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The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention

David L. Nersessian†

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Introduction

[M]en and women are not only themselves; they are also the region in which they are born, the city apartment or the farm in which they learned to walk, the games they played as children, the old wives' tales they overheard, the food they ate, the schools they attended, the sports they followed, the poets

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they read, and the God they believed in. It is all these things that have made them what they are . . . .

Beginning with the aftermath of World War II and the horrors of the Holocaust, the international community resolved, at least officially, to treat acts of genocide as criminal under international law, rather than excusing them as an unfortunate (but necessary) incident of state sovereignty. The primary international vehicle for criminalizing genocide is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention").

The Genocide Convention makes clear that certain enumerated acts against national, ethnic, racial, or religious groups are criminal under international law. Numerous states have ratified the Convention and domesticated the crime under their own national criminal laws. But despite widespread acceptance and support of the treaty, the Convention lay all but dormant for much of its existence. It was only in the early 1990's, when faced with almost unspeakable acts of barbarity in eastern Europe and in Africa, that the United Nations implemented direct international enforcement of the Convention by including the crime in the mandates of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR).

Future international enforcement will occur, at least in theory, in the International Criminal Court, whose underlying treaty achieved the necessary number of ratifications and entered into force on July 1, 2002.

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This article analyzes the contours of the groups protected by the Genocide Convention and the means by which genocidal intent is manifested against those groups. It advocates a broad understanding of the protections set forth in the Genocide Convention, but it does not add to the existing debate over whether the Convention should include additional human groups for protection beyond the national, religious, ethnic and racial categories set forth in the treaty's text. Nor does it join efforts to criticize the enumerated prohibited acts set forth in the Convention as being artificial and unduly restrictive. Rather, the emphasis here is on the periphery of the four groups already covered by the treaty and how genocidal intent is effectuated against them, not upon the groups or underlying acts that "should" be or might have been covered had the Convention's drafters made different choices back in 1948.

This article has two primary goals. After sketching the background of the crime of genocide and the Genocide Convention in Part II, it moves on in Part III to a critical analysis of the proper methodology for defining the contours of protected human groups. The analysis focuses principally upon academic writings and upon decisions in the international criminal tribunals that address the issue, including the most recent decision on the issue, the ICTR Appeal Chamber's July 2002 judgment in Prosecutor v. Bagilishema. It argues that efforts to achieve a purely objective or scientific definition of protected groups have proved to be largely artificial and even counterproductive in practice. The better approach to defining such groups is to adopt a more subjective inquiry into the contours of the group as understood (and acted upon) by the perpetrators of genocide.

The subjective approach advocated in Part III is necessary because the underlying concept of a human group, protected or otherwise, is necessarily abstract and is not susceptible of definition by reference solely to objective parameters. To the extent that objective indicia of group status exist, the composition of the group outlined by those criteria may bear no relation whatsoever to the group as targeted for genocide, further calling

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7. See ICC Statute, supra note 6, arts. 5–6. Also included are war crimes, crimes against humanity, and provisions to take future jurisdiction over the crime of aggression once the offense is defined. Id. at arts. 7 (crimes against humanity), 8 (war crimes), and 5(2) (aggression).

8. This ground has been well-covered already. See, e.g., Beth Van Schaak, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, 106 YALE L.J. 2259, 2260 (1997) and sources cited therein.


into question the wisdom of extensive reliance upon so-called "objective" measures of group identity.

This being said, a purely subjective approach does not provide a satisfactory answer, either. 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. Accordingly, this article advocates a hybrid approach to defining groups that accounts for the subjective views of the perpetrator but requires some measure of baseline objective evidence linking the perpetrator’s views to the group’s pre-genocidal existence.

Following the discussion of the contours of the protected group, Part IV analyzes how genocidal intent actually is manifested against that defined group in terms of the genocidist’s efforts to achieve the group’s destruction. The article makes the case for a broad conception of what it means to intend to destroy a group “as such” and rejects a strict numerical construction of the crime. It advocates the parallel recognition of a more flexible approach grounded principally in the intentions of the genocidist. This approach is better-suited to protecting human groups and aligns best with the actual structure of the Genocide Convention, which sets forth an inchoate crime that penalizes certain acts committed with a particular mental state, rather than any actual result flowing from those acts. Part V briefly summarizes and concludes.

I. Background

A. The Origins of the Term “Genocide”

Polish law professor Raphael Lemkin, a refugee who barely escaped the Nazi occupation of his homeland, coined the neologism “genocide” in 1944 by combining the Greek genos (race or tribe) with the Latin cide (killing). Lemkin conceived of genocide as:

[A] coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. . . . Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their

11. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944). Although the term ‘genocide’ is modern, the acts it contemplates are not. A commonly cited example of an early genocide dates back to the Roman sacking of Carthage in 146 B.C. See Frank Chalk & Kurt Jonassohn, The History and Sociology of Genocidal Killings, in GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 39, 42 (Israel W. Charny ed., 1988). Later, “[s]pecial wholesale massacres occurred in the wars waged by Genghis Khan and by Tamerlane.” LEMKIN, supra, 80, n.3. Early twentieth century examples include Germany’s 1904 massacre of tribal Heroes in South-West Africa and the slaughter of Turkish Armenians by the “Young Turks” of the crumbling Ottoman Empire in 1915. See BARBARA HARFP, GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES 3 (1984).
individual capacity, but as members of the national group.12

Lemkin thus characterized genocide as a multi-faceted attack on the existence of a human group and identified eight features of the crime, including political, social, cultural, economic, biological, physical, religious, and moral genocide.13 In his later writings, Lemkin acknowledged that the more widely-accepted species of the crime were its physical, biological, and cultural manifestations.14 Physical genocide is the tangible annihilation of the group by the killing and maiming of its members, whether committed over the short or the long term.15 Biological genocide is the imposition of measures calculated to decrease the overall reproductive capacity or fertility of the group.16 Cultural genocide is the destruction of a group’s unique cultural, linguistic, and religious characteristics.17

B. The Genocide Convention

Lemkin’s academic concept of genocide crystallized into a multilateral treaty on the subject in relatively short order. The Genocide Convention that exists today arose out of a process that included three General Assembly resolutions, three multinational drafting committees, three working drafts, and the participation of numerous states, voting blocs, and ideological constituencies.18 The final form of the treaty was approved unanimously in the General Assembly on December 9, 1948 and went into effect in January 1951.19

12. Lemkin, supra note 11, 79 (emphasis added).
13. Id. at 79-90.
15. Lemkin, supra note 11, 87-89.
16. Id. at 86-87.
17. Id. at 84-85, 89. A paradigm of cultural genocide was addressed during the trial of Nazi governor Artur Greiser before Poland’s post-war Supreme National Tribunal. See Prosecutor v. Greiser, reprinted in 13 L. Rep. Trials War Crim. 70, 80-84 (1949) (detailing educational, linguistic, religious, cultural, and scientific destruction in Poland).
The Genocide Convention makes clear that genocide, without question, is a criminal act. Article I provides that "[t]he Contracting Parties confirm that Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."\(^{20}\) It contemplates worldwide application of the prohibition in all possible circumstances, whether the crime is committed in time of war or peace or as part of a larger plan or policy targeting any particular protected group.\(^{21}\)

Article II defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical,\(^{22}\) 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.\(^{23}\)

The Genocide Convention protects people and criminalizes physical and biological genocide.\(^{24}\) Individuals are protected insofar as they are group members, but the real object of protection is the group itself. Although "[g]roups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals[,] . . . these individuals are important not per se but only as members of the group to which they belong."\(^{25}\)

There is no requirement under the Convention that a genocidist achieve his aims or that the group attacked actually suffer total or partial destruction. Rather, the crime is complete when certain enumerated acts are committed against group members with the requisite intent.\(^{26}\) Genocide thus is defined as an inchoate offence vis à vis the protected groups. Inchoate offenses criminalize certain acts committed with a particular mental state, whether or not those acts actually lead to the injury contem-

\(^{20}\) Genocide Convention, supra note 2, art. I.

\(^{21}\) Id.


\(^{23}\) Genocide Convention, supra note 2, art. 2.

\(^{24}\) The acts referenced in Articles II(a), (b), and (c) constitute physical genocide; those in Articles II(d) and (e) constitute biological genocide. See Draft Code, supra note 22, art. 17 cmt. 12.

\(^{25}\) ROBINSON, supra note 18, 58.

plated (i.e., attempts). This is in contrast to result-oriented offenses, which require the act in question actually to achieve a specified result (i.e., murder).

We now turn to Part III and the complexities of defining the contours of the various groups protected under the Convention.

II. Defining A Protected Group

A. The Protected Groups Listed in the Convention

The Genocide Convention sets forth four restrictive categories of protected groups. By definition, the crime of genocide can be perpetrated only against individuals properly classified as belonging to national, ethnic, racial, or religious groups. If the victim in question lacks membership in a protected group, genocide has not occurred with respect to that victim, even if the actor’s ultimate intention is to facilitate the destruction of a protected group. Thus, attacks on moderate Hutu during the Rwandan hostilities cannot constitute genocide under the Convention, even though many of those crimes were an essential part of the overall scheme to destroy Tutsis as a group. So, too, with respect to atrocities by the Khmer Rouge, where prohibited genocidal acts against protected ethnic, national and religious groups proceeded hand-in-hand with parallel attacks on economic, social, and political groups.

Group status is not always an easy question to answer. As the Rutaganda Trial Chamber held:

\[\text{The concepts of national, ethnical, racial and religious groups have been researched extensively and... at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context.}\]

Before embarking on a detailed analysis of the contours of protected groups under the Convention, the baseline characteristics of racial, ethnic, religious, and national groups are discussed in turn.

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27. See, e.g., Andrew J. Ashworth, Defining Criminal Offences Without Harm, in CRIMINAL LAW: ESSAYS IN HONOUR OF J.C. SMITH 7, 8 (Peter Smith ed., 1987).
28. Id.
29. See Genocide Convention, supra note 2, art. II.
30. See Akayesu (TC), supra note 4, ¶ 710.
31. Atrocities against moderate Hutu probably constitute crimes against humanity. See ICTR Statute, supra note 5, art. 3.
33. Prosecutor v. Rutaganda, Case No. ICTR-96-3, ¶ 56 (ICTR Trial Chamber Dec. 6, 1999), available at www.ictr.org; See also Prosecutor v. Krstic, Case No. IT-98-33 (ICTY Trial Chamber Aug. 2, 2001) ¶ 557, available at www.un.org/icty (“A group’s cultural, religious, ethnic, or national characteristics must be identified within the socio-historic context within it inhabits.”).
34. The various categories of protected groups under the Convention were addressed in the context of prior writing by the author on genocidal intent. See Nersessian, supra note 4, 260-62. Certain aspects of that baseline discussion are drawn upon here.
1. Racial Groups

Racial groups are defined primarily by the external physical appearance of their members. The Proxmire Act categorizes them as "a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent." The ICTR has defined them based upon "the hereditary physical traits often associated with a geographical region, irrespective of linguistic, cultural, national, or religious factors." Both of these conceptions accord with prior academic commentary. Drost, for example, notes that the word "racial . . . refer[s] mainly to external, physical features and appearance . . .".

2. Ethnic Groups

The ICTR has specified that an "ethnical group is generally defined as a group whose members share a common language or culture." This view accords with both the travaux preparatoires of the Genocide Convention and prior academic writing, which indicate that the term "ethnical" incorporates the social, linguistic, and cultural aspects of the group at issue. A Special Rapporteur of the International Law Commission articulated the distinction between ethnic and racial groups as follows:

The difference between the terms 'ethnic' and 'racial' is perhaps harder to grasp. It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony.

3. Religious Groups

The Akayesu Trial Chamber has opined that a "religious group is one whose members share the same religion, denomination or mode of worship." This appears to be a functional definition grounded in the objective practices of group members. In contrast, the Proxmire Act additionally accounts for the subjective belief system of group members and defines a religious group as one whose members have a "common religious creed, beliefs, doctrines, practices or rituals."

There is room for controversy over whether a nonreligious or an atheistic group qualifies for protection under the Convention. An atheistic group

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36. Akayesu (TC), supra note 4, ¶ 514.
37. Drost, supra note 26, 62.
38. Akayesu (TC), supra note 4, ¶ 513.
41. Akayesu (TC), supra note 4, ¶ 515.
presumably could be comprised of individuals from a variety of faiths who have rejected their religious heritage. In this light, atheists hardly are a homogeneous "group." Nevertheless, they appear to share common practices and a similar belief system. It seems that either conception of religious groups is sufficient to include groups of atheists, agnostics, and other nontheistic persons targeted for genocide, based either on their internal "beliefs" (i.e., that there is no God) or their functional "mode of worship" (i.e., choosing not to worship at all). This view accords with the general trend of international thought on the issue.

4. National Groups

The Convention's reference to "national" groups implies a definition grounded in nationality and citizenship. The Proxmire Act defines a national group as one "whose identity as such is distinctive in terms of nationality or national origins." The implication of this formulation is that any individual can belong to at least two national groups simultaneously: the nation of birth origin and the nation(s) of current citizenship.

The International Court of Justice dealt with the question of nationality in the Nottebohm Case, which involved a claim arising out of Frederic Nottebohm's arrest and permanent expulsion from Guatemala. The issue of nationality was central to the case because Liechtenstein could press its diplomatic claim for damages only if Nottebohm truly was its citizen.

Frederic Nottebohm was a German businessman who lived in Guatemala for over 30 years. When World War II broke out, Guatemala sided with the Allies. Nottebohm applied for, and was granted, citizenship in Liechtenstein under a special law that waived Liechtenstein's ordinary 3-year residency requirement. But upon his return to Guatemala in 1940 under a Liechtenstein passport, Nottebohm was interred as an enemy alien and was later deported, his property being expropriated by the government. After the war, Liechtenstein sought redress from Guatemala in the ICJ, alleging that Nottebohm was its citizen and claiming damages, inter alia, for the uncompensated taking of Nottebohm's extensive assets. Guatemala defended on the grounds that Nottebohm was not a genuine national of Liechtenstein under international law.

43. See id.; Akayesu (TC), supra note 4, ¶ 515. See also Mathew Lippman, Genocide: The Crime of the Century—the Jurisprudence of Death at the Dawn of the New Millennium, 23 Hous. J. Int'l L. 467, 475 (2001) ("The term 'religious' encompasses theistic, nontheistic, and atheistic groups that are united by a single spiritual ideal.").

44. See Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR, 73d plen. mtg., Supp. No. 51, at 171, art. 1(1), U.N. Doc. A/36/684 (1981) ("Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have a religion or whatever belief of his choice. . . ").

47. Id. at 17.
48. Id. at 7, 13-16.
49. Id. at 9.
The ICJ held that Liechtenstein’s domestic determination of Nottebohm’s status was not dispositive and that the issue of nationality under international law was a separate question. The ICJ described nationality as:

a legal bond having its basis [in] a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected to the population of the State conferring nationality than with that of any other State.51

The ICJ ultimately decided that Nottebohm was not Liechtenstein’s national under international law and dismissed the case against Guatemala.52 Unfortunately for Frederic Nottebohm, under German law he ceased to be a national of Germany when he applied for citizenship in Liechtenstein.53 And Guatemala hardly considered him its citizen: it jailed Nottebohm as an “enemy alien,” took his property, and deported him.

The Nottebohm decision can be criticized because it essentially left Frederic Nottebohm stateless. Some authorities hold, however, that the case can be restricted to its unique context, thereby limiting its stringent future application. Under this view, the Nottebohm Case dealt solely “with the admissibility of a claim for diplomatic protection and did not imply that a person could be generally treated as stateless.”54

Whatever the ultimate character of the ICJ’s judgment, it is clear that Nottebohm still bears some international effect: its dictum concerning “dominant and effective nationality” has been adopted and applied in other international cases dealing with the question of nationality.55 More recently, the ICTR imported the Nottebohm criteria and defined a national group as “a collection of people who are perceived to share a common legal bond based on common citizenship, coupled with reciprocity of rights and duties.”56 Group members’ personal conceptions of their own nationality (whether by affiliation or otherwise) thus are not dispositive of the question. The tribunal’s focus on the legal aspects of nationality (on “rights and duties” and “a common legal bond”) makes clear that a collection of individuals organized on the basis of political beliefs is insufficient to consti-
tute a national "group" under the Convention without some additional legal interest tying them together.\textsuperscript{57}

This being said, some commentators believe that the concept of nationality embodied in the Convention nevertheless is broader than the conception articulated in Akayesu. Lyal Sunga argues that

'National Group' in Article II appears to refer to a distinct people who forms a 'nation' or 'people' in the sense that the members of such a group share linguistic, ethnic, religious and cultural similarities (or some of these) which distinguish it from the general population, rather than to any legal criteria concerning citizenship or nationality.\textsuperscript{58}

5. Overlapping Groups

The enumerated categories of protected groups are not inherently distinct, leading to protection for some groups on multiple bases. Persons of Jewish descent, for example, are protected both as an ethnic and a religious group, and probably as a national group as well.\textsuperscript{59} Tribal groups fall under the Convention\textsuperscript{60} and may satisfy the criteria for any or all of the four categories.

As the ICTY recently stated:

National, ethnical, racial or religious groups are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous . . . . The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the second world war, as 'national minorities,' rather than to refer to several distinct prototypes of human groups.\textsuperscript{61}

Apart from distinguishing between the protected groups themselves, there is also potential for overlap between protected and unprotected groups. Political groups, for example, were deliberately excluded from the final version of the Convention.\textsuperscript{62} Nevertheless, there has been some thought that the concept of national groups includes political groups. Thus, Drost argues that "political groups which are at the same time national groups are protected under the Convention."\textsuperscript{63}


\textsuperscript{59} See Attorney General of Israel v. Eichmann, 36 I.L.R. 5, 53 (Isr. Dist. Ct. Jerusalem 1961), aff'd Attorney General of Israel v. Eichmann, 36 I.L.R. 277 (Isr. Sup. Ct. 1962) (referencing "the Jewish State, which would open the gates of the homeland wide to every Jew, and confer upon the Jewish People the status of a fully privileged member of the comity of nations.").

\textsuperscript{60} See Draft Code, supra note 22, art. 17 cmt. 9.

\textsuperscript{61} Krstic, supra note 33, ¶ 555-56.


\textsuperscript{63} Drost, supra note 26, 62.
Drost's point is technically accurate but should not be taken as extending the Genocide Convention to cover political groups. Political affiliations, as noted above, are insufficient to establish nationality in and of themselves. In truth, the tag-along political (or social or economic) character of a protected group is irrelevant. The only proper inquiry under the Convention is whether the group qualifies as a protected group, not whether it also has additional characteristics that fall outside the Convention.

6. Non-Enumerated Groups

A strict positivist reading of the Convention denies protection to all human collectives except national, ethnical, racial and religious groups. Nevertheless, the ICTR deviated from a strict textual analysis to answer the question of whether Rwandan Tutsi constituted a protected group under the Genocide Convention.

In Akayesu, the ICTR looked past the plain text of the Genocide Convention (and its own articulation of the characteristics of an ethnic group) and analyzed the Convention's drafting history. The Court held that it was "particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group." It then determined that "a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner." Applying this analysis, the tribunal found that Tutsi constituted a distinct and stable ethnic group even though they shared language, society, and culture with the Hutu that massacred them.

The Akayesu decision is not terribly precise in its articulation of criteria to evaluate the existence of additional "permanent and stable" groups.

65. Akayesu (TC), supra note 4, ¶ 516 (emphasis added).
66. Id. at ¶ 511.
67. Id. at ¶¶ 122, 124, 702, and n.56. For the contrary view, see Tara Sapru, Into the Heart of Darkness: The Case Against the Foray of the Security Council Into the Rwandan Crisis, 32 TEX. INT'L L.J. 329, 343-44 (1997) (arguing that Tutsi do not qualify as a distinct ethnic, national, religious or racial group).
68. This is an overarching issue with opinions from the ICTR and the ICTY. As hybrids of the inquisitorial civil and adversarial common law systems, the tribunals must both opine the law and make detailed factual findings while ensuring that the accused benefits from the presumption of innocence and that the prosecution establishes guilt beyond a reasonable doubt. This leads to written opinions of considerable length where the articulation of legal rules and factual findings is not always distinct. See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda pursuant to General Assembly Resolutions 53/212 and 53/213, Nov. 22, 1999, U.N. Doc. A/54/634, ¶ 61 (citing as examples the
The ruling clearly indicates that the determination should be made on a case-by-case basis in light of the social, political, and cultural characteristics from which the group derives. This being said, it is unclear whether the ICTR merely applied new criteria to interpret the scope of one of the four existing protected groups or moved beyond the text of the Convention to announce a new rule granting protection to additional "stable and permanent" groups beyond those listed in the Convention.

The opinion can be read both ways. On one hand, the ICTR's decision in Akayesu could be limited to the facts of the case before it and to the specific context of ethnic groups. Its holding could be confined factually to Article 2 of the ICTR Statute, to the specific facts of the situation in Rwanda in 1994, and to the particular ethnic group comprising Tutsis. In this light, the Tribunal simply engaged in a broader analysis (moving beyond the generally-accepted criteria of distinctiveness of language, society, and culture) to determine whether Tutsis were distinctly "ethnic" for purposes of the Convention.

Conversely, a broader conception of protected groups under the Genocide Convention itself can be derived from the case. Dictum from the Tribunal speaks to a wider doctrinal approach whose aim is to determine whether the "common criterion" of stability and permanence exists with respect to a particular (albeit non-enumerated) group. This approach derives from the "manifest intent" of the drafters of the Genocide Convention. In this light, the reach of the Convention itself (and not just the ICTR Statute) extends beyond its plain text to any stable and permanent group. One commentator argues that the ICTR formulation indeed stretches beyond Akayesu and allows the protection of any so-called "institutional" group under the Convention. On the whole, however, this expansive reading of Akayesu is properly subject to significant criticism. Despite understandable motives, the tribunal's legal basis for moving beyond the four enumerated categories set forth in Article 2 of the ICTR Statute is questionable.

First, the tribunal's decision represents a substantial departure from long-standing principles of treaty construction under international law. The stated rationale behind the holding was the so-called "manifest intent" of the Convention's drafters. But the travaux préparatoires of the Genocide Convention (or any treaty, for that matter) are by no means dispositive and must be considered in their proper context. Widely-accepted interna-
tional authority provides that the travaux should not even be used as an interpretive tool in the first instance, limiting their utility either to rectifying a manifestly absurd or conflicting treaty construction or confirming a plain-text interpretation.73 But even such supplemental use of the travaux was unwarranted in Akayesu. The clear text of the Convention sets forth four protected groups, and four protected groups only. The plain meaning of that articulation is that only those four groups are covered.74

Second, any reliance upon original drafting records, whether or not otherwise appropriate, itself is subject to a certain degree of criticism on the grounds of being overly-selective in referencing source material to support a particular point. The Genocide Convention was a work of compromise and negotiation between some fifty-seven states,75 with a variety of close votes on a number of key provisions.76 As the Drafting Committee Chairman pointed out, statements by various states as to the meaning of a particular provision were not meant to have any binding effect; they merely indicated that a majority of the drafting committee ascribed a certain interpretation to a particular text.77 And with respect to proposed amendments that were later adopted, the Sixth Committee expressly "did not necessarily adopt the interpretation given by [the proposal's] author."78

Last, the tribunal's perceived analytical distinction between stable and unstable, alienable and inalienable groups simply is intellectually unsatisfying. Nationality and religion are freely alienable, for example, and have been for some time.79 Indeed, the Universal Declaration of Human Rights, adopted by the UN General Assembly on the heels of the Genocide Convention, expressly acknowledges the right to alter nationality and religion.80 Ethnicity can be cast off by adopting the cultural and linguistic characteristics of another group. Racial characteristics, perhaps the most immutable of all, increasingly can be altered through surgical and techno-

73. Article 31 of the Vienna Convention on the Law of Treaties requires a treaty to be interpreted in good faith according to the ordinary meaning of its text in light of its object and purpose. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, art. 31(1). Supplementary recourse to the travaux is permitted in only two circumstances, either: (1) to confirm a plain-meaning analysis of the text under Article 31; or (2) to ascertain the meaning of the treaty if the Article 31 interpretation renders it ambiguous or leads to a manifestly absurd or unreasonable result. Id. at art. 32.

74. This is not meant to preclude the possibility of a wider conception of the crime under customary international law. Rather, as a matter of treaty interpretation, the Akayesu tribunal's analysis of the travaux was misapplied.


78. Id., 77th mtg. at 136-37 (1948) (Mr. Maktos, U.S.).

79. This was recognized even during the drafting of the Convention. Id., 69th mtg. at 60 (1948) (Mr. Shawcross, U.K.).

logical advances.\textsuperscript{81} With this in mind, the assumption that some group characteristics are manifestly alienable and that others are not becomes more and more questionable.

The further implications of the Akayesu decision are far-ranging and lie beyond the scope of this work. The remaining analysis in this article considers the decision only in its more restrictive setting (i.e., as setting forth additional criteria to ascertain the scope of a particular ethnic group).

B. How is Group Membership Determined?

It is the province of a court trying a genocide case to determine whether particular victims qualify for membership in protected racial, national, ethnic and religious groups under the Convention.\textsuperscript{82} But what criteria should the Court apply to make this decision?

One possibility includes an objective determination of group status. In the objective inquiry, neither the victim's nor the perpetrator's views are dispositive, though they are taken into account as evidence. The objective determination is also informed by, for example, expert testimony from anthropologists, historians, and religious scholars, evidence from knowledgeable "outsiders" (i.e., former colonial rulers), testimony from legal scholars on the citizenship law of a particular nationality, and other similar sources.

The other chief alternative is to seek a subjective inquiry into the criteria used by the perpetrator to define the group targeted for genocide (meaning that the perpetrator's view, once established, is dispositive as to whether that victim was a member of a given protected group).\textsuperscript{83}

Both the subjective and objective theories have been drawn on, in varying forms, by the ICTR and the ICTY in recent genocide cases. The case law reflects some theoretical confusion in the tribunals that has yet to be resolved once and for all at the appellate level, although the July 2002 ICTR Appeals Chamber decision in \textit{Prosecutor v. Bagilishema}\textsuperscript{84} certainly reflects some progression of the legal thought in this area.

\textsuperscript{81} See, e.g., \textit{JOHN H. GRIFFIN, BLACK LIKE ME} (1962) (narrative by a white reporter who altered his skin color with pigment medication in order to experience first-hand the racial segregation laws governing southern blacks in the United States during the late 1950s).

\textsuperscript{82} This is not to suggest that states do not (or should not) make this determination themselves for other (i.e., political) purposes. The United States Department of State, for example, readily concluded in early 1994 that Tutsi constituted an ethnic group and that genocide probably was being committed in Rwanda against them. See Sean Murphy, \textit{Department of State Legal Analysis of 1994 Genocide in Rwanda}, 96 \textit{Am. J. Int'l. L.} 258, 259-60 (2002).

\textsuperscript{83} In the Musema case, the ICTR also ruled that the existence of a protected group can also be the subject of a defense admission, obviating the need for proof on the issue under either test. \textit{See Prosecutor v. Musema}, Case No. ICTR-96-13, ¶ 935 (ICTR Trial Chamber Jan. 27, 2000), aff'd \textit{Prosecutor v. Musema}, Case No. ICTR-96-13 (ICTR Appeals Chamber Nov. 16, 2001), available at www.ictr.org.

\textsuperscript{84} \textit{See Bagilishema}, supra note 10, ¶¶ 60-65.
1. The Objective Approach

The Commission of Experts that investigated the Rwandan crisis and recommended establishing the ICTR believed that it was "not necessary to presume or posit the existence of a race or ethnicity itself as a scientifically objective fact." Nevertheless, the ICTR decision in Akayesu was largely grounded in a search for tangible indicia of group membership and an objective judicial determination of group status. Evidence credited by the tribunal included testimony about national identity cards (a holdover from former Belgian colonizers) that identified their holders as Hutu or Tutsi. The Court found that Tutsi witnesses testified credibly as to their separate ethnic identity and determined that the former Belgian colonizers in Rwanda likewise distinguished between Hutu and Tutsi. Based on "the facts brought to its attention during the trial," the ICTR ruled that "Tutsi did indeed constitute a stable and permanent group and were identified as such by all."

At least one other court applied an objectified approach to defining protected groups under the Genocide Convention. In Kayishema, the ICTR credited the Akayesu decision on Tutsi ethnicity but took independent evidence and made its own finding on the point. In addition to similar evidence of identity cards and subjective testimony on group composition, the Kayishema court also credited expert testimony on the status of Tutsi as an ethnic group.

Some commentators have labeled Kayishema a purely subjective decision and it is true that the tribunal at least acknowledged that a subjective approach might also be possible, in terms either of the ethnic group's self-identification or the composition imposed upon the group by the perpetrators. Nevertheless, it is clear that in application the tribunal focused its efforts on determining the group status of Tutsi as a stand-alone concept, rather than linking the legal standard exclusively either to the minds of the Tutsi victims or to Kayishema himself as a perpetrator of genocide.
2. The Subjective Approach

In *Jelisic*, the ICTY rejected the objective approach to determining group status and held that although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or religious group today using objective and scientifically irrefutable criteria would be a perilous exercise whose result 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, ethnical or religious group from the view of those persons who wish to single that group out from the rest of the community.

The subjective approach was adopted by the ICTR in the *Rutaganda* and *Musema* cases. But in each of these three decisions, the subjective inquiry of the Court was tempered by a perceived limitation in the Convention restricting it to "stable" and "permanent" human groups to which individuals belonged regardless of their own desires. Thus, the subjective stigmatization of an otherwise excluded (i.e., political or social) target group still does not qualify the excluded group for protection under the Convention.

The court conducts the subjective inquiry "on a case-by-case basis, taking into account both the relevant evidence proffered and the political and cultural context . . . ." The subjective analysis applies to any of the four protected groups under the Convention.

The subjective theory recognizes that perpetrators of genocide can stigmatize (and thus define) the victim group in one of two ways: positively or negatively. Positive stigmatization is distinguishing the target group based on the perpetrator's assessment of the group's characteristics (i.e., dark skin, attending Synagogue, social and cultural traits, etc.). Negative stigmatization essentially is a "not me" formulation: the perpetrator defines the characteristics of his own national, ethnical, racial, or religious group and rejects others that lack those characteristics. The rejected individuals form a distinct (and protected) group by virtue of their exclusion.

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96. The judgment accounted for both the Akayesu and Kayishema opinions. See *Jelisic*, supra note 3, ¶ 61.
97. *Id.* at ¶ 70 (emphasis added). It is unclear why the *Jelisic* tribunal claimed that a religious group could be defined objectively, whereas national, racial and ethnic groups could not. As noted above, religious characteristics seem no less and no more immutable than those of nationality, ethnicity or race.
100. See *Jelisic*, supra note 3, ¶ 69; *Rutaganda*, supra note 33, ¶ 56, *Musema*, supra note 83, ¶ 162.
102. See *Jelisic*, supra note 3, ¶¶ 69-72.
103. *Id.* at ¶ 71.
104. *Id.*
105. *Id.*
Negative stigmatization has implications far beyond its application in the tribunals. In the view of one author, negative stigmatization could be used to "[make] the case that genocide could be committed by perpetrators of the same ethnicity who justified their murders by an ideology which reclassified and labeled the victims, discriminating their collaborators and those to be saved as a new kind of people."106

Taken to its logical extreme, negative stigmatization could be used to authorize the application of the Genocide Convention to situations like the so-called "auto-genocide" in Cambodia, where the Khmer Rouge destroyed a significant part of the Khmer people.107 The Convention does not require perpetrators to belong to a different group than the victims,108 though a case of genocide where the victim and perpetrator belonged to the same group undoubtedly would be rare.

Though possible in theory, the actual stigmatization in cases of auto-genocide is in all probability grounded in something besides nationality, ethnicity, religion or race. If Khmers are killing Khmers, the targeting is probably (with the possible exceptions of mass murder/suicide, as perhaps with large scale cult activity, or a group member's collaboration with genocidists to ensure individual self-preservation) grounded in criteria other than protected group status (i.e., in political beliefs, social groups, economic status, etc.). Negatively stigmatized or not, groups so-targeted based upon such other criteria do not qualify for protection under the Convention.

3. Evaluating the Subjective & Objective Approaches

Both the subjective and objective inquiries contemplate a case-by-case determination based upon the group victimized.109 The primary distinction between them is the degree of reliance placed upon the perpetrator's definition of the protected group. The perpetrator's definition of the group is dispositive as to the contours of the group under the subjective approach, whereas it is only one of several factors in the objective formulation.

Viewed in isolation, neither approach is entirely satisfactory. First, as the Jelisic court noted, the "perilous exercise" of defining groups "using objective and scientifically irreproachable criteria" does not necessarily lead to sensible results corresponding "to the perceptions of the persons concerned by such categorization."110 Unless the genocidists specifically consulted anthropologists or historians to develop criteria, the "scientific" determination of what constitutes a particular group may bear no resemblance whatsoever to the group actually targeted. Scientific and historic

107. Id.
109. Id.; Akayesu (TC), supra note 4, ¶ 122, 702, n.56.
110. Jelisic (TC), supra note 3, ¶ 70.
evidence itself is to some extent subjective, being subject to competing expert testimony and clashes of scholarly opinion. The opinions and beliefs of former colonizers and knowledgeable "outsiders" likewise are susceptible to the identical criticisms of being both irrelevant (except to the extent that the beliefs were adopted by the genocidists) and subject to clashes of opinion.

Testimony by group members on their personal understanding of group membership is problematic because, in cases of genocide, it really is how the perpetrator defines the group that counts. In Nazi Germany, for instance, what mattered was how the Nazi government categorized someone as a Jew, not whether the victim attended Synagogue, participated in the Jewish community, spoke Hebrew, etc.\textsuperscript{111} Serbs, Muslims, and Rwandans determine the religion and ethnicity of a child solely based upon the religion and ethnicity of the father.\textsuperscript{112} Jews do not.\textsuperscript{113} Thus, whether an individual sees himself as a member of a particular group is largely irrelevant to whether or not he ultimately is targeted for genocide as part of a perpetrator's efforts to destroy the group.

Evidence of the subjective views of the victims also suffers from the practical drawback of being susceptible to loss during the genocide itself. If the genocide is particularly successful, there may be few or no survivors left to testify about the group identity. Any remaining survivors justifiably may fear further retaliation if they testify, whatever protective measures are offered to keep their identities secret.\textsuperscript{114} If cultural genocide accompanies physical and biological genocide (and it often does),\textsuperscript{115} the documentary and historical records of the group's self-definition likewise may be destroyed.

Since it really is the genocidist who defines the target group, the better method is to bring the primary focus to the perpetrator's subjective stigmatization of the group. Genocide is a crime that we punish, not based upon the underlying acts themselves (murder, assault, etc.), but based upon the \textit{special intent} with which those acts were accomplished. The genocidist's mental state toward the group is the critical element: it distinguishes geno-

\textsuperscript{111} The application of the Nuremberg Laws led to a complex formula to determine whether a person was a "full Jew." Ultimately, the question turned on whether one had three or more Jewish grandparents. Lesser categories of Jews included Mischlinge of the first (two Jewish grandparents) and second (one Jewish grandparent) degrees. See Reich Citizenship Law: First Regulation, arts. 2, 5 (Germany 14 Nov. 1935), available at www.us-israel.org/jsource.Holocaust.html (visited May 2, 2000). See also Lemkin, supra note 11, 75-78.


\textsuperscript{113} See Fisher, supra note 112, 114.

\textsuperscript{114} Both tribunals, for example, offer varying degrees of protection to victims and witnesses. See ICTR Statute, supra note 5, art. 21; ICTY Statute, supra note 5, art. 22.

cide from murder. It criminalizes acts against protected groups *qua* groups.

It is not too far afield to suggest that the contours of protected groups should be determined, at least in part, by the subjective beliefs of those who seek to destroy them. The fundamental nature of the crime derives from the perpetrator's desire to destroy the group, which necessarily is an abstracted concept that can refer only to collectives of individuals, none of whom are protected *as individuals* under the Genocide Convention. Without a subjective definition, the aims of the Convention are thwarted because the conduct and intentions of the perpetrator, which we seek to punish, may bear no relation to an "objective" measure of the group attacked.

The perpetrator's views on group status may be inferred from the circumstances in which the genocide took place and from any pattern of conduct directed against the target group. This is not to suggest, however, that the perpetrator's definition of the group should be viewed in a vacuum or taken as being entirely dispositive of the question. Taken to its logical extreme, the subjective test risks severing a fundamental link between the perpetrator's definition of the group and the contours of the group as it existed in society before the genocide.

A simple example makes the point. Consider, for example, a genocidist who confesses to committing prohibited acts with the intent to destroy all Tutsi in Rwanda in 1994. This particular genocidist defines the ethnic group of Tutsi as anyone holding a national identity card identifying them as Tutsi, along with their "associates" and "supporters." This definition of 'Tutsi' is broad enough to include so-called moderate Hutu, who were massacred in parallel attacks during the 1994 genocide. But can this perpetrator's individual conception of the group of Tutsi stand in this circumstance, such that we can properly characterize his attack on moderate Hutu as an act of genocide?

The answer is no. There is a patent conflict in this hypothetical between the perpetrator's subjective definition of the group and even the most remote understanding of Tutsi ethnicity as it existed in pre-1994 Rwanda. The fundamental disconnect created by the absence of any kind of tangible indicia of group membership supporting the perpetrator's understanding is fatal to adopting a purely subjective approach. This is particularly true in the context of one of the world's most serious crimes.

At a minimum, then, there must be some colorable evidence that the victim group has some recognized racial, national, ethnic or religious existence outside of the mind of the perpetrator. This is necessary to ensure that the perpetrator's conception of the victim group bears some logical relation to one or more of the four categories set forth in the Genocide Convention. Absent this requirement, a virtually unlimited number of protected groups would exist, depending solely upon the creativity of the perpetrator in defining criteria for membership in a particular protected group.

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116. See Akayesu (TC), supra note 4, ¶ 523.
group. A purely subjective test thus conflicts with the object and purpose of the Convention itself, where a number of compromises and hard choices were made during the drafting process in an effort to achieve consensus upon a restricted number of enumerated groups for protection.

Colorable evidence could include any of the so-called "objective" features of group membership drawn upon by the Akayesu and Kayishema tribunals. The difference is in how that evidence is used. Under the objective approach, it was to determine the parameters of the group itself. Under the analysis advocated here, the evidence serves merely as a backstop to ensure some logical connection between the perpetrator's definition of the group and the group's pre-genocidal existence.

Once this minimum baseline is demonstrated, however, the remainder of the inquiry should focus solely upon the group as defined by the perpetrator. After all:

It would not be logically necessary to postulate the existence of objective and clear-cut distinctions among groups of people to prove that a particular group was stigmatized and targeted. In this sense, the perception of differences is more important than the differences themselves. The Genocide Convention can be implemented effectively only if courts recognize that the prosecution should not be expected to prove the unprovable. What matters is the targeting of the group in question, the intention to destroy the group in whole or in part and actual measures to carry this intention out.

Any drawbacks associated with a primarily subjective approach to determining group status (tempered by a baseline of objective indicia) are outweighed by the practical impossibility of defining groups in any other way. The Akayesu tribunal, for example, resorted to dramatic lengths of semantic sleight of hand to justify departing from the Convention's plain wording of "national, ethnical, racial or religious" groups. As shown above, such efforts to define a protected group objectively have proved largely artificial, suffer from serious analytical flaws and practical drawbacks, and in any event may bear no relation at all to the group as ultimately targeted.

The international criminal tribunals are on the right track with the recent ICTR decision in Bagilishema and the ICTY's 2001 conviction of General Rasilav Krstic. Both courts adopted a mixed approach to ascertaining the existence of a protected group under the Convention. As the Bagilishema court put it:

The Chamber notes that the concepts of national, ethnical, racial, and religious groups enjoy no generally or internationally accepted definition. Each of these concepts must be assessed in the light of a particular political, social, historical, and cultural context. Although membership of the targeted

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117. See Akayesu (TC), supra note 4, ¶ 702; Kayishema, supra note 68, ¶¶ 523-26.
118. Id.
119. SUNGA, supra note 58, 112.
120. See discussion supra, nn. 64-81, and accompanying text.
121. See Bagilishema, supra note 10.
122. See Krstic, supra note 33.
group must be an objective feature of the society in question, there is also a subjective dimension. A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.\(^1\)

Once the contours of the protected group are defined, the next area of inquiry is how, for purposes of genocide, a perpetrator's genocidal intent is manifested against that group “as such.” These issues are discussed in Part IV.

III. Genocidal Intent: What it Means to Intend to Destroy a Protected Group “As such”

A. The Mens Rea of Genocide

The special intent that characterizes genocide is often seen as the primary distinguishing characteristic of the crime.\(^2\) The Convention requires the mens rea to extend to all or part of a protected group, as opposed to being directed at an individual or an institution of some kind. Since “intent is a mental factor which is difficult, even impossible to determine . . . in the absence of a confession from the accused his intent can be inferred . . . .”\(^3\)

Absent a confession or tangible documentation of genocidal plans or acts, this inference is drawn on a case-by-case basis from evidence presented at trial.\(^4\) Essentially, the court seeks to infer what the genocidist must have intended by taking evidence of what he actually did. The inquiry is all-encompassing but can consist of an examination of the number of victims,\(^5\) the methodology and pattern of the genocidal conduct, and the prior statements and acts of the defendant.\(^6\) The “general political doctrine that gave rise to the acts” is relevant, as is the “repetition of destructive and discriminatory acts.”\(^7\) Considerations relating to a pattern of conduct include the scale and general nature of the atrocities committed,\(^8\) the discriminatory targeting of the members or property of

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\(^1\) See Bagilishema, supra note 10, ¶ 65. See also Krstic, supra note 33, ¶ 557 (“[T]he Chamber identifies the relevant group by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethничal, racial or religious characteristics.”).

\(^2\) See Akayesu (TC), supra note 4, ¶ 498.

\(^3\) Id. at ¶ 523.

\(^4\) See Musema, supra note 83, ¶ 167; Rutaganda, supra note 33, ¶ 62.


\(^6\) See Jelisic (TC), supra note 3, ¶ 73; Kayishema, supra note 68, ¶¶ 531-39.

\(^7\) Karadzic and Mladic, supra note 115, ¶ 294.

\(^8\) See Kayishema, supra note 68, ¶ 94.
one group to the exclusion of other groups,131 methodical or systematic planning or killing,132 and the weapons employed and the extent of bodily injury.133

Acts of cultural genocide, though not covered by the Convention, also can demonstrate a specific intent to destroy a protected group.134 The ICTY described such conduct as acts that either violate or are perceived by the perpetrator to violate the “very foundation of the group.”135 The Trial Chamber cited Serbian destruction of Muslim libraries and religious institutions as evidence of genocidal intent toward Muslims.136

The underlying motivations for the crime of genocide are irrelevant.137 If the requisite intent exists, it matters not whether that intent was fueled by animus toward the protected group, by hopes of financial gain, by a personal grudge against individual group members, by ideological or resistance, or indeed by any reason at all.138 Motive can, however, serve as evidence toward proving the existence of genocidal intent.139

B. Discriminatory Targeting of Group Members

Genocidal acts manifest against members of the protected group, not in their individual capacities, but based upon their membership in the group.140 The individual is targeted as a means to an end: as a step further along the path of achieving the “ultimate criminal objective” of destroying the group.141 “Chosen as such . . . the victim of the crime of genocide is the group itself and not only the individual.”142 The act extends beyond the individual for “the realization of an ulterior motive, which is to destroy . . . the group of which the individual is just one element.”143

The Convention says nothing explicit about the discriminatory selection or targeting of group members. It requires simply that prohibited acts take place against members of the protected group with the requisite level of intent.144 The Draft Code, on the other hand, specifies that a “prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall

131. Id.
132. Id.
133. Id.
134. See, e.g., Krstic, supra note 33, ¶ 480; Karadzic and Mladic, supra note 115, ¶ 94-95.
135. Karadzic and Mladic, supra note 115, ¶ 94.
136. Id. at ¶ 95.
137. Note, however, that it is not always clear whether specific evidence relates to motive or intent at trial. See, e.g., Frederick M. Lawrence, The Case for a Federal Bias Crime Law, 16 NAT’L BLACK L.J. 144, 156-57 (1999) (noting that motive and intent are not always analytically distinct).
138. See, e.g., Jelisic (AC), supra note 3, ¶ 49; Drost, supra note 26, 83-84.
139. See Kayishema, supra note 68, ¶ 97; Karadzic and Mladic, supra note 115, ¶ 94-95.
140. Jelisic (TC), supra note 3, ¶ 66; Kayishema, supra note 68, ¶ 97.
141. Draft Code, supra note 22, art. 17 cmt. 6.
142. Akayesu (TC), supra note 4, ¶ 521.
143. Id. at ¶ 522.
144. See Genocide Convention, supra note 2, art. II.
objective of destroying the protected group."\textsuperscript{145} Both the ICTR and the ICTY adopted the Draft Code formulation and presume that some evidence of discriminatory targeting of group members is necessary to establish the genocidal intent against the group.\textsuperscript{146}

The tribunals appear to use targeting as a proxy for establishing genocidal intent, to help the court parce out whether an attack on a particular group member is really directed at the larger group, rather than at that member as an individual. The targeting requirement ensures that victims are selected because of their group membership, rather than for personal (i.e., revenge), financial (i.e., murder for hire), or other reasons independent of the intent to destroy the group as such.

Certain presumptions about the actor's intent do come into play, however, in the context of the victimization. The \textit{Jelisic} Trial Chamber held that "an individual knowingly acting against the backdrop of widespread and systematic violence being committed against only one specific group could not reasonably deny that he chose his victims discriminatorily."\textsuperscript{147}

There is no requirement that the genocidist contemplate destruction of national, ethnic, racial, or religious groups as protected groups or that he bear in mind any particular understanding of the nature of the group targeted. If a prohibited act is committed against a group member with the intent \textit{vis à vis} the group, and the group qualifies as protected under the Convention, that act constitutes genocide. A perpetrator who attacks Jews, for example, need not conceive of the group of Jewish People as constituting a racial group, a religious group, an ethnical group, etc. It is enough that he acted against individual Jews with the criminal intent to destroy the larger group.

The precise contours of the targeting requirement, and the precise degree of specificity with which a particular victim must be selected, remain unclear. Nothing in the Draft Code or in the tribunal decisions provides, however, that the targeting of specific or identified individuals is required. Nor should it be. Genocide is defined in the inchoate mode and penalizes certain acts committed with a particular mental state, not the ultimate result of those acts. Genocidal intent does not (and should not) depend upon the fortuity of the perpetrator having good information for targeting purposes. So long as an attack was intended to destroy a protected group and a prohibited act was committed against group members, it suffices as genocide under the Convention. There is no requirement that the perpetrator have specific knowledge of the identity and characteristics of these victims.

Consider the hypothetical example of a mass murder of a busload of moderate Hutu and ethnic Tutsis at a roadblock in Rwanda in early 1994. Out of 80 victims, half were Tutsi and half Hutu. If the entire busload was slaughtered \textit{en masse}, there can be little question that a prohibited act (kill-

\textsuperscript{145} Draft Code, \textit{supra} note 22, art. 17 cmt. 6 (emphasis added).
\textsuperscript{146} \textit{Akayesu (TC)}, \textit{supra} note 4, ¶ 521; \textit{Jelisic (TC)}, \textit{supra} note 3, ¶ 67; Draft Code, \textit{supra} note 22, art. 17 cmt. 6.
\textsuperscript{147} \textit{Jelisic (TC)}, \textit{supra} note 3, ¶ 73.
ing) took place against members of a protected group (ethnic Tutsi) with genocidal intent (inferred from evidence at trial and the wider context of killings and persecution that left 800,000 Tutsi dead). There can be little doubt that the killing of the Tutsi bus riders was an act of genocide. There is no need to establish that the perpetrator of the killings had specific knowledge that each of the 40 individual Tutsis was, in fact, a Tutsi at the moment that he killed them. A prohibited act occurred against group members with the requisite intent, and that is sufficient under the Convention.148

C. Destroying Group “As Such”

The intent to destroy a group “as such” means the intent to destroy the group “as a separate and distinct entity.”149 As one commentator put it: “[a]n act of genocide constitutes not just an attack on an individual, but also a threat to the group with which the individual is identified. It is an offense against a core aspect of humanity—the very nature of collective human identities.”150

The emerging case law from the tribunals recognizes two ways in which a group can be destroyed. The first method is the destruction of the group in terms of sheer group size and homogeneous numerical composition (the “quantitative approach”).151 The second contemplates the destruction of a key segment of the group, such as its leadership or other segments of the group deemed essential to its existence (the “qualitative approach”).152 During the Balkan crisis, for example, “a substratum of the Bosnian Muslim population consisting of public officials, the well educated, and other leaders were targeted for annihilation.”153

1. The Quantitative Approach

The quantitative approach presumes that the victimization of either a substantial part of the group or a substantial number of its members leads to the destruction of the group “as such.” Group members are treated as fungible for purposes of the quantitative approach: the focus is on sheer numbers or percentages.

148. This consideration is probably what the UN Commission of Experts had in mind when it opined that it would be an unreasonably high burden for the prosecution to have to prove the intent to destroy a protected group with respect to each individual killing in order to distinguish genocide from murder. See S.C. 1994 Expert Report, supra note 85, ¶ 167.
149. Draft Code, supra note 22, art. 17 cmt. 7. The United States legislation uses the phrase “viable entity” to convey the same concept. See Proxmire Act, 18 U.S.C. §1093(8).
150. See Abrams, supra note 32, 304.
151. See Jelisic (TC), supra note 3, ¶ 81.
152. Id.
154. See Draft Code, supra note 22, art. 17 cmt. 8.
155. Robinson, supra note 18, 63.
It is not necessary for a genocidist to intend to destroy a protected group in its entirety. The Convention provides that it is sufficient to intend to destroy a protected group "in part." But when something less than absolute destruction is contemplated, uncertainty arises in terms of the meaning of the phrase "in part." Does it refer to any part of the group (including individual members), to a majority of the group, to a certain percentage of the group in a given geographical area, etc.?

A variety of sources opine that the phrase "in part" in Article II really means "in substantial part." The reading-in of the word "substantial" appears to arise out of the search for a practical way to distinguish genocide (viewed generally as a large-scale crime against a protected group) from ordinary "hate" or "bias" crimes (viewed generally as an attack on an individual because of his membership in the group, or aggravated thereby). The apparent effort is to parcell out matters of domestic versus international concern and to prevent dilution of the crime by reserving the label "genocide" for large-scale activities against human collectives. The ICC Statute attempts to achieve this aim by imposing a contextual requirement, which mandates that the genocidal attack either take place as part of an objective pattern of similar conduct against the group or be sufficient to effect such group destruction in and of itself.

The United States' domestic genocide legislation specifically requires the intent to destroy a substantial part of a group. It defines "substantial part" as "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which the group is a part." Other sources adopt a "substantial part" test without the concomitant definition restricting genocide to acts rendering a group all but numerically extinct, leaving the phrase open to broader understanding. It is clear, however, that the modern trend in the quantitative analysis is toward a requirement that the perpetrator intend to destroy "a quantitatively substantial part of the protected group."
In contrast to the "substantial part" test, some authorities hold that the Convention requires the intent to destroy a substantial number of members of the protected target group:

Therefore, the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if those persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial; the Convention is intended to deal with action against large numbers, not individuals even if they happen to possess the same group characteristics.163

The ICTR interpreted the "in part" language as mandating "the intention to destroy a considerable number of individuals who are part of that group."164 In the ICTY, the court looks for "evidence of an intention to destroy a reasonably substantial number relative to the total population of the group."165

During the drafting process, one participating state offered a third interpretation and opined that the "in part" language still required the intent to destroy an entire group but allowed that intent to be implemented in stages.166 This view contributed to much of the controversy over the ratification of the Convention in the United States.167 But despite its political impact on the American Congress, the viability of the position is doubtful: it contradicts the plain text of the Convention and has been disregarded as a legitimate interpretation.168

The two primary formulations of the quantitative approach might be called the "percentage test" and the "numeric test." The concepts are similar but not coextensive. The percentage test compares the number of victims to the size of the overall group. In the numeric test, the inquiry is whether the number of victims, in and of itself, is sufficiently large.

The numeric test is better-suited to protecting large numbers of people from genocide, while the percentage test works better for smaller populations. Thus, the intent to kill 10,000 Chinese in China probably qualifies as the intent to destroy a substantial number of victims under the numeric test even if the figure is statistically insignificant compared to a national population exceeding one billion. On the other hand, the intent to kill three members of a tiny aboriginal tribe of a dozen people (25%) probably is sufficient under the percentage test, whereas the number hardly seems to constitutes a "multitude" or "considerable number" of victims. In Jelisic, the ICTY Trial Chamber apparently equated the tests in determining whether the accused intended to destroy a "substantial part" of the target

163. ROBINSON, supra note 18, 63.
164. See Kayishema, supra note 68, ¶ 97.
168. See, e.g., ROBINSON, supra note 18, 63.
In practice, the two tests often will amount to a distinction without a difference. Under the numeric inquiry, the court still must determine whether the extent of victimization was "substantial."\textsuperscript{170} It is unlikely that a court can make this determination abstractly: there must be at least some reference to the overall group population.

Whether or not the tests are distinct, the result in many cases of genocide will be identical: the number of victims will constitute both a significant number of victims and a significant percentage of the targeted group. This certainly was the case in Rwanda, where between 800,000 and 1 million people in a population of approximately 7 million were killed in 1994 alone.\textsuperscript{171}

One UN \textit{Special Rapporteur} opined that both proportionate scale and the total number victimized should be considered,\textsuperscript{172} and there appears to be some judicial receptivity to using both tests. In \textit{Kayishema}, the court held that "both proportionate scale and total number are relevant."\textsuperscript{173} The \textit{Kayishema} court held, however, that destroying a group "in part" required an intent to "destroy a considerable number of individuals,"\textsuperscript{174} implying greater reliance on the numerical test. Likewise, the United States Department of State apparently considered both criteria in formulating its mid-1994 conclusion about the existence of genocide in Rwanda: "The number of Tutsis subjected to killings and other listed acts involved in Rwanda can easily be considered substantial. International humanitarian agencies estimate that from eight to forty percent of the Tutsi population may have perished."\textsuperscript{175}

Both formulations are linked to geographical considerations. Once the protected group is defined, each test looks to the composition and size of that group within a particular geographical area.\textsuperscript{176} This reliance on geography is somewhat problematic because the result can change depending on the scope of the area considered. Since the geographic line can be drawn in different places, the identical set of facts can lead some authorities to conclude that genocidal intent existed while others find that it did not. For example, a dozen Muslims may constitute neither a "substantial part" nor a "substantial number" of Muslims in the world, in a particular nation, in a region, or even in many cities. It may well be a "substantial part" or "substantial number" of Muslims living in a small village, on a street, or within a particular building. Whether genocidal intent exists thus is to some extent a function of how broadly the group in question is regarded.

\textsuperscript{169} \textit{Jelisic (TC)}, supra note 3, n.111.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Kayishema}, supra note 68, ¶ 291.
\textsuperscript{172} \textit{Whitaker}, supra note 108, ¶ 29.
\textsuperscript{173} \textit{Id.} at ¶ 96.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{See Murphy}, supra note 82, 260.
\textsuperscript{176} \textit{See} Proxmire Act, 18 U.S.C. §1091(a); \textit{ROBINSON}, supra note 18, 63.
Some commentators advocate a wide focus on genocidal intent and argue that the actor's intent must be to destroy the group in its entirety within the nation. "The history of the negotiations is quite clear. The overt acts constituting genocide become genocide only when committed as part of a plan to destroy a group in its entirety within the state. Obviously, the commission of genocide affects a substantial number of persons . . . ."\(^{177}\)

The United States likewise draws the line on the basis of nationality, but tempers it somewhat by contemplating less than absolute destruction, focusing on the group's ongoing viability within a State.\(^ {178}\)

Conversely, recent case law from the international criminal tribunals reflects a more tailored approach. In Jelisic, the Court held that genocide could be "perpetrated in a limited geographic zone."\(^ {179}\) The opinion noted that a limited geographical zone could be as small as a municipality,\(^ {180}\) as does more recent case law from the ICTY.\(^ {181}\)

The mere fact that genocidal acts are concentrated in a limited geographical zone, however, is not dispositive to the question of whether genocide has taken place. What matters is the relation of that cluster of attacks to the wider geographical definition of the group. Even the intent to eliminate 100% of the group's population in a particular area may not be sufficient vis-à-vis a broad conception of the protected group as a whole (as with the United States formulation that looks to remaining viability within a nation).

In Kayishema, the ICTR found Kayishema guilty of genocide, inter alia, for acts that took place in limited geographical areas: the killing of at least 8,000 Tutsi at the Gatwaro Stadium in Kibuye Town and another 4,000-5,500 at a Church in Mubuga (both historically safe havens in times of racial strife in Rwanda).\(^ {182}\) Kayishema was the prefect (governor) of the Kibuye prefecture (one of eleven regional areas in Rwanda), which was in turn divided into nine communities.\(^ {183}\) Both massacre sites fell within Kayishema's prefecture.

Kayishema's actions in Kibuye took place against the wider backdrop of nationwide atrocities against Tutsi.\(^ {184}\) The Kayishema opinion did not specify whether Kayishema acted with the intent to substantially destroy Tutsis within those communities, within his prefecture, or within the nation itself. If the Jelisic formulation is credited, the distinction probably does not matter. Kayishema could commit genocide if he intended to destroy a substantial part of the population of Tutsi in the individual communities of Mubuga or Kibuye Town or within the wider prefect of Kibuye, whether or

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179. Jelisic (TC), supra note 3, ¶ 83.
180. Id.
181. Sikirica, supra note 165, ¶ 68.
183. Id. at ¶¶ 2, 20.
184. Id. at ¶ 54.
not his actions were part of a larger genocidal plan to destroy the Tutsi population in Rwanda as a whole.

The result would be different if the wider conception of geographic scope was mandated. The national model, for example, frames genocide as an act intended to destroy a substantial part of the protected group within a nation.\textsuperscript{185} If Kayishema intended only to rid his prefect of Tutsi, he probably could not be convicted of genocide. Despite their atrocity, the killings at the Stadium (8,000 people) and at Mubuga Church (some 5,500 people) probably would not constitute acts against a “substantial part” of the overall Tutsi population in Rwanda, where minimum estimates of the number killed exceed 800,000.

In \textit{Sikirica}, the ICTY considered genocidal liability for the victimization of 1,000-1,400 Muslims in its acquittal of the accused on charges of genocide. The court held that “[t]his would represent between 2\% and 2.8\% of the Muslims in the Prijedor municipality and would hardly qualify as a ‘reasonably substantial’ part of the Bosnian Muslim group in Prijedor.”\textsuperscript{186} Although the tribunal was quick to note that “[t]he fact that the evidence does not establish that a substantial number of Bosnian Muslims or Bosnian Croats were victims . . . does not necessarily negate the inference that there was an intent to destroy in part the Bosnian Muslim or Bosnian Croat group,” the ICTY nevertheless determined that when the quantitative figures were “considered along with other aspects of the evidence, it becomes clear that this is not a case in which the intent to destroy a substantial number of Bosnian Muslims or Bosnian Croats can properly be inferred.”\textsuperscript{187}

It seems clear that the quantitative method should have some ongoing application in determining genocidal intent, although it is not the sole proper inquiry in that regard. At present, the trend appears to be (properly) away from the United States’s national model embodied in the Proxmire Act.\textsuperscript{188} The better approach is to credit the notion that genocide can be committed (as judged on a case-by-case basis) in an area as small as a municipality or a community, depending upon the perpetrators’ ultimate intent for the group.

The percentage test and the numerical formulation both add value to the inquiry of whether genocidal intent existed in a particular case, and both theories should be recognized and applied in future genocide cases. Each is consonant with the overall object and purpose of the Genocide Convention to protect human groups from physical or biological destruction. The percentage test is better-suited to protecting smaller collectives

\begin{itemize}
  \item \textsuperscript{185} Proxmire Act, 18 U.S.C. §1093(8).
  \item \textsuperscript{186} Sikirica, supra note 165, ¶ 72.
  \item \textsuperscript{187} Id. at ¶ 75.
  \item \textsuperscript{188} Compare Jelisic (TC), supra note 3, ¶ 83 (“international custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone”) and Sikirica, supra note 165, ¶ 68 (the inquiry can focus upon acts within “a country or a region or a single community”) with Proxmire Act, 18 U.S.C. §1093(8) (focusing inquiry on a nationwide basis).
\end{itemize}
who are targeted for genocidal acts, whereas the numerical test better covers situations where a large number of people are victimized. Although the result under both analyses in many instances will be the same, it is both sensible and proper to infer genocidal intent if either test is satisfied in any particular case.

2. The Qualitative Approach

The qualitative analysis takes an opposite approach from the quantitative method. Its fundamental premise is that members of the group have unequal worth for purposes of the survival of the group. As Professor Bassiouni put it, the concept of genocide “is sufficiently pliable to encompass not only the targeting of an entire group, as stated in the Convention, but also the targeting of certain segments of a given group, such as the Muslim elite or the Muslim women.”

The targeting of some group members is believed to be more harmful because their loss contributes more significantly to the destruction of the group. In the words of the UN Commission of Experts, a focused attack on a specific segment of a protected group (i.e., political, business, or intellectual leaders or military or law enforcement personnel) “may be a strong indication of genocide regardless of the numbers killed.”

To use a simple example, assume that a nomadic aboriginal tribe is targeted for genocide. Five percent of the tribe are “hunters,” whose work produces almost all of the food consumed by the tribe. Under the qualitative approach, the killing of the hunters with the intent to destroy the tribe may constitute genocide even if killing 5% of the tribe would be insufficient under a quantitative approach. The killing of the hunters is considered genocide because, without the food they provide, the chances are much greater that the tribe as a whole will be destroyed.

The Jelisic court adopted a subjective approach and held that the targeting of the group’s leadership must be considered in light of the fate of the rest of the group. If the group’s leadership was exterminated and the rest of the group was subsequently or concurrently further victimized, deported or forced to flee, the actions against the leaders may constitute genocide.

The concept of qualitative genocide is not recognized universally and presents some complications in application. An initial question arises as to the scope of qualitative destruction contemplated. Dictum adopted by the Jelisic Court appears to move beyond the physical and biological survival of the group and into the area of the group’s economic, social and

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191. Jelisic (TC), supra note 3, ¶ 81.
192. See, e.g., Proxmire Act, 18 U.S.C. §1093(8) (only numerical loss leads to the destruction of the group as a "viable entity").
cultural preservation. These additional concepts were not included in the Genocide Convention, and it would be a vast (and unwarranted) expansion of the treaty's mandate to read them back in via the qualitative approach.

If the qualitative approach is used at all, it must be applied in accord with the object and purpose of the Genocide Convention and limited to the physical and biological existence of the group. Attacks on academics, intellectuals, economic leaders, and religious leaders in and of themselves are insufficient to prove genocidal intent per se. There must be some additional proof that the victimization of the particular segment was in fact an attack upon the physical or biological viability of the group itself. This apparently was the aim of the ICTY trial chamber in *Krstic*, which analyzed the effect on the group of an attack on all military-aged men on the group of Bosnian Muslims in Srebenica.

But even in the physical and biological context, the qualitative approach, as applied to date, suffers from a problematic fundamental premise. It presumes that some human beings are (or were) inherently more valuable than others and that a court can somehow make this determination. This assumption is somewhat elitist and not even necessarily valid.

The concept of objectively-measurable worth may have some application in certain clearly defined cases (as in the example of the aboriginal hunters, above). As a rule of general application, however, it is fraught with practical complications. Group members can hardly be expected to be a source of accurate testimony on the worth of their fellow group members vis-à-vis the survival of the group. And apart from distinguishing group members along functional lines and making presumptions about the actual effect of those functions on the group, it will be difficult, if not impossible, for a court to develop sound criteria to judge the relative value of human beings.

The qualitative test as applied in the *Jelisic* decision also to some extent is inconsistent with the Genocide Convention itself, in that it seeks to infer genocidal intent based upon the results of a qualitative attack on the group. But results are irrelevant for purposes of genocide: the Convention articulates an inchoate crime, which penalizes the doing of certain acts with the requisite intent, not the successful results of those acts. It is irrelevant to the question of mens rea under the Convention whether a qualitative attack had any effect upon the group at all.

The analysis in *Krstic* comes closer to the mark in its focus upon what the Bosnian Serb forces knew or must have known would result from their

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193. See *Jelisic (TC)*, supra note 3, ¶ 81.
196. See *Jelisic (TC)*, supra note 3, ¶ 81.
killing of 7,500-plus military-aged Muslim men at Srebeneica. The ICTY’s focus in that case was properly directed to the perpetrator’s intent. But even Krstic can be criticized somewhat for its lack of precision. As a matter of the law of evidence to prove that genocidal intent existed, Krstic is sound: it certainly makes sense to look at what actually happened in Srebeneica to infer what the Bosnian Serbs intended for the region. This being said, the Krstic decision should not be interpreted as imposing a requirement that a targeted qualitative attack have any actual effect on the group or that the targeted segment of the group was in fact valuable for the purposes of the group’s physical or biological survival.

A more precise approach would be to adopt a qualitative analysis that focuses upon the perpetrator’s subjective beliefs as to the valuable segments of a target group for purposes of the group’s physical and biological existence. The court could then focus upon tangible evidence of the subjective intent of the perpetrator. Framing the question in terms of what the perpetrator believed eliminates the elitist tinge of having a court objectively judge the relative worth of human beings and removes any results-focused bias from the analysis.

The subjective version of the qualitative test would be satisfied if, with the intent to destroy all or part of the group as such, the perpetrator victimized specific group members with the belief that those victims had some enhanced qualitative value to the physical or biological survival of the group (i.e., that they were “hunters,” medical doctors, soldiers, etc.). The focus rests upon the perpetrator’s understanding of the valuable segments of the group. There is no need, however, to establish that the perpetrator’s beliefs about the group (or its valuable segments) were in fact correct or that the qualitative targeting had any actual effect upon the group.

The formulation advocated here aligns best with the inchoate structure of the Convention, which penalizes acts that are committed with a certain mental state, rather than the successful results of that conduct. As noted previously, for purposes of genocide, the perpetrator’s views are the ones that truly matter, not the subjective views of the victims or even an objective determination of value by a court. It matters not whether the perpetrator is objectively correct about the value of the victim(s) to the group. If the perpetrator chose a victim in the belief that the victim had enhanced value, what matters is the fact that a criminal choice was made, not that the choice was based upon good information or proved to be accurate in hindsight. If a perpetrator attacks a certain segment of a protected group with the intent to destroy the group in whole or in part, that criminal attack can and should be punished as an act of genocide under the Convention.

197. See Krstic, supra note 33, ¶¶ 595-98.
Conclusion

Genocide has plagued humanity for millennia, but it was only in the mid-twentieth century that the crime was so-labeled. The core concept of the crime is the protection of human groups as groups (distinguishing genocide from so-called "hate" or "bias" crimes against individuals).

Genocide evolved rapidly from an academic concept to a firm principle of international law. Raphael Lemkin's conception of genocide as a multi-faceted attack on the various aspects (i.e., physical, political, social, biological, cultural, etc.) of existence of human groups yielded to a drafting process that enabled genocide to stand as a distinct crime embodied in a multilateral treaty, the Genocide Convention. Shortly thereafter, genocide was recognized as a jus cogens norm of customary international law whose prohibitions extended to the world entire, superseding the effects of mere treaty obligation. Widespread ratification nevertheless followed, and the Convention today is one of the most widely accepted and ratified international instruments.

Despite its widespread acceptance, the Convention has been much-criticized for its shortcomings, particularly with respect to the human groups included within its protections. But even within the four categories of protected national, religious, ethnic and racial groups covered by the treaty, there has been much difficulty to date in adequately defining the precise contours of each of the protected groups under the Convention.

Each act of genocide must stand or fall on its own and the determination of whether a protected group exists must be made on a case-by-case basis. Nevertheless, the criteria applied in determining whether a protected group exists (and how that group is targeted) will largely determine whether a charge of genocide will succeed or fail.

Judicial efforts to achieve an objective or scientific definition of protected groups under the Convention have proved largely artificial and often bear no relation to the group as-targeted by the perpetrators of the crime. As such, the better approach to defining groups under the Convention is to adopt a subjective inquiry into the contours of the group as defined by the perpetrators themselves. This subjective approach is necessary because the concept of a human group, protected or otherwise, is necessarily abstract and devoid of any genuine scientific or other purely-objective parameters. But because a purely subjective approach could lead to group definitions that are inconsistent with the manifest object and purpose of the Convention, this article advocates a hybrid approach that accounts for the subjective views of the perpetrator but requires a baseline measure of external indicia linking the perpetrator's understanding to the group's pre-genocide existence in society.

Once the contours of the group are defined, it again lies with the court to ascertain whether, in light of prohibited acts against group members, genocidal intent actually was manifested against the group itself. Although a numerical analysis in this regard is helpful and offers some valid insight into genocidal intent, quantitative approaches provide only half the answer. The object and purpose of the Convention call for a broad conception of what it means to destroy a group "as such." Accordingly, this article advocates the alternate recognition of a more flexible qualitative approach grounded principally in the intentions of the genocidist for the perceived "valuable" segments of the group. If a perpetrator attacks a certain segment of a protected group with the intent to destroy the group in whole or in part, that criminal attack can and should be punished as an act of genocide under the Convention.

It is proper to adopt a liberal understanding of the groups protected under the Convention and the methods by which genocidal intent against those groups may be manifested. In the final analysis, however, these efforts must be understood and applied within the textual parameters set forth by the Convention's drafters. It is only through a broad reading of the text, rigorously applied and analyzed under established principles of international jurisprudence, that the true "humanitarian and civilizing purpose"199 behind the Convention actually can be recognized and effected on an international scale.

199. See Reservations, supra note 198, 1951 I.C.J. at 23.