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National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc *International Criminal Tribunals*

Agnieszka Szpak*

Abstract

The aim of this article is to analyse the jurisprudence of the ad hoc *International Criminal Tribunals with regard to the understanding of the notion of the groups protected against genocide. According to the Convention on the Prevention and Punishment of the Crime of Genocide, only national, ethnic, racial, and religious groups are protected. Among the conclusions is the one according to which the Tribunals developed this notion in a creative way and contributed to its dynamic application, especially by way of introducing the concepts of stable and permanent groups being protected as well as the concepts of positive/negative and objective/subjective notions of the targeted group.*

1 Introduction

At the outset it should be indicated that the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR) significantly contributed to an understanding of the crime of genocide and its particular elements such as the protected group (national, ethnic, racial, or religious one), the special intent to destroy the group, the term 'in whole or in part', and finally the specific genocidal acts

* Assistant Professor, Faculty of Political Sciences and International Studies, Department of International and European Law, Nicolas Copernicus University, Poland. Email: aszpak@umk.pl.

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enumerated in the genocide definition. It is significant that the functioning of the Tribunals sends a very important and strong signal that there will be no impunity and every person responsible for international crimes – no matter what government post they hold or what their political influence is – will be tried and punished. This is the first time that war criminals have been tried and punished in such a systematic way.

The ICTY was created by the SC Resolution 827 (1993), and the ICTR by the SC Resolution 955 (1994).[1] According to the ICTY Statute of 26 May 1993, the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Articles 2–5 enumerate offences falling under the Tribunal's jurisdiction.

Article 2 pertains to grave breaches of the Geneva Conventions of 1949 as regards the protection of victims of war; Article 3 relates to violations of the laws or customs of war other than grave breaches of the Geneva Conventions. Article 4 penalizes genocide as well as conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. The crime of genocide has been defined – in identical terms to those in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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.[2]

Finally, Article 5 pertains to crimes against humanity.[3]

The ICTR Statute of 8 November 1994 states that the Tribunals 'shall have the power to prosecute persons responsible for serious violations of international

[1] UN SC Res 827 (1993) and 955 (1994) are respectively available at: http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement and http://daccessdds.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement. On the genesis, structure, and jurisdiction of the ICTY and the ICTR see Meernik, 'Victor's Justice or the Law?', 47 *J Conflict Resolution* (2003) 140; Joyner, 'Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia', 6 *Duke J Comp & Int'l L* (1995–1996) 79; Tung, 'The Implementation of International Humanitarian Law by the United Nations. Case Study in the Former Yugoslavia', in E. Frangou-Ikonomidou, C. Philotheou, and D. Tsotsoli (eds), *Peace and Human Rights* (2003), at 413–420; Wieruszewski, 'Międzynarodowy Trybunał Karny dla osądzenia sprawców naruszeń prawa humanitarnego w b. Jugosławii', *Panstwo i Prawo (PiP)* (1993) 60; Nowakowska, 'Międzynarodowy Trybunał Karny dla osądzenia sprawców naruszeń prawa humanitarnego w byłej Jugosławii od 1991 roku', 3 *Przegląd Sądowy* (1997) 69.

[2] Convention on the Prevention and Punishment of the Crime of Genocide, available at: http://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf (visited: 27 May 2011). When invoking the Genocide Convention I will be using this source.

[3] The Statute of the ICTY is available at: hwww.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf (visited 27 May 2011).

humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994'. Article 2 regulates genocide and is identical to Article 4 of the ICTY Statute. Article 3, pertaining to crimes against humanity, lists the same crimes as the ICTY Statute. Lastly, Article 4 of the Statute relates to violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (in other words, war crimes committed in non-international armed conflict).[4]

Unlike ICTY proceedings, the majority of the indictments confirmed by the ICTR contain charges of genocide, in this way expressing the common feeling that the situation in Rwanda was first and foremost genocide.[5]

2 The Jurisprudence of the ICTR

A *The* Akayesu *Case*

Jean-Paul Akayesu was charged with genocide, crimes against humanity, and violations of common Article 3 and Additional Protocol II. Before his election as mayor of Taba, he was first a teacher, then education inspector. Akayesu's criminal responsibility was based on both his direct and indirect participation in the 1994 genocide. His actions in Taba amounted to direct participation in the crime of genocide. During the genocide, numerous Tutsi sought refuge in the Taba communal offices, where they were beaten and killed instead of being protected. It is estimated that 2,000 people were killed in the 1994 massacres against the Tutsi in the community of Taba alone. In addition to this, numerous Tutsi women were submitted to sexual violence by the troops. They were mutilated and raped, often by more than one attacker and in public. The rapes of the Tutsi women were of a systematic nature. Police officers armed with guns, as well as Jean-Paul Akayesu himself, were reportedly present at some of these acts. Akayesu was also suspected of having ordered several murders and having participated in carrying them out. He encouraged criminal acts and gave orders for people to be killed.[6] The judgment was issued on 2 September 1998.[7] In this judgment the ICTR stated expressly that in the time frame of April–July 1994 genocide was committed in Rwanda. The number of casualties was estimated at between 500,000 and one million people. All the conditions to confirm that genocide was committed were fulfilled. Killings as one of the genocidal acts were perpetrated with the intent to destroy in whole or in part a national, ethnic, racial, or religious group as such, in this case Tutsi.[8]

[4] The Statute of the ICTR is available at: www.unictr.org/tabid/94/default.aspx (visited 27 May 2011).

[5] Cissé, 'The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda', 1 *Yrbk Int'l Humanitarian L* (1998) 161, at 166–167.

[6] See: the ICTR website at: www.unictr.org/ (*Cases*).

[7] ICTR judgments are available at: www.unictr.org/.

[8] *Prosecutor v. J.-P. Akayesu,* Trial Chamber 1998, *ibid.,* at paras 111, 112–129.

In the *Akayesu case* the Trial Chamber noted that the crimes enumerated in the ICTR Statute – genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II (in other words war crimes committed in a non-international armed conflict) – have different constituent elements and are intended to protect different interests. The prohibition of genocide is aimed at protecting certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of Article 3 common to the Geneva Conventions and of Additional Protocol II serves to protect non-combatants from war crimes in civil war.[9]

The ICTR confirmed that the Genocide Convention is undeniably considered part of customary international law.[10] It invoked the ICJ *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951)*, where the ICJ confirmed that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation' and that 'the universal character both of the condemnation of genocide and of the co-operation [is] required "in order to liberate mankind from such an odious scourge"'.[11] The ICJ added:

> in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest: namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions . . .. [12]

This statement was the expression of the concept of the *erga omnes* rights.

In the *Akayesu case* the Trial Chamber of the ICTR analysed the definition of national, ethnic, racial, and religious group. It clarified that a national group is 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. An ethnic group is generally defined as a group the members of which share a common language or culture. The conventional definition of a racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors. A religious group is one the members of which share the same religion, denomination, or mode of worship.[13]

A genocidal act must have been committed against one or several individuals because such individual or individuals were members of a specific group, and specifically because they belonged to this group. In other words, the victim is chosen not because of his individual identity, but rather on account of his membership of a

[9] *Ibid.*, at paras 469–470.
[10] *Ibid.*, at paras 492–495.
[11] [1951] ICJ Rep 15, at 23.
[12] *Ibid.*
[13] *Akayesu, supra* note 8, at paras 512–515.

national, ethnic, racial, or religious group. The victim of the act is therefore a member of a group, chosen as such, which hence means that the victim of the crime of genocide is the group itself and not just the individual. In such a case it is important to state the special intent. Such intent is a mental factor, which is difficult, or even impossible, to determine.This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. It is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, the commission of the crime in a certain region or country, or, furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Tribunal to infer the genocidal intent of a particular act.[14] In the case of Rwanda such a context consisted of the internal armed conflict.

Scholarship takes a similar stand. National, ethnic, racial, and religious groups were chosen by the UN GA to be included in the class of protected groups because each group has historically been the target of animosity and each group is characterized by cohesiveness, homogeneity, inevitability of membership, stability, and tradition. Affiliation with political groups was, however, considered as a matter of individual choice, and as such the political groups were not afforded protection. National groups are identified with a specific nation, while ethnic groups refer to cultural or linguistic groups within or outside the state. Racial groups are defined on the basis of hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors. And religious groups include theistic, non-theistic, and atheistic communities.[15]

A strictly positivistic approach might lead to the conclusion that only persons falling precisely within any of the categories mentioned by name in the Genocide Convention could be victims of the crime of genocide as perceived in international law. The ICTR Trial Chamber in the *Akayesu case* rightly did not recognize this narrow concept. Scholars indicate that Tutsi *prima facie* fit into the ethnic group. This, however, is rather problematic as Rwanda's Tutsi and Hutu share the same language and culture. To solve this dilemma, the ICTR used another factor to define Tutsi as an ethnic group, namely their stability.[16] According to the ICTR, on reading through the

[14] *Ibid*., at paras 521–523.

[15] Shah, 'The Oversight of the Last Great International Institution of the Twentieth Century: the International Criminal Court's Definition of Genocide', 16 *Emory Int'l L Rev* (2002) 351, at 357–358. See also Kabatsi, 'Defining or Diverting Genocide: Changing the Comportment of Genocide', 5 *Int'l Crim L Rev* (2005) 387; Lippman, 'Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium', 23 *Houston J Int'l L* (2000–2001) 467, at 475–476.

[16] A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals. Volume II. The International Criminal Tribunal Rwanda 1994–1999* (2001), at 541–543. See also Shah, *supra* note 15, at 365 and 368. Shah notes that the difference between Tutsi and Hutu was based mainly on factors of a material and social nature.

travaux préparatoires of the Genocide Convention it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion; groups the membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership of such groups would seem to be normally not challengeable by their members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[17] This distinction is aimed at emphasizing the freedom of change in the membership of a particular group as is typical for groups regarded as mobile, and at emphasizing the lack of this freedom in the case of groups recognized as stable. In my opinion the ICTR rightly recognized the Tutsi as a protected group and consequently confirmed the fact that genocide had been committed in Rwanda. The reasoning according to which genocide may be committed only against stable groups is correct and justified. Moreover, it should be stressed that there are doubts concerning the stability of religious groups, as generally membership of such groups is a matter of personal choice. If, despite those doubts, religious groups are included in the prohibition of genocide, so should stable groups such as the Tutsi. The ICTR Trial Chamber took into consideration the fact that the Tutsi and Hutu groups – in spite of some similarities – were perceived to be two different ethnic groups as an argument supporting the above mentioned conclusion.

It might also be emphasized that there were many differences between the Hutu and the Tutsi, differences of social rather than ethnic character. They pertained to the social status of the two tribes: the Hutu were farmers whereas the Tutsi were cattle breeders. The Tutsi were taller, lankier, and thin-lipped, whereas the Hutu were shorter and thick-lipped. Belgium, the former colonial power ruling in Rwanda, had adopted a system of division between the Tutsi and the Hutu based on their wealth. According to the law of 1931, to be regarded as Tutsi one must have owned more than nine head of cattle. Eventually when genocide was being committed in Rwanda, ethnicity was judged by the identity cards that divided Rwandans along ethnic lines between the Tutsi and the Hutu.[18] During the colonial regime the Tutsi minority constituted the more educated part of the society; its elite wielded the power. The Hutu, being in the majority, were subordinated to them. Moreover, Belgian colonizers used the rule *divide et impera* and in this way deepened the conflict. By favouring the Tutsi, the Belgians contributed to creating resentment among the Hutu for the Tutsi.

Scholars indicated that although the ICTR proceeded on the assumption that the Hutu and the Tutsi constituted different ethnic groups, it must have been well aware that this assumption was contradicted by the Tribunal's own definition of ethnicity. Perhaps for that reason, it decided in the negative the question whether the four

[17] *Akayesu, supra* note 8, at para. 511. See also Shah, *supra* note 15, at 369–370; K.C. Moghalu, *Rwanda's Genocide. The Politics of Global Justice* (2005), at 80.

[18] D.K. Dróżdż, *Zbrodnia ludobójstwa w międzynarodowym prawie karnym* (2010), at 144–145. See also Moghalu, *supra* note 17, at 9–11.

categories mentioned in its Statute (which are identical to those in the Genocide Convention and the ICC Statute) constituted a *numerous clausus*. However, the ICTR confined the extended reach of the Genocide Convention's protection to 'stable' groups, constituted in a permanent fashion, and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Taking into account the difficulties with classifying some groups as protected by the Genocide Convention, it is from time to time stressed that the list of protected groups is too restrictive, and that in fact it should include any coherent collectivity which is subject to persecution, including political groups and possibly women, homosexuals, and economic and professional classes,[19] who very often fall victim to attacks, including genocidal attacks. Moreover, there is some inconsequence clearly visible with regard to religious groups as it is arguable that religious affiliation is in fact involuntary but is rather a conscious decision made by every individual. As S.B. Shah asks, is not religious affiliation considered to entail voluntary group membership just like political convictions?[20] A person may change his or her religion or faith and stop being a member of a certain religious group.

In this context J.D. van der Vyver suggests, however, that a customary-law concept of genocide is much broader than the definition of that crime contained in the Genocide Convention. Acts of the kind mentioned in the Convention targeting a group not falling within the narrow categories expressly mentioned or impliedly included in the Convention's definition of genocide would nevertheless be genocide under customary international law, provided that genocidal intent could be demonstrated. However, the jurisdiction of *ad hoc* international criminal tribunals, as well as the ICC, is limited to the Genocide Convention's definition of genocide; therefore this conclusion has no practical meaning.[21]

Still, there are also scholars who think a Convention definition of genocide to be adequate. F. Kabatsi states that political groups, in particular, cannot be included in the definition of genocide. This does not mean that such crimes are less significant; however, they just do not fall under the patronage of genocide. She warns us not to be too eager to make the definition too inclusive, for it would make genocide commonplace. Such groups as political ones are protected, but by different provisions.[22] They are covered by provisions on crimes against humanity.

B *The* Nchamihigo *Case*

Siméon Nchamihigo was a public prosecutor in the prefecture of Cyangugu. He was alleged to have organized and participated in a campaign against the Tutsi population

[19] Feindel, 'Reconciling Sexual Orientation: Creating a Definition of Genocide That Includes Sexual Orientation', 13 *Michigan State J Int'l L* (2005) 197; Vyver, 'Prosecution and Punishment of the Crime of Genocide', 23 *Fordham Int'l LJ* (1999–2000) 286, at 304–305.

[20] Shah, *supra* note 15, at 370, 384, and 387.

[21] Vyver, *supra* note 19, at 306.

[22] Kabatsi, *supra* note 15, at 398–399.

and political enemies in Cyangugu. This campaign included: compiling lists of influential Tutsis and members of the opposition; identifying the persons to be executed according to the list; surveying and restricting the movements of these people in order to facilitate attacks on them; supervising road blocks and handing out weapons to the militia. Nchamihigo was also said to have organized and supervised the military training of the militia in the prefecture of Cyangugu. This militia later participated in attacks on Tutsis who had sought refuge in different communes, in which many people died. In April 1994 Nchamihigo allegedly supervised the setting up of road blocks, and ordered the killing of any Tutsis who passed by, on occasion mentioning by name those who were to be killed. The Trial Chamber of the ICTR found Nchamihigo guilty of genocide and sentenced him to life imprisonment. The Appeals Chamber confirmed Nchamihigo's convictions for genocide, extermination, murder, and other inhumane acts as crimes against humanity.[23]

In the judgment in the *Nchamihigo case* issued on 24 September 2008 the ICTR Trial Chamber agreed – as a rule – with the conclusions on national, ethnic, racial, and religious groups in the *Akayesu case*.[24] Nevertheless, it is worth mentioning that, when analysing the intent to destroy a national, ethnic, racial, or religious group in whole or in part, the ICTR Trial Chamber noted that the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining the membership of a protected group, where the evidence demonstrates that the perpetrators of the crimes perceived Hutu political opponents as Tutsi. In the cases when the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.[25] In other words, to convict an individual of genocide it is enough for the perpetrator to perceive the victim as belonging to the national, ethnic, racial, or religious group which the perpetrator intended to destroy in whole or in part. It is not necessary for the victim actually to belong to the group.

In the context of the perception of the victim by the perpetrator as belonging to a national, ethnic, racial, or religious group, and the victim's actual membership of a group, we may note here that there are two approaches in the ICTR jurisprudence to the concept of a protected group: objective (the *Akayesu case*) and subjective (the *Nchamihigo case*). In accordance with the first approach the group should be regarded as a social fact, a stable and permanent reality. Members belong to the group automatically and irreversibly on the basis of their birth within the group. The subjective approach indicates that the group exists to the extent that its members perceive

[23] The profile of the accused and the factual details have been taken from the website: www.trial-ch.org/ (Trial: Track Impunity Always, visited: 13 May 2011) and from the ICTR judgments available at the Tribunal's official website: www.unictr.org/. Every time I give the facts of the case I will refer to those two sources.

[24] *Prosecutor v. S. Nchamihigo*, Trial Chamber 2008, *supra* note 23, at paras 329–338.

[25] *Ibid.*, at para. 338.

themselves as belonging to that group (self-identification) or are perceived as such by the perpetrators of the genocide (identification by others).[26]

C *The Rutaganda and Bagilishema Cases*

The *Rutaganda case* was the first occasion on which the ICTR used the subjective approach; it did not, however, entirely reject the subjective approach as a combination of both these concepts was used. Georges Rutaganda was an agricultural engineer and a businessman. He acted as the chairman of his own limited liability company, named after himself, which imported food and beverages. Georges Rutaganda was also a member of the national and the regional committee of the *Mouvement Républicain National pour le Développement et la Démocratie* (hereinafter MRND; National Republican Movement for Development and Democracy) and a shareholder in *Télévision Libre des Mille Collines* (hereinafter RTLM; Free Radio and Television of the Thousand Hills). On 6 April 1994 he occupied the post of second vice-president of the national committee of the *Interahamwe* (an extremist Hutu militia of the MRND). In carrying out this function he was said to have encouraged and participated in several killings of civilians in Rwanda.

When analysing the definition of a protected group, the Trial Chamber noted that the concepts of national, ethnic, racial, and religious groups had been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context. Moreover, the Trial Chamber stated that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to that group.[27] The ICTR reached a similar conclusion in the *Bagilishema case*.[28] As G. Verdirame wrote, the adoption of a subjective approach to the definition of the four protected groups breathed new life into the Genocide Convention and ensured a healthy interplay between the norms and the socio-cultural context in which they are applied.[29] In other words, the subjective approach offers protection to a larger number of genocide victims: not just persons actually belonging to the protected national, ethnic, racial, or religious groups but also to those perceived as members of those groups.

[26] Aptel, 'The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda', 13 *Criminal L Forum* (2002) 273, at 284. On this issue see also Verdirame, 'The Genocide in the Jurisprudence of the Ad Hoc Tribunals', 49 *ICLQ* (2000) 578, at 592–594.

[27] *Prosecutor v. G. A. N. Rutaganda,* Trial Chamber 1999, *supra* note 7, at para. 56.

[28] *Prosecutor v. I. Bagilishema,* Trial Chamber 2001, *supra* note 7, at para. 65. For more factual details see www.trial-ch.org/ (visited 13 May 2011).

[29] Verdirame, *supra* note 26, at 598. See also Kress, 'The Crime of Genocide under International Law', 6 *Int'l Criminal L Rev* (2006) 461, at 473–479; Moghalu, 'International Humanitarian Law From Nuremberg to Rome: The Weight Precedents of The International Criminal Tribunal for Rwanda', 14 *Pace Int'l L Rev*. (2002) 273.

However, a purely subjective approach does not seem to be satisfying as it would cause unacceptable expansion of the notion of a protected group dependent only on the perpetrator's state of mind. As D. Nersessian notes, 'taken to its logical conclusion, a purely subjective approach could lead to group definitions that bear no relation at all to the established pre-genocidal existence of the group in society. This disconnect is inconsistent with the manifest object and purpose of the Convention, which is to protect certain categories of pre-existing human groups from physical and biological destruction.'[30] For that reason the most appropriate way of ascertaining the existence of a protected group is a mixed approach, meaning a subjective-objective approach. Accordingly, the perpetrator's state of mind (his or her perception of the group he or she intended to destroy) must be taken into account, but there must be some colourable evidence that the victim group has some recognized racial, national, ethnic, or religious existence outside the mind of the perpetrator. This is necessary to ensure that the perpetrator's concept of the victim group bears some logical relation to one or more of the four protected categories.[31] With reference to a subjective element, it should be added that in the case of genocide sometimes what is more relevant than real differences is the perception of some features as differences. Consequently, the genocide perpetrator's state of mind is relevant. We may conclude that the perception of the perpetrator is more relevant than self-identification by the group members, the latter also reflecting the subjective approach.

D *The Kayishema and Ruzindana Case*

Obed Ruzindana was a prosperous businessman shipping merchandise abroad and importing goods into Rwanda. During the period when the crimes were being committed, that is from April to June 1994, Ruzindana carried on with his commercial activities. Ruzindana was said to have played a preponderant role in the systematic extermination of the Tutsis who had sought refuge in the Bisesero region located in the Kibuye prefecture. The massacres in the Bisesero region went on for several months, from April to June 1994, and resulted in tens of thousands of deaths. At various different places Ruzindana reportedly provided transport for the assailants and incited the latter to attack the Tutsis who had sought refuge in that region. He allegedly drew up the plan of attack to be implemented, commanded the assailants, and personally took part in the massacres. He distributed traditional weapons to the assailants and launched the attack by opening fire on the Tutsi refugees.

Clement Kaiyshema was – at the time genocide was committed – a Prefet of the Department of Kibuye. During the 1994 massacres, he wielded both *de iure* authority and *de facto* control over the mayors, the gendarmerie, and other law enforcement agencies which took part in the massacres. There is no space here to describe all the

[30] Nersessian, 'The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention', 36 *Cornell Int'l LJ* (2003–2004) 293, at 296.

[31] *Ibid.*, at 312.

details of the deeds the accused committed; thus it must suffice to give only a few examples. Before 14 April 1994, thousands of Tutsis sought refuge in the church at Mubuga – 20 km from the town of Kibuye – seeking protection from the attacks which were already underway throughout the Kibuye prefecture. Kayishema and his subordinates, amongst whom could be numbered local government officials, gendarmes, units of the communal police, and the *Interahamwe,* were present at the site and were said to have taken part in the attacks launched against the Mubuga church between 14 and 16 April and which resulted in the deaths of thousands of victims. On 17 April 1994, Kayishema reportedly took part in the massacre of Tutsis who sought refuge in the grounds of the Catholic Church and the Saint John Home in the town of Kibuye. On 21 May 1999, the Trial Chamber of the ICTR found Kayishema and Ruzindana to be guilty of genocide; however, they were found not guilty of war crimes and other inhumane acts as a crime against humanity. Ruzindana was sentenced to 25 years' imprisonment and Kayishema to life imprisonment. In 2001, the Appeals Chamber confirmed the verdict.

When analysing particular elements of the definition of genocide, the ICTR Trial Chamber in the *Kayishema and Ruzindana case* of 21 May 1999 – as a rule – confirmed previous ICTR conclusions with regard to such elements as 'destruction of the group' and 'in whole or in part'.[32] The Trial Chamber, however, formulated a broader definition of an ethnic group: first of all 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)'.[33]

E *The Setako and Karemera Cases*

The facts of the *Setako case* were the following: Ephrem Setako was a colonel in the Rwandan Armed Forces. As such, he led, amongst others, members of the Rwandan army, the presidential guard, and the *Interahamwe* militias. Because of his rank and status in the Army, Setako was regarded as a high commander holding effective control over the members of the military. He is said to have repeatedly expressed his intention to destroy in whole or in part the Tutsi group. He allegedly incited, ordered, aided, or encouraged the murder of the Tutsi civilian population. Setako was found guilty of genocide, extermination as a crime against humanity, and violence to life as a war crime for ordering the killing of 30 to 40 refugees at the Mukamira military camp, on 25 April 1994. He was sentenced to 25 years' imprisonment.

The *Setako case* is one of the most recent judgments (of 25 February 2010). From a legal point of view it is important that in this case the ICTR Trial Chamber stated without any doubt or justification that it was firmly established that the Tutsi ethnicity was a protected group.[34]

[32] *Prosecutor v. C. Kayishema, O. Ruzindana,* Trial Chamber 1999, *supra* note 7, at paras 95–99.
[33] *Ibid.*, at para. 98.
[34] *Prosecutor v. E. Setako,* Trial Chamber 2010, *supra* note 7, at para. 468.

It is worth mentioning here that, as early as in 2006 in the ICTR Appeals Chamber's *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (*Karemera case*), the Appeals Chamber recognized as common knowledge the following facts:

- The Twa, the Tutsi, and the Hutu existed as protected groups falling under the Genocide Convention;
- Rwanda was a state party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and a state party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977;
- widespread or systematic attacks were directed against a civilian population based on Tutsi ethnic identification;
- between 6 April and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.[35]

On this basis it may be concluded that the issue of the Tutsi as an ethnic group is no longer controversial.

3 The Jurisprudence of the ICTY

A *The* Jelisić *Case*

The *Jelisić case* of 14 December 1999 was the first genocide case tried by the ICTY. Goran Jelisić was charged with genocide, violations of the laws and customs of war, and crimes against humanity. He confessed to all the charges except for genocide.[36]

Jelisić's actions were undertaken in the following context: on 1 May 1992, the Muslim and Croatian population in the town of Brcko, a municipality in Bosnia and Herzegovina, was told by radio to surrender its arms. Immediately after this announcement the Serb forces, which included soldiers, paramilitary forces, and policemen, took over control of the town. The Serb forces expelled the Muslim and Croatian people from their homes and grouped them together in assembly camps. The Muslim and Croatian men, aged between 16 and 60 (at an age to bear arms), as well as a few women, were then transferred to the camp at Luka. Based on his own statements made during his guilty plea, Goran Jelisić arrived at the Brcko camp on about 1 May 1992. Between 7 and 21 May 1992, the prisoners in the Luka camp were the subject of a systematic campaign to eliminate them. On numerous occasions, with help from the camp guards, Goran Jelisić chose groups of detainees to be interrogated before being beaten and, very often, executed. On 19 October 1999, the Trial Chamber issued an oral verdict in which it acquitted Goran Jelisić on the count of genocide. On the other hand, it found him guilty of all the other counts with which he had been charged. On 14 December 1999, the Trial Chamber delivered its verdict and sentenced Jelisić to

[35] *Appeals Chamber Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice of 16 June 2006 (Karemera case)*, at paras 24–32, 35, available at: www.unictr.org.

[36] *Prosecutor v. G. Jelisić*, Trial Chamber 1999, at paras 8 and 12, available at: www.icty.org.

40 years' imprisonment for war crimes and crimes against humanity. On 5 July 2001, the Appeals Chamber confirmed the sentence.[37]

When analysing the notion of a group targeted by genocide, the ICTY Trial Chamber stated that the preparatory work of the Genocide Convention demonstrated that a wish had been expressed to limit the field of application of the Convention to protecting 'stable' groups objectively defined, to which individuals belonged regardless of their own desires.[38] The Trial Chamber noted that, although the objective determination of a religious group still remains possible, to attempt to define a national, ethnic, or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise, the result of which would not necessarily correspond to the perception of the persons concerned by such categorization. Therefore it is more appropriate to evaluate the status of a national, ethnic, or racial group from the point of view of those who wish to single that group out from the rest of the community. The Trial Chamber consequently decided to evaluate membership of a national, ethnic, or racial group using a subjective criterion. It is the 'stigmatization of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators'.[39]

The ICTY Trial Chamber in the *Jelisić case* pointed to the two possible concepts of defining a protected group: using positive or negative criteria. In accordance with the positive approach, the perpetrators of the crime distinguish a group by the characteristics which they deem to be particular to a national, ethnic, racial or religious group. A negative approach would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider themselves to belong and which to them displays specific national, ethnic, racial, or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. In this case the targeted group was the Bosnian Muslim population.[40]

It seems, however, that such a vague approach (the negative one) to a protected group is too far reaching and makes it possible to claim the existence of genocide on the basis of actions which would not qualify as genocide when using the narrow approach to the group. Taking into consideration the circumstance that genocide is called the crime of crimes, its definition should not be expanded by defining the notion of a protected group too broadly. As a matter of fact, it is possible to accept the negative meaning of the protected group suggested by the Trial Chamber only on the condition that the group is characterized as having certain national, ethnic, racial, or religious features. In other words, the *Jelisić judgment* does not provide an answer to the question of how the protected group should be understood, and a deeper analysis of the

[37] The profile of the accused and the factual details have been taken from the website: www.trial-ch.org/ (Trial: Track Impunity Always, visited: 15 May 2011) and from the ICTY case information sheets available at the Tribunal's official website: www.icty.org/ (Cases). Every time I give the facts of the case I will refer to those two sources.

[38] *Jelisić, supra* note 36, at para. 69.

[39] *Ibid.*, at para. 70.

[40] *Ibid.*, at paras 71–72.

group brings us back to square one, i.e., defining the group by its national, ethnic, racial, or religious features.

B *The Krstić Case*

The next important ICTY genocide case is the *Krstić case*. The Trial Chamber delivered its judgment on 2 August 2001. General Radislav Krstić was charged with genocide in the context of the Srebrenica massacres committed in July 1995.[41] In Srebrenica approximately 7,000–8,000 Bosnian Muslims – adult men as well as young boys – were killed. The alternative charge was complicity in genocide.[42]

From October 1994 to 12 July 1995, Radislav Krstić was the Chief of Staff/Deputy Commander of the Drina Corps of the Army of the Serb Republic of Bosnia-Herzegovina/Republika Srpska. He was promoted to the rank of Major-General in June 1995 and assumed command of the Drina Corps on 13 July 1995. The factual allegations refer to the widely documented and known facts of the fall of the Srebrenica enclave in July 1995, when 7,000–8,000 men of military age were slaughtered. At the time of the related events, Srebrenica was located in the zone placed under the responsibility of the Drina Corps, one of the corps of the Army of the Republika Srpska. Krstić was Chief of Staff of the Army of the Republika Srpska and Commander of the Drina Corps. On 2 August 2001, the Trial Chamber found Krstić guilty of genocide, persecution and murder, cruel, and inhumane treatment, terrorizing the civilian population, forcible transfer and destruction of the personal property of Bosnian Muslim civilians, and murder as a violation of the laws and customs of war, and sentenced him to 46 years' imprisonment. On 4 April 2004, the Appeals Chamber handed down its judgment confirming the finding that acts of genocide had taken place in Srebrenica. It nevertheless held that Krstić was a mere accomplice to genocide. According to the judgment, his participation consisted in aiding and abetting acts of genocide rather than instigating such acts. The Appeals Chamber consequently unanimously sentenced Krstić to 35 years in prison.

Within its general remarks on the crime of genocide, the ICTY Trial Chamber noted that when interpreting Article 4 of the ICTY Statute the state of customary international law at the time the events in Srebrenica took place must be taken into consideration. The Trial Chamber first referred to the Genocide Convention, which constitutes the main reference source in this respect. Although that Convention was adopted during the same period as the term 'genocide' itself was coined (1943–1944),[43] the Convention has been viewed as codifying a norm of international law long recognized and which case law would soon elevate to the level of a peremptory norm of general international law.[44]

[41] *Prosecutor v. R. Krstić*, Trial Chamber 2001, at para. 3, available at: www.icty,org.

[42] See Mundis, 'Introductory Note to ICTY: Prosecutor v. Krstić', 40 *ILM* (2001) 1343 and Southwick, 'Srebrenica as Genocide? The Krstić Decision and the Language of the Unspeakable', 8 *Yale Human Rts & Development LJ* (2005) 188.

[43] Szawłowski, 'Rafał Lemkin – twórca pojęcia "ludobójstwo" i główny architekt Konwencji z 9 XII 1948 (w czterdziestolecie śmierci)', *PiP* (1999) 74, at 80.

[44] *Krstić, supra* note 41, at para. 541.

In the *Krstić case* the Trial Chamber confirmed that Article 4 of the ICTY Statute characterizes genocide by two already mentioned constitutive elements: the *actus reus* of the offence, which consists of one or several of the acts listed in Article 4(2) and the *mens rea* of the offence, which is described as the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such.[45] It referred to UN GA Resolution 96(I), which defined genocide as 'a denial of the right of existence of entire human groups'.[46] The Trial Chamber in the *Krstić case* invoked conclusions from the *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951)* where the ICJ stated that the aim of the Genocide Convention is 'to safeguard the very existence of certain human groups and . . . to confirm and endorse the most elementary principles of morality'.[47]

The Trial Chamber added that the Genocide Convention seeks to protect the right to life of human groups as such. This characteristic makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership of a specific community but does not necessarily seek to destroy the community as such.[48]

The ICTY Trial Chamber in the *Krstić case* stressed that the Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnic, racial, or religious groups.[49] A group's cultural, religious, ethnic, or national characteristics must be identified within the socio-historic context which it inhabits. This may be regarded as the recognition of the objective criterion in the process of qualifying a group protected against genocide. Furthermore, to identify the relevant protected group it is possible to use as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnic, racial, or religious characteristics. In the latter case what is decisive is the subjective perception of the group as national, racial, ethnic, or religious.[50] In other words, this stigmatization is equivalent to the subjective perception of the protected group by the perpetrator. In the *Krstić case* the Trial Chamber used this mixed concept (subjective-objective) and recognized Bosnian Muslims as a national group protected by Article 4 of the ICTY Statute.[51] As a justification it noted that, originally viewed as a religious group, the Bosnian Muslims were recognized as a 'nation' by the Yugoslav Constitution of 1963. The evidence tendered at the trial also showed very clearly that the highest Bosnian Serb political authorities and the Bosnian Serb forces operating in Srebrenica in July 1995 viewed the Bosnian Muslims as a specific national group.[52]

[45] *Ibid.*, at para. 542.

[46] UN GA Res. 96(I), 11 Dec. 1946 is available at: www.un.org/documents/resga.htm (last visited 2 Apr. 2011).

[47] *Supra* note 11, at 23.

[48] *Krstić, supra* note 41, at para. 553.

[49] *Ibid.*, at para. 554.

[50] *Ibid.*, at para. 557.

[51] *Ibid.*, at para. 560.

[52] *Ibid.*, at para. 559.

C *The Stakić Case*

In September 1991, Milomir Stakić was elected Vice-President of the Serbian Democratic Party Municipal Board in Prijedor, located in north-western Bosnia and Herzegovina. Stakić quickly seized power in that municipality, imposed severe restrictions on the non-Serb population, and perpetrated attacks against Bosnian Muslims and Croats. Stakić instigated or otherwise aided and abetted the commission of the crimes committed in the Prijedor Municipality and organized and supported deportations and forced expulsions of more than 20,000 non-Serbs. Many of the Bosnian Muslims and Croats who survived the attacks were arrested and transported to detention centres, administered by the Crisis Staff of the Serbian Democratic Party, where many were then killed. Milomir Stakić was convicted of crimes against humanity and of violations of the laws or customs of war, yet was found not guilty of genocide. He was sentenced to life imprisonment on 31 July 2003. On 22 March 2006 the Appeals Chamber confirmed his convictions and delivered its judgment, sentencing him to 40 years' imprisonment.[53]

Turning to the legal findings on genocide, in the *Stakić case* the ICTY Trial Chamber reasoned that in cases where more than one group is targeted it is not appropriate to define the group in general terms, as, for example, 'non-Serbs'. In this respect, the Trial Chamber did not agree with the 'negative approach' taken by the Trial Chamber in the *Jelisić case,* which marked the change in the ICTY jurisprudence, where the Trial Chamber defined the 'negative approach' as identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnic, racial, or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.[54]

Taking into account inconsistent jurisprudence, the ICTY Appeals Chamber in the same *Stakić* case decided to deal in a more detailed manner with the issue of the negative or positive approach to identifying a national, ethnic, racial, or religious group. Its conclusions are to be found in the judgment of 22 March 2006. The Appeals Chamber recognized that the term 'as such' ('committed with intent to destroy in whole or in part') has great significance, 'for it shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet when a person targets individuals because they lack a particular national, ethnical, racial or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics.'[55]

The ICTY Appeals Chamber indicated that the drafting history of the Genocide Convention, the second article of which is repeated verbatim in Article 4(2) of the ICTY's Statute, shows that the Genocide Convention was meant to incorporate the understanding of the term 'genocide' as embracing the groups possessing certain

[53] See www.haguejusticeportal.net/eCache/DEF/6/042.html (visited 16 May 2011).
[54] *Prosecutor v. M. Stakić,* Trial Chamber 2003, at para. 512, available at: www.icty.org.
[55] *Prosecutor v. M. Stakić,* Appeals Chamber 2006, at para. 20, available at: www.icty.org.

features (national, racial, etc.) – a concept incompatible with the negative definition of targeted groups.[56]

With regard to the subjective perception of the protected group by the perpetrator, the Appeals Chamber claimed that nowhere in its judgment may it be suggested that targeted groups can only be defined subjectively, by reference to the way the perpetrator stigmatizes victims. The Trial Chamber in the *Krstić case* found only that 'stigmatization . . . by the perpetrators' can be used as 'a criterion' when defining targeted groups – not that stigmatization can be used as the sole criterion. In other words, the criterion of stigmatization may be used, but only supplementarily and not as the sole and decisive one. The Appeals Chamber in the *Stakić case* also noted that whether or not a group is subjectively defined is not relevant to whether it is defined in a positive or a negative way. Consequently, when a targeted group is defined in a negative manner (for example, non-Serbs), whether the composition of the group is identified on the basis of objective criteria or a combination of objective and subjective criteria is immaterial as the group would not be protected under the Genocide Convention. Thus, the Trial Chamber did not err when it found that a group identified negatively as non-Serbs cannot be a protected group.[57] In this case the elements of genocide must be separately considered in relation to Bosnian Muslims and Bosnian Croats.[58]

There is some criticism of this conclusion among international law scholars. For example, according to C. Mitchell, the Appeals Chamber did not explain in any detail why a group (as opposed to an individual) defined negatively on the basis of national, ethnic, racial, or religious characteristics should not be subject to the same protection as a group defined positively on identical criteria. Secondly, the Appeals Chamber observed that a negatively-defined group may be subject to protection under Article 4 if it is comprised of several positively-defined groups, each of which constitutes a protected group in its own right. However, the Appeals Chamber indicated that even if such a finding were to be made, it would not extend the protection of Article 4 to groups that were defined purely on a negative basis. The Appeals Chamber did not appear to consider that all negatively-defined groups are arguably the subject of an underlying positive definition. For example, members of the negatively-defined group of 'non-Serbs' in Prijedor were members of the non-Serb group by virtue of their positive membership of a different ethnic group. This reasoning could apply equally across all protected categories under Article 4. Therefore, it is arguable that all groups defined negatively on the basis of national, ethnic, racial, or religious characteristics should be protected under Article 4 by virtue of their underlying positive definition.[59]

In my opinion, however, this conclusion goes too far. Even if we think it right, it is then necessary to define the negatively protected groups by indicating their positive features, namely by defining them as national, ethnic, racial, or religious groups. In

[56] *Ibid.*, at paras 21–22.

[57] *Ibid.*, at paras 25–26.

[58] *Ibid.*, at para. 28.

[59] Mitchell, 'Case Note. Prosecutor v Milomir Stakic [IT-97-24-A] (Appeals Chamber) (22 March 2006)', 13 *Australian Int'l LJ* (2006) 269, at 273.

this way one goes back to the point one started from. In the *Stakić case* the ICTY examined whether genocide had been committed against Bosnian Muslims and Bosnian Croats respectively and not against them all treated as one protected group of non-Serbs. Yet it seems that if the intent pertains to the destruction of a group in whole or in part, then those two groups may be treated jointly and afforded protection as non-Serbs. The situation would be different if the notion 'in whole or in part' referred to destruction, as then it would be necessary to examine whether the group was really destroyed in whole or in part – Bosnian Croats and Bosnian Muslims respectively. As has already been noted, actual destruction is not required to convict a perpetrator of genocide. Still, if every protected group negatively defined is arguably the subject of an underlying positive definition, for example as consisting of a number of positively defined protected groups, then the protection should be afforded to each of those groups separately. As a consequence their protection against genocide is in no way diminished.

D *The Popović et al. case*

In one of its recent judgments, delivered on 10 June 2010 in the *Popović et al. case,* the ICTY Trial Chamber agreed with the *Stakić* judgment conclusions and confirmed that genocide was 'originally conceived as the destruction of a race, tribe, nation, or other group with a particular positive identity; not as the destruction of various people lacking a distinct identity'. According to the Chamber, the Genocide Convention's definition of the group, reflected in Article 4, adopts the understanding that genocide is the destruction of distinct human groups with particular identities, such as 'persons of a common national origin' or 'any religious community united by a single spiritual idea'. A group is defined by particular positive characteristics – national, ethnic, racial, or religious – and not by the lack of them. Thus, a negatively defined group, for example all non-Serbs in a particular region, does not meet the definition.[60] The protected group was defined as Bosnian Muslims, some of whom – against whom the attack was directed – were Muslims from eastern Bosnia. The Trial Chamber – referring to the Yugoslavian Constitution of 1963 recognizing Bosnian Muslims as a nation – approved of such a conclusion.[61] This case also concerned the Srebrenica genocide. The defendants in this case were seven former high-ranking officials of the Bosnian Serb military and police. The Trial Chamber found two of the accused, Vujadin Popović and Ljubiša Beara, guilty of genocide and imposed sentences ranging from five years' to life imprisonment. The *Popovic et al.* case concerns the wide range of crimes committed by Bosnian Serb forces in the enclave of Srebrenica and Žepa in 1995. The accused were found guilty of various crimes including: genocide, conspiracy to commit genocide, extermination, persecution, forcible transfer, and murder (crimes against humanity); and murder and terrorizing civilians as violations of the laws or customs of war.[62]

[60] *Prosecutor v. Popović et al.*, Trial Chamber 2010, at paras 807–809, available at: www.icty.org.

[61] *Ibid.*, at paras 834, 839–840.

[62] For more details see www.trial-ch.org/ and http://www.haguejusticeportal.net/eCache/DEF/11/767.html (visited 25 May 2011).

4 Concluding Remarks

From the above analysis of the jurisprudence of the *ad hoc* International Criminal Tribunals some conclusions common to both of them may be drawn. First, there are two approaches to defining the notion of a national, ethnic, racial, or religious group: objective (*the Akayesu case)* and subjective (*Nchamihigo, Bagilishema, Kayishema and Ruzindana*). In accordance with the first approach, the group should be regarded as a social fact, a reality regarded as stable and permanent. Individuals are members of the group automatically and irreversibly by way of being born within the group. The subjective approach presupposes in turn that the group exists as much as its members perceive themselves as belonging to that group (self-identification) or are as such perceived by the perpetrators of the genocide (identification by others). The *Krstić case* is the exception, as there the ICTY used the mixed approach (subjective and objective).

On the basis of another criterion one may understand the group in a negative or positive way. A negative definition of the group (as not being the same the perpetrator of the genocide belong to) is not sufficient, as genocide encompasses the intent to destroy particular groups of people having a certain identity, for example national or religious. Such a group is defined by possessing certain features – national, ethnic, racial, or religious – and not by the lack of them. Negatively defined groups, such as for instance non-Serbs, do not meet those conditions.

Taking into account the ICTY judgments in *Krstić* and *Jelisić* as well as the ICTR judgment in *Akayesu,* it must be noted that the definition of the protected group to which the intent relates has not been set out in a definite manner. However, it is possible to point to some elements common to the jurisprudence of both Tribunals with regard to the understanding of the definition of national, ethnic, racial, or religious groups. Such elements include the impossibility of defining the group in a negative way and the stable character of that group. In other words, a protected group must be defined by showing certain features it possesses: national, ethnic, racial, or religious; or supplementarily by indicating the stable nature of the group and automatic membership of it. The conclusion by which the protection is afforded to stable and permanent groups should be recognized as a significant contribution, as should the success of the ICTR in defining the notion of genocide and punishing its perpetrators.