"The enumeration of ‘protected groups’ in the definition of genocide should be developed to include any ‘stable or permanent’ group”. Critically discuss.

The purpose of the essay is to discuss whether the definition of genocide be given a wider scope to include “any stable or permanent group” within the meaning of protected groups. While the definition of genocide includes four protected groups, yet interpretation of these groups are not consistent. “The international criminal tribunals approaches have somewhat shifted from objective to subjective while classifying the protected groups”.1 As there is no specific rule regarding classification of groups yet they are classified according to how different they are from others. The objective of this essay is to ensure protection to the undefined group that still exists but is not within the meaning of the protected group.

Art. 2 of the genocide convention2 defines genocide as “Any act which is committed with the intent to
destroy, in whole or in part, a national, ethical, racial, or religious group”. The definition includes only four protected groups i.e. national, racial, ethical and religious group but it doesn’t mention about any other groups that are still existent but are not within the meaning of protected group. Further Art. 6 of ICC, Art. 4 of ICTR and Art.2 of ICTY have also defined genocide but have failed to define other undefined groups. This becomes one of the major drawbacks of the definition of genocide as it is too narrow to give a perfect definition to the protected groups. The United Nations findings shows that “the convention fails to define groups clearly and this has in fact made the convention less effective”. But in due course of time, the definition of protected groups has transformed from objective approach to subjective approach by relying on their uniqueness.

It is a well-known fact that in a genocide a particular group is being targeted rather than a particular individual. The group identity is well explained by the Rome Statute, which defines genocide as ‘One of the several acts which are ‘committed with the intent to destroy in whole or in part a national, ethical, racial or religious group as such’. As such within the inverted commas signifies that the intention to is to destroy a group which has common identity”. Hence it was rightly pointed out by David Nersessian that “If an individual lacks membership in a protected group, genocide cannot occur with respect to that victim”. This implies that the courts have to come to a conclusion that the victim is one among the member of the protected group before punishing the culprit charged with the crime of genocide. Further, according to the ILC’S Draft Code, “It is the membership of the particular individual that decides the criteria for the determination of the victims of genocide rather than individual identity”.10

The historical backdrop of the term genocide takes to back to the year 1944, when a Polish- Jewish lawyer Raphael Lemkin coined the term genocide, when Nazis during the second world war were committing crimes against Jews and other groups. His aim was to protect the group as a whole and not as a single individual as he believed that “there should be a treaty which protects groups that are being attacked based upon their caste, race or ethnicity”. With the rising genocide cases and Lemkin’s effort for criminalising genocide, the General Assembly by Resolution 96 affirmed “Genocide as an international crime whether committed on religious, racial, political or any other grounds”. After few recommendations, the second draft by the Ad Hoc Committee on Genocide made protection limited to national, racial, religious and political groups. Thereafter, the sixth committee excluded political groups from the definition of protected groups in the genocide convention.14 It was clear that defining genocide was not at all an easy task. Since the day of drafting of genocide convention, the definition has changed numerous times as it was not clear as to what should be inserted to the definition of genocide. Further, who comes under the four protected group remained uncertain. The effectiveness of the genocide convention lost its existence as nobody seems to follow it for many years until 1998, when for the first time it was used to convict a person guilty of genocide.15 The other reasons for not getting implemented being changes in the racial, religious, nationality and ethnicity meaning in due course of time. Further, it was the duty of implementing government to assure that if any crime of genocide happens, the perpetrators should be punished according the genocide
Jean Paul Akayesu was the first person in the history to be convicted for the crime of genocide by the international criminal tribunal in the year 1998. He was liable for committing atrocities on residents of the community where he was the mayor during 1993-94. This case sets a precedent as far as genocide is concerned and is considered as a benchmark in defining genocide for the cases to follow. As it was the first of its kind in the history, ICTR discussed the constituents of the crime of genocide in detail and hence laid a stress on the four protected groups. According to the tribunal, since there was a specific intent to destroy a particular group, it was important to define each group to avoid confusion. However, it was not an easy task. To determine the result of the case, it was important to determine the Tutsi group who in the present case are the victims.

In order to define the Tutsi group, ICTR followed the International Court of Justice’s judgement in Nottebohm case17, which defined national group as, “A group of people who share a legal bond among themselves based upon citizenship and respective rights and duties”.18 In Nottebohm case, “Nationality was based on the relationship of person with the state”.19 ICTR committed an error while trying to equate nationality and citizenship. There is a huge difference between nationality and citizenship which ICTR failed to recognise. For instance, it was ruled by the Spanish National Court that “A national group is not limited to collection of people of the same nation but rather it is a national human group formed by a community”.20 Further, according to scholars, it is not necessary for the national groups to have the nationality of the state where the reside in, they can be called as inhabitants of the territory.21

Further in the judgement, ICTR opined that the Tutsis are ethnic group. Ethnic groups refers to a group “whose members share a common language and culture”.22 According to the tribunal, Tutsi were an ethnic group though they share a common language, practise same religion and have similar culture with the Hutu group.23 Marriages between the two groups are also very common and it is really difficult to distinguish between the two groups.24 The tribunal tried to define Tutsi group as ethnic group due by creating a ‘stable and permanent’ category based upon some common features.25 It was believed that Tutsis of Rwanda are the descendants of Nilotic herders and Hutus of Rwanda belong to the Bantu region of South-Central Africa.26 Ethnic groups in reality are the one “who have common ancestry, real or fictious and who are regarded by others”.27 The visible physical difference between the two is that, the Tutsi people are tall and slender with fine pointed nose whereas a Hutu member is relatively shorter with flat nose.28 As it was very difficult to distinguish between the two, the Belgian Colonies issued identity cards where the ethnic origin of the person was mentioned based upon the number of cattle owned by the family member.29 The tribunal realised that none of the four terms is applicable to the group but made it clear that it still extends to other groups which are not in the ambit of protected groups. The tribunal in its judgement held that “A particular manner was
used to commit the crime of genocide in order to target a particular stable group where membership is automatically by birth. It excludes the other members who join the group voluntarily without being related to the group. Further the tribunal opined that the intention of the drafters should be taken into account while mentioning Art 2 of the statute. It is meant for the protection of “any stable and permanent group” even if it isn’t expressly stated in the statute. Hence the Tutsi group was qualified as an ethnic group even if it does not fulfil all the conditions required.

This justification was therefore criticized by many scholars for giving it a wider interpretation and hence it lost its importance in due course of time. According to some scholars, this justification is far away from the actual interpretation of the terms mentioned in the Art 2. They did not meant to be what the tribunal justified. The real intention of the drafters was invoked because if it is meant to be protection of all stable and permanent groups, it would have been clearly stated. The tribunal tried to give a wider meaning to a restrictive category. Further the travaux preparatoires can be referred to clarify the doubts relating to any ambiguous or obscure words in a treaty. As rightly stated by Sir Percy Spender and Sir Gerald Fitzmaurice of ICJ, “The provision has to be interpreted in order to give maximum effect not to introduce anything which can alter the provisions”. While Jorgensen opined that the tribunal’s interpretation is “unjust and very liberal as far as interpretation and intentions of the drafters are concerned”. Schabas also criticised the tribunal stating that “The groups in the convention are neither stable nor permanent”. According to him, only racial groups can claim as stable and permanent group. The status of the national groups changes with the change of borders; the ethnicity changes due to marriage; the changes in religious groups are very frequent.

Different Approaches towards defining ‘Protected Groups’

The Akayesu judgment took an objective approach while defining ‘Protected Groups’ while other contemporaries in the later judgements had subjective approach towards the protected group. The changes in the approach was spotted in the case of Jelisić: “In order to define a national, ethnic, racial or religious group, using objective and scientifically non approachable would hamper the objective of the statute”. Further, in Jelisić case, the tribunal discussed about the positive and the negative definition of a protected group. It said “A group can be stigmatised positively as well as negatively. The positive approach would be that the perpetrator distinguished the group based on characteristics such as national, racial, ethnic or religious. Whereas the negative approach would be identifying the individuals who are not part of the group to which they belong but rather to the group they find to have specific
characteristics”.

The following year witnessed two judgements given by ICTR which took an objective approach contradicting the Akayesu case. The first being Rutaganda case, which said that “the concept of protected groups has been widely researched and till now there is no precise definition regarding it. Every group has to be categorized according to political, social and cultural context”.

Here we can say that the tribunal took a subjective approach as each case is decided on its own merit and by looking into each of the categories before reaching to a conclusion. Further, the tribunal did not avoid the conclusions drawn in Akayesu case but shifted the approach in order to have a clear and precise meaning of the victims. In other words, it can be said that a subjective approach was taken by keeping in mind the objective elements as the basic element i.e. ‘stable and permanent’ cannot be altered.

Another judgement of 1999 showcased a different concept. In Kayishema and Ruzindan, ethnic group was defined as “members who share common language and culture; or, a group that distinguishes it from others or, a group that is identified by others such as perpetrators”. Here we can get the idea looking at the definition that it is a mixture of both the approaches. As we can see the use of semicolons and or at the end of each category signifies objective approach for common language and culture, self-identification as a subjective approach and perpetrator based subjective approach.

While this judgement showed a different approach but it was subjected to a lot criticisms for taking into perpetrators intensions to define genocide.

Further, in the Jelisić case, the ICTY relied on the approach taken in Kayishema and Ruzindana. According to the tribunal “Discriminating a group on the basis of a national, ethnic or racial unit by the their community makes them easier for the perpetrator to target a particular group”.

Hence, the perception of the perpetrator became one of the important criteria. The opinions of the tribunal in Jelisić case was well adopted by ICTY in Brdanin case.

In the case of Tolimir, ICTY made references of Brdanin and Jelisić case to conclude that “A group must have unique identity based upon its common characteristics”. It can be ascertained that the tribunal believes in the perpetrator based approach. Though it fails to mention about it in its judgement but referring the Brdanin case in its judgment implied that the tribunal supports the perpetrator based approach.

The subjective approach became an obvious and popular approach. The ICTR in the case of Baglilishema tried to derive the problems in defining the objective approach. According to

A different view has been taken in Kristić case. Radislav kristić was the General of the Bosnian-Serbian army
who committed genocide in Srebrenica (Bosnia). Nearly 25,000 Bosnian Muslims were detained and later on were killed by the army. The tribunal had to establish whether those executions done amounts to genocide or not. If only the Muslims of Bosnia are targeted, protection can be sought under the genocide convention. On the other hand, the tribunal upholds the view of the genocide convention which seeks to protect only four groups and not any other group. The tribunal after examining the genocide convention, were of the opinion that the protected group had no specific definition in the convention nor it can be found anywhere else. As noted above, in Jelisić case, it was held that when the group is being discriminated by the community on the basis of nationality, ethnicity, religious or racial means, it is easier for the perpetrator to target the victim group. Similarly, the tribunal here were of the opinion that "the cultural, ethnical, religious and nationality of the group shall be recognised on the basis of his socio-historic background". As the Bosnian Muslims of Srebrenica are part of Bosnian Muslims and not separate from the Muslim population, they can claim protection under the genocide convention. Hence, the tribunal held Kristić guilty for the crime of genocide, crime against humanity and for war crimes and was sentenced for 46 years of imprisonment. While it can be seen that a different approach has been taken in the Kristić case yet it was criticised by many jurists on various grounds. Amann described the approach of the tribunal as "Ensemble Construction". It called so because the tribunal did not define the groups individually rather collaborated all of them under one head as the national minorities. Schabas too called the approach as historical and of the view that it was based upon some human rights instruments. It too was of the opinion that individual definitions should have been provided for each group to make the concept clear and meaningful.

The Dafur commission has a different approach towards protected groups. It said “It is not a protected group unless it has a distant racial, national, ethnical or religious group”. It also suggests that “if doubt arises, it shall be determined whether (i) the persons shall be perceived and treated as belonging to one of the protected groups and (ii) whether they belong to such group”.

CRITICAL ANALYSIS OF THE APPROACHES TAKEN BY THE TRIBUNALS

It is evident from the cases that the main question before the tribunal was whether the victim groups can be labelled as a protected group and if so, whether they are eligible to be protected under the genocide convention. As it can be seen that the tribunals tried and tested different approaches and methodologies in order to define the protected groups under the genocide convention. The tribunals made two popular approaches being subjective and objective, in order to determine protection to the victim groups. According to the first ever case of genocide i.e. Akayesu case, “All permanent and stable groups whose membership is determined by birth” are protected under the genocide convention. While in the case of Kayishema, it was held that the convention protects only four groups and Tutsi group is one of the groups that come under the protected group. It did not advocate for the presence of other imaginary group and as that would demean the interpretation given to the protected group under the genocide convention. The tribunal did not disagree to the approach taken in Akayesu case but at the same time they tried to put in a new methodology and approach to define the protected groups under the genocide convention. While the tribunal in the Akayesu case took an objective approach, the tribunal in Kayishema case tried an advanced subjective approach to define protected group. Although a subjective approach has been taken in Jelisić case, but it also relies on the approach taken in Akayesu case. Thus, favouring both the approaches of the tribunals. The tribunal in Kristić case was one of its kind who used a complete different approach in order to define the protected group. It was the first tribunal to have used a socio-historical approach. But it committed an error...
while doing so. In the process of trying out a different approach, it puts the protected groups under one head thus misinterpreting the words of the statute as well as the intentions of the drafters.

55 ibid
57 ibid, para 498-499
58 supra note 15

CONCLUSION
To sum up the approaches, it can be concluded that the first ever case of genocide that came up in the Akayesu case was criticised for misinterpreting the words of the statute as well as the intention of the drafters. The Akayesu case tried to define the protected group in an objective approach but that did not impress the other contemporaries in the later cases as it created confusion. So, they drifted from the objective approach to subjective approach. They all relied on the perpetrator based approach. Though discriminating the group on basis of nationality, ethnicity, racial or religious basis makes the group vulnerable as a target group, hence it is advisable not to stigmatise a group as this can protect an imaginary group from being a victim. If the imaginary group has got all the objective needed to be a protected group, then that imaginary group can be called a protected group even if it has not been exclusively stated in Art 2 of the genocide convention. However, it should be noted that the genocide convention protects only four groups and hence this should not widen the concept of protected group by adding some more categories.

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