ARTICLES

FINDING THE RIGHT VICTIM: THE DETERMINATION OF GROUPS PROTECTED UNDER THE GENOCIDE CONVENTION

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ABSTRACT

This Article deals with the assessment of one of the aspects that give genocide its particular character: the "group element," which carries significance both for genocidal acts and for the required genocidal intent. Under the Genocide Convention, the victim must be a member of one of four protected groups (only national, ethnical, racial, or religious groups are protected) and the perpetrator must intend to destroy this group in whole or in part. The Article analyzes the main approaches which have been employed towards the identification of the relevant groups and the criticism to which they give rise. It thus poses the question whether the objective approach towards group determination is, in light of the fluidity of certain groups and of the phenomenon of "multiple belonging," sustainable and if there are indeed some groups that cannot be said to have an objective existence. But it also examines the difficulties that attach to the subjective approach, exploring the possibility that a method which relies solely on the perspective of the perpetrator may bring groups into the scope of the Genocide Convention that were deliberately excluded and that a method which, instead, focuses on the victims' perspective, may result in a group concept that does not comply with the requirement of the foreseeability of the law. The Article suggests a novel solution to this dilemma by introducing the "objective individualized approach": an approach that is not exclusively reliant on the perspective of the individual defendant, but includes individualized aspects in its methodology and takes, as its main focus, an understanding of the group from the viewpoint of an observer from the defendant's peer society.

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I. INTRODUCTION

The creation of a clear divide between perpetrator and victim groups and indeed the process that has been described as "othering" appears to be an essential feature of the crime of genocide and certainly inhabits the term as employed in common usage.[1]

But the group element also informs the way in which genocide is understood from a legal perspective. It found reflection in the Genocide Convention and subsequent instruments which extend its protection to four enumerated entities only: national, ethnical, racial, and religious groups.[2]

Yet when, in 2005, the United Nations Commission of Inquiry into the atrocities in Darfur, Sudan, made its report to the Secretary General, it found the application of the Genocide Convention in this regard a challenge.[3] There seemed to be no doubt that the attackers saw the victims (mainly members of the Fur, Masalit, and Zaghawa tribes) as "members of a distinct group."[4] Yet for the Commission, the conclusion that these tribes made up groups "distinct from the ethnic group" to which the attackers belonged was not straightforward: they

1. I.e., the establishment of an image of the superior self as opposed to the lesser "other" – of the group that is "not us". *See* Susan J. Stabile, *Othering and the Law*, 12:2 U. ST. THOMAS L.J. 381, 382 (2016) with further references.

2. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. *See also* Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), at 12, U.N. Doc. S/25704, art. 4(2) (May 3, 1993) [hereinafter ICTYSt]; S.C. Res. 955 (establishing the International Criminal Tribunal for Rwanda, Annex, Statute of the International Criminal Tribunal for Rwanda), art. 2(2) (Nov. 8, 1994) [hereinafter ICTRSt]; Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 6 (July 17, 1998) [hereinafter ICCSt].

3. *See* Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, transmitted by Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, ¶¶ 508–12, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter Darfur Commission].

4. *Id.* ¶¶ 508, 511.

shared language and religion, intermarriage between the groups was common, and, in the words of the report, members of the victim group could "hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them."[5]

It was not the first time that questions regarding the subsumption of a collectivity under the terms of the Genocide Convention have caused difficulties.[6] But it is a problem that goes to the very essence of the law. Is it possible to speak of a distinct, protected group when "objective parameters" for its determination cannot be found? And if objective parameters fail, would it be justifiable to rely on the perception of the suspected perpetrators or the victims themselves (as the Darfur Commission eventually did)?[7]

This Article provides a critical analysis of the approaches which have been advanced regarding group determination for the purposes of the Genocide Convention in international courts and tribunals—in particular, in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—and in the literature.

Both the objective and the subjective method, but also "mixed" approaches to evaluate groups, invite critique. Difficulties arise when they are measured against principles of international criminal law, but also when viewed from the perspective of the object and purpose of the Genocide Convention and indeed with regard to the very feasibility of their application.

Even the logic underlying them is not free from doubt. Under closer scrutiny, questions arise as to the validity of the distinction between "objective" and "subjective" methods, the feasibility of differentiating between individual groups, and indeed the very existence of certain groups.

At the same time, an analysis of the group element also casts light on the impact that foundational principles of international criminal justice exert on methods of interpretation in relation to this aspect of the crime. In light of their application, it is possible not only to perform a critical assessment of the various approaches towards the group element, but also to develop an understanding of this concept which may manifest a greater alignment with the relevant principles than had hitherto been done.

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5. *Id.* ¶ 508. *See also* Carola Lingaas, *The Elephant in the Room: The Uneasy Task of Defining Racial in International Criminal Law*, 15:3 INT'L CRIM. L. REV. 485, 509 (2015).

6. *See infra* text accompanying note 17.

7. *See* Darfur Commission, *supra* note 3, ¶¶ 511–12.

This Article first discusses the significance of the group element for the purposes of the Genocide Convention and for the structure of the crime of genocide (Part II). Part III is dedicated to the various approaches that have been advanced in an effort to interpret the group element and to its application to several groups in cases before the international criminal tribunals. It will thus discuss the objective approach, the various subjective approaches, as well as mixed approaches and subject the perspectives that have been suggested to critical analysis.

Part IV provides a reflection on the principle of legality and the way in which, in particular through its inherent requirements of foreseeability and accessibility, it informs the interpretation of the law of genocide in this context. On the basis of this analysis, a particular methodology (here termed the "objective individualized approach") is formulated which, it is suggested, follows an understanding of the group element that is in conformity with the mandates of that principle as a rule both of international criminal and human rights law.

The concluding Part V reflects on the challenges to traditional approaches towards group determination and suggests that methods employed in other areas of international criminal law, where the identification of the appropriate perspective to a particular concept likewise plays an important role, can be instrumental in resolving the dilemma that the search for the right approach to group determination invokes.

The current study is limited to the determination of the group element itself; the question of the determination of group membership lies outside its scope.[8] It is a question which involves complications similar to those under consideration here, and it is true that certain overlaps exist: determining parameters for group membership, for instance, by focusing on the personal belief of individuals or on their descent, also has an impact on the boundaries of the group itself. Where it is indicated, insights from the determination of group membership will therefore be used for the determination of the group concept, too, bearing in mind that, in the international criminal tribunals, the same approach is not necessarily followed for the assessment of the relevant concepts.[9]

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8. The distinction between determination of the group and an individual's belonging to that group is, however, not always done with sufficient clarity in the literature and in the tribunals. *See, e.g.*, Lingaas, *supra* note 5, at 502. *See also* Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the ad hoc Tribunals*, 49:3 INT'L AND COMPAR. L.Q. 578, 588–89 (2000). The difficulty is not helped by the fact that group determination can indeed be approached through the question as to who is a member of the group, if that is done in an abstract way (i.e., "who would in general qualify as a member of group Y" as opposed to "is X a member of group Y?").

9. With regard to the determination of group membership, it appears in particular that the international criminal tribunals give preference to the subjective approach. *See, e.g.*, Prosecutor v.

II. The Group Element and the Problem of Determination

The "group element"—the restriction of the protection of the Genocide Convention to four enumerated groups—must count among the characteristic aspects of the legal concept of the crime of genocide today. It carries significance for the mens rea, where it forms an integral part of specific genocidal intent: the perpetrator must have had the intent to destroy one of the four protected groups, "in whole or in part . . . as such."[10] But it also appears on the objective side: each of the five alternatives of committing genocide contains an explicit reference to the group element;[11] and the Elements of Crimes to the Rome Statute today make clear that the victim must have belonged "to a particular national, ethnical, racial or religious group."[12]

In view of that, it may appear that the determination of the existence of a protected group is an indispensable task for international criminal courts and tribunals.

That, however, is a point which is not entirely free from doubt. Schabas, for one, writing in the context of the determination of "tribal groups" and groups defined by "colour" (as per the Canadian Criminal Code), rejects the need "to establish within which of the four enumerated categories they should be placed," warning further that the "search for autonomous meanings for each of the four terms will weaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed."[13] And in *Akayesu*, the first case in which the particular crime category of genocide had been applied by an international criminal tribunal, the Trial Chamber found that it was "clearly" the intent of the drafters of the Convention "to protect any stable and permanent group"[14] and that, "in any case" the Tutsis (the principal victim group in Rwanda) "did indeed constitute a

Emmanuel Ndindabahizi, Case No. ICTR-2001-71-I, Judgment and Sentence, ¶ 468 with further references (Int'l Crim. Trib. for Rwanda July 15, 2004) [hereinafter Ndindabahizi (Trial Chamber)]. *See also* Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgment in the Case, ¶ 318 (Int'l Crim. Trib. for Rwanda Dec. 13, 2006) [hereinafter Seromba (Trial Chamber)].

10. *See* sources cited *supra* note 2.

11. *See* Genocide Convention, *supra* note 2, art. II (the words "of the group" in alternatives (a), (b) and (e); "on the group" in alternative (c) and "within the group" in alternative (d)). *See also* ICTYSt, *supra* note 2, art. 4(2); ICTRSt, *supra* note 2, art. 2(2); ICCSt, *supra* note 2, art. 6.

12. Rep. of the Preparatory Comm'n for the Int'l Crim. Ct., *Part II: Finalized Draft Text of the Elements of Crimes*, arts. 6(a)-(e), the second element of each provision, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

13. William A. Schabas, Genocide in International Law 130–31 (2d ed. 2009).

14. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment in the Case, ¶ 701 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) [hereinafter Akayesu (Trial Chamber)] (emphasis added).

stable and permanent group and were identified as such by all"[15]—a statement that at least allows for the reading that any group would be protected under the law against genocide, as long as it is "stable and permanent," and regardless of its explicit mention in the Convention.[16]

That, however, amounts to an understanding of protected groups that invites critique. Given the commonalities between the Tutsis and the Hutus (the group from which most of the perpetrators came), which embraced, *inter alia*, religious and linguistic aspects,[17] it is understandable why Trial Chambers dealing with this situation would be tempted to follow an approach which dispenses with the need for detailed determination. But the *Akayesu* approach is wide in the extreme. Its potential for clashes with the principle of legality has been outlined in the literature[18] (the application of the rule *nullum crimen sine lege* to the question of group determination is a point to which this Article will return).[19] It is also questionable whether this interpretation is indeed in keeping with the intentions of the drafters.[20] The view expressed by the International Law Commission (ILC) in the context of its work on the law of treaties has some persuasive force here: the treaty text is the version which must "be presumed to be the authentic expression of the intentions of the drafters";[21] and in the case of the Genocide Convention, this "authentic expression" does enumerate the individual groups.

Not even the *Akayesu* judges went as far as to abandon any attempt at engaging in group determination. They did, on the contrary, rely on particular evidentiary strands to substantiate their finding that the Tutsis qualified as an ethnic group, including the existence of identity cards that contained the designation "Tutsi" as well as statements provided by "all the Rwandan witnesses" who had appeared before the Trial Chamber.[22] Nor did the view that the protection of the Genocide Convention could be extended to any stable and permanent group

15. *Id.* at ¶ 702.

16. *See* David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 305 (2003).

17. *See* LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 112 (1997).

18. *See* Lingaas, *supra* note 5, at 495.

19. *See infra* Part IV.A.

20. *See* Verdirame, *supra* note 8, at 592.

21. Int'l L. Comm'n, *Draft Articles on the Law of Treaties with Commentaries*, 1966 2 Y.B. INT'L COMM'N 187, 220, art 27, ¶ 11.

22. Akayesu (Trial Chamber), *supra* note 14, ¶ 702.

find favor with later Trial Chambers, who, instead, emphasized the need for specific group determination in the relevant situations.[23]

That does not preclude a change to the group element through future legislative action; in particular, through an amendment of the International Criminal Court (ICC) Statute. Given the arbitrary nature of the selection of the four protected groups,[24] such change might indeed be strongly indicated. The legal provisions adopted in some domestic criminal justice systems, in which the legislators opted for a wider group concept, can provide helpful guidance in that regard.[25]

However, simply reading into the existing definition groups to which the Genocide Convention and the subsequent international instruments have not made reference would be a more than questionable endeavor. The Defense has rights, too: it would be difficult to assert that the extension of the Genocide Convention to groups that not only lie completely outside the literal understanding of the text, but may have been deliberately omitted by the drafters,[26] was an entirely foreseeable concept to the defendant.[27]

If the Trial Chambers have come to accept that the determination of the relevant groups is a necessary task,[28] it is also true to say that the

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23. *See, e.g.*, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment in the Case, ¶ 373 (Int'l Crim. Trib. for Rwanda Dec. 6, 1999) [hereinafter Rutaganda (Trial Chamber)]; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment in the Case, ¶ 317 (Int'l Crim. Trib. for Rwanda May 15, 2003) [hereinafter Semanza (Trial Chamber)]. For the ICTY, *see, e.g.*, Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment in the Case, ¶ 667 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) [hereinafter Blagojević (Trial Chamber)]; Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment in the Case, ¶ 684 (Int'l Crim. Trib. for the Former Yugoslavia Sep. 1, 2004) [hereinafter Brđanin (Trial Chamber)]; Prosecutor v. Karadžić, Case No IT-95-5/18-T Judgment in the Case, ¶ 541 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) [hereinafter Karadžić (Trial Chamber)].

24. For the codification history relating to the four protected groups and the failure in particular to include political and economic groups, *see* LARS BERSTER, *Article II in* CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: A COMMENTARY, 86, 86–88 (Christian Tams et al. eds., 2014). For a critique of the group element as it currently stands, *see* PAUL BEHRENS, *The Need for a Genocide Law*, *in* ELEMENTS OF GENOCIDE 237, 252 (Paul Behrens & Ralph Henham eds., 2012).

25. *See* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 211-1 (Fr.) ("ou d'un groupe déterminé à partir de tout autre critère arbitraire"). Identical wording is found in LOI No.8-98 du 18 Octobre 1998 portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité, art.1 (Congo). *See also* Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law,* 1 J. INT'L CRIM. JUST. 86, 100 at note 65 (2003).

26. *See* sources cited *supra* note 24.

27. *See infra* Part IV.A. *See*, on the problem, *also* Vasiliauskas v. Lithuania, App. No. 35343/05, ¶ 169–86 (Oct. 20, 2015), https://hudoc.echr.coe.int/eng?i=001-158290.

28. *See supra* text at note 23.

methods of determination still show a considerable degree of variation, and that each of the approaches employed by the international criminal tribunals is open to critique.

Not all aspects, however, are controversial: in some regards, the Trial Chambers were able to identify parameters for group determination which, while they are fairly general in nature, seem today to enjoy widespread agreement in international criminal law.

For one, it appears clear that the determination whether the group in question falls within the categories of the protected groups has to be done on a case-by-case basis.[29]

Secondly, a "particular positive identity" has to be associated with the group; defining the group in a negative way is thus not sufficient.[30] By way of example, the ICTY Trial Chambers point out that the definition of the relevant group as "non-Serbs" would, since it proceeds on the basis of entirely negative criteria, not suffice for the relevant group determination.[31] It is a point which has some relevance to the characterization of religious groups: if determination has to proceed on the basis of positive characteristics, then the understanding of a group as being composed of "non-believers" would, arguably, not be satisfactory, and atheists would thus fall outwith the scope of the protection.[32]

Thirdly, there also appears to be agreement on the fact that, in situations where more than one group is targeted, a separate consideration

29. *See, e.g.*, Rutaganda (Trial Chamber), *supra* note 23, ¶ 373; Blagojević (Trial Chamber), *supra* note 23, ¶ 667; Brđanin (Trial Chamber), *supra* note 23, ¶ 684; Semanza (Trial Chamber), *supra* note 23, ¶ 317; Karadžić (Trial Chamber), *supra* note 23, ¶ 541.

30. Karadžić (Trial Chamber), *supra* note 23, ¶ 541. *See also* Prosecutor v. Mladić, Case No. IT-09-92-T, Judgment in the Case, ¶ 3436 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017) [hereinafter Mladić (Trial Chamber)]; Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment in the Case, ¶ 512 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003) [hereinafter Stakić (Trial Chamber)]; and, for an extensive discussion, Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment in the Case, ¶ 19–28 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) [hereinafter Stakić (Appeals Chamber)].

31. *See* Stakić (Trial Chamber), *supra* note 30, ¶ 512; Brđanin, (Trial Chamber), *supra* note 23, ¶ 685; Karadžić (Trial Chamber), *supra* note 23, ¶ 541. In that regard, the ICTY appears to have abandoned the previous stance of the *Jelisić* Trial Chamber, which would still have accepted the existence of a "distinct group" composed of "all individuals thus rejected." Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment in the Case, ¶ 71 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) [hereinafter Jelisić (Trial Chamber)].

32. For a different view, *see* Nersessian, *supra* note 16, at 301, who appears to accord positive characteristics to atheists as a group ("they appear to share common practices and a similar belief system").

of the elements of the crime has to be performed for each of the relevant groups.[33]

A fourth aspect is more controversial. While, in light of the above considerations, the group in question certainly has to be protected under the Genocide Convention, the question whether the targeted entity has to be different from the perpetrator's own group, is more difficult to answer.

From one perspective, it may seem strange to raise this point in the first place: if genocide is seen as a particularly strong example, and perhaps the ultimate expression, of "othering,"[34] then the fact that the targeted group is distinct from the perpetrator group would appear to be an inevitable element of the crime.

Not everybody, however, agrees with that view. In 1979, when the atrocities committed in Cambodia under the Khmer Rouge were discussed in the U.N. Commission on Human Rights, Abdelwahab Bouhdiba (Chairman of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), having provided an outline of the harrowing crimes committed against the people of Cambodia, concluded that the situation "constituted nothing less than autogenocide."[35] Others have followed that understanding, with Benjamin Whitaker asserting that the definition of genocide did "not exclude cases where the victims are part of the violator's own group."[36]

It is true that the Convention does not expressly exclude the perpetrator's own group from the range of protected groups. What is more—if the protected interest of the law against genocide is indeed understood to be the group as such, rather than the interests of individuals,[37] there is, prima facie, no reason why a group should be withdrawn from the remit of the Convention merely because the perpetrator, too, is one of its members. Difficulties arise due to different, but interlinked,

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33. *See* Stakić (Trial Chamber), *supra* note 30, ¶ 512; Brđanin (Trial Chamber), *supra* note 23, ¶ 686; Karadžić (Trial Chamber), *supra* note 23, ¶ 541.

34. *See supra* text at note 1.

35. U.N. ESCOR, Comm. on H.R. on Its Thirty-Fifth Session, Summary Rep. of the First Part (Public) of the 1510th Meeting, ¶ 22, U.N. Doc. E/CN .4/SR.1510 (Mar. 9, 1979).

36. U.N. ESCOR, Comm. on H.R., Sub-Commission on Prevention of Discrimination and Prot. of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned, revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by Mr. B. Whitaker, ¶ 31 U.N. Doc. E/CN .4/Sub.2/1985/6 (July 2, 1985). *See also* Nersessian, *supra* note 16, at 310; HELEN FEIN, GENOCIDE: A SOCIOLOGICAL PERSPECTIVE 20 (1993).

37. *See*, on the debate, CLAUS KREß, *VStGB § 6, in* 9 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH 1302 (Christopher Safferling ed., 4th ed. 2022).

aspects of the crime. If the "intent" to destroy is to be understood (along with the prevailing view in the international criminal tribunals)[38] as referring to the emanation of a volitional element, then the perpetrator must be held not only to accept the destruction of a substantial part of their own group, but to "seek" its destruction.[39] If, furthermore, intent to destroy the group "as such" is understood as denoting that the victims were targeted because of their membership of the protected group,[40] then the destruction of their own group must be held to have been the underlying motive of the perpetrator's acts.[41] Situations of that kind are not inconceivable—mass suicides among religious cults, for instance, do exist[42]—but the considerations outlined above exert a limiting effect on their historical prevalence.

All of the above-named points are reflections which approach the group concept on a general level only; they reveal little about the way in which the actual determination has to be performed. It is in this regard, however, that by far the greatest challenges relating to the assessment of protected groups arise. The question, in particular, as to the perspectives and parameters that have to be employed in the determination of the relevant groups, has received diverging answers in Trial Chambers and literature alike.

The task of group determination escapes simple solutions not least because—along with the interpretation of other aspects of the crime—it moves uneasily between two principles which underlie the creation of the law against genocide: the stigmatic principle on the one hand, and the protective principle on the other.[43]

The latter notion, which can be traced back to the rule of effectiveness as a principle of treaty interpretation,[44] seeks to counter the

38. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment in the Case, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) [hereinafter Krstić (Appeals Chamber)]; Blagojević (Trial Chamber), *supra* note 23, ¶ 656.

39. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment in the Case, ¶ 550 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) [hereinafter Krstić (Trial Chamber)]. *See also* Akayesu (Trial Chamber), *supra* note 14, ¶ 498 ("clearly seeks to produce"); Prosecutor v. Jelisić, Case No. IT-95-10-A, Decision of Appeal, ¶ 46 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) [hereinafter Jelisić (Appeals Chamber)] ("seeks to achieve").

40. *See* Rutaganda (Trial Chamber), *supra* note 23, ¶ 61.

41. Regarding the understanding of "as such" as motive, *see* Paul Behrens, *Genocide and the Question of Motives*, 10 J. INT'L CRIM. JUST. 501, 508–10 (2012).

42. *See, e.g.*, David Chidester, *Rituals of Exclusion and the Jonestown Dead*, 56:4 J. AM. ACAD. RELIGION 681, 682–86 (1988) (on the 1978 killings at the Peoples Temple Agricultural Cooperative in Guyana).

43. For a more detailed discussion on this, *see* BEHRENS, *supra* note 24, at 237–53.

44. *See* Fisheries Jurisdiction (Spain v. Canada), Judgment, 1998 I.C.J. Rep. 432, 455 ¶ 52 (Dec. 4).

danger that an overly restrictive interpretation of the Convention may lead to an undue reduction in the scope of the law and in turn to a lack of protection for the victims and unwarranted escape routes for potential perpetrators. It would thus militate for a more extensive reading of the prohibition of genocide, taking into account in particular that the Convention seeks "to safeguard the very existence of certain human groups and . . . to confirm and endorse the most elementary principles of morality."[45]

The stigmatic principle, on the other hand, militates for a narrower interpretation. It finds its basis in the understanding of genocide as a crime that is "condemned by the civilized world,"[46] that constitutes an "odious scourge"[47] and "shocks the conscience of mankind";[48] in other words, as a crime of a particular gravity which sets it aside from other reprehensible forms of human behavior. As such, it is unavoidable that the perpetrator has to negotiate a certain threshold; if the boundaries of genocide were set too wide, the crime would fail to fulfill the requirements of the stigmatic principle. The need for a more restrictive interpretation is further put in focus through the consideration of the applicable interpretive principles of international criminal law, not least the rule *nullum crimen sine lege stricta*.[49]

The main approaches that have been advanced towards the determination of groups protected under the Genocide Convention and subsequent instruments are discussed in the following Part, which also examines the chief points of critique that they invite.

III. Approaches Towards Group Determination and Their Evaluation

A. *Finding the Right Approach: Introductory Remarks*

The international criminal tribunals, it appears, are aware of the challenge caused by the need to reach a determination of the protected groups and have noted, in several decisions, that there are no "generally" and "internationally accepted" definitions of the four groups.[50]

45. Reservations on the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, at 23 (May 28) [hereinafter Genocide Reservations].

46. Genocide Convention, *supra* note 2, Preamble.

47. *Id.*

48. Genocide Reservations, *supra* note 45, at 23.

49. *See* on this in more detail, *infra* Part IV.A.

50. Rutaganda (Trial Chamber), *supra* note 23, ¶ 56; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 161 (Jan. 27, 2000) [hereinafter Musema (Trial Chamber)];

That seems a somewhat sweeping observation. The international community certainly had to deal with groups protected under the law against genocide before, if in different contexts: the concept of nationality is essential to the Hague Convention on Nationality Laws,[51] race and ethnic origin to that of the Convention against Racial Discrimination,[52] religion to that of the leading human rights treaties.[53] While it is true that not all of the treaty provisions led to clear group definitions by the authorized supervisory bodies, some definitions do exist (such as that provided by the International Court of Justice (ICJ) in the *Nottebohm* case on nationality),[54] while in other cases, attempts have been made by human rights bodies to approach a concept through the stipulation of positive or negative examples.[55]

At the same time, the fact that group concepts have been approached in other areas of the law does not necessarily mean that a direct translation of the conclusions reached there to the field of international criminal law is appropriate (or indeed, always possible).

The question of racial groups may serve as an example. On those (relatively rare) occasions where an instrument provides for a definition of "race," the temptation may be great to apply it to the law of genocide as well. Directive 2011/95/EU of the European Parliament and the Council is one such instance: dealing, *inter alia*, with questions of refugees and the persecution they face (within the meaning of Article 1 (A) of the 1951 Refugee Convention),[56] it approaches in Article 10(1)

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 65 (June 7, 2001) [hereinafter Bagilishema (Trial Chamber)].

51. *See* Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, Apr. 12, 1930, 179 L.N.T.S. 89.

52. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1), Dec. 21, 1965, 660 U.N.T.S. 195.

53. *See* International Covenant on Civil and Political Rights art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9(1), Apr. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; American Convention on Human Rights art. 12(1), Nov. 21, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; African Charter on Human and Peoples' Rights art. 8, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter].

54. Nottebohm Case (Second Phase) (Liechtenstein v. Guatemala), Judgment, 1955 I.C.J. Rep. 4, 23 (Apr. 6) [hereinafter Nottebohm].

55. *See*, on the concept of religion, Human Rights Committee, General Comment No. 22: Article 18, Freedom of Thought, Conscience or Religion, U.N. Doc. CCPR/C/21/Rev.1/Add.4, ¶ 2 (Jul. 30, 1993); C. v. United Kingdom, App. No. 10358/83, 37 Eur. Comm'n H.R. 142, 147 (Dec. 15, 1983).

56. Convention relating to the Status of Refugees art. 1(A), July 28, 1951, 189 U.N.T.S. 150, as amended by the New York Protocol of 31 January 1967, 606 U.N.T.S. 267 [hereinafter Refugee Convention].

the concept of "race" (as a potential reason for persecution).[57] Its very wording, however, makes clear that the concept used there is wider than that which has applicability in the Genocide Convention—the Article of the 2011 Directive specifies that "race" is to apply not only to "colour" and "descent," but also to "membership of a particular ethnic group," and thus combines two categories that found distinct mention in the Genocide Convention. In other situations again, it is the objective of a particular field of law that makes concepts employed within its framework less suitable for direct transfer to the area of international criminal law. Human rights law and international criminal law, for instance, seem to pursue similar objectives, but they do so through instruments that target different addressees—States in the field of human rights, individuals in the field of international criminal law. This may justify different interpretations of concepts that operate under the same names.[58]

Religious groups furnish an example.

The concept of religion has, of course, for a long time been considered in human rights law,[59] where it constitutes one of those instances in which the relevant supervisory bodies engaged in definitional efforts through the stipulation of exemplars for the relevant categories.[60] If the understanding of the concomitant right is taken as a starting point, there may be good reason to conclude that freedom of religion also encompasses "freedom from religion";[61] and would thus embrace atheism in its protective scope as well.

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57. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), art. 10 (1), 2011 O.J. (L 337) 9, 16.

58. *See, e.g.*, (also with regard to the concept of "race") Lingaas, *supra* note 5, at 515, critiquing suggestions that the term "racial group" be interpreted in line with the CERD definition.

59. *See* sources cited *supra* note 53.

60. *See* sources cited *supra* note 55.

61. That seems to be the understanding given to the right by Judge Bonello. *See* Lautsi v. Italy, App. No. 30814/06, ¶ 2.6 (Mar. 18, 2011), https://hudoc.echr.coe.int/tkp197/view.asp#{%22itemid%22:[%22001-104040%22]} (Bonello, J., concurring). The point is not entirely uncontested: the fact, after all, can be taken into account that the relevant right, as phrased in the leading human rights instruments, does not refer to religion alone. *See* ECHR, *supra* note 53, art. 9 (1) ("freedom of thought, conscience and religion"); ICCPR, *supra* note 53, art. 18(1) ("freedom of thought, conscience and religion"). *See also* ACHR, *supra* note 53, art. 12(1) ("freedom of conscience and of religion"); Banjul Charter, *supra* note 53, art. 8 ("[f]reedom of conscience, the profession and free practice of religion"). It is, however, an understanding that correlates well with the ECtHR's own findings in Kokkinakis v. Greece, where the Court concluded that the right "*in its religious dimension* … is also a precious asset for atheists, agnostics, sceptics and the

But where the consideration of atheists as a protected group is concerned, international criminal law, as discussed above, has chosen a different route—at least if the view is followed that the group determination for atheists is done on a negative basis rather than through the stipulation of positive parameters.[62] From the point of view of international criminal law, the narrower protective scope of the norm makes sense, not least because the more restrictive understanding of "religious groups" arguably enhances the foreseeability of the provision and thus leads to better compliance with the principle of legality.[63]

For the international criminal tribunals, these considerations mean that the determination of the protected groups is a task which still has to be performed by the judges themselves, even in instances where related concepts may exist in other areas of international law. It is in fact at this point, at the selection of suitable parameters for group determination, that the greatest difficulties arise. The Trial Chambers have employed both objective and subjective methods (as well as mixed approaches) to approach the concept of protected groups, but neither are they consistent in the adoption of these approaches,[64] nor are the individual approaches themselves free from justified critique. And while reference to "objective" and "subjective" criteria is made by the judges themselves,[65] the question also lingers as to whether there is wisdom in a differentiation along these lines—a point to which this Article will return.[66]

B. *The Objective Approach and Its Problems*

The objective approach is usefully understood as a method which presupposes that groups constitute categories that exist in the outside world, independent from the perspective of those that are affected by the situation in which the alleged crime has occurred. As such, Trial Chambers evaluating charges of genocide would, under this approach,

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unconcerned." Kokkinakis v. Greece, App. No. 14307/88, ¶ 31 (May 25, 1993) [hereinafter Kokkinakis] (emphasis added), https://hudoc.echr.coe.int/eng#{%22appno%22:[%2214307/88%22],%22itemid%22:[%22001-62384%22]}.

62. *See* Nersessian, *supra* note 16, at 300–01. *See also supra* note 32 and accompanying text.

63. *See infra* Part IV.A.

64. *See* Lingaas, *supra* note 5, at 505 (with particular reference to the definition of racial groups before the ICTR). *See also* Verdirame, *supra* note 8, at 588–89 (noting, at least where ethnic groups in the Rwandan context are concerned, a shift within the case law from the objective approach to the subjective approach).

65. *See* Semanza (Trial Chamber), *supra* note 23, ¶ 317; Blagojević (Trial Chamber), *supra* note 23, ¶ 667; Brđanin (Trial Chamber), *supra* note 23, ¶ 684.

66. *See infra* text accompanying notes 90–93.

be able to stipulate certain parameters that characterize the relevant group—helped sometimes by scholarly or legal opinion that may already have existed in the field.[67]

The clearest example for the application of the objective approach was provided in *Akayesu*, where the Trial Chamber deemed it "necessary to consider a definition of the group as such" and did in fact proceed to provide definitions for each of the four groups to which the Genocide Convention referred.

It thus noted that a national group was "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[68] It constituted one of the above-named situations of an international criminal tribunal being able to rely on existing legal opinion: in this instance, on a formula which the ICJ had provided in the *Nottebohm* Case.[69]

An "ethnic group" was considered by the *Akayesu* Trial Chamber to be "generally defined as a group whose members share a common language or culture";[70] and it was here that the Chamber invoked particular criteria—such as identity cards, which marked their bearers as "Tutsi"—in evidence of its conclusions on the relevant determination.[71]

For racial groups, the Trial Chamber relied on the "conventional definition," which was "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[72] In that regard, the existing literature would have been able to assist in the group determination: Pieter Drost, for one, had noted in 1959 that the word "racial" was "usually taken to refer mainly to external, physical features and appearance . . . ."[73] And while later authors were willing to take similar definitions aboard in their approaches to the protected group under the Genocide Convention,[74]

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67. For an instance of scholarly opinion preceding Trial Chamber judgments, *see infra* text accompanying note 73 and for legal opinion, *infra* text accompanying note 69. But see also, on the difficulty of considering a group determination that is done in a different area of the law, *supra* text accompanying notes 59–63.

68. Akayesu (Trial Chamber), *supra* note 14, ¶ 512.

69. *See* Nottebohm, *supra* note 54, at 23.

70. Akayesu (Trial Chamber), *supra* note 14, ¶ 513.

71. *See supra* text accompanying note 22.

72. Akayesu (Trial Chamber), *supra* note 14, ¶ 514; *see also* Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment in the Case, ¶ 98 (Int'l Crim. Trib. for Rwanda May 21, 1999) [hereinafter Kayishema (Trial Chamber)].

73. Pieter Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples* 62 (A.W. Sythoff 1959)

74. Werle and Jessberger, for instance, refer to the concept of race (while noting that it was "not unproblematic given its abusive usage") as one to "describe social groups whose members

the concept, as will be seen, is not unproblematic;[75] indeed, it may be considered exemplary for the difficulties that arise when attempts are made to approach the determination of a protected group on the basis of objective parameters alone.[76]

A "religious group" was defined in *Akayesu* as one "whose members share the same religion, denomination or mode of worship."[77] It is a vague formula (and not devoid of tautology), but, as in the case of the other groups, the Trial Chamber proceeded here through the stipulation of (seemingly) objective criteria which served to define the group on the basis of positive parameters, rather than through a negative determination.[78]

Nor is this method without its merits: it is evidence at least of the Trial Chamber's efforts to reach a better approximation of the concepts than that provided in the text of the Genocide Convention, and it is a procedure which is certainly preferable to the shortcut taken by some later Chambers, which simply took "judicial notice" of the fact that "citizens native to Rwanda were severally identified according to the ethnic classifications of Hutu, Tutsi and Twa,"[79] or, even less helpfully, stated that "the existence of widespread or systematic attacks against a civilian population based on Tutsi ethnic identification" was a "notorious fact . . . not subject to reasonable dispute."[80]

There is, too, a certain seductive appeal to the employment of objective parameters: by making use of them, the Chambers seem to have laid down formulae which provide guidance for future situations of this kind. At least prima facie, the objective approach seems to ensure that like situations are treated alike.

And yet, it is an approach which is accompanied by particular problems.

For one, it is the very fact that the "objective approach" may be removed from the perception of persons involved in the relevant situation that can lead to questionable results. In *Jelisić*, the Trial Chamber

exhibit the same inherited, visible physical traits, such as skin colour or physical stature." GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 345 (4th ed. 2020).

75. *See* Lingaas, *supra* note 5, at 497–98.

76. *See infra* text accompanying notes 124-26.

77. Akayesu (Trial Chamber), *supra* note 14, ¶ 515. *See also* Kayishema (Trial Chamber), *supra* note 72, ¶ 98.

78. *See supra* text accompanying note 30.

79. Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T, Judgment in the Case, ¶ 10 (Int'l Crim. Trib. for Rwanda Dec. 18, 2008). *See also* Seromba (Trial Chamber), *supra* note 9, ¶ 4.

80. Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 29 (Int'l Trib. for Rwanda June 16, 2006).

itself observed that attempts "to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria" may well yield results which did "not necessarily correspond to the perception of the persons concerned by such categorisation."[81] An example employed by several authors is that of the categorization of Jews in Nazi Germany: the definition reached under the Nuremberg laws[82] may well have been exemplary for the perpetrators' perspective,[83] yet an "objective" understanding may have reached quite different results.[84]

The consideration of certain groups also casts doubt on the assumption that an objective view—a bird's eye perspective, as it were—can invariably be considered a satisfactory method of group evaluation.

Religious groups are an example. It is curious that the same Trial Chamber which voiced criticism on the objective approach, where national, ethnical, and racial groups were concerned,[85] found that "the objective determination of a religious group still remains possible."[86] In this case, it is the potential deviation of the objective perspective from the one taken by the victim group that appears challenging. Religious groups seem intimately connected to the innermost beliefs of their members, and the question arises whether an understanding of the relevant group on the basis of parameters that are entirely divorced from the views of persons affected by the situation can be made.[87]

At the same time, the criticism that the objective view may differ from subjective perceptions of the relevant protected group also risks introducing the appearance of circular reasoning. By itself, the observation that such a clash is problematic, indicates that a prioritization of one method (the subjective approach) over the other (the objective perspective) has already been made.

That does not mean that there cannot be good reasons why the subjective view—or at least the involvement of certain individualistic parameters in the group determination—is indicated; not least on the

81. Jelisić (Trial Chamber), *supra* note 31, ¶ 70.

82. More precisely under the Erste Verordnung zum Reichsbürgergesetz [First Regulation on the Reich Citizenship Act], Nov. 14, 1935, RGBL I/125 1333, 1334, § 5 (Ger.).

83. *See* Verdirame, *supra* note 8, at 588; Nersessian, *supra* note 16, at 311.

84. See the discussion in Verdirame, *supra* note 8, at 588, but also his reference to reaching consensus on an "objective" approach to begin with, *id.*

85. *See supra* text accompanying note 81.

86. Jelisić (Trial Chamber), *supra* note 31, ¶ 70. On a critical view of this, *see also* Nersessian, *supra* note 16, at 309 n. 97.

87. There may, however, be reason to consider that the perspective of persons affected by the situation may be formed by that of the perpetrator group (*see infra* Part IV.B.).

basis of the principle of legality, which puts the perspective of the perpetrator in particular focus (a point to which this study will return).[88]

When considered on its own, however, it is difficult to reach the conclusion that the subjective view should be inherently superior to the objective one, or that the objective approach should be dismissed solely on the basis that it may clash with the subjective assessment. On the contrary, the argument can be advanced that a definition based on objective parameters does at least offer a concept which can be applied across a multitude of societies and in any situation in which charges of genocide have arisen.

Closer inspection of the objective approach, on the other hand, reveals difficulties that are not easily dismissed.

A point that goes to the core of the method is the very question of how "objective" the objective approach truly is. If the objective approach is indeed understood as one that is based on the assumption of groups as categories existing in the outside world,[89] an obvious way of reaching group determination from this perspective would be to draw on the help of experts who are independent in the sense that they do not belong to the directly affected parties. But even in this regard, difficulties arise.

When Benedict Anderson, in a famous example, offers the definition of a "nation" as an "imagined political community," since its members, even in the case of small nations, "will never know most of their fellow-members, meet them, or even hear of them," while in the minds of each of them still "lives the image of their communion,"[90] the question may arise whether, simply because a political scientist, and thus an "outside expert" has offered the relevant determination along these lines, a truly "objective" approach has been established. This approach, too, one could argue, has to rely on the subjective imaginings of the group members.

Similar situations can arise when the relevant definition had been offered by courts themselves. The *Akayesu* Trial Chamber, as noted above, had, for the concept of "national groups," referred back to the definition provided in *Nottebohm*.[91] Yet the *Akayesu* judges left out the sentence that followed the quote they provided: nationality, in the view of the ICJ "may be said to constitute the juridical expression of the fact

88. *See infra* Part IV.A.

89. *See supra* text accompanying note 67.

90. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (2006).

91. *See supra* text accompanying note 69.

that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State."[92] That, however, introduces subjective parameters: if the ICJ, among a variety of criteria on which they could have chosen to rely (such as the possession of passports) chose to focus on features such as "closeness," it appears that it was not prepared to dispense with aspects which require an assessment from the perspective of the affected persons.

In the case of religious groups, an assessment along similar lines can easily materialize: the fact that an "outside expert" has provided a definition does not necessarily mean that a complete dispensation with subjective parameters (such as, for instance, the beliefs held by group members) has taken place.[93]

A further problem relating to group determination from the objective perspective lies in the fact that a certain fluidity often characterizes the groups protected under the Genocide Convention.

With regard to the Hutus and the Tutsis as ethnic groups in Rwanda, Guglielmo Verdirame observes that "transitions" from one group to the other were possible and refers, *inter alia*, to the example of Froduald Karamira.[94] At the time of the conclusion of his trial in Rwanda in 1997, it was reported that Karamira was "born a Tutsi" but used "a Rwandan custom" to become a Hutu.[95] A court in Kigali found that he had been one of the leaders of Interahamwe, the militia that had perpetrated many of the killings in Rwanda in 1994; the charges against him also included inciting genocide through Radio Rwanda and Radio-Television Libre de Mille Collines (RTLM).[96]

Even the characteristics of a racial group, in David Nersessian's view "perhaps the most immutable of all,"[97] cannot be said to be devoid of fluidity. Carola Lingaas for one takes exception to the view of race as a "static concept," noting, rightly, that "it has been interpreted differently at different times"[98] and (perhaps more controversially) that it "is

92. Nottebohm, *supra* note 54, at 23.

93. *See also*, for the explicit incorporation of the views of affected parties in a seemingly objective assessment, *supra* text accompanying note 22.

94. *See* Verdirame, *supra* note 8, at 589 n.51.

95. *Tutsi Sentenced to Die for Role in Rwanda Genocide*, THE TORONTO STAR (Feb. 15, 1997), https://www.proquest.com/newspapers/tutsi-sentenced-die-role-rwanda-genocide/docview/437621294/se-2.

96. *See id. See also* Will Scully, *Prominent Genocide Suspect Goes on Trial in Rwanda*, ASSOCIATED PRESS (Jan. 30, 1997).

97. Nersessian, *supra* note 16, at 306.

98. *See* Lingaas, *supra* note 5, at 485.

a fluid concept that changes with the use a person makes of it."[99] Changes at least to the "physical traits," which the *Akayesu* Trial Chamber had marked as characteristics of racial groups,[100] are certainly possible.[101]

Considerations of this kind have led some scholars to take the view that at least a purely objective approach is simply not supportable. Lingaas thus finds that "[t]he group no longer appears as a static, but moreover as a dynamic construct . . . Being exposed to constant change, the group cannot and should not be defined in an objective manner only."[102]

Yet in this sweeping form, this observation is open to critique. Why, one may ask, should it not be possible to define the group objectively, yet flexibly? The rule historically used by the builders of Lesbos comes to mind ("[a] flexible (lead) ruler which [could] be bent to fit what is being measured"[103])—it led Aristotle to observe that, "just as that rule [was] not rigid but [could] be bent to the shape of the stone, so a special ordinance [can be] made to fit the circumstances of the case."[104] Or, on the contrary, a formula can be devised that is so general that it would cover a multitude of cases across a range of different time periods. It is more convincing when the point is made that at least a "rigid" objective definition of a group may not be possible because of other factors that have an impact on the concept[105] which may ultimately be subjective in nature.[106] At least on a pragmatic level, challenges in the application of the objective approach tend to manifest themselves in that context: the fluidity of the relevant group will often be due to aspects that depend on subjective decisions or perceptions.

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99. *Id.* at 511. The debate on that point is ongoing. *See, e.g.*, Sarita Srivastava, *"I wanna be white!" Can we Change Race?*, CONVERSATION (June 26, 2017), https://theconversation.com/i-wanna-be-white-can-we-change-race-78899; Rebecca Tuvel, *In Defense of Transracialism*, 32(2) HYPATIA 263 (2017).

100. Akayesu (Trial Chamber), *supra* note 14, ¶ 514.

101. Nersessian, *supra* note 16, at 306.

102. *See* Lingaas, *supra* note 5, at 513.

103. *Lesbian Rule*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/lesbian-rule_n?tab=meaning_and_use#158069553100 (last visited Apr. 25, 2023).

104. ARISTOTLE, THE NICHOMACHEAN ETHICS bk. 5, ch. 10, pt. 7 (Harris Rackham trans., Harvard Univ. Press rev. ed. 1934).

105. *See* Rights of Minorities in Upper Silesia (Minority Schools), Dissenting Opinion by Judge Nyholm, 1928 P.C.I.J. (ser. A) No. 15, at 65 (Apr. 26) [hereinafter Nyholm Opinion]; Verdirame, *supra* note 8 at 590–591.

106. The difficulty with this argument is, however, that it again introduces a notion of circularity: it appears to presuppose a certain concept of the group before the "appropriate" parameters for defining the group are discussed.

Even where, as in *Akayesu*, an attempt has been made to define a protected group on the basis of objective parameters, further difficulties may arise due to its interrelationship with other groups under the Convention.

For one, the question may arise as to how the phenomenon of "multiple belonging" in this context is to be evaluated.

The point has been made above that, in the view of the Trial Chambers, a separate assessment of the elements of genocide has to be performed for each of the relevant groups that the perpetrator targets,[107] so that, for instance, the targeting of people who belong to both a national and a religious group warrants separate evaluations. However, the possibility also exists that the persons who are targeted belong to different groups that could fall under the same category; that, for instance, the victims belong to more than one national group. It is this kind of scenario that puts particular strain on an assessment that proceeds by objective parameters only.

Where multiple belonging in the field of national groups is concerned, the problem of the involvement of subjective parameters arises again[108]—at least if the *Nottebohm* decision is taken as the standard by which the relevant national group has to be determined.

Multiple belonging plays a prominent role also where religion is concerned, raising the possibility that individuals may belong to more than one religious group. The prevalence of multiple religious belonging, in particular in Asia, has been pointed out by several authors: Peter Phan, for instance, notes that in countries "such as China, Japan, Korea, Vietnam, India, Nepal, and Sri Lanka, multiple religious belonging is a rule rather than an exception, at least on the popular level."[109]

That raises questions not only with regard to the membership of individual believers, but also with regard to the approach taken towards the definition of a particular religion. An "objective" approach, in Western countries, may, as Jan Van Bragt points out, perceive multiple belonging as "fundamentally at odds with the traditional understanding of religion[,]"[110] an understanding that at least seems to hold true where Judaism, Christianity, and Islam are concerned.[111]

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107. *See supra* text accompanying note 33.

108. *See supra* text accompanying note 92.

109. Peter C. Phan, *Multiple Religious Belonging: Opportunities and Challenges for Theology and Church*, 64 THEOLOGICAL STUD. 495, 498 (2003). For Japan, see Jan Van Bragt, *Multiple Religious Belonging of the Japanese People*, *in* MANY MANSIONS? MULTIPLE RELIGIOUS BELONGING AND CHRISTIAN IDENTITY 7, 7–19 (Catherine Cornille ed.).

110. Van Bragt, *supra* note 109, at 17.

111. *See* Phan, *supra* note 109, at 498.

This, however, raises doubts about the adequacy of an understanding of the group that would exclude the subjective perspective of members whose belief system does embrace adherence to more than one faith. An objective approach, however (a view, for instance, based on the opinion of more progressive scholars of religion) that does not insist on such limitations on the group element leads to even more fundamental questions: does an identifiable group still exist if it has no discernible boundaries?

The problem of open or ill-defined boundaries invites consideration of a further point, which likewise casts doubt on the wisdom of the purely objective approach that the *Akayesu* Trial Chamber promoted. If a protected group has no clear-cut boundaries, the question arises whether, on the basis of strictly objective parameters, a group that is separate from that of the perpetrator can be identified.

The point has been made above that the commission of genocide is, in theory, possible, even if the target group is the group to which the perpetrator belongs.[112] However, if the view is followed that a volitional element is in these cases still required, i.e., that the perpetrator must "seek" the destruction of their own group "as such,"[113] the practical relevance of "auto-genocide" in cases in which a separation between victim group and perpetrator group is not possible, appears limited.

The significance of this point became clear in the situation of Rwanda. Apart from the fact that a distinction between Hutus and Tutsis on the basis of purely objective parameters was difficult because of the various commonalities they shared,[114] the above mentioned fluidity of the group—the fact that persons could "transition" from one group to the other—further exacerbated the problem.[115] A further example in that context was that of Robert Kajuga,[116] one of the leaders of the Interahamwe militia.[117] According to Human Rights Watch, Kajuga's father was a Tutsi, his mother a member of the Hutu group;[118] but his father had reportedly "acquired Hutu identity papers for his

112. *See supra* text accompanying notes 35–42.

113. *See supra* text accompanying notes 38–42.

114. *See supra* text accompanying note 17.

115. *See supra* text accompanying notes 94–96.

116. *See* Verdirame, *supra* note 8, at 589 n.51.

117. *Leave None to Tell the Story: Genocide in Rwanda*, HUMAN RIGHTS WATCH (Mar. 1, 1999), https://www.refworld.org/docid/45d425512.html.

118. *Id.*

family[.]"[119] At the *Semanza* Trial, Defense Counsel for Semanza pointed out, with reference to Kajuga, that "[t]hose who carried out the massacres were led by a Tutsi";[120] and the sociologist and former Rwandan minister Pascal Ndengejeho, testifying for the Defense, asked the question "if … someone working on behalf of the Tutsis [prepared] the massacre of the Tutsis, would that be called genocide? If a Hutu prepared the massacres of the Hutus, would that be called genocide?"[121]

The employment of purely objective parameters is not helpful in this context; it is, on the contrary, capable of blurring the lines between perpetrator and victim groups.

What is more, the use of exclusively objective parameters may not only fail to distinguish between particular groups in a particular case—it invites doubts about the protected groups on a more fundamental level. In other words, from an objective perspective, the question may well be asked whether the drafters of the Convention were correct in assuming (as far as they did)[122] that the groups to which they referred do lead an objective existence to begin with.

No group has attracted more doubt in that regard than the "racial group" to which the Convention refers. Intermarriage and other mixing of racial groups, after all, occurred not just in the Rwandan context,[123] nor are the "hereditary physical traits" to which the *Akayesu* Trial Chamber made reference[124] distributed along "clear boundaries[.]"[125] Taken together, these are aspects which have made geneticists reluctant to speak of the existence of "races."[126]

Similar doubts appear in the report of the Commission of Experts that in 1994 analyzed the atrocities in Rwanda and noted that "to recognize that there exists discrimination on racial or ethnic grounds, it is

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119. Jeevan Vasagar, *From Four-Star Sanctuary to Star of Hollywood: The Hotel that Saved Hundreds from Genocide*, THE GUARDIAN (Feb. 16, 2005), https://www.theguardian.com/world/2005/feb/16/rwanda.film.

120. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Continued Trial Transcript 61, lines 14–16 (Int'l Crim. Trib. for Rwanda January 29, 2002) (Mr. Alao).

121. *Id.* at 63, lines 14–19 (Mr. Ndengejeho).

122. For the expression of a differentiating view at codification stage, *see, e.g.*, Sixth Committee, 75th Meeting, U.N. Doc. A/C.6/SR.75 113–14 (Mr. Petren, Sweden), (Oct. 15, 1948) [hereinafter Sixth Committee], with particular reference to religious groups.

123. *See* on that Sunga, *supra* note 17, at 112. *See also* Sixth Committeee, *supra*, note 122, 116 (Mr Demesmin, Haiti).

124. *See supra* text accompanying note 72.

125. THOMAS HYLLAND ERIKSEN, ETHNICITY AND NATIONALISM: ANTHROPOLOGICAL PERSPECTIVES 6 (Pluto Press 3d ed. 2010).

126. *Id.* at 5–6. *See also* Lingaas, *supra* note 5, at 487.

not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact."[127]

In the literature, Thomas Eriksen notes that the concept of race can still possess relevance in as far as it "inform[s] people's actions; at this level, race exists as a cultural construct, whether it has a biological reality or not[.]"[128] The understanding that derives from that, as Lingaas has it, is one of races as "socially constructed rather than [being] a biologically given."[129]

And there may be reason to believe that the international criminal tribunals themselves have become more open towards the understanding of race—and of other groups—as "social constructs."[130] But a group determination that proceeds on the basis of a constructed, rather than a "given" category, is, at the same time, a form of identification that inevitably has to involve the consideration of subjective parameters.[131] The conclusion to be drawn from the understanding of racial groups may well be that the objective approach, at least if based on groups that lead an outside existence, which is independent from the perspective of affected parties,[132] is bound to fail, because certain groups, in spite of the mention they receive in the Genocide Convention, cannot assert an existence in that sense of the word.

C. *The Subjective Approach and Its Challenges*

In light of considerations of this kind, it is understandable that the international criminal tribunals have become increasingly critical of a "purely objective approach" (with the *Krstić* Trial Chamber going as far as to note that an "attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention")[133] and have been willing to include more subjective parameters in their assessment.[134] One of the clearest expressions of support for the subjective view is provided in *Jelisić*, where the Trial Chamber voiced distinct criticism of the

127. U.N. Secretary-General, Letter dated Dec. 9, 1994 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1994/1405, annex, Final report of the Commission of Experts established pursuant to Security Council resolution 935 ¶ 159 (Dec. 9, 1994).

128. ERIKSEN, *supra* note 125, at 6.

129. *See* Lingaas, *supra* note 5, at 485–86.

130. *See* Verdirame, *supra* note 8, at 592.

131. *See* Lingaas, *supra* note 5, at 513.

132. *See supra* text accompanying note 67.

133. Krstić (Trial Chamber), *supra* note 39, ¶ 556.

134. *See* Lingaas, *supra* note 5, at 513; *see also* Verdirame, *supra* note 8, at 589.

objective view and noted that it was "[t]herefore . . . 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."[135]

In theory, the subjective view allows for two different forms of assessment (although in practice, the international criminal tribunals have often utilized elements of both)[136]: the group may identify itself as such ("self identification" in the words of the *Kayishema* Trial Chamber,[137] or identification by the victim group), or the group may be identified as such by the perpetrators of the crime.[138]

The international criminal tribunals were not the first ones to reach this possible understanding of the relevant groups. Group determination performed by the group itself had featured even in the debates in the Sixth Committee, where the Swedish representative (Petren) noted, with regard to religious groups, that "[t]he profession of a faith did not result only from ancestral habit; it was a question to which each person gave a personal answer."[139]

However, in the international criminal tribunals, it is the identification of the group through the perpetrator that has found particular support, leading to the view expressed in the literature that the current understanding of the "subjective approach" in the Trial Chambers is one that refers to the perpetrator's perspective of the group.[140] That may be a somewhat sweeping assessment: the fact remains that some of those Trial Chambers which expressed themselves in strong terms in favor of the perpetrator's perspective did not distinguish particularly well between the determination of the group and determination of membership in the group.[141] It is, at the same time, true that the perpetrator's view has at least in some cases been given priority: the *Jelisić* Trial Chamber, for one, found that it was "the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows

135. Jelisić (Trial Chamber), *supra* note 31, ¶ 70. The Trial Chamber in that case, however, did not engage in a particularly clear distinction between group status and individual membership in the group. *Id.*

136. *See infra* Part III.C.

137. Kayishema (Trial Chamber), *supra* note 72, ¶ 98; *see also* Brđanin (Trial Chamber), *supra* note 23, ¶ 683.

138. Brđanin (Trial Chamber), *supra* note 23, ¶ 683; *see also* Kayishema (Trial Chamber), *supra* note 72, ¶ 98.

139. *See* Sixth Committee, *supra* note 122.

140. *See* Lingaas, *supra* note 5, at 498.

141. *See* Bagilishema (Trial Chamber), *supra* note 50, ¶ 65. *See also* Ndindabahizi (Trial Chamber), *supra* note 9, ¶ 468.

it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators."[142]

The subjective approach, however, invites difficulties of its own.

If it is applied through reliance on the perpetrator's perspective, it would enable the latter to impose his views on the assessment that the court has to perform. The results can be troubling not only from an ethical point of view.[143]

By so doing, the perpetrator may also bring groups into the protective remit of the Convention which the drafters of the law against genocide had intended to exclude. Groups, for instance, which, from the perspective of outside experts, might have been seen as political in nature, may well receive classification as religious groups, because this is how the perpetrator considered them. If the (contested) view were followed that atheists are covered by the Genocide Convention,[144] then such an assessment may have to apply to certain atrocities committed in Guatemala during the presidency of Ríos Montt, who, according to one observer, held the opinion that the target group were "communists and therefore atheists and therefore . . . demons and therefore you can kill them[.]"[145] In that way, political groups would be brought in through the back door of an interpretive method that relies solely on the perpetrator's perspective.

It ought to be noted that not everybody would consider this problematic. Jean-Michel Chaumont, for one, expressed himself strongly in favor of a view that would include any group, be it ever so arbitrarily chosen, and noted that the relevant group may well exist only in the files of the perpetrator.[146] Going by this perspective, as Nersessian has it, "a virtually unlimited number of protected groups would exist, depending solely upon the creativity of the perpetrator in defining criteria for membership in a particular protected group."[147]

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142. Jelisić (Trial Chamber), *supra* note 31, ¶ 70.

143. On the parallel problem that arises where determination of group membership is concerned, *see* Paul Kim, *The Law of Genocide in the Jurisprudence of ICTY and ICTR in 2004*, 5 INT'L CRIM. L. REV. 431, 440 (2005) (noting that such determination compels us to "no longer speak of the murder of human beings, but . . . distinguish between human beings[.]").

144. *See supra* text accompanying note 32.

145. VINCENT BEVINS, THE JAKARTA METHOD: WASHINGTON'S ANTICOMMUNIST CRUSADE & THE MASS MURDER PROGRAM THAT SHAPED OUR WORLD 227 (Public Affairs 2020).

146. JEAN-MICHEL CHAUMONT, DIE KONKURRENZ DER OPFER: GENOZID, IDENTITÄT UND ANERKENNUNG 182 (Thomas Laugstein trans., Zu Klampen Lüneburg 2001). *See also* Lingaas, *supra* note 5, at 496–97.

147. Nersessian, *supra* note 16, at 312–13. Nersessian's mention of "membership" in this context does not militate against conclusions on the group concept itself: by allowing the

There may still be reasons to consider this an acceptable approach. Without the perpetrators and their particular mindset, there would be no victimization of the group to begin with, and the target of the perpetrators' actions is certainly selected on the basis of their perceptions of the group, with all the stereotypical and prejudicial connotations that may have colored them.

And yet, there would be something strange about convicting an individual perpetrator of genocide if he is the only one who determines the relevant group in this particular way. Nor is that the way that all national jurisdictions take where the perpetrator's belief of the crime differs from that which is "objectively" held. The concept of the "imaginary crime" (*Wahndelikt*) has been used in situations in which the defendant, in full knowledge of the facts, believes that his conduct fulfills a penal norm that does in fact not exist[148] (the perpetrator, for instance, brings foreign currency into another state in the mistaken belief that this is a crime under that state's law). An interpretation error which extends criminal liability to the detriment of the defendant (reversed error of subsumption, *umgekehrter Subsumptionsirrtum*) is often treated in the same way,[149] and it may well be assumed that that is the case when the defendant's determination of the group differs from that which the law may adopt. The criminalizing norm, after all, does exist, as does the legal requirement of the presence of a particular protected group—but the defendant employs an interpretation which is wider than that which has to be given to the law, and it is only because of that that his conduct would fall within the remit of the provision.

Wahndelikt and *umgekehrter Subsumptionsirrtum* lead to the acquittal of the defendant on the particular charge; but other crimes which may have a more extensive scope may of course still be applicable. Following that view, and if a determination of the group element by the individual perpetrator alone is rejected, the possibility exists that a defendant whose assessment of the relevant group differs to his disadvantage from that of his judges may be acquitted of genocide but found guilty of a crime against humanity (for instance, that of extermination or persecution), if the conditions of the latter crime are fulfilled.

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perpetrator to define the membership of the group, the perpetrator would also have discretion to determine the group "as such". *See also supra*, text accompanying note 110.

148. *See* Dietrich Oehler, *Attempted Crimes*, 24 AM. J. COMP. L. 694, 699 (1976).

149. Wilfried Bottke, *Zur Möglichkeit und Strafbarkeit des Untauglichen Versuchs einer Straftat*, 13 JRE 395, 410 n.52 (2005). Bottke offers for this the example of a cleaner who, because she is employed on the premises of a public authority, believes she has the status of a civil servant and that the laws on bribery of civil servants therefore apply to her. *Id. See also* MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 145 (2009).

A subjective approach that relies on group identification as performed by the victims is not without difficulties either.

Problems may well arise on the evidentiary side of the determination: what, for instance, should be considered satisfactory proof for the self-identification of the group? The question can be expected to gain particular significance when there are few survivors of a situation marked by genocide who are able to provide first-hand evidence on the group's understanding of its self, or when the surviving members are reluctant to speak up.[150]

On the substantive side, the problem of potentially deviating standards manifests itself again. Lingaas, while not discounting an approach that takes the perpetrator's perspective into account, also notes that the victim's view "should be given equal weight as the perpetrator's," reasoning that, "[i]f a group perceives itself as being distinct from another group, then this perception would also influence the perpetrator's view of that group."[151]

Yet that is precisely a point that cannot easily be assumed.

The victims may well apply a perspective to the understanding of their own group that is more restrictive than that employed by the perpetrator. In a different context—that of the interpretation of the phrase "particular social group" in the 1951 Refugee Convention[152]—Kirby J, in a 1997 case in the Australian High Court, approved of the view "that self-identity as a member of a particular group cannot be a universal prerequisite" and noted that "many German citizens of Jewish ethnicity did not, in the 1930s, identify themselves as 'Jews.' They conceived of themselves as Germans[,]" without that, however, preventing their persecution as members of a "particular social group."[153] In a similar vein, Nersessian, noting particular patrilineal examples of the determination of the group composition as assessed by the victims themselves, expresses the view that "whether an individual sees himself as a member of a particular group is largely irrelevant to whether or not

150. Nersessian, *supra* note 16, at 311. The problem of determination can be expected to be particularly significant where groups are concerned whose identification may be dependent on fluctuating factors, such as ethnic and national groups. For instance, would the enrolment of children in a school in which a language different from that of their families is spoken amount to an intended change of the relevant ethnic or national group? *See* Nyholm Opinion, *supra* note 105, at 63–64. *See also* the discussion in Verdirame, *supra* note 8, at 590–91, 591 n.57.

151. *See* Lingaas, *supra* note 5, at 514.

152. Refugee Convention, *supra* note 56, art. 1(A)(2).

153. *Applicant A and Another and Refugee Review Tribunal (Joining) v. Minister for Immigration and Ethnic Affairs*, Appeal decision, [1997] HCA 4, ¶ 198.8 (Austl.).

he ultimately is targeted for genocide as part of a perpetrator's efforts to destroy the group."[154]

Yet if the possibility exists that the victims understand the group more restrictively than the perpetrator, it is also possible that they apply a more extensive understanding than that used by the perpetrators or indeed by outside observers. Where that is the case, the difficulties outlined in the context of the perpetrator's perspective[155] recur: a widening of the concept from the victims' perspective may bring groups into the remit of the Convention to which the law, where the literal interpretation is applied, would not grant protection. In the literature, the view has also been expressed that a "purely subjective test" would clash with the object and purpose of the Genocide Convention.[156]

An interpretation that relies exclusively on the victims' understanding of the group is also capable—arguably even more so than a "purely" objective approach—of leading to conflicts with the principle of legality. The possibility, after all, may exist that a perpetrator (in full knowledge of the facts that characterize the group) understands the group as a political faction or a military militia, while the victim group (or indeed the substantial part of it that the perpetrator targets)[157] considers itself as an interconnected entity only due to a particular, shared, spiritual belief, and thus principally as a religious group.[158] Especially in cases in which the perpetrator's view is shared by outside observers, it may be difficult to assert with confidence that the "appropriate" group determination, if understood as the one based entirely on the victims' perspective, would have been foreseeable to the defendant at the relevant moment in time.[159]

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154. Nersessian, *supra* note 16, at 311.

155. *See supra* text accompanying notes 146–47.

156. Nersessian, *supra* note 16, at 313.

157. On the requirement of subjective substantiality, *see* Paul Behrens, *The Crime of Genocide and the Problem of Subjective Substantiality*, 59 GERMAN Y.B. INT'L L. 321 (2016).

158. The fact may be recalled that more than one militia group has been connected to particular belief systems. Both Foday Sankoh, leader of the Revolutionary United Front (RUF) in Sierra Leone, and Joseph Kony, leader of the Lord's Resistance Army (LRA) in Uganda, were described as "messianic" figures. Douglas Farah, *Sierra Leone Rebels Contemplate Life Without Guns*, THE WASHINGTON POST (Apr.13 2001), https://www.washingtonpost.com/archive/politics/2001/04/14/sierra-leone-rebels-contemplate-life-without-guns/a0e8573c-829c-4eed-90e9-b27b4bc07cfd/; Agence France Presse, *US Military in CentrAfrica ahead of Rebel Hunt* (Nov. 17, 2011); child soldiers in Liberians United for Reconciliation and Democracy (LURD) reportedly went through spiritual rituals in an effort to make them impervious to bullets, etc. Lotte Vermejj, The Bullets Sound Like Music to My Ears: Socialization of Child Soldiers within African Rebel Groups 148 (2014) (Ph.D. dissertation, Wageningen University) (CORE).

159. *See* Lingaas, *supra* note 5, at 512–13. *See also infra* Part IV.A.

These concerns appear to be reflected on the judicial level as well. While it is possible to detect among the Trial Chambers a certain sympathy for a subjective assessment that prioritizes the perspective of the perpetrator,[160] the same cannot easily be said about the victims' perspective. Mixed approaches do exist—they form the subject of the next section—but group determination which is based *solely* on the victims' views does not, so far, seem to have found favor with the international criminal tribunals.[161]

D. *Mixed Approaches and Their Difficulties*

From a fairly early stage in their considerations, the Trial Chambers, instead of following the *Akayesu* approach in all its aspects,[162] had been prepared to take additional parameters into account in their determination of the protected groups. Mixed approaches came into being which, on the subjective side, contained both the perpetrator's and the victims' views. Two years after *Akayesu*, the ICTR, in *Kayishema*, thus suggested that the determination of an "ethnic group" could also be done through the group distinguishing itself "as such (self identification)" or through a group being "identified as such by others, including perpetrators of the crimes (identification by others)."[163] The Commission of Inquiry into Darfur, in its 2005 report, appeared to advocate the possibility of a "purely" subjective approach,[164] but would, in so doing, likewise have included perspectives of both perpetrators and victims.[165]

It is worth noting that the *Kayishema* Trial Chamber, in the above mentioned judgment, did not discount the suitability of objective parameters altogether but, rather, suggested that a subjective approach could work as an alternative to this perspective.[166] It is indeed possible to discern a reluctance in some Trial Chambers to abandon objective parameters altogether.[167] The view that in the end appeared to be the prevailing opinion in the international criminal tribunals incorporated both objective and subjective parameters in its approach. The stock phrase that came to be adopted called for group determination to be

160. *See supra* text accompanying notes 140-42.

161. *See* Lingaas, *supra* note 5, at 510–11.

162. *See supra* text accompanying notes 68–78.

163. Kayishema (Trial Chamber), *supra* note 72, ¶ 98.

164. *See* Darfur Commission, *supra* note 3, ¶¶ 509–12.

165. *Id.* ¶¶ 509–11.

166. *See supra* text accompanying note 137.

167. *See* Brđanin (Trial Chamber) *supra* note 23, ¶ 684; Musema (Trial Chamber), *supra* note 50, ¶ 162; Rutaganda (Trial Chamber), *supra* note 23, ¶ 57.

"made on a case-by-case basis, by reference to both objective and subjective criteria."[168]

In the literature, too, mixed approaches of that kind have found a level of support, with Nersessian, for one, speaking in favor of an examination that ensures that "some logical connection between the perpetrator's definition of the group and the group's pre-genocidal existence" is in place.[169]

In the international criminal tribunals, reference is in this regard also made to the "context" in which the relevant groups are to be assessed; described variably as the "social" or "historical" context,[170] the "political, social and cultural context"[171] or the "political, social, historical and cultural context."[172]

Expert opinion, it appears, can play a significant role in the process of ascertaining the group—in particular, arguably, in determining the very context which the Trial Chambers outline. To the *Gacumbitsi* Trial Chamber, for instance, the observations which the historian Alison Des Forges had provided in *Akayesu* were of decisive importance in the identification of the group: Des Forges had testified that three distinct ethnic groups existed in Rwanda (the Hutu, the Tutsi and the Twa), and the Trial Chamber "[c]onsequently" concluded that, at the relevant time, "Rwandan citizens were categorised into [these] three ethnic groups[.]"[173] In its 2005 Report, the Darfur Commission similarly had recourse to the views of anthropologists in approaching the concept of "tribe" (whose categorization as a protected group it explored),[174] and

168. *See* Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 811 (Int'l Crim. Trib. for Rwanda Dec. 1, 2003); *see also* Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgment and Sentence, ¶ 630 (Int'l Crim. Trib. for Rwanda Jan. 22, 2003) [hereinafter Kamuhanda (Trial Chamber)]; Brđanin (Trial Chamber) *supra* note 23, ¶ 684; Semanza (Trial Chamber), *supra* note 23, ¶ 317.

169. Nersessian, *supra* note 16, at 313. *See also* Lingaas, *supra* note 5, at 514.

170. Semanza (Trial Chamber), *supra* note 23, ¶ 317. *See also* Krstić (Trial Chamber), *supra* note 39, ¶ 557 ("socio-historic context").

171. Rutaganda (Trial Chamber), *supra* note 23, ¶ 56; Musema (Trial Chamber), *supra* note 50, ¶ 163.

172. Bagilishema (Trial Chamber), *supra* note 50, ¶ 65; Kamuhanda (Trial Chamber), *supra* note 168, ¶ 630.

173. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶¶ 27–28 (Int'l Crim. Trib. for Rwanda June 17, 2004) (with reference to *Akayesu* (Trial Chamber), Transcript, Feb. 12, 1997, 11–13).

174. *See* Darfur Commission, *supra* note 3, ¶¶ 495–97.

legal scholars have, in their own writings, likewise relied on the views of anthropologists to approach the concept of particular groups.[175]

Mixed approaches along these lines harbor a certain attractive appeal. They appear to offer a methodology that avoids the shortcomings of subjective approaches: where the perspectives of victims and perpetrators may lead to an unduly narrow understanding of the group concept, a mixed approach which utilizes all of the parameters discussed above can provide a comprehensive picture of the targeted group while, at the same time, it does not have to abandon the advantages that inhabit any of the individual approaches.

That understanding, however, may be based on a reasoning error. The mere piling on of different approaches with their diverging parameters does not yet say anything about the suitability of the group determination that emerges from them. If, for instance, one particular method is, on closer inspection, found to be unsuitable for the purposes of group determination, it will carry that deficiency also into the mixed approach of which it forms part.

The subjective approach that relies on the victims' perspective offers an illustration. The point has already been made that the Trial Chambers had been reluctant to determine the group on the basis of the identification by the victims alone.[176] Yet if the victims' perspective is included in a composite approach, then it is entirely possible that self-identification in a particular case is given priority over the other parameters, and that perpetrators might be acquitted of genocide because their understanding of the targeted group was wider than that of the victims.[177]

In other cases again, defendants may be convicted of the crime, because the judges employed parameters that had been furnished by outside experts but were not easily accessible or foreseeable to the perpetrators (and may even have differed from the victims' own understanding of the group).

The fact remains that the decision on the precise parameters to which priority has to be given in a composite approach still remains within the remit of the Trial Chamber.

That they have already proceeded in a way that does not give all parameters equal weight, is clear: the *Semanza* Trial Chamber, for instance, while acknowledging that "both objective and subjective

175. *See* ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW 237 (4th ed. 2010) for the concept of "race" in the context of the crime against humanity of apartheid. *See also* Lingaas, *supra* note 5, at 491.

176. *See supra* text accompanying note 160.

177. For an example, *see supra* text accompanying note 153.

criteria" ought to be involved, interpreted the mixed approach as relying on "objective particulars of a given social or historical context," and on the "subjective perceptions of the perpetrators"[178] (a finding which thus omits the victim's perspective from consideration).

That situation, however, means that the difficulties which have been noted in the context of other approaches with regard to the lack of foreseeability of group determination[179] have not disappeared through the adoption of a mixed approach. In fact, the case can be made that the difficulty has increased under the composite approach: while, under the objective approach and even under the victim-centered approach there were particular parameters to which the perpetrator could have been referred, the mixed approach includes a plethora of criteria without any guidance on how they are to be employed. Their weighting is, ultimately, a matter for the individual Trial Chambers: It is not inconceivable that a defendant is convicted of genocide by judges who gave greater weight to the perpetrator's own perspective, while his comrade, having committed the same acts against the same group, is acquitted because his judges prioritized other parameters. The composite approach thus invites arbitrariness into the decision-making process, opens the door to inconsistencies in the case law and allows for a misalignment between the determination of protected groups and the principle of legality.

IV. Towards Legality: The Individualized Perspective

A. *The Importance of the Principle of Legality for the Assessment of the Relevant Approach*

The difficulties outlined above result in an understanding of the relevant approaches in which the stipulation of meaningful distinctions between "objective" and "subjective" methods at times becomes questionable and may indeed, in some respects, be altogether shorn of any rational basis. But if that is the case, the question can with some justification be asked as to why this distinction had been introduced in the first place and what principles these approaches seek to protect.

A particular advantage that may be associated with the objective view is that it (seemingly) imposes narrow boundaries on the concepts of the four protected groups. By so doing, it appears to convey an understanding that complies with the object and purpose of a law that restricts its protection to certain entities only as well as with the

178. Semanza (Trial Chamber), *supra* note 23, ¶ 317.

179. *See supra* text accompanying note 159.

intention of the parties to the Genocide Convention. A purely subjective approach, on the other hand, runs the risk that groups are brought within the scope of the Convention whose protection had never been considered or had even been expressly rejected.[180]

Most of all, however, the adoption of a concept with clear boundaries also appears—at first sight—to avoid arbitrariness in its application in practice and to send out a clear message to potential perpetrators about the exact form of conduct that falls under the law of genocide today.

Yet the very same argument can well be advanced in relation to the subjective approach. In fact, its proponents are likely to point out that it is the subjective approach—especially, if it is founded on the perpetrator's own perspective—that is best suited to giving fair warning to potential genocidaires. If a perpetrator is prosecuted on the basis of intent against a group defined by parameters he himself employed, it is more likely that the relevant rule prohibiting this conduct was foreseeable to him all along.

These are aspects which are linked to the principle of *nullum crimen sine lege*—the principle of legality—to which reference has already been made.[181]

The rule is enshrined in major human rights treaties,[182] but, as a fundamental principle of international criminal justice, it is also embraced by the ICC Statute and has been acknowledged in the case law of the international criminal tribunals.[183] The requirements of accessibility and foreseeability are (in both fields) accepted as being among its essential aspects.[184] The relevant law thus has to be formulated with

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180. *See supra* text accompanying notes 143–47 and note 24.

181. *See supra* text accompanying notes 18–19, 49. *See also* Jared L. Watkins & Randle C. DeFalco, *Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, 63 RUTGERS L. REV. 193, 199 & n.21 (2010).

182. *See* ICCPR, *supra* note 53, art. 15(1); ECHR, *supra* note 53, art. 7(1); ACHR, *supra* note 53, art. 9; Banjul Charter, *supra* note 53, art. 7(2).

183. *See* ICCSt, *supra* note 2, art. 22(1); *see, e.g.*, Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) [hereinafter Krnojelac (Appeals Chamber)]; Prosecutor v. Hadžihasanović, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No. IT-01-47-AR72, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003); Rutaganda (Trial Chamber), *supra* note 23, ¶ 86 (regarding ICTRSt, *supra* note 2, art. 4); Musema (Trial Chamber), *supra* note 50, ¶ 237 (regarding ICTRSt, *supra* note 2, art. 4).

184. *See, e.g.*, Cantoni v. France, App. No. 17862/91, Judgment, ¶ 29 (Eur. Ct. H.R. Nov. 11, 1996) [hereinafter Cantoni]; S.W. v. United Kingdom, App. No. 20166/92, Judgment, ¶ 35 (Eur. Ct. H.R. Nov. 22, 1995) [hereinafter S.W.]; Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 62 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2002); Krnojelac (Appeals Chamber), *supra* note 183, ¶ 220.

"sufficient precision"[185] and "definiteness."[186] And while the existence of these conditions does not mean that judicial interpretation of existing legal rules is considered impermissible,[187] it has at the same time been established that *nullum crimen sine lege* applies to case law as well,[188] which must be sufficiently precise,[189] must not involve an extensive construction to the accused's detriment,[190] must be "consistent with the essence of the offence," and reasonably foreseeable.[191]

It is true that even the existence of conflicting court decisions has been found not to be a violation of human rights by itself,[192] and that may, at first sight, indicate that the existence of divergent judicial approaches towards the determination of the protected group might not, per se, violate the principle of *nullum crimen sine lege*.

It has to be said, however, that there is, among international courts and expert commentators on judicial proceedings alike, a certain unease about the existence of inconsistent case law,[193] with the Consultative Council of European Judges (CCJE) noting that "[j]udges should in general apply the law consistently."[194] The reason for that is that court decisions which send out conflicting messages can cause a breach of the right to a fair trial as protected under human rights

185. On this, *see* European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law*, CDL-AD(2011)003rev, ¶ 44 (Venice, Mar. 25–26, 2011) [hereinafter Venice Commission Report]; Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgment, ¶ 578 (Extraordinary Chambers in the Courts of Cambodia Nov. 23, 2016).

186. Stakić (Trial Chamber), *supra* note 30, ¶ 719. The Appeals Chamber disagreed with the Trial Chamber's application of the principle in the particular case, but it did not disturb the validity of the principle. Stakić (Appeals Chamber), *supra* note 30, ¶ 313–14.

187. The ECtHR has, in that regard, referred to judicial interpretation as an "inevitable element" in any legal system, "including criminal law[.]" S.W., *supra* note 184, ¶ 36. For the field of international criminal law, *see also* Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶¶ 126–27 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

188. Cantoni, *supra* note 184, ¶ 29 (with reference to the concept of "law" in the meaning of ECHR, art. 7, which enshrines the rule of *nullum crimen sine lege*).

189. Aydin v. Germany, App. No. 16637/07, Judgment, ¶ 57 (Eur. Ct. H.R. Jan. 27, 2011).

190. S.W., *supra* note 184, ¶ 35.

191. *Id.* ¶ 36; Radio France v. France, App. No. 53984/00, Judgment, ¶ 20 (Eur. Ct. H.R. Mar. 30, 2004).

192. *See* Şahin v. Turkey, App. No. 13279/05, Judgment, ¶¶ 58, 84, 86 (Eur. Ct. H.R. Oct. 20, 2011) [hereinafter Şahin]; Dimech v. Malta, App. No. 34373/13, Judgment, ¶ 64 (Eur. Ct. H.R. Apr. 2, 2015) [hereinafter Dimech].

193. *See* Bakir v. Turkey, App. No. 46713/10, Judgment, in particular at ¶ 62 (Eur. Ct. H.R. July 10, 2018) [hereinafter Bakir].

194. Consultative Council of European Judges, Opinion No. 11 on the Quality of Judicial Decisions, CCJE (2008) 5, ¶ 49 (Dec. 18, 2008) [hereinafter CCJE Opinion].

law.[195] They can also, especially where the divergences have prevailed for a longer time, affect the certainty of the law.[196]

What a "clearly defined" law requires is, in any event, that an individual must be able to know "if need be, with the assistance of the courts' interpretation" of the relevant rule, "what acts and omissions will make him criminally liable[,]"[197] and must be enabled "to regulate his or her conduct" accordingly.[198]

The foreseeability of the law that is thus achieved is ultimately a safeguard against arbitrary decisions by public authorities;[199] a point that applies with equal validity to statute law as well as to court decisions.[200]

From that point of view, the emergence of widely different methods on the determination of the group element appears in a rather different light.

If, to a principle-oriented approach towards the determination of protected groups, the absence of arbitrary elements in the decision-making process is key, it might in fact appear that none of the approaches discussed above fall foul of that test, at least if arbitrariness is understood in a rather generalized way: the objective, the subjective, and the mixed approaches do, after all, follow reasoned considerations (or are at least capable of invoking pertinent rationales for their development).

And yet, to exclude arbitrariness altogether, the crucial question has to be asked whether the defendant had had fair warning of the parameters on which the Trial Chamber relied in its determination of the group; in other words, whether they had been foreseeable to him.

A point that can be expected to be of particular relevance for the question of the foreseeability of the relevant group determination is that of the constituency that is deemed to be authorized to determine

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195. *See* Şahin, *supra* note 192, ¶ 52. *See also* Lupeni Greek Catholic Parish v. Romania, App. No. 76943/11, Judgment, ¶ 81 (Eur. Ct. H.R. May 19, 2015) [hereinafter Lupeni].

196. *See* Albu v. Romania, App. No. 34796/09, Judgment, ¶ 34(v) (Eur. Ct. H.R. May 10, 2012) [hereinafter Albu]. *See also* Venice Commission Report, *supra* note 185, ¶ 44; CCJE Opinion, *supra* note 194, ¶¶ 47–49; Dimech, *supra* note 192, ¶ 64; Şahin, *supra* note 192, ¶¶ 54, 57.

197. Cantoni, *supra* note 184, ¶ 29. *See also* Kokkinakis, *supra* note 61, ¶ 52. Specifically for international criminal law, *see* Contempt Judge v. Beirut, Case No. STL-14-06/PT/CJ, Decision on Motion Challenging Jurisdiction, ¶ 32 (Special Trib. for Lebanon Nov. 6, 2014).

198. Venice Commission Report, *supra* note 185, ¶ 44. *See also* Gillan v. United Kingdom, App. No. 4158/05, Judgment, ¶ 76 (Eur. Ct. H.R. Jan. 12, 2010).

199. *See* Bakir, *supra* note 193, ¶ 54; Tommaso v. Italy, App. No. 43395/09, Judgment, ¶ 109 (Eur. Ct. H.R. Feb. 23, 2017). *See also* James M. West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PACIFIC RIM L. & POL'Y J. 85, 127 (1997) ("it is just to punish conduct only if no unfair surprise is involved").

200. *See* Albu, *supra* note 196, ¶ 39; Lupeni, *supra* note 195, ¶ 91.

the concept of the protected group. Prima facie, there is again no reason why anybody's view—that of the victims of the crime, that of the experts—should be excluded from the outset. But nor are these perspectives, by themselves, dispositive.

The victim community may very well have engaged in a process of self-identification in relation to their own group. Yet if such an assessment is not accessible to the defendant, it loses much of its helpfulness for the purposes of international criminal law: such a determination lacks the degree of foreseeability that the principle of legality requires.

The view of experts—for instance, anthropologists—on a particular group may likewise provide valuable insights, especially if it takes account of perceptions prevailing in the particular region in which the group exists. But resorting to expert opinion, like resorting to the views of victims, does not by itself provide an answer to the question as to whether the relevant perspective had been foreseeable to the defendant. Experts who take a "world view," for instance, of an ethnic group that has an international existence, may thus rely on an understanding that is alien to the one that prevails in the particular region in which the alleged crimes were committed; experts who define a national group by "formal" parameters such as official categorization and passports, may adopt an understanding that varies from the way in which the group is seen by perpetrator and victim communities alike and which might thus not be helpful for the establishment of a group concept that would have been foreseeable to the defendant.

In light of these challenges, it appears tempting to conclude that the appropriate concept of the relevant group is that which is derived from the perpetrator's own views.

Nor would this be an entirely unsupported understanding of at least some of the groups whose existence the Genocide Convention protects. It approaches the view of Jewish identity that, for instance, Sartre suggested when he relied in that regard on the determination by the perpetrator.[201]

Yet while this is a perspective that would certainly have been foreseeable to the individual defendant, it also brings problems in its train. Apart from the fact that, as discussed above, it opens the possibility of unduly widening the remit of the Genocide Convention in some cases,[202] there is a further challenge that may give pause. If a Trial Chamber is content with the theoretical possibility that a certain group

201. JEAN-PAUL SARTRE, ANTI-SEMITE AND JEW 69 (George J. Becker trans., Schocken Books 1995).

202. *See supra* text accompanying notes 144–45.

is protected on the basis of its definition by the defendant and only the defendant, then it also has to be content with the possibility that a group is not protected because the defendant, and only the defendant, believed it not to fall within the scope of the Convention, with the consequence of an acquittal on the charge of genocide. What is more: a defendant who, for instance, identifies a religious group as political, has thus made a group determination which, in his case, would have to override that made by others (including that made by society at large and the perpetrator's own community)—and this would have validity not only with regard to his own intent but in relation to the existence of the group that is required for the objective side of the crime.[203]

These are difficulties which raise the question whether mediating approaches which avoid results of this kind may possess some justification.

Following a consideration of Recommendation VIII of the Committee on the Elimination of Racial Discrimination (which expressed the view that membership in a racial or ethnic group shall "if no justification exists to the contrary, be based on self-identification by the individual concerned"),[204] Rüdiger Wolfrum, for instance, suggested that "[a] group may also be identified as such by the dominant population in a country although it does not regard itself as being ethnically or racially different."[205]

This emphasis on societal and geographical parameters bears some resemblance to certain approaches which have been advanced where the determination of substantiality is concerned, i.e., the question whether the perpetrator (as required by the international criminal tribunals) sought to target at least a substantial part of the relevant group.[206] In that context, the Trial Chambers did accept that the part of the group that matters for that assessment might well be limited to a

203. *See supra* text accompanying notes 11–12.

204. Committee on the Elimination of Racial Discrimination, General Recommendation VIII Concerning the Interpretation and Application of Article 1, Paragraphs 1 and 4 of the Convention: Identification with a Particular Racial or Ethnic Group, U.N. Doc. A/45/18 (1990).

205. Rüdiger Wolfrum, *The Committee on the Elimination of Racial Discrimination,* 3 MAX PLANCK Y.B. U.N. L. 489, 498 (1999). *See also* Lingaas, *supra* note 5, at 491.

206. *See* Krstić (Appeals Chamber), *supra* note 38, ¶ 12; Bagilishema (Trial Chamber), *supra* note 50, ¶ 64; Krstić (Trial Chamber), *supra* note 39, ¶ 586; Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 831 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010); Brđanin (Trial Chamber), *supra* note 23, ¶ 701; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Rep, ¶ 198 (Feb. 2007).

particular geographical zone[207] (a view which is also reflected in the case law of some domestic courts[208] and which finds support in the literature).[209] The *Krstić* Appeals Chamber, in a somewhat more cautious phrasing, allowed that the geographical factor could "inform the analysis" relating to substantiality and based that on the fact that genocidal intent was always limited by the "opportunity" presented to the relevant perpetrators.[210]

The argument can be made that geographical conditions have an impact not only on determining substantiality, but on the assessment of the group itself. From the perspective of the principle of legality, the inclusion of the geographical component also appears to support the requirements of foreseeability: the group determination that prevails in a particular society in a particular region will often be the one to which the perpetrator has access, too.

Often, but not always: it is certainly possible that the perpetrator moves within a community that made a conscious effort to set itself apart from the "dominant population" in the particular region and has, over time, developed its own understanding of the relevant target group.

There may thus be reason to draw the limits of the investigation not at the evaluation of the prevailing views "in the region." A formula along these lines does not yet reveal much about the particular constituency that engages in the group determination and about the question whether the prevailing view had been accessible to the perpetrator.

In light of the diverging interests which the right approach towards the determination of protected groups has to accommodate, the challenge seems close to that of the squaring of the circle: on the one hand, the resulting group concept must meet the requirements of *nullum crimen sine lege*; on the other hand, a feasible method of group identification must avoid the difficulties which reliance on the perpetrator's views alone brings with it.

It is suggested, however, that the problems that accompany an approach that is based solely on the perception of the perpetrator can

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207. *See* Brđanin (Trial Chamber), *supra* note 23, ¶ 703; Krstić (Trial Chamber), *supra* note 39, ¶ 590; Jelisić (Trial Chamber), *supra* note 31, ¶ 83.

208. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 30, 1999, III. 2 (Ger.); Bundesverfassungsgericht [BVerfG] [Constitutional Court] Dec. 12, 2000, 79 (Ger.).

209. NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 63 (World Jewish Congress 1960); Drost, *supra* note 73, at 85; Florian Jessberger, *The Definition and the Elements of the Crime of Genocide*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY 87, 108 (Paola Gaeta ed. 2009). For a critical assessment of this approach, *see* Behrens, *supra* note 157, at 340–44.

210. Krstić (Appeals Chamber), *supra* note 38, ¶ 13.

be avoided without encroaching on the principle of legality. What is required for the purposes of group identification is not that the perpetrator had *in fact* considered the collectivity in question as a protected group,[211] but that the determination of the relevant protected group had been available to him. What is needed, is a view that possesses sufficient individualized components to bring the resulting approach close enough to the perpetrator's potential mindset to satisfy the requirements of foreseeability, while still containing sufficient safeguards to avoid an approach which is exclusively informed by the thought processes of the alleged genocidaire.

It is, again, the question of the constituency that performs the relevant group determination that takes center stage: who exactly is the "appropriate definer" whose understanding of the group must be available to the perpetrator?

B. *The Objective Individualized Approach*

This is a problem which is not germane to the question of group determination, nor indeed to the law of genocide. It is illuminating to note that the matter of the defining perspective has arisen in other fields of criminal law as well.

Insights that can be obtained from the justification of duress are particularly instructive. The situation which this defense presupposes has, for the purposes of the Rome Statute, been understood to be one "resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person,"[212] and similar wording has been employed in various domestic criminal justice systems.[213]

Where the determination of the situation of duress is concerned, the individual perpetrator—as in the case of the determination of protected groups—is faced with the task of performing an evaluation. Here, too, the relevant assessment can be done from an objective or a subjective viewpoint, and both perspectives have been advocated in the

211. Situations in which the defendant's view of the group element differed from the applicable group determination still invite the assessment that an unavoidable error regarding the group concept has occurred, and that therefore a factual mistake has come into existence which negates the mental element required by the crime. *See* ICCSt, *supra* note 2, art. 32(1).

212. *See* ICCSt, *supra* note 2, art. 31(1)(d); *see also* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 66 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) [hereinafter Erdemovic (McDonald/Vohrah)].

213. *See*, for an overview, Erdemovic (McDonald/Vohrah), *supra* note 212, ¶¶ 59–64.

past.[214] Either method can lead to results that may appear extreme: the subjective approach, in its purest form, would leave the availability of the defense entirely up to the defendant's personal views, which may be informed by a belief system that nobody else in society shares.[215]

A purely objective approach, on the other hand, may lead to results that are artificial in nature and that even an average person in the position of the defendant could not have reached. The employment of an unloaded gun in order to prompt the defendant to undertake a certain criminal act, is an example: even if both the defendant and the person wielding the gun believed that the gun was loaded, the situation would still not be characterized by a threat that, if scientific standards were applied, "really" existed in the outside world.

In light of this, it is understandable that certain "mixed" approaches have emerged which, while not entirely abandoning an objective basis for the situation of duress (or necessity),[216] include individualized parameters in their determination as well.[217] The House of Lords, in the English case of *R v. Howe*, for instance, confirmed that the "threat" required for a situation of duress had to be such that "a person of reasonable firmness[,]" possessing the "characteristics" of the defendant and being in his situation, "could not have been expected to resist [it]."[218]

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214. *See, e.g.,* for the subjective approach, Prosecutor v. Ongwen, ICC-02/04-01/15, Defence Appeal Brief Against Convictions, ¶ 508 (Int'l Crim. Ct. Oct. 19, 2021). For the objective approach, *see, e.g.*, Albin Eser, *Article 31, in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1125, 1151 ¶ 53 (Otto Triffterer & Kai Ambos eds., 2016). *See also* IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, Case No. 9, *Ohlendorf et al*, Judgment (1948, April 8–9) 480 (1949); Prosecutor v. Ongwen, ICC-02/04-01/15-1943, Paul Behrens Amicus Curiae Observations, ¶ 6 (Int'l Crim. Ct. Dec. 23, 2021) [hereinafter Ongwen (Behrens Observations)].

215. *See* Paul Behrens, *Of Feline Kings and Spying Spirits: Approaching the Situation of Duress in Ongwen* (forthcoming).

216. In early international criminal law, the terms "duress" and "necessity" were often employed interchangeably. *See, e.g.*, IX TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, Case No 10, *Krupp et al*, Judgment (1948, July 31) 1436 (1950). The distinction that is commonly made in contemporary law is that between duress as a situation in which a person is compelled to commit the relevant crime because of threats coming from another human being, while necessity refers to situations in which the threat arises from other circumstances. *See* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997). *See also* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 645 (2d ed. 2016).

217. *See, e.g.*, The Indian Penal Code Act No. 45, 1860, § 94. *See also* MODEL PENAL CODE § 2.01 (AM. L. INST., 1962).

218. R v. Howe [1987] AC 417 (HL) 426 (per Lord Hailsham LC); *see also* Cochrane v. HM Advocate [2001] SCCR 655 ¶ 14 (Scot.); R. v. Ryan [2013] S.C.C. 3, ¶ 52 (Can.).

For the determination of the situation of "danger" which the German law of necessity requires, the "social circle" (*Verkehrskreis*) theory has been proposed: according to this understanding, the assessment has to be done from the position of a "reasonable observer from the social circle of the acting person" who has the benefit of any special knowledge the defendant may have possessed.[219]

This is not the purely subjective test that had been advocated by some commentators both on the relevant defense in international criminal law[220] and in domestic law.[221] It is, rather, an approach under which the viewpoint of the perpetrator is tempered by reference to certain objective safeguards—i.e., by inquiring into the perspective of his peer group.

The resulting standard is in fact somewhat more "objective" than that suggested in *Howe*, and that may be beneficial. The "characteristics" of the defendant, after all, may well include certain superstitions that only he possessed and on which he insists even in the face of different perceptions prevailing in the peer group. It is difficult to see why, in situations like these, the views held by the perpetrator alone should put him in the privileged position of availing himself of the defense. The social circle theory, which rather allows certain "individual aspects" to be considered,[222] appears more convincing: what matters is that the determination of the danger incorporates also, to a degree, the *possibilities* of obtaining the relevant knowledge through the defendant.[223]

If this is not an entirely subjective approach, it is also not an approach that follows an "extremely objective" view, and it thus eschews the imposition of an unrealistic standard for matters which the individual defendant has to assess.

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219. The root of this theory lies in a standard applied by the German Reichsgericht in cases of negligence. *See* Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] Dec. 7 1929, 126, 329 (331); HANS-HEINRICH JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 437 (1972). From there, it was adapted for the determination of situations of necessity; see references in Walter Perron, *§ 34*, in SCHÖNKE/SCHRÖDER, STRAFGESETZBUCH KOMMENTAR 10 (Albin Eser ed., 30th ed. 2019); *see also* Armin Kaufmann, *Zum Stande der Lehre vom personalen Unrecht*, in FESTSCHRIFT FÜR HANS WELZEL ZUM 70. GEBURTSTAG AM 25. MÄRZ 1974, 402 (Günther Jakobs ed., 1974); Friedrich Schaffstein, *Der Maßstab für das Gefahrurteil beim rechtfertigenden Notstand*, in FESTSCHRIFT FÜR HANS-JÜRGEN BRUNS ZUM 70. GEBURTSTAG 101 et seq (Wolfgang Frisch ed., 1978) [hereinafter Schaffstein]. *See* Ongwen (Behrens Observations), *supra* note 214, ¶ 6.

220. *See supra* sources in note 214.

221. *See, e.g.*, R v. Howe [1987] AC 417 at 421 for the Defence in that case ("The test should be purely subjective and the defendant should be judged on the basis of what he honestly and actually believed and feared.").

222. Schaffstein, *supra* note 219, at 97.

223. *Id.* at 95 ("[D]ie subjektiven Erkenntnismöglichkeiten des Handelnden.").

For the purposes of the determination of protected groups under the Genocide Convention, the social circle theory does carry particular advantages. It acknowledges—in line with the prevailing view of the international criminal tribunals—that the perspective of those affected by the situation has to play a role in the process of group determination.

Yet it does not content itself with merely following the perspective of the perpetrator, and it thus avoids some of the difficulties outlined above.[224] It is not a purely subjective approach: an individual perpetrator cannot bring political groups into the protective remit of the Genocide Convention "through the back door," because in his own perception they are to be considered religious in nature. If it is he, and only he, who defines the relevant group in this way—if not even a person from his social circle would have performed the same determination—it would not be appropriate to speak of an intent to destroy a protected group; it is rather a case of a reversed subsumption error,[225] in which a relevant condition of the crime (the group element) did not exist to begin with.

It is suggested that the consideration of the "social circle," the peer group of the perpetrator, is a particularly helpful tool: the cases of genocide that were adjudicated by the international criminal tribunals were certainly, in their majority, marked by the existence of a perpetrator group characterized by particular perceptions that set them apart from other sections of society, and certainly from the victim group.

It is true that this approach can lead to different determinations of the same social entity within the same society.

In situations of genocide, a historian or a political scientist, adopting a "bird's eye perspective" of events, may baulk at the notion of classifying the same targeted group as both a "protected group" and "not a protected group".

Yet far from being a disadvantage, the acknowledgment of this point must count among the principal insights of an individualized approach along these lines. From the standpoint of legality, this method of group determination does indeed make sense. Not every section of society will have the same understanding of the relevant protected group. What is more: divisions may arise within perpetrator communities, too. University teachers who formulate discriminatory "race theories" may well prepare the climate for acts against a particular group; some may even harbor intent to destroy the group as such. Racist foot soldiers "on

224. *See supra* text accompanying notes 144–47.

225. *See supra* text accompanying note 149.

the ground," on the other hand, may define the group through the utilization of very different methods.

Paradoxically, an interpretation of protected groups under the Genocide Convention that takes into account the understanding that a particular peer community applies to the concept leads, in light of the requirements of foreseeability, to more stable standards than a seemingly objective definition that may, for instance, be available to anthropologists, but not to the relevant perpetrator group. It removes the arbitrariness that inhabits a determination process which, depending on the preference of the judges, can rely on objective, subjective, or mixed approaches. By incorporating the perceptions of their relevant social circles as a necessary prerequisite, it ensures that fair warning is given to *all* potential perpetrators, and by so doing, it promotes the certainty of the law.

If, on the other hand, a different standard for group determination is widely adopted outside the perpetrator community but was, for certain personal reasons, well accessible to the individual defendant, a situation emerges which the social circle theory accommodates by taking into account any special knowledge that may be particular to that person.[226] In some cases, this may lead to an assessment of the group element that differs from that which relies on the perceptions of the peer group alone. Instances of this kind may arise, in particular, where "mixed" groups are concerned—groups, for example, that are characterized both by religious and political components.

In situations of that kind, it is well possible that the emerging standards of assessment diverge even between the peer group and the individual perpetrator (or, to be more precise, a person of his social circle but endowed with his particular knowledge). The perpetrator's own community—a militia, for instance—may well consider the target group as being political in nature; it may, in fact, have been conditioned to think of them as the "political" (or the "military") enemy.

The militia leader, on the other hand, will often possess better knowledge and may well be aware that the group displays few political features and is, outside the perpetrator community, better known for its prominent religious aspects. Other members of the perpetrator group may still have links to the target group and thus possess insights into its nature of which their peers are deprived, and so on.

If, in light of this special knowledge, the perpetrator is still willing to form intent to destroy the collectivity as a religious group, he does not appear unduly disadvantaged if a stricter standard of group determination

226. *See supra* text at note 219.

applies to him than that which is employed in relation to his peers. In situations like that, the perpetrator has fair warning that the group would be classed as a protected group, and a determination which takes his special knowledge into account does not violate the requirements of the foreseeability of the law.

There is, at the same time, one point on which a deviation from the social circle theory, as developed for the determination of necessity and duress, appears indicated. The theory meets its boundaries where the particular personal characteristics of the imagined observer are concerned, whose perspective is to be adopted, i.e., with regard to the substitution of the defendant's perspective with that of a "reasonable observer."[227]

Reasonableness, it is suggested, is exactly not the quality that can be required where the determination of groups under the Genocide Convention is concerned. Quite apart from the ethically dubious procedure of according a notion of "reasonableness" to the perpetrators of these crimes, the very premise that the development of specific intent has to derive from rational thinking (which, presumably, would have to be based on objectively verifiable parameters) is fraught with doubt.[228]

The understanding that "race" has no objective scientific basis[229] may well have claim to being a "reasonable" assessment, but it is not likely to inform the thinking of white supremacists. Even the concept of race as a "cultural construct"[230] might not be easily accessible to them; their concept may well be founded on the, entirely unreasonable, notion that "race" has a definite genetic meaning.

That, however, does not preclude the fact that, from their perspective, they have performed a group determination. What gave rise to such assessment will in fact often be based on reasons that lie outside the realm of rationality—on stereotypes, prejudices, and even superstitions. All that is required, however, is that the emerging concept was foreseeable to the perpetrator, so that he could have adapted his conduct to avoid the targeting of a protected group. That condition, however, is fulfilled regardless of whether a "reasonable" observer would have reached the same determination or not.

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227. *Id.*

228. Schabas is not far wrong when he notes that "[t]rying to find an objective basis for racist crimes suggests that the perpetrators act rationally, and this is more credit than they deserve." *See* SCHABAS, *supra* note 13, at 128, although it is true that racist motives are not the only ones that can lead to the formation of dolus specialis. *See* Behrens, *supra* note 41, at 510–14.

229. *See supra* text accompanying notes 123–27.

230. *See supra* text accompanying notes 128–31.

The resulting approach, which shall here be termed the "objective individualized approach," is therefore best described thus: a determination of a protected group which fulfils the requirements of legality is done if it is performed from the perspective of an observer from the social circle of the acting person who has the benefit of any special knowledge the latter may have possessed.

An example for the fact that the assessment done by the "social circle" of the perpetrator can differ markedly from that adopted by others—by experts outside the groups, by the victims themselves, by societies in other jurisdictions—yet is held with serious belief by the perpetrator group, is provided by the categorization of Jews in Nazi Germany, to which reference has been made above.[231] The extreme consequences that the relevant classification reached is illustrated by a study published by the *Evangelische Pfarrhausarchiv* (Protestant Vicarage Archive), which documented more than a hundred instances of Protestant pastors who, because they had at least one Jewish grandparent, fell within the scope of the Nuremberg laws.[232] The biographies contained in the study include cases in which the affected vicars suffered discrimination, dismissal, and deportation to concentration camps.[233]

Few of them would, arguably, have considered themselves Jews, and few scholars on Judaism would reach the conclusion that a Protestant vicar ought to be considered a member of the protected group.[234]

In situations like these, both the perspective of the victims and of expert commentators therefore diverge from that adopted by the perpetrator group. Yet it would be exceedingly strange if a defendant would have to be acquitted of genocide when his own circle clearly defined the group as one of the four enumerated groups and when he had developed the requisite intent to destroy that group, in whole or in part, as such.

At the same time, these considerations are also instrumental in addressing difficulties that arise from divergent methods that may have been employed in efforts to determine the relevant group. It is, ultimately, of little import whether the assessment is done on the basis of a formula with specified parameters or whether the defining constituency genuinely believes that the determination of the group can be

231. *See supra* text accompanying notes 82–84.

232. EVANGELISCHES PFARRHAUSARCHIV [PROTESTANT VICARAGE ARCHIVE], WIDER DAS VERGESSEN. SCHICKSALE JUDENCHRISTLICHER PFARRER IN DER ZEIT VON 1933–1945: SONDERAUSSTELLUNG IM LUTHERHAUS EISENACH, APRIL 1988–APRIL 1989 (1988).

233. *Id.* in particular 7–18, 21–24.

234. On the impact that questions of membership of a particular group have on the determination of the group as such, *see supra* text at note 8, and text accompanying notes 110-11.

done "on sight." The fact that the relevant method was employed by the perpetrator's social circle is sufficient; and if that means that group determination is done on the basis of stereotypes and prejudices, it is still an approach that is foreseeable and gives fair warning to the defendant.

That, ultimately, has to be considered the decisive advantage of the objective individualized approach. Others—authorities at the highest level of their profession, even the victims themselves—may well have employed a fundamentally different approach. But no injustice is done to the perpetrator who is measured by his own yardstick. If his peers have identified the group in a particular way, international criminal justice is perfectly entitled to assert that this form of assessment had been available to him, and that its use in the case in question fulfils the requirements of foreseeability and accessibility of the law.

V. Concluding Thoughts

The "group element"—the existence of a national, ethnical, racial or religious group—plays a significant role both on the side of the *actus reus* and the *mens rea* of the crime of genocide. But it is more than that: it is a prerequisite that attaches to the core meaning of the crime to such a degree that it can, without exaggeration, be named (next to specific intent) as one of the two aspects that truly characterize the legal concept of genocide.

Like specific intent, however, the actual determination of the group element has escaped simple solutions and given rise to controversy.

It is true that on some of its aspects—the fact that the group has to be defined by reference to positive rather than negative parameters, that its identification has to be done on a case-by-case basis, and that a separate group determination has to be performed in situations in which more than one group is targeted—agreement appears to exist. These, however, are points that are so general in nature that their usefulness for the performance of the determination of the four groups in individual cases is significantly impaired.

The question whether such determination should be done on the basis of an objective or a subjective approach has kindled considerable debate in international criminal tribunals and in the literature. They are questions with tangible consequences: depending on the relevant approach, the resulting concept can obtain wider or narrower boundaries and may show different degrees of alignment with the requirements of *nullum crimen sine lege*.

Neither approach can claim to be free from challenge. The objective approach appears to carry the advantage of fixed, foreseeable parameters,

but it is based on assumptions that cannot easily withstand closer analysis. There is reason to believe that the groups do not, in fact, represent "static" concepts, but that a degree of fluidity often inhabits them. The phenomenon of multiple belonging casts further doubt on the rigidity of the relevant group boundaries, and the question can indeed be asked if the assumption of an "objective" existence of certain groups is justifiable —"racial groups" in particular raise doubts in that regard.

The subjective view comes with its own difficulties. If it is understood as an approach that is based on the perpetrator's perceptions, it allows for the possibility that certain groups are brought into the scope of the Genocide Convention whose coverage was deliberately omitted when the instrument was first conceived—a situation that is likely to arise in particular where "mixed" groups are concerned, groups, for instance, that are characterized by both political and religious components. Reliance on the view formulated by the victim group can bring similar challenges with it and can, in particular, result in questionable results if the group concept that emerges from this approach had not been accessible to the perpetrator.

Both approaches raise questions about the constituency that is authorized to perform the relevant determination. What is more, the possibility of divisions even within that constituency cannot be excluded for either method. International courts and tribunals themselves do not speak with one voice where group determination is concerned, but neither can this necessarily be expected of outside experts (scholars whose academic work focuses on the relevant groups). The constituencies involved in "subjective" determinations, likewise, do not necessarily represent monolithic blocs offering only one concept of the group in question.

From the viewpoint of international criminal law, the overarching question with regard to group determination, as with the determination of all aspects of substantive crimes, has to be that of its compliance with the principle of legality, and that means, in particular, that, whatever approach is adopted, the resulting group element needs to have been foreseeable and accessible to the defendant.

In light of this consideration, none of the methods that have been suggested by the Trial Chambers for group determination is per se without meaning. But in order to be a valid approach, each of them has to be able to answer in the affirmative the question whether they provided the defendant with fair warning at the time his intent was formed. It is at that stage that doubts about a perspective based on perceptions by the victim group or on conclusions by outside experts arise. If these

views were not accessible to the defendant, they are of little use for the determination of this aspect of the crime of genocide.

These are considerations which appear to favor approaches that come closer to the perspective of the perpetrator. Methods, therefore, which take into account the views held in the particular region in which the situation emerged, or which are maintained in the relevant society that exists there, hold particular interest in that regard, as they, arguably, are better suited to approaching the mindset of a perpetrator whose subjective framework they may well shape. The question is, ultimately, which constituency appears most appropriate for the purpose of establishing a concept to which the perpetrator would have clear access.

The dilemma that emerges here—on the one hand, the need to avoid an approach under which a perpetrator may impose his personal concept of a particular group on the law, and, on the other hand, the need for an approach that would have been accessible to the perpetrator—is not a problem that arises in the context of genocide only. An area within criminal law where this challenge has manifested itself in the past is that of the determination of a situation of necessity or duress as a defense to acts that would otherwise have constituted crimes under the relevant (domestic or international) legal order.

The difficulty here is similar: for the assessment of a "threat" or "danger" as the basis for this defense, it is possible to opt for an "entirely objective," strictly "scientific" approach and accept the price of conclusions that are far removed from the realities of the situation and from the mindset not only of the particular perpetrator but of most persons placed in his position. An entirely subjective approach, on the other hand, has to accept the presence of extreme misconceptions that could exist only in the mind of the particular perpetrator and thus again lead to an understanding of the grounds of the defense that does not do justice to the realities of the situation.

Several jurisdictions and commentators on criminal law have, therefore, declared their preference for a mitigating approach which, while not opting for an entirely subjective assessment, takes account of certain individual aspects that shape the evaluation.

It is suggested that valuable insights can be gained from this understanding; not least in the form it receives through a method which has here been termed the "objective individualized approach." From this vantage point, the question is not how the relevant concept is assessed by the perpetrator, but how it would be assessed by a person from the social circle of the perpetrator, with the benefit of any special knowledge the perpetrator may possess.

Where the determination of groups protected under the law of genocide is concerned, this approach appears particularly helpful not least due to the fact that most of the situations in which international criminal tribunals are faced with allegations that the crime has been committed are marked by the existence of a perpetrator society—a peer group which often holds beliefs that are particular to this collectivity.

It is a perspective that obviates the need to select a particular method of assessment—assessment through the right formulaic parameters, say, or through the establishment of particular exemplars. At the same time, it is not a matter of concern that the resulting view deviates very widely from that held in other parts of society or indeed by commentators adopting a worldwide view of the group in question. Situations such as the classification of Jews under the Nuremberg laws provide evidence for the fact that such differences in categorization are very much a reality. The basis of the objective individualized approach, however, is simpler than that: it is premised on how the perpetrator's peer group itself would have performed the assessment of the relevant group.

It is, at the same time, an approach which is, to a considerable degree, instrumental in overcoming the arbitrariness that characterizes the case law on this matter to this date. It dispenses with the need to check the relevant group concept against those advocated by expert opinion or held by victim groups. It is well possible—perhaps unavoidable—that, as a result, different group concepts may come into existence. Yet it is an approach that carries the advantage of enshrining a method that is more stable than the current forms of determination. Where Trial Chambers currently enjoy discretion as to the weight they accord to subjective and objective perspectives respectively (as well as on the path they choose to determine "objectivity" in particular), the standard under the individualized objective approach is always the same: the starting point here is, in every case, the understanding adopted by the perpetrator's peer group.

Most of all, however, the individualized objective approach represents a perspective that is particularly well aligned with the principle of legality. Its ambition is not to achieve conformity with all possible views of the relevant target group. The view of the "social circle" of the perpetrator, however, is the view of the very group that shapes his thinking and whose perceptions he, in turn, may be able to influence. It is, therefore, a viewpoint which carries an advantage that poses a significant challenge to many other approaches that have been suggested in the past.

No person charged with genocide because they formed the intent to destroy a protected group, as defined by their peer group, can claim that this concept of the group had not been foreseeable to them; and no injustice is done to a perpetrator convicted of genocide on the basis of a group concept adopted not by authorities in a remote temple of knowledge, nor even by the victims themselves, but by their own companions in crime.