1 December 2003) at para. 813 (International Criminal Tribunal for Rwanda, Trial Chambers), online: ICTR <<http://www.ictr.org>> [*Kajelijeli*].

Although there is concern surrounding each of the perspectives, the combination approach allows for the benefits to most heavily outweigh the concerns. The best balance is reached if the two are used from the beginning of the analysis in a complementary way. Balancing the objective and subjective perspectives creates a more holistic understanding of the protected groups. The objective respects the intentions of the drafters of the *Convention*, while the subjective respects the experience and cultural understandings of the community.

#### **IV. EFFECT OF THE ICTR ON THE INTERNATIONAL CRIMINAL COURT**

The ICTR was the first international criminal court to hear a case of genocide and the first to convict an individual of genocide. Currently, it has heard the greatest number of genocide charges of any international tribunal. The ICC must be sure to consider the findings of the ICTR in cases of genocide.

Article 6 of the *Rome Statute* reproduces, word for word, Article II of the *Genocide Convention* (as did the *ICTR Statute*).<sup>96</sup> The criteria for a protected group under ICC jurisdiction are the same as the criteria under ICTR jurisdiction. The inchoate crimes have been removed under article 6 of the *Rome Statute*, but all except “conspiracy to commit” have been included elsewhere.<sup>97</sup> In addition to Article 6, the *Rome Statute* includes the “Elements of Crimes,” which provides detailed descriptions of the elements of the three core crimes. The “Elements” are not binding on the Court, but “shall assist the Court in the interpretation and application” of the crimes.<sup>98</sup>

When it comes to interpreting the mental element of genocide, the ICC is in a similar place as the ICTR was at the beginning of its existence. There is nothing more included in the *Rome Statute*, nor the *Elements of Crimes*, regarding the mental element of genocide and in particular the protected groups. The ICC has the advantage of looking at applicable treaties, and may apply its previous decisions in any future proceedings.<sup>99</sup> The Court should also be able to use the decisions of the ICTR and ICTY as resources. It

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<sup>96</sup> *Rome Statute of the International Criminal Court*, article 6.

<sup>97</sup> *Ibid.*, article 25.

<sup>98</sup> *Ibid.*, article 9.

<sup>99</sup> *Ibid.*, article 21(2).



is likely that the ICTR's jurisprudence will impact the ICC in its analysis of genocide, as it is the same law that is being applied.

### **1. Determining the Protected Groups**

The ICTR, in *Akayesu*, introduced the idea of "stable and permanent, by birth" as the criteria that should be applied to determine groups protected by the 1948 *Genocide Convention*. The ICC will, in all likelihood, not follow this approach. It fails to adequately respect the choices made by the drafters of the *Convention* and arbitrarily expands the protected groups in a limitless way. Trampling on accepted methods of interpretation, it ignores the ordinary meaning of the words used. Furthermore, it should be noted that Article 22 of the *Rome Statute* explicitly states, "the definition of a crime shall be strictly construed and shall not be extended by analogy."<sup>100</sup>

The conceptual competition between the ensemble and seriatim constructions is more significant. The inclusion of Article 22 of the *Rome Statute* gives the seriatim construction the advantage, as it is a strict construction with no need for extension or analogy. The ICTR failed to uphold the spirit of the *Genocide Convention*, as it identified a very narrow and time-specific definition of each group, ignoring the different and more inclusive meanings of 1948. If the ICC takes the seriatim approach, then it must be sure to accept more holistic definitions of the terms than was done by the ICTR, in order to ensure that groups such as the Tutsi are included in the protected groups.

Ideally, the ICC will accept the ensemble construction, as it balances the drafters' intentions with modern need. Although not the understandings that initially come to mind, using the enumerated terms as adjectives is a completely acceptable usage, and in this case, the more appropriate. This approach, taken by the ICTY, recognizes the interconnectedness of the four terms, and that, in practice, one often is unable to distinguish between them. Groups that have similar criteria to the four enumerated terms are also protected. There is no doubt the Tutsi of Rwanda have the similarities necessary to be protected.

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<sup>100</sup> *Ibid.*, article 22.

The ICC should reject the approach taken in *Akayesu* and should use either the seriatim construction or the ensemble construction. If the seriatim approach is chosen, a holistic approach to the definitions would best respect the purpose of the *Convention*. Nevertheless, the ensemble construction is most preferable, as it recognizes the interconnectedness of the four enumerated terms. As was recognized by the ICTY, it is the approach that best reflects the history of the *Convention* as well as modern day necessities.

## **2. Definition Perspective**

The ICTR appears to have settled on using both an objective and subjective analysis in determining the groups protected by the *Genocide Convention*. The ICC will likely follow this. The use of an objective criterion creates greater stability and consistency in the application of the *Convention*, which should be an important goal of the ICC. Using an objective approach alone, though, does not respect cultural and social realities of peoples' lives. In 1994, asking an individual in Rwanda what their ethnicity was would yield one of three answers: Hutu, Tutsi or Batwa. People understood themselves as belonging to an ethnic group. A purely objective analysis fails to understand the complexities of a society such as that of Rwanda.

A subjective approach, on the other hand, respects the experience of the members of the community. It allows their understandings to be included in the criminal proceedings. Alone, though, it has the potential of protecting purely artificial groups. The *Genocide Convention* protects a certain kind of group, and, whether it is just the four listed groups or an ensemble construction of these groups, there must be some objective component in order to respect the intentions of the drafters of the *Convention*. A purely subjective approach also has the hazard of allowing the perpetrator alone to define the crime. The subjective analysis encourages the domestic understanding to be included, but has the potential of making a farce out of the *Convention*.

Together, the objective and the subjective analyses encourage respect for the ordinary meanings of the terms in the *Convention*, while respecting the experience of those involved in the incidents. The ICC will need to define the relationship between the two

approaches. The ICTY and ICTR have been far from consistent in dealing with this problem, and have approached the issue by encouraging a case-by-case analysis. This is appropriate, so long as both the objective and subjective analyses are used in every case. Although this approach does not create complete predictability, it balances local with global considerations. This result is what is most needed when it comes to defining the protected groups.

Who should be protected under Article 6 of the *Rome Statute*? The group should fit objectively into the net created by the four terms in the article, mirroring that created by Article 2 of the *1948 Genocide Convention*. Further, the subjective understanding of the victims, the perpetrator, and the community as a whole, must be taken into account while determining whether the group is caught by the *Convention*. The objective/subjective balance must be met on a case-by-case basis in order to give full value to the intentions of the drafters of the *Convention*. There is no doubt that the experience of the ICTR jurisprudence will be invaluable to the ICC. One of the most important contributions of the ICTR is to put into practice a fifty-year-old convention that had never before been tested.

## **CONCLUSION**

Genocide is a crime committed against a group victim. The *1948 Genocide Convention* was created in response to the atrocities committed against the Jewish people of Europe, but its application to subsequent brutalities has not been clear. Both the ICTY and the ICTR were faced with interpreting this *Convention*. One of the most important aspects of the law of genocide is determining what groups are to be protected. This issue arose in the very first trial of the ICTR. Further trials confronted the issue of whether the protected groups should be determined objectively or subjectively. The effect of ICTR and ICTY jurisprudence on the future of the law of genocide and its administration at the ICC is still not certain.

The case of the Rwandan Tutsi presented the international legal community with a difficult situation. The group escaped easy classification, and the ICTR had to confront this problem. The reality is that in our current world, most groups are more like the

Tutsi in 1994 than the Jewish during WWII. Groups are an intersection of both true and artificial differences; they evade easy classification. This does not mean, *prima facie*, that they will not be protected. The interpretation of “protected groups” advocated within this article will protect groups like the Tutsi, who were targeted in the same way as the European Jewish community. The *1948 Genocide Convention* must be interpreted in a way that empowers the international community to prevent and protect, while upholding genocide as “the crime of crimes.”