The Elephant in the Room: The Uneasy Task of Defining ‘Racial’ in International Criminal Law

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Abstract

The Rome Statute of the International Criminal Court contains the term 'racial' in its provisions on the crime of genocide, persecution and apartheid. However, it fails to provide for a definition of this historically burdened term. International criminal law is guided by the principle of legality and legal norms should be as narrowly defined as possible. This article will therefore attempt to provide a contemporary legal definition of 'racial'. The article contains an overview of the historical development, the treatment of the issue of 'race' by anthropology and human rights, before turning to international criminal law. Cases dealt with by the ICTR and the ICTY on 'racial groups' with regard to the crime of genocide will be analysed and categorized. The article concludes with a suggestion to juxtapose racial groups with ethnical groups, based on the perception of the perpetrator or the self-perception of the victims (subjective approach).

Keywords

racial group – subjective approach – genocide – ICTY – ICTR – Rome Statute

1 Introduction

Defining ‘race’ or ‘racial group’ is not an easy task. Race is not a static concept with one clear meaning. It has been interpreted differently at different times in history. Due to its obvious historical burdening, the term ‘race’ has not been defined satisfactorily in legal literature. It is based on the highly contested explanation that people can be categorized on the basis of their external features and inherited characteristics. There is, however, wide scientific agreement that races are socially constructed rather than a biologically given. Race is a social relationship and construct, created by a specific society to indicate and justify difference in treatment or in position. Race should therefore be studied in the context of the society in which it is used.¹ Schabas acknowledges

¹ William Schabas, *Genocide in International Law* (Cambridge University Press, Cambridge, 2. ed. 2009), p. 129; Thomas Hylland Eriksen, *Ethnicity and Nationalism* (Pluto Press, London, 3. ed. 2010), p. 5; Erica Howard, ‘Race and Racism – Why does European Law have Difficulties with Definitions?’, 5 *International Journal of Comparable Labour Law and Industrial Relations* (2008), p. 10; David Davis, ‘Constructing Race: A Reflection’, 54 *The William and Mary Quarterly* (1997), p. 7; Stephanie Schmölzer, ‘Implementing European Standards’, *University of Oslo Faculty of Law Research Paper* No. 2014-01, p. 50, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2374412>, 23 September 2014; Statement on Race (1950), in: Unesco, *Four Statements on the Race Question* (1969), pp. 30-35,

that: “[a]s a way to classify humans into major subspecies (...) race has become virtually obsolete”² and “the existence of races themselves no longer corresponds to usage of progressive social science”.³ But even though there is no scientific justification to divide the human population into different races, legal instruments such as the Genocide Convention or the provision on apartheid and persecution in the Rome Statute of the International Criminal Court (ICC) continue to use the term ‘race’ and ‘racial’. Nystuen rightfully points out: “One cannot treat the term as non-existent, in spite of its dubious connotations”.⁴

Racism has been defined as a relationship of domination and subordination, thus not about objective characteristics, but more about hatred of the ‘others’ in defence of ‘self’, whereby the ‘others’ are portrayed as inferior. Race can therefore be described as a social construct that includes a combination of personal and social attributes.⁵ Racism is a cumulative problem: the discrimination deprives a group of equal treatment and presents the group as a problem. That group is then commonly blamed for its own condition, leading to reinforcement of racist theories.⁶ Racial discrimination works on the perceived attributes and deficiencies of a group, not individualized characteristics. They are solely judged on their membership to a group that is mistakenly thought to have a racial basis.⁷

Modern genetics tend not to speak of race for three reasons: first, there has been so much interbreeding between human populations that there are no ‘pure’ racial groups. Secondly, the distribution of hereditary physical traits does not follow clear boundaries. Thirdly, no matter what race one could belong to, people everywhere have the same inborn abilities. Variations exist on an individual level, not however at a group level.⁸

Despite a general scientific discredit following the Second World War, theories of racial superiority and the notion of biological differences between human races continue to appear in popular thinking and political discourses.⁹ The racist view establishes a hierarchy of groups, which is conceived as affecting intelligence and behaviour.¹⁰

The need of the term ‘race’ in international treaties is claimed to be justified in order to subsume cases of discrimination based on the wrongful – or perceived – belief that races exist.¹¹ The Commission of Experts on Rwanda, for example, made clear that: “to recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact”.¹² The European Commission against Racism and Intolerance warranted the inclusion of race into legal provisions as important to

<unesdoc.unesco.org/images/0012/001229/122962eo.pdf>, 23 September 2014, emphasizing that: “For all practical social purposes, ‘race’ is not so much a biological phenomenon as a social myth” (p. 33).

² Schabas, *ibid.*, pp. 122-123.

³ *Ibid.*, p. 129.

⁴ Gro Nystuen, *Achieving Peace or Protecting Human Rights?* (Martinus Nijhoff Publishers, Leiden, 2005), p. 119.

⁵ Sandra Fredman, ‘Combating Racism with Human Rights: The Right to Equality’, in Sandra Fredman (ed.), *Discrimination and Human Rights* (Oxford University Press, Oxford 2001), pp. 10-11.

⁶ Unesco, Statement of Race 1967, *supra* note 1, p. 53.

⁷ Ellis Cashmore, *Encyclopedia of Race and Ethnic Studies* (Routledge, London, 2008), p. 345.

⁸ Hylland Eriksen, *supra* note 1, p. 6; Peter Wade, *Race, Nature and Culture* (Pluto Press, London, 2002), p. 2; Jean Hiernaux, ‘Biological Aspects of the Racial Question’, in: UNESCO, *Four Statements on the Race Question* (1969), pp. 12, 14.

⁹ Schabas, *supra* note 1, p. 129.

¹⁰ Hiernaux, *supra* note 8, p. 9.

¹¹ Schmölzer, *supra* note 1, p. 50.

¹² Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), (S/1995/1405), p. 31, para. 159.

“ensure that those persons who are generally and erroneously perceived as belonging to ‘another race’ are not excluded from the protection provided for by the legislation”.¹³

Of paramount importance is the reference to perception, thus a subjective element, as will be shown below in the discussion of the *ad hoc* criminal tribunals’ jurisprudence on racial groups. With other words: even if race does not exist, people are still protected from racial discrimination by others who – wrongfully - perceive them as belonging to another race. However, the continued use of the terms race and racial in legal documents is not uncontroversial: it might contribute to the perpetuation of the categorization of people.¹⁴

The construction of a ‘racial group’ is fundamental to the question of genocide, persecution and apartheid as found in the Rome Statute. Its definition will be analysed in view of its historical development. Thereafter the human rights practice will be considered, followed by an anthropological approach, before turning to international criminal law, with a detailed analysis of the jurisprudence by the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).

2 Historical Definition of Race

The Swedish scientist von Linné established in 1758 what he believed was a link between exterior features and inner qualities. His work was written in a period when science started challenging the church. Based on the four natural elements (air, earth, wind and water), corresponding to the four directions of the world (north, east, south and west), the four continents (Europe, America, Asia and Africa) as well as the four humours of the body (blood, phlegm, yellow and black bile), the four canonical races were defined: the European man (white), the Asian man (yellow), the African man (black), and the American man (red). Not only were people qualified as belonging to one of four different racial groups, but each group was attributed different characteristics, based on the ultimate belief that light-skinned people were superior to dark-skinned people and therefore were allowed to take benefit from the ‘subordinate races’. These race theories were well received until far into the twentieth century, amongst other for justification of slave trade and colonialism.¹⁵

The so-called races of mankind have been recognized to be incidental and arbitrary inventions and a by-product of Europe’s religious, economic and imperial expansion during colonialism.¹⁶ The doctrines of racial superiority cast a dark shadow over the first half of the twentieth century. They were used in imperialist conceptions as well as by the National Socialist party in Germany, killing six million Jews and other people labelled as ‘racially inferior’.¹⁷

3 Human Rights Definition of Race

The international criminalisation of genocide, persecution and apartheid originates in human rights law, more specifically from treaties that prohibit genocide and racial discrimination, namely the

¹³ ECRI General Policy Recommendation No. 7 (2003), p. 5.

¹⁴ Schmölzer, *supra* note 1, p. 50.

¹⁵ Nystuen, *supra* note 4, p. 119; Loïc Wacquant, ‘For an Analytic of Racial Domination’, 11 *Political Power and Social Theory* (1997), pp. 223, 231.

¹⁶ Davis, *supra* note 1, p. 7.

¹⁷ Michael Banton, ‘Social Aspects of the Race Question’, in: UNESCO, *Four Statements on the Race Question* (1969), p. 17.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Genocide Convention and the Apartheid Convention. Other instruments, both soft- and hard-law, such as the Universal Declaration of Human Rights (1948) or the Charter of the United Nations (1945), also contain prohibitions of racial discrimination.

The ICTY has pointed out that definitions for the purposes of human rights are not necessarily controlling in international criminal law.¹⁸ Also human rights courts have emphasized the different aims of human rights law and international criminal law: prior's objective was not to punish individuals who were guilty of violations, but rather to protect the victims and to provide for reparation of damages resulting from State acts.¹⁹ Thus, the applicability of human rights law to cases of international criminal law is not self-evident: the Appeals Chamber, for example, emphasized that the ICTY was not bound by the findings of regional human rights or other international courts.²⁰ Despite not being binding, the jurisprudence was nevertheless considered a useful and persuasive source of guidance and assistance in interpreting the law.²¹

Art. 21(3) Rome Statute provides that the application and interpretation of its provisions must be consistent with 'internationally recognized human rights' and without adverse distinction founded on grounds as race. On a more general level, Art. 36(3)(b) Rome Statute demands that candidates for judge positions shall have established competence in the law of human rights, thus further linking international criminal with human rights law. Legal scholars acknowledge that the ICC will be aided by the jurisprudence of other criminal tribunals and possibly also human rights institutions, but that the latter should not be determinative because it arises in a different context.²²

The relevance of human rights law to international criminal law is thereby established. Hereafter the treatment of the issue of race by human rights law will be analysed. The ICERD contains a widely accepted, broad definition of the term 'racial discrimination' in its Art. 1(1):²³

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

However, the terms 'race' or 'racial discrimination' are not actually defined; they are simply juxtaposed with the other concepts of colour, descent, national or ethnic origin, thereby creating one big melting pot for any kind of discrimination. Racial discrimination is simply defined as the discrimination based on, amongst others, race. Legal literature has reduced the discussion to juxtaposing the different grounds for discrimination.²⁴

Ethnic origin was included in the ICERD in order to show that ethnic discrimination was considered as racial discrimination in the sense of Art. 1.²⁵ In fact, an English dictionary defines

¹⁸ *The Prosecutor v. Kunarac et al.*, Case No IT-96-23/1-A, Appeals Judgment (12 June 2002), paras. 147-148.

¹⁹ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Judgment (29 July 1988), para. 134.

²⁰ *The Case against Hartmann*, Case No. IT-02-54-R77.5-A, Appeals Judgment (19 July 2011), para. 159.

²¹ Vladimir Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts* (Intersentia, Cambridge/ Antwerp/ Portland, 2. ed., 2014), p. 1367.

²² Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court', in: Roy Lee (ed.), *The International Criminal Court* (Kluwer Law International, Hague/ London/ Boston, 1999), p. 124.

²³ Christopher Hall, 'The Crime of Apartheid', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Verlag C.H. Beck, München, 2. ed. 2008), p. 265, note 124.

²⁴ Nystuen, *supra* note 15, p. 118.

²⁵ Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon, Oxford, 1992), p. 159. Gerhard Werle, *Principles of International Criminal Law* (T.M.C. Asser Press, The Hague, 2005), p. 264.

ethnic as ‘relating to a particular race of people’, which makes a distinction between race and ethnicity impossible.²⁶ Race and ethnicity are often juxtaposed, whereas race seemingly refers to an outdated concept and ethnicity to the modern definition of the same issue.²⁷ According to Thornberry, ethnicity appears to be the broadest term available, broader than both race and nationality.²⁸

The Committee on the Elimination of Racial Discrimination has in General Recommendation No. 8 embraced contemporaneous scientific views when concluding that the identification of a member of a particular racial or ethnic group could be based upon self-identification by the individual concerned.²⁹ Objective criteria are therefore rendered insignificant. A group may also be identified as such by the dominant population, even if it does not regard itself as being ethnically or racially different.³⁰

Thornberry emphasizes that the ICERD contains a stipulative definition rather than one flowing from the usual meaning of race; it was perhaps best considered as a definition solely for the purpose of the Convention.³¹ Applying the ICERD’s definition to the provisions on the crime of genocide, persecution or apartheid in the Rome Statute should therefore only be done with prudence. The criminal law principle of strict legality and its accompanying principle of foreseeability, dictate clearly defined terms. The human rights approach of juxtaposing different reasons for discrimination, without providing for a precise definition thereof, seemingly contradicts with these principles and should therefore be avoided.

4 Anthropological Definition of Race

Confronted with difficulties in defining the terms ‘race’ and ‘racial’, certain legal scholars suggest turning to anthropology. Bantekas, for example, concludes that the crime of apartheid is “based solely on racial discrimination (...) and much will depend on the anthropological definition of ‘race’”.³²

The Darfur Commission³³ also turned to anthropology when confronted with the term ‘tribe’ and whether it was comprised by one of the four protected groups in the Genocide Convention.³⁴ In practice, anthropological approaches have therefore already been applied to cases of international criminal law. However, it remains to be determined whether anthropological definitions can be applied to criminal law cases as a general rule or only on a case-by-case basis. A historical and contemporary review of the anthropological definition of race will hereafter be given in an attempt to assert whether or not it can be applied to criminal law provisions.

Sociologist Ruth Benedict was one of the first, as early as in 1940, to make an attempt to define racism, interestingly enough by juxtaposing race with ethnicity: “Racism is the dogma that

²⁶ <dictionary.cambridge.org/dictionary/british/ethnic>, 19 June 2014.

²⁷ Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press, Manchester, 2009), p. 231.

²⁸ Thornberry, *supra* note 25, pp. 160-161.

²⁹ CERD, *General Recommendation No. 08: Identification with a particular racial or ethnic group* (A/45/18).

³⁰ Rüdiger Wolfrum, ‘The Committee on the Elimination of Racial Discrimination’, in Jochen Frowein, Rüdiger Wolfrum (eds.), *3 Max Planck Yearbook of United Nations Law* (Martinus Nijhoff Publishers, Leiden, 1999), p. 498.

³¹ Thornberry, *supra* note 25, p. 160.

³² Ilias Bantekas, *International Criminal Law* (4th ed., Hart Publishing, Oxford, 2010), p. 237.

³³ International Commission of Inquiry on Darfur established pursuant to United Nations Security Council Resolution (S/RES/1564).

³⁴ Report of the Darfur Commission (S/2005/60), para. 495.

one ethnic group is condemned by nature to congenital inferiority and another group is destined to congenital superiority".³⁵ According to anthropologist Hylland Eriksen, race exists as a cultural construct, whether it has a biological reality or not. Racism builds on the assumption that personality is linked with hereditary characteristics that differ systematically between races and thus may assume sociological importance despite the lack of objective existence.³⁶ He acknowledges the close relationship between race and ethnicity, with blurred boundaries caused by an overlap in many aspects.³⁷ Fellow anthropologist Wade states that after the Second World War the notion of race generally was replaced by the notion of ethnicity, which "seems to avoid all the nasty baggage that the concept of race brought with it".³⁸

While in everyday language, ethnicity still has a ring of race relations, in social anthropology it refers to aspects of relationships between groups which consider themselves - and are regarded by others - as being culturally distinctive, thus distinguished by criteria such as language or political organization. Ethnic groups have a common myth of origin, thereby linking ethnicity to descent and turning it to kindred concept to race. The decisive feature of ethnicity is the degree of contact between several groups and the idea of being culturally different. Only in as far as cultural differences are perceived as being important and therefore made socially relevant, do social relationships have an ethnic element.³⁹ Whereas race stands for the attributions of one group, ethnic group stands for the creative response of a people who feel marginal to the mainstream of the society.⁴⁰ Once the consciousness of being part of a distinct group is formed, it takes on a self-perpetuating quality that is passed on from one generation to the next; language, religion and political institutions become part of the ethnic attribution.⁴¹

Anthropology made an interesting discovery: unequal power relations, for example between different races, are highly complex and nearly impossible to break down to one singular cause. Inequality is in most cases triggered by miscellaneous grounds, such as age, sexuality, ethnicity, nationality, region and race. These multiple dimensions of social life are mutually influencing each other, making them reciprocally depending.⁴² This analysis is of importance for the legal definition of race: could it be possible that racial discrimination always depends on several aspects? Possibly there is no such thing as pure racial discrimination, but only one based on a multiplicity of reciprocally influential aspects. Would this make the ICERD's definition the most accurate one, juxtaposing different terms without actually defining them? Ultimately, race would not have to be defined, nor would - as a matter of fact - any of the other terms, since any kind of discrimination would be covered by ICERD's definition.

From a perspective of strict legal positivism, this solution seems inappropriate. Why would any legal norm contain distinct terms as 'race', 'descent' or 'ethnic origin' if it were of no importance to distinguish amongst them? Criminal law, in particular, demands strict adherence to the principle of *nullum crimen sine lege stricta*, thus calling for clear definitions. The juxtaposing of these terms cannot signify that they should be treated equally, thereby avoiding a precise definition.

³⁵ Quoted by Banton, *supra* note 17, p. 20

³⁶ Hylland Eriksen, *supra* note 1, p. 6.

³⁷ *Ibid.*, pp. 5, 7; Cashmore, *supra* note 7, p. 143.

³⁸ Wade, *supra* note 8, p. 3.

³⁹ Hylland Eriksen, *supra* note 1, pp. 5, 7, 15-16.

⁴⁰ Cashmore, *supra* note 7, p. 143.

⁴¹ *Ibid.*

⁴² Wade, *supra* note 8, p. 19. Wacquant asserts that any racial situation, structure or event can be broken down into a complex and dynamic set of five elementary forms of racial domination. These building blocks are: categorization, discrimination, segregation, ghettoization and racial violence (Wacquant, *supra* note 15, p. 230).

5 International Criminal Law Definition of Race

With the limited number of adjudicated cases before the ICC, the *ad hoc* tribunals' jurisprudence with regard to the term 'racial group' – mostly in connection with the crime of genocide - will prove to be crucial for its interpretation.

Legal terms do need a precise definition because "each individual word employed in a legal document implies and contributes an autonomous meaning and must hence be interpreted as a stand-alone component within the norm's substance".⁴³ The Darfur Commission concluded in a similar way by referring to the principle of effectiveness: despite the terminology of 'race' or 'racial' being criticized because it is outdated or even misleading, the rules containing that term should be interpreted as giving them their maximum effect.⁴⁴

5.1 The Definition of 'Racial' in Art. 7(1)(h) Rome Statute

The crime of persecution is founded on deprivation of fundamental rights by reason of a person's group membership. Persecution has to be committed on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law. The Elements of Crime to the Rome Statute do not further define the term racial, but simply state that this was one of the impermissible grounds. Byron suggests interpreting the grounds for persecution "similarly to those terms as used for the crime of genocide".⁴⁵

Unfortunately, she fails to clarify that the genocide provisions prohibit discriminative acts exclusively against national, ethnical, racial or religious groups, thus containing a narrower field of application than the crime of persecution. Political, cultural and gender groups are specifically not granted protection under the crime of genocide. For the definition of the term 'racial' within the framework of the crime of genocide, the following chapter will contain an in-depth analysis.

5.2 The Definition of 'Racial' in Provisions on Genocide

The Genocide Convention⁴⁶ and the crime of genocide in Art. 6 Rome Statute encounter the same difficulties as the crime of persecution in defining the protected victim groups, particularly the racial one. The definitions in Art. 6 Rome Statute, Art. 2 ICTY Statute and Art. 4 ICTR Statute reproduce Articles II and III of the Genocide Convention; they are therefore identical.

Art. II of the Genocide Convention reads: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (...)".

Common to the four groups is the fact that their membership is determined by birth.⁴⁷ The *travaux préparatoires* to the Genocide Convention reveal that membership to racial, religious or national groups was seen as being a permanent and stable feature, the destruction of which

⁴³ Christian Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck, Hart, Nomos, München, 2014), p. 103.

⁴⁴ Darfur Report, *supra* note 34, p. 125, at para. 494.

⁴⁵ Byron, *supra* note 27, p. 231.

⁴⁶ Convention on the Prevention and Punishment of the Crime of Genocide (UN GA Res. 260 A (III) of 9 December 1948).

⁴⁷ Daniel Ntanda Nsereko, 'Genocide: A Crime against Mankind', in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (Kluwer Law International, The Hague, 2000), p. 130; Werle, *supra* note 25, p. 194.

“appeared most heinous in the light of the conscience of humanity, since it was directed against human being whom chance alone had grouped together”.⁴⁸ It was acknowledged that people could change their nationality or religion, however, it was assumed that people often are born into religious groups and do not easily abandon their faith.⁴⁹

Ever since the adoption of the Genocide Convention in 1948, many have attempted to define its Art. II, however, with unconvincing results because the concepts of race, ethnic and national group *a priori* are imprecise.⁵⁰ Scholars agree that the four group categories are not clear-cut, but are used interchangeably and often overlap.⁵¹ Schabas suggested using the four groups as ‘four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection’.⁵² He considers a precise definition of a group unnecessary where it can be established that it is embraced by the overarching purpose of the enumeration.⁵³ He is joined by Verhoeven who favours an extension to virtually include any membership of a human collectivity as such.⁵⁴

Despite its practical merits, Tams, Berster and Schiffbauer rightfully question the implications of this holistic approach. The merging of the categories, in effect, leads to deleting the four elements and replacing them by an unnamed generic category, which is not reconcilable with the principle of *nullum crimen sine lege stricta* in Art. 22(2) Rome Statute.⁵⁵ Furthermore, the drafters on purpose limited the protection to the four specific groups that represent an exclusive list.⁵⁶

There are two ways of determining a group membership: according to the objective approach a group is regarded as a social fact, a stable and permanent reality. Neither the views of the perpetrator nor the victim are decisive. According to a subjective identification, the group exists to the extent that its members perceive themselves as belonging to it (self-identification) or are perceived as such by the perpetrator (identification of others).⁵⁷

The assignment of objective elements, however, entails definitional challenges. Tams, Berster and Schiffbauer conclude that “the affiliation of a given body of persons to at least one of

⁴⁸ (A/C.6/SR.74), p. 99. Agnieszka Szpak, ‘National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the *Ad Hoc* International Criminal Tribunals’, in 23 *European Journal on International Law* (2012), p. 159. Others point to the cohesiveness, homogeneity and involuntariness of the membership to the group (Matthew Lippman, ‘Genocide’, in M. Cherif Bassiouni (ed.), *International Criminal Law* (3rd ed., Martinus Nijhoff Publishers, Leiden, 1999).

⁴⁹ Szpak, *supra* note 48, p. 159; Ntanda Nsereko, *supra* note 47, p. 130.

⁵⁰ Joe Verhoeven, ‘Le Crime de Génocide’ [The Crime of Genocide], *Revue Belge de Droit International* (1991), p. 21.

⁵¹ David Nersessian, ‘The Razor’s Edge: Defining and Protecting Human Groups Under the Genocide Convention’, 36 *Cornell International Law Journal* (2003), p. 303; Ntanda Nsereko, *supra* note 47, p. 131; Schabas, *supra* note 1, p. 129.

⁵² Schabas, *ibid.*

⁵³ Schabas, *ibid.*, pp. 130-131.

⁵⁴ Verhoeven, *supra* note 50, p. 23.

⁵⁵ Tams et al., *supra* note 43, p. 102.

⁵⁶ *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment (2 August 2001), para. 554; Nersessian, *supra* note 51, pp. 299 and 306; Emanuela Fronza, ‘Genocide in the Rome Statute’, in: Flavia Lattanzi, William Schabas, (eds.), *Essays on the Rome Statute of the International Criminal Court* (il Sirente, Ripa Fagnano Alto, 1992), p. 133; Werle, *supra* note 25, pp. 193-194. Szpak, however, disagrees and claims the four categories did not constitute a *numerus clausus* (Szpak, *supra* note 48, pp. 160-161).

⁵⁷ Szpak, *supra* note 48, pp. 162-163; Nersessian, *supra* note 51, p. 307; Fronza, *supra* note 56, p. 133. Verdirame rightfully points out that the consequences of this distinction are not only of theoretical, but also of practical importance: if solely objective criteria would apply, then during the Holocaust only Jews according to the *halachic* rules would be considered protected victims. Persons who were killed because they were considered Jewish under the Nuremberg laws would not be protected victims of a genocide (see: Guglielmo Verdirame, ‘The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals’, 49 *International and Comparative Law Quarterly* (July 2000), p. 589).

the protected groups under Article II of the Convention should be judged objectively, irrespective of the point of view of either the perpetrators or the victims”.⁵⁸ The authors, unfortunately, refrain from explaining how an objective attribution should be performed, especially with regards to the racial group. With a wide scientific consensus that there are no definable human races it is rather bold to demand such a classification by a court. With all due respect for the principle of legality, the interpretation cannot be taken to imply that the victims objectively have to be assigned to a specific racial, ethnical, national or religious group. Furthermore, the proposed objective affiliation partially contradicts decisions by international criminal tribunals and semi-judicial bodies, as to be shown below. The Darfur Commission’s report, for example, concluded that over recent years a self-perception of two distinct groups had emerged between the ‘African’ rebel tribes and their ‘Arab’ opponents, even though their distinction lacked a genuinely objective basis.⁵⁹

Schabas points out that the definitional difficulties have led some writers to suggest a purely subjective approach.⁶⁰ Chaumont suggests such an approach, by relying exclusively on the perpetrator’s perception of the victimized group. According to Chaumont, there is no requirement for an existing ‘*genos*’ in a genocide, since the victim group could exist in the perpetrator’s head only, thereby containing an element of arbitrariness and not necessarily reflecting the self-identification of the group itself.⁶¹ Even the most arbitrarily grouping of people should be included by the provisions on genocide. Since these groups, however, were impossible to define beforehand – precisely because they depend on the perpetrator’s arbitrariness – their narrow definition in legal provisions should be removed or replaced by a wide description such as ‘any membership to a group as defined by the perpetrator’.⁶² As a matter of fact, France expanded its national legislation on the crime of genocide in 1992 to include any arbitrarily defined group, thereby relying on a subjective approach.⁶³

Other scholars seemingly do not perceive the objective determination of a ‘racial group’ as a problem and instead rely on antiquated methods. Nersessian, for example, refers to a publication of 1959 that defines racial groups primarily by the external physical appearance of their members.⁶⁴ According to Werle, a racial group was a social group whose members exhibit the same inherited, visible physical traits, such as skin color or physical stature, thus relying exclusively on objective and scientifically highly contested arguments.⁶⁵ Ntanda Nsereko defines a racial group as one of the groupings into which the entire human species is divided and the members of which were easily identifiable and constituted distinct, clearly determinable communities.⁶⁶ He states:

⁵⁸ Tams, et al., *supra* note 43, p. 103.

⁵⁹ Darfur Report, *supra* note 34, p. 129, at paras. 509-511; Schabas, *supra* note 1, p. 105.

⁶⁰ Schabas, *ibid.*, p. 126.

⁶¹ Jean-Michel Chaumont, *Die Konkurrenz der Opfer* [The Concurrence of the Victims] (zu Klampen Verlag, Lüneburg, 2001), pp. 181-182. It is to be acknowledged that Chaumont is not a lawyer, but a philosopher and sociologist.

⁶² *Ibid.*

⁶³ The French Penal Code was modified in 2004, but retained the definition of 1992 (“destruction totale ou partielle d’un groupe national, ethnique, racial ou religieux, ou d’un groupe déterminé à partir de tout autre critère arbitraire”): www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIARTI000006417532&dateTexte=&categorieLien=cid, 10 June 2014.

⁶⁴ Nersessian, *supra* note 51, p. 300.

⁶⁵ Werle, *supra* note 25, p. 197.

⁶⁶ Ntanda Nsereko, *supra* note 47, p. 130.

Be that as it may, however, the various racial groups are distinguished and classified according to genetically transmitted differences. Each group has physical features that are hereditary. Included among these features are skin colour, hair, eyes and stature.⁶⁷

The author does acknowledge the immense difficulties in classifying people along racial lines, coupled with further complicating issues of culture and languages, which lead others to juxtapose racial with ethnical.⁶⁸ Lippmann, seemingly unaware of scientific progress and academic discourse, does not even discuss the definitional issue when claiming that “[t]he concept of racial groups is self-evident”.⁶⁹ Lüders asserts that international jurisdiction and scholarly literature used the term ‘race’ in reference to its actual meaning: a group of persons whose members have the same hereditary acquired, unchangeable physical traits.⁷⁰ All these definitions provided by legal scholars relate to outdated and highly contentious concepts of racial distinction, based on the wrongful understanding of different human races that have distinct physical appearances and qualities. This type of categorization should be strictly avoided in legal discussions and elsewhere, precisely because of its scientific inaccuracy and controversy.

When confronted with the definition of the term ‘racial group’, international criminal tribunals usually saw themselves challenged with an objective definition of the protected group. The foundation of the objective approach was laid by the Permanent International Court of Justice and the International Court of Justice in the *Minorities in Upper Silesia*-case and the *Nottebohm*-case respectively.⁷¹ The group was considered a given fact, shaped in the social reality in a stable and permanent way. The individuals acquired group membership by birth.⁷² Instead, there has been a progressive, ground-breaking shift towards the subjective approach, thereby avoiding scientifically verifiable parameters. The nowadays prevailing subjective approach refers to the perpetrator’s perception of the victim group. It is the perpetrator who defines the victim’s status as a member of one of the protected groups.⁷³ Fronza refers to this as an issue of “meta-juridical dimension” because the group does not correspond to an objective reality, but appears to be the result of a subjective construction, in which the imagination and perception of the groups as something unitary was fundamental.⁷⁴

There seem to be three different schools with regard to the subjective approach: one where the perpetrator’s perception is the dominant one, one where the victim’s self-perception is of importance and a third where either the perpetrator or the victim’s perception of differentness is decisive. The Darfur Commission, for example, concluded that the victim and persecutor “perceive each other and themselves as constituting distinct groups”,⁷⁵ thereby falling into the third category. Nevertheless, the *ad hoc* criminal tribunals did in most cases not rely purely on the subjective approach, but demanded certain objective elements as well.

⁶⁷ Ntanda Nsereko, *supra* note 47, p. 131.

⁶⁸ *Ibid.*

⁶⁹ Lippmann, *supra* note 48, p. 412.

⁷⁰ Barbara Lüders, *Die Strafbarkeit von Völkermord nach dem Römischen Statut für den Internationalen Strafgerichtshof* [The Criminal Liability for Genocide in the Rome Statute of the International Criminal Court] (Berliner Wissenschafts-Verlag, Berlin, 2004), p. 79.

⁷¹ Verdirame, *supra* note 57, pp. 589-591.

⁷² Fronza, *supra* note 56, p. 133.

⁷³ Tam, et al., *supra* note 43, p. 103; Schabas, *supra* note 1, p. 125; Werle, *supra* note 25, p. 196; Verdirame, *supra* note 57, p. 589.

⁷⁴ Fronza, *supra* note 56, p. 132.

⁷⁵ Darfur Report, *supra* note 34, para. 509; William Schabas, *An Introduction to the International Criminal Court* (4th ed., Cambridge University Press, Cambridge, 2011), p. 105.

The following sub-chapters will analyse the relevant jurisprudence of the *ad hoc* criminal tribunals with regard to the objective and subjective approach to defining group membership, especially racial groups. It will be demonstrated that there is some theoretical confusion as to the subjective and objective approach. Subsequently, a definition of a ‘racial group’ as found in the provisions on genocide and apartheid and of ‘racial ground’ in persecution will be suggested.

5.2.1 Jurisprudence of the International Criminal Tribunal for Rwanda

Following the genocide in Rwanda in 1994, the *ad hoc* established International Criminal Tribunal for Rwanda (ICTR) was confronted with two groups that were labelled as distinct by means of their identity cards, originating from times of Belgian colonialism. In reality, however, the Rwandan Tutsis and Hutus spoke the same language, practiced the same religions and essentially had the same culture, thus disenabling a clear-cut distinction based on ethnicity that precisely uses language, religion and culture as defining criteria. There are some genomic differences in the two groups, but more often than not they are undistinguishable. The Tribunal concluded that the Tutsis and Hutus in fact were ‘ethnic’ groups as stated in the provision on genocide of the ICTR Statute.⁷⁶ It acknowledged that the recognition of the Tutsis as a group was founded on perception and as such a social construct.⁷⁷ The later cases confirmed that it was firmly established that the Tutsi ethnicity was a protected group.⁷⁸ In the *Karemera* case, the Tribunal declared that the Tutsi ethnic identification was a notorious fact of common knowledge not subject to reasonable dispute.⁷⁹

With the judgment against *Akayesu* for the first time ever an international criminal tribunal convicted an individual for genocide. The Trial Chamber defined a racial group as following: “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”.⁸⁰ This approach is ambiguous since it refers to hereditary physical traits, which imply an objective approach to a scientifically highly disputed method, namely the identification of people by means of their physical appearance, such as their skin colour. According to an English dictionary, hereditary signifies “genetically transmitted or transmittable from parent to offspring”.⁸¹ As seen above in the introduction, race in

⁷⁶ *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment (1 December 2003), para. 242. This conclusion was confirmed by *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), para. 523. It was in fact only due to the introduction of ID-cards that an affiliation to the Tutsi, Hutu or Twa group was created and consolidated. According to a Belgian law of 1931, in order to be regarded as Tutsi one had to own more than nine cows, thus creating a system of division based on wealth. Simultaneously, the visions of Tutsi superiority were implanted and perceptions racialized. The characterization as member of one of these ethnical groups is therefore primarily a result of a social attribution process (Lüders, *supra* note 70, p. 87; Verdirame, *supra* note 57, p. 589; Szpak, *supra* note 48, p. 160). The ICTY concluded: “The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups”, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), para. 172.

⁷⁷ Lüders, *supra* note 70, p. 53.

⁷⁸ See e.g., *The Prosecutor v. Nizeyimana*, Case No. ICTR-2000-55, Trial Judgment (19 June 2012), para. 1493 or *The Prosecutor v. Setako*, Case No. ICTR-04-81-T, Trial Judgment (25 February 2010), para. 468.

⁷⁹ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (16 June 2006), paras. 29 and 35.

⁸⁰ *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), paras. 514 and 516. The Court had difficulties defining the Tutsi population as a distinct ethnic group and noticed that they did not have their own language or distinct culture. The Trial Chamber was hard pressed to find objective criteria on which to conclude that the Tutsi were a protected group: “However, the Chamber finds that there are a number of objective indicators of the group as a group with a distinct identity” (*ibid.*, para. 170; John Quigley, *The Genocide Convention* (Ashgate, Aldershot, 2006), p. 146).

⁸¹ See <www.merriam-webster.com/dictionary/hereditary>, accessed 19 May 2014.

the sense of genetic transmission from parents to their children, lacks scientific grounds. At the same time, the Trial Chamber refers to the identification of these traits with a geographical region, thus approaching a subjective method, whereby the term ‘identified’ refers to the perpetrator’s subjective perception of a groups’ affiliation to a geographical region. The subjective approach is emphasized by the clarification that the racial membership was irrespective of linguistic, cultural, national or religious factors, thereby delimiting it from ethnical membership.⁸² The Court furthermore referred to the ICJ’s *Nottebohm* case that opted for objective criteria, by relying on social facts as opposed to social constructs.⁸³ Hence, the ICTR took an approach with both subjective and objective elements, with an emphasis on the objective elements.

In the *Rutaganda* judgment, the ICTR pointed out that:

the concepts of national, ethnical, racial and religious groups have 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.⁸⁴

The membership of a group was thus a subjective rather than an objective concept. The Court went on to declare: “The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group”.⁸⁵ The Court did not openly repudiate the predominantly objective approach taken by *Akayesu* one year earlier, however, there seemingly was a quiet shift towards the subjective approach, setting aside some important precedents.⁸⁶ Despite the fact that the Court viewed the membership as subjective, it nevertheless demanded a certain objectivity of the group, namely a relative stability and permanence. Political or economic groups were excluded from the protection of the Genocide Convention precisely because they were considered not being permanent or stable groups.⁸⁷ While the criteria of stability and permanence were discussed in the drafting of the Genocide Convention, they were not considered independent criteria, but merely as a justification for the inclusion of particular types of groups.⁸⁸ The intention was to limit the field of application of the Genocide Convention to objectively defined stable groups to which individuals belonged regardless of their own desires.⁸⁹ Returning to the *Rutaganda* case, the ICTR determined that the protection of a

⁸² Werle, however, considers the ICTR in *Akayesu* to have taken a firmly objective approach. He acknowledges that other authors perceive the case to be a combination of objective and subjective criteria (Werle, *supra* note 25, p. 194). Other scholars also concluded that the ICTR in *Akayesu* took a purely objective approach, *see e.g.*, Szpak, *supra* note 48, p. 162 and Verdirame, *supra* note 57, p. 592.

⁸³ Verdirame, *supra* note 57, p. 591.

⁸⁴ *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment (6 December 1999), para. 55. The case of *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, Appeals Judgment (27 January 2000), paras. 161-163 refers to the *Rutaganda* case and applies the exact same terminology.

⁸⁵ *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment (6 December 1999), para. 55.

⁸⁶ Verdirame, *supra* note 57, pp. 592 and 594.

⁸⁷ *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment (6 December 1999), para. 56. *The Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Trial Judgment (12 November 2008), para. 337 and *The Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Appeals Judgment (28 November 2007), para. 496, dealt with cases of killings of Hutu political opponents, who were considered members of a political rather than an ethnical group and were therefore not granted protection under the Genocide Convention.

⁸⁸ Quigley, *supra* note 80, p. 150. This fact is of particular importance with regard to the *Akayesu* judgment where the Tutsis did not match any of the four protected groups, forcing the Court to resort to a protection of any stable and permanent group (Verdirame, *supra* note 57, p. 592).

⁸⁹ *The Prosecutor v. Jelisić*, Case No. ICTY-95-10-A, Appeals Judgment (14 December 1999), para. 69.

specific group by the Genocide Convention would have to be performed on a case-by-case basis, accounting for the relevant evidence as well as the political, cultural and social setting.⁹⁰

The *Kajelijeli* judgment emphasized that:

Trial Chambers of this Tribunal have noted that the said concept enjoys no generally or internationally accepted definition, rather each concept must be assessed in the light of a particular political, social, historical and cultural context (...). [M]embership of a group is, in essence, a subjective rather than an objective concept [where] the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. A determination of the categorized groups should be made on a case-by-case basis, by reference to both objective and subjective criteria.⁹¹

The Court relied primarily on a subjective approach whereby the perpetrator's perception was decisive in determining the group membership. The ICTR nevertheless demanded a categorization on a case-by-case basis, with reference to objective as well as subjective elements. It is not quite clear whether the political, social, historical and cultural context constitute the objective criteria or whether there are other criteria the Court would rely upon.

The *Rutaganda* and *Musema* judgments both demanded the same elements as the *Kajelijeli* judgment in order to determine the victim's group membership. Nevertheless, they went further by including the victim's perception as a possible determining factor. The elements of the *Rutaganda* and *Musema* judgments were the following:

- The political, social and cultural context has to be considered.
- The membership is subjective rather than objective.
- The victim is perceived by the perpetrator as a member of a group.
- In some instances the victim may perceive himself as a member.
- The membership has to be determined on a case-by-case basis.

In the *Kayishema and Ruzindana* case, the Trial Chamber innovatively demanded a purely subjective approach, by stating that an ethnic group, members of which shared a common language and culture, could be distinguished by means of self-identification or by identification by others, including the perpetrators. The ICTR stated that a "racial group is based on hereditary physical traits often identified with geography",⁹² thereby partially confirming the definition of the *Akayesu* judgment. It increasingly acknowledged that collective identities were social constructs, so-called "imagined identities" that depended entirely on variable and contingent perceptions and not on verifiable social facts.⁹³

⁹⁰ *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment (6 December 1999), para. 57. *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment (1 December 2003), para. 811 uses the exact same criteria as *Rutaganda* in determining the protected group.

⁹¹ *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A, Trial Judgment (1. December 2003), para. 811. The 2004 *Kamuhanda* judgment uses nearly the same wording as the 2003 *Kajelijeli* judgment (*The Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment (22 January 2004), para 630).

⁹² *The Prosecutor v. Kayishema and Ruzindana*., Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98.

⁹³ Verdirame, *supra* note 57, with reference to Benedict Anderson, *Imagined Communities* (2006). Nersessian considers the *Kayishema* case as an objective approach, because the ICTR focused on objective determination of the group status, rather than linking it to the perpetrator's perception (see Nersessian, *supra* note 51, p. 308). However, the later reference in *Jelisic* to the *Kayishema* case shows that latter was understood by the ICTY as a subjective

The *Bagilishema* judgment confirmed the difficulties of an objective group definition. It stated:

the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally (...) In such a case (...) the victim could be considered (...) as a member of the protected group (...).⁹⁴

The Trial Chamber declared that, nevertheless, membership must be an objective feature of the society in question, although there also was a subjective dimension.⁹⁵ According to Lüders, the *Bagilishema* judgment was a turning point in the ICTR's jurisprudence from an objective to a subjective approach.⁹⁶

The trial of *Muvunyi* was initially concluded with a judgment on 12 September 2006 where the Trial Chamber II affirmed that:

the Statute does not clearly establish the criteria for determining protected groups (...), the Trial Chambers have tended to decide the matter on a case-by-case basis, taking into consideration both the objective and subjective particulars, including the historical context and the perpetrator's intent.⁹⁷

The sentence against Muvunyi was annulled by the Appeals Chamber on 29 August 2008. A re-trial took place in 2009 and did not deal with the issue of group identification. Although the 2006 judgment, strictly speaking, is no longer valid, it nevertheless gives an insight into the Trial Chamber's approach in determining the protected groups. The judgment has been referred to in later cases, for example the ICTY *Tolimir* case, and thus continues to have legal relevance. Of particular interest is the judgment's reliance on both objective particulars, such as the historical context, and subjective particulars, such as the perpetrator's intent. However, the Trial Chamber seems to confuse the subjective perception of the perpetrator with the genocidal intent. The subjective approach in determining a group would correctly be whether the perpetrator – and possibly the victim – perceives the target group as being distinct from another group. The perpetrator's intent, however, is a part of the *mens rea*, namely the requirement of a special intent to destroy a group. The Court does obviously not distinguish between the special intent as part of the *mens rea* and the determination of the target group by means of perception as part of the *actus reus*.

The *Ndindabahizi* case contains a reference to the *Bagilishema* case, confirming “the subjective intentions of the perpetrator are of primary importance”.⁹⁸ It further states that “physical traits were an important, if not decisive, indicator of ethnic identity”,⁹⁹ thereby indicating an objective approach because of the reference to physiognomy.

In the case against *Semanza*, the ICTR Trial Chamber concluded:

approach (*The Prosecutor v. Jelusic*, Case No. IT-95-10-A, Trial Judgment (14 December 1999), para. 70, footnote 95).

⁹⁴ *The Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment (7 June 2001), para. 65.

⁹⁵ *Ibid.*

⁹⁶ Lüders, *supra* note 70, p. 57.

⁹⁷ *The Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Trial Judgment (12 September 2006), para 484, <www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=search&docid=48f356e42&skip=0&query=Muvunyi>, 27 May 2014.

⁹⁸ *The Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-I, Trial Judgment (15 July 2004), paras. 468-469.

⁹⁹ *Ibid.*

The Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused's genocidal intent is to be determined by objective or subjective criteria or by some hybrid formulation. The various Trial Chambers of this Tribunal have found that the determination (...) ought to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria.¹⁰⁰

The *Nahimana* Appeals Chamber judgment was more cautious when referring to the perpetrator's perception as a defining element of a protected group by stating: "the jurisprudence of the ad hoc Tribunals acknowledges that the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining membership of a protected group".¹⁰¹

There appears to be a lack of coherence in the ICTR judgments as to their approach in defining the protected racial groups. While some judgments clearly favour an objective approach, others apply the subjective approach. Before an overview of the cases will be given, the jurisdiction of the other *ad hoc* international criminal tribunal will be analysed.

5.2.2 Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia
The International Criminal Tribunal for the Former Yugoslavia (ICTY) was equally challenged as the ICTR in determining victims' group membership in alleged cases of genocide. In the early case against *Dragan Nikolic*, the Trial Chamber concluded: "the civilian population subjected to such discrimination was identified by the perpetrators of the discriminatory measures, principally by its religious characteristics".¹⁰²

The Court emphasized the perpetrator's perception, thereby taking a subjective approach. The Court did not rely on objective factors in defining whether the protected group was of a distinct religion. In *Jelacic*, the ICTY Trial Chamber acknowledged that an objective classification was a hazardous undertaking:

to attempt to define a (...) racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a (...) racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a (...) racial group using a subjective criterion.¹⁰³

The Court confirmed that it chose to follow the subjective approach taken by the ICTR in the *Kayishema and Ruzindana* case.¹⁰⁴ It went on to emphasize:

It is the stigmatization of a group as a distinct (...) racial unit by the community which allows it to be determined whether a targeted population constitutes a (...) racial group in the eyes of the alleged perpetrators.¹⁰⁵

¹⁰⁰ *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment (15 May 2003), para. 317.

¹⁰¹ *The Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Appeals Judgment (28 November 2011), para. 496.

¹⁰² *The Prosecutor v. Nikolic*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (20 October 1995), para. 27.

¹⁰³ *The Prosecutor v. Jelacic*, Case No. IT-95-10-A, Appeals Judgment (14 December 1999), para. 70.

¹⁰⁴ *Ibid.*, para. 70, footnote 95.

¹⁰⁵ *Ibid.*, para. 70.

Despite a reference to the *Kayishema and Ruzindana* case, the *Jelusic* judgment strictly speaking took a different approach. The former relies on a subjective approach and refers to either the perpetrator's or the group members' perception, whereas the latter relied exclusively on the "eyes of the alleged perpetrators". While both take a stand on the subjective approach, they vary in their source of perception.

The *Jelusic* position was confirmed by the *Brdanin* judgment, but the Court went further by claiming that the relevant protected group:

may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived (...) racial (...) characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.¹⁰⁶

The Court thereby approached the *Kayishema and Ruzindana* judgment, allowing for a subjective approach by the perpetrator or the victim. But it also demanded objective criteria:

The correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria. This is so because subjective criteria alone may not be sufficient to determine the group (...).¹⁰⁷

In *Tolimir*, the ICTY referred to both the *Brdanin* and *Jelusic* case and confirmed that

the determination of the group is to be made on a case-by-case basis, using both objective and subjective criteria. The group must have a particular, distinct identity and be defined by its common characteristics rather than a lack thereof. It is not sufficient to define a relevant protected group using negative criteria.¹⁰⁸

The judgment demands an approach based on both objective and subjective elements without particular emphasis on either, thereby apparently weighing them equally. According to the tribunal, the common characteristic of the group defines its identity. The ICTY unfortunately fails to specify whether it was the perpetrator or the victims who define these characteristics. However, the Trial Chamber refers to the *Brdanin* case and quotes in footnote 3095 that the perpetrator's identification of the group members was the decisive one. Therefore it can be assumed that a subjective approach based on the perpetrator's perception is preferred, with appropriate consideration of the objective criteria.

In *Krstić*, the ICTY agreed that the differentiation of protected groups with scientifically objective criteria would be inconsistent with the Genocide Convention's purpose. Moreover, the group's characteristics should be identified within the socio-historic context in which it resides. According to the Court, the Convention's groups were supposed to describe a single phenomenon that was recognized as "national minorities" in human rights provisions.¹⁰⁹ According to Szpak, the

¹⁰⁶ *The Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment (1 September 2004), para. 683.

¹⁰⁷ *Ibid.*, para. 684.

¹⁰⁸ *The Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Judgment (12 December 2012), para. 735. The judgment referred to the case of *The Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment (22 March 2006), paras. 19-21.

¹⁰⁹ *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment (2 August 2001), paras. 556-557.

Chamber's reliance on the socio-historic context is a recognition of the objective criterion.¹¹⁰ The Chamber identified the relevant groups on the basis of their stigmatization, especially by the perpetrator's perception of the group as national, racial, ethnic or religious.¹¹¹ With the partial reliance on subjective approach, the *Krstić* case can be said to have applied a mixed concept, with both subjective and objective elements.¹¹²

In *Stakic*, the Appeals Chamber gives an interesting overview of earlier judgments and explains their position with regard to the perception of the victim group. It specified that the *Krstić* and *Rutaganda* trial judgments did not suggest that target groups may only be defined subjectively, by reference to the perpetrator's stigmatization of the victims. The Appeals Chamber claimed that the trial judgment in *Krstić* found only that "stigmatisation (...) by the perpetrators" could be used as "a criterion" when defining target groups, but not that stigmatization could be used as the sole criterion. Similarly, while the *Rutaganda* Trial Chamber found national, ethnical, racial, and religious identities to be largely subjective concepts, suggesting that acts may constitute genocide if the perpetrator perceives the victim as belonging to the targeted group, it held that a subjective definition alone was not enough to determine victim groups. The Appeals Chamber concluded that also other ICTR trial judgments decided that the target group could not be only subjectively defined.¹¹³ The analysis by the Appeals Chamber in the *Stakic* case is thorough and informative, however, its conclusion regarding the *Krstić* case should be challenged. In the *Krstić* case, the Court was very specific to – and rightfully so – reject scientific, objective criteria, a virtually impossible endeavour for racial or ethnical groups. According to the ICTY, the stigmatization by the perpetrator could be used as a criterion when identifying the protected group. But the Tribunal also stated that it was a stigmatization of the group, "notably by the perpetrators of the crime", which was the decisive criterion in identifying the relevant victim group, "on the basis of its perceived (...) racial (...) characteristics". The words 'notably' and 'perceived' both point to the perpetrator's identification. It would therefore seem more appropriate to acknowledge the stigmatization by the perpetrator as the – and not only a – defining criterion. Despite disagreeing with the Appeals Chamber's conclusion, for the sake of this overall analysis, it can be established that the *Stakic* case concluded with a primarily objective approach with due consideration of subjective elements. Unfortunately, the Court failed to explain how the objective approach should be performed.

5.2.3 The Darfur Commission's Approach

The UN Security Council established a commission of inquiry into atrocities – especially genocide – in Darfur in the Sudan. The Darfur Commission defined the subjective approach as two distinct groups perceiving each other and themselves as constituting distinct groups,¹¹⁴ thus apparently belonging to a third category, whereby the perception of the perpetrator and the victim are the determining factors. According to the Commission, the rebel tribes were perceived as being 'African', while their opponents were perceived as being 'Arabs', even though there were no objective grounds for such a distinction.¹¹⁵ In fact, the two groups shared the Islamic faith and the Arabic language, and there was a high level of inter-marriages. The Commission concluded that

¹¹⁰ Szpak, *supra* note 48, p. 169.

¹¹¹ *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment (2 August 2001), para. 557.

¹¹² Szpak, *supra* note 48, p. 169.

¹¹³ *The Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment (22 March 2006), para. 25.

¹¹⁴ Darfur Report, *supra* note 34, p. 129, para. 509.

¹¹⁵ *Ibid.*

these groups were not, objectively speaking, of different ethnicity.¹¹⁶

5.2.4 Conclusion

There appear to be three different theories of the purely subjective approach: first the predominant one, in which the perpetrator perceives a victim as belonging to a specifically defined (however not necessarily objective) group.¹¹⁷ Secondly, an inverted approach, in which the victim perceives himself as belonging to a distinct group. And thirdly, a ‘double-subjective’ approach, according to which not only perpetrator’s perception, but also the self-perception of the victims is of relevance. Most judgments by the *ad hoc* criminal tribunals seem to favour a subjective approach based on the perception of the perpetrator, with consideration of certain objective elements.

Fig. 1 illustrates an overall perspective of the different approaches:

FIGURE 1 *The overall perspective of the different approaches*

Fig. 2 shows where the seventeen cases by the ICTR and ICTY were placed:

¹¹⁶ Darfur Report, *supra* note 34, p. 129, para. 511.

¹¹⁷ Lüders, *supra* note 70, p. 55.

FIGURE 2 *The approaches taken in ICTR and ICTY cases*

There is no dominant approach, as the above graph clearly shows. What has been demonstrated, however, is that neither the ICTY nor the ICTR ever took a purely victim-based subjective approach, whereby only the victim-group perceives itself as being distinct from another group, but not the perpetrator or objective criteria. This approach can therefore be considered excluded for the interpretation of a 'racial group'. In only one case, *Stakic*, an entirely objective approach was taken, relying exclusively on objective criteria in determining the protected group. This case seems an exception and should not be considered, particularly for cases of racial groups, since they are nearly impossible to determine objectively.

Two ICTY cases (*Nikolic* and *Jelusic*) favour the subjective approach following the perpetrator's perception. These cases are amongst the first ones and clearly a minority. The *Krstić* case also favours a subjective approach, however, it partially relied on the group's identification within the socio-historic context that it inhabits, thereby taking into account objective criteria. Four ICTR cases (*Akayesu*, *Bagalishema*, *Ndindabahizi* and *Nahimana*) favour a largely objective approach with a certain subjective dimension. Two other ICTR cases (*Kajelijeli* and *Kamuhanda*) essentially applied a subjective approach with the perpetrator's perception as the main factor, nevertheless demanding some objective elements. Only one case (*Kayishema and Ruzindana*) clearly takes a stand for the double-systematic approach, whereby either the perception of the victim(s) or the perception of the perpetrator(s) is decisive. This judgment, nevertheless, demanded some kind of objectivity with regard to the group determination. Finally, four cases – two by the ICTR (*Rutaganda* and *Musema*) and two by the ICTY (*Brdanin* and *Tolimir*) – permit a primarily perpetrator-based subjective approach, but

also allowing self-identification by the victim group. All four cases require some objective element as well. Three cases distinguish themselves from the others: *Stakic* clearly takes a stand on the objective approach, whereas *Semanza* and *Muvunyi* seemingly are indifferent to either a subjective or objective approach.

The next and final section will discuss the current developments and suggest a solution for further reference when confronted with the definition of a racial group.

6 Discussion

Race is a social construct, connected to a particular society, in which it occurs and is applied to justify inequality. It is a fluid concept that changes with the use a person makes of it. It would therefore not be relevant whether a race exists – or not. It would only be of importance to observe that social actors treat races as real and organize their lives and exclusionary practices accordingly. The perception in the minds of people is important: they discriminate someone because they perceive this person as being different.¹¹⁸

The *travaux préparatoires* to the Genocide Convention reveal that the four protected groups, the national, ethnical, racial and religious group, were intended to be an exhaustive list. These four groups were considered to be cohesive, stable and permanent and therefore meriting more protection than loose groups to which membership could be easily gained or renounced, such as political groups.¹¹⁹ Although the jurisdiction by the *ad hoc* tribunals on genocide and the protected groups acknowledges the fact that neither national, racial nor ethnical groups are clearly objectively definable concepts, it nevertheless demands for a certain degree of objectivity when defining the group. The determination of a group membership according to the subjective approach is based on the perception of a group as being different. This is the same reasoning behind the contemporary definition of racism, whereby members of so-called racial groups are being discriminated because they are perceived as being different.

Unfortunately, an objective approach alone is not helpful in determining members of a racial group. It would rely on the outdated notion of distinct physical traits between the different “races of mankind”. Since this concept is highly contested and scientifically refuted, it cannot be applied in an objective manner. Any efforts to objectively define a protected group have proven to be artificial, suffered from serious analytical flaws and bore no relation at all to the group as ultimately targeted.¹²⁰ Schabas rightfully states: “Trying to find an objective basis for racist crimes suggests that the perpetrators act rationally, and this is more credit than they deserve”.¹²¹

However, a subjective approach that draws on the perception of the perpetrator, will not lead to a satisfactory result either. A purely subjective theory risks encompassing fluid groups without a stable composition. Furthermore, by relying exclusively on the perpetrator’s imagination, any kind of group, whether existent or not, could become a target for genocide. In lack of any further criteria, a virtually unlimited number of protected groups could exist, depending only upon the creativity of the perpetrator in defining criteria for membership, thereby risking an expansion of the definition of

¹¹⁸ Howard, *supra* note 1, p.10.

¹¹⁹ At the same time, the lack of protection for political groups is also one of the most contentious issues of the genocide definition. Their exclusion had the consequence that 300,000 mentally ill and homosexual Germans murdered by the Nazis were not granted protection as genocidal acts. However, the acts remain prohibited, despite under other norms (Verdirame, *supra* note 57, p. 581).

¹²⁰ Nersessian, *supra* note 51, p. 313.

¹²¹ Schabas, *supra* note 1, p. 128.

a racial group to include any kind of discriminatory clause.¹²² This would conflict with the object and purpose of the respective legal provision.¹²³ The perception of differentness has to be restricted in order to coincide with the principle of legality and predictability of (criminal) law. Literature and court decisions increasingly acknowledge that a group is primarily a social construction, thereby gradually abolishing objective criteria for its determination and increasingly relying on a subjective perceptive approach. The group no longer appears as a static, but moreover as a dynamic construct that is influenced by the composition of its members, its environment and its social surroundings. Being exposed to constant change, the group cannot and should not be defined in an objective manner only.¹²⁴ The remarkable progressive movement towards a purely subjective approach that takes into account the changing nature of socio-cultural perceptions has been welcomed and “does not reinforce perilous claims to authenticity in the field of ethnic and racial identities”.¹²⁵

A combination of a subjective approach whereby the perpetrator’s perception is the determining factor with objective elements will not lead to a satisfactory solution either. The wide spectre that could potentially be assigned to a racial, ethnical or national group (whereas religious accounts for less problems)¹²⁶ is not necessarily narrowed by the requirement of a certain degree of objectivity. As a provocative example women could subjectively be perceived as being ‘different’, if a predominantly subjective approach is applied. In certain societies, as a matter of fact, women are perceived as being different than men. These women would also fulfil the objective requirements since they are a stable and permanent group into which they have been born, with a usually irreversible membership. But are women as a distinct group supposed to be comprised by the protection of the genocide provisions?¹²⁷

The approach used by the *ad hoc* tribunals whereby the membership is determined on a case-by-case basis, accounting for the relevant evidence as well as the political, cultural and social setting, seems to be a step into the right direction. Race is, as has been shown above, a social concept and has to be seen in the context of a society at large. This coincides with the case-by-case determination demanded by the international criminal tribunals. Connected with the subjective concept of a perception - either the perception, the self-perception or a combination of both – it will enable to define whether someone is a member of a racial group.

If one relies on a subjective approach, the victim’s perception should be given equal weight as the perpetrator’s. If a group perceives itself as being distinct from another group, then this perception would also influence the perpetrator’s view of that group. The perpetrator would perceive the victim group as being different because they themselves feel distinct. As a starting point, the group is often treated differently or has a different social position. It is an entire group’s self-perception which lays the fundament for their identity and their position in a society, not only certain individuals’ view of their differentness. This feeling of being a distinct group would with certainty transmit beyond the group’s boundaries.

¹²² Nersessian, *supra* note 51, p. 312.

¹²³ Szpak, *supra* note 48, p. 164; Nersessian, *supra* note 51, p. 313.

¹²⁴ Lüders, *supra* note 70, pp. 54 and 60. Lüders declares the criteria of a ‘stable group’ as irreconcilable with the prohibition of analogy, since it would introduce an additional element to the *actus reus* of the crime of genocide (*ibid.*, p. 284).

¹²⁵ Verdirame, *supra* note 57, p. 594.

¹²⁶ Verhoeven, *supra* note 50, p. 21. Atheistic or agnostic views are considered challenging in the context of a ‘religious group’, see e.g., Tams, Berster, Schiffbauer, *supra* note 43, p. 113 or Werle, *supra* note 25, p. 198.

¹²⁷ Szpak points out that some authors have suggested including women, political groups and homosexuals into the list of protected groups, since they form a coherent collectivity that very often fall victim to attacks (Szpak, *supra* note 48, p. 161).

Szpak suggests a mixed approach, by combining a subjective and objective approach. She takes the perpetrator's perception as a starting point, but demands "some colourable evidence that the victim group has some recognized racial (...) existence outside the mind of the perpetrator".¹²⁸ This connection was necessary to ensure a logical relation of the perpetrator's concept of the victim group to one of the four protected categories. She sees the perception by the perpetrator as more relevant than the victim's self-perception, however, fails to give any convincing reasons for this conclusion.¹²⁹ Nersessian concurs with Szpak and elaborates that it was the *génocidaire* who defines the target group thereby bringing the primary focus to the perpetrator's subjective stigmatization of the group.¹³⁰ He suggests some tangible indicia of group membership, some logical connection between the perpetrator's definition and the group's pre-genocidal existence.¹³¹ This suggestion, whereby any indication of a pre-genocidal existence of the racial group is the fundament to build upon, could indeed be a sensible solution. It does not demand an objectivity which cannot be provided, especially in the case of a racial group. Instead it anchors its legitimacy in a group's existence in society prior to the perpetrated act. This existence in return does not have to be objectively founded, but can be perceived only. Furthermore, this solution concurs with the scientific finding that race is a social construct and as such has to be seen within the wider societal boundaries.

Racial discrimination under international law is broadly defined to include "race, colour, descent, national or ethnic origin", according to Art. 1(1) ICERD.¹³² Werle suggests interpreting the term 'racial group' in international criminal law in conformity with the definition found in the ICERD.¹³³ This opinion is questionable because a human rights' definition should be applied to international criminal law only with cautiousness, mainly due to the different settings of the legal regimes. While human rights aim at providing individuals rights against wrongful treatment by a state, international criminal law creates criminal accountability for individuals' wrongdoing. Thornberry has pointed out that the ICERD definitions might exclusively apply to the ICERD, but not other treaties.

The ICERD defines race through race and thereby fails to provide a clarifying definition. The notion of 'colour' apparently refers to the nowadays scientifically disproved and outdated race theories based on the physical appearance of people. With regard to 'ethnic groups', these might be included in the definition of 'racial groups', since international jurisdiction and legal scholarship, anthropology and encyclopaedic definitions seemingly juxtapose them.¹³⁴

Even though there is no universal definition for race, because it depends on the perception of a group by others or their own self-perception, 'racial' can nevertheless not be juxtaposed with the terms 'political', 'national', 'cultural', 'religious' or 'gender', grounds listed in the provision on the crime of persecution. This would ultimately lead to an unacceptable broadening of the provision and creation of a generic category of 'other reasons', thereby violating the principle of legality and foreseeability of criminal norms.

In conclusion, the concept of race is a social construct that lacks any objective, scientific foundation. Race depends on the perception and/or self-perception of a group as being different

¹²⁸ Szpak, *supra* note 48, p. 164.

¹²⁹ *Ibid.*

¹³⁰ Nersessian, *supra* note 51, p. 311.

¹³¹ *Ibid.*, p. 313.

¹³² Hall, *supra* note 23, p. 229.

¹³³ Werle, *supra* note 25, p. 264.

¹³⁴ Ntanda Nsereko, *supra* note 47, p. 131. Byron suggests taking the two concepts of racial and ethnic groups together to cover relevant cases, *see* Byron, *supra* note 27, p. 231.

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from another group, thus following a subjective approach. Whereas human rights law juxtaposes race with colour, ethnicity, nationality and descent, international criminal law should take a more restrictive approach, not least because of the principle of legality. For the same reason it is not recommended to create a generic category that contains any kind of distinction, be it on grounds of perceived differences of gender, physical abilities or other reasons. It is therefore suggested that race should be interpreted to include the perception and/or self-perception - the so-called double subjective approach, allowing for either self-perception, the perpetrator's perception or a combination of both - for reasons of perceived racial or ethnical differences.