

MEMORANDUM

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To: Professor Michael Scharf
The International War Crimes Project
New England School of Law

From: Eric Pelofsky
David Kassebaum
Thien-Ky Luu

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. ISSUE

This research memorandum seeks to examine the following issue:

Do the Hutus and Tutsis qualify as “ethnic” groups under the terms of the Statute of International Criminal Tribunal for Rwanda (the “Statute”) and the Convention for the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”), given the magnitudes of intermarriage between these groups and given their common language and culture?

B. SCOPE OF THE TRIBUNAL

The International Criminal Tribunal for Rwanda (the “ICTR”) was established by the United Nations Security Council to “prosecute persons responsible for genocide” committed in Rwanda and adjacent states during 1994 and defined genocide as certain murderous or violent

acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group....”¹ It was presumed that the prosecutor could investigate and prosecute crimes of violence committed between the Hutu group and Tutsi group. However, because the Hutu and Tutsi groups in Rwanda generally share the same nationality, religion, and race, defining these groups as separate and distinct ethnic groups is essential to the application of the Genocide Convention. A recent decision by Chamber I of the ICTR (the “Akayesu Court” or the “Court”) strained to identify the Hutu group as a protected group and, in doing so, undermined the generally presumed applicability of the genocide provisions of the Statute to the events in Rwanda.² The Chamber’s interpretation of the word “ethnical” in the Statute, however, is in variance with the *travaux préparatoire* of the Genocide Convention. In fact, a more detailed reading of the *travaux* suggests that the definition of “ethnical” group includes the Hutus and the Tutsis as separate and distinct ethnical groups and no contortions are necessary to meet the “ethnical” group threshold for a genocide conviction.

C. SUMMARY OF CONCLUSIONS

The Akayesu Court erred when it concluded that an ethnic group was “a group whose members share a common language or culture.” It offers too narrow a conception of “ethnic” groups and forces an unnecessary and potentially unworkable extension of the law of genocide.

¹ Statute of the International Tribunal for Rwanda, S/RES/955 (1994) (Annex), November 8, 1994, art. 2 [hereinafter the “Statute”].

² Prosecutor v. Akayesu, Case ICTR-96-4-T, Judgement, (September 2, 1998) (Kama, Aspegren, Pillay, JJ.) [hereinafter the “Akayesu Decision”].

Such a conclusion is not supported by the *travaux préparatoire* for the Genocide Convention from which the Statute draws its definition of the crime of genocide. Instead the *travaux* presents a broader interpretation of “ethnicity” which would accommodate a group based upon patrilineal lineage combined with social distinction. Definitions offered by scholars and international documents that followed the Genocide Convention reflect a broader interpretation of “ethnicity” groups. Frequently, international documents offer protection and rights to “ethnicity,” “linguistic” and “cultural” groups, underscoring the degree to which groups are not identical even though they may have characteristics that are overlapping. A stronger foundation for prosecutions might be built if the term “ethnicity” were defined broadly (to include common traditions, kinship ties and social distinctions at birth) rather than shunted aside in favor of a new category that allowed “any stable and permanent group” to receive protection under the Genocide Convention. Such a category, created more on the basis of the drafters’ aspirations than the drafters’ language, invites attacks on the credibility of the Court for going beyond the terms of its Statute. Such attacks, if given a shred of viability, might jeopardize the momentum of the International Criminal Tribunal which has been specifically questioned and criticized for the possibility that its safeguards against political manipulation and abuse will be ineffective.

II. FACTUAL BACKGROUND

Jean Paul Akayesu, a Hutu bourgmestre of the Taba commune, was charged by the Prosecutor of the ICTR with various acts of genocide, crimes against humanity, incitement to

commit genocide, and violations of the Geneva Conventions and the second Additional Protocol.³ According to the allegations, he participated in the brutal atrocities in Rwanda that followed the deaths, or assassinations, of the Burundi President Cyprien Ntaryamira and Rwandan President Juvénal Habyarimana on April 6, 1994.⁴ On September 2, 1998, the Court found Akayesu guilty of genocide, crimes of humanity and incitement to commit genocide.⁵

The Akayesu Court declared that, under international law, an ethnic group “is generally defined as a group whose members share a common language or culture.”⁶ The Akayesu Court did not attribute its definition of “ethnic” group to any source of international jurisprudence.⁷ It then concluded that the Tutsis and Hutus “were not, as a technical matter, separate ethnic

³ Akayesu Decision, §1.2. *See also* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

⁴ Akayesu Decision, ¶106.

⁵ Akayesu Decision, §8.

⁶ Akayesu Decision, ¶513.

⁷ The source did not need to be a treaty, customary rule, or general principle. It might have even relied upon the statements of legal scholars. Statute of the International Court of Justice, art. 38(1)(d).

groups.”⁸ The conclusion was presented indirectly – the Akayesu Court concluded that the *travaux préparatoire* of the Genocide Convention required that the Convention’s protection extend to “any stable and permanent group”⁹ and Tutsis “did indeed constitute a stable and permanent group” without stating directly that the Tutsis constituted an “ethnic” group.¹⁰

The ambiguity reflected in the legal conclusion of the Court mirrored the scholarly ambivalence about the differences between Hutus and Tutsis. As one scholar observed, Hutus and Tutsis in Rwanda share the same nationality, race, and religion and “partake of ‘a common language or culture.’”¹¹ An author has stated that “racial lines were blurred early on by social, economic, and political divisions.”¹² In addition, anthropologists are “uneasy about calling them ethnic groups” notes another author who acknowledged that “years of intermarriage have made it difficult, if not impossible, to distinguish between most Hutu and Tutsi by their physical appearance.”¹³ The Akayesu Court also acknowledged the confusion about the content and uniting factors of the Hutu and Tutsi groups:

⁸ Diane Marie Amann (edited by Bernard D. Oxman), *International Decisions: Prosecutor v. Akayesu*, 93 AM. J. INT’L L. 195, 196 (1999).

⁹ Akayesu Decision, ¶701 (emphasis added). It should be noted that in the factual discussion, the Akayesu Court did refer to the Tutsis as an ethnic group: “In the opinion of the Chamber, all this proves that it was indeed a particular group, the Tutsi *ethnic* group, which was targeted.” Akayesu Decision, ¶124 (emphasis added).

¹⁰ Akayesu Decision, ¶702.

¹¹ Amann, *supra* note 8, at 196.

¹² Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 179 (1995).

¹³ Robert Block, *The Tragedy of Rwanda*, N.Y. REV. OF BOOKS, October 20, 1994, at 4-6.

Rwanda [during the German League of Nations mandate], admittedly, had some eighteen clans defined primarily along lines of kinship. The terms Hutu and Tutsi were already in use but referred to individuals rather than to groups. In those days, the distinction between the Hutu and Tutsi was based on lineage rather than ethnicity.¹⁴

The Court went on to note that, in the 1930s, the Belgians imposed a “permanent distinction by dividing the population into three groups which they called ethnic groups” and made it “mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity.”¹⁵ This construct persisted until after the 1994 genocide.¹⁶

In spite of the blurry conceptual lines between the two groups, the Akayesu Court concluded that genocide had been committed by Hutus against the Tutsis. The Court specified the patrilineal nature of the Hutus and Tutsis in concluding that genocide had been committed. The Court remarked that “[e]ven pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father’s group of origin.”¹⁷ In drawing its legal conclusion, the Akayesu Court made note of the ethnicity category on the identity cards and the unprompted use of “Hutu” and “Tutsi” when witnesses were asked their ethnicity.¹⁸ Some have

¹⁴ Akayesu Decision, ¶81.

¹⁵ Akayesu Decision, ¶83.

¹⁶ Akayesu Decision, ¶83.

¹⁷ Akayesu Decision, ¶121 [sic].

¹⁸ Akayesu Decision, ¶702.

congratulated the Court for its expansion of the groups protected by the Genocide Convention,¹⁹ but others have questioned its sustainability.

III. LEGAL DISCUSSION

The genocide provision of the Statute is drawn directly and almost completely²⁰ from the Genocide Convention and therefore its own origins and legislative history are vital to any attempt to interpret the meaning of an “ethnic” group. Interpretation or application of a treaty is governed by the Vienna Convention on the Law of Treaties which lays out several general rules of interpretation.²¹ Article 31 of the Vienna Convention states that a treaty should be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”²² The same Article allows reference to “any subsequent practice in the application of the treaty which establishes the agreement of the parties

¹⁹ See Amann, *supra* note 8, at 198 (“The decision of the Tribunal to treat the Tutsi as if it were an enumerated group properly recognizes the role of socially imposed discrimination in establishing group identity. It evinces the kind of flexibility that drafters of the Convention had, in fact, endorsed.”) (notes omitted). See also Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: the 1998 Kambanda and Akayesu Case*, 11 FLA. J. INT’L L. 517, 531 (1997) (“By adding ‘stable and permanent group, whose membership is largely determined by birth,’ to the four existing categories, that is, national, ethnical, racial, and religious group, of the Genocide Convention, the Chamber has significantly expanded the kinds of populations that will be protected by that Convention. The Chamber also expanded upon the categories of protected peoples by refusing to confine itself to an objective, universalistic definition of ethnic group. Instead, it relied on the subjective perceptions of the Rwandan people.”).

²⁰ The term “ethnic” is substituted in the Statute for the term “ethnical” in the Genocide Convention.

²¹ Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27, signed May 23, 1969 and entered into force January 27, 1990 [hereinafter the “Vienna Convention”].

regarding its interpretation.”²³ In addition, the Article indicates that “a special meaning shall be given to a term if it is established that the parties so intended.” Article 32 allows reference to the *travaux préparatoire* or the facts surrounding completion of the treaty:

in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.²⁴

None of the protected groups of the Genocide Convention are defined within the convention. However, as noted by the Akayesu Court,²⁵ the International Court of Justice has defined one of the four groups, the “national” group.²⁶ Subsequent treaties have also elaborated by implication on the boundaries of other protected groups, for example the “racial” group in the International Convention on the Elimination of All Forms of Racial Discrimination.²⁷ These actions can be interpreted to imply that the groups created by the Genocide Convention are not self-explanatory

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²² Vienna Convention, *supra* note 21, article 33(1).

²³ Vienna Convention, *supra* note 21, article 33(1).

²⁴ Vienna Convention, *supra* note 21, article 32.

²⁵ Akayesu, ¶512.

²⁶ Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 23 (1955) (“According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”).

²⁷ 660 U.N.T.S. 195, article 1(1), entered into force January 4, 1969 (“the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”). This treaty incorporated three protected categories created by the Genocide Convention (racial, ethnical and national) into a single category (racial).

and their boundaries are not made obvious by the ordinary language of the convention. Moreover, the Permanent Court of International Justice has utilized *travaux préparatoire* to confirm “its conclusions as to the ‘ordinary’ meaning of the text.”²⁸ Accordingly, a review of the preparatory work of the drafters of the Genocide Convention would be appropriate under Article 32(a).

In crafting the Genocide Convention and, in particular, the provisions related to the crime of genocide, the diplomatic delegations had different views of the task at hand. Some delegations believed that the purpose was to codify pre-existing international law related to the crime of genocide that had been announced or acknowledged both by the Nürnberg trials and the General Assembly.²⁹ For example, the Soviet representative objected to a provision because it introduced questions which were “extraneous to the very concept of genocide.”³⁰ He argued that the groups to be protected by the Genocide Convention must be selected on “legal and historic grounds.”³¹ In contrast, other delegations argued that the “etymology of the word ‘genocide’ could not determine its definitive meaning, for words evolved and changed in meaning even in legislative

²⁸ International Law Commission, *Report of the International Law Commission to the General Assembly*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, 223 (1966) *quoting* Interpretation of the Convention of 1919 concerning Employment of Women during the Night, P.C.I.J. (1932), Series A/B, No. 50, 380.

²⁹ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 101, 104, U.N. Doc. A/C.6/SR.74 (1948). *referencing* Official Records of the Second Part of the First Sessions of the General Assembly, 6th Comm., 55th plenary meeting.

³⁰ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 105, U.N. Doc. A/C.6/SR.74 (1948).

³¹ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 106, U.N. Doc. A/C.6/SR.74 (1948).

texts.”³² In either case, the Genocide Convention is understood today to have settled the language of international law with respect to the crime of genocide.³³

A. Adding “Ethnical” to the Genocide Convention

Review of the *travaux préparatoire* of the Genocide Convention with respect to the inclusion of “ethnical” groups suggests that the Akayesu Court defined “ethnical” groups too narrowly. The drafters of the Genocide Convention voted to include the word “ethnical” after the draft convention already included “national,” “racial” and “religious” groups. While the vote on the amendment to add “ethnical” groups to the draft convention, a Swedish proposal, was very close (18-17, with 11 abstentions), the actual debate over the amendment was brief. The Swedish representative presented two situations where convention coverage was appropriate but not available without the term “ethnical.” He noted:

The constituent factor of a minority might be the language spoken by that group. If a linguistic group were unconnected with an existing State, it would not be protected as a national group, but it could be protected as an ethnical group.

³² U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 114, U.N. Doc. A/C.6/SR.74 (1948). Similarly, the Greek representative argued that: “[t]here were no theoretical or practical reasons for excluding political groups. Member States themselves must decide whether they intended to exclude them or not.” U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 107, U.N. Doc. A/C.6/SR.74 (1948).

³³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702, comment b (1986) (noting that the definition of genocide stated in Article II of the Genocide Convention “is generally accepted for purposes of customary law under this section”). *See also* Case Concerning Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1995 I.C.J. ¶ 31 (Preliminary Objections Judgment, July 11) (“It follows that the rights and obligations *enshrined* by the Convention are rights and obligations *erga omnes*”) (emphasis added).

The concept of a racial group was often ill-defined. Its 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.

Addition of the ethnical group would make it possible both to clarify those ideas, and to extend protection to doubtful cases.³⁴

The Swedish representative also received support from the Haitian representative who noted that racial intermingling presented a serious challenge to the efficacy of a definition of genocide based on racial groups. He favored the Swedish amendment because:

intermingling between the races in certain regions had made the problem of race so 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.³⁵

This debate also reflected some ambivalence about including ethnical groups. The Egyptian, Uruguayan and Belgian representatives commented that terms “racial” and “ethnical” have the same meaning.³⁶ The Egyptian representative interpreted the addition of “ethnical” as an effort to clarify the meaning of a “national” group and rejected it as unnecessary.³⁷ Nonetheless, if

³⁴ U.N. GAOR 6th Comm., 3rd Sess., 75th mtg. at 115, U.N. Doc. A/C.6/SR.75 (1948) (emphasis added).

³⁵ U.N. GAOR 6th Comm., 3rd Sess., 75th mtg. at 116, U.N. Doc. A/C.6/SR.75 (1948).

³⁶ U.N. GAOR 6th Comm., 3rd Sess., 75th mtg. at 115, U.N. Doc. A/C.6/SR.75 (1948) (“no great difference between ethnical and racial groups”); U.N. GAOR 6th Comm., 3rd Sess., 75th mtg. at 115, U.N. Doc. A/C.6/SR.75 (1948) (“the two words had the same meaning”); U.N. GAOR 6th Comm., 3rd Sess., 75th mtg. at 116, U.N. Doc. A/C.6/SR.75 (1948) (“the two words had exactly the same meaning; consequently, nothing would be added to the text by inserting the ethnical group”).

³⁷ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 99-100, U.N. Doc. A/C.6/SR.74 (1948) (“[Mr. Raafat] did not think that the Swedish amendment, which sought to clarify the concept of the national by adding the word “ethnical”, was justified. The well-known problem of the

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interpretive guidance is to be drawn from the argument or arguments that carried the vote, then it would likely be a mischaracterization to limit the commonalties of an ethnical group to language and/or culture. In particular, the Swedish representative introduced the ideas of linguistic or cultural commonalties as *examples* of defining characteristics of ethnical groups, not as the *only* possible defining characteristics. An ethnical group might be defined, as the Swedish representative noted, by the “whole of its traditions.”³⁸

The definition of ethnical groups varied from delegation to delegation. In a debate over the inclusion of “political” groups in the draft convention, the representative of the Soviet Union argued that an “ethnical group was a sub-group of a national group; it was a smaller collectivity than the nation, but one whose existence could nevertheless be of benefit to humanity.” In the same debate, the Belgian representative stated that:

“[i]f the etymology of the word ‘genocide’ were borne in mind, the conclusion would have to be that the crime could be committed only against ethnical groups. The addition of religious groups constituted an extension of the concept of genocide, but that extension had been sanctioned by international law.”³⁹

If anything, the *travaux* underscores the desire of the drafters to further refine the convention’s reach by extending its coverage, in a workable way, to situations in which international boundaries or interracial marriages have made the “national” or “racial” categories difficult to apply.

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German minorities in Poland or of the Polish minorities in Germany, and the question of the Sudeten Germans, showed that the idea of the national group was perfectly clear.”)

³⁸ U.N. GAOR 6th Comm., 3rd Sess., 75th mtg. at 115, U.N. Doc. A/C.6/SR.75 (1948).

The debate over the inclusion of “political” groups underscores the drafters’ intent to fashion the Genocide Convention’s coverage in a way that did not damage its overall efficacy.⁴⁰ Working towards that end, the delegations sought to limit coverage to stable and “permanent” groups,⁴¹ a point observed by the Akayesu Court.⁴² The Iranian representative explained the rationale supporting this limitation:

If it were recognized that there was a distinction between those groups, membership of which was inevitable, such as racial, religious or national groups, whose distinctive features were permanent; and those, membership of which was voluntary, such as political groups, whose distinctive features were not permanent, it must be admitted that the destruction of the first type appeared most heinous in the light of humanity, since it was directed against human being whom chance alone had grouped together.⁴³

As another representative noted, “[t]hose who needed protection most were those who could not alter their status.”⁴⁴ The Soviet representative emphasized that the criterion used to identify protected groups should be “of an objective character.”⁴⁵ The groups to be protected, according to the Soviet representative, would be “the racial and national groups, which constituted distinct,

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³⁹ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 107, U.N. Doc. A/C.6/SR.74 (1948).

⁴⁰ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 100, U.N. Doc. A/C.6/SR.74 (1948) (“The convention would be weakened if its scope were made too wide”).

⁴¹ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 99, U.N. Doc. A/C.6/SR.74 (1948).

⁴² Akayesu Decision, ¶516.

⁴³ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 99, U.N. Doc. A/C.6/SR.74 (1948) (“Although it was true that people could change their nationality or their religion, such changes did not in fact happen very often; national and religious groups therefore belonged to the category of groups, membership of which was inevitable.”).

⁴⁴ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 111, U.N. Doc. A/C.6/SR.74 (1948).

⁴⁵ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 105, U.N. Doc. A/C.6/SR.74 (1948).

clearly determinable communities.”⁴⁶ In spite of this commitment to protecting only groups with largely immutable characteristics, the representatives did not identify through their debates or otherwise the constituent elements of an “ethnic” group.

The drafters, nonetheless, did outline certain parameters. If an “ethnic” group relied on biological and/or physiological differences between peoples for its boundaries, there would be no difference between the term “ethnic” and “racial.” As the Swedish and Haitian delegates stated, however, the term is based more on cultural differences between groups, cultural differences that are unalterable by individuals’ choice – differences that exist between Hutus and Tutsis in Rwanda. Despite the intermarriages, Hutus and Tutsis constitute “distinct” and “clearly determinable communities” due to, inter alia, their patrilineal traditions and social distinctions set at birth. The Akayesu Court was correct in striving to limit the protection of the Genocide Convention to a “stable, permanent group”, but it did not need to reject the application of term “ethnic” to the Hutus and Tutsis groups.

B. Post-Genocide Convention Efforts

Many legal scholars and others have tried to fill the definitional gap left by the drafters of the Genocide Convention. The United Nations Educational, Scientific and Cultural Organization gathered experts together in 1950 (and several times thereafter) in an attempt to define a “racial” group. The experts argued that a racial group was identifiable because of a concentration of “hereditary particles (genes)” or “physical characters,” but also acknowledged that these

⁴⁶ U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 105, U.N. Doc. A/C.6/SR.74 (1948).

concentrations were variable and sometimes subject to disappearance.⁴⁷ The experts then noted that “[n]ational, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups: and the cultural traits of such groups have not demonstrated genetic connexion with racial traits.”⁴⁸ Consequently, the experts argued in favor of dropping “the term ‘race’ altogether and speak[ing] of ethnic groups.”⁴⁹ Another scholar offered an expansive definition of ethnic groups as “descent groups, differentiated by language, culture, style, national origin, *kinship ties* and religious belief.”⁵⁰ These definitions present a marked difference from that offered by the Akayesu Court, a difference that would allow Hutus and Tutsis to be identified as ethnic groups.

C. Treatment of “Ethnic” by Other Treaties

Treaties and other international documents that followed the Genocide Convention treat “ethnic” as a characteristic whose content is separate, or potentially separate, from a shared language or a shared culture. The term “ethnic” was incorporated into a number of treaties which sought to offer rights and protection to minorities. Notably, Article 27 of the International Covenant on Civil and Political Rights, signed in 1966, declared that:

⁴⁷ United Nations Educational, Scientific and Cultural Organization (UNESCO), *FOUR STATEMENTS ON THE RACE QUESTION* 30-31 (1969).

⁴⁸ UNESCO, *supra* note 47, at 31.

⁴⁹ UNESCO, *supra* note 47, at 31.

⁵⁰ J. Massiah, “Ethnic Structure of the West Indies,” paper submitted to the seminar “Caribbean Background II” held in 1970 by the Centre for Multiracial Studies in Barbados, 1 (emphasis added) *quoted by* Maryellen Fullerton, *A Comparative Look at Refugee Status Based on*

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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 the other members of their group to enjoy their own culture, to profess and practise their own religion, or to use their own language.⁵¹

By listing the three minority group as equals in sequence, this provision underscores that a linguistic minority can be separate and distinct from a ethnic minority.⁵² The official commentary on Article 27 also acknowledges this possibility: “[t]he terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion *and/or* a language.⁵³ The use of “or” confirms this reading of the text. A United Nations study that followed in 1977 defined the term minority in the following way:

A group numerically inferior to the rest of the population, 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

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Persecution Due to Membership in a Particular Social Group, 26 CORNELL INT’L L.J. 505, 524 (1993).

⁵¹ International Covenant on Civil and Political Rights, art. 27, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter the “ICCPR”].

⁵² Admittedly, a textual reading (using the process of elimination) might lead one to conclude that the term “ethnic” minority refers to a group that shares the same culture, as a religious group would “profess and practice [its] own religion” and a linguistic minority would “use [its] own language.” ICCPR, *supra* note 51, article 27.

⁵³ Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 38 ¶5.1 (1994) (emphasis added). The Committee went on to observe “that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.” *Id.* at ¶7.

show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁵⁴

Again the use of language suggests that “ethnic” and “linguistic” characteristic are not necessarily overlapping. The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, which followed in 1990, used the same form.⁵⁵ Such usage of “ethnic” in international documents does not provide any significant support for the Court’s narrow definition of an “ethnic” group. A declaration adopted in 1992 by the United Nations General Assembly, picking up on the Egyptian view expressed nearly 48 years earlier, implied that “national” and “ethnic” were interchangeable by listing the groups in the following way: “[p]ersons belonging to national *or* ethnic, religious and linguistic minorities....”⁵⁶ This variation allowed “ethnic” to substitute for “national,” but allowed no such substitution with respect to “linguistic.” Thus, even this reference to an “ethnic” group does not support the finding of the Akayesu Court.

The current international legal understanding of groups, however, may be on a trend that will go beyond the limits set by the drafters of the Genocide Convention. In one of the most

⁵⁴ Francesco Capotorti, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, §10, U.N. Doc. E/CN.4/Sub.2/384/Add.5 (1977).

⁵⁵ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, ¶32 (June 1990), 29 I.L.M. 1305 (1990) (“Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.”).

recent expressions with respect to “national minorities,” the language reflects a shift towards subjective, rather than objective, criteria. An additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms proposed by the European Parliament defined “national minority” as:

a group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof,
- b. maintain long standing, firm and lasting ties with that state,
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state,
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.⁵⁷

More notable is the final factor in the definition which focuses on the desire of the group to preserve its identity.⁵⁸ This factor introduces something that allows groups that are not immutable or “stable” and “permanent” to be considered “national minorities” deserving of protection. The concern for the Genocide Convention is not immediate because the convention

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⁵⁶ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Annex, art. 2(1), G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (1992) *reprinted in* 32 I.L.M. 911, 915 (1993).

⁵⁷ Parliamentary Assembly of the Council of Europe, *Recommendation 1201 on an Additional Protocol on the Rights of Minorities to the ECHR*, February 1, 1993. It should be noted that, like previous treaties and other international documents, the proposed protocol implies that ethnic characteristics may not necessarily overlap with cultural or linguistic characteristics by listing them as equals in sequence.

⁵⁸ The 1977 United Nations study, *supra* note 54, also included a desire of the group to preserve itself, but it was worded in such way to suggest that the desire be observable

(continued...)

does not employ “national minority,” however, this trend may tear at the principle woven almost without dissent into the *travaux* of the Genocide Convention.

In sum, it should be noted that modern usage of the term “ethnic” in international law documents reflects a set of characteristics that may not be covered entirely by language or culture. Accordingly, the definition set out by the Akayesu Court is out of step with both the *travaux* of the Genocide Convention and the usage of the word today. Patrilineal membership, traditions, and social distinction based on birth would be sufficient to garner the status of an “ethnic” group for the Hutu and/or Tutsi group.⊕

cc: Cyrus Benson, III
Allan Gropper
Abby Cohen Smutny
Lee Steven

(...continued)

externally. Here the self-preservation requirement may be a “motive,” which appears to be a lower threshold.