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Genocide and Discrimination: Lessons to Be Learnt from Discrimination Law

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Abstract
A survey of the case law of the ICTY and ICTR reveals inconsistencies and conceptual discrepancies in the approach to genocide cases, in particular with respect to the cornerstones of such cases – the identification of the protected group and its members – resulting in different levels of protection against genocide. A review model might help to address these issues, which are, arguably, preconditions of the legitimacy of these courts and of the effective enforcement of the prohibition of genocide. Given the close relationship between genocide and discrimination, this review model might be built on the 'building blocks' of discrimination law. The purpose of this contribution is twofold: (1) by unfolding the relationship between direct discrimination and genocide to devise a model of review, and (2) to analyse the consequences of the consistent application of this model for the identification of the protected groups and their members.

Key words
discrimination; genocide; ICTR; ICTY; international criminal law; members of the protected groups; protected groups

1. Introduction

Increasing globalization has gone hand in hand with proliferation of international criminal judicial bodies. Given the facts that international criminal law is a relatively new field of law and that most of these judicial bodies were created to address crimes that have been committed in a specific context, the adjudication of similar cases has often followed different paths, resulting in different levels of protection against international crimes. One could argue, however, that different approaches to similar cases would not help to legitimize the existence of and adjudication by international criminal courts and would not contribute to the effective enforcement of the prohibition of such crimes. Although consistent jurisprudence is important in each field of law, in international criminal law it is even more so preconditioned by one of its foundational principles – *nullum crimen sine lege*.[1]

Adjudication about international crimes has not been a simple task, given, among other things, the complexities of the legal provisions and the factual circumstances

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1 For similar arguments concerning the approach towards persecution charges see C. Fournet and C. Pégorier, '"Only One Step Away from Genocide": The Crime of Persecution in International Criminal Law', (2010) 10 *International Criminal Law Review* 713, at 713–14.

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of the cases. The crime of genocide,[2] the law of which is still evolving,[3] is, arguably, the most complex crime of all. A survey of the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) reveals inconsistencies and conceptual discrepancies in the approach to genocide cases, in particular with respect to the cornerstones of such cases, namely the identification of the protected group and its members.[4] The basic assumption of this paper is that a conceptually well-established and coherent review model might help to achieve consistency and find a common language across the different international criminal courts and within their own jurisprudence in the future, and thus would enhance the level of protection against genocide as well as the legitimacy of these courts.

It is generally accepted that, conceptually, there is an essential link between genocide and direct discrimination: the concept of genocide has a discriminatory component and the crime of genocide is the result of serious and far-reaching discrimination against certain groups.[5] Based on this relationship, it can be argued that the concept of discrimination and the theoretical considerations of discrimination law can provide the building blocks and the foundational basis for a model of review for genocide cases in international criminal law.[6]

The purpose of this contribution is, accordingly, twofold. First, the paper aims to unfold the relationship between direct discrimination and genocide, based on which to identify the building blocks of a review model, and to devise the model itself. Second, it will analyse the consequences of the consistent application of this model for the identification of the members of the protected group and the protected group itself, illustrating the different aspects with cases brought before the ICTY and the ICTR.

In order to achieve these goals the paper is structured as follows. Section 2 proceeds in three steps toward a model of review for genocide cases. First, the paper will explain the relationship between genocide and direct discrimination on the grounds of race or religion (subsection 2.1). Second, it introduces the building

2 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951), Art. 2; 1991 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc.S/S/RES/827 (1993), Art. 4; 1994 Statute of the International Criminal Tribunal for Rwanda, UN Doc.S/RES/955 (1994), Art. 2; (1998) Rome Statute of the International Criminal Court, UN Doc.A/CONF.183/9 (2002), Art. 6. For a comprehensive analysis of this crime, see W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2009).

3 W. A. Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 LJIL 871, at 874.

4 Another much-debated and discussed aspect is the special intent and its meaning. Given the limited space of this article, issues relating to the special intent will not be addressed in great detail.

5 This position was confirmed, inter alia, in the *Kupreškić* case. According to the Trial Chamber '[b]oth persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discrimination: to attack persons on account of their ethnic, racial, or religious characteristics'. *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić*, Judgement, Case No. IT-95-16-T, T.Ch., 14 January 2000, para. 636.

6 Although the present article focuses on the criminal-law approach, the International Court of Justice could also rely on this model when deliberating a dispute between states concerning the interpretation, application, or fulfilment of the Genocide Convention, as enshrined in Article 9 Genocide Convention.

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blocks of a review model (subsection 2.2). Third, based on this relationship and the building blocks a review model will be devised (subsection 2.3). This review model will serve as the basis for the further analysis of the two essential aspects of genocide cases: the identification of the members of the protected group and the identification of the protected group itself. Section 3 will take a closer look at the different approaches toward the identification of members of the protected group (subsection 3.1), will suggest that the approach taken in discrimination law can also be followed in genocide cases (subsection 3.2), and will rebut the arguments brought up against the suggested approach (subsection 3.3). Section 4 will discuss the two most controversial aspects relating to the identification of the protected group: coverage of the protected group (subsection 4.1) and the approach to the identification of the protected group (subsection 4.2), and will point to the approach flowing logically from the review model. The paper will conclude with some final observations (subsection 5).

2. Toward a model of review for genocide cases

2.1. Direct discrimination and genocide: the relationship

It is generally accepted that genocide and direct discrimination on the grounds of race[7] and/or religion are related to each other in several respects.[8] Direct racial and/or religious discrimination is considered to mean that an individual suffers disadvantage (is treated differently) on the grounds of his/her race or religion.[9] One could argue that such discrimination is included in the concept of genocide, which is defined as committing certain acts, such as killing *members of a group*, causing serious bodily or mental harm to *members of a group*, and so on, *with the intent to destroy*, in whole or in part, this *national, ethnic, racial, or religious group*.[10] The discriminatory aspect of genocide is generally argued to relate to the special intent to destroy a group 'as such'.[11] The intent to destroy a group absorbs the intent to discriminate against this specific group. However, it can be asserted that the prohibited conduct (*actus reus*) is also discriminatory, as it concerns not merely killing someone, but *killing members of a protected group*. So in terms of discrimination,

7 For the sake of simple referencing, 'race' here is understood in a broad sense, including national, ethnic, and racial groups in the definition of genocide.

8 See, e.g., G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), at 226.

9 The most often quoted and accepted definition of direct racial discrimination can be found in the Racial Equality Directive (RED) adopted by the European Union. It defines this phenomenon as follows: '*direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin*'. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(2)(a). Except for the protected grounds, the same definition can be found in the Framework Equality Directive (FD) with regard to direct discrimination on the grounds of religion or belief. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(a).

10 Genocide Convention, *supra* note 2, Art. 2. The same definition was adopted in the ICTY Statute, *supra* note 2, Art. 4; ICTR Statute, *supra* note 2, Art. 2; ICC Statute, *supra* note 2, Art. 6.

11 For a recent example, see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, P.T.Ch. I, 4 March 2009, para. 142. See also *Kupreškić* case, *supra* note 5, para. 636.

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the conduct constitutes discrimination against the *individual members* of the group, while the special intent refers to the intent to eliminate the *group* against the members of which discrimination was carried out.

Persecution on political, racial, national, ethnic, or religious grounds, a crime against humanity,[12] is often compared with genocide given the discriminatory component in both concepts; i.e., the intent to discriminate against a specific group in persecution cases is compared with the intent to destroy a protected group in case of genocide. Although both crimes incorporate the intent to *discriminate against a group*, it is generally accepted that the special intent of the crime of genocide constitutes a distinctive feature between these two crimes.[13] Notwithstanding this difference in the *mens rea*, in light of the above explanation of the relationship between discrimination and genocide, it can be argued that in both cases there is *discrimination against the individual members* of the protected group when a specific conduct is committed. This discrimination is an aspect stemming from but at the same time separate from *the intent to destroy a specific group* in genocide cases and from *the intent to discriminate against a protected group* in persecution cases. Whilst the *mens rea* is different in these two crimes, the *actus reus* in both cases includes discrimination. Accordingly, given this similarity, the approach toward the identification of members of the protected group as well as the protected group in persecution cases can be considered in the examination of genocide cases, and, for the sake of consistency, these approaches should be harmonized.

2.2. Building blocks of a model of review for genocide cases

Although the concept of discrimination has been clothed with different understandings and interpretations,[14] the following conceptual 'building blocks' of direct racial/religious discrimination can be identified: *harm* suffered (less-favourable treatment, disadvantage), *protected characteristic* (race and/or religion) and a *causal link* between the harm and the characteristic (less-favourable treatment *on the grounds of* race and/or religion).[15]

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12 ICTY Statute, *supra* note 2, Art. 5; ICTR Statute, *supra* note 2, Art. 3, ICC Statute, *supra* note 2, Art. 7(h). The prohibited grounds are not entirely the same under the three statutes.

13 This position was also adopted in the *Kupreškić* case, *supra* note 5 (and confirmed also by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996, [1996] ICJ Rep. 43). According to the ICTY 'the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong.' *Kupreškić* case, *supra* note 5, para. 636.

14 See, inter alia, S. Fredman, *Discrimination Law* (2002).

15 See, e.g., M. J. Busstra, *The Implications of the Racial Equality Directive for Minority Protection within the European Union* (2011), at 148–57; M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (2011), at 23–5.

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For instance, if a Roma person is not employed on the explicitly stated grounds of his Roma origin, this is a clear case of *overt direct* racial discrimination: he suffered harm (rejection) on the grounds of (causal link) his racial origin (protected characteristic). However, very often the reason indicated for the refusal does not directly and explicitly refer to the Roma origin of the person; rather the potential employer gives the explanation that, for instance, the position has already been filled, or the applicant did not have enough experience; i.e., it is unclear whether there was a causal link between the harm and the racial origin. The suffered harm and the protected characteristic are present, but it is not clear what the actual reason of the employer was. In such cases, it has to be strictly scrutinized whether or not there is a causal link between the applicant's Roma origin and his unsuccessfulness in getting this job. This and similar cases can be categorized as *covert direct* discrimination.[16]

Covert direct discrimination cases should, however, not be confused with indirect discrimination cases. Indirect discrimination focuses on the discriminatory *effect* of a seemingly neutral measure as opposed to the *causal relationship* in (covert and overt) direct discrimination cases.[17] A typical case of indirect discrimination is when, for instance, a rule is introduced that the lunch break of cleaners will be unpaid. If a high percentage of cleaners belongs to a certain racial or religious group, it can be proved that this measure has a disadvantageous effect on this group, and thus constitutes indirect discrimination against them. In this case the reason of the perpetrator is irrelevant; discrimination is established on the basis of the effect/impact of the measure at stake on a specific group. Due to its focus on the effect of a seemingly neutral measure, the concept of indirect discrimination is, arguably, not applicable to genocide cases, and will not be discussed further.

Given the relationship between the concepts of direct racial and/or religious discrimination and genocide, these building blocks can also be explored in the definition of genocide (and persecution) relating to the conduct element, where the individual discrimination takes place. The *harm* would be a conduct, a list of which is provided in Article II Genocide Convention (killing, inflicting serious bodily or mental harm, and so on); the *protected characteristics* are the following: nationality, racial or ethnic origin, or religion, and it has to be proven that killing of or inflicting serious bodily and mental harm and so on on certain individuals were carried out on the grounds of the victims' national, racial, or ethnic origin or religious affiliation; i.e., that there is a *causal link* between the harm and the protected characteristic.

2.3. Model of review for genocide cases

As explained above, the *conduct* (e.g., killing of members of a group, *actus reus*) can be regarded as a specific form of direct discrimination on the grounds of race and/or religion: the perpetrator commits the specific act (e.g., killing) on discriminatory

16 See, e.g., D. Schiek, L. Waddington, and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007), at 185–6; Ambrus, *supra* note 15, at 30–4. As an effect of the explicit prohibition of direct discrimination the number of overt discrimination cases continuously decreases, with the result that proving discrimination, more specifically the causal link, becomes more difficult.

17 See, inter alia, Busstra, *supra* note 15, at 138–48.

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grounds (causal link) in addition to the intent to commit this act (e.g., intent to kill, *dolus actus*). So the *formula of the conduct* could be described as follows:[18]

act + intent to commit this act (*dolus actus*) + discriminatory grounds (causal link) = conduct (discrimination, *actus reus*)

This formula is based on the identification of the different elements of the conduct in genocide cases; i.e., the causal link can be regarded as an inherent element in the definition of the conduct. Accordingly, the explicit mention of the discriminatory component does not create any additional burden of proof. The purpose of the explicit acknowledgement of the discrimination component is to realize that such a killing, inflicting serious injury, and so on conceptually constitute discrimination, which, in turn, has consequences for the approach judicial bodies should take toward the identification of the members of the protected group and the protected group itself. So realizing that the conduct constitutes discrimination has effect on who can be regarded as victims of genocide, and, hence, which deeds are parts of the genocidal charges.

If the conduct can be seen as a specific form of discrimination, the *formula of genocide* will be the following:

conduct (discrimination, *actus reus*) + special intent (*dolus specialis*) = genocide[19]

When examining genocide cases judicial bodies follow a two-step approach: first they look at the *act* in combination with the *dolus actus* required for this conduct (e.g., intent to kill) and then examine the *dolus specialis* (intent to destroy the group specified in the definition). Some considerations have been given to discrimination only with regard to the *dolus specialis*.[20] In light of the relationship between genocide and discrimination and the formula described above, the suggested approach, i.e., the model of review, would, however, be the following: judges should first look at whether discrimination on the specified grounds has taken place (killing members of the group), and then examine whether this discriminatory conduct has been

18 This contribution does not aim to discuss the crime of genocide in terms of *mens rea* and *actus reus*; rather it focuses on the conceptual elements of this crime. Note that sometimes the term '*actus reus*' is used to refer merely to what is here called the specific acts (e.g., killing) without including the discriminatory aspect; that is, killing *members of the protected group*.

19 Although the ICJ wanted to emphasize the special nature of the special intent, the above position seems to be confirmed by its judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, *supra* note 13. More concretely, the Court explained that '[i]t is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a *discriminatory intent*. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.' *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] ICJ Rep. 43, at 121, para. 187 (emphasis added).

20 Although there were some inconsistencies in the case law (in particular of the ICTR) in the order in which to follow when examining genocide cases, it seems now generally accepted to first look at the *actus reus* and then examine the *mens rea* of the perpetrator. See, e.g., *Prosecutor v. Laurent Semanza*, Judgement and Sentence, Case No. ICTR-97-20-T, T.Ch., 15 May 2003, paras. 311–323; *Prosecutor v. Clément Kayeshima and Obed Ruzindana*, Judgement, Case No. ICTR-95-1-T, T.Ch. II, 21 May 1999, para. 520; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 19, para 43.

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committed with the intent to destroy this particular group. The suggested *review model* is, thus, the following:

Stage 1: (act + intent to commit this act + causal link =) conduct (discrimination, *actus reus*) Stage 2: special intent

Conceptually, these two stages of investigating genocide cases can be well distinguished; however, in practice they are most of the time intertwined in that the factual evidence and the legal argumentation of the two stages often overlap.[21] In certain cases, there might be some direct evidence about the intent to destroy a group – for instance, some official documents might exist. This intent can then also be used to prove the causal link at the discrimination/conduct stage.[22] In other cases, there might not be any evidence about the intent to eliminate a group; however, inferences might be drawn from the first stage. For instance, the scale and extent of discriminatory killing might indicate the intent to destroy a specific group.[23]

One could argue that advancing such a discrimination-based approach would introduce a motive element in the crime of genocide, and for this reason it cannot be accepted. Indeed, it is generally accepted that '[t]he motive for which a crime is committed, as opposed to the intention with which it is committed, is ordinarily irrelevant to guilt in criminal law'.[24] However, this argument against acknowledging the discriminatory component of the conduct of genocide can be rebutted for, at least, two reasons. First, as mentioned above, the explicit acknowledgement of the discriminatory nature of the conduct merely aims to provide further assistance in the identification of the protected groups and their members, and does not aim to impose any additional burden of proof in the investigation of and deliberation on genocide charges. Second, and irrespective of the explicit identification of the conduct as discrimination, the claim is commonly made with regard to the special intent that

> the discriminatory nature of genocide seems to require a motive: the victims are singled out not by reason of their individual identity but because of their membership of a national, ethnic, racial or religious group. . . . personal motivation for the perpetrator's participation in the crime is not relevant – but having a discriminatory purpose for the crime is intrinsic to the special intent.[25]

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21 See also A. Cassese, *International Criminal Law* (2008), at 142; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgement, Case No. ICTR-95-1-T, T.Ch. II, 21 May 1999, paras. 531–540; *Prosecutor v. Alfred Musema*, Judgement, and Sentence, Case No. ICTR-96-13-A, T.Ch. I, 27 January 2000, paras. 928–931; *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabukuze, Anatole Nsengiyumva*, Judgement and Sentence, Case No. ICTR-98-41-T, T.Ch. I, 18 December 2008, para. 2116.

22 See, e.g., *Prosecutor v. Radislav Krstić*, Judgement, Case No. IT-98-33-T, T.Ch., 2 August 2001, para. 547.

23 See, e.g., *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, para. 523; B. van Schaack, 'International Law Weekend-West: Panel Presentation: Darfur and the Rhetoric of Genocide', (2005) 26 *Whittier Law Review* 1101, at 1127–31.

24 R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2010), at 222–3.

25 Ibid.

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In a similar vein, it has been argued that 'it should be necessary for the prosecution to establish that genocide, taken in its collective dimension, was committed "on the grounds of nationality, race, ethnicity, or religion". The crime must, in other words, be motivated by hatred of the group.'[26] These claims take the position that a motive is inherently included in the special-intent requirement of genocide. If this is indeed the case, the explicit acknowledgement that the conduct element of genocide (as opposed to the special intent) constitutes discrimination would not add a further motive element, as discrimination against the members of the protected group stems from this collective hatred against a specific group, and not from the individual motive of the perpetrator.

This suggested review model might place the problems relating to two fundamental aspects of genocide cases in a somewhat different light and help to identify the most appropriate solutions that could address them. These problems relate to the difficulties with and inconsistencies in identifying the members of the protected group and identifying the protected group itself.

3. Identification of members of the protected group

In order to establish that genocide has been committed, an important question to be answered is whether the particular person attacked is a member of a protected group, which requires the existence of a consistent and conceptually well-founded approach toward the identification of the members of a protected group. A closer look at the case law of the international criminal courts reveals that two main approaches have been used for the identification of the members of the protected group in a rather inconsistent and unclear manner.[27]

After introducing these two approaches, it will be suggested that an answer to the dilemma as to which approach should be applied can come from the review model and its discrimination component. The arguments against the suggested approach will also be discussed and an attempt will be made to address them.

3.1. Objective versus subjective approach

In the legal literature as well as in the case law a discussion is going on over which approach should be applied by international criminal courts with regard to the identification of the members of a protected group: the so-called objective or subjective approach.[28] The objective approach means that the judicial body examines

26 Schabas, *supra* note 2, at 306.

27 Compare, for instance, the following judgements: *Akayesu* case, *supra* note 23, para. 521; *Prosecutor v. Ignace Bagilishema*, Judgement, Case No. ICTR-95-1A-T, T. Ch. I, 7 June 2001, para. 65; *Prosecutor v. Laurent Semanza*, Judgement and Sentence, Case No. ICTR-97-20-T, T.Ch., 15 May 2003, para. 317; *Prosecutor v. Goran Jelisić*, Judgement, Case No. IT-95-10-T, T.Ch., 14 December 1999, para. 70; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc.S/2005/60, 25 January 2005, para. 509; *Prosecutor v. George Rutaganda*, Judgement, Case No. ICTR-97-21-T, T.Ch. I, 6 December 1999, para. 56; *Prosecutor v. Juvénal Kajelijeli*, Judgement, Case No. ICTR-98-44A-T, T.Ch. II, 1 December 2003, para. 811. See also Cryer et al., *supra* note 24, at 211–13; Mettraux, *supra* note 8, at 223–4.

28 See, inter alia, Cryer et al., *supra* note 24, at 213; Schabas, *supra* note 2, at 124–9; Schabas, *supra* note 3, at 879–80; Mettraux, *supra* note 8, at 224.

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the objective existence of the racial or religious identity of the victim; that is, whether or not the victim *actually belonged* to a certain racial or religious group or actually possessed the so-called 'objective' features that identify the members of these groups. In the *Akayesu* case, for instance,[29] the point of departure of the ICTR seems to have been based on an objective approach. The Chamber stated that

> for any of the acts charged under Article 2(2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals *were members of a specific group*, and specifically because they belonged to this group.[30]

More concretely, the question was raised whether serious bodily and mental harm inflicted on a Hutu woman can be regarded as forming part of the genocidal conduct against the Tutsi group. The factual description of the case explains that this should not be the case:

> Akayesu . . . went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her on the whereabouts of Alexia, the wife of Professor Ntereye. During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. . . . Although the above acts constitute serious bodily and mental harm inflicted on the victim, the Chamber notes that *they were committed against a Hutu woman*. Consequently, they cannot constitute acts of genocide against the Tutsi group.[31]

The application of the objective approach can also be observed in persecution cases.[32] Since the *Krnojelac* case[33] it seems now established that

> [t]he crime of persecution consists of an act or omission which (1) *discriminates in fact* and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[34]

'Discrimination in fact' has been argued to mean that '[t]here must be a discriminatory *effect* upon the victims',[35] i.e., persecution can be established when the act

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29 See also *Prosecutor v. Goran Jelisić*, Judgement, Case No. IT-95-10-T, T.Ch., 14 December 1999, para. 66. For a more recent application of this approach, see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, P.T.Ch. I, 4 March 2009, para. 137. On this aspect of the case, see also R. Cryer, 'The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision', (2009) 7 *Journal of International Criminal Justice* 283, at 292–3.

30 *Akayesu* case, *supra* note 23, para. 521 (emphasis added).

31 Ibid., paras. 720–721 (emphasis added).

32 See also K. Roberts, 'The Law of Persecution before the International Criminal Tribunal for the Former Yugoslavia', (2002) 15 LJIL 623, at 626.

33 This approach has been confirmed most recently by the ICTY. See *Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač*, Judgement, Case No. IT-06-90-T, T.Ch. I, 15 April 2011, para. 1852.

34 *Prosecutor v. Milorad Krnojelac*, Judgement, Case No. IT-97-25-T, T.Ch., 15 March 2002, para. 431 (emphasis added). Further confirmed in subsequent cases also by the Appeals Chamber. See, inter alia, *Prosecutor v. VlastimirĐorđević*, Judgement, Case No. IT-05-87/1-T, T.Ch. II, 23 February 2011, paras. 1755 and 1757–1758; *Gotovina* case, *supra* note 33, paras. 1802 and 1843; *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, Case No. IT-95-14/2-A, A.Ch., 17 December 2004, para. 101.

35 D. L. Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity', (2007) 43 SJIL 221, at 242.

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of the perpetrator results in discrimination against those actually belonging to the group.[36]

Opposed to this view, the subjective approach focuses on the identification of the victims by the perpetrator.[37] In the *Gacumbtsi* case, for instance, the Trial Chamber of the ICTR explained that

> [m]embership of a group is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, but the determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria. . . . Evidence must also be tendered to show either that the *victim belonged* to the targeted ethnical, racial, national or religious group or that the *perpetrator of the crime believed that the victim belonged to the said group*.[38]

So the Trial Chamber was willing to take into account the perception of the perpetrators for the identification of the members of the group. Nevertheless, the Chamber did not take a clear-cut position as to which approach should be used; in their view both approaches could, and probably at best their combination should,[39] be used.

Similarly, starting from the *Kvočka* case,[40] which was later confirmed in the *Naletilić and Martinović* case, the ICTY accepted in persecution cases that 'persons *suspected of being members* of these groups are also covered as possible victims of discrimination'.[41] In other words, the ICTY did not require that 'discrimination in fact' occurred; i.e., they applied the subjective approach to persecution,[42] interestingly without any reference to related genocide cases.[43]

Examples can, thus, be found for the objective as well as for the subjective approach in both genocide and persecution cases. The effect of the objective approach is that only those are considered victims of genocide who *actually* belong to a specific group, so only such conduct will amount to genocide which was committed against the 'actual' members of a specific group. As opposed to this, the acceptance of the subjective approach results in that in addition to the above-mentioned conduct, the

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36 Ibid. For a different position see Fournet and Pégorier, *supra* note 1.

37 Some scholars when referring to the subjective approach also include self-identification by the victim group in addition to the identification by the perpetrator. This position can also be identified in the case law. In this contribution, the subjective approach is understood in the above-suggested narrower meaning. See, inter alia, R. Young, 'How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide', (2010) 10 *International Criminal Law Review* 1, at 2 and 10.

38 *Prosecutor v. Sylvestre Gacumbsti*, Judgement, Case No. ICTR-2001-64-T, T.Ch. III, 17 June 2004, paras. 254–255 (emphasis added).

39 For a recent adoption of this view in the case law, see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ICC-02/05–01/09, P.T.Ch. I, 4 March 2009, para. 23.

40 This position of the ICTY is much debated in the literature.

41 *Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlado Radić, Zoran Žigić*, Judgement, Case No. IT-98-30/1-T, T.Ch., 2 November 2001, para. 195 (emphasis added).

42 See also Roberts, *supra* note 32, at 626.

43 The most recent example for the subjective approach in relation to persecution is the *Gaddafi* case, where the Pre-Trial Chamber established the following: 'the Chamber is further satisfied that there are reasonable grounds to believe that, in furtherance of the above-mentioned State policy . . . the Lybian Security Forces carried out throughout Libya . . . an attack against the civilian population taking part in demonstrations against Muammar Gaddafi's regime or *perceived* to be dissidents.' *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11, P.T.Ch. I, 27 June 2011, para. 32 (emphasis added).

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conduct committed against those who were mistakenly perceived as belonging to a group also forms part of genocide (provided the existence of the special intent is proven).

It has been argued in the legal literature that while previously the objective approach dominated in genocide cases, at present there is a tendency towards applying the subjective approach.[44] The subjective tendency was considered inappropriate by some scholars[45] or was argued to be a mere misperception by others.[46] It seems that at present, at least in the practice of the Tribunals, concerning charges of genocide '[t]he prevailing view is that determination of the relevant protected group should be made on a case-by-case [basis], relying upon both objective and subjective criteria'.[47] Interestingly, with respect to persecution the objective approach seems to have gained more acceptance in both the legal literature and case law.[48]

3.2. Discrimination law: perception

The question can legitimately be posed: which approach ought to be applied in order to be conceptually correct and consistent, given the review model suggested above? Is it the subjective or the objective approach, or the combination of the two?[49] The relationship between genocide and discrimination entails that the conceptual considerations of discrimination law relating to the protected group and the members of this protected group can be and are relevant to genocide cases.

In discrimination law the focus is not so much on the objective or subjective approach; rather the related discussion centres around the existence of the causal link between the harm and the protected grounds and the different ways to prove it.[50] Proving that a person with a certain racial origin or religious affiliation (protected characteristic) has suffered a certain disadvantage (harm) is not sufficient for concluding that discrimination has taken place. It also has to be proven that there was a causal link between the protected characteristic and the harm. As explained above, in covert direct discrimination cases the perpetrators often try to negate the causal link by referring to grounds other than the racial or religious affiliation of the victims. In these cases a comparison between the treatment of this group and the treatment of another group, the members of which do not have the racial or religious traits possessed by the group harmed, can show this causal link. Namely, such a comparison can reveal the perception of the perpetrator as to the importance of the racial or religious affiliation of these individuals, irrespective of whether or not this perception was actually correct – from the perspective of the victim or otherwise. Accordingly, proving the causal link in direct discrimination cases means that it is

44 See, inter alia, Cassese, *supra* note 21, at 138; Cryer et al., *supra* note 24, at 211–13; Young, *supra* note 37, at 2–3.
45 C. Kress, 'The Crime of Genocide under International Law', (2006) 6 *International Criminal Law Review* 461, at 473–6.
46 Young argues that 'the trend towards subjectivity is not so much a change of criteria but a changed understanding of the fundamental nature of existing criteria.' Young, *supra* note 37, at 3 and 10.
47 W. A. Schabas, 'The Law and Genocide', in D. Bloxham and A. D. Moses (eds.), *The Oxford Handbook of Genocide Studies* (2010), 134; Schabas, *supra* note 2, at 128.
48 See, inter alia, Roberts, *supra* note 32, at 624–8; Nersessian, *supra* note 35.
49 See, e.g., Cryer et al., *supra* note 24, at 213.
50 See, e.g., Ambrus, *supra* note 15, at 105–28.

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proven that the perpetrator perceived the victims as belonging to a certain group and that this perception made the perpetrator commit the conduct; i.e., it is the perception that matters as far as the identification of the members of the protected group is concerned.

Given the discriminatory element of genocide cases, this perception-based approach can also be asserted to be applicable to the first step of scrutinizing genocide complaints. The perpetrator commits the conduct *because* he *considers* the victims to belong to a certain group. Accordingly, a discrimination-led conceptualization would call for the application of the subjective approach.

As the above elaboration also illustrates, the focus on the subjective approach does not, however, mean that the objective approach or 'objective' factors, which are themselves argued to be 'the product of social processes, informed by subjective social beliefs which have been transferred to a broader socio-legal context',[51] cannot and should not have any role to play. Based on discrimination law, it can be argued that they can assist in proving the perception of the perpetrator; i.e., they have evidential role. Most of the time relying on objective factors would imply comparison. With the help of comparison based on 'objective' factors the perception of the respondent can be proven. This implies that the so-called legal and evidential steps should be distinguished. While the legal step requires the finding of a causal link based on the perception of the perpetrator, in evidential terms this causal link can be proven with the help of comparison based on 'objective' factors. It is, thus, important to keep in mind that using comparison based on the 'objective' features of the protected group does not mean that the focus of the legal concept should shift from the subjective to the objective approach; the 'objective' factors have 'mere' evidential function.

3.3. Arguments against the subjective approach

Admittedly, the perception-based (or subjective) approach has already raised eyebrows and several arguments were brought up against it. If one accepts the suggested review model, these arguments can, arguably, be convincingly rebutted.

First, it has been argued that a *strict textual interpretation* of the concept and the prohibited acts in the definition of genocide seems to have reference to the 'objective existence' of the specific groups, rather than to the perception of the perpetrator.[52] For instance, 'killing members of the group', a prohibited conduct in the definition of genocide, seemingly advances the idea that individuals are killed because they *actually* belong to a certain group. The lack of clarity in this respect was also emphasized by the international criminal courts. In the *Semanza* case, for instance, the ICTR's Trial Chamber explained that '[t]he Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused's genocidal intent is to be determined by objective or subjective criteria or by some

51 Young, *supra* note 37, at 15–16.
52 See, inter alia, ibid., at 5–8; Kress, *supra* note 45, at 474.

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hybrid formulation'.[53] It can be argued that, as this formulation is very similar to the definition of direct discrimination, in that it also lacks an explicit reference to the perception of the perpetrator, conceptually there is no obstacle to accepting the subjective approach. Accordingly, the formulation does not rebut the application of the subjective approach.

Second, the view that the discrimination aspect is absorbed in the *dolus specialis* has resulted in the plea that only the chapeau of the definition of genocide (with its reference to the *dolus specialis*) pertains to the assessment of the *subjective* view of the perpetrator, while the conduct is seen as requiring the assessment of the facts.[54] This argument can be translated as indicating that the perception of the perpetrator is relevant only with respect to the genocidal intent, and thus the conduct needs to be assessed without any reference to the subjective view of the perpetrator. In other words, the conduct has to be committed against the *actual* members of the protected group.[55] This position is well illustrated by the *Muhimana* case,[56] in which the Chamber adopted the subjective approach to the extent that it could prove the special intent to destroy the Tutsis. In this case, mistakenly, a Hutu woman, perceived as Tutsi, was raped, for which the respondent later apologized. While this rape was considered to provide evidence for the special intent to destroy the Tutsi group, the conduct against her was not taken into account in terms of the *actus reus*.[57] The proposed approach, however, adopts the view that the *actus reus* also has a discriminatory component, which is different from the special intent to destroy a particular group. Accordingly, given the discriminatory component of the conduct, the examination of the *subjective* view of the perpetrator can and should play a role also when the conduct is examined. For the *Muhimana* case it means that this Hutu woman should have been seen as a victim of genocide, given the perception of the perpetrator.

Third and closely related to the previous point, those arguing in favour of the objective approach often refer to the position taken in *persecution cases*.[58] As indicated above, in persecution cases the *Krnojelac* approach seems to be the generally accepted position,[59] where the position has been taken that the actual members of the group should suffer harm because without 'actual' discrimination 'an accused could be convicted of persecution without anyone actually having been persecuted.'[60] However, it is commonly acknowledged that a typical feature of discrimination law and hate crimes is that, although mistakenly harmed, the selection of certain individuals on the grounds of their racial origin or religious affiliation still causes harm to the protected group and its members by sending out stigmatization signals.[61]

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53 *Prosecutor v. Laurent Semanza*, Judgement and Sentence, Case No. ICTR-97-20-T, T.Ch., 15 May 2003, para. 317 (emphasis added).
54 Mettraux, *supra* note 8, at 226.
55 See, e.g., ibid., at 224.
56 *Prosecutor v. Mikaeli Muhimana*, Judgement and Sentence, Case No. ICTR- 95-1B-T, T.Ch. III, 28 April 2005.
57 Ibid., paras. 513 and 517.
58 See, inter alia, Roberts, *supra* note 32, at 625.
59 See, inter alia, ibid., at 627–8.
60 *Prosecutor v. Milorad Krnojelac*, Judgement, Case No. IT-97-25-T, T.Ch., 15 March 2002, para. 432.
61 See also Mettraux, *supra* note 8, at 226; Roberts, *supra* note 32, at 627.

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Accordingly, this position gives rise to the convincing argument that even in the absence of 'actual' discrimination, the perpetrator should be found responsible for persecution if it can be proven that he perceived the victims as belonging to a certain group and this belief made him commit the harmful acts. The Chamber in the *Naletilić and Martinović* case also confirmed this position, though using a slightly different reasoning. In their view, mistakenly harmed victims are also victims of persecution because they 'have no influence on the definition of their status', and they 'are *discriminated in fact* for who or what they are on the basis of the perception of the perpetrator'.[62]

Fourth, it has also been argued that responsibility for a conduct committed mistakenly against a specific person can be excluded on the grounds of *mistake of fact*, which in turn would support the prevalence of the objective approach.[63] Indeed, it can be argued that the mistake-of-fact argument and the subjective approach are mutually exclusive.[64] Schabas, for instance, explained with regard to the 'factual elements of the actus reus' (conduct) that '[a]n accused might also argue mistake of fact, and even mistake of law, with respect to such knowledge-related aspects of the crime as membership in the targeted group'.[65] If courts accept evidence proving that the perpetrator was mistaken as to the actual belonging of the alleged victim to the group targeted, it supports the view that the objective approach is preferred for the identification of the members of the protected group. However, the applicability of this ground of exclusion with regard to the identification of the members of the protected group can be rejected on, at least, three grounds. First, if one accepts the argument that hate crimes are specific in that they will be realized once stigmatization signs are sent out even if committed on the 'wrong object', the mistake-of-fact argument seems difficult to accept. Second, the mistake-of-fact argument raises the question what the 'objective' membership means: who defines the objective belonging, and what is the relevance of the victim's own identification? Racial (and religious) identities are social constructs, which are difficult to define in objective terms, and thus it is difficult to construct how one could be 'factually' mistaken. Still, one could say that if the perpetrators identify some features considered 'objective' by them based on which they can select the members of the protected group, and the person who suffered harm does not actually possess these specific features, the mistake-of-fact argument should be accepted. However, in such cases, it seems difficult to see why a criminal court should accept the lack of those 'objective' features that were identified by the perpetrators as grounds of excluding responsibility. Similarly, probably the victim was attacked because some of the 'objective' features of the victim made the perpetrator 'believe' that this person belonged to the group targeted. Again, the question can be posed why the lack of one of the many identified

62 *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, Case No. IT-98-34-T, T.Ch., 31 March 2003, para. 636. For a more recent confirmation of this position, see *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. Prosecutor*, Judgement, Case No. ICTR-99-52-A, A.Ch., 28 November 2007, para. 986, and Partly Dissenting Opinion of Judge Shahabuddeen, para. 14.

63 Schabas, *supra* note 2, at 395–6.

64 Nersessian, *supra* note 35, at 242.

65 Schabas, *supra* note 2, at 396.

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features should exclude this conduct from the crime of genocide. Third, conceptually the mistake-of-fact argument 'serves to show that the defendant did not have the *mens rea*.'[66] The example par excellence in this respect is bombing a civilian object, e.g., hospital, believing that it was a military facility. The mistake-of-fact argument can, in such cases, be accepted if the accused proves that he *believed* that this object was a military facility, even though in actual fact it was not; i.e., it aims to prove the perception of the perpetrator as opposed to the objective facts. In genocide cases this would mean that the perpetrator will not be held responsible if it can be proved that the perpetrator *believed* the victim was a member of the protected group, but, given the lack of certain 'objective' features, he, in actual fact, was not. However, in addition to the issues raised above, the following question can also be posed: if the victim did not possess those features, what made the perpetrator believe that they did belong to this group in the first instance? All in all, one needs to realize that due to this discrimination component the logic of the mistake-of-fact argument is difficult to apply and is different from the factual circumstances in other crimes. Given all these reasons, this specific ground of exclusion, arguably, does not support the prevalence of the objective approach over the subjective approach.

In sum, reliance on the review model in genocide cases implies that judicial bodies need to find ample evidence concerning the perception of the alleged perpetrator in order to construct the causal link between the conduct committed and the protected characteristic. The so-called objective approach can be used to prove the perpetrator's perception; i.e., this approach has a mere, though very important, evidential role. So a hybrid approach, which is often argued to be present in the case law of the tribunals, needs to be understood in this light. The focus on the perpetrator's perception has the effect that if an individual is proven to be perceived as being a member of a specific national, racial, ethnic, or religious group, he/she needs to be taken as a victim of the discriminatory conduct, irrespective of his/her actual belonging to this group.

4. Identification of the protected group

Similarly to the identification of the members of the protected group, the identification of the protected group itself has also given rise to questions in the practice of international criminal courts. Two main dilemmas can be explored in this regard: what is the coverage of the protected group, and what approach should be taken toward the identification of the protected group. Both dilemmas will be subsequently addressed from the perspective of the review model, which, in turn, might help find solutions to the concerns raised.

4.1. Coverage of the protected group

The first issue, the coverage of the protected group, relates to situations where individuals are not members of the specific national, ethnic, racial, or religious group and are not perceived by the alleged perpetrator as being so. Still, these individuals

66 Cryer et al., *supra* note 24, at 414.

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suffer the same or similar harm as those belonging to the group because they give some form of support to the group actually attacked. It has been explained above that non-members can be regarded as 'covered' by the protected group if perceived by the perpetrator as belonging to such a group. Now the question is whether the coverage of the protected group can be stretched so far as to include mere 'supporters' of the actually protected group.[67]

In the *Nahimana et al.* case[68] the Appeals Chamber was confronted with this dilemma.[69] The Prosecutor argued that

> groups targeted for genocide may be defined subjectively, on the basis of a variety of criteria, including the perception of the perpetrators themselves. . . . the perpetrators . . . *regarded all Hutu who supported Tutsi as Tutsi*, and placed them in the same category: Hutu victims thus fell within the protected group pursuant to the applicable law on genocide.[70]

The Chamber, however, did not share this position. It explained that 'the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining membership of a protected group'; however, 'in the present case Hutu political opponents were acknowledged as such and *were not 'perceived' as Tutsi*'.[71] They went further and stated that

> [e]ven if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.[72]

While the Prosecutor tried to argue that the perpetrators perceived the Hutu political opponents as belonging to the Tutsi group, the Chamber concluded that in this case those individuals were not conceived as members of the Tutsi group, instead they were seen as a *political* group, which is not a protected ground under the Statute and the Convention. These different positions illustrate that there are some uncertainties as to the coverage of the protected group. At first sight, both arguments seem reasonable: the Hutu political group supported the Tutsis, they had a close link to them, and they also contributed to the protection and survival of Tutsis; still, this Hutu political group was clearly not seen as ethnically belonging to the Tutsi group. So how should the judicial bodies proceed in such cases?

Discrimination law might provide an answer to this dilemma, where the concept of 'discrimination by association' has emerged recently, and has gained increasing acceptance both in practice and in academic circles.[73] The first remarkable point in

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67 See also Mettraux, *supra* note 8, at 225.

68 *Nahimana* case, *supra* note 62.

69 See also *Prosecutor v. Siméon Nchamihigo*, Judgement, Case No. ICTR-01-63-T, T.Ch. III, 12 November 2008, para. 335; *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Judgement and Sentence, Case No. ICTR-98-41-T, T.Ch. I, 18 December 2008, paras. 2125 and 2141.

70 *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. Prosecutor (Respondent)*, Judgement, Case No. ICTR-99-52-A, A.Ch., 28 November 2007, para. 494 (emphasis added).

71 Ibid., para. 496 (emphasis added).

72 Ibid., para. 496.

73 See, e.g., L. Waddington, 'Protection for Family and Friends: Addressing Discrimination by Association', 2007 *European Anti-Discrimination Law Review* 13.

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this process was the Maduro AG Opinion in the *Coleman* case before the European Court of Justice relating to discrimination against the mother of a disabled child. The question was whether this discrimination could be seen as discrimination on the grounds of disability. In the view of Maduro AG '[o]ne way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group'.[74] Conceptually, 'discrimination by association' would also result in regarding the members of the protected group as less 'valuable', the prevention of which is one of the aims of discrimination law. How could this concept be applied to the examination of the discrimination stage of genocide cases?

The *Nahimana et al.* case shows that the arguments of the Prosecutor as well as the Appeals Chamber were based on the perception of the perpetrators, which, in light of the conceptual elaboration above, can be praised. In the Chamber's view there was no evidence that could support the position that the perpetrators considered the Hutu political opponents as belonging to the Tutsi ethnic group. Indeed, based on the available facts and the inferences that could be drawn from them, one could argue that in this case the Hutu political opponents were not regarded as belonging to the Tutsi ethnic group. However, this does not mean that they cannot be considered victims of the conduct constituting genocide.[75] The concept of 'discrimination by association' could cover this group: they suffered harm because they were closely associated with the Tutsi. Turning the argument around, one could say that had they not been associated with the Tutsi ethnic group, the Hutu political opponents would not have become victims of killings, injury, and so on. The most relevant question to be answered is: what was the main reason to attack them? It seems that they were not attacked because they were an opponent political group, but because they were closely associated with an ethnic group that was to be destroyed.

Accepting the concept of 'discrimination by association' would, thus, mean that the coverage of the protected group can, in addition to those neither belonging to a protected group nor perceived by the perpetrator as such, be extended to those who provide support to this protected group.[76] It should be clear that 'discrimination by association' does not mean that a new protected ground, namely political view or opinion, is added in a hidden manner to the enumerated grounds in the Genocide Convention and the statutes of the international courts. This concept does not focus on the political opinion of the group, though in certain situations it is definitely closely related to providing support for a group. In order for these attacks to constitute

74 Opinion of Advocate General Maduro in ECJ, 31 January 2008, case C-303/06, para. 12.

75 For a different position, see, e.g., W. A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006), 219–20; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 12–13.

76 Although, following a different line of reasoning, Mettraux also found that '[t]he killing or mistreatment of a person who, though not himself or herself a member of the targeted group, but whose killing or mistreatment could further the attack against the protected group, could in principle be regarded as genocidal in character. Thus, the killing of a moderate Hutu who was opposed to the policy of the (Hutu) leaders, or married to a Tutsi, could be seen as genocidal to the extent that the removal of such an individual might arguably facilitate and contribute to the destruction of the Tutsi group by Hutu extremists.' Mettraux, *supra* note 8, at 225.

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genocidal conduct, it has to be proven that these individuals were not targeted because of their political belief, but because their support of this group hindered the execution of the genocidal plan. Such reliance on the concept of 'discrimination by association' would also provide higher protection for those being actually targeted by the genocidal conduct. Interestingly, the broad coverage of the protected group was also accepted with respect to persecution in the *Naletilić and Martinović* case,[77] where the Chamber concluded that '[t]he targeted group must be interpreted broadly, and may, in particular, include such persons who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group*'.[78]

4.2. Approach to the identification of the protected group

The second issue relates to the approach adopted to the identification of the protected groups.[79] The question, among others,[80] has been raised in the case law whether or not one could commit genocide against a group, which is identified by the lack of certain characteristics, e.g. non-Serbs. Put differently, the dilemma is whether the discriminatory conduct (and thus genocide) needs to be directed against a specifically identified national, ethnic, racial, or religious group or whether it can also be aimed at all individuals who are excluded from the group to which the perpetrators consider them to belong. In the case law and in the literature these two methods are referred to as 'positive approach' and 'negative approach', respectively.[81] There is a general consensus that the negative approach is not appropriate in genocide cases for several reasons, among which are the arguments that it extremely broadens the victim group and that it does not fit the definition.[82]

Conceptually, the so-called 'negative approach' would, indeed, be very broad, as it includes each and every individual who does not belong to the perpetrator's group. However, the fact that a group of individuals is described by the perpetrators as non-Serb does not necessarily imply that a negative approach is applied. As explained, conceptually, discrimination is based on the perception of the perpetrator, which

77 The ICC Pre-Trial Chamber also seemed to follow this position, when they explained in the Gaddafi case that '[a]bductions and subsequent torture of family members of alleged dissidents who could not be found [had] also been reported.' In other words, torturing those who are associated with those belonging to the opponent political group seems to be seen as persecution. *Muammar Mohammed Abu Minyar Gaddafi* case, *supra* note 43, para. 47.

78 *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, Case No. IT-98-34-T, T.Ch., 31 March 2003, para. 636.

79 Some scholars criticize the restrictive interpretation of these four groups. A significant group argues that the definition should be stretched in order to include political groups. Another group would rather adopt a new definition with a more expansive list of protected grounds. See, inter alia, Schabas, *supra* note 2, at 131–3, 150–1, 164–5; W. A. Schabas, 'Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide', (2008) 61 *Rutgers Law Review* 161, at 163.

80 The most relevant issues that were mentioned with respect to the identification of the protected group will be pinpointed below.

81 See, inter alia, *Prosecutor v. Goran Jelisić*, Judgement, Case No. IT-95-10-T, T.Ch., 14 December 1999, para. 71; *Prosecutor v. Milomir Stakić*, Judgement, Case No. IT-97-24-T, T.Ch., 31 July 2003, para. 512; Cryer et al., *supra* note 24, at 213; Mettraux, *supra* note 8, at 225.

82 See, inter alia, Cryer et al., *supra* note 24, at 213; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, *supra* note 13, paras. 193–196; *Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05–01/09, P.T.Ch. I, 4 March 2009, para. 135.

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perception is constructed upon certain traits of individuals. Accordingly, the judicial bodies need to look for those features that the perpetrators took into account when they targeted certain groups, and identify the group based on these traits.[83] This approach might lead to the creation of a group the members of which do not necessarily regard themselves as a coherent group. This construction, as mentioned above, is based on the idea that, strictly speaking, racial and ethnic groups are psychological and social constructs,[84] and do not have an 'objective' existence.[85] These ethnic or racial groups 'are subjectively established, depending on particular conceptions of in-groups and out-groups in society. Since these conceptions vary in time and space, different proxies are used to single these groups out.'[86] In other words, the perpetrators can create a group; i.e., a group that does not necessarily have an 'objective' existence.[87] It is, however, essential that the features the perpetrators perceive are based on national, ethnic, racial, or religious proxies; e.g., language, skin colour and so on. Unlike the Akayesu method, with a clear-cut definition for each protected group,[88] the suggested approach supports the view that these four groups should be considered to 'help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection.'[89] Thus, one does not need to fit a group into one of the groups, rather the focus should be on the traits that constitute the foundations

83 Arguably, this approach was also adopted in the *Final Report of the Commission of Experts for the Former Yugoslavia*, United Nations Security Council, S/1994/674, 27 May 1994, para. 96.

84 Similarly to the identification of the members of the protected group, there is an ongoing debate in the legal literature about the approach to be applied toward the identification of the protected group: should it be an objective or a subjective approach? A purely subjective approach is considered undesirable by some because 'otherwise the Convention could be used to protect entirely fictitious national, ethnic, racial or religious groups' (Cryer et al., *supra* note 24, at 213) or because 'law cannot permit the crime to be defined by the offender alone' (W. A. Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia', (2001) 25 FILJ 23, at 39). For relevant case law see, e.g., *Prosecutor v. Laurent Semanza*, Judgement and Sentence, Case No. ICTR-97-20-T, T.Ch., 15 May 2003, para. 317; *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, para. 511. Others are, however, more inclined to accept the subjective approach. See, e.g., Schabas, *supra* note 3, at 879–80; Mettraux, *supra* note 8, at 224; R. Y. Park, 'Proving Genocidal Intent: International Precedent and ECCC Case 002', (2010) 63 *Rutgers Law Review* 129, at 136–8. In the legal practice see furthermore *Prosecutor v. Goran Jelisić*, Judgement, Case No. IT-95-10-T, T.Ch., 14 December 1999, para. 70; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc.S/2005/60, 25 January 2005, para. 509; *Prosecutor v. George Rutaganda*, Judgement, Case No. ICTR-97-21-T, T.Ch. I, 6 December 1999, para. 56; *Prosecutor v. Juvénal Kajelijeli*, Judgement, Case No. ICTR-98-44A-T, T.Ch. II, 1 December 2003, para. 811.

85 Young argues that '[a] subjectively defined group does not necessarily denote an imaginary group but simply accepts that the facts upon which a group's existence is based are a result of complex interactions with the subjective views of the society in question'. Young, *supra* note 37, at 22.

86 Busstra, *supra* note 15, at 31. See also Schabas, *supra* note 3, at 879; *Prosecutor v. Goran Jelisić*, Judgement, Case No. IT-95-10-T, T.Ch., 14 December 1999, para. 70; Mettraux, *supra* note 8, at 224.

87 This argument implies that the Akayesu method to include all 'stable and permanent groups' can also be rebutted. *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, paras. 428–429. See also *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc.S/2005/60, 25 January 2005, para. 501; Schabas, *supra* note 3, at 878–9.

88 See also Kress, *supra* note 45, at 476.

89 Schabas, *supra* note 2, at 129. This view is generally shared among scholars and found justified based on the preparatory work of the Genocide Convention. See, inter alia, Schabas, *supra* note 84, at 38–9. For the relevant case law see, e.g., *Prosecutor v. Radislav Krstić*, Judgment, Case No. IT-98-33-T, T.Ch., 2 August 2001, paras. 555–556; *Prosecutor v. George Rutaganda*, Judgement, Case No. ICTR-97-21-T, T.Ch. I, 6 December 1999, para. 56.

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of these groups enumerated in the Genocide Convention. Accordingly, it follows from the discrimination component of the review model that a protected group can also be constructed by the perpetrators themselves, which means that any reference to individuals not belonging to a protected group should be strictly scrutinized in order to identify the actually targeted group.

5. Final observations

It has been argued that the discrimination component of genocide can be employed for designing a two-stage model for reviewing genocide cases, the first step of which is to look at whether there has been a discriminatory conduct. Relying on the conceptualization of discrimination law for the first step can also put an end to the debate on the approach to be chosen for the identification of the members of the protected group. A discrimination-law-led conceptualization requires a perception-based (or subjective) approach with regard to the identification of these individuals. Similarly, acknowledging the conduct element as discrimination can assist judicial bodies in finding solutions for the dilemmas raised with regard to the identification of the protected group itself.

One could, however, warn that this model would considerably broaden the scope of the 'protected group', applauded by some,[90] while considered undesirable by others.[91] It can be asserted, though, that this broadening is not so much a consequence of this model; rather this broad understanding of the protected groups and their members is an inherent feature of the discrimination component in the concept of genocide. It is the special intent that makes genocide the gravest of crimes, which, in turn, does restrict its scope.

Applying this model would, arguably, yield a more coherent and consistent interpretation by judicial bodies when deliberating genocide charges, and thus enhance their legitimacy. This conceptual clarity and the model of review could contribute to a better understanding of the crime of genocide and to a broader public acceptance of the legal reasoning and the punishment imposed upon the perpetrators. This broader acceptance could, subsequently, also make people reject the idea of making any distinction on the grounds of race or religion.

90 See, inter alia, B. van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, (1997) 106 *Yale Law Journal* 2259; L. L. Bruun, 'Beyond the 1948 Convention: Emerging Principles of Genocide in Customary International Law', (1993) 17 *Maryland Journal of International Law and Trade* 193, at 210–18.

91 Kress, *supra* note 45, at 500; Schabas, *supra* note 3, at 879.

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