

GENOCIDE, HOLOCAUST: A Human Rights Perspective

Nitesh Bhatt Assistant professor Faculty of Law, Jamnalal Bajaj School of Legal Studies *BANASTHALI
VIDYAPITH P.O. Banasthali Vidyapith – 304022.

Abstract

We live in a time of unparalleled instances of genocide and ethnocide. Mass violence, torture, violations of fundamental human rights, and the mistreatment of human beings is not a new aspect of humanity; documentation of such events spans the historical record. However, technology has taken these cruelties to new levels.

The ordinary meaning is murder by government of people due to their national, ethnic, racial, or religious group membership. We need to continue to examine the factors which enable individuals collectively and individually to perpetrate evil/genocide and the impact of apathetic bystanders as fuel for human violence. While an exact predictive model for mass violence/human cruelty is beyond the scope of human capability, we have an obligation to develop a model that highlights the warning signs and predisposing factors for human violence and genocide. With such information, we can develop policies, strategies, and programs designed to counteract these atrocities.

Introduction

. . . Let us not wait until the worst has happened, or is already happening. Let us not wait until the only alternatives to military action are futile hand-wringing or callous indifference. Let us . . . be serious about preventing genocide. Only so can we honour the victims. . . . Only so can we save those who might be victims tomorrow.

—UN SECRETARY-GENERAL KOFI ANNAN¹

The world was stunned by the scale and ferocity of the violence [in Rwanda]. But that same world fell woefully short in helping to stem the killings and in heeding the clear warning signs that were visible for months as tensions rose, deadly plans were hatched and guns and machetes were distributed. . . . We honor [the victims'] lives through remembrance and reflection, but also through doing everything that we can to improve protection, response, and safeguarding populations from genocide and other atrocities.

¹ Press Release, Secretary-General Kofi Annan, Action plan to prevent genocide, UN Press Release SG/SM/9197 AFR/893 (Apr. 7, 2004)

—UN SECRETARY-GENERAL BAN KI-MOON²

We live in a time of unparalleled instances of genocide and ethnocide. The Holocaust, the genocides in Darfur, Turkey, Cambodia, Tibet, & Bosnia, the disappearances in Argentina & Chile, the death squad killings in El Salvador, Stalin's purges the killing of the Tutsi in Rwanda . . . and the list goes on.

Last century is marked by unparalleled human cruelty, mass violence, ethno political conflict, and genocide. Government genocidal policies alone have resulted in over 210 million deaths³ - 80 percent of these are civilian deaths (170 million); nearly four times the number of individuals killed in combat during international/domestic wars during this same time period.

Mass violence, torture, violations of fundamental human rights, and the mistreatment of human beings is not a new aspect of humanity; documentation of such events spans the historical record. However, technology has taken these cruelties to new levels.

Men and women have through history always been capable to perform the most horrendous acts towards other men and women. Some of the worst acts that can be committed are acts of genocide. This crime has even been described as the “crime of crimes”.⁴ Genocide is a word that is strongly emotionally and politically loaded. When a phenomenon or event is labelled a genocide this is often a way to express a concern about the gravity of the situation and not necessarily an attempt to define the situation from legal point of view. In this situation it is the role of lawyers to interpret the definition of genocide in international law. Crimes against humanity are widespread or systematic attacks on the civilian population, irrespective of whether the people are nationals or non-nationals and irrespective of whether the attacks are committed in time of war or in time of peace.⁵

I.1 Historical Background of Genocide-

History of genocide can be traced back from the beginning of social and political life on earth. Each and every movement of group of particular individuals with intention to usurp the person or property of other groups of individuals forcefully has always been resulted in dreadful struggle and the result of struggle is end of life of mass. This mass killing with intention to satisfy the political need was termed previously as holocaust and later on as Genocide. The major genocide in the history can be read under following heads.—

Destruction of Mongol Empire, Congo Holocaust, Zulu Kingdom Holocaust, Islamic Invasion in India, German Holocaust, Genocide in Rwanda and former Yugoslavia etc are the most common of the horrific crime of genocide.

² Ban Ki-moon, UN Secretary-General, Remarks at ceremony honouring UN staff victims of Rwanda Genocide (Apr. 7, 2014).

³ Available at <http://faculty.webster.edu/woolfm/flohandout.html> last visited on 02/05/2019

⁴ Prosecutor v. Kambanda (ICTR-97-23-S), Judgement and Sentence, 4 September 1998, para. 16

⁵ “Holocaust and Other Genocides” accessed at: http://www.holocaustremembrance.com/sites/default/files/EWG_Holocaust_and_Other_Genocides.pdf last visited on 03 May 2019

The most prominent evidence of holocaust in ancient India is the Kalinga Holocaust. The third emperor of the Mauryan dynasty, Ashoka, hailed to be one of the most famous ancient rulers of India, was involved in a ghastly battle that led to the mass killings of hundreds of thousands of people. By attacking Kalinga in 260 BC, King Ashoka slaughtered, butchered and brutally killed everyone who came in his way. History is testimony to the brutal and inhumane warfare practices adopted by King Ashoka. It was the battle of Kalinga that later created a deep sense of remorse in Asoka's heart leading to his conversion to Buddhism. Most of the history texts have hailed Ashoka for spreading Buddhism in many parts of the world⁶.

I.2 Meaning and Definition of Genocide -

Genocide is "the ultimate crime." In 1946, in the wake of the Holocaust, as one of its first acts, the United Nations condemned the crime of genocide, calling it "a denial of the right of existence of entire human groups" that "shocks the conscience of mankind, results in great losses to humanity. . . and is contrary to moral law and to the spirit and aims of the United Nations."⁷

Genocide is also a subject of social science and scholarly study, but its legal definition does not easily allow for empirical and historical research. For this reason the definition of genocide for research purposes has, in essence, been of two types. One is the definition of genocide as the intention to murder people because of their group membership, even if political or economic. A second definition, which may also be called democide, is any intentional government murder of unarmed and helpless people for whatever reason⁸.

Taking both social definitions into account, governments have murdered probably around 174 million people during the 20th Century. Most of this killing, perhaps around 110 million people, is due to communist governments, especially the USSR under Lenin and Stalin and their successors (62 million murdered), and China under Mao Tse-tung (35 million). Some other totalitarian or authoritarian governments are also largely responsible for this toll, particularly Hitler's Germany (21 million murdered) and Chiang Kai-chek's Nationalist government of China (about 10 million)⁹. Other governments that have murdered lesser millions include Khmer Rouge Cambodia, Japan, North Korea, Mexico, Pakistan, Poland, Russia, Turkey, Vietnam, and Tito's Yugoslavia.

There is a high correlation between the degree of democratic freedom a people enjoy and the likelihood that the government will commit democide. Modern democratic governments have committed virtually no domestic genocide. Those governments that commit the most genocide have been totalitarian governments, while those that committed lesser genocide have been partially or wholly authoritarian and dictatorial.

⁶ Available at <http://www.youthkiawaaz.com/2012/05/genocides-in-india-from-past-to-present/> last visited on 02/01/2016

⁷ UN General Assembly, The Crime of Genocide, G.A. Res 96(I), UN Doc A/RES/96(I) (Dec. 11, 1946).

⁸ "Genocide:R.J. Rumme"¹ accessed at <https://www.hawaii.edu/powerkills/GENOCIDE.ENCY.HTM> last visited on 02/05/2019

⁹ Datas availabl at <https://www.hawaii.edu/powerkills/GENOCIDE.ENCY.HTM>

Regardless of type of government, the likelihood of genocide increases during their involvement in war, or when undergoing internal disruptions, as by revolution, rebellion, or foreign incursions. Such provides the cover and excuse for genocide. Regardless of war or peace, the motive for genocide may be to deal with a perceived threat to the government or its policies, to destroy those one hates or envies, to pursue the ideological transformation of society, to purify society, or to achieve economic or material gain.

Winston Churchill defined 'Genocide' as the crime without a name.¹⁰ The ordinary meaning is murder by government of people due to their national, ethnic, racial, or religious group membership.¹¹ As per Collins English Dictionary genocide is "the policy of deliberately killing a nationality or ethnic group". Genocide can also be defined as The deliberate destruction of an entire race or nation.¹² Earlier in a similar sense was *populicide* (1799), from French *populicide*, by 1792, a word from the Revolution. This was taken into German, e.g. *Völkermeuchelnden* "genocidal" (Heine), which was Englished 1893 as *folk-murdering*.¹³ 1944, apparently coined by Polish-born U.S. jurist Raphael Lemkin (1900-1959) in his work "Axis Rule in Occupied Europe" [p.19], in reference to Nazi extermination of Jews, literally "killing a tribe," from Greek *genos* "race, kind" (see *genus*) + *cide*. The proper formation would be *genticide*.

Rafael Lemkin, the hero of Samantha Power's new book, spent his life fighting against the systematic destruction of national, ethnic, racial or religious groups. The word he invented in 1944 – just in time for its use at the Nuremberg Trials — was "genocide." Or, as Lemkin, who lost forty-nine members of his family in the Holocaust, preferred it: "Genocide," with a capital G.¹⁴

Lemkin was the first man to introduce the term 'Genocide'. According to Lemkin (1944), the term 'mass killing' was inadequate in describing the true atrocities of the Holocaust (cited in Yacoubian, 2000) thus as a result, he devised the term 'genocide' from the 'Greek 'genos' meaning race or tribe, and the Latin 'cide', meaning killing.¹⁵

Before 1944 no term like genocide was in existence. 'Holocaust' was being used to denote the crime of mass killing of human being. Holocaust was specifically used for killing of Jews by Nazi Government of Germany. In more specific sense ,Holocaust was the name of a specific historical mass killing while the term 'Genocide' later on was devised by Lemkin in 1944 during the 2nd world war to denote the mass killing of human being either by individual or by group of individual or by state. The term 'Holocaust' has also been understood in the sense mass killing of human being by State or it can also be termed as State sponsored murder at large scale .

¹⁰ "Genocide in international law: The Crimes of Crimes", William A. Schabas available at <http://www.javeriana.edu.co/blogs/ildiko/files/Genocide-in-International-Law1.pdf> last visited on 18/01/2016

¹¹ Genocide - Wikipedia, the free encyclopedia available at https://en.wikipedia.org/wiki/Genocide_pdf, last visited on 18/05/2019

¹² The American Heritage® New Dictionary of Cultural Literacy, Third Edition.

¹³ Online Etymology Dictionary, © 2010 Douglas Harper, available at http://dictionary.reference.com/browse/genocide_pdf last visited on 18/05/2019

¹⁴ "Naming Genocide- JOANNE MARINER"- Available at <http://www.counterpunch.org/2002/09/25/naming-genocide/> last visited on 20/05/2019

¹⁵ 'GENOCIDE PREVENTION IN THE MODERN SETTING: THEORY VERSUS PRACTICE' By Lucy Kentish' available at www.internetjournalofcriminology.com last visited on 21/01/2016

Genocide is “the ultimate crime.” “ In 1946, in the wake of the Holocaust, as one of its first acts, the United Nations condemned the crime of genocide, calling it “a denial of the right of existence of entire human groups” that “shocks the conscience of mankind, results in great losses to humanity.. . and is contrary to moral law and to the spirit and aims of the United Nations.” Genocide is also defined as “a profound and whole-scale violation of human rights. It is an attack on individual men, women and children in which those affected are singled out for extermination—and denied their inherent individual dignity—not because of anything they have done as individuals, but because of the group to which they belong”.¹⁶

As debate has continued surrounding an absolute and applicable definition of genocide, various commentators have sought to offer alternatives as an attempt to overcome this issue, one such example being that of Katz (1994, cited in Jones2006: 18)¹⁷, who states:-

“Genocide is the actualisation of the intent, however successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the perpetrator, by whatever means.”

Although ‘the word is new, the concept is ancient’ (Kuper, 1981 cited in Jones, 2006:3)¹⁸ and there are numerous examples throughout history of intentional mass killings of specific groups, for example, the total destruction of Carthage by Rome in 149 B.C. (Adler et al, 2004). According to Rummel (1994, cited Heidenrich, 2001: 8) 170,000,000 men, women, and children fell victim to genocide in the first 88 years of the twentieth century, thus ‘This is as though our species has been devastated by a modern Black Plague. And indeed it has, but a plague of absolute power and not germs’. Although most genocidal acts occur during periods of armed conflict, there is an important legal distinction between ‘war’ and genocide. Wars are supposed to involve only armed forces, and to preserve some civility, those involved in war must avoid harming non-combatants, which includes: ‘infants, children, women, the elderly, military physicians, medics and prisoners’ (Heidenrich, 2001: 1)¹⁹.

I.3. Essential Ingredients of Genocide-

The authoritative definition of genocide in international law is the definition given in the UN Genocide Convention²⁰, which was created in 1948. The Genocide Convention was a landmark in the history of international criminal law as it was the first instrument that recognised that gross human rights violations committed in absence of an armed conflict are nevertheless of international concern.

¹⁶ “Manual on Human Rights and the Prevention of Genocide Foreword by Adama Dieng,” Jacob Blaustein Institute for the Advancement of Human Rights available at <http://www.jbi-humanrights.org/JBI%20Manual%20on%20Human%20Rights%20and%20Prevention%20of%20Genocide.pdf> last visited on 12/05/2019.

¹⁷ Available at http://www.internetjournalofcriminology.com/Kentish_Genocide_Prevention_in_the_Modern_Setting_IJC_July_2011.pdf last visited on 12/05/2019

¹⁸ http://www.internetjournalofcriminology.com/Kentish_Genocide_Prevention_in_the_Modern_Setting_IJC_July_2011.pdf

¹⁹ Available at http://www.internetjournalofcriminology.com/Kentish_Genocide_Prevention_in_the_Modern_Setting_IJC_July_2011.pdf last visited on 12/05/2019

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277. (1951), adopted by the UN General Assembly on October 9 1948

Convention on the Prevention and Punishment of the Crime of Genocide-

Article 2 of Genocide Convention defines "Genocide" .This crime involves, "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:-

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

I.4 Human Rights and Genocide-

Human Right have been defined by various jurist in various ways. Some said Human right are those right which a man posses only by virtue of being human. Human rights are moral principles or norms, that describe certain standards of human behaviour, and are regularly protected as legal rights in municipal and international law. They are commonly understood as inalienable fundamental rights "to which a person is inherently entitled simply because she or he is a human being," and which are "inherent in all human beings" regardless of their nation, location, language, religion, ethnic origin or any other status. They are applicable everywhere and at every time in the sense of being universal, and they are egalitarian in the sense of being the same for everyone. They require empathy and the rule of law and impose an obligation on persons to respect the human rights of others. They should not be taken away except as a result of due process based on specific circumstances; for example, human rights may include freedom from unlawful imprisonment, torture, and execution.²¹

The 1948 Universal Declaration of Human Rights, the foundational document for internationally recognized human rights, contains 30 principles or general statements about human rights. Subsequent treaties have translated these 30 principles into many specific rights. Among all these rights, some are said to be truly fundamental for a life with dignity.

The violation of these absolutely core rights is said to constitute gross or major violations of human rights. International law does not provide us with a set list of gross violations, but there is no doubt that genocide and crimes against humanity are on that list.

²¹ Available at https://en.wikipedia.org/wiki/Human_rights last visited on 12/05/2019

Here it would be pertinent to see the whole provisions of UDHR to make it clear that what kind of rights have been conferred to human being as their basic human right.

I.5 various aspects of Crime of Genocide;-

(a) War crime and Genocide- Violation of law of war is resulted in the commission of war crime. But war crimes are also distinguished from genocide.

War crimes is defined as grave breaches of the Geneva Convention of 12 August 1949 such as wilful killing, torture or inhuman treatment, including biological experiments, destruction of property and taking of hostages²².

While Genocide are the acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, including killing members of the group, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.

Thus violation of Geneva Convention of 12 August 1949 during war is resulted in war crime.

(b) Ethnic Cleansing and Genocide-

When we hear of one group of people targeting another based on something like race, nationality or religion, the terms “ethnic cleansing” and “genocide” are often tossed around to mean the same thing²³. To be specific, the end goal of genocide is complete destruction of a particular group, while ethnic cleansing is an expulsion of the group from a certain area, often encouraged by violence. While ethnic cleansing technically isn’t usually a crime (although the behaviors it describes are), genocide is. Not everyone wants to keep them separate, while others argue that treating them both the same is lessening the severity of genocide.

Both the terms “genocide” and “ethnic cleaning” have distinct emotions attached to them, and while they’re often used by the media as interchangeable terms, there are some important distinctions, even though there’s no formal, legal definition that’s accepted worldwide. When it comes to the United Nations, the two actions are completely different, and something labelled as actions of ethnic cleansing are not considered a part of the criminal acts of genocide.

Genocide is considered any act committed against a group with the intention of destroying that group completely. Whether the target is selected based on race, nationality, religion, or ethnicity, genocide is done with the end goal of completely eradicating a group of people. According to The Genocide Convention, there are a number of different ways it can be done, including the removal of children and the future

²² “Genocide, crimes against humanity and war crimes: criminal investigation and prosecution “ available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A116005>. last visited on 12/05/2019

²³ "The Difference Between Ethnic Cleansing And Genocide" available at <http://knowledgenuts.com/2015/08/02/the-difference-between-ethnic-cleansing-and-genocide/> last visited on 12/05/2019

generations of a people, measures that prevent the birth of a new generation and, of course, the infliction of death, bodily harm, or mental harm on a certain group.

Ethnic cleansing, on the other hand, is the process of removing particular groups from an area. The same groups are often targeted in both cases, with race, nationality, and religion being major selection factors.

Where the methods and end goals of genocide are extermination, the methods and end goals of ethnic cleansing might be removal and resettlement, although that often comes along with a price paid in human lives. Deportation, expulsion orders, and forcible removal are all a part of ethnic cleansing.

The line between the two is often horrifyingly unclear, although the UN recognizes them as two separate crimes. Ethnic cleansing is considered a crime against humanity, while intent plays a huge part in the definition of genocide. For crimes to be considered genocide, there must be a specific end goal behind the actions – eradication.

Genocide can be viewed as the ultimate step in ethnic cleansing, but even that distinction often doesn't help to make matters more clear.

Perhaps most bizarre of all is the absolute lack of a specific definition of what is ethnic cleansing. Since there's no accepted definition, it's not technically a crime. Pieces of what make up the behaviours of ethnic cleansing—deportation, seizure of land and property, harassment, torture, and other such behaviours—are obviously illegal, but the debate over ethnic cleansing is still raging.

The whole argument really came about after World War II, when the term “genocide” was first used. At that time, the distinction was “intent to destroy” as opposed to “intent to remove,” although others say it's a distinction that shouldn't really matter from a moral standpoint.

(c) **Whether Mass Media Hate Speech Constitute the Crime of Genocide?**

In 1946, the tribunal at Nuremberg sentenced to death the publisher of an anti-Semitic weekly newsletter for his role as "Jew-Baiter Number One," holding that his publications "infected the German mind with the virus of anti-Semitism and incited the German people to active persecution." In *Prosecutor v. Nahimana, Barayagwiza, and Ngeze (the Media Case)*,²⁴ the International Criminal Tribunal for Rwanda (ICTR) produced international criminal law's first reexamination of the link between mass media and mass slaughter, convicting three media executives for the role of their newspaper and radio station in Rwanda's 1994 genocide. Trial Chamber I found the defendants guilty of genocide, direct and public incitement to genocide, conspiracy to commit genocide, and two crimes against humanity (persecution and extermination), thus signaling that hate speech can constitute international law's most heinous crimes.

²⁴ Case No. ICTR-99-52-T (Int'l Crim. Trib. for Rwanda Trial Chamber I Dec. 3, 2003), available at <http://www.icttr.org/ENGLISH/cases/Nahimana/judgement/Judgement.pdf>. last visited on 13/05/2019 The judges were Navanethem Pillay (presiding), Erik Mose, and Asoka de Zoysa Gunawardana.

Within its 360-page judgment, the Tribunal established a number of principles that will help refine the contours of speech rights under international criminal law. Though its elaboration of media causation is not perfect - particularly with respect to its broad inclusion of print media and its practical exclusion of sexual violence - the Tribunal nevertheless established a workable foundation for future development.

The United Nations established the ICTR to hold accountable the persons most responsible for Rwanda's three-month genocide,²⁵ in which Hutu extremists killed an estimated 800,000 Tutsis and moderate Hutus after the president's plane was shot down. Hassan Ngeze was the founder, owner, and editor-in-chief of *Kangura*,²⁶ an extremist newspaper that published pieces "brimming" with "contempt and hatred for the Tutsi ethnic group," sometimes "calling for the extermination of the Tutsi."²⁷ Ferdinand Nahimana founded and directed one of the most prominent media sources in the country, radio station *Radio Television Libre des Mille Collines* (RTLM),²⁸ which sought to foment hostility not merely toward members of the political opposition but toward all Tutsis and Tutsi sympathizers.²⁹ After the plane crash, RTLM broadcasts reached a fever pitch, openly demanding the extermination of Tutsis³⁰ and working essentially as a "radio dispatcher for murder"³¹ by manipulating and revealing the movements of Tutsis to facilitate their slaughter at the hands of the Hutu populace.³² Jean- Bosco Barayagwiza was the "lynchpin" between Ngeze and Nahimana second-in-command at RTLM, Barayagwiza helped found and direct an exterminationist political party in which Ngeze was also involved.

In its legal findings, the Tribunal first held the defendants guilty of genocide.³³ The language of RTLM, *Kangura*, and the individual defendants met the high bar for the necessary genocidal intent.³⁴ Most

²⁵ See Statute of the International Tribunal for Rwanda, 33 I.L.M. 1602 [hereinafter ICTR Statute], available at <http://www.icttr.org/ENGLISH/basicdocs/statute.html>, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600.

²⁶ Media Case 123, 997A. The name *Kangura* literally means "to wake up others." Witnesses testified that, even though a significant proportion of Rwanda's population is illiterate, *Kangura*'s influence was greatly enhanced through oral retelling. Ngeze himself wrote articles in *Kangura*, gave radio interviews, drove around with a megaphone in his vehicle, distributed weapons to Hutu fighters, and ordered the killing of Tutsi civilians.

²⁷ The Tribunal singled out two pieces for special mention. First, the Appeal to the Conscience of the Hutu, and the "Ten Commandments" contained therein, called for Hutus to "take all necessary measures to deter the enemy from launching a fresh attack." (internal quotation marks omitted). Second, the cover of *Kangura* No. 26 depicted a machete next to text reading "What weapons shall we use to conquer the Inyenzi once and for all" Inyenzi, the word for cockroach, was used both as a reference to the fighters of the Tutsi political resistance movement and, by extension, as a slur against all Tutsis. For more information on the content of mass media during the genocide, see JEAN-PIERRE CHRETIEN ET AL., *RWANDA: LES MIDIAS DU GINOCIDE* (1995).

²⁸ See Media Case It 342-43; (noting testimony that "almost everyone had a radio and listened to RTLM"); 555, 567 (describing Nahimana's role)

²⁹ See *ibid* 485-86

³⁰ In June 1994, for example, an RTLM broadcast urged: One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the Inkotanyi and exterminate them [T]he reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it. *Ibid.* 396. Inkotanyi literally means a resistance soldier, *id.* at iv (glossary), but the Tribunal determined through passages like this one that RTLM effectively used it in reference to all Tutsis.

³¹ Editorial Fanning Rwanda's Genocide, N.Y. TIMES, Dec. 5, 2003, at A38. Available at Jstore

³² See Media Case 482; see also *ibid.* 1 444 (noting one witness's account that "being named on RTLM [was] 'a death sentence'"). There was widespread consensus in Rwanda that the radio was a major, if not the key, facilitator of the genocide. The Tribunal noted the testimony of one expert witness, Alison Des Forges of Human Rights Watch, who received "urgent telephone calls [during the genocide] ... from people in Rwanda, desperately seeking to 'stop that radio.'" *Ibid.* 482, 971. RTLM eventually earned the nickname "Radio Machete." *Id.* ? 10o31

³³ For an overview of the ICTR's jurisprudence and the doctrinal elements of each of the crimes under its jurisdiction, see HUMAN RIGHTS WATCH, *GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS*

significant, the Tribunal also noted that while "the nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself," this fact "does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication."³⁵ Finally, the ICTR found individual criminal responsibility for all three defendants, not only for some of their actions unrelated to mass media but also for their involvement in RTLM and Kangura.³⁶

(d) Rape as an Act of Genocide-

Rape has occurred within internal and international armed conflicts, throughout history.³⁷ Unfortunately, for much of history, rape has been looked upon as an unavoidable aspect of conflict.³⁸ However, with the horrific reports of mass rapes and rape/death camps in Bosnia, the crime of rape both gained media attention and evoked public outrage.

In the wake of the attention given to the mass rapes committed in Bosnia, one legal scholar, Rhonda Copelon, expressed concern about this "overemphasis" and "focus" on genocidal rape. Her concerns were: 1) that an overemphasis on "genocidal rape" could result in the elision of rape and genocide; 2) that the

OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004)

³⁴ Media Case 965. The ICTR found "compelling" and "conclusive" evidence of intent to commit genocide in broadcasts such as the one cited above, see supra note 10, and in Kangura pieces like the cover of No. 26, see supra note 7, as well as in individual statements and publications by the defendants themselves. Media Case 957-69

³⁵ The Tribunal continued, rebutting the arguments of the defense: If the downing of the plane was the trigger, then RTLM, Kangura and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded." 953. See also id. 487 (finding causal connections "to varying degrees" between RTLM broadcasts and the death of some Tutsi civilians).

³⁶ In some cases, the responsibility was deemed direct. See 974 (finding Nahimana directly responsible, since "RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians"); id. I 977A (finding Ngeze directly responsible for his role "[a]s founder, owner and editor of Kangura, a publication that instigated the killing of Tutsi civilians, and for his individual acts in ordering and aiding and abetting the killing of Tutsi civilians"). In other cases, the Tribunal relied on the ICTR's statutory provision for command responsibility. See ICTR Statute, art. 6(3) (allowing conviction of a superior who "knew or had reason to know" of, but failed to prevent or punish, a subordinate's act punishable by the ICTR); Media Case 973 (convicting Barayagwiza under a theory of command responsibility for "his active engagement in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM").

³⁷ Human Rights Watch summarizes the history as follows: During the Second World War, some 200,000 Korean women were forcibly held in sexual slavery to the Japanese army. During the armed conflict in Bangladesh in 1971, it is estimated that 200,000 civilian women and girls were victims of rape committed by Pakistani soldiers. Mass rape of women has been used since the beginning of the conflict in the Former Yugoslavia. Throughout the Somali conflict beginning in 1991, rival ethnic factions have used rape against rival ethnic factions. During 1992 alone, 882 women were reportedly gang-raped by Indian security forces in Jammu and Kashmir. In Peru in 1982, rape of women by security forces was a common practice in the ongoing armed conflict between the Communist Party of Peru, the Shining Path, and government counterinsurgency forces. In Myanmar, in 1992, government troops raped women in a Rohingya Muslim village after the men had been inducted into forced labour. Under the former Haitian military regime of Lt.Gen. Raoul Cedras, rape was used as a tool of political repression against female activists or female relatives of opposition members. BINAIFER NoWROJEE, HUMAN RIGHTS WATCH/AFRICA, SHATTERED Lives: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND AFTERMATH n.39 (Dorothy Q. Thomas & Janet Fleishman eds., 1996) [hereinafter SHATTERED LivEs].

³⁸ At least one commentator has posited that rape has not received significant attention, either legally or socially, because: 1) rape has been viewed as "an inevitable but subsidiary component of warfare; a 'natural' sideshow in the theatre of war," 2) "rape has been treated as a legitimate tactic in the arsenal of weapons used to fight the enemy nation by way of anti-morale campaigns, and in this sense is not an act against the individual woman, but is an attack on the whole community," and, finally, 3) "rape can also be seen to have developed into a sophisticated form of political torture, albeit one informed by sexual impulses, used to punish suspected 'enemies' and to terrorize the population into submission." Jasminka Kalajdzic, Rape, Representation, and Rights: Permeating International Law with the Voices of Women, 21 QUEENS L.J.457, 463 (1996).

gendered nature of the crime of rape—a violent crime committed against women qua women—could become obscured; 3) that rape victims could lose their subjectivity and become objectified because the crime of genocidal rape would be viewed primarily as a crime perpetrated against a group and not against the individual woman; and, lastly, 4) that rape committed in an armed conflict outside of the context of a genocide could become invisible. In response to these concerns, Copelon proposed "surfacing" gender in the midst of genocide that is, acknowledging the relevancy of gender in genocidal rape³⁹.

In September 1998, the Rwandan Tribunal rendered an historic judgment in *Prosecutor v. Jean-Paul Akayesu*,⁴⁰ becoming the first international criminal tribunal to define rape as an act of genocide and to find an individual guilty of genocide on the basis, inter alia, of acts of rape and sexual violence. The Rwandan Tribunal in its Akayesu Judgment addresses and clarifies many, if not all, of the concerns raised in the debate about genocidal rape.

First, the Rwandan Tribunal recognized the intersectionality of the crime of genocidal rape. The Tribunal recognized that "genocidal rape" during the Rwandan genocide happened to certain women because of their ethnicity specifically to Tutsi women or Hutu women married to Tutsi men. The Tribunal also recognized that these women were targeted both because of their ethnicity and because of the beliefs and opinions held by Hutus about Tutsi women as women.

Second, the Rwandan Tribunal managed to "surface gender in the midst of genocide" by recognizing the subjectivity of victims of the crime of genocidal rape. The Tribunal recognized that although the intent of the act of genocidal rape is to destroy a particular group, the effect of the act is the infliction of serious injury and harm. The Rwandan Tribunal acknowledged genocidal rape as possibly the most effective and serious way of inflicting injury and harm on individual Tutsi women, thus advancing the destruction of the entire Tutsi group.

More than sixty years later the Genocide Convention is a well-established instrument that comprises of elements of international criminal law, international humanitarian law and international human rights law. The Convention defines an international crime and spells out rules of prosecution and extradition and therefore falls under international criminal law. Since the definition of genocide is included in the Statutes of the two ad hoc tribunals created to prosecute violations of humanitarian law the Genocide Convention can be claim to be a part of humanitarian law. The prohibition of genocide is closely connected to the universal right to life⁴¹. In other instruments this right is often linked to the individual's right to life whereas the Genocide Convention protects the right to life for entire human groups also called the right to existence. The General Assembly Resolution 96 (I) reflects this view when it describes genocide as a "denial of

³⁹ Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 197, 199 (Julie Peters & Andrea Wolper, eds., 1995).

⁴⁰ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T (Judgment, September 2, 1998) ch. 6.3.1, 496, available at ICTR website, <http://www.ictt.org>.

⁴¹ Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), UN Doc. A/810, art 3.

existence of entire human groups as homicide is the denial of the right to live of individual human beings...”.

Suggestions to Prevent Genocide

On the tenth anniversary of the 1994 genocide in Rwanda, United Nations Secretary-General Kofi Annan stressed the need to develop more effective strategies for preventing genocide, and he called on the world to “recognize the signs of approaching or possible genocide, so that we can act in time to avert it.” He pointed to the United Nations human rights system as having a special responsibility to play in sounding the alarm about the risk of genocide. A decade later, United Nations Secretary-General Ban Ki-moon agreed that “human rights violations must be seen as early warning signals of conflict and mass atrocities,” and stressed the need for swift action to be taken to protect people whenever such risks are detected.

We need to continue to examine the factors which enable individuals collectively and individually to perpetrate evil/genocide and the impact of apathetic bystanders as fuel for human violence. While an exact predictive model for mass violence/human cruelty is beyond the scope of human capability, we have an obligation to develop a model that highlights the warning signs and predisposing factors for human violence and genocide. With such information, we can develop policies, strategies, and programs designed to counteract these atrocities.

