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The Interpretation of the
Genocide Convention's
Protected Groups Definition

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Summary

The Genocide Convention was created in the aftermath of World War II. The international community was appalled by the Nazi policy of extermination of “inferior” groups of people. The word genocide was created during the war to cover these policies and acts committed by the Germans. After the war genocide was defined in the Genocide Convention. The Convention’s article II defines genocide as an intentional physical destruction of national, ethnical, racial or religious groups in whole or in part. The Genocide Convention also established the criminal responsibility of individuals committing genocide in time of peace. This was already recognised in time of war through the Nuremberg Principles.

The definition of genocide in the Genocide Convention is also most likely identical with the definition of genocide in the customary international law, which according to the ICJ is prohibited in international law.

The protected groups are hard to separate from each other and all four of them have common features. One is that they are, more or less, stable and permanent groups. National and ethnical groups are particularly hard to separate from each other since both are mostly defined through a common language, culture or way of life. Racial groups are often described as having special inherited physical traits whereas religious groups are defined by their theistic, non-theistic or atheistic belief.

The definition has been strongly criticised and especially the scope of the protected groups has been accused of not covering some of the major post-war mass murders. A second problem is that the four enumerated groups are hard to define clearly. There are no generally accepted definitions in international law of the groups and this leads to problems when the Convention is to be applied in specific cases. This is reflected in the case law of the two UN tribunals, the ICTY and the ICTR. The statutes of the tribunals have the exact same definition of genocide as the Genocide Convention.

The ICTR had difficulties fitting the Tutsi into one of the protected groups, whereas the ICTY had an easier task to distinguish the Bosnian Muslims as a protected group under the Genocide Convention. Several Trial Chambers have so far interpreted the protected groups definition differently and there are three clearly distinguishable approaches in the case law: the objective, the subjective and the ensemble or holistic approach. The objective approach is probably the one intended by the drafters while the subjective approach is preferred by most commentators since the concepts of national, ethnical and racial groups are mostly about the perception of the members and others. The ensemble approach recognises the fact that the groups are hard to separate and that at least the national, ethnical and racial groups

seem to be forming one larger whole and should therefore not be seen as three different concepts.

It is not possible to say which of these approaches that will prevail but future decisions in the ICC will hopefully provide for a more consistent interpretation of the Genocide Convention's protected groups definition.

Abbreviations

COE	Council of Europe
ETS	European Treaty Series
GAOR	General Assembly Official Records
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PCNICC	Preparatory Commission for the International Criminal Court
UN	United Nations
UNTS	United Nations Treaty Series

1 Introduction

Men and women have through history always been capable to perform the most horrendous acts towards other men and women. Some of the worst acts that can be committed are acts of genocide. This crime has even been described as the “crime of crimes”.¹ Genocide is a word that is strongly emotionally and politically loaded. When a phenomenon or event is labelled a genocide this is often a way to express a concern about the gravity of the situation and not necessarily an attempt to define the situation from legal point of view. In this situation it is the role of lawyers to interpret the definition of genocide in international law. The authoritative definition of genocide in international law is the definition given in the UN Genocide Convention², which was created in 1948. The Genocide Convention was a landmark in the history of international criminal law as it was the first instrument that recognised that gross human rights violations committed in absence of an armed conflict are nevertheless of international concern.

More than fifty years later the Genocide Convention is a well-established instrument that comprises of elements of international criminal law, international humanitarian law and international human rights law. The Convention defines an international crime and spells out rules of prosecution and extradition and therefore falls under international criminal law. Since the definition of genocide is included in the Statutes of the two ad hoc tribunals created to prosecute violations of humanitarian law the Genocide Convention can be claim to be a part of humanitarian law. The prohibition of genocide is closely connected to the universal right to life³. In other instruments this right is often linked to the individual’s right to life whereas the Genocide Convention protects the right to life for entire human groups also called the right to existence. The General Assembly Resolution 96 (I) reflects this view when it describes genocide as a “denial of existence of entire human groups as homicide is the denial of the right to live of individual human beings...”

Already during the drafting of the Convention there was a debate over the scope of protection under the Genocide Convention. Which groups should be awarded protection? The drafters finally agreed on a narrow definition protecting four enumerated groups: national, ethnical, racial and religious. The debate however was not over. Commentators have criticised or defended the definition ever since and the debate has only grown stronger in recent years. This reflects the fact that the last ten years the Genocide Convention has finally been applied in international tribunals and national

¹ Prosecutor v. Kambanda (ICTR-97-23-S), Judgement and Sentence, 4 September 1998, para. 16

² Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277. (1951), adopted by the UN General Assembly on October 9 1948

³ Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), UN Doc. A/810, art 3.

courts. The number of cases is likely to increase with the creation of the International Criminal Court.

The status of the crime of genocide, the Genocide Convention's fundamental role in international criminal law and the current accelerating general interest for the crime of genocide caught my interest and therefore I decided to write my thesis about the crime of Genocide.

1.1 Purpose

The purpose of the thesis is to analyse the Genocide Convention's protected groups definition. To achieve this, some fundamental questions will be answered, namely:

1. What is the position of the Genocide Convention in international law?
2. How should each of the four enumerated groups be defined?
3. What kind of critique has been raised against the protected groups definition and what are the defences for the current definition?
4. How is the protected groups definition interpreted in the ICTY and the ICTR and are their interpretations consistent with the demands of the general principles of international criminal law?

1.2 Scope and Limitations

In order to offer satisfying answers to the questions above the thesis has a broad scope. The concepts of national, ethnical, racial and religious groups are not clearly defined in international law and to define them here, apart from describing the different definitions offered in various instruments in international law, I choose to include some definitions offered in social science. I believe this is important since these concepts are not only legal but are also discussed extensively in social sciences. To put the Genocide Convention into its proper historical and social context there is also a short background that describes the creation of the Convention.

The cases chosen from the ICTY and ICTR have been included because they show all-important interpretations of concern to the protected groups definition. Each of them has brought something new to the interpretation of the Genocide Convention and are frequently cited by commentators in international criminal law.

The question of intent is only discussed briefly in the thesis. The intent to commit genocide is a question that is closely connected to the protected groups definition especially when the subjective approach in the ICTY and ICTR is discussed. Therefore it is mentioned in chapter 5 but not described or analysed closely.

Genocide is since the Nuremberg Trials linked to the concept of crimes against humanity. This broad crime is not discussed here since this thesis is dealing exclusively with Genocide.

1.3 Material and Method

I have used a wide range of material in order to make the thesis as broad as intended. Firstly, I have used the Genocide Convention and other instruments of international law. Secondly, reports from the UN and other international organisations as the COE has provided me with material for the thesis. The two reports prepared for the Commission of Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities by Ruhashyankiko and Whitaker have been invaluable sources of information.⁴

Schabas' excellent textbook⁵ has not only provided me with valuable information and comments on the subject but also functioned as my foremost reference work. Although all scholars do not accept his conclusions and are not taken for granted in this thesis either, the work covers all parts of the crime of genocide in international law. Furthermore, cases from the ICTY and ICTR have been vital for the study and various articles and textbooks offered the commentaries and analyses needed for this work to reflect the current position of scholars concerned with the definition of genocide.

The method is both descriptive and analytical. The methods are represented both in the part defining the protected groups and in the case study part of the thesis. The short historical background constitutes a descriptive part.

1.4 Outline

After this introductory chapter, the second chapter forms a historical background on the crime of genocide. It describes the process that led to the creation of the Genocide Convention. In the following chapters the protected groups definition is analysed and the position of the Genocide Convention in international law is described and analysed. Here the focus is on the four enumerated groups and their inter-relations, similarities and differences. Consequently a critique of the definition of genocide in the Genocide Convention follows where the different arguments for and against the current definition will be described and assessed, here the much discussed issue of the omission of political groups will be highlighted.

⁴ Ruhashyankiko Nicodème, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*. UN Doc. E/CN.4/Sub.2/416 4 July 1978 and Whitaker B. *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*. UN Doc. E/CN.4/Sub.2/1985/6 2 July 1985

⁵ Schabas William A., *Genocide in International Law*. 2000a. Cambridge UK: Cambridge University Press

The fifth chapter starts with an introduction to the ICTY, ICTR and ICC and the Statutes of the Tribunals and their relation to the Genocide Convention. The relevant principles of international criminal law are described since they are important in the following case studies. Four cases are discussed in the thesis and after the facts of a case and the Tribunal's reasoning a commentary follows each of the four cases. The sixth chapter is a dominantly analytical and conclusive assessment of the protected groups definition of the Genocide Convention and the interpretations offered by the Tribunals. Here the effects of the inconsistency of the Tribunals and the ambiguity of the protected groups definition are analysed and discussed.

2 Creation of the Genocide Convention

2.1 Raphael Lemkin and Genocide

The Polish scholar Raphael Lemkin created the term genocide in 1944. His book *Axis Rule in Occupied Europe* was an analysis of the Nazis practice of extermination. Lemkin named this practice “genocide”, from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).⁶ According to Lemkin, the aim of genocide was the destruction of “national groups”.⁷ This aim and intent to destroy a group is still what distinguishes genocide from other crimes. Lemkin’s analyses and definition of genocide was applicable to the acts of the Nazis, which required that people be treated not as individuals but as members of a specific group.⁸

2.2 The General Assembly Resolution 96 (I)

In the post war Nuremberg trials, genocide was mentioned by the prosecutors as a crime but the judgements omitted the word itself, although they described acts that would now be defined as genocide as criminal acts. Extermination of national and racial groups was however conceptualised as a category of crimes against humanity. In later trials against lower rank Germans, such as The Justice case, genocide was mentioned in the judgements. The Justice case was distinguished as the first international decision to discuss and explicitly convict defendants of genocide.⁹

The question of genocide was put on the UN General Assembly’s agenda during its first session in 1946. The matter was referred to the 6th committee, which, after discussion in the full committee and a subcommittee, submitted a proposed draft resolution to the General Assembly. This draft was unanimously adopted on 11th of December 1946.¹⁰

The Resolution¹¹ affirmed that genocide is a crime under international law and that principals and accomplices, whether the crime is committed on religious, racial, political or any other ground, are punishable. The crime of

⁶ Amann Diane Marie, “Group Mentality, Expressivism, and Genocide”. 2 *International Criminal Law Review* 93. 2002. p. 96-97

⁷ Lemkin Raphael, *Axis Rule in Occupied Europe*.1944. Washington: Publications of the Carnegie Endowment for International Peace, Division of International Law. p. 79

⁸ Amann. p. 97

⁹ Lippman Mathew, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later”. 15 *Ariz. J. Int’l & Comp. L.* 415. 1998. *435-439

¹⁰ Schabas. 2000a. p. 42-45

¹¹ General Assembly Resolution 96 (I)

genocide was defined by the Resolution as a “denial of the right of existence of entire human groups”. The Resolution further requested the Economic and Social Council to prepare a draft convention on the crime of genocide.¹²

Resolution 96 (I) has been used and cited frequently, in both subsequent instruments and judicial decisions, and can therefore be seen as codifying customary principles of international law. Schabas suggests however that much caution is advised in respect to this issue.¹³ Another writer uses the wording of the Resolution to argue that political groups are protected by a *jus cogens* norm which prohibits Genocide. According to this interpretation the *Jus Cogens* norm has broader scope of protection than the Genocide Convention.¹⁴

2.3 Drafting the Convention

A first draft on a convention text was created by the Secretariat’s Human Rights Division with help from three invited experts, one of them being Raphael Lemkin. The draft contained definitions of protected groups, acts of genocide and punishable offences. The acts of genocide were divided into three groups: physical genocide (acts causing death or injuring health or physical integrity), biological genocide (restriction of birth) and cultural genocide (destroying the special characteristics of the groups).¹⁵

The protected groups in this draft were racial, national, linguistic, religious or political groups of human beings.¹⁶ The draft was not adopted as the final convention text though it can be used in a comparison to the Genocide Convention and the Resolution 96 (I).

A UN Ad Hoc Committee modified the draft text, mostly on procedural matters but also the definition of genocide was changed although the protected groups remained the same as in the earlier draft. The draft from the Ad Hoc Committee was referred to the General Assembly’s 6th Committee.¹⁷ In the 6th Committee the draft was discussed article by article and significant changes were made in article II and III that defined the crime of genocide. Political groups were excluded and ethnical groups included instead. The concept of cultural genocide was also excluded, limiting the punishable acts to physical and biological genocide. The Sixth Committee’s draft convention was unanimously adopted by the General Assembly on 9 December 1948.¹⁸

¹² Ibid.

¹³ Schabas, 2000a. p. 46

¹⁴ Van Schaack Beth. “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot”. 106 Yale L.J. 2259. (1997) * 2280. See also chapter 3.2

¹⁵ Robinson Nehemiah. *The Genocide Convention A Commentary*. 1960. New York: Institute of Jewish Affairs, World Jewish Congress. p 19

¹⁶ UN Doc. A/AC 10/41 cited in Schabas. 2000a. p. 59

¹⁷ Robinson, p.23-25

¹⁸ Schabas, 2000a. p. 71-80

3 The Genocide Convention

3.1 Introduction and a short overview of the Genocide Convention

The purpose of the Genocide Convention is, as stated in the full name,¹⁹ to ensure the prevention and punishment of the crime of genocide. The Convention clearly states that genocide is a crime under international law whether committed in time of war or in time of peace.²⁰ Article II of the Convention defines the crime itself: “genocide means one of following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”²¹

Article III enumerates the acts punishable under the Genocide Convention. These are besides the principal crime of genocide: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

The following articles in the Convention deal, inter alia with issues like implementation of the Convention in domestic law,²² trials by competent tribunals,²³ the role of the United Nations²⁴ and disputes relating to the interpretation of the Convention²⁵. The definition of genocide in the Convention is apparently narrower than the one in the Resolution 96 (I). A reason for this can be that a resolution does not have the same legally binding effect as a convention and countries therefore are more willing to accept a broad definition in a resolution.

Ratner and Abrams states that the Genocide Convention is today regarded as the authoritative codification of the basic legal principles relating to genocide.²⁶

¹⁹ The Convention on the Prevention and Punishment of the Crime of Genocide

²⁰ The Genocide Convention article I

²¹ Ibid. article II

²² Ibid. article V

²³ Ibid. article VI

²⁴ Ibid. article VIII

²⁵ Ibid. article IX

²⁶ Ratner Steven R & Abrams Jason S. *Accountability for Human Rights Atrocities and International Law.: Beyond the Nuremberg Legacy*. 2001. Oxford: Oxford University Press. p. 28

3.2 Prohibition of Genocide as Part of Customary Law

3.2.1 Genocide as an International Crime

In view of the fact that not all States are parties to the Genocide Convention,²⁷ the question of its relationship to customary international law is of obvious significance to national, ethnical, racial and religious groups in countries not parties to the Convention. These States that are not parties are quite as heterogeneous as the States parties and do not present themselves as a group of particular outstanding politically stable countries. Their minorities live under the same conditions of insecurities as minorities in any other modern State. Thus, the principles of the Genocide Convention are just as important and desirable in those countries.

As seen in the foregoing chapter, Resolution 96 (I) has been an argument for commentators to support the view that genocide was condemned by customary international law independent of the Genocide Convention. This is reflected in Article I of the Convention where the parties “*confirm* that genocide, whether committed in time of peace or war, is a crime under international law” (emphasis added).

Normally General Assembly Resolutions have a recommendatory force only. However they can be the best possible statement of customary international law provided that certain conditions are fulfilled. Resolution 96 (I) clearly deals with a legal issue and claims to be a declaration of existing law rather than creating a new law. According to Thornberry the Resolution is an important piece of evidence of a rule which is accepted as law. An US Military Tribunal observed this when stating that: “The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion.”²⁸

The drafters of the Convention had different views on the matter of genocide as a crime under international law. The representative of Poland argued that Resolution 96 (I) recognised genocide as crime under international law and the United Kingdom regarded physical genocide as already a crime so that the proposed convention would make no significant contribution to international law.²⁹ Other countries doubted the criminality of genocide under international law in time of peace. They were doubtful whether the Resolution 96 (I) be legally binding upon the States. This is a valid point since, as seen above, a General Assembly resolutions are of

²⁷ By 18th of February there were 135 States parties to the Genocide Convention, Indonesia has for example not ratified the Convention, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp> accessed 2004-02-19

²⁸ Thornberry Patrick. *International Law and the Rights of the Minorities*. 1992. Oxford: Clarendon. p. 92

²⁹ GAOR, 3rd Session, Part I, 6th Committee, 64th meeting

recommendatory nature. The doubters did not address the issue whether a principle of customary law could none the less have been created.³⁰ Article I of the Genocide Convention declared genocide to be a crime under international law and thereby made a statement to the issue of genocide as customary law.

In the *Reservations case*³¹ the ICJ stated that “the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, *even without any conventional obligation*” (emphasis added).³² Thus it is clear that the ICJ considered genocide to be a crime under international customary law. The Secretary- General has in a report concerning the competence of the ICTY, stated that the Genocide Convention is beyond doubt part of international customary law.³³ The Genocide Convention binds only States and the prohibition of Genocide in international customary law should therefore also bind only States. It imposes no duties and no responsibility directly on the individual, only a State exercising its jurisdiction under national legal systems could normally prosecute an individual.

However there is the concept of “universal jurisdiction”. Universal jurisdiction applies to a limited number of crimes which any State, even absent personal³⁴ or territorial³⁵ links to the crime. According to Schabas these crimes in international customary law are piracy, slave trade and traffic in women and children. Some multilateral treaties also recognise universal jurisdiction for particular offences among others hijacking and other threats to air travel.³⁶ The Genocide Convention does not provide for universal jurisdiction over the crime of Genocide.³⁷ According to Schabas there is no universal jurisdiction accepted for the crime of genocide either in customary law or under the Genocide Convention.³⁸

It seems as if there is no individual responsibility for the crime of genocide under international law. However, the concept of “international crimes”, that is, crimes that States are not only obligated to prosecute but are also universally binding to individuals, establishes this individual responsibility for persons committing genocide. That individuals can be responsible for committing crimes under international law was established in the Nuremberg Principles. There, the responsibility of the individual for crimes against humanity (including genocide), war crimes and crimes against peace

³⁰ Ibid. 63rd meeting.

³¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory opinion of 28 May 1951, ICJ Reports 1951

³² Ibid. 15.

³³ Report of the Secretary- General Pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 35

³⁴ The offender is a national of the prosecuting State.

³⁵ The crime was committed on the territory of the prosecuting State.

³⁶ Schabas, 2000a. p. 354

³⁷ The Genocide Convention article VI

³⁸ Schabas. 2000a. P. 367

is established.³⁹ The question that arises is how to identify such crimes. Today a good source to find out which crimes can be seen as international crimes is the Rome Statute of the ICC. That a crime is under the jurisdiction of the ICC is a good indication that the international community considers the crime to be an international crime. Genocide is a crime in the Rome Statute of the ICC.⁴⁰

The ICJ never clearly defined the scope of the customary law prohibiting genocide. Some writers argue that it is broader than the Genocide Convention itself. The definition of genocide in Article II of the Genocide Convention forms a minimum, which is probably reflected also in the customary law that outlaws genocide. Of all the States that have ratified the Convention none have made reservations to the first Articles that define the crime. Thornberry describes this as an “undisputed core of genocide”.⁴¹ Still there is nothing that prevents the customary law of genocide to be broader than the Convention. Most writers though seems to be of the notion that the definition of genocide in Article II is also the definition of genocide in customary law and that there is no *opinio juris* among States for the notion that the definition of genocide in customary law is expanded beyond the scope of the Convention.⁴² The fact that the Convention’s definition of genocide has been transferred in its exact wording to the Statutes of the ICTY, ICTR and the ICC is evidence that supports the view that this definition is also what constitutes the customary law prohibiting genocide and the international crime of genocide.

3.2.2 Genocide as a Jus Cogens norm

Articles 53 and 54 of the Vienna Convention regulate what are called jus cogens norms. According to Article 53 a jus cogens norm is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted. There are no specifications or examples given of these norms. The prohibition of genocide is often mentioned as one of the possible jus cogens norms. According to Thornberry, genocide per se or as a part of international criminal law, figure in practically every listing of principles of jus cogens.⁴³ There is no generally accepted test for verification of a rule, which is claimed to be jus cogens. A rule must be accepted by community of States as a whole. The phrase “as a whole” seems to indicate that there must be a universal

³⁹ Broomhall Bruce. *International Justice & the International Criminal Court*. 2003. Oxford: Oxford University Press. p. 20

⁴⁰ Rome Statute of the International Criminal Court. 1998. Article 6

⁴¹ Thornberry, p. 104-105

⁴² Thornberry, p 105. See also Nsereko Daniel D. “Genocide: A Crime Against mankind” in Kirk McDonald Gabrielle & Swaak-Goldman Olivia (eds.). *Substantive and procedural Aspects of International Criminal Law. The Experience of International and National Courts Vol. I, Commentary*. 2000. The Hague: Kluwer Law International. p. 123. Stating that “the Convention is part of customary law”

⁴³ Other proposed jus cogens norms are the prohibition against slavery and piracy. See Thornberry, p. 97

acceptance of a jus cogens norm. It might however be enough if a very large majority of States accepts a rule as jus cogens. Thornberry argues that the prohibition of genocide is a jus cogens norm since there is an overwhelming support for this within the international community of States and because genocide is the most fundamental denial of human dignity and equality.⁴⁴ The ICTY has also expressed the view that the definition of genocide in the Genocide Convention is a jus cogens norm.⁴⁵

3.3 Protected Groups in the Genocide Convention

3.3.1 Groups

Article III of the Convention states that genocide has to be committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Before taking on the task to define and discuss upon the four enumerated protected groups something should be mentioned about the concept of “groups” itself. The *travaux préparatoires* of the Genocide Convention do not provide any meaningful discussion or definition of this word. Robinson’s definition of groups is that groups consist of individuals.⁴⁶ This definition is perhaps somewhat brief and obvious but complemented with the four words national, ethnical, racial, and religious it could be the best definition.

Lerner concludes that “groups” is a broader notion than for example “people”. Lerner further gives the word group the meaning of ethnic, racial, religious, linguistic or cultural groups.⁴⁷ Using that definition he comes notably close to using the word groups as synonymous to the enumerated groups in the Genocide Convention.

Schabas discusses why “minorities” was not used instead of groups. He suggests that the term minorities could have been felt to have a too technical meaning and that it could limit the scope of the Convention.⁴⁸ Also, as Whitaker observes, genocide can be committed against a majority group.⁴⁹ That interpretation must be correct. Nothing in the Genocide Convention says that a group must be in minority to be victim of genocide. The main objective of the Genocide Convention is to prevent and punish the crime of genocide and not to protect minorities. In fact, it is not unheard of

⁴⁴ Ibid. p. 99-100

⁴⁵ Prosecutor v. Milomir Stakic, 31 July 2003, IT-97-24, [hereinafter: Stakic case] para. 500

⁴⁶ Robinson p. 58

⁴⁷ Lerner Natan. *Group Rights and Discrimination in International Law*. 1991. Dordrecht: Kluwer Academic Publishers. p.30-32

⁴⁸ Schabas, 2000a. p. 107

⁴⁹ Whitaker, p. 16

in history that a minority group oppressed a majority; the South African system of Apartheid is a recent example of that phenomenon.

3.3.2 National Groups

The term national has no clear and undisputed definition. Therefore I will show some proposed definitions and then make a suggestion on how to interpret this term in the Genocide Convention.

In social science the term “nation” is used often as near synonymous with the term “ethnicity”.⁵⁰ That is the starting point also for this and the following chapter and may be good to keep in mind.

The ICTR has offered one definition on the concept of national groups. According to that definition national groups are people who are perceived to share legal bond based on common citizenship and reciprocity of rights and duties.⁵¹ This interpretation of the term “national” is problematic since the ICTR based its interpretation on a decision of the ICJ.⁵² This decision was concerned with the concept of “nationality” which is not the same as membership of a “national group”. The ICJ case does not address the situation of national minorities who share cultural bond with a given state while they are citizens of another state. Therefore this interpretation cannot be used to define the term “national” in the Genocide Convention.⁵³ Schabas’ definition of national groups is: “national minorities while sharing cultural and other bonds with a given State, may actually hold the nationality of another State, or who may even be stateless.”⁵⁴

The UN Special Rapporteur Ruhashyankiko also stressed this difference between what he calls the ethnographical sense of the term and the politico-legal sense of citizenship. This was inferred from interpretations of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination which prohibits distinctions, exclusions, restrictions or preferences based, inter alia, on descent, national or ethnic origin.⁵⁵ This is described more closely by Johansson according to whom the term nationality can refer on the one hand to citizenship and on the other hand to a group of people joined together by descent and cultural factors like traditions and practices. In the later meaning the term nationality relates to concepts like ethnicity and people.⁵⁶

⁵⁰ Yinger, Milton J., *Ethnicity: Source of Strength?: Source of Conflict?* 1994. Albany: State University of New York Press. p. 12

⁵¹ Akayesu case, para. 511

⁵² Nottebohm Case, Judgement of 6 April [1955] ICJ Reports p. 24

⁵³ Schabas, 2000a. p. 115

⁵⁴ Ibid., p. 115

⁵⁵ Ruhashyankiko, p. 16-17

⁵⁶ Johansson, Rune, “Nationer och Nationalism: Teoretiska och Empiriska Aspekter” In: Tägil, Sven (ed.). *Den Problematiska Etniciteten- Nationalism, Migration och Samhällsomvandling*. 1993. Lund: Lund University Press. p. 16

According to Schabas, the main concern of the Genocide Convention was to protect what was in Europe known as national minorities. Schabas considers that the drafting history and the context of the adoption of the Genocide Convention make this clear.⁵⁷ After World War I a system was created in Europe under the protection of the League of Nations for the protection of national minorities. Minority schools were established in several countries and minorities could play a role in the political affairs of countries like Czechoslovakia and Latvia. The system was built up with three kinds of instruments: (1) five treaties with particular states involving minority problems; (2) provisions on minorities in general peace treaties with four countries, and (3) declarations made by several states as a condition for their admission to the League of Nations. In addition bilateral and multilateral agreements were made to protect minorities in the concerned countries. The aim for these instruments and agreements was in general to grant legal equality to individuals belonging to a minority and to make it possible for minorities to preserve the characteristics and traditions of the group.⁵⁸ In an advisory opinion in 1930 the PCIJ defined communities⁵⁹ as “a group of persons living in a given country or locality, having a race, religion, language and traditions of their own.”⁶⁰

The concept of national minorities is still used in European human-rights instruments. Still there have not been any official attempts to define the concept of national minorities in post-war European organisations as OSCE and COE. The task of the OSCE High Commissioner on National Minorities is to provide early warnings and to de-escalate situations of tension involving national minorities in the OSCE area. Thus his mandate gives him the task of short-term conflict prevention.⁶¹ The mandate does not contain any definition of national minorities since there is no generally accepted agreement on what constitutes a national minority in the OSCE. In the OSCE Copenhagen Document of 1990 certain rights that members of national minorities are entitled to enjoy are enumerated. Members of a national minority have the right to “express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects...” To belong to a national minority is also the choice of a person's own will.⁶² The OSCE High Commissioner on National Minorities has used an unofficial working definition of national minorities. According to this definition a national minority possess differences in ethnicity, religion or language compared to the rest of the population.⁶³

⁵⁷ Schabas, 2001a. p. 116

⁵⁸ Lerner, p.12

⁵⁹ “Communities” was used synonymous with “national minorities” See Jackson Preece, Jennifer. *National Minorities and the European nation-States System*. 1998. Oxford: Clarendon Press. p. 16

⁶⁰ *Greco-Bulgarian Communities Case*, PCIJ series B, No. 17 p 24

⁶¹ www.osce.org/hcnm/mandate/ Accessed: 2004-01-21

⁶² <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm> Accessed: 2004-01-21

⁶³ Jackson Preece, p. 21

The COE Framework Convention for the Protection of National Minorities protects the individual national minority member's rights to his or her religion, language and culture.⁶⁴ In the explanatory comments on the COE Framework Convention it is pointed out that no definition of the concept of national minorities is offered by the Convention. Instead a pragmatic approach was adopted, seeing that at that stage it was not possible to find a definition which would have general support of all COE member states.⁶⁵

The *travaux préparatoires* of the Swedish minority protection legislation recognises the following criteria for a group to be considered a national minority: expressed kinship within the group, a non-dominant position within the society, the minority has to have a common religious, linguistic and/or cultural affiliation.⁶⁶ This is mentioned as an example on how the term national minority can be defined in national legislation.

According to Jackson Preece immigrants, refugees and migrant workers are not encompassed by the pre W. W. II, OSCE and COE concepts of national minorities. These groups were not encompassed by the definition of national minorities proposed by UN Special Rapporteur Francesco Caporti. He defined a minority as a group whose members are nationals of the state and possess ethnic, religious or linguistic characteristics.⁶⁷

If the term "national" in the Genocide Convention has the same definition as "national minorities", a few remarks should be made. The traditional definition of national minorities does not encompass groups of individuals who are not nationals of the given State. Thus, national groups in the Genocide Convention cannot encompass others than nationals in the given State. The whole concept of national minorities and national groups seem to refer to relations within a State. If the persons committing the genocide come from an outside country can the victims be members of a national group in the eyes of the Genocide Convention? As far as I can interpret these two concepts it would be better to label the group as an ethnical or racial group instead of a national group in case of an attack from persons from another country. It also seems as if the term national groups only covers nationals (as in citizens) of the State where the Genocide takes place. Immigrants and refugees, groups that can consist of considerable number of individuals are better protected under the racial, ethnical and religious terms in the Genocide Convention.

⁶⁴ Framework Convention for the Protection of National Minorities ETS No. 157 (1995).

Found at:

[http://www.coe.int/T/e/human%5Frights/Minorities/2%2E%5FFRAMEWORK%5FCONVENTION%5F%28MONITORING%29/1%2E%5FTexts/H\(1995\)010%20E%20FCNM%20and%20Explanatory%20Report.asp#TopOfPage](http://www.coe.int/T/e/human%5Frights/Minorities/2%2E%5FFRAMEWORK%5FCONVENTION%5F%28MONITORING%29/1%2E%5FTexts/H(1995)010%20E%20FCNM%20and%20Explanatory%20Report.asp#TopOfPage). Article. 8-12. Accessed 2004-03-24 [hereinafter: Framework Convention for the Protection of National Minorities and Explanatory Report]

⁶⁵ Framework Convention for the Protection of National Minorities and Explanatory Report. Explanatory Report Article 10

⁶⁶ *Nationella Minoriteter i Sverige* Regeringens Proposition 1998/99 143. p. 33

⁶⁷ Jackson Preece, p. 18-22

3.3.3 Ethnical Groups

The term “ethnical” was added into the Genocide Convention on a proposal from Sweden, which felt that the use of the term “national” might be confused as to encompass also political groups.⁶⁸

The Swedish delegate to the 6th Committee also noted that a constituent factor of a minority might be its language. If a linguistic group did not have bonds with an existing state the group would be protected as an ethnical rather than as a national group. In the view of the Soviet Union delegate, who was in favour of the inclusion of the term “ethnical”, an ethnical group was a smaller collectivity than a nation.⁶⁹ This view is rejected by Thornberry, in his opinion ethnic seems to be the broadest term available. Thus, it is broader than both racial and national. In fact “racial” and “national” are to be included in the term “ethnic”⁷⁰

In the Universal Declaration of Human Rights ethnic origin is not a prohibited ground of discrimination⁷¹ According to Schabas this implies that “ethnical” must be covered by the terms race, colour and nationality. There is no generally accepted definition of the term “ethnical” in international law. The International Covenant on Civil And Political Rights gives racial, ethnic or religious groups the right to enjoy their own culture and to practise their own language and religion.⁷² Thus, culture, religion and language are important attributes of an ethnic group.

According to Max Weber “We shall call ‘ethnical groups’ those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization and migration [...] it does not matter whether or not an objective blood relationship exist.”⁷³ It is a question of presumed identity and not social fact. The term “ethnical” in the Genocide Convention has also been described as larger than “racial” and determined a community of people bound together by the same customs, the same language and the same race.⁷⁴ In Swedish legislation against discrimination ethnic affiliation is used as a concept that covers ethnic and national origin, race or colour.⁷⁵

It seems that a subjective belief in common culture, language, customs and religion are indicators of ethnical groups. According to Weber also attributes of the groups as clothing, style of housing, food and eating habits,

⁶⁸ Robinson, p. 59

⁶⁹ Schabas, 2000a. p. 124

⁷⁰ Thornberry, p. 160-161

⁷¹ Universal Declaration of Human Rights, Art. 2

⁷² International Covenant on Civil and Political Rights. (1976) 999 UNTS 176. Art. 27

⁷³ Guibernau, Montserrat & Rex, John. *The Ethnicity Reader*. 1997 Oxford: Polity. p. 18-19

⁷⁴ Whitaker, p. 15-16

⁷⁵ Lag om förbud mot diskriminering. SFS 2003:307. para. 4

the division of labour between the sexes has affected the belief of an ethnic affiliation.⁷⁶

Of course in different parts of the world some of the above mentioned indicators points of ethnic affiliation more than others. When applying the concept of ethnic groups in the Genocide Convention it must be in the proper context of the specific case.

3.3.4 Racial Groups

The term racial has, according to Schabas, changed from the least problematic in the eyes of the drafters to the most troublesome concept to apply and interpret. In the *travaux préparatoires* of the Genocide Convention there are no discussions on whether to include this term or not, whereas the terms ethnical, religious and national at least were discussed to some extent. Schabas therefore interprets that as an indicator that this term was close to the core of what was intended in the drafting of the Convention.⁷⁷

The original definition of the term was that of a broad general concept. 50 years ago the concept of race was understood to encompass national, ethnical and even religious groups.⁷⁸

The International Convention for the Elimination of All Forms of Racial Discrimination defines racial discrimination as: “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”⁷⁹ This supports the notion of “race” as a broad concept not limited to physical traits.

The term “race” is described as “slippery” by Cornell and Hartmann. First there is the definition of race as biology. According to this definition a race is a genetically distinct sub-population of a given species. In matters concerning humans this is not a relevant concept since genetic differences among human groups that we commonly view as races are inconsistent and insignificant. Scientists have long disagreed about which, if any, genetic differences exist between races and about how many human races there are in the world. The numbers proposed can vary from three to sixty-three. Indeed the idea of biologically distinct human races is not scientific but historical.⁸⁰

Of course genocide can still be committed on racial groups although the concept of race is dismissed by modern science. In the words of Schabas:

⁷⁶ Guibernau & Rex, p. 20

⁷⁷ Schabas, 2000a. p. 120

⁷⁸ Ibid., p. 121

⁷⁹ International Convention for the Elimination of All Forms of Racial Discrimination. (1969) 660 UNTS 195. Articles. 2(2) and 7

⁸⁰ Cornell, Stephen & Hartmann, Douglas, *Ethnicity and Race: Making Identities in a Changing World*. 1998. Thousand Oaks, California: Pine Forge. p. 21

“Surely an individual who sought to destroy the "Negroid" or "Mongoloid" race or part of it would be committing genocide under the terms of the convention, even though modern science disputes the validity of such designations from an objective standpoint.”⁸¹

The Akayesu Trial Chamber defined a racial group as a group with common hereditary physical traits.⁸² This definition is not satisfactory since physical differences among “races” are seldom consistently apparent.⁸³ However if a subjective approach is used this definition would suffice. The Tutsi of Rwanda would be a race since the perpetrators considered them to have certain hereditary physical traits.⁸⁴

There is indeed a confusion concerning the terms, national, ethnical and racial in the Genocide Convention. The report of Special Rapporteur Ruhashyankiko illustrates this well. He does not draw any conclusions or propose any definition of the term racial. The report simply shows that these terms merge into each other and are almost impossible to distinguish between.⁸⁵ It is clear though that the term “racial” has become less relevant and the term “ethnical” is used more frequently now than when the Genocide Convention was created. Often one group can be labelled as a national, ethnical or racial group. The Jews are a good example of this. A national group often has a common culture or language and is therefore an ethnical group at the same time. Racial groups, if defined as groups with hereditary physical traits, do not have to be national or ethnical groups. Blacks or African-Americans in the United States constitute, what could reasonably be called a racial group, but have become so assimilated into the American society that no traces of their original language or culture can be seen.⁸⁶ As seen in this chapter, in many international and national instruments race is a subgroup to ethnic or vice versa.

3.3.5 Religious Groups

Religious groups were part of the list of protected groups in the General Assembly Resolution 96 (1) and in the early drafts of the Genocide Convention as well as in the final text of the Convention.

In the 6th Committee the United Kingdom questioned the inclusion of religious groups. The United Kingdom delegate argued that people are free

⁸¹ Schabas, William, *The Genocide Convention at Fifty*, United States Institute of Peace Report 41 found at <http://www.usip.org/pubs/specialreports/sr990107.html#genocide> 2004-02-16

⁸² Akayesu case, para. 514

⁸³ Cornell, Hartmann, p. 23

⁸⁴ Akayesu case, para. 118 one witness is quoted saying “ their children, later on , would not know what a Tutsi looked like, unless they referred to history books”

⁸⁵ Ruhashyankiko, paras. 65-76

⁸⁶ This depends on a definition of national and ethnical groups that is based on the members’ common language or culture. If a belief in a common descent can qualify a group as ethnical or national group then African-Americans are certainly an ethnical group.

to join and leave religious groups and therefore they should be omitted in the Genocide Convention. However, there are convincing historical reasons why religious groups should be included in the Convention. The groups protected in the Genocide Convention are closely connected to the post-First World War minority protection system and religious groups were part of and protected in this system. In fact, although religious groups are theoretically voluntary and free to join and leave they are in reality often just as permanent and stable as racial or ethnic groups. The Soviet Union argued that religious groups are not targeted because of their religious affiliation but because of their ethnic, national or racial affiliation. Thus the expressed protection of religious groups would be unnecessary.⁸⁷

It is true that for some groups religion and race is one and the same thing. Jews, for example belong to a racial group as well as a religious group. Another example would be the Sikhs.⁸⁸ However, there are examples from history that show that religious groups can be targeted because of their religious affiliation. The European wars ending in 1648 and the St. Bartholemew massacres in France are examples from European history. In Asia we can see violence between Hindus and Muslims in India. In these cases it is more appropriate to label the targeted groups religious groups than ethnic, national or racial groups.

Religious groups should not be interpreted only to encompass worshippers of well-known or well-established religions. Schabas argues that religious groups are to be understood in a broad sense without clearly explaining the boundaries for this broad interpretation.⁸⁹

The General Assembly's 3rd Committee stated in a draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, inter alia that the expression religion or belief should include theistic, non-theistic and atheistic beliefs.⁹⁰ The UN Human Rights Committee has said that religion should not be limited to traditional religions or to beliefs with institutional characteristics analogous to those of traditional religions.⁹¹ In 1994 the same Committee decided that a Canadian group called the "Assembly of the Church of the Universe" could not be protected under the ICCPR art 18 because "a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant (freedom of religion and conscience)."⁹²

⁸⁷ Schabas, 2000a. p. 127

⁸⁸ Nsereko, p. 132

⁸⁹ Schabas, 2000a. p.128

⁹⁰ UN Doc. A/8330 para. 16-20

⁹¹ General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights (1993) UN Doc. CCPR/C/21/Rev.1/Add.4, para. 2

⁹² Report of the Human Rights Committee Vol. II General Assembly Official Records, Forty-ninth Session Supplement No. 40. UN Doc. A/49/40 p.369-370

The word “belief” should be interpreted strictly in connection with the term religion. It does not refer to belief in general, therefore political, cultural or scientific beliefs are not protected since these are not normally conceived to belong to the sphere described as religion.⁹³

Thus, religion and belief are broad concepts. Religious groups as understood in the Genocide Convention should also be interpreted broadly. One writer states that “religious groups as referred to in the Genocide Convention include any religious community united by a single spiritual ideal.”⁹⁴ This definition makes it difficult to encompass atheists into the scope of the Genocide Convention. What distinguishes atheists is the lack of a spiritual ideal.

According to Lippman the term religious groups encompasses theistic, non-theistic and atheistic communities united by a single spiritual ideal.⁹⁵ He seems to have no problem to fit atheistic and non-theistic communities. It is in the very nature of atheists to not organise in communities united by a spiritual ideal. Atheism unlike the affiliation to a traditional religion are most often based on an active individual choice and not brought upon persons as part of ethnic or racial affiliation. However, attacks targeting atheists should obviously be within the scope of the Genocide Convention. Thus, a better definition of the term religious groups in the Genocide Convention would be people sharing the same religion or belief. As stated above, the term religion and belief should be interpreted broadly. Nsereko offers a similar definition. According to him a religious group refers to people who adhere to a particular religious persuasion, be it theistic or non-theistic.⁹⁶

⁹³ Lerner, Nathan, “Religious Human Rights Under the UN”, In: Witte, John & Van der Vyver, John David, *Religious Human Rights in global Perspective- Legal Perspectives* 1996. The Hague: Nijhoff. p. 87

⁹⁴ Ruhashyankiko, p 20

⁹⁵ Lippman, *456

⁹⁶ Nsereko, p. 132

4 Critique Against the Protected Groups-Definition

4.1 The omission of political groups in the Genocide Convention

The protected groups definition of the Genocide Convention has been heavily criticised. The lack of protection of political groups in the Convention has been called the Convention's blind spot.⁹⁷ In Van Schaack's opinion this omission insulated political leaders from being charged with the very crime they are most likely to commit: the extermination of politically threatening groups and therefore escapes liability.⁹⁸ One writer suggests that events in Cambodia and Uganda would not be international crimes since they cannot properly be called genocide.⁹⁹ According to Drost a dangerous loophole exists in the Convention because of the lack of protection of political and other groups. Any government could put genocide into practice under cover of measures taken against political or other groups for reasons of national security, public order or any other reason of state. If members of a national, ethnical, racial or religious group are attacked the perpetrator can easily claim that the attack is directed towards the same persons as members of an unprotected group, for example social, economic or cultural group. In Drost's opinion, the crime of genocide is the deliberate destruction of physical life of individuals by reason of their membership of any human collectivity as such.¹⁰⁰ Whitaker proposed an amendment to the Genocide Convention so that it would also protect political groups. His report states that it's only logical for political groups to be treated like religious groups since a distinguishing mark for both groups is the common beliefs, which unite their members.¹⁰¹ Other commentators are of the opinion that political ideology, which in the time of the drafting of the Genocide Convention were regarded as less stable, are now regarded as an integrated and immutable part of human identity.¹⁰²

Schabas does not agree with this view. That political groups are excluded from the Genocide Convention is in no way a license to eliminate them. Indeed, the destruction of political groups is forbidden in the customary norm of crimes against humanity.¹⁰³ According to the ILC, who rejected an amendment to the Convention, "political groups were included in the definition of persecution contained in the Nuremberg Charter", therefore

⁹⁷ Van Schaack, *2259

⁹⁸ Ibid., *2268

⁹⁹ Schabas, 2000a. p. 144

¹⁰⁰ Drost, Pieter N., *The crime of State, II: Genocide*. 1959. Leiden: A. W. Sythoff. p 19

¹⁰¹ Whitaker, p. 18-19

¹⁰² Ratner & Abrams, p. 44

¹⁰³ Schabas, 2000a. p. 144

“persecution directed against members of a political group could still constitute a crime against humanity.”¹⁰⁴

It is also important not to confuse atrocities committed against political groups against political motivated genocides. The definition of genocide in Article II of the Genocide Convention is the commission of certain acts “with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Neither Article II nor any other article of the Genocide Convention refers to the motives that lie behind the commission of such acts.¹⁰⁵ According to Sunga, the fact that the Genocide Convention does not protect political groups should not be seen to imply that the attempted destruction of a national, ethnical, racial or religious group is excluded from the Genocide Convention’s coverage whenever political motives may be involved in the commission of genocide. To the contrary it is clear to Sunga that the Genocide Convention was specifically designed to prohibit a State sponsored program of mass-murder and extermination.¹⁰⁶ Thus, if a national, ethnical, racial or religious group also happens to constitute a political group it is protected by the Genocide Convention. However the perpetrator must know that the group is also a protected group to have the intent to destroy such a group.

4.2 The Omission of Other Groups in the Genocide Convention

The Genocide Convention has not only been criticised because of the lack of protection of political groups. There are other groups that are also omitted, often linguistic, cultural, economic are mentioned as groups that should be protected but also groups defined by sexuality and groups have been mentioned.

Jonassohn finds the definition in the Convention unsatisfactory. The reason is that none of the major victim groups of those, what Jonassohn calls “genocides”, that have occurred since its adoption falls within its definition. This seems in his view be true to events in Burundi, Cambodia, Indonesia, East Timor or Ethiopia. Therefore he creates an own proposed definition of genocide: “*Genocide* is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.”¹⁰⁷ This definition is quite close to the one expressed in the UN General Assembly resolution 96(I) where genocide is defined as the “denial of the right of existence of entire human groups”

¹⁰⁴ Report of the International Law Commission on the Work of Its Forty- Eight Session, 6 May-26 July 1996, UN Doc. A/51/10, p. 89

¹⁰⁵ LeBlanc, Lawrence J., *The United States and the Genocide Convention*. 1991 Durham and London: Duke University Press. p. 81

¹⁰⁶ Sunga, Lyal S., *The Emerging System of International Criminal law: Developments in Codification and Implementation*. 1997. The Hague: Kluwer Law International

¹⁰⁷ Jonassohn, Kurt, “What is Genocide?” in Fein Helen (ed.), *Genocide Watch*. 1992. New Haven: Yale University Press. p 18-19

whereas they do not enumerate which groups are protected.¹⁰⁸ This non-exhaustive list of protected groups would then include all those groups who according to Whitaker should be amended to the Convention.

He recommended in his report that the definition should be extended to include gender groups i.e. men or women and homosexuals.¹⁰⁹ A non-exhaustive list of protected groups is rejected by Schabas. In his view that would lead to an “absurdity that trivialises the very nature of genocide: the human race itself constitutes a protected group, and therefore genocide covers any mass killing.”¹¹⁰ Ratner and Abrams describes the debate over the scope of the Genocide Convention as “sterile” and they believe that this debate run a risk of “detracting from the enormity of the atrocities themselves.”¹¹¹

The wish to extend the definition of genocide to any group of people seems to be based on the weight of the word “genocide” in general. The term “genocide” has such an emotional and political impact that it is used in a more expansive sense than the legal definition might allow. Lawyers and commentators must work to rescue genocide from being diluted as a concept, both legally as well as generally. From a legal point of view it would be a mistake to change a definition that is accepted in international law. A new definition could be challenged by and loose support from States. Since the Genocide Convention’s definition also most likely is the definition of genocide in international customary law a change in the Convention would make the definition of genocide in customary law harder to decide. Thus, a change would be a mistake especially since atrocities not covered by the Genocide Convention are addressed by other legal norms.

¹⁰⁸ See chapter 2.3

¹⁰⁹ Whitaker, p. 16, 19

¹¹⁰ Schabas, 2000a. p 150

¹¹¹ Ratner & Abrams, p.43-44

5 The Ad Hoc- Tribunals and the Genocide Convention

5.1 Introduction to the Tribunals

5.1.1 The International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (the ICTY) was set up by the UN Security Council in 1993 pursuant to resolution 808 and 827.¹¹² The Security Council did this as an answer to the events in Former Yugoslavia that were considered as threats to international peace and security. Therefore the Security Council exercised its power under chapter VII under the UN Charter to set up the ICTY as its subsidiary organ.

The ICTY proceedings are governed by the ICTY-Statute¹¹³ and by Rules of Procedure and Evidence adopted by the judges themselves. The task of the ICTY is to prosecute persons responsible for grave breaches of the Geneva Convention of 1949, violations of the laws or customs of war, genocide and crimes against humanity.¹¹⁴

The Security Council set no time limit for the Tribunal's existence. The ICTY consists of Trial Chamber, an Appeals Chamber, a prosecuting organ and a registry. Judges are elected by the General Assembly from a list of candidates submitted by the Security Council.¹¹⁵

5.1.2 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (the ICTR) was, like the ICTY set up by the UN Security Council.¹¹⁶ The Tribunal is governed by its statute¹¹⁷ and has the power to prosecute persons responsible for serious violations of international humanitarian law committed in Rwanda and by Rwandan citizens in neighbouring states between 1 January 1994 and 31

¹¹² UN Doc. S/RES 808 (1993) and S/RES 827 (1993)

¹¹³ Adopted by Security Council Resolution 827 (1993), amended by Resolution 1166 (1998), Resolution 1329 (2000) and Resolution 1411 (2002)

¹¹⁴ Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter: The ICTY-Statute], found at <http://www.un.org/icty/legal/doc/index.htm> Accessed 2004-03-24. Art. 2-5

¹¹⁵ Ratner & Abrams. p. 192-193

¹¹⁶ UN Doc. S/Res/955 (1994)

¹¹⁷ Adopted by Resolution 955 (1994)

December 1994. The crime of Genocide is within the jurisdiction of the Tribunal.¹¹⁸

The reason for creating this Tribunal was the atrocities that took place in Rwanda 1994 when members of the Hutu attacked members of the Tutsi population. The Tribunal gave in 1998 its first guilty verdict in a genocide trial.¹¹⁹ The organisation of the ICTR is identical with the ICTY's organisation and the Tribunals share a common appellate chamber as well as a common prosecutor. The sharing of common institutions as well as rules aims at promoting consistency in the law and practice of the two Tribunals.¹²⁰

5.1.3 The Statutes of the Tribunals and the Genocide Convention

The ICTY and ICTR-Statutes' provisions on the crime of genocide are closely connected to the Genocide Convention since the definitions of genocide are identical in the statutes and the Genocide Convention. The ICTR-Statute article 2, the ICTY-Statute article 4 and the Genocide Convention article II have exactly the same wording. When a tribunal for Former Yugoslavia was first proposed, several governments submitted draft statutes and general comments on the subject. There was general agreement that genocide should be within the jurisdiction of the Tribunal and that the definition of genocide should conform to the text in the Genocide Convention.¹²¹

The Secretary General's report on the matter suggested that only rules that were clearly part of customary law should be applied. The Genocide Convention was according to the report part of customary law.¹²²

5.2 The ICC and the Genocide Convention

5.2.1 Introduction to the ICC

Already in the drafting and adopting of the Genocide Convention there were opinions raised for establishing an international tribunal that would try people charged with genocide.¹²³ However the international community waited until 1989 to start planning for and discussing an international criminal tribunal. The question was raised by Trinidad and Tobago in an UN

¹¹⁸ ICTR-Statute, found at <http://www.ictr.org/ENGLISH/basicdocs/statute.html> accessed 2004-03-24 Art. 2

¹¹⁹ Akayesu case

¹²⁰ Ratner & Abrams p. 202-203

¹²¹ Schabas. 2000a. p. 98

¹²² Report of the Secretary General. UN Doc. S/RES/827 annex (1993)

¹²³ "Study by the International Law Commission of the Question of an International Criminal Jurisdiction", General Assembly Resolution 260 B(III)

General Assembly resolution directing the ILC to consider the subject within the ongoing project of the draft Code of Crimes against the Peace and Security of mankind.¹²⁴ The Special Rapporteur to the ILC noted that some crimes, among them genocide, because of their gravity must come within the jurisdiction of an international court.¹²⁵ In 1994 the ILC submitted a draft statute for an International Criminal Court to the General Assembly. The General Assembly established an *ad hoc* committee on the establishment of an International Criminal Court, which met twice in 1995. After the General Assembly considered the Committee's report it created the PCNICC to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference.¹²⁶ This draft was then discussed in the diplomatic conference where the final version of the Rome Statute was adopted. The Rome Statute entered into force 1 July 2002 after the 60th country had ratified the Statute.¹²⁷

In the preamble of the Rome Statute the State Parties recognise that the crimes under the Statute threatens the peace and security and well-being of the world and are determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. The main feature of the Rome Statute is the principle of complementarity. This principle governs the basic relation between the ICC and national proceedings. The ICC shall deem a case inadmissible if:

“(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute...”¹²⁸

In its proceedings the ICC shall firstly apply the Statute, the Elements of Crimes, and its Rules of Procedure and Evidence. Secondly, applicable treaties and the principles and rules of international law shall, where appropriate, be applied. Also principles derived from national laws and national laws can be applied. The ICC does not have to follow principles or rules as interpreted in previous decisions.¹²⁹

5.2.2 The Rome Statute and the Genocide Convention

The crime of genocide is defined in the Rome Statute's article 6. Like in the ICTY and the ICTR the Rome Statute has the same definition as in the

¹²⁴ General Assembly Resolution 44/89

¹²⁵ Schabas, 2000a. p. 90

¹²⁶ <http://www.un.org/law/icc/general/overview.htm> accessed: 2004-03-28

¹²⁷ <http://www.icc-cpi.int/php/show.php?id=faq#faq1> accessed: 2004-03-28

¹²⁸ Rome Statute, Article 17 (1)

¹²⁹ Ibid. Article 21

Genocide Convention, thus the Rome Statute protects national, ethnical, racial and religious groups. The Statute is a multilateral treaty and shall be interpreted according to the principles in the Vienna Convention. Since the definition of genocide is taken from the Genocide Convention the *travaux préparatoires* of the Convention can be used for interpretation of the Statute's definition as well.

5.3 General principles of interpretation in international criminal law

5.3.1 Introduction to the Tribunals and General Principles of International Criminal Law

The statutes of the Nuremberg and Tokyo tribunals were thin when it comes to the so-called general principles of international criminal law. When the Security Council drafted the statutes of the ICTY and ICTR the general principles were again omitted from the statutes. The drafter has after defining the crimes left these issues to the discretion of the judges.

When the ICC-Statute was created the drafters limited the possibility of judicial discretion. In the ICC-Statute there are several articles concerning issues that can be considered as general principles of international criminal law.¹³⁰

The fact that there are no explicitly mentioned general principles in the ICTY and ICTR Statutes does not mean that the tribunals do not have to adhere to such principles at all. The problem is what principles should be adhered to. In this study I will try to find the general principles that the tribunals should follow when they interpret the Genocide Convention's definition of the crime of genocide.

In every legal order general principles are needed to guide judges in their interpretation of the law. The general principles set out the overall orientation of the system, provide sweeping guidelines for the proper interpretation of the law and also enables courts to fill the gaps of written and unwritten norms.¹³¹ Being a part of international law, international criminal law has a need for general principles and these exist, although not explicitly in the statutes of the tribunals.

The ICTY elaborated on the issue of interpreting the Statute of the Tribunal. It found that interpretation is especially complex since the ICTY-Statute is created with the approach that the provisions accommodate principles of law from the main legal systems of the world. The ICTY specifically stated that

¹³⁰ Schabas, 2000a. p. 71

¹³¹ Cassese, Antonio, *International Criminal Law*. 2003. Oxford: Oxford University Press. p. 135

the Statute consist of a fusion and a synthesis of the common law and the civil law systems.¹³²

In the Celebici case the Trial Chamber concluded that the ICTY has a special object namely to create peace and security in former Yugoslavia and that the interpretation of the Statute must therefore take into account these objects and the political and social considerations which played an important role in the creation of the ICTY.¹³³

5.3.2 Vienna Convention on the Law of Treaties

The Genocide Convention is a treaty between states, thus it shall be interpreted in accordance with the principles in Articles 31-32 in the Vienna Convention. The general rule of interpretation is that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹³⁴ Supplementary means of interpretation as the *travaux préparatoires* can be used if the interpretation according to Article 31 is ambiguous or obscure or if it leads to a result which is manifestly absurd or unreasonable.¹³⁵

The ad hoc Tribunals do not apply the Genocide Convention directly but only the definition of genocide of the Convention directly transferred into the statutes of each tribunal. The Statutes are not treaties but instead created by the UN Security Council under chapter VII of the UN Charter. Thus, in theory the Tribunals would not have to interpret the Convention by the rules in the Vienna Convention. According to Schabas it is logical to use the Vienna Convention also in the ICTY and ICTR since the definitions of genocide in the Statutes are so closely connected to the definition in the Genocide Convention. The fact that the Statutes are norms derived from the UN Charter, which is a treaty submitted to the rules of interpretation in the Vienna Convention, is an argument for using the Vienna Convention.¹³⁶ Another writer does not agree with this view. According to Machteld Boot, a requirement should be applicable to the ICTY and ICTR-Statutes according to which those statutory provisions, which define criminal conduct, are to be interpreted strictly and not according to the Vienna Convention’s rules of treaty interpretation.¹³⁷

¹³² Prosecutor v. Delialic *et al*, 16 November 1998 IT-96-21, [hereinafter: Celebici case], para. 158

¹³³ *Ibid.* para. 170

¹³⁴ Vienna Convention on the Law of Treaties, (1979) 1155 UNTS 331, Article 31

¹³⁵ *Ibid.* Article 32

¹³⁶ Schabas. 2000a. p. 540-541

¹³⁷ Boot, Machteld, *Genocide, Crimes Against Humanity, War Crime: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. 2002. Antwerp: Intersentia. p. 261 See chapter 5.2.4 for an elaboration on the matter of strict construction in international criminal law.

5.3.3 Principle of legality

The principle of legality is not one but a number of different principles that govern national as well as international criminal law. This principle is expressed in the ICC-Statute Articles 22 and 23. According to these articles no one shall be criminally responsible under the ICC-Statute unless acts have been committed that constitute a crime within the jurisdiction of the court.

This principle is also part of the rules in the ICCPR. According to Article 15: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” Although not mentioned in the Statutes of the ad hoc-Tribunals, according to Machteld Boot, the Tribunals have to observe this rule and other principles included in UN Human Rights instruments because the Tribunals are created as subsidiary organs to the UN Security Council.¹³⁸

To satisfy the principle of legality a crime must be defined sufficiently to put people on notice that a particular conduct has been characterised as criminal. The language in international criminal law instruments to define crimes is less specific than that found in many contemporary national penal codes. The reason for this can, according to Bassiouni, be that international criminal law is to be embodied and implemented into national legislation through which it can be enforced in national judicial systems. Therefore international criminal law norms need only to be declarative and can suffer from a generalising language that would normally be contrary to the demands of the principle of legality in most legal systems.¹³⁹ In the view of Bassiouni, the general principles of international criminal law themselves do not meet the demands of the principle of legality. Paradoxically even though the principle of legality is part of the general principles of international criminal law these principles are the most likely to lack the requirements of the principle of legality.¹⁴⁰

The Genocide Convention protected groups definition, although difficult to interpret correctly and to apply in specific situations, is unambiguous and clear enough to fulfil the demands of the principle of legality. The protected groups are enumerated in, what at least seems to be an exhaustive list of groups namely ethnical, national, racial and religious groups. Since the ICTY and ICTR and now also the ICC-Statutes offer identical protected groups definitions the principle of legality does not restrict or prevent the

¹³⁸ Ibid. p. 250-251

¹³⁹ Bassiouni, M. Cherif. *International Criminal law Vol. II, Procedural and Enforcement Mechanisms*. 1999. Ardsley, N.Y : Transnational Publishers p. 33-34

¹⁴⁰ Ibid. p. 37-38

use of these definitions in the Tribunals. The crime of Genocide became a crime under international law not later than by the adoption of Resolution 96 (I) and specified in the Genocide Convention shortly thereafter. Thus, the ad hoc-tribunals also follow the principle of legality as expressed in the ICCPR Article 15. The Secretary-General has also pointed out that the ICTY is not a legislator but shall apply existing international humanitarian law. According to the Secretary-General the principle of *nullum crimen sine lege* requires the ICTY to apply those rules that are beyond doubt part of customary law.¹⁴¹

5.3.4 Principle of Strict Construction

This principle is illustrated in the ICC-Statute Article 22. It says that the definition of a crime shall be strictly construed and shall not be extended by analogy. According to one ICTY-Trial Chamber the rule of strict construction requires “that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. In the construction of a criminal statute no violence must be done to its language to include people within it who do not ordinarily fall within its express language.”¹⁴² The effect of the rule of strict construction is, according to the Celebici Trial Chamber, that when the wording of an international criminal law provision is vague or ambiguous and leaves reasonable doubt of its meaning, the benefit of the doubt should be given to the accused and not to the law that has failed to be specific enough for its purpose.¹⁴³

5.4 Cases from the Tribunals

5.4.1 Akayesu Case

Jean Paul Akayesu was charged with genocide before an ICTR Trial Chamber on 13 February 1996.¹⁴⁴ Akayesu was bourgmestre of a commune in Rwanda from 1993 until 1994. The prosecution considered Akayesu responsible for several atrocities in the commune where he was bourgmestre. In each of the paragraphs of the indictment that charged Akayesu with genocide were the acts, according to the prosecution, committed with the intent to destroy, in whole or in part, a national, ethnic or racial group and the victims in each paragraph were members of a national, ethnic, racial or religious group.¹⁴⁵

¹⁴¹ Report of the Secretary-General Pursuant to Security Council Resolution 808. UN Doc. S/25704, paras. 33-34

¹⁴² Celebici case, para. 410

¹⁴³ Ibid. para. 413

¹⁴⁴ Akayesu case, para. 6

¹⁴⁵ Ibid.

The massive judgement that stops short of 300 pages analyses the events in Rwanda 1994 and the question whether genocide was committed in Rwanda in 1994. One chapter of the judgement also analyses the law, which the judgement is based on where the definition of genocide and the protected groups are given attention by the Trial Chamber. According to the Tribunal it was proven that the “Tutsi ethnic group” was targeted in the events in Rwanda 1994. Thus the Tribunal concluded that genocide was indeed committed in Rwanda.¹⁴⁶ When labelling the Tutsi as an ethnic group in this earlier part of the judgement, the Tribunal made the reservation that the term ethnic was only used because it was used by previous colonial authorities and by the Rwandans themselves.¹⁴⁷ This should not be interpreted as recognising the Tutsi as an ethnic group under the Genocide Convention, perhaps not a successful way to deal with these concepts and terms.

The Tribunal further tried to give an objective definition of each of the four groups enumerated in the Genocide Convention and the ICTR-Statute. National groups are defined as a “collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.” This definition was taken from the Nottebom ICJ-case.¹⁴⁸ Ethnic groups are, according to the Akayesu Trial Chamber, generally defined as a group whose members share a common language and culture.¹⁴⁹ A racial group is based on, and recognised by hereditary physical traits identified with a geographical region.¹⁵⁰ Religious groups are groups whose members share the same religion, denomination or mode of worship.¹⁵¹

At this stage the Tribunal got into trouble because in its view it was not clear that the Tutsi belonged to one of the four groups as defined by the Tribunal itself. A typical Tutsi is tall and slender, with a fine pointed nose, a typical Hutu is shorter with a flatter nose. These differences are visible in some, but not in many others. Therefore it was not clear that the Tutsi could be regarded as a racial groups as defined by the Trial Chamber. Rwandan Tutsi and Hutus speak the same language, practise the same religions and have essentially the same culture. Marriages between Tutsi and Hutus are also common and to distinguish between members of the two groups is difficult. The Belgian colonisers had to create a system of identity cards, and determined what was called “ethnic origin” based on the number of cattle owned by a family.¹⁵² When regarding the issue of Tutsi as an ethnic group the Tribunal noticed that all Rwandan identity cards in 1994 included a reference to the holder’s ethnic group, Tutsi, Hutu or Twa.¹⁵³ The Tribunal

¹⁴⁶ Ibid. paras. 124-125

¹⁴⁷ Ibid. para. 122

¹⁴⁸ Ibid. para. 512

¹⁴⁹ Ibid. para. 513

¹⁵⁰ Ibid. para. 514

¹⁵¹ Ibid. para. 515

¹⁵² Schabas. 2000a. p. 109

¹⁵³ Akayesu case para. 702

could not however give the Tutsi the status as an ethnic group in the objective sense and could not use any of the other three enumerated groups in the ICTR-Statute and Genocide Convention. The Tribunal then made an innovative interpretation of the protected groups definition. When reading through the *travaux préparatoires* of the Genocide Convention the Tribunal found 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.”¹⁵⁴ A common denominator of the four enumerated groups were according to the Akayesu Trial Chamber 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.”¹⁵⁵

An indication of this is, according to the Tribunal, that more mobile groups whose members join through individual voluntary commitment, such as political and economic groups are excluded in the Genocide Convention. Therefore the Tribunal asked the question whether it would be possible to punish acts of physical destruction of a group, as happened in Rwanda, if this group is not a racial, national, ethnic or religious group. This question got an affirmative answer by the Tribunal. According to the Tribunal it is particularly important to respect the intention of the drafters of the Genocide Convention. This intention was to patently ensure the protection of any stable and permanent group.¹⁵⁶ In the factual findings of the case the Tribunal found that the Tutsi was a stable and permanent group thereby protected by the Genocide Convention and the ICTR-Statute. The arguments for the Tutsi being a stable and permanent group was that every Rwandan identity card had a reference to the bearers “ethnic group”. Also all witnesses appearing before the Tribunal “answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity.”¹⁵⁷

5.4.1.1 Commentary on the Akayesu Case

The interpretation of the protected groups definition in the Akayesu case has been strongly criticised. One argument against the “stable and permanent group” concept is that the Tribunal’s interpretation hardly can be compatible with the principle of strict construction in penal law.¹⁵⁸ The Akayesu Trial Chamber interpreted a treaty that defines a criminal offence, and the interpretation should therefore be subject to a restrictive interpretation and respect the rule of *nullum crimen sine lege*. If the stable and permanent approach is to be sustained it must rely on a construction of the actual words that appear in article II. If the drafters meant to protect all stable and

¹⁵⁴ Ibid. para. 511

¹⁵⁵ Ibid.

¹⁵⁶ Ibid. para. 516

¹⁵⁷ Ibid. para. 702

¹⁵⁸ Schabas, William A., “Commentary” in Klip André & Sluiter Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals-The International Criminal Tribunal for Rwanda*. 1999. Antwerp: Intersentia. p. 543

permanent groups they could easily included that in the Convention itself.¹⁵⁹ The *travaux préparatoires* can be used to assist in clarifying ambiguous or obscure terms in a treaty, or terms that are manifestly absurd and unreasonable.¹⁶⁰ Jorgensen is of the opinion that the Akayesu Trial Chamber's interpretation constitutes an "unjustifiably liberal interpretation both of the terms of the Convention and of the intention of the drafters" and thus rejects the reasoning of the Tribunal.¹⁶¹ The argument seems to be that there is nothing in the wording of the Genocide Convention that suggests that all stable and permanent groups are protected.

Verdirame agrees with Jorgensen when stating that the Trial Chamber had to "force an interpretation of the Convention that seems remote from the text of Art. II and from the intention of the drafters."¹⁶² He suggests that the Akayesu Trial Chamber felt itself bound by precedents in international law when not adhering to the subjective approach.¹⁶³

Schabas also criticises the Tribunal for misinterpreting the intention of the drafters and the *travaux préparatoires*. The groups enumerated in the Genocide Convention are neither stable nor permanent. Only racial groups when defined genetically can claim to be a stable and permanent group for a longer period of time. National groups are modified as borders change and as conceptions of identities evolve, both individually and collectively. Members can also come and go in ethnic groups although there are often legal rules for this, determining ethnicity as a result of marriage or in the case of children whose parents belong to different ethnic groups. Religious groups can start to exist and disappear within a short period of time.¹⁶⁴ The Universal Declaration of Human Rights, approved shortly after the Genocide Convention, recognises the fundamental right to change both nationality and religion.¹⁶⁵

The Akayesu Trial Chamber used the omission of political groups in the Genocide Convention as an argument for using the "stable and permanent groups" concept.¹⁶⁶ Political groups were however excluded in the last stages of negotiation, and the decision is described by Schabas as "not a principled decision based on some philosophical distinction between stable and more ephemeral groups." He interprets the *travaux préparatoires* and finds that political groups were excluded to make it possible also for a minority of the countries to accept the Genocide Convention thus securing a rapid ratification.¹⁶⁷

¹⁵⁹ Schabas. 2000a p. 132

¹⁶⁰ Vienna Convention art. 32

¹⁶¹ Jorgensen, Nina H. B., "The Definition of Genocide: Joining the Dots in the Light of Recent Practice", 1 *International Criminal Law Review* 285. 2001, p. 288

¹⁶² Verdirame, Guglielmo, "The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals", 49 *International and Comparative Law Quarterly* 578. 2000. p. 592

¹⁶³ *Ibid.* p. 689

¹⁶⁴ Schabas. 2000a p. 133

¹⁶⁵ Universal Declaration of Human Rights, arts. 15(1) and 18

¹⁶⁶ Akayesu case, para. 515

¹⁶⁷ Schabas, 2000a. p 133

Another writer interprets the *travaux préparatoires* and the Convention differently. Nsereko finds that a common feature of the four groups which makes them worthy of protection is the fact that their members do not choose to be members. They are born into the groups. Thus, they are products of circumstances beyond the control of the members. It is heinous to destroy them when they had no part in choosing to belong to the groups. Additionally, members of these groups are easily identifiable and constitute distinct, clearly determinable communities. In Nsereko's view, this was why groups such as cultural and political groups were excluded in the Genocide Convention. Membership of a political group is optional and members of such groups are not born into the groups. This writer also feels that cultural groups are such non-permanent groups. A person can change his or her culture, voluntarily or otherwise, and embrace or be assimilated into another. However, according to Nsereko, there is an inconsistency in the conceptualisation of the protected groups. Religion, like political affiliation, is a matter of the individual's choice and will. Yet religious groups are protected in the Genocide Convention. Nsereko explains this contradiction with the assumption of the drafters that people are actually born into religious groups and that they do not often change religions. He is however doubtful whether this assumption still is true.¹⁶⁸ Thus, Nsereko agrees with the Akayesu Trial Chamber in its view that political and cultural groups were omitted because of their nature as non-permanent groups. It is clear that some writers think that the groups protected in the Genocide Convention are protected because of their nature as supposed permanent and stable groups. And the Akayesu Trial Chamber would not have drawn such strong criticism if it had stopped its interpretation with that. However, the Trial Chamber concluded that since the enumerated groups are permanent and stable all groups that can be seen as permanent and stable are protected. The Akayesu Trial Chamber claimed to have support in that view from the *travaux préparatoires* while for example Schabas interprets the same sources differently.

5.4.2 Kayishema Ruzindana Case

In this trial before the ICTR the two defendants were a former prefect and a businessman. They were both charged and found guilty of the crime of genocide committed during the conflict in Rwanda 1994.¹⁶⁹

This trial chamber came up with a completely different solution when interpreting the protected groups definition in the Genocide Convention than the trial chamber in the Akayesu case. The Tribunal did in the Kayishema case address the group issue as part of the larger question of special intent

¹⁶⁸ Nsereko, p.130

¹⁶⁹ The Prosecutor v. Clément Kayishema and Oben Ruzindana. 21 May 1999. ICTR-95-1-T [hereinafter: Kayishema case]. Chapter 7

(mens rea).¹⁷⁰ The defendants had, according to the Tribunal, committed acts with the intent to destroy the Tutsi as a group. This intent was displayed by the words, deeds, pattern of conduct and the number of Tutsi killed in the specific area.¹⁷¹ A guilty verdict on the crime of genocide required the Tribunal to find that the Tutsi were protected in the Genocide Convention. In the words of the Tribunal: “The intent must exist to destroy a national, ethnical, racial or religious as such. Thus the acts must be directed towards a specific group on these discriminatory grounds.”¹⁷²

The judgement in this case offered the same definitions of racial and religious groups as in the Akayesu case. An ethnic group was in Kayishema defined as “...one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification) or, a group identified as such by others, including perpetrators of the crimes (identification by others).”¹⁷³ The Tribunal did not offer any definition of national groups.

In this case the Tribunal clearly interpreted the concept of ethnic groups differently than the trial chamber in the Akayesu case. The definition starts with an objective criterion: members of a group share a common language and culture. This objective criterion is still close to the Akayesu definition. The Tribunal then introduced an expanding subjective interpretation in the Kayishema case. Groups whose members do not share a common language and culture can still be an ethnic group, if the groups are perceived as such groups by members of the groups or by others. This approach is appealing in many ways. It expands the protection of groups that cannot be considered as protected groups from an objective point of view. By using a subjective approach it is not necessary to assess whether a group actually can be regarded as objectively being a protected group. If only the victims, perpetrators or anyone else regarded the group as such, the group is protected under the Genocide Convention.

5.4.2.1 Commentary on the Kayishema Case

While appreciated by some this judgement and its interpretation of the protected groups definition has also been criticised. Schabas has strong principal objections to the Tribunal’s reasoning in the Kayishema case. According to Schabas it is wrong to give a group protected status by using a purely subjective method. One flaw is that this approach could allow, at least in theory, genocide to be committed against a group that does not really exist. The group could exist only in the mind of the perpetrator. Schabas makes an analogy to the crime of patricide that exists in some jurisdictions, where someone kills an individual believing, erroneously that he or she is killing a parent, only commits murder not patricide. Schabas

¹⁷⁰ Ibid. paras. 91-99

¹⁷¹ Ibid. paras. 531-545.

¹⁷² Ibid, para. 98

¹⁷³ Ibid,

does admit that the subjective approach can be helpful but that it flounders since law cannot permit the crime to be defined by the offender alone. Thus it is necessary to determine some objective existence a group and its status as a protected group under the Genocide Convention.¹⁷⁴

Schabas second objection is that the Tribunal's interpretation is not in accordance with the wording of the Genocide Convention article II and ICTR-Statute article 2. The argument used by Schabas is that the concept of groups appears not only in the part of the article with the mental element of the crime. The article goes further and requires, in the definition of actual acts of genocide that these acts are directed against members of the group and this requirement would need some objective identification of the group and its members.¹⁷⁵

The principal objection made by Schabas seems more valid than that the Tribunal interpreted the wording of the ICTR-Statute and Genocide Convention wrongly. If it is possible to determine the existence of with a subjective approach in the preamble of the article II it should be possible to also determine the members of the group with this subjective approach. The concept of "groups" can not differ when mentioned in first the preamble and then in the enumeration of acts of genocide against a protected group. However, there is nothing that prevents the subjective approach from being used also in defining members of a protected group. If the groups can be defined from a subjective point of view then their members could be as well.

The subjective approach is also rejected by Jørgensen who states that "the definition of genocide is not based on the perpetrator's belief in the existence of a protected group." In Jørgensen's view a group must be recognised according to objective criteria before trying to assess the perpetrator's mind.¹⁷⁶

Verdirame supports the interpretation in the Kayishema case. He calls the Tribunal's subjective approach "a welcome shift" in the interpretation of the protected groups definition.¹⁷⁷ According to Verdirame ethnicity is completely determined by "variable and contingent" perceptions.¹⁷⁸ Also Ratner and Abrams prefer the subjective approach to the objective approach.¹⁷⁹

The subjective approach is useful since, as the Tribunal noted, there are no generally accepted definitions of the concepts of racial, national and

¹⁷⁴ Schabas, 2000a. p. 110. See also: Schabas, William A., "Groups Protected by the Genocide Convention: Conflicting Interpretation From the International Criminal Tribunal for Rwanda" 6 *ILSA J. Int'l & Comp. L.* 375. (2000b) *384

¹⁷⁵ Schabas. 2000a. p. 110-111

¹⁷⁶ Jørgensen p. 289 if not an objective definition is used, there is also a "risk of getting lost amongst the subjective elements."

¹⁷⁷ Verdirame. p. 594

¹⁷⁸ Ibid. p. 592

¹⁷⁹ Ratner and Abrams, p. 35

religious groups. As the Tribunal stated, membership of a group is, in essence, a subjective rather than an objective concept.¹⁸⁰ To try to define concepts that have no generally accepted definitions could mean that the ICC would have difficulties applying these definitions on various cases from different part of the world where, as in Rwanda, they do not fit into the perceptions of ethnicity in the area in question. For someone trained in the legal science it might be awkward to apply a subjective approach. In matters referring to concepts as ethnicity, race and nation perhaps one must however adhere to sociological perceptions and not necessarily find objective “evidence” of the existence of such a group.

5.4.3 The Jelasic Case

Goran Jelasic was charged in 1995 with inter alia genocide before the ICTY. The Prosecution stated that Jelasic had systematically killed Muslim detainees in three prison camps in Bosnia. These killings were, according to the prosecution, carried out with the intent to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical or religious group.¹⁸¹ Jelasic who introduced himself as the “Serb Adolf” to the prisoners were also charged with war crimes and crimes against humanity. For these crimes he declared himself guilty. He denied the charges of genocide.¹⁸² Since Jelasic did not plead guilty to the genocide charges, the part of the judgement that treats the crime of genocide is the major part of the judgement. This case was the first before the ICTY where a defendant was charged with genocide.

When assessing whether Jelasic had committed genocide the Trial Chamber started to give an account on the sources that would be used to interpret article 4(2) of the ICTY-Statute. The Trial Chamber acknowledged the relation between the ICTY-Statute and the Genocide Convention. The Jelasic case came after the Akayesu and the Kayishema cases and the Trial Chamber also mention these cases as sources that was taken into account. The Tribunal did, in accordance with the *nullum crimen sine lege* principle, only take into account those legal ingredients of the crime of genocide that formed part of customary international law.¹⁸³

The Jelasic Trial Chamber chose the subjective approach to determine whether the Bosnian Muslim population was a national, ethnical or racial group. Religious groups were considered possible to determine objectively. The Trial Chamber stated that to define “national, ethnical groups objectively would be a perilous exercise” since that would not necessarily correspond to the perception of the persons concerned by the

¹⁸⁰ Kayishema case. para. 55

¹⁸¹ The Prosecutor v. Goran Jelasic, 14 December 1999, IT-95-10. [hereinafter: Jelasic case] para. 3

¹⁸² Ibid, para. 11

¹⁸³ Ibid, para. 61

categorisation.¹⁸⁴ As mentioned earlier the Prosecution specified the group as the Bosnian Muslim people.

The Tribunal accepts the interpretation of the Akayesu Trial Chamber concerning the wish of the drafters of the convention. According to the Tribunal, it is expressed a wish in the *travaux préparatoires* to limit the field of the Genocide Convention. The Convention was, according to this wish, created to protect “stable” groups objectively defined and to which individuals belong regardless of their own choices and desires.¹⁸⁵

It is not possible to see whether the Trial Chamber rejects this method of definition because of changed conditions since 1948 or that it never was a desirable method. The reason for the Jelisić Trial Chamber to choose the subjective approach rather than the objective, regardless of the claimed intention of the drafters, is that it is the stigmatisation of a group by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the convention. Thus the Jelisić Trial Chamber adopted the same method to define national, racial and ethnical groups as the Kayishema Trial Chamber.¹⁸⁶ However the Tribunal never address the issue which of the enumerated groups the Bosnian Muslim population belonged to. Instead they elaborated on a question that did not get much attention in the Akayesu and Kayishema cases: positive or negative approach of the perpetrator. These two approaches deals with the manner of stigmatisation of a group by the perpetrator. A positive approach consists of the perpetrators of the crime distinguishing a group by the characteristics, which they believe to be particular to a national, ethnical, racial or religious group.. The negative approach consists of identifying individuals as not being part of the group that the perpetrators of the crime consider themselves to belong to and to them is a national, ethnical, racial or religious group. When using this approach, all individuals rejected as a member of the perpetrators’ group would, by exclusion make up a distinct national, ethnical, racial or religious group. According to the Jelisić Trial Chamber it is consistent with the object and purpose of the Genocide Convention to consider that also groups defined by exclusion and stigmatised by the perpetrators are protected by the Genocide Convention.¹⁸⁷

The positive approach is probably the most common when genocide is committed. The negative approach is also common in situations of discrimination and apartheid. In South Africa the white part of the population used both a negative and positive approach. The apartheid system discriminated all who were not white, but also divided non-whites into different categories and thereby using a positive approach. Also the Nazis used both positive and negative approach by excluding all non-

¹⁸⁴ Ibid. para. 70

¹⁸⁵ Ibid. para. 69

¹⁸⁶ Ibid. para. 70 The Trial Chamber also states explicitly in footnote 95 p. 22 that it follows the position of the ICTR in the Kayishema case.

¹⁸⁷ Ibid, para. 71

Germanic people as inferior. But in the genocidal policies they had a positive approach by single out a few groups as the Jews and Romanies. The Trial Chamber states that the prosecution advanced the positive approach since the targeted group was the Bosnian Muslim population.¹⁸⁸

5.4.3.1 Commentary on the Jelasic Case

This case did not bring a completely new interpretation on the protected groups definition. The reason for including the Jelasic case in this study is that the Trial Chamber could choose between either the objective approach, as in the Akayesu case, or the subjective approach, as in the Kayishema case. The judgement came approximately six months after the Kayishema judgement. In the ICTR the both Trial Chambers kept their own ways of interpretation in the following cases.

The Jelasic Trial Chamber rejected the objective approach and even called it a “perilous exercise”. When arguing for the subjective approach the Jelasic Trial Chamber used different arguments than the Kayishema Trial Chamber. In the present case the perpetrators’ stigmatisation of the victims played the significant role. In Kayishema case both the perception of the victims, perpetrators and others could be taken into account when giving a group protection under the Genocide Convention. Thus the Jelasic Trial Chamber applied a stricter subjective approach than the Kayishema Trial Chamber. In the Jelasic case one can note that the Trial Chamber admitted that it was the intention of the drafters to give objective meanings to the groups, this conclusion is not drawn in the Kayishema case. Still, the Jelasic Trial Chamber refused to apply this intention of the drafters. Since the subjective approach is used, the critique raised against this approach in the Kayishema case can also be raised against it in the Jelasic case.

The interpretation of the Trial Chamber concerning the positive and negative approaches was later criticised and rejected by an ICTY Trial Chamber in the Stakic Case. According to the Stakic Trial Chamber “a targeted group may be distinguishable on more than one basis and the elements of genocide must be considered in relation to each group separately, e. g. Bosnian Muslims and Bosnian Croats.”¹⁸⁹ Thus it would not be possible to define a protected group as, for example, non-Serbs.

5.4.4 Kristic Case

Radislav Kristic was charged with genocide committed in the Srebrenica region in Bosnia 1995. Kristic had, at that time, the rank of General-Major

¹⁸⁸ Ibid. para. 72

¹⁸⁹ Stakic case, para. 512

in the Bosnian Serb Army Drina Corps.¹⁹⁰ The events in the UN safe area of Srebrenica have become well known to the world. Approximately 25.000 civilian Bosnian Muslim, most of them women, children and elderly people were expelled from the region and bussed into Bosnian Muslim controlled territory by the Bosnian Serb Army. The military aged Bosnian Muslim men¹⁹¹ were taken prisoner, detained in brutal conditions and then executed. The Trial Chamber estimated the number of disappeared men to over 7000.¹⁹² In the introduction of the case the Krstic Trial Chamber emphasised that although the “events ...in Srebrenica defy description in their horror”, the task of the Trial Chamber was a “modest” one: to find whether Krstic was criminally responsible under international law.¹⁹³

The Krstic Trial Chamber stated that it had to interpret article 4 of the ICTY-Statute taking into account the state of international customary law at the time at the events in Srebrenica took place. The main source of customary international law was the Genocide Convention. The Convention was according to the Trial Chamber interpreted pursuant to the rules of the Vienna Convention Articles 31 and 32. Supplementary sources of interpretation included inter alia the *travaux préparatoires* of the Genocide Convention, international case law on the crime of genocide and UN-reports on the crime of genocide.¹⁹⁴

Since the Trial Chamber established that Bosnian Muslim men living in the Srebrenica enclave were targeted, the critical determination to be made in the case was whether the killings and other offences were committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The Trial Chamber therefore had to establish whether the Bosnian Muslim population or any other group was targeted and if the group could be deemed to be a protected group under the Genocide Convention. It is emphasised in the judgement that the Genocide Convention is restricted to protect the four enumerated groups and not any groups of human beings.¹⁹⁵

The Trial Chamber started by establishing that no clear definition of the enumerated groups exists in the Genocide Convention or elsewhere. Instead the view is advanced that the preparatory works of the Convention and the work of international bodies related to minority protection show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous. The fact that European human rights instruments use the term “national minorities” while universal instruments usually make reference to “ethnic, religious or linguistic minorities” was

¹⁹⁰ Prosecutor v. Radislav Krstic, 2 August 2001, IT-98-33, [hereinafter: Krstic case] annex I paras. 1-2

¹⁹¹ Although boys who were younger and men who were older than what could be called “military aged” were killed, the Krstic Trial Chamber uses the term to describe the group, which was killed following the take-over of Srebrenica.

¹⁹² Krstic case. para. 1

¹⁹³ Ibid. para.2

¹⁹⁴ Ibid. para. 541

¹⁹⁵ Ibid. para. 554

referred to as a support of this interpretation.¹⁹⁶ The Trial Chamber also noted that the *travaux préparatoires* of the Genocide Convention reflects that the term “ethnicity” was added in a later stage of the drafting process to ensure that the term “national” would not be interpreted as also covering purely political groups. The Krstić Trial Chamber summed up these arguments into one conclusion: the list set out in the Genocide Convention was designed to describe a single phenomenon. The phenomenon is roughly the same phenomenon that before the Second World War was referred to as national minorities. Consequently the notion supported at least in the case law of the ICTR and ICTY that the enumerated protected groups refer to several distinct human groups was abandoned. The Krstić Trial Chamber called the attempt to differentiate each of the named groups on the basis of scientifically objective criteria “inconsistent with the object and purpose of the Convention”.¹⁹⁷

In this case the Trial Chamber used the subjective approach to decide whether a protected group was targeted. As in the Jelisić case it was the stigmatisation of the group, notably by the perpetrator, on the basis of its perceived national, ethnic, racial or religious characteristics that was crucial to the Trial Chamber. According to the Trial Chamber “a group’s cultural, religious, ethnic or national characteristics must be identified within the socio-historic context which it inhabits.”¹⁹⁸ The indictment defined the targeted group in this case as the Bosnian Muslims and during the proceedings the Prosecution chose to define the group as the Bosnian Muslim population of Srebrenica as well as the Bosnian Muslims of Eastern Bosnia. The Defence argued that the Bosnian Muslims of Srebrenica did not constitute an own national, ethnic, racial or religious group and that it is not possible to create an artificial group by limiting a larger group to a smaller geographical area. According to the Defence, the only group that fitted into the protected groups definition was the entire Bosnian Muslim group.¹⁹⁹

It is clear to the Krstić Trial Chamber that the Bosnian Muslims constituted a group protected under the Genocide Convention. Further, no national, ethnic, racial or religious characteristic made it possible to differentiate the Bosnian Muslims of Srebrenica from the other Bosnian Muslims. The only distinctive feature was the geographical location, a criterion not mentioned in the Convention. The Bosnian Muslims of Srebrenica did not perceive themselves as a distinct national, ethnic, racial or religious group but rather as members of the Bosnian Muslim group. Thus the Krstić Trial Chamber define the targeted group not as the Bosnian Muslim population of Srebrenica but as the Bosnian Muslims.²⁰⁰

¹⁹⁶ The Trial Chamber particularly mentioned Article 14 of the European Convention on Human Rights and Article 27 of the International Covenant on Civil and Political Rights.

¹⁹⁷ Krstić case, paras. 554-556

¹⁹⁸ Ibid. para. 557

¹⁹⁹ Ibid. paras. 557-558

²⁰⁰ Ibid. paras. 559-560

The Trial Chamber eventually found Kristic Guilty of the crime of genocide as well as crimes against humanity and war crimes and sentenced him to 46 years of imprisonment.²⁰¹

5.4.4.1 Commentary on the Case

Although the ICTY in the Kristic case interpreted the protected groups definition in a different way than in any of the previous judgements in the ICTR and ICTY this fact does not seem to have got the proper amount of attention in commentaries on the case. Amann calls the approach used by the Kristic Trial Chamber “ensemble construction”.²⁰² This label describes the approach well because the Trial Chamber rejected an interpretation based on independent definitions of the racial, national and ethnical groups and chose to use the three concepts and form one described as “national minorities”. In a commentary Schabas calls the Trial Chamber’s analysis “historical” and notices that the interpretation relies on texts in similar human rights instruments. Schabas, who notices that the Kristic Trials Chamber has interpreted the protected groups definition as a single phenomenon, believes that an appropriate balance has been struck in the interpretation. This interpretation avoided the narrow positivism of an approach that focuses on individual definitions for the four categories.

Schabas also finds it striking that the Kristic Trial Chamber did not even allude to the previous case law of the ICTR on this point.²⁰³ Schabas is satisfied with this interpretation since it is in accordance with his own suggested interpretation. In his work *Genocide in International Law* he suggests a new radical interpretation completely different from the ones in the ICTR and ICTY case law and also earlier doctrine. Amann recognises this and suggests that Schabas influenced the Trial Chamber although it did not explicitly mention that in the judgement.²⁰⁴ Schabas criticises the earlier case law since the deconstruction of the enumeration risks distorting the sense that belongs to the four terms as a whole. He refers to the works of Lemkin who also associated the prohibition of genocide with the protection of minorities and to the same international human rights instruments that appeared in the Kristic judgement. According to Schabas “The four terms in the Convention not only overlap, they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection.”²⁰⁵

Amann however does not seem to find this approach more appropriate than the approach used in previous case law. In her opinion, the Kristic Trial Chamber did not explain the mechanics of interpreting several words as a

²⁰¹ Ibid. para. 727

²⁰² Amann p. 109-113

²⁰³ Schabas, William A., “Was Genocide Committed in Bosnia and Herzegovina? First Judgements of the International Criminal Tribunal for the Former Yugoslavia”. 25 *Fordham Int’l L.J.* 23 (2001). *38

²⁰⁴ Amann p. 112

²⁰⁵ Schabas, 2000a. p. 111

whole.²⁰⁶ According to Amann it is not possible to interpret the travaux préparatoires in the way Schabas and the Kristic Trial Chamber did. It seems unlikely that the drafters intended an extreme “ensemble” approach. She bases that assumption on the debate in the *travaux préparatoires*, which is demonstrated by the exclusion and inclusion of proposed terms in the Convention. Thus it is implied that each term has an independent meaning. The correct approach would be a synthesis of the previous approach to give meaning to every individual term and the “ensemble” approach. A tribunal confronted with a particular case should draw from both interpretations as required from the context at hand.²⁰⁷ This suggested approach seems like a well-found compromise between the two current interpretations. The negative aspect is that it gives no absolute rule for a judge in a genocide case. Her argument that the “ensemble” approach allows too much judicial discretion is also true for her suggested compromise.

It is clear that the Kristic case introduced a radical interpretation of the protected groups definition in case law interpreting the Genocide Convention. In the argumentation of the Trial Chamber as well as in Schabas’ texts there are many good reasons for adopting this new interpretation. The strongest argument one can use against this view is the one articulated by the Akayesu Appeals Chamber: “A provision or part thereof should not be interpreted in a manner to render it redundant or bereft of any object, unless such a conclusion is inevitable. One must proceed from the assumption that the lawmakers intended to give some effect to each of the words used.”²⁰⁸ The words of the Genocide Convention clearly states that ethnical, national, racial and religious groups are protected. It seems as if there are two conflicting principles of interpretation that come into collision with one another. The principle of strict construction states that “the interpreter of a provision can only determine whether the case is within the intention of a criminal statute by construction of the express language of the provision.”²⁰⁹ This principle is also manifested in the quote from the Akayesu Appeals Chamber above. The other principle is the principle of teleological interpretation, which is to interpret a provision according to the will and intention of the drafters.²¹⁰ On the other hand it is not contrary to the principle of strict construction to give a provision a meaning which is more consonant with the intent of the legislators and best effectuates that intent.²¹¹ However a teleological interpretation cannot be contrary to the express language of a provision in criminal law. This is particularly important when the provision defines a crime.

²⁰⁶ Amann. p. 113

²⁰⁷ Amann p. 138, 143

²⁰⁸ Prosecutor v. Jean Paul Akayesu, Appeals Chamber’s Judgement 1 June 2001, ICTR-96-4, para. 468

²⁰⁹ Celebici case, para. 410

²¹⁰ This is on the assumption that the ensemble approach really is what was intended by the drafters and the intended interpretation of Article II of the Genocide Convention.

²¹¹ See chapter 5.2.4

Schabas also criticises the Kristic Trial Chamber for using a purely subjective approach. He cannot accept the notion that the perpetrator alone can define the crime.²¹²

5.4.5 A Comparison of the Tribunals' Approaches to the Genocide Convention's Protected Groups Definition

One question that each trial chamber had to address in the cases above was whether the alleged victim groups qualified for protection under the Tribunals' statutes. The later Trial Chambers, although not expressly disagreeing with the Akayesu Trial Chamber's interpretation, established different methods and legal tests to decide the limits of protection for groups under the Genocide Convention.

The chambers developed two clearly distinguishable approaches for making the determination of which groups should be awarded protection. The Akayesu Trial Chamber decided that the enumeration of the four groups in the Genocide Convention did not excluded groups that were not national, ethnical, racial or religious groups from protection. According to those judges, all permanent and stable groups whose memberships are determined by birth are protected under the Convention. The Kayishema Trial Chamber believed that the four enumerated groups were sufficient and that the Tutsi could be protected within those groups. By doing so, the Kayishema judges did not have to openly challenge the "permanent and stable groups" interpretation of the Akayesu Trial Chamber. The subjective approach of the Kayishema Trial Chamber has received approving comments from many commentators but also criticism. The Akayesu Trial Chamber followed the objective approach which was probably intended by the drafters of the Convention, whereas the Kayishema Trial Chamber choose a more modern approach. To define the concepts of national, ethnical and racial groups from a subjective point of view has strong support in social sciences like sociology. This means that the individuals concerned with such classifications also should decide whether it is possible to define a group as one of the protected groups.²¹³ In the Jelusic case the Trial Chamber clearly argues for the subjective choice although it admitted that the Akayesu Trial Chamber interpreted the preparatory works of the Genocide Convention correctly. The subjective approach is also used in the Kristic case.

The Kristic Trial Chamber was the first and so far the only trial chamber to apply the ensemble or holistic approach. With this approach the enumerated groups are seen as a single entity and attempts to define the groups separately is to wrongly interpret the intention of the drafters and the spirit of the Genocide Convention.

²¹² Schabas, 2000b. *39

²¹³ See chapters 3.3.2, 3.3.3 and 3.3.4

6 The Effects of the Ambiguity in the Interpretation of the Genocide Convention's Protected Groups Definition - Conclusion

The most obvious effect of the definition's ambiguity that also is demonstrated in this thesis is that it affords tribunals significant flexibility in their interpretation of the Genocide Convention. This is positive so far that the flexibility allows the tribunals to adapt to social and political changes and allow them to give protection to groups who do not literally fit into the four enumerated groups in the Convention.

There are several negative aspects of the ambiguity and inconsistency of the interpretation of the definition of genocide. The appearance of confusion and inconsistency among the different trial chambers could undermine the confidence of the international community in the tribunals as competent interpreters of international criminal law. Inconsistent decisions could possibly make the tribunals appear arbitrary, incoherent and/or unfair. National courts, because of their reliance on the States' monopoly of violence, are not so dependent on maintaining the confidence of the public whereas the tribunals depend solely on the persuasive value of their reasoning. Thus an absence of coherent and uniform interpretation prevents the formation of clear precedents limiting tribunal's ability to maintain credibility in the eyes of the international community.²¹⁴

There is also the view that the Tribunals' judicial discretion has opened for the possibility of political pressure. According to one writer, the ICTY and the ICTR are accountable to the UN and therefore not as independent as they should be. The Security Council established the tribunals for the purpose of prosecuting genocide. Thus it was clear that the international community suspected that genocide had occurred in Rwanda and former Yugoslavia. Therefore the Tribunals were under pressure to find that genocide had occurred. If the Akayesu Trial Chamber had not found that the Tutsi constituted a protected group, it could not have convicted the accused of genocide, thus forfeiting the very purpose of the Tribunal itself. The ambiguous language of the Convention creates the potential for the tribunals to interpret the rules on an ad hoc basis to achieve predetermined results.²¹⁵

²¹⁴ "Developments in the Law-International Criminal Law", Vol. 114 issue 7 *Harvard Law Review* p.1943 (2001), p. 2021

²¹⁵ *Ibid.* p. 2023

It is true that a more precise definition of genocide would not allow the tribunals the same judicial discretion as the current definition does. But then also the positive side of the flexibility of the Convention would be lost. From a criminal law point of view it can be positive with clear and unambiguous rules. This also makes it easier for the Tribunals to adhere to the principles of legality and strict construction of criminal law. On the other hand the Convention is not only a criminal law instrument but also an instrument for minority and human rights protection. A more strict definition of genocide could have left the Tutsis of Rwanda without protection under the Genocide Convention. This would certainly have been devastating for the ongoing development of criminal law and disturbing from a human rights point of view. From a mere practical point of view it does not seem possible for the international community to define genocide stricter than the current definition. The concepts of national, ethnical, racial and religious groups are not suited for an exact legal definition, the perception of these concepts change with time and social context. International law cannot change fast enough and a more strict definition would risk becoming obsolete and impossible to apply on changed conditions.

When drafting the ICC-Statute the States kept the definition of the Genocide Convention. This can be seen as a vote of confidence from the international community on the possibility of the Court to interpret the ambiguous definition without undue influence from States or the UN. Since genocide has followed humanity through history the ICC will surely have to interpret the definition of genocide. Hopefully the Court can then combine the demands of criminal law with the demands of the protection of minorities and groups that risk becoming victims of genocide. A consistency in interpreting the definition of genocide in the ICC would also give signals to national courts where perpetrators of genocide will also be prosecuted.

The conclusion of the jurisprudence from the ICTY and the ICTR is that there is no clear interpretation of the protected groups definition in the Genocide Convention. There are now three different ways of interpretation. The Krstic Trial Chamber's interpretation has only increased the inconsistency in the Tribunal's interpretation of the definition of genocide. However it is an approach that better reflects the reality than approaches that tries to define the national, ethnical and racial groups as different concepts. As this work shows, the three concepts closely interact and help to define each other. Common denominators of national, ethnical and to lesser extent also racial groups are language, culture and religion. Therefore it perhaps serves no purpose to try to separate the two concepts at all. The reason for the separation seems to be that the drafters were more familiar with the concept of national (minority) groups. Since then, the concept of ethnicity has become more common when distinguishing groups with a common language, culture or religion. The combination of the current definition and an interpretation of it where the definition is applied in context of each case is the best method to keep the strong position of the definition of genocide in international law. This would not risk diluting the definition of genocide

and would at the same time avoid the effects of a too rigid interpretation of the four enumerated groups.

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