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# GROUPS PROTECTED BY THE GENOCIDE CONVENTION: CONFLICTING INTERPRETATIONS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

William A. Schabas\*

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The Convention for the Prevention and Punishment of the Crime of Genocide<sup>1</sup> protects "national, ethnical, racial and religious" groups from intentional physical destruction. It imposes a variety of obligations upon States with respect to individual criminal liability for the crime. "[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation,"<sup>2</sup> said the International Court of Justice in its celebrated advisory opinion.

The enumeration of the groups protected by the *Convention's* definition of genocide is perhaps its most controversial aspect. Critics have argued that the omission of political, economic, social, gender and other groups is illogical and incompatible with the *Convention's* lofty mission.<sup>3</sup> Some domestic legislatures, when enacting implementing legislation, have expanded the list of groups covered by the term genocide, the most extensive of these being the recent amendment to the French *Code penal* which defines genocide as the

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\* M.A. (Toronto), LL.D. (Montréal), Professor of Human Rights Law and Director, Irish Centre for Human Rights, National University of Ireland, Galway.

1. Convention for the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

2. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), [1951] I.C.J. Reports 16, p. 23. Quoted in: *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] I.C.J. Reports 226, ¶ 31. See also Report of the Secretary-General pursuant to ¶ 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, ¶ 45.

3. Pieter Nicolaas Drost, *THE CRIME OF STATE, VOL. 2, GENOCIDE* 122-23 (1959); Frank Chalk, Kurt Jonassohn, *The Conceptual Framework, in THE HISTORY AND SOCIOLOGY OF GENOCIDE* 11 (Frank Chalk, Kurt Jonassohn, eds., 1990). See also Kurt Johassohn, *What is Genocide?*, in *GENOCIDE WATCH* 17-26 (Helen Fein, ed., 1991); KURT JONASSOHN, KARIN SOLVEIG BJÖRNSON, *GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS* 1 (1998).

intentional destruction of any group based on arbitrary criteria.<sup>4</sup> Indeed, since the *Convention's* adoption in 1948, surely far more has been said and written lamenting the restrictive scope of the groups covered by the definition found in article II of the *Convention* than on its interpretation per se.

The first judicial interpretation of the enumeration of groups protected by the *Genocide Convention* dates to September 1998, fifty years after the *Convention's* adoption.<sup>5</sup> In *Prosecutor v. Akeyesu*, a Trial Chamber of the International Criminal Tribunal for Rwanda wrestled with the application of the enumeration to the Tutsi victims of the 1994 genocide in Rwanda.<sup>6</sup> Perplexed by difficulties in determining how to categorize the Tutsi group, the Trial Chamber ultimately ruled that article II of the *Genocide Convention* should be interpreted to apply to all "stable and permanent" groups, whether or not the Tutsi could be neatly fit within the scope of the terms "national, ethnical, racial or religious." Months later, a second Trial Chamber of the same Tribunal, in *Prosecutor v. Kayeshema and Ruzindana*, took a very different approach to the issue, ruling that the Tutsi were an ethnic group not because they met the definition in any objective sense but because Rwandan laws had defined them as such.<sup>7</sup>

This paper examines the conflicting interpretations produced by different Trial Chambers of the International Criminal Tribunal for Rwanda with respect to the enumeration of groups protected by the prohibition of genocide.

## I. HISTORICAL CONSIDERATIONS

The Polish jurist Raphael Lemkin, in his 1944 work *Axis Rule in Occupied Europe*, invented the term genocide, defining it as a crime directed against "the national group as an entity."<sup>8</sup> A close reading of Lemkin's writings shows that he viewed the prohibition of genocide as an extension of the protection of what were called "national minorities" in the inter-war treaty regime. It is true that Lemkin spoke of "political" and "economic" genocide, but here he referred not to the group protected but rather to the nature of the persecution. Lemkin's approach to the forms that genocide might take, including destruction of political, economic and cultural institutions, was far broader than what would

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4. Penal Code (France), Journal officiel, July 23, 1992, art. 211-1.

5. The Eichmann case involved interpretation of Israeli legislation modelled on article II of the Genocide Convention. While the two judgments construe several important elements of the definition, they do not give any attention to the enumeration of groups: A.G. Israel v. Eichmann, (1968) 36 I.L.R. 5 (District Court, Jerusalem); A.G. Israel v. Eichmann, (1968) 36 I.L.R. 277 (Supreme Court).

6. *Prosecutor v. Akayesu*, (Case no. ICTR-96-4-T), Judgment, Sept. 2, 1998, (1998) 37 I.L.M. 1399.

7. *Prosecutor v. Kayeshema and Ruzindana*, (Case no. ICTR-95-1-T), Judgment (May 21, 1999).

8. Raphael Lemkin, *AXIS RULE IN OCCUPIED EUROPE, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

later take shape within the *Convention*. But as for the nature of the groups protected, his narrow conception is quite faithfully reflected in article II of the *Convention*.<sup>9</sup>

The term "genocide" was used by the prosecution during the Nuremberg trial of the major war criminals to describe the destruction of the Jewish population of Europe.<sup>10</sup> The judges, however, did not adopt the term, and qualified the persecution of Jews by the Nazi regime as a crime against humanity. A few months after the Nuremberg judgment of September 30 - October 1, 1946, genocide was the subject of a General Assembly resolution. The first draft of General Assembly Resolution 96(I) spoke of "national, racial, ethnical or religious groups,"<sup>11</sup> echoing almost exactly the terminology later enshrined in the 1948 *Convention*. However, a drafting sub-committee of the Sixth Committee changed this to "racial, religious, political and other groups."

No recorded debates of the sub-committee exist to explain the addition of "political and other groups," and the summary records of the plenary Sixth Committee are silent on the subject. It has subsequently been argued that the presence of "political and other groups" within the 1946 definition suggests the existence of a broader concept of genocide than that expressed in the *Convention*, one that reflects customary law. But given the meager record of the debates, the haste with which the resolution was adopted, the novelty of the term, and the fact that the subsequent *Convention* excludes "political and other groups," such a conclusion seems adventuresome at best. That Resolution 96(I) also omits ethnic and national groups is a further argument against it being taken as an authoritative list on this issue.

During the subsequent drafting work on the *Convention*, although debate raged about the specific groups to be included, particularly political groups, there is no doubt that the drafters intended to list the protected groups in an exhaustive fashion. Inclusion of "national groups" within the enumeration raised little controversy during the drafting of the *Convention*. As delegates explained, the term was well-understood within the context of the "minorities problems" in Eastern Europe between the two wars. Concern that "national" might be confused with "political" led Sweden to propose the addition of the term "ethnical."<sup>12</sup> The reference to "racial" groups posed the least problem for the drafters of the *Convention*. There are no significant references to discussion

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9. As a consultant to the Secretariat, he opposed adding political groups to the enumeration in the draft *Convention*: U.N. Doc. E/447, 22.

10. France et al. v. Goering et al., (1946) 22 I.M.T.203, 13 I.L.R. 203, 41 A.J.I.L. 172, 45-6 (I.M.T.).

11. U.N. Doc. A/BUR/50, proposed by Cuba, India and Pakistan. The Saudi Arabian draft convention, submitted at about the same time, spoke of "the destruction of an ethnic group, people or nation." U.N. Doc. A/C.6/86.

12. U.N. Doc. A/C.6/SR.73 (Petren, Sweden); U.N. Doc. A/C.6/SR.74 (Petren, Sweden).

of the term "racial" in the *travaux préparatoires*, suggesting that it is very close to the core of what the *Convention* was intended to protect. Although some questioned the inclusion of religious groups, these were accepted on the understanding that they were closely analogous to ethnic or national groups, the result of historical conditions that were in reality as defining of the group in an immutable sense as racial or ethnic characteristics.

Subsequent to the adoption of the *Convention*, the International Law Commission regularly flirted with the idea of modifying the text of article II of the *Convention* so as to give the enumeration of protected groups a non-exhaustive character, but it eventually returned to the original 1948 version.<sup>13</sup> When it created the *ad hoc* Tribunals, the Security Council also retained the 1948 definition. There were isolated attempts to amend the definition of genocide during the drafting of the *Rome Statute*,<sup>14</sup> but the final version also repeats the 1948 text without modification.

## II. AKAYESU: "STABLE AND PERMANENT GROUPS"

The Trial Chamber of the International Criminal Tribunal for Rwanda, in its September 2, 1998 decision in *Akayesu*, considered the enumeration of protected groups in article II of the *Genocide Convention* (the model for article 2 of the *Statute of the International Criminal Tribunal for Rwanda*<sup>15</sup>), to be too restrictive. The categorization of Rwanda's Tutsi population clearly vexed the Tribunal. For the Tribunal, the word "ethnic" came closest, yet it too was troublesome because the Tutsi could not be meaningfully distinguished, in terms of language and culture, from the majority Hutu population.<sup>16</sup>

The Rwandan Tutsis are, it is widely believed, descendants of Nilotic herders, whereas the Rwandan Hutus are considered to be of "Bantu" origin from South and Central Africa. Historically, their economies were different, the Tutsis raising cattle while the Hutus tilled the soil. There are genomic differences, a typical Tutsi being tall and slender, with a fine, pointed nose, a

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13. Yearbook 1951, Vol. I, 90th meeting, at 66-8; Yearbook 1951, Vol. II, p. 136; "Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur," U.N. Doc. A/CN.4/398 (1986), art. 12(1); Yearbook 1989, Vol. I, 2099th meeting, p. 25, ¶ 42; Yearbook 1989, Vol. I, 2100th meeting, p. 27, ¶ 2, p. 30, ¶ 31; Yearbook 1989, Vol. I, 2102nd meeting, at 41, ¶ 12; "Report of the Commission to the General Assembly on the work of its forty-first session," U.N. Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), at 59, ¶ 160; Yearbook 1991, Vol. I, 2239th meeting, at 214, ¶ 7-8; Yearbook 1991, Vol. I, 2251st meeting, at 292-93, ¶ 9-17; "Report of the Commission to the General Assembly on the work of its forty-third session," U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), at 102, ¶ (2).

14. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. Doc. A/50/22, at 12-13, ¶ 59-72.

15. U.N. Doc. S/RES/955, annex.

16. *Akayesu*, *supra* note 6, at ¶ 693.

typical Hutu being shorter with a flatter nose. These differences are visible in some, but not in many others. Rwandan Tutsis and Hutus speak the same language, practice the same religions, and have essentially the same culture. Mixed marriages are common. Distinguishing between them was so difficult that the Belgian colonizers established a system of identity cards, and determined what Rwandan law calls "ethnic origin" based on the number of cattle owned by a family.<sup>17</sup>

Confronted with the prospect that none of the four terms of the definition might apply, the Tribunal concluded that the *Convention* could still extend to certain other groups, although their precise definition was elusive. Pledging fidelity to the *Convention's* drafters, the *Akayesu* judgment declared:

On reading through the travaux préparatoires of the Genocide Convention (Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly), it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

The Trial Chamber continued:

Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide

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17. André Guichaoua, *LES CRISES POLITIQUES AU RWANDA ET AU BURUNDI (1993-1994)* (1995); Jean-Pierre Chrétien, *LE DÉFI DE L'ETHNISME; RWANDA ET BURUNDI: 1990-1996* (1997); G. PRUNIER, *THE RWANDA CRISIS, 1959-1994, HISTORY OF A GENOCIDE* (1995); Filip Reyntjens, *L'AFRIQUE DES GRANDS LACS EN CRISE* (1994).

Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.<sup>18</sup>

With this approach, the Rwanda Tribunal encompassed the nation's Tutsi population within the definition of genocide, even if the term "ethnic group" was deemed insufficient.

The *Akayesu* analysis is open to criticism on several fronts. In the first place, it quite brazenly goes beyond the actual terms of the *Convention* definition, invoking the intent of the drafters as a justification. The problem is that the drafters chose the four terms in order to express their intent. If they meant to protect all "stable and permanent groups," why didn't they simply say this? The role of the *travaux préparatoires* is to assist in clarifying ambiguous or obscure terms, or those that are manifestly absurd or unreasonable,<sup>19</sup> not to add elements that were left out. As was stated by Sir Percy Spender and Sir Gerald Fitzmaurice of the International Court of Justice: "The principle of interpretation directed to giving provisions their maximum effect cannot legitimately be employed in order to introduce what would amount to a revision of those provisions."<sup>20</sup> Reading in terms that are not already present in the text is also particularly objectionable when the treaty defines a criminal offence, which should be subject to restrictive interpretation and respect the rule *nullum crimen sine lege*.<sup>21</sup> If the "stable and permanent" hypothesis is to be sustained, it must rely on a construction of the actual words that appear in article II.

A general discomfort with the term "racial group" may explain why the International Criminal Tribunal for Rwanda, in its September 2, 1998 judgment in the *Akayesu* case, was reluctant to classify the Tutsi as a racial group. The general conception of Tutsi within Rwanda is based on hereditary physical traits, even though these may be difficult to distinguish in many cases. According to the Rwanda Tribunal, "[t]he conventional definition of a racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."<sup>22</sup>

This definition, adopted by the Tribunal in 1998, is considerably more restrictive than the recognized meaning of the term "racial" in 1948. An indication of usage at the time is provided by the Oxford English Dictionary, which proposes several definitions of race, of which the most appropriate are: "A group of persons, animals, or plants, connected by common descent or

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18. *Akayesu*, *supra* note 6, at ¶ 515.

19. Vienna Convention on the Law of Treaties, (1979) 1155 U.N.T.S. 331, art. 32.

20. South West Africa case, [1950] I.C.J. Reports 128.

21. Prosecutor v. Delalic et al., (Case no. IT-96-21-T), Judgment, Nov. 16, 1998, (1999) 38 I.L.M.57, ¶ 402, 409-13.

22. *Akayesu*, *supra* note 6, at ¶ 513.

origin;" "A group or class of persons, animals, or things, having some common feature or features."<sup>23</sup> This definition can be extended without difficulty to cover national, ethnic, and even religious minorities, and that is indeed how the term was understood in 1948, although this no longer corresponds with modern-day usage.<sup>24</sup> For example, the Permanent Court of International Justice, in a 1935 advisory opinion, spoke of the "the preservation of [the] racial peculiarities" of national minorities.<sup>25</sup> A special United Nations Declaration of December 17, 1942 denounced ill-treatment of the "Jewish race" in occupied Europe.<sup>26</sup> The judgment of the International Military Tribunal at Nuremberg noted that judges in Germany were removed from the bench for "racial reasons," a reference to treatment of Jewish jurists.<sup>27</sup> It also condemned Julius Streicher for crimes against humanity because his incitement to murder and extermination at a time when Jews in the East were being killed under the most horrible conditions constituted "persecution on political and racial grounds." A British war crimes tribunal at the end of the Second World War convicted Nazis for their "persecution of the Jewish race."<sup>28</sup> The International Military Tribunal for the Far East charged the Japanese government with failing to take into account the "racial needs" and "racial habits" of prisoners of war.<sup>29</sup>

Although the term "racial group" may be increasingly obsolete, the concept persists in popular usage, social science, and international law. Understandably, progressive jurists search for a meaning that is consistent with modern values and contemporary social science. This must be the explanation for the Rwanda Tribunal's insistence upon hereditary traits as the basis of a definition. Yet it is unquestionable that the meaning of "racial groups" was much broader at the time of the drafting of the *Convention*, when it was to a large extent synonymous with national, ethnic, and religious groups. That

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23. IN THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2400 (R. W. Burchfield, ed., 1971).

24. ETHNIC RELATIONS: A CROSS-CULTURAL ENCYCLOPEDIA 195 (David Levinson, ed., 1994). But in the early 1980s, a court in The Netherlands concluded that Jews were covered by the word "race" in the country's Penal Code, because "[t]he widely held opinion is that the term 'race' in ¶ 429(4) cannot be construed solely in the biological sense but rather . . . must be viewed as defining 'race' by reference also to ethnic and cultural minorities." S. J. Roth, *The Netherlands and the 'Are Jews a Race?' Issue*, 17:4 PATTERNS OF PREJUDICE 52 (1983).

25. *Minority Schools in Albania*, Advisory Opinion, April 6, 1935, P.C.I.J. Series A/B, No. 64.

26. *Quoted in* MANFRED LACHS, *WAR CRIMES, AN ATTEMPT TO DEFINE THE ISSUES* 97-98 (1945).

27. *France et al. v. Goering et al.*, *supra* note 10, at 419 (I.M.T.).

28. *United Kingdom v. Kramer et al.*, ("Belsen Trial"), (1947) 2 L.R.T.W.C. 1 (British Military Court), at 106.

29. *United States of America et al. v. Araki et al.*, Judgment of the International Military Tribunal for the Far East, Nov. 4, 1948, in *THE TOKYO WAR CRIMES TRIAL* 49,688 (R. John Pritchard, Sonia Magbanua Zaide, eds., 1981).



modern judicial interpretation results in less protection now than fifty years ago is surely a perverse result.

On closer scrutiny, three of the four categories in the *Convention* enumeration, national groups, ethnic groups, and religious groups seem to be neither stable nor permanent. Only racial groups, when they are defined genetically, can lay claim to some relatively prolonged stability and permanence. The day after the General Assembly adopted the *Genocide Convention* it approved the *Universal Declaration of Human Rights*, which proclaims the fundamental right to change both nationality and religion, thereby recognizing that they are far from permanent and stable.<sup>30</sup> National groups are modified dramatically as borders change and as individual and collective conceptions of identity evolve. Nationality may be changed, sometimes for large groups of individuals where, for example, two countries have joined or secession has occurred. Religious groups may come into existence and disappear within a single lifetime. As for ethnic groups, individual members may also come and go, although there will often be formal legal rules associated with this, determining ethnicity as a result of marriage or in the case of children whose parents belong to different ethnic groups.

Furthermore, it is not at all clear from a reading of the *travaux préparatoires* of the *Convention* that the intent of the drafters "was patently to ensure the protection of any stable and permanent group," as the Rwanda Tribunal claimed. In fact, reference to groups which are "stable and permanent" occurred only infrequently during the drafting, and other, complex justifications for the choices of the General Assembly were also given in the course of the debates.<sup>31</sup> What a review of the drafting history reveals is that political groups - perhaps the best example of a group that is not stable and permanent - were actually included within the enumeration until an eleventh-hour compromise eliminated the reference. The debates leave little doubt that the decision to exclude political groups was mainly an attempt to rally a minority of Member States, in order to facilitate rapid ratification of the *Convention*, and not a principled decision based on some philosophical distinction between stable and more ephemeral groups.

Nor is there any support for the "stable and permanent" hypothesis in national legislation introducing the crime of genocide in domestic penal codes. It is true that several States have departed from the *Convention* definition, but none has taken the "stable and permanent" approach.

The Trial Chamber's imaginative interpretation in *Akeyesu*, designed to address its discomfort with defining the Tutsi as an ethnic group, is particularly

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30. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, arts. 15(1), 18.

31. U.N. Doc. A/C.6/SR.69 (Amado, Brazil).

puzzling because in the same judgment the Trial Chamber convicted the accused of crimes against humanity, in that he was responsible for a “widespread or systematic attack on the civilian population on ethnic grounds.”<sup>32</sup> Surely the word “ethnic” means the same thing in article 4 of the *Statute* as it does in article 2 of the *Statute*? Yet the Rwanda Tribunal did not see any need to enlarge the definition of crimes against humanity!

### III. KAYESHEMA: PURE SUBJECTIVITY

Determining the meaning of the groups protected by the *Convention* seems to dictate a degree of subjectivity. It is the offender who defines the individual victim’s status as a member of a group protected by the *Convention*.<sup>33</sup> The Nazis, for example, had detailed rules establishing, according to objective criteria, who was Jewish and who was not. It made no difference if the individual, perhaps a non-observant Jew of mixed parentage, denied belonging to the group. As Jean-Paul Sartre wrote in *Réflexions sur la question juive*, “[l]e juif est un homme que les autres hommes tiennent pour juif: voilà la vérité simple d’où il faut partir. En ce sens le démocrate a raison contre l’antisémite: c’est l’antisémite qui fait le juif.”<sup>34</sup> Problems with the four categories in article II of the *Convention* have led some writers to argue for a purely subjective approach.<sup>35</sup> If the offender views the group as being national, racial, ethnic, or religious, then that should suffice, they contend. In Rwanda, Tutsis were betrayed by their identity cards, for in many cases, there was no other way to tell.

In *Kayeshema and Ruzindana*, another Trial Chamber of the International Criminal Tribunal for Rwanda adopted a purely subjective approach, noting that an ethnic group could be “a group identified as such by others, including perpetrators of the crimes.”<sup>36</sup> Indeed, it concluded that the Tutsi were an ethnic group based on the existence of government - issued official identity cards describing them as such,<sup>37</sup> quite clearly failing to endorse the “stable and

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32. Prosecutor v. Akayesu, *supra* note 6, at ¶ 652.

33. For consideration of this question from the standpoint of minorities law, see, John Packer, On the Content of Minority Rights, in *DO WE NEED MINORITY RIGHTS* 124-25 (J. Räikkä, ed., 1996); John Packer, *Problems in Defining Minorities*, *MINORITY AND GROUP RIGHTS TOWARDS THE NEW MILLENIUM* (B. Bowring, D. Fottrell, eds., 1999).

34. Jean-Paul Sartre, *RÉFLEXIONS SUR LA QUESTION JUIVE* 81-84 (1954).

35. Jean-Michel Chaumont, *LA CONCURRENCE DES VICTIMES: GÉNOCIDE, IDENTITÉ, RECONNAISSANCE* 211-12 (1997).

36. Prosecutor v. Kayeshema and Ruzindana, (Case no. ICTR-95-1-T), Judgment, May 21, 1999, at ¶ 98.

37. *Id.* at ¶ 522-30.

permanent” analysis of the *Akayesu* judgment.<sup>38</sup> However, it did not explicitly disagree with the other Trial Chamber’s analysis.

This approach is appealing up to a point, especially because the perpetrator’s intent is a decisive element in the crime of genocide. The flaw of this approach is allowing, at least in theory, genocide to be committed against a group that does not have any real objective existence. To make an analogy with ordinary criminal law, many penal codes stigmatize patricide, that is, the killing of one’s parents. But the murderer who kills an individual believing, erroneously, that he or she is killing a parent, is only a murderer, not a patricide. The same is true of genocide. Although helpful to an extent, the subjective approach flounders because law cannot permit the crime to be defined by the offender alone. It is necessary, therefore, to determine some objective existence of the four groups.

It is also significant that several references to “group” appear within article II of the *Convention*. The term is used both within the *chapeau*, which describes the mental element or *mens rea* of the offence, and the five paragraphs that follow, which set out the punishable acts of genocide. Had the concept of groups appeared only in the portion of the text dealing exclusively with the mental element, namely the *chapeau*, the subjective argument would have more force. It would be sufficient to identify a genocidal intent where the accused believed that the group existed. However, the provision goes further and requires, in the definition of the actual acts of genocide, that they be directed against “members of the group.”

#### IV. DEFINING THE GROUPS: AN OBJECTIVE APPROACH

The High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe, Max van der Stoep, was once quoted saying that although he could not define the term, “I know a minority when I see one.”<sup>39</sup> Put differently, difficulty in constructing a definition does not render an expression useless, particularly from the legal point of view. The four terms – national, ethnical, racial, and religious – necessarily involve a degree of subjectivity because their meaning is determined in a social context. For example, issue may be taken with the term “racial” because the existence of races themselves no longer corresponds to usage of progressive social science.<sup>40</sup> However, the terms “racial” as well as “race,” “racism,” and “racial

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38. *Id.* at. ¶ 94.

39. Max van der Stoep, *Prevention of Minority Conflicts, in THE CSCE AND THE TURBULENT NEW EUROPE* 148 (L.B. Sohn, ed., 1993). His comment was inspired by United States Supreme Court Justice Potter Stewart who said the same thing about pornography. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963).

40. According to the Commission of Experts on Rwanda, “to recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or

group” remain widely used and are certainly definable. They are social constructs, not scientific expressions, and were intended as such by the drafters of the *Convention*. To many of the delegates attending the General Assembly session of 1948, Jews, Gypsies and Armenians might all have been qualified as “racial groups,” language that would be seen as quaint and perhaps even offensive a half-decade later. Their real intent was to ensure that the *Convention* would contemplate crimes of intentional destruction of these and similar groups. The four terms were chosen in order to convey this message. International law knows of similar examples of anachronistic language. One of the earliest multilateral treaties dealing with human rights was aimed at “white slavery.”<sup>41</sup> Its goal, the eradication of forced prostitution on an international scale, remains laudatory and relevant, although the terminology is obviously archaic.

The four terms in the *Convention* not only overlap,<sup>42</sup> they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the *Convention* find protection. This was certainly the perception of the drafters. For example, they agreed to add the term “ethnicity” so as to ensure that the term “national” would not be confused with “political.”<sup>43</sup> On the other hand, they deleted reference to “linguistic” groups, “since it is not believed that genocide would be practised upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics.”<sup>44</sup> The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.

The 1996 report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind adopts this approach in considering “tribal groups” to fall within the scope of the definition of genocide.<sup>45</sup> It is not difficult to understand why tribal groups fit within the four corners of the domain, whereas political and gender groups do not. Yet in concluding that tribal groups meet the definition of genocide, it seems unnecessary to attempt to establish within which of the four enumerated

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ethnicity itself as a scientifically objective fact.” Final report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), U.N. Doc. S/1995/1405, annex, ¶ 159.

41. International Agreement for the Suppression of the White Slave Traffic, (1904) 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, (1910) 7 Martens Nouveau Recueil (3d) 252, 211 Consol. T.S. 45.

42. Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398, at ¶ 56.

43. U.N. Doc. A/C.6/SR.73 (Petren, Sweden); U.N. Doc. A/C.6/SR.74 (Petren, Sweden).

44. U.N. Doc. A/401.

45. Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. Doc. A/51/10, at 89.

categories they should be placed. In the same spirit, the Canadian *Criminal Code*'s genocide provision includes the term "color" in its list of protected groups.<sup>46</sup> We readily understand that groups defined by "color" are also protected by the *Convention* without it being important to determine whether they are in fact subsumed within the adjectives national, racial, ethnical, or religious.

There is a danger that a 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. To a degree, this problem is manifested in the September 2, 1998 judgment of the International Criminal Tribunal for Rwanda in the *Akayesu* case. It also appears in the definitions accompanying the genocide legislation adopted by the United States of America.<sup>47</sup> Deconstructing the enumeration risks distorting the sense that belongs to the four terms, taken as a whole.

Raphael Lemkin conceived of genocide as a crime committed against "national groups," something made apparent by frequent references in his book *Axis Rule in Occupied Europe*.<sup>48</sup> In his famous study, he associated the prohibition of genocide with the protection of minorities.<sup>49</sup> Lemkin clearly did not intend the prohibition of genocide to cover all minorities, but rather those that had been contemplated by the minorities treaties of the inter-war years. The term "national" had an already well-accepted technical meaning, having been used to describe minorities in the legal regime established in the aftermath of the First World War. For Lemkin, genocide was above all meant to describe the destruction of the Jews, who cannot in a strict sense be termed a national group at all. Yet the term's usage was clear enough in what it covered and what it was meant to protect. The historical circumstances and the context of Nazi persecution further enhanced this perspective. The etymology of the term "genocide" also confirms this. In ancient Greek, *genos* means "race" or "tribe." It does not refer to any group in the abstract, or even to groups defined on the basis of political view, or economic and social status.

Attacks on groups defined on the basis of race, nationality, ethnicity, and religion have been elevated, by the *Genocide Convention*, to the apex of human rights atrocities, and with good reason. The definition is a narrow one, it is true, but recent history has disproven the claim that it was too restrictive to be of any practical application. For society to define a crime so heinous that it will

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46. Criminal Code [Canada], R.S.C. 1985, c. C-46, s. 318(4), "any section of the public distinguished by colour, race, religion or ethnic origin."

47. Genocide Convention Implementation Act of 1948, (The Proxmire Act), S. 1851, sec. 1093.

48. *Supra* note 8, at 79, 80-2, 85-7, 90-3. See also, Raphael Lemkin, *Le génocide*, [1946] REV. INT'L DROIT PÉNAL 25. (Par 'génocide' nous voulons dire la destruction d'une nation ou d'un groupe ethnique.)

49. Raphael Lemkin, *Axis Rule in Occupied Europe*, *supra* note 21, at 90.

occur only rarely is testimony to the value of such a precise formulation. Diluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivializing the horror of the real crime when it is committed.

