

**ESTABLISHING THE ETHNIC
ORIGIN OF GENOCIDE VICTIMS:
The Akayesu Judgment in Point**

**A Research Paper Prepared for the International Criminal Tribunal for Rwanda
under the Auspices of the New England School of Law.**

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MEMORANDUM

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Subject Establishing the Ethnic Origin of Genocide
Victims: The Akayesu Judgment in Point

I. INTRODUCTION

On September 2, 1998 the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") pronounced an historic verdict against Jean-Paul Akayesu, finding him guilty, among other offenses, of genocide.

The particulars of the atrocities in Rwanda forced the Chamber to address the question whether the Tutsis in Rwanda constituted an "ethnic" group for the purpose of determining criminality under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the "Genocide Convention") and the Statute of the ICTR.

Although the Trial Chamber ruled that the Tutsis were an ethnic group within the meaning of the Statute and the Genocide Convention, it did not provide a firm analytical framework within which to define the contours of ethnicity in the

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context of genocide. In the absence of such definition, the Trial Chamber's Decision is vulnerable to critique, and future genocide prosecutions -- be they in Rwanda or elsewhere -- may founder for lack of understanding of who and what may constitute an ethnic group.

The purpose of this memorandum, therefore, is to provide an understanding of ethnicity drawn from legal precedent and scholarly usage, whereby a prosecutor might be able accurately to ascertain whether a group targeted for violence is an "ethnic" group so as to satisfy the prerequisite group element for the commission of genocide.

The Akayesu Verdict

The ICTR is the second international entity with jurisdiction to punish the crime of genocide. Founded in the wake of the atrocities in 1994, the ICTR Statute closely parallels that of the International Criminal Tribunal for the former Yugoslavia ("ICTY").^{1/} Since the International Military Tribunal and the International Military Tribunal for the Far East (the "Nuremberg" and "Tokyo" Tribunals, respectively) predated the enactment of the Genocide Convention in 1948, the ICTY and ICTR have been the sole fora in which to consider the elements of that crime.

Both Statutes adopted a definition of genocide identical to that of the Genocide Convention. That Convention reads, in relevant part: "[G]enocide means

^{1/} The Tribunal Statutes are not identical: in particular, the ICTR Statute includes violations of Common Article 3 of the Geneva Conventions of 1949 as punishable offenses. The absence of this provision in the Statute of the ICTY contributed to the ruling by its Appeals Chamber that Grave Breaches of the Geneva Conventions in the Balkan conflict needed to have had an international character in order to be punishable. See Tadic

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group[.]"^{2/}

The trial of Jean-Paul Akayesu, former Bourgmestre of Taba in Rwanda, posed for the first time the problem of how to interpret the group element of the Genocide Convention, as transposed into the Statute. The killing of Tutsis by Hutus in Rwanda could not, by definition, be based upon national, racial or religious considerations. In order to constitute genocide, therefore, such killing would have had to have been premised upon the specific intent to destroy the Tutsis as an ethnic group.^{3/}

The Trial Chamber noted that initially the terms Hutu and Tutsi connoted a social as much as an ethnic distinction:

The terms Hutu and Tutsi were already in use but referred to individuals rather than to groups. In those days, the distinction between Hutu and Tutsi was based on lineage rather than ethnicity. Indeed, the demarcation line was blurred: one could move from one status to another, as one became rich or poor, or even through marriage.

According to the Trial Chamber it was the Belgian colonists who entrenched the Hutu-Tutsi distinction by dividing the Rwandan population accordingly, and by referring to the Hutu-Tutsi dichotomy in terms of ethnic groups. Since this distinction was preserved through the massacres in 1994, the Trial Chamber

^{2/} Genocide Convention, Article II.

^{3/} There is some debate as to whether the terms "ethnical" and "ethnic" are identical in meaning. While we discuss this issue below, we use the term "ethnic" in this memorandum without seeking to distinguish between it and the term "ethnical".

noted that the Rwandan population identified itself as Tutsi or Hutu. In the same breath, however, the Trial Chamber observed that this distinction could not have been made on the basis of ethnicity:

The term *ethnic group* is, in general, used to refer to a group whose members speak the same language and/or have the same culture. Therefore, one can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture.

Later in its Decision, the Trial Chamber appeared to revise its opinion:

Paragraph 7 of the indictment alleges that the victims in each paragraph charging genocide were members of a national, ethnic, racial or religious group. The Chamber notes that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. However, the Chamber finds that there are a number of objective indicators of the group as a group with a distinct identity. Every Rwandan citizen was required before 1994 to carry an identity card which included an entry for ethnic group (*ubwoko* in Kinyarwanda and *ethnie* in French), the ethnic group being Hutu, Tutsi or Twa. The Rwandan Constitution and laws in force in 1994 also identified Rwandans by reference to their ethnic group. Article 16 of the Constitution of the Rwandan Republic, of June 10 1991, reads, "All citizens are equal before the law, without any discrimination, notably, on grounds of race, colour, origin, ethnicity, clan, sex, opinion, religion or social position". Article 57 of the Civil Code of 1988 provided that a person would be identified by "sex, ethnic group, name, residence and domicile." Article 118 of the Civil Code provided that birth certificates would include "the year, month, date and place of birth, the sex, the ethnic group, the first and last name of the infant." The Arusha Accords of 4 August 1993 provided for the suppression of the mention of ethnicity on official documents (see Article 16 of the Protocol on diverse questions and final dispositions). Moreover, customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines of heredity. The identification of persons as belonging to the group of Hutu or Tutsi (or Twa) had thus become embedded in Rwandan culture. The Rwandan witnesses who testified before the Chamber identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbors belonged. Moreover, the Tutsi were conceived of as an ethnic group by those who targeted them for killing. As the expert witness, Alison Desforges, summarised:

"The Primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time. In other words, the group, the definition of the group to which one feels allied may change over time. But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition reality is an interplay between the actual conditions and peoples' subjective perception of these conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene. But, the Belgians did impose this classification in the early 1930's when they required the population to be registered according to ethnic group. The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence by the First Republic and the Second Republic in Rwanda to such an extent that this division into three ethnic groups became an absolute reality".

Although the Trial Chamber later reiterated its opinion that an ethnic group consisted of people sharing a common language or culture, it nonetheless ultimately ruled that "the Tutsi constituted a group referred to as 'ethnic' in official classifications."

It is unclear whether the Trial Chamber was holding that the Tutsi were indeed an ethnic group for the purpose of establishing genocide, or whether the fact that Rwandan Hutu and Tutsi alike appeared to understand the Hutu/Tutsi definition in terms of ethnicity was itself sufficient as far as the Trial Chamber was concerned to make genocide out of the intentional destruction of one of those groups, as such.

In light of the ambiguity of the Trial Chamber's decision in this respect, it is necessary to explore the possible definitions of ethnicity, such that the

Tutsi, and potentially, future victimized groups, qualify as "ethnic" for the purpose of prosecuting genocide.

We shall first examine the Genocide Convention and the debate which took place on the inclusion of ethnic groups as a protected category. Next, we shall briefly survey national implementing legislation of the Convention. Following this survey we turn to use of the term "ethnic" or "ethnicity" in other international instruments. In a similar vein, we shall analyze domestic interpretations of ethnicity in anti-discrimination legislation. Lastly, we shall look to academic and scholarly definitions of ethnicity.

II. THE GENOCIDE CONVENTION

A. Origin of the word "genocide"

Raphael Lemkin is widely credited with having coined the term genocide in 1944. According to Lemkin, the word genocide was derived from the Greek "genos" (race, tribe) and the Latin root "cide" (killing), thereby "corresponding in its formulation to words as tyrannicide, homicide, and infanticide."^{4/} Lemkin defined genocide in the following manner:

[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. The objectives of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion and economic existence of national groups, and the destruction of personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against individuals, not in their individual capacity, but as members of the national group.

^{4/} Raphael Lemkin, Axis Rule in Occupied Europe at 79 (1944).

The first legal reference to the crime of genocide was made during the Nuremberg trials. The Charter of the International Military Tribunal at Nuremberg, created on August 8, 1945, called for the punishment of acts constituting "Crimes Against Humanity."^{5/}

On November 2, 1946, the United Nations delegates from Cuba, India, and Panama requested the Secretary General to place on the General Assembly agenda an item addressing the prevention and punishment of genocide. The delegates sent a draft resolution along with their request. On March 28, 1947, the Economic and Social Council passed a resolution that called on the Secretary General to create a draft convention on the crime of genocide.

The Secretary General asked the U.N. Division of Human Rights to draft the convention. The draft convention was then discussed and amended by three international law experts appointed by the Secretary General: Professor Donnedieu de Vabres of the Paris Faculty of Law, Professor Pella of the International Penal Law Association and Professor Raphael Lemkin. Article I of the Secretariat's draft Convention defined genocide as a "criminal act directed against anyone of the

^{5/} Under Article 6(c) the Charter included in its coverage, "Crimes Against Humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds, in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

aforesaid groups [racial, national, linguistic, religious or political] with the purpose of destroying it in whole or in part, or of preventing its preservation or development."^{6/}

The international law experts disagreed over whether political groups should be protected by the Convention. Professor Lemkin argued that political groups lacked "permanency and the specific characteristics of other groups referred to" and that the Convention "should not run the risk of failure by introducing ideas on which the world is deeply divided."^{7/} In contrast, Professor Donnedieu de Vabres argued that "genocide was an odious crime, regardless of the group which fell victim to it and the exclusion of political groups might be regarded as justifying genocide in the case of such groups." After the draft Convention was completed the Secretary General obtained comments from member states and submitted the draft and comments to the General Assembly.

On November 23, 1947, the Economic and Social Council adopted a resolution that created an Ad Hoc Committee to create a new draft Convention, incorporating the Secretary General's draft Convention, the comments of member states on this draft Convention, and other drafts submitted by member states.^{8/} The Ad Hoc Committee unanimously voted to protect national, racial, and religious groups under the Convention and voted four to three to protect political groups.

^{6/} 4 U.N. ESCOR at 5, U.N. Doc. E/447 (1947).

^{7/} Id. at 22.

^{8/} The Ad Hoc Committee was composed of seven members of ECOSOC: China, France, Lebanon, Poland, U.S.A., the U.S.S.R. and Venezuela. See 6 U.N. ESCOR Committee on Social Affairs (37th Mtg.), U.N. Doc. E/AC/7/37 (1948).

The inclusion of political groups was controversial. The Soviet Union, Poland, and Venezuela argued that the category of political groups lacked the stability that national, racial, and religious groups have. Notably, the Ad Hoc Committee's draft did not include ethnic or ethnical groups.

B. The Addition of Ethnical Groups.

When the Ad Hoc Committee completed its draft, the Economic and Social Council transmitted the draft along with its own report to the General Assembly. The General Assembly referred the draft Convention to the Sixth Committee to work out the details of the final draft.

In the Sixth Committee's seventy-fifth meeting the Swedish delegate proposed to insert the term "ethnical group" after national group in Article II of the Convention.^{9/} The Swedish delegate explained that the concept of a racial group was often ill-defined. He further contended that for some groups race was not always the dominating characteristic of a group, which might rather be defined by the whole of its traditions and its cultural heritage. The delegate asserted that the addition of the term ethnical group would clarify these ideas and extend the Convention's protection to doubtful cases.

The Haitian delegate supported the Swedish amendment stating that "intermingling between races in certain regions had made the problem of race so

^{9/} 3 U.N. GAOR C.6 (75th mtg.) at 115 (1948), Mr. Petren (Sweden).

complicated that it might be impossible, in certain cases, to consider a given group as a racial group, although it could not be denied classification as an ethnical group."^{10/}

In contrast, the Egyptian, Uruguayan, Belgian, expressed the view that there was no significant difference between the term "racial group" and the term "ethnical group." Beyond these remarks, there was very little discussion about the Swedish amendment. The proposal passed by only one vote: eighteen to seventeen, with eleven abstentions. Given the paucity of debate on the subject, it would seem that the narrow margin owed more to doubt about the usefulness of including ethnical groups in the language than to any genuine dispute as to whether ethnical groups, if indeed they were different to racial groups, ought to be protected by the Convention.

While the inclusion of "ethnical groups" created very little debate, the inclusion of political groups created an ongoing controversy that was only resolved near the end of the drafting process. During the meeting in which the Sixth Committee approved the insertion of the term "ethnical group," it also debated whether the term political group should be removed. The Committee initially voted to keep the term political group but later voted to remove it.^{11/}

The Iranian delegate asserted that the inclusion of political groups would result in various states refusing to ratify the Convention because they feared that the international community might label attempts to maintain internal stability as

^{10/} Id.

^{11/} 3 U.N. GAOR C.6 (128th mtg.) at 663, 664 (1948).

genocide.^{12/} In addition, the Soviet and the Belgian delegates asserted that the inclusion of political groups within Article II was contrary to the accepted definition of genocide and would lead to Article II being extended to groups which should not be covered by the Convention.

On December 6, 1948, the Sixth Committee transmitted its report to the General Assembly and three days later the General Assembly unanimously adopted a resolution creating the International Convention on the Prevention and Punishment of the Crime of Genocide.^{13/}

C. National Transpositions of the Genocide Convention.

Signatory parties to the Genocide Convention have at one time or another transposed the Convention into their domestic law. Some states have made significant changes to the language for domestic purposes, while others have retained the Convention's terminology verbatim. Although no state appears to have focused directly on the category of ethnic group, certain changes and commentaries in the legislative history shed light on the possible meaning of ethnicity in the context of genocide.

United States: In 1988 the U.S. Congress passed the Genocide Convention Implementation Act.^{14/} In the definitions section the statute states: "the term ethnic group means a set of individuals whose identity as such is distinctive in

^{12/} 3 U.N. GAOR C.6 (74th mtg.) at 99 (1948), Mr. Abdoh (Iran).

^{13/} 3 U.N. GAOR C.6 (179th plen. mtg.) at 851 (1948).

^{14/} Codified at 18 U.S.C. §§ 1091-1093 (1999).

terms of common cultural traditions or heritage..."^{15/} Beyond this the legislative history of the Act does not provide much insight. A Senate report on the bill which later became the Act states:

The four groups protected under section 1091 are the same groups protected under Article II of the Convention. The definitions of 'ethnic group,' 'national group,' 'racial group,' and 'religious group' in the new Section 1093 mean a set of individuals whose identity is distinctive in terms of certain common characteristics of the individuals in the group.^{16/}

Canada: Section 318 of the Canadian Criminal Code makes the advocacy or promotion of genocide an indictable offense that may be punished by a prison term up to five years.^{17/} The section contains a definition of genocide:

"[G]enocide means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely, (a) killing members of a group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.... [I]dentifiable group means any section of the public distinguished by colour, race, religion or ethnic origin."^{18/}

The Canadian definition subsumes ethnic origin into the category of an identifiable group without providing further enlightenment.

United Kingdom: On March 27, 1969, the British Parliament passed the Genocide Act. The Act defines genocide in the following way: "A person

^{15/} 18 U.S.C. § 1093(2) (1999).

^{16/} S. Rep. No. 100-333, at 10 (1988), reprinted in 1988 U.S.C.A.A.N. 4163.

^{17/} R.S.C. 1985, c. C-46, s. 318.

^{18/} Id.

commits an offense of genocide if he commits any act falling within the definition of 'genocide' in Article II of the Genocide Convention...."^{19/} The British genocide law thus refers back directly to the Genocide Convention without embellishment. In this respect, an understanding of the British reading of the term "ethnic group" must await a domestic genocide prosecution.^{20/}

France: The French implementing legislation of the Genocide Convention includes a significant addition to the category of groups. The statute begins by following the Genocide Convention verbatim; after citing national, ethnic, racial or religious groups, however, the statute continues to make punishable the destruction of "a group constituted according to any other arbitrary criterion" (un groupe déterminé à partir de tout autre critère arbitraire).^{21/}

This formulation was a compromise between those legislators who preferred to maintain the wording of the Genocide Convention and those who wished to improve upon it. An earlier draft of the implementing legislation had eliminated reference to national, ethnic, racial or religious groups and replaced these elements with the words "a population group arbitrarily singled out" (un groupe de population arbitrairement discriminé).^{22/}

^{19/} Genocide Act 1969, Section 1.

^{20/} British courts, however, have supplied a definition of ethnicity outside the context of genocide. See below.

^{21/} Code Pénal Français Art. 211-1 (1992).

^{22/} Débats Parlementaires, Assemblée Nationale, 2e séance du lundi décembre 1991.

The French legislation cuts both ways for the proposition that ethnic groups ought to be broadly construed under the Genocide Convention: on one hand, the French statute recognizes that ethnicity, like the other group identities in the Convention, is a random appurtenance of human society given importance only by the prejudice which it might engender. Hence, the French statute mentions "any other arbitrary criterion" which might similarly be held against an individual.

On the other hand, the statute's inclusion of a catch-all category might imply a conception of rigidity in the existing categories. Under this reading of the statute, a population group of dubious ethnic affinity but with definite social ties might come under the protection of the catch-all category without satisfying the definition of an ethnic group. In this sense, the French legislation implies an infirmity in the Genocide Convention as much as it helps cure it.

III. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

References to ethnicity can be found in certain human rights instruments. While generally of little use in providing an understanding of the meaning of ethnicity, these treaties occasionally involve the discussion of salient issues.

The International Covenant on Civil and Political Rights.

One year after its creation in 1946, the Commission on Human Rights created a Sub-Commission on the Prevention of Discrimination and Protection of Minorities and authorized it to undertake studies and to make recommendations to the Commission concerning the protection of racial, national, and linguistic minorities. In 1950, several members of the Sub-Commission suggested that the most effective

way to protect the rights of minorities would be to include an article on the subject in the then proposed Covenant on International Civil and Political Rights ("ICCPR"). Several drafts were created, ultimately leading to what is now Article 27 of the ICCPR.

At the same time, the Sub-Commission proposed several definitions for the term "minority", which were all highly criticized. In 1954, the Sub-Commission proposed a thorough study of the position of minorities throughout the world , and for that purpose defined minorities as: "those non-dominant groups in a population which possess and wish to preserve ethnic, religious, or linguistic traditions or characteristics markedly different from those of the rest of the population."^{23/} Several decades later, the Sub-Commission continues to consider the question of how to define the term "minority."

The ICCPR was adopted in 1966, 18 years after the Genocide Convention was created. Like the Genocide Convention, the protections under the ICCPR extend to ethnic groups. Unfortunately, the travaux préparatoires do not indicate an applicable definition for the term "ethnic group." Article 27 of the ICCPR states: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

^{23/} Louis B. Sohn, The Rights of Minorities, in The International Bill of Rights, 270, 277 (Louis Henkin ed., 1981).

the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."^{24/}

In the drafting of Article 27, North and South American members of the Commission on Human Rights made it clear that they wanted to exclude recent immigrants from the group that would be protected. This is the reason that Article 27 contains the opening phrase, "In those states in which ethnic, religious or ethnic minorities exist." The drafters of the Convention agreed that Article 27 should only cover groups "long established on the territory of a state."^{25/}

In 1971 Francesco Capotorti began a major study of minorities for the UN Human Rights Commission, using the following definition: " A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-- being nationals of the state-- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."^{26/}

^{24/} International Covenant for Civil and Political Rights, Article 27.

^{25/} 10 GAOR Annexes, U.N. Doc. A/2929, Agenda Item No. 28, Part II, at 63 (1955).

^{26/} Sohn, supra, at 278.

The International Criminal Court.

The Statute of the International Criminal Court ("ICC") was created by treaty in July 1998. The ICC awaits the requisite number of signatures and ratifications to become effective. Like the ICTY and ICTR, the ICC imports the text of the Genocide Convention verbatim into its Statute.

An initial report by the International Law Commission recommended that the word "ethnic" in the genocide part of the text be replaced with "ethnical" to conform with modern usage. This change was opposed by some observers on the ground that tampering with one part of the Convention would raise doubts about the original scope of the text.^{27/}

Another possibility raised was that the word "ethnical" was a term of art with broader meaning than ethnic.^{28/} In this sense, it may be that the word "ethnical" connotes a qualification to the term "ethnic": "ethnical" would mean "ethnic-like" or "resembling ethnic". It might thus be thought that the word "ethnical" broadens the scope of potentially targeted groups by allowing for them to be more loosely knit than ethnic groups, *stricto sensu*.^{29/}

^{27/} See, e.g., Amnesty International - Report - IOR 40/01/97.

^{28/} Id.

^{29/} This interpretation also inadvertently serves the purpose of narrowing the definition of "ethnic" by implying that "ethnical" groups might include categories eluded by the appellation "ethnic".

This hypothesis is nonetheless fatally flawed. First, the travaux préparatoires indicate no such intention on the part of the Swedish delegate who proposed the introduction of the term "ethnic", or of any delegate during debate on its inclusion. Second, the ethnical/ethnic discrepancy exists only in English. The French term "ethnique" is used to translate both English words. Other languages similarly fail to reflect any distinction between the two English terms. It seems, therefore, that the word "ethnic" is nothing more than an older variant form of "ethnical".

IV. OTHER DEFINITIONS OF ETHNICITY

A. Definitions of ethnicity in domestic anti-discrimination legislation.

Numerous countries have enacted statutes that prohibit discrimination based on ethnicity. Although these statutes are quite distinct from the Genocide Convention, interpretations of the word "ethnic group" are useful, particularly in countries that have ratified the Genocide Convention. The best example among these -- and, to our knowledge, the only one which has engendered lengthy discussion on ethnicity -- is the United Kingdom's Race Relations Act of 1976. Section one of the Act states:

A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if--

- (a) on racial grounds he treats that other less favourably than he treats or would treat other persons or
- (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but--

- (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it and
- (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied and
- (iii) which is to the detriment of that other because he cannot comply with it.

Section 3(1) of the Race Relation Act states "'racial group' means a group of persons defined by reference to colour, race, nationality or *ethnic or national origins*, and references to a person's racial group refer to any racial group into which he falls." ^{30/} (emphasis added).

The leading case on the interpretation of the statutory term "a group of ethnic origin" is *Mandla v. Dowell Lee*.^{31/} In *Mandla*, the Commission for Racial Equality brought an action against the headmaster of a private school for refusing to grant admission to an orthodox Sikh boy unless the boy removed his turban and cut his hair. The reasons for the headmaster's denial were that "the wearing of a turban, being a manifestation of the boy's ethnic origins, would accentuate religious and social

^{30/} Id.

^{31/} [1983] 2 App. Cas. 548.

distinctions in the school which, being a multiracial school based on the Christian faith, the headmaster desired to minimize."^{32/}

Since British law contained no explicit protections for religious minorities, the Commission brought an action under the 1976 Race Relations Act, claiming that the headmaster had violated Section 1(1)(b) of the Act by engaging in indirect racial discrimination. More specifically, the case against the headmaster was that he applied a rule equally to all students but that it was a rule:

which is such that the proportion of Sikhs who can comply with it is considerably smaller than the proportion of non-Sikhs who can comply with it and (ii) which the [headmaster could not] show to be justifiable irrespective of the colour, etc [of the Sikh student] and (iii) which [was] to the detriment of the [Sikh student] because he cannot comply with it.

In his opinion, Lord Fraser wrote that the central question before the court was whether Sikhs are a "racial group" as defined by the Act. In his analysis of the question, Lord Fraser examined the definition of the word "ethnic" in the several editions of the Oxford English Dictionary. According to 1897 edition one meaning of the word "ethnic" was "pertaining to race peculiar to a race or nation ethnological." The Concise Oxford Dictionary in 1934 gave a more concise definition, "pertaining to race or ethnological." The 1972 edition defined ethnic in the following way:

^{32/} Id.

"pertaining to or having common racial, cultural, religious, or linguistic characteristics. esp. designating a racial or other group within a larger system."

Lord Fraser, concerned that this definition was too broad for purposes of interpreting the term in the Race Relations Statute went to set out a set of factors that should be used to distinguish "ethnic groups":

In my opinion the word 'ethnic' still retains a racial flavour but is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin.

For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these:

- (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive
- (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

In addition to those two essential characteristics the following characteristics are, in my opinion, relevant:

- (3) either a common geographical origin, or descent from a small number of common ancestors
- (4) a common language, not necessarily peculiar to the group
- (5) a common literature peculiar to the group
- (6) a common religion different from that of neighboring groups or from the general community surrounding it
- (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say,

the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.^{33/}

At the end of his opinion, Lord Fraser adopted the reasoning of the lower court to reach the conclusion that Sikhs are a distinct group with reference to ethnic origin. The lower court stated: "Sikhs are a distinctive and self-conscious community. They have a history going back to the fifteenth century. They have a written language which a small proportion of Sikhs can read but which can be read by a much higher proportion of Sikhs than of Hindus. They were at one time politically supreme in the Punjab."

Lord Templeman agreed with Lord Fraser that the central issue before the court was whether Sikhs are a "racial group" under the 1976 Race Relations Act. He also agreed that the definition of a racial group under the Act was dependent on certain characteristics "namely group descent, a group of geographical origin and a group history."

Lord Templeman asserted that Sikhs satisfied this test. He stated, "[t]hey are more than a religious sect, they are almost a race and almost a nation. As a race, the Sikhs share a common colour, and a common physique based on common ancestors from that part of the Punjab which is centered on Amritsar." Yet Lord Templeman went on to explain that Sikhs "fail to qualify as a separate race because in

^{33/} Id.

racial origin prior to the inception of Sikhism they cannot be distinguished from other inhabitants of Punjab.^{34/} Thus, although Sikhs are racially indistinct from other Punjabis (Hindu and Muslim), they have a shared history and common cultural traditions that make them a distinct ethnic group for purposes of the Race Relations Act.

Other cases have illustrated that the court's reasoning in *Mandla* will not protect all ethnic minorities in the United Kingdom. For example, in *Dawkins v. Crown Suppliers*,^{35/} the Court of Appeal, Civil Division, refused to recognize Rastafarians as a "racial group with reference to ethnic origins" under the Race Relations Act.

In *Dawkins*, the appellant, a Rastafarian, applied for a job to be a truck driver for a government agency.^{36/} When the appellant attended the interview he was informed that the agency expected their drivers to cut their hair. The appellant indicated that he could not cut his hair and he was later rejected for the job.

^{34/} Id.

^{35/} [1993- ICR] 517, [1993] IRLR 284.

^{36/} Before reaching the Court of Appeal, the Industrial Tribunal, an administrative court, held that Rastafarians constitute a racial group under the Act. The Employment Appeal Tribunal, an administrative appellate court, reversed the decision.

The issue before the court was whether Rastafarians are a racial group under the 1976 Race Relations Act. Writing on behalf of a three judge panel, Lord Neill accepted the reasoning adopted by the lower court to conclude that Rastafarians were not a racial group. The lower court had analyzed Rastafarians as a group based on the factors discussed by Lords Fraser and Templeman in *Mandla v. Lee*. In comparing Rastafarians to Sikhs the lower court stated:

Lord Templeman [in *Mandla v. Lee*] held that Sikhs qualified as a group defined by ethnic origins because they constitute a separate and distinct community derived from racial characteristics.... But in our judgement, Rastafarians cannot be so described. There is in our view insufficient to distinguish [sic] them from the rest of the Afro-Caribbean community so as to render them a separate group defined by reference to ethnic origins. *They are a religious sect and no more.*^{37/} (emphasis added).

The court below had emphasized the fact that the Rastafarian movement was only 60 years old. As a result, it concluded that they did not have a "long shared history," one of the indicia of a "racial group" described by Lord Fraser in *Mandla v. Lee*.

The court of Appeal agreed with this point stating: "[Rastafarians] are a separate group but not a separate group defined by reference to their ethnic origins.... [I]t is not enough for Rastafarians to now to look back to a past when their ancestors,

^{37/} Id.

in common with other people from the Caribbean were taken there from Africa."^{38/}

The court found that Rastafarians did have a strong cultural tradition that is distinct from mainstream Afro-Caribbean culture. But, since they did not have a "long shared history," they could not be considered a racial group under the Race Relations Act.

Dawkins v. Crown Suppliers, in comparison to *Mandla v. Lee*, is a troubling case. In making fine distinctions over which groups are protected by the Race Relations Act, the Court of Appeal ultimately favored one religious minority over another. As discussed above, the main difference between orthodox Sikhs and other people from Punjab is religion. There are in fact Punjabis who believe in Sikhism but who do not wear the distinctive items that Sikhs are required to wear.

Thus, when the court stated that Rastafarians are distinguishable from the rest of the Afro-Caribbean community only as a religious sect, it failed to realize that the same can be said of Sikhs in Punjab.

B. Definitions of Ethnicity in Academe.

Subjectivity has been a common theme running through academic discourse on ethnicity. Several scholars have noted that the salient feature of ethnicity is *belief* in a shared kinship or identity; the actuality may be less important.

^{38/} Id.

This sense of shared identity, whether real or perceived, could connote a broad range of relationships. In its root form, the Greek word *ethnos* was used in several contexts:

The ancient Greeks used the term *ethnos* in a variety of ways. In Homer we hear of *ethnos hetairon*, a band of friends, *ethnos lukion*, a tribe of Lycians, and *ethnos melisson* or *ornithon*, a swarm of bees or birds. Aeschylus calls the Persians an *ethnos*, Pindar speaks of the *ethnos aneron* or *gunaikon*, a race of men or women, Herodotus of *to Medikon ethnos*, the Median people, and Plato of *ethnos kerukikon*, a caste of heralds. All this became, in the New Testament writers and Church Fathers, *ta ethne*, the gentile peoples.^{39/}

It appears from this original range of usage that the modern understanding of ethnicity has narrowed considerably from its root meaning. Even allowing for this limitation, however, the often subjective character of ethnicity permits a broader interpretation. Hence, one leading scholar uses the following definition:

An ethnic group is defined here as a collectivity within a larger society *having real or putative common ancestry*, memories of a shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood. Examples of such symbolic elements are: kinship patterns, physical contiguity (as in localism or sectionalism), religious affiliation, language or dialect forms, tribal affiliation, nationality, phenotypical features, or any combination of these. A necessary accompaniment is some consciousness of kind among members of the group.^{40/} (emphasis added)

^{39/} John Hutchinson & Anthony D. Smith (eds.), *Ethnicity*, at 4.

^{40/} *Id.* at 6 (quoting Schermerhorn, 1978:12).

The German sociologist Max Weber similarly defined ethnicity in terms of subjective perceptions about objective characteristics:

The belief in group affinity, regardless of whether it has any objective foundation, can have important consequences especially for the formation of a political community. We shall call 'ethnic groups' those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization or migration; this belief must be important for the propagation of group formation; conversely, it does not matter whether or not an objective blood relationship exists. Ethnic membership (*Gemeinsamkeit*) differs from the kinship group precisely by being a presumed identity, not a group with concrete social action, like the latter.^{41/}

The widespread agreement that ethnic groups are subjectively constituted appears to apply only to group members themselves. Scholars and commentators are unreceptive to the notion that ethnicity can be conferred on an otherwise disparate group of people by the subjective belief of outsiders. In other words, while a belief in a common identity may bind people together as an ethnic group, a belief in the common identity of some people by others who do not share, or who think they do not share, this identity is by itself insufficient to create an ethnic group.

Although this mechanism of ethnic identity makes sense inasmuch as beliefs ought at least to be self-imposed if they are to have consequences, it is plausibly at odds with the underlying purpose of genocide prosecutions; since intent is a crucial

^{41/} Id. at 35 (quoting Weber, *The Origins of Ethnic Groups*, at 1).

element in the crime of genocide -- and intent, of course, is subjective^{42/} -- the belief of the putative perpetrator of genocide ought to weigh heavily in the calculus of the offense.^{43/} If a government undertakes mass relocations of people because of that government's belief -- a belief not shared by those relocated -- that they constitute an ethnic group, is not the offense one of genocide? What, indeed, of the situation where individuals undertake to exterminate an established ethnic group and erroneously target others?^{44/}

V. CONCLUSION

It is evident that the drafters of the Genocide Convention did not, for the most part, envision a situation like the one in Rwanda. The addition of ethnicity to the list of protected groups seems originally to have been intended only to refine and supplement the category of race.

^{42/} This is not say that subjective intent cannot be proved by objective indicators.

^{43/} The Trial Chamber itself noted this fact in the passage from its opinion quoted above: "Moreover, the Tutsi were conceived of as an ethnic group by those who targeted them for killing."

^{44/} In this sense the two situations might be distinguished by the doctrines of mistake of fact and mistake of law. In the latter situation, the perpetrators would be making a mistake of fact, believing that their victims were members of a targeted ethnic group when in actuality they were not. Assuming that one accepts the academic understanding that ethnic group identity must be self-constituting, the first situation might be characterized as a mistake of law, where the perpetrators, in a sense, thought they were committing genocide, but in fact were not, since the people forcibly transferred were of shared ethnicity only in the eyes of the transferors.

The Rwandan genocide nonetheless made urgent the need for going deeper than the plain language of the Convention and beyond the realm of original intent.^{45/} At the close of the Twentieth Century, it is increasingly conceivable that people of the same race, religion and nationality will come at odds. If ethnicity yet divides these people, the Genocide Convention, and any international organ with jurisdiction to apply the Convention's terms to the situation, will be relevant.

Based upon the examination above of legal and scholarly sources, it would seem fair to conclude the following:

- 1) An ethnic group need not be defined exclusively in terms of common ancestry; other constituent factors, such as social class, shared communal interests, or even religious affiliation, may ultimately coalesce to give a community an ethnic identity.
- 2) The reality of an ethnic group's common ancestry is less important than its perception of such ancestry. If a group believes itself to be an ethnic group, then for all intents and purposes it is an ethnic group. Whether an outside group can effectively impose ethnicity upon another people by that outside group's perception that the people are of common ethnicity is a more contentious proposition.

^{45/} The intent of drafters of international instruments may bear less weight for international courts than it does for courts in the United States, where recourse to legislative history in order to ascertain original intent is a common device of decision-making.

3) Although ethnic groups are often marked by a distinctive language or culture, these are not prerequisites. Ethnic identity is ultimately self-referential; it need have no component except the fact of the identity itself.

4) While the definition of an ethnic group may not be stretched so broadly that it ultimately accommodates political groups and other deliberately omitted from the text of the Convention and the Statute, domestic and international interpretations appear to eschew a narrow or strict construction of the term -- in favor of a reading which provides protection to a broad swath of potentially vulnerable groups.

* * *

In a world where act of calculated violence continue to be perpetrated on whole populations, genocide prosecution remains a powerful weapon against impunity. That weapon ought not to be blunted for failure to give it the widest possible application within reason. In this way the future, if not better, at least promises to be more just.

P.H.C.