

A WOMAN SCORNED FOR THE “LEAST CONDEMNED” WAR CRIME: PRECEDENT AND PROBLEMS WITH PROSECUTING RAPE AS A SERIOUS WAR CRIME IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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I. INTRODUCTION

The woman scorned is Pauline Nyiramasuhuko, Rwanda’s Former Minister for Women’s Affairs, who is currently on trial at the International Criminal Tribunal for Rwanda (“ICTR”) for allegedly using her official capacity to incite Hutus to rape thousands of female Tutsis during the 1994 Rwanda Genocide.¹ She is the first woman to be charged with rape as a crime against humanity by an international tribunal.² The 1994 Rwanda Genocide had devastating effects on the female population in the country due to the systematic gender-based violence endorsed and carried out by

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¹ See *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-I, Amended Indictment (Aug. 10, 1999), at www.ictr.org/ENGLISH/cases/Nyira/indictment/index.pdf (last visited Apr. 10, 2004) (naming offenses stipulated in Articles 2, 3, and 4 of the ICTR Statute).

² See Peter Landesman, *The Minister of Rape: How Could a Woman Incite Rwanda’s Sex-Crime Genocide?*, N.Y. Times Mag., Sept. 15, 2002, at 82. The New York Times Magazine depicted Nyiramasuhuko on its cover in a striking graphic. Male officials who incited similar violence against women in Rwanda or other conflicts have not received similar publicity by the news media; however, the implications of this discrepancy are beyond the scope of this Article.

government officials.³ Almost one million people were killed in one hundred days⁴ and, according to some reports, nearly all female survivors—including many young girls⁵—were raped and sexually brutalized.⁶ While these crimes are neither historically nor geographically unique to the 1994 Rwanda Genocide,⁷ the ICTR's efforts in prosecuting gender-based violence as crimes against humanity and tools of genocide have been unprecedented.⁸ Rape warfare, although common throughout history, has traditionally been the least condemned war crime.

³ See Human Rights Watch & Fédération Internationale Des Ligues Des Droits De L'Homme, Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath 1 (1996), available at www.hrw.org/reports/1996/Rwanda.htm (last visited Apr. 10, 2004) [hereinafter Human Rights Watch, Shattered Lives]; see also Alison Des Forges, Human Rights Watch, Leave None to Tell the Story, Genocide in Rwanda (1999), available at www.hrw.org/reports/1999/rwanda/ (last visited Apr. 10, 2004) (describing the events leading up to the genocide and the violence that occurred in specific areas in extensive detail); see generally African Rights, Rwanda: Death, Despair and Defiance (1995) (providing a comprehensive overview of the genocide from personal, communal, and national perspectives).

⁴ Compare Republic of Rwanda, Genocide and Justice, at www.rwanda1.com (last visited Feb. 16, 2003) (reporting that one million Rwandan citizens were killed in one hundred days), with International Criminal Tribunal for Rwanda, Handbook for Journalists, available at www.ictor.org/ENGLISH/handbook/index.htm#1 (last visited Mar. 3, 2004) (estimating that approximately 800,000 individuals were killed during the three month period). See also Press Release, United Nations, Detailed Report on Situation of Rape, Widowed, Landless and Otherwise Traumatized Women in Rwanda presented to the Anti-Discrimination Committee, U.N. Doc. WOM/896 (Feb. 1, 1996), at www.un.org/News/Press/docs/1996/19960201.wom896.html (last visited Mar. 25, 2004) (reporting that the 1994 genocide left 500,000 women widowed and 400,000 children orphaned); Human Rights Watch, Shattered Lives, *supra* note 3, at 35 (emphasizing that Rwanda has “become a country of women” and that they now account for over 70 percent of the population).

⁵ See Human Rights Watch, Shattered Lives, *supra* note 3, at 76 (describing a Kigali doctor's account of treating a two-year old girl for chronic vaginitis as a result of being raped during the genocide); see also *id.* at 58 (describing one survivor's account of being repeatedly raped and held hostage at age eleven during the genocide).

⁶ See *id.* at 24 (asserting that “rape was the rule and its absence the exception”) (quoting Rene Degni-Segui, United Nations Special Rapporteur on Rwanda).

⁷ See Kelly D. Askin, War Crimes Against Women: Prosecution in International War Crimes Tribunals 2-99 (1997) (describing gender-based violence against women from 500 B.C. through World War II); see also Patricia Viseur-Sellers, The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law, in 1 Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts 263, 265 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) (stating that “[w]artime arsenals employed sexual violence as a standard armament for two thousand of the past twenty-five hundred years”).

⁸ See, e.g., Human Rights Watch, Women's Human Rights, in World Report 1999 427, available at www.hrw.org/wr2k/Wrd.htm (last visited Jan. 11, 2003) (noting that the first conviction for rape at the ICTR demonstrated significant progress in denouncing sexual violence against female civilians).

Although not without criticism,⁹ the ICTR shattered historical ambivalence toward gender-based violence by indicting and prosecuting Rwandan officials who countenanced rape as a method of warfare during the genocide.¹⁰ The first step in shattering this ambivalence occurred with the prosecution of Jean Paul Akayesu,¹¹ a mayor in the Taba Commune,¹² who also sanctioned massive sexual violence against Tutsi women. With the Prosecutor v. Akayesu¹³ decision, the ICTR became the first international war crimes tribunal to convict an official for genocide and to

⁹ See International Crisis Group, The International Criminal Tribunal for Rwanda: Justice Delayed 1-3 (June 7, 2001), at www.crisisweb.org/library/documents/report_archive/A400442_02102001.pdf (last visited Mar. 25, 2004) (reporting that the organization's independent evaluation of the ICTR's first seven years of existence concluded that the Tribunal had failed to uphold its mandate). A majority of Rwandans were found to hold the belief that the ICTR is "a useless institution, an expedient mechanism for the international community to absolve itself of its responsibilities for the genocide and its tolerance of the crimes of the RPF [Rwandan Patriotic Front]." *Id.* at iii. See also David Stoelting et al., International Legal Developments in Review: International Criminal Tribunals for the Former Yugoslavia and Rwanda, 36 Int'l Law. 573, 578-81 (2002) (detailing the controversies and public embarrassment the ICTR faced in 2001 leading to its internal reorganization that year).

¹⁰ See Kelly D. Askin, Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status, 93 Am. J. Int'l L. 97, 99 (1999) (emphasizing how in contrast to the Nuremberg and Tokyo Tribunals, which largely ignored gender-based crimes, the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the ICTR have "surmounted reluctance and other obstacles to address these crimes despite their sexually graphic nature and traditional insensitivities to women's rights and needs").

¹¹ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998), at www.ictor.org/default.htm (last visited Apr. 10, 2004) (convicting Jean Paul Akayesu of crimes against humanity and genocide).

¹² See Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment (June 1997), paras. 2-4, at www.ictor.org/ENGLISH/cases/Akayesu/indictment/actamond.htm (last visited Mar. 3, 2004) (explaining the relative position and authority of bourgmestres in Rwanda). Rwanda is divided into eleven prefectures each governed by a prefect and subdivided into communes, which are governed by bourgmestres or mayors. *Id.* para. 2. Bourgmestres are appointed by the President of the Republic, upon recommendation of the Minister of the Interior. *Id.* "In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*." *Id.* Jean Paul Akayesu served as mayor of the Taba commune from April 1993 until June 1994. *Id.* para. 3. His responsibilities included "performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority." *Id.* para. 4.

¹³ See *id.* paras. 12A-12B (adding counts thirteen and fourteen against Akayesu for committing crimes against humanity by facilitating the commission of sexual violence (rape and other inhumane acts) at the bureau communal he headed). The amended indictment also added a definition of sexual violence. *Id.* para. 10A.

declare that rape could constitute genocide.¹⁴ Pressure from women's groups, coupled with cooperation and support coming from within the ICTR, led to the watershed decision linking sexual violence to the genocide in Rwanda.¹⁵ However, the ICTR's handling of the Akayesu and Nyiramasuhuko cases also reveal a failure to adequately investigate and indict the gender-based violence sanctioned by the government during the genocide before trial, deficiencies in handling witnesses during the investigation and trial stages, and delays affecting the delivery of justice to survivors. These deficiencies must be addressed and corrected in order to maintain the Tribunal's legitimacy, protect women's human rights, and build upon the jurisprudence condemning rape warfare as genocide. An assessment of the ICTR's deficiencies is especially timely given that the tenth anniversary of the genocide occurred in April 2004.

Although the Akayesu conviction and the Nyiramasuhuko prosecution have significant precedential value, the problems encountered by the ICTR in indicting and prosecuting gender-based violence should be lessons for future prosecutions in the international community.¹⁶ Recognition of rape as a serious war crime represents only the first step in creating the deterrent necessary to combat future impunity. Assessing the past in order to improve the effectiveness of future prosecutions for rape warfare is imperative as women of all ages, races, colors, creeds, and ethnicities continue to be raped during armed conflicts.¹⁷ Effective

¹⁴ See, e.g., Press Release, Amnesty International, Rwanda: Amnesty International Welcomes Historic Rulings of the International Criminal Tribunal for Rwanda, Sept. 4, 1998, at www.amnestyusa.org/news/1998/14703098.htm (last visited Mar. 26, 2004) (explaining that Akayesu's conviction was the first time an international court had applied the Genocide Convention of 1948).

¹⁵ See A Landmark Ruling on Rape, N.Y. Times, Feb. 24, 2001, at A12 (reporting that mass rape in Rwanda was ignored during the first four years of the ICTR's existence, and that vigorous lobbying from women's groups and the encouragement by the sole female judge at the Tribunal forced investigators to look into rape and hire more female investigators).

¹⁶ See Human Rights Watch, Shattered Lives, *supra* note 3, at 5 (asserting that an international legal framework condemning genocide and holding the perpetrators accountable will send a message "that impunity for such crimes will not be tolerated by the international community").

¹⁷ See, e.g., Human Rights Watch, Women's Rights Division Home Page, at www.hrw.org/women/index.php (last visited May 29, 2004) ("Combatants and their sympathizers in conflicts, such as those in Sierra Leone, Kosovo, the Democratic Republic of Congo, Afghanistan, and Rwanda, have raped women as a weapon of war with near complete impunity."). Although the international women's human rights movement has made "very real progress [in] identifying, raising awareness about, and challenging impunity for women's human rights violations," violations against women's rights remain "relentless, systematic, and widely tolerated, if not explicitly condoned." *Id.* See generally Tiare Rath, In War-Riddled Congo, Militias Rape With Impunity, Women's eNews, Apr. 27, 2003, at www.womensenews.org/article.cfm/dyn/aid/1307/context/archive/ (last visited Apr. 10, 2004) (reporting that the type of rape warfare experienced by Rwandan women is also being

prosecutions will lead to more convictions, which will in turn translate into a legal vindication of women's human rights in the international community.¹⁸

This article argues that while the ICTR has established an important precedent in prosecuting gender-based violence as crimes against humanity and tools of genocide, its deficiencies illustrate the continued struggle to enforce international norms protecting women from violence during armed conflict.¹⁹ Without improvements in three specific areas, the potency of the ICTR's groundbreaking decisions will become diluted and less likely to be applied by other legal bodies, to further the objective of enforcing women's human rights, and to lead to greater deterrence of gender-based violence. Part II of this article discusses the gender-based violence that occurred during the 1994 Rwanda Genocide and addresses the historic ambivalence toward prosecuting rape as a war crime or crime against humanity. This ambivalence demonstrates a lack of implementation and enforcement of the legal norms protecting women's human rights.²⁰ Part III emphasizes the significance of the first international conviction of rape as a condemnable war crime, while highlighting the need for improvements in order to ensure more effective prosecution of gender-based violence. The cases of two prominent Rwandan officials—Akayesu and Nyiramasuhuko—are discussed in this regard. Part III also explains how the ICTR's progressive precedent on sexual violence is being tarnished by the Tribunal's continuing failure to adequately indict perpetrators for commission of gender-based crimes, a widening divide between the need for legal justice and survivors' interests, and excessive delays that are diluting the credibility of legal justice as a deterrent. Part IV concludes with three major recommendations to the ICTR directed at improving the Tribunal's prosecution of gender-

inflicted on women and girls in the Democratic Republic of Congo, which has been embroiled in a five-year armed conflict).

¹⁸ Cf. Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1284 (1991) ("Determined to leave a trace, to make sex equality ordinary, to live under social conditions that reflect and reinforce their aspirations rather than suppress or extinguish them, to live in respect and safety rather than indignity and terror, to redefine social standards in the image of their values, to participate fully in their own times, to save their own lives and those of generations to come, women have long demanded legal change as one vehicle for social change.").

¹⁹ See Hilary Charlesworth, *What are Women's International Human Rights?*, in *Human Rights of Women: National and International Perspectives* (Rebecca Cook ed., 1994) (referencing the international community's past failure to include women in the interpretation, implementation, and enforcement of basic human rights).

²⁰ See Askin, *supra* note 10 and accompanying text (asserting the failure of the post-World War II tribunals to prosecute rape as a serious war crime); see also Catharine MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 Harv. Women's L.J. 5, 5 (1994) (arguing that "human rights have not been women's rights—not in theory or reality, not legally or socially, not domestically or internationally").

based violence and preserving its legitimacy as a source of international condemnation and deterrence.

II. BACKGROUND

While violence against women occurs every day worldwide,²¹ women are particularly vulnerable to gender-based violence²² during armed conflict.²³ International norms²⁴ protect women from gender-based violence

²¹ See MacKinnon, *supra* note 20, at 5 (reporting that women are violated sexually and reproductively every day in every country in the world); see also Human Rights Watch, *Shattered Lives*, *supra* note 3, at 27 (attesting that rape against countless women and young girls throughout history is a bitter reality in all regions of the world).

²² See Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 4-15, 1995), para. 113, available at www.un.org/womenwatch/confer/beijing/reports/ (last visited Apr. 10, 2004) (describing gender-based violence as actions, threats of action, coercion, or arbitrary deprivation of liberty that results in or is likely to result in physical, sexual, or psychological harm or suffering). Gender-based violence also includes, but is not limited to the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Id.

²³ See Report of the Secretary-General on Women, Peace and Security, U.N. SCOR, 57th Sess., para. 6, U.N. Doc. S/2002/1154 (2002) (explaining how women are disproportionately targeted in armed conflicts and constitute the majority of all victims, refugees, and internally displaced persons). Because women do not enjoy equal status with men in any society, armed conflict exacerbates inherent discrimination against women in violent forms. *Id.* para. 5. During conflict, women and young girls are vulnerable to all forms of gender-based violence, including sexual violence, exploitation, torture, rape, mass rape, forced pregnancy, sexual slavery, enforced prostitution, and trafficking. *Id.* para. 7. Often the highest level of officials endorses such acts and attributes political significance to them. *Id.* See also Human Rights Watch, Women's Human Rights, *supra* note 8, at 429 (emphasizing how being female is a risk factor because women and girls are often persecuted by using sexual violence against them on the basis of their gender); see generally Vesna Kesic, From Reverence to Rape: An Anthropology of Ethnic and Genderized Violence, in Frontline Feminisms: Women, War, and Resistance 23, 25 (Marguerite R. Waller & Jennifer Rycenga eds., 2000) (asserting that violence against women in armed conflict varies "in form, scale, and intensity from killing, rape, torture, forced impregnation, body searches at checkpoints, imprisonment, settlement in concentration camps and refugees, and forced prostitution to verbal insults and degradation, psychological suffering for losses, and the burden of responsibility that women carry as survivors").

in theory,²⁵ but adequate norm development requires implementation and enforcement by the international community in order to transform theory into practice.²⁶

²⁴ See William F. Felice, Taking Suffering Seriously: The Importance of Collective Human Rights 99 (1996) (explaining how norms and values "can create a countervailing force to other components of power, including the military and economic components").

²⁵ See Declaration on the Protection of Women and Children in Emergency and Armed Conflict in 1974, G.A. Res. 3318, U.N. GAOR, 29th Sess., Supp. No. 31, para. 4, U.N. Doc. A/9631 (1974) (stressing the importance of special protection for women in armed conflict due to their role as mothers and caregivers). In 1976, the United Nations launched its "Decade for Women." See Report of the Fourth World Conference on Women, *supra* note 22, para. 25 (describing how the U.N. General Assembly's "International Women's Year" in 1975 was a turning point in awareness of women's issues in the international community and began the U.N. Decade for Women (1976-85), which was a world-wide effort to examine the status and rights of women). Next, the United Nations created the Convention on the Elimination of All Forms of Discrimination Against Women, which is the main human rights instrument to monitor the status of women around the world. See Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, arts. 1-2, 12 U.N.T.S. 13, 13 (entered into force Sept. 3, 1981) (creating a monitoring committee of experts to review periodic reports made by States Parties evaluating compliance with obligations to abolish discriminatory laws and promote the status of women). In 1985 at the World Conference on Women in Nairobi, the United Nations adopted Forward Looking Strategies for Advancement of Women, which referred to specific abuses against women during armed conflict. See Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, U.N. GAOR, 40th Sess., para. 41, U.N. Doc. A/CONF.116/28/Rev.1 (1986) (describing the progress of the last decade and specific goals that need further development in establishing full protection for women's human rights). Although the United Nations' nominal "Decade for Women" ended in 1985, the organization kept abreast of gender issues in the international community and passed the Declaration on the Elimination of Violence Against Women in 1993. See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993) (addressing explicitly gender-based violence in armed conflict). In 1994, the World Conference on Human Rights in Vienna passed the Vienna Convention, which specifically addressed gender issues. See Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/Conf.157/24 (1993) (explaining steps that should be taken to ensure that states give equal consideration to women's human rights in their domestic programs). The Fourth World Conference on Women in Beijing in 1995 produced the Beijing Declaration. See also Lisa A. Crooms, Using a Multi-Tiered Analysis to Reconceptualize Gender-Based Violence Against Women as a Matter of International Human Rights, 33 New Eng. L. Rev. 881, 885 (1999) (enumerating the three main functions of the Violence Declaration). But see Hilary Charlesworth, The Mid-Life Crisis of the Universal Declaration of Human Rights, 55 Wash. & Lee L. Rev. 781, 794 (1998) (noting that "[t]he overarching slogan of the U.N. human rights system with respect to women seems to be just 'add women and stir.'" (quoting Christine Chinkin, Feminist Interventions Into International Law, 19 Adel. L. Rev. 13, 18 (1997))).

²⁶ See Felice, *supra* note 24, at 110 (asserting that the international system provides standards upon which to judge state conduct and creates a dynamic process using principles to guide, judge, and influence state behavior).

A. The Least Condemned War Crime: A Historical Perspective of Rape in Armed Conflict

Prior to the Akayesu decision, the international community treated rape as the “least condemned war crime.”²⁷ Throughout history, rape has regularly been used as a method of warfare in both international and internal armed conflicts;²⁸ however, the international community has treated rape as a prosecutable war crime only in the last fifty years.²⁹

Despite the sexual violence and systematic rape that occurred during World War II,³⁰ rape was not prosecuted as a war crime.³¹ The

²⁷ See Human Rights Watch, Shattered Lives, *supra* note 3, at 27-28 (quoting Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence Against Women).

²⁸ See Amnesty International, Human Rights are Women's Right 18-20 (1995) (noting that Crusaders raped women in the name of religion in the twelfth century; invading forces mass-raped indigenous women in the fifteenth-century conquest of the Americas; English soldiers systematically raped Scottish women in the eighteenth century; the German army used rape as a weapon of terror in World War I; the Soviet army used rape as a weapon of revenge in World War II; and that Kuwaiti women and foreign domestic workers were subjected to sexual violence by Iraqi soldiers during Iraq's 1991 invasion of Kuwait); *see also* Iris Chang & William C. Kirby, The Rape of Nanking: The Forgotten Holocaust of World War II 2 (1998) (noting that Pakistani soldiers in trying to repress Bengalese nationalism in the 1971 civil war carried out the largest systematic rape of female civilians in humankind's history, but that this episode was only slightly larger than the systematic rape carried out in Nanking, China by Japanese soldiers from 1937-38).

²⁹ See Human Rights Watch, Shattered Lives, *supra* note 3, at 28 (explaining that the classification of rape and other forms of sexual violence as an attack of honor fails to recognize the acts as a violation of women's physical integrity, diminishes the serious nature of the crimes, and contributes to the misperception that rape is an incidental or lesser crime in comparison to crimes such as torture); *see also* Julie A. Mertus, War's Offensive on Women: The Humanitarian Challenge in Bosnia, Kosovo, and Afghanistan 73-75 (2000) (discussing how the definition of gender-based violence in international documents has evolved). Initially women were seen as chattel—i.e., property that belonged to men. *Id.* Soldiers viewed women as objects they could use as a reward for fighting or as compensation for being underpaid. *Id.* When rape was recognized as a crime, it was viewed as a crime against the man who possessed the woman—e.g., her husband or father. *Id.* Rape eventually came to be characterized as an attack against a woman's chastity or virtue, but this definition also denoted a crime against the man or family who was entitled to the woman's honor. *Id.*

³⁰ See Rhonda Copelon, Surfacing Gender: Reengraving Crimes Against Women in Humanitarian Law, in Women and War in the Twentieth Century: Enlisted With or Without Consent 335 (Nicole A. Dombrowski ed., 1999) (describing the maintenance of concentration camp brothels for the rape of Jewish and Aryan women and the Allied soldiers' rape of German women).

³¹ See *supra* notes 27-30, *infra* notes 32-42 and accompanying text (discussing how rape was not treated as a heinous atrocity during the tribunals following the Second World War).

International Military Tribunal for the Far East ("IMTFE")³² omitted sexual crimes from its charter (although charges of rape were included in some of the indictments).³³ The IMTFE prosecuted rape only in conjunction with other crimes, classifying it as "inhuman treatment," "ill-treatment," and "failure to respect family honour and rights;" however, it was not considered a serious enough charge to stand alone in an indictment.³⁴ In 1946, during the prosecutions led by the Control Council for Germany,³⁵ rape was specifically enumerated as a crime against humanity, although it was never prosecuted as such.³⁶ In fact, prosecutors did not include rape in a single indictment.³⁷

Promulgated in the wake of the Second World War, the Fourth Geneva Convention of 1949 explicitly recognized rape as a wrong in armed conflict, but framed it as an attack on a woman's honor instead of a serious human rights violation.³⁸ Article 27 of the Fourth Convention provides that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."³⁹ By framing rape as an indignity or an attack on women's honor, the severity of this human rights violation in the eyes of the international

³² See Mertus, *supra* note 29, at 75-76 (describing that while the Nuremberg trials continued, the Allies established a second tribunal to prosecute Japanese officials for war crimes in 1946).

³³ See *id.* at 77 (describing the IMTFE tribunal's prosecution of rape).

³⁴ *Id.*

³⁵ See Jocelyn Campanaro, Women, War, and International Law: The Historical Treatment of Gender-based War Crimes, 89 Geo. L.J. 2557, 2565 (2001) (noting that the trials conducted under Control Council Law No. 10 were for lesser war criminals but allowed for the prosecution of a larger group of rapists, even though this did not become a reality).

³⁶ See Human Rights Watch, Shattered Lives, *supra* note 3, at 33 n.53 (explaining that the Nuremberg Charter, Article 6(c) was amended by the Berlin Protocol, 59 Stat. 1546, 1547 (1945), E.A.S. No. 472, 82 U.N.T.S. 284 to include rape as a crime against humanity).

³⁷ See Campanaro, *supra* note 35, at 2565.

³⁸ See Copelon, *supra* note 30, at 335 (explaining that the 1949 Geneva Conventions and the 1977 Protocols regarding the protection of civilians in war explicitly prohibit rape, forced prostitution, and any form of indecent assault, and call for special protection of women during war, including separate quarters with supervision and searches by women only).

³⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) (defining rape as an attack on a woman's honor); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 76, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II].

community is diminished. The reach of the definition is limited because rape as a crime against honor requires preconditions of virginity or chastity—simply being an individual entitled to physical security is not sufficient.⁴⁰ It also ignores the fact that a rape victim subsequently faces community stigmatization and thus fears to reveal the violation, thereby diminishing the potential for justice.⁴¹ In stark contrast, the prosecution of rape as a crime against humanity provides for the recognition that rape is “fundamentally violence against women—violence against their bodies, autonomy, integrity, selfhood, security, and self-esteem” thus an unacceptable human rights violation.⁴²

Although contemporary international treaties include gender-based violence as a prohibited offense,⁴³ the ICTR’s gender-conscious prosecution of rape as a crime of war represents the long-awaited manifestation of concrete enforcement of women’s international human rights.⁴⁴ The extensive and systematic gender-based violence that occurred during the 1994 Rwanda Genocide demonstrated the failure of international norms theretofore in protecting women from unlawful human rights violations.⁴⁵

B. Gender-Based Violence in the 1994 Rwanda Genocide

Approximately one million Rwandan men, women, and children were massacred in a three-month period in 1994.⁴⁶ Ethnic tensions in Rwanda erupted after an unknown party shot down the plane carrying President Habyarimana in Kigali, Rwanda on April 6, 1994.⁴⁷ In response,

⁴⁰ See Copelon, *supra* note 30, at 336 (analyzing the negative implications of describing rape as a crime of honor).

⁴¹ See *id.* (arguing that community stigmatization prevents women from reporting rape and therefore prevents legal prosecution of the crime).

⁴² *Id.*

⁴³ See Campanaro, *supra* note 35, at 2566-69 (summarizing the post-World War II humanitarian law instruments and their treatment of crimes against women in armed conflict).

⁴⁴ See Human Rights Watch, Women’s Human Rights, *supra* note 8, at 427 (discussing the importance of this precedent).

⁴⁵ See Mertus, *supra* note 29, at 71-81, 90-101 (referencing the historical treatment of gender in conflict, the treatment of gender-based violence under human rights laws, and the recognition of gender violence as a human rights violation); Campanaro, *supra* note 35, at 2566-69 (summarizing the international humanitarian law in place to protect women); see also Declaration on the Protection of Women and Children in Emergency and Armed Conflict in 1974, *supra* note 25 and accompanying text (assessing the United Nation’s efforts in implementing norms to protect women’s human rights).

⁴⁶ See *supra* note 4 and accompanying text.

⁴⁷ See Gérard Prunier, The Rwanda Crisis: History of a Genocide 211-12 (1995) (detailing the events leading up to the genocide). The party responsible for this event was

two militia groups—the Rwandan Armed Forces (“RAF”) and the Interahamwe—immediately set up roadblocks and began a house-to-house hunt to find and murder Tutsis and moderate Hutus for retribution.⁴⁸ During the ensuing Rwandan genocide, Hutu individuals committed widespread gender-based violence against Tutsi women and some Hutu women,⁴⁹ including rape, mutilation, and sexual slavery.⁵⁰ Moreover, Rwandan officials sanctioned and encouraged this violence.⁵¹

Despite the existence of international norms proscribing violence against women,⁵² the 1994 Rwanda Genocide had devastating effects on women.⁵³ Ethnic and gender stereotypes propagated by the Hutu majority before 1994 fueled widespread gender-based violence against women.⁵⁴ For example, propaganda portrayed Tutsi females as condescending seductresses inaccessible to Hutu men.⁵⁵ When females in an ethnic caste

largely uninvestigated and is still unknown. *Id.* at 213. See generally Des Forges, *supra* note 3 (discussing the events preceding the genocide).

⁴⁸ See Prunier, *supra* note 47, at 229 (describing how the Hutu government used the military during the genocide).

⁴⁹ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 65-68 (presenting individual testimony of the sexual violence Hutu women suffered during the genocide and noting that this occurred especially if they “looked Tutsi” or were married to a Tutsi).

⁵⁰ See *id.* at 42-65 (detailing individual testimony of the violence inflicted upon Tutsi women).

⁵¹ See *id.* at 1, 48 (emphasizing that administrative, military, political, and civilian authorities at the national and local levels encouraged the systematic raping of women and children to further the goal of destruction of the Tutsi). In previous conflicts in Rwanda, women and children were generally protected as civilians; however, leaders of the genocide encouraged an organized strategy to rape as a tool of destruction. *Id.* at 41.

⁵² See Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. Rev. 733, 785 (1998) (describing the void between normative creation and implementation of human rights and actual enforcement of those rights); see also Joshua Bardavid, *The Failure of the State-Centric Model of International Law and the International Criminal Court*, 15 N.Y. Int’l L. Rev. 9, 10 (2002) (emphasizing the lack of an international rule of law to prevent atrocities and reporting that the former United Nations’ High Commissioner for Human Rights commented that “a person stands a better chance of being tried and judged for killing one human being than for killing 100,000”).

⁵³ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 1 (referencing the sexual violence Rwandan women experienced on a massive scale during the 1994 genocide and its aftermath); see generally Des Forges, *supra* note 3 (describing the events leading up to the genocide and the violence that occurred in specific areas in extensive detail).

⁵⁴ See Llezlie L. Green, Note, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument For Intersectionality in International Law*, 33 Colum. Hum. Rts. L. Rev. 733, 746-50 (2002) (asserting that propaganda dispersed by the Hutu government fueled gender-specific hate toward Tutsi women).

⁵⁵ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 15-19 (describing different propaganda messages directed at Tutsi women by the Hutu government). The

are characterized as “sexual temptresses” they become “by definition unchaste and therefore subject to sexual abuse without legal redress.”⁵⁶ Such images thus contributed to the racist attitude that Tutsi women were objects to be dominated, dehumanized, and destroyed by Hutu soldiers.⁵⁷

The death toll from the genocide does not adequately reflect the number of women who suffered sexual violence at the hands of the Hutus. Gender-based crimes are extremely difficult to document because they typically involve physical and psychological injuries that women often conceal in order to avoid further emotional distress, community ostracization,⁵⁸ and retribution from perpetrators.⁵⁹ Nonetheless, the reports estimating the number of women who were raped—based on the number of pregnancies conceived during the three-month period—conclude that “rape was the rule and its absence the exception.”⁶⁰ Such statistical approximations yield a number ranging from at least 250,000 to 500,000 rape survivors.⁶¹ However, this number does not account for the thousands of women so brutalized during acts of sexual violence that they can no longer conceive children as a result, nor does it account for the number of multiple rapes and gang rapes suffered by individual women throughout the conflict.⁶² The figure also does not account for the unmarried women who

images also portrayed Tutsi women as spies who would dominate and undermine Hutu men. *Id.* at 19.

⁵⁶ Cf. Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev. 51, 66-69 (2002) (explaining the female virtue paradigm, where sexless or virtuous women are protected by society and women portrayed as sexual or those who have sexual histories are perceived as “unchaste and therefore subject to sexual abuse without legal redress”).

⁵⁷ See Human Rights Watch, Shattered Lives, *supra* note 3, at 18 (using rape during the genocide shattered these images by “humiliating, degrading, and ultimately destroying the Tutsi woman”); see also MacKinnon, *supra* note 20, at 12 (describing genocidal rape as rape under orders, rape as massacre, rape to kill and make the victims wish they were dead). “It is also rape as an instrument of forced exile . . . rape to be seen and heard and watched and told to others: rape as a spectacle. . . . to drive a wedge through a community, to shatter a society, to destroy a people.” *Id.* See generally Copelon, *supra* note 30, at 332, 338 (describing rape as one of the most common forms of torture used against women).

⁵⁸ See Human Rights Watch, Shattered Lives, *supra* note 3, at 72-75 (explaining how surviving rape results in stigma, isolation, and ostracization for many women and young girls).

⁵⁹ *Id.* at 25, 89-91 (describing rape as one of the most under-reported crimes).

⁶⁰ *Id.* at 24.

⁶¹ See Copelon, *supra* note 30, at 333 (reporting that the Rwandan National Population Office confirmed that between 2,000 and 5,000 Rwandan women were pregnant as a result of being raped, but noting that not all rapes result in a full-term pregnancy).

⁶² See Human Rights Watch, Shattered Lives, *supra* note 3, at 43-45 (detailing one woman’s experience of multiple gang rapes and sexual mutilation at the hands of the Interahamwe).

self-aborted their rape-conceived pregnancies⁶³ or committed infanticide⁶⁴ to spare themselves from cultural ostracization.⁶⁵

Many Rwandan women have experienced a “living death” due to the psychological, emotional, physical, and social consequences of surviving rape.⁶⁶ Furthermore, many survivors will continue to carry these consequences with them throughout their lives.⁶⁷ Seventy percent of Rwandan rape survivors are now reportedly HIV-positive due to the systematic and purposeful rape by soldiers carrying the virus as part of the terror campaign.⁶⁸ Some survivors ache for death to end their misery.⁶⁹ According to one Rwandan rape survivor, “after rape, you don’t have value in the community.”⁷⁰ Thus, many survivors believe that rape is a crime worse than death,⁷¹ and an accurate representation of the consequences of

⁶³ See *id.* at 79.

⁶⁴ See *id.* at 79-80.

⁶⁵ See *id.* at 79-82 (describing the psychological difficulties of becoming pregnant through rape). Children conceived from rape are known as “enfants non-desires” (unwanted children), “enfants de mauvais souvenir” (children of bad memories), or children of hate. *Id.* at 79. One Rwandan woman asked, “How can you have a child of someone who killed your husband and children?” *Id.*

⁶⁶ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 73-74 (noting comments of two widows interviewed). “Our past is so sad. We are not understood by society. . . . We become crazy. We aggravate people with our problems. We are the living dead.” *Id.* at 73. “When they kill your husband and children and then leave you, it is like killing you. They left us to die slowly. I wish every day that I was dead.” *Id.* at 74. *But see id.* at 75 (noting one survivor’s desire to “challenge the [rapists/killers] and live. We don’t want to remain the living dead.”).

⁶⁷ See Landesman, *supra* note 2, at 89, 116 (summarizing the long-term consequences of surviving rape).

⁶⁸ See *id.* at 116. Rwandan President Kagame has asserted that the Hutu government brought AIDS patients out of hospitals to form “battalions of rapists.” *Id.* In addition, thirty-five percent of the Rwandan army was reportedly HIV-positive. Human Rights Watch, *Shattered Lives*, *supra* note 3, at 76. See also Nicole Itano, *How Rwanda’s Genocide Lingers for Women*, Christian Sci. Monitor, Nov. 27, 2002, available at www.csmonitor.com/2002/1127/p08s01-woaf.html (last visited Apr. 10, 2004) (describing how a handful of programs are assisting women who were raped and infected with AIDS, but thousands more go without help); see generally Janice Alfred, *The 45th Session of the Commission on the Status of Women: Gender Discrimination and the AIDS Pandemic*, 18 N.Y.L. Sch. J. Hum. Rts. 439, 439 (2002) (reporting that HIV/AIDS is the fourth leading cause of death in sub-Saharan Africa and discussing its effect on women).

⁶⁹ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 47, 59 (describing women who believe surviving the genocide is more horrific than the crimes they suffered).

⁷⁰ *Id.* at 25.

⁷¹ *Id.* at 47, 59.

the gender-based violence suffered by Rwandan women in 1994 may never be known.⁷²

Nyiramasuhuko's case presents the first time an international war crimes tribunal has indicted and prosecuted a woman for genocide or for inciting rape as a crime against humanity.⁷³ Her alleged involvement in the government-sanctioned sexual violence began in Butare, a Rwandan town that put up a valiant defense to the Hutu death squads only to suffer horrific consequences.⁷⁴ As a stronghold of Tutsis and moderate Hutus, Butare had resisted the government's orders to carry out genocide.⁷⁵ Enraged by this defiance, the interim government sent Nyiramasuhuko to enforce its orders.⁷⁶ As the Minister of Women and Family Affairs, Nyiramasuhuko's official duties before the 1994 genocide included the preservation, education, and empowerment of Rwanda's women.⁷⁷ Nyiramasuhuko, however, allegedly used her official authority to dehumanize Rwandan women by ordering the rape and murder of Tutsi women.

Nyiramasuhuko's role in inciting the sexual violence as part of the genocide was not unique because other government officials also incited or sanctioned similar sexual violence; however, her case has received disproportionate media attention in comparison to her male counterparts.⁷⁸ Presumably, rape warfare is not newsworthy in itself, but a female leader advocating violence against women is a less common occurrence.⁷⁹

⁷² See *id.* at 24 (emphasizing rape as one of the most under-reported crimes due to the reluctance of survivors to seek medical attention or report their experiences during the genocide to anyone).

⁷³ See Landesman, *supra* note 2, at 82 (asserting that Nyiramasuhuko is the first woman on trial for genocide in an international court); see also Nicole Hogg, Women Accused of Genocide in Rwanda, Women's Human Rights in Conflict Situations Newsletter (Int'l Centre for Hum. Rts. and Democratic Dev., Canada), vol. 4 (2001), at www.ichrdd.ca/english/commdoc/publications/women/bulletin/vol4no1/womenAccusedOfGenocideRwanda.html (last visited Mar. 26, 2004) (listing other female offenders who have been tried for genocide, not including rape). For example, two Rwandan nuns were convicted of genocide in Belgium, and six women charged with genocide in Rwandan courts received a death sentence with one being reduced to life imprisonment and one being executed. *Id.* See generally African Rights, Rwanda: Not So Innocent: When Women Become Killers (1995) (explaining the ways women participated in the genocide with detailed testimony against certain alleged women offenders).

⁷⁴ See Landesman, *supra* note 2, at 82-84 (giving a detailed account of the activities in Butare following Nyiramasuhuko's arrival).

⁷⁵ *Id.* at 82.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *supra* note 51 and accompanying text (describing how government officials sanctioned the sexual violence as part of the genocide).

⁷⁹ See, e.g., Michele Landsberg, Misplaced Blame: With Many Men Behind the Rwanda Atrocities, Why Does the Media Single Out a Woman as a Unique Monster, The

Witnesses have testified that Nyiramasuhuko frequently gave instructions to the Interahamwe militia⁸⁰ to rape Tutsi women before they killed them or to rape the women instead of killing them.⁸¹ On April 25, 1994 acting in her official capacity, Nyiramasuhuko offered food and safety to thousands of beleaguered Tutsis in a Butare sports stadium.⁸² Once they gathered in the sanctuary, she told the Hutu soldiers “[b]efore you kill the women, you need to rape them.”⁸³ Shortly thereafter, Nyiramasuhuko visited a compound where Interahamwe members were guarding seventy Tutsi women and told the guards to burn the women.⁸⁴ Again she suggested, “[w]hy don’t you rape them before you kill them?”⁸⁵ Although Nyiramasuhuko was one of the “best-known, most easily identifiable members of the government that orchestrated the slaughter,” she traveled and worked undisturbed in the region for three years following the genocide before being arrested.⁸⁶ Even though conflicting reports exist as to her activity between 1994 and her eventual capture in 1997, her identity had not

Hamilton Spectator Mag., Sept. 28, 2002, 2002 WL 26714001 (“Nyiramasuhuko did not invent, plan or initiate the mass rapes alone. The Hutu government, of which she was a fanatically loyal servant, did that.”); *see generally* Lucinda Joy Peach, *Is Violence Male? The Law, Gender, and Violence, in Frontline Feminisms: Women, War, and Resistance*, *supra* note 23, at 57, 62-64 (discussing theories behind the law’s failure to condemn male violence against women). Peach asserts that the law is not only male-biased and itself violent, but the law also operates on the basis of an understanding that violence is male, which places women in a “double-bind” where violence exercised by legitimate agents—i.e., men—is not prohibited with the same vigor as it is for illegitimate agents, i.e., women, who use violence. *Id.*

⁸⁰ *See* Landesman, *supra* note 2, at 82 (noting that Interahamwe—the militia group who supported the Hutu government—means “those who attack together”).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.* (describing how after obeying Nyiramasuhuko’s orders, the Interahamwe dragged Tutsi women away to a forested area to be raped). The remaining refugees received machine-gun fire and grenades in the “sanctuary.” Any surviving individuals met death by machete. *Id.* Nyiramasuhuko watched the entire episode until bulldozers began piling bodies for burial in a nearby pit. *Id.* at 84.

⁸⁴ *See id.* at 82 (describing how “Butare’s Favorite Daughter” returned to massacre and incite sexual violence against Tutsis in Butare).

⁸⁵ *See id.* (reporting that witnesses reported that Interahamwe said they were tired from killing all day, so instead of raping them they “just put the gasoline in bottles and scattered it among the women, then started burning”).

⁸⁶ *See* Lindsey Hilsum, *Rwanda—Refugees and Genocidaires, in Crimes of War: What the People Should Know* 316-18 (Roy Gutman et al. eds., 1999), *available at* www.crimesofwar.org/thebook/book.html (last visited May 3, 2004) (describing the inexplicable failure to arrest Nyiramasuhuko despite that she was one of the most easily identifiable members of the Rwanda government).

been concealed to prevent a more timely arrest.⁸⁷ Until amended, her original indictment did not include any charges for inciting the militia to commit acts of sexual violence against Tutsi women.⁸⁸

One week before Nyiramasuhuko's arrival in Butare, the massacre of Tutsis began in the Taba commune of Gitarama under Jean Paul Akayesu's command.⁸⁹ As a Rwandan bourgmestre (mayor), Akayesu supervised the police bureau in the Taba commune, which is north of Butare.⁹⁰ In his official capacity, Akayesu was responsible for maintaining law and order in the Taba commune.⁹¹ His authority included the power to call for assistance from regional or national authorities to keep the peace.⁹² Once the genocide began, Tutsis sought refuge at the police bureau only to suffer heinous violence under his command.⁹³ At the commune, female displaced civilians were repeatedly raped, sexually violated, physically assaulted, and/or murdered.⁹⁴ Akayesu's amended indictment alleged that he knew that the acts were taking place and was at times present during their commission.⁹⁵ Further, by failing to prevent the acts while being

⁸⁷ Compare Landesman, *supra* note 2, at 85 (reporting that she found safety in a refugee camp in Congo, eventually slipping into Kenya, where she lived as a fugitive for almost three years), with Hilsum, *supra* note 86, at 317 (reporting that she escaped to Zaire through the Zone Turquoise controlled by French forces). Hilsum also reports that while at a refugee camp in eastern Zaire near Bukavu, she was employed by a Catholic relief organization as a social services coordinator. *Id.* She reportedly traveled undisturbed between Zaire and Kenya for three years until the current Rwandan government pressured President Moi for her capture. *Id.*

⁸⁸ See *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-I, Amended Indictment, (Aug. 10, 1999), at www.icttr.org/ENGLISH/cases/Nyira/indictment/index.pdf (last visited Apr. 10, 2004) (naming charges for inciting rape under counts 7 and 11).

⁸⁹ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-I, Amended Indictment (June 1997), para. 12, at www.icttr.org/ENGLISH/cases/Akayesu/indictment/actamond.htm (last visited Mar. 3, 2004) (asserting that at least 2,000 Tutsis were killed in Taba between April 7 and the end of June 1994).

⁹⁰ See *id.* paras. 2, 12 (explaining that the President of the Republic appoints each bourgmestre who is the most powerful official in the commune). As bourgmestre, Akayesu also had exclusive control of the communal police force. *Id.* para. 4.

⁹¹ See *id.* para. 12 (describing his official duties).

⁹² *Id.*

⁹³ See Amnesty International, *supra* note 14, at 1 (describing the extensive sexual violence and massacres that occurred at the Taba commune under Akayesu's control).

⁹⁴ See *Akayesu*, Case No. ICTR-96-4-I, at paras. 12A-12B (describing the sexual violence suffered at the Taba commune).

⁹⁵ *Id.*

present he encouraged their commission.⁹⁶ At least 2,000 Tutsis were killed in Taba during a three-month period.⁹⁷

C. The Aftermath: The Journey to Legal Justice Begins

The classification of rape as a crime against humanity and a tool of genocide places it among the most serious types of international war crimes.⁹⁸ Genocidal acts and crimes against humanity command strong condemnation from the international community.⁹⁹ Before the Akayesu decision, skepticism existed as to whether rape or sexual assault could be prosecuted as a crime against humanity.¹⁰⁰ The ICTR created influential legal precedent by recognizing gender-based violence as among the most serious types of crimes under its jurisdiction.¹⁰¹ The recognition of gender-based violence as a grave war crime signals that the international community will no longer tolerate such behavior and thus represents real progress in the enforcement and protection of women's human rights.¹⁰² However, in order to achieve this end, the important legacy of the ICTR precedent in prosecuting gender-based violence must be preserved.¹⁰³

The United Nations Security Council established the ICTR in Arusha, Tanzania in November 1994 to render justice, aid reconciliation,

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Olivia Swaak-Goldman, Crimes Against Humanity, in 1 Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, *supra* note 7, at 145 (explaining that crimes against humanity are considered among the most serious war crimes); see also Theodor Meron, Rape as a Crime under International Humanitarian Law, 87 Am. J. Int'l L. 424, 426-28 (1993) (explaining how rape could be considered a crime against humanity under international law).

⁹⁹ See Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale L.J. 2537, 2595 (1991) (noting that laws proscribing crimes against humanity have commanded commitment by the international community, which has "resolved emphatically that it will not countenance impunity for massive atrocities against persecuted groups").

¹⁰⁰ See Askin, *supra* note 7, at 300 (expressing the improbability of successfully prosecuting sexual assault as a crime against humanity under Article 5); see also Orentlicher, *supra* note 99, at 2590-91 and nn.238-40 (asserting that most post-Nuremberg efforts to broaden the scope of crimes against humanity have "failed to garner broad consensus").

¹⁰¹ See Patricia M. Wald, Judging War Crimes, 1 Chi. J. Int'l L. 189, 191 (2000) (noting that the ICTR and ICTY have both "spawned over 300 articles in the international journals, more than any other topic in international law in the last decade").

¹⁰² See Amnesty International, *supra* note 14 and accompanying text (describing the significance of the Akayesu decision in linking sexual violence to crimes against humanity and genocide).

¹⁰³ See *id.* (arguing that the Akayesu decision sends a clear message to the international community that genocide will not be tolerated).

and establish the historical truth of what happened in Rwanda in 1994.¹⁰⁴ In order to create the link between rape and the most serious war crimes, the ICTR needed a proper indictment, prosecution, and conviction integrating the legal definitions of sexual violence with genocide and crimes against humanity.¹⁰⁵ Although the ICTR Statute laid the groundwork, the original indictment of Akayesu would not have been amended to include charges of sexual violence without pressure from women's groups and cooperation within the ICTR.¹⁰⁶ The successful conviction of Akayesu for incitement of rape as a crime against humanity and a tool of genocide encouraged prosecutors to amend other indictments, as was the case with Nyiramasuhuko, in an effort to hold officials accountable for the extensive gender-based violence that occurred during the Rwandan genocide.¹⁰⁷ Because external pressure was the prerequisite to indicting officials for the widespread sexual violence, improvements in the internal legal structure of the Tribunal must occur to ensure that gender-based violence is prosecuted as effectively as genocidal murder.¹⁰⁸

¹⁰⁴ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453d mtg., U.N. Doc. S/RES/955 & Annex (1994), *reprinted in* 33 I.L.M. 1958 (1994) [hereinafter ICTR Statute].

¹⁰⁵ See Panel, Violence Against Women and International Law: Rape as a War Crime, 90 Am. Soc'y Int'l L. Proc. 605, 613 (Patricia Viseur-Sellers noting that because no previous war tribunal or convention explicitly defined rape, the Prosecutor's Office submitted the elements of the crime of rape as prohibited conduct under the grave breaches concept and under the crimes against humanity concept in the spring of 1996, almost one year before amending the Akayesu indictment).

¹⁰⁶ See Barbara Crossette, An Old Scourge of War Become its Latest Crime, N.Y. Times, June 14, 1998, at 2 (explaining that pressure from women's organizations and the support of then Prosecutor Richard Goldstone succeeded in elevating sex crimes to the level of genocide and crimes against humanity).

¹⁰⁷ See also Patricia Viseur-Sellers, The Cultural Value of Sexual Violence, 93 Am. Soc'y Int'l L. Proc. 312, 312 (1999) (discussing the prosecutor's decision to amend Akayesu's indictment to include sexual violence charges).

¹⁰⁸ See Crossette, *supra* note 106, at 2 (alluding to the need to ensure better prosecution of gender-based violence so pressure from women's groups is no longer a prerequisite to amending indictments).

III. TURNING AMBIVALENCE INTO ACCOUNTABILITY: THE ADJUDICATION OF RAPE BY THE ICTR

A. The Significance of the Akayesu Decision

Despite the relatively low numbers of convictions issued since its creation,¹⁰⁹ ICTR decisions have tremendously impacted the developing doctrine of international criminal law.¹¹⁰ According to the ICTR's Eighth Annual Report to the United Nations, the Tribunal has issued eleven judgments since the first trial began in January 1997.¹¹¹ The influence of the

¹⁰⁹ In 1994, the United Nations created the ICTR as an ad hoc tribunal to adjudicate crimes committed by individuals through a resolution passed by the U.N. Security Council. International Criminal Tribunal for Rwanda. *See* ICTR, About the ICTR: General Information, at www.ictr.org/default.htm (last visited Mar. 3, 2004). The ICTR has jurisdiction over crimes committed "by Rwandans in the territory of Rwanda and in the territory of neighbouring States, as well as non-Rwandan citizens for crimes committed in Rwanda" during the year 1994. *Id.* The official mission of the ICTR is to "render justice and aid reconciliation in Rwanda establishing the historical truth of what happened in Rwanda in 1994." *Id.* The ICTR consists of three major organs: the Chamber, which includes the Appeals Chamber and Trial Chambers; the Prosecutor's Office, which is responsible for investigating and prosecuting; and the Registry, which is responsible for the overall administration and management of the Tribunal. *Id.* In addition, there exists the Defense Counsel Management Section, the Detention Facility, and the Witnesses and Victims Support Section. *Id.* The Prosecutor's Office is located in Kigali, Rwanda, and the seat of the ICTR is in Arusha, Tanzania. *Id.* In 2002-03, the ICTR had a budget of \$177,739,400 and 872 staff members from eighty countries. *Id.* The ICTY is substantively similar but was created in 1993 to adjudicate crimes committed by individuals in the former Yugoslavia beginning in 1991. *See generally* International Criminal Tribunal for the former Yugoslavia, The ICTY at a Glance: General Information, at www.un.org/icty/glance/index.htm (last visited Mar. 3, 2004) (providing an overview of the ICTY's structure and jurisprudence).

¹¹⁰ *See, e.g.*, Nancy Amoury Combs, International Criminal Jurisprudence Comes of Age: The Substance and Procedure of an Emerging Discipline, 42 Harv. Int'l L.J. 555, 560-61 (2001) (concluding that the ICTR's judgments on genocide have greatly enhanced the understanding of the crime's elements). The work of both ad hoc tribunals has greatly influenced accountability under international humanitarian law and led to the development of the Special Court for Sierra Leone. *See* About the ICTR: General Information: Achievements of the ICTR, at www.ictr.org/default.htm (last visited Mar. 3, 2004). Suggestions for similar tribunals are now common responses to gross human rights violations in the Democratic Republic of Congo, Cambodia, and East Timor. *Id.*

¹¹¹ *See* Eighth Annual Report of the ICTR for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between January 1 and December 31, 1994, U.N. GAOR, para. 1, U.N. Doc. S/2003/707 (2003), available at www.ictr.org (last visited Mar. 3, 2004) [hereinafter Eighth Annual Report] (providing a detailed overview of the completed judgments and those the Tribunal expects to complete in the near future noting that two trials involving ten accused, the Butare case [Nyiramasuhuko] and the Military case, were in progress at the time of the report). During the first mandate from 1994-99, the Tribunal issued six judgments involving seven accused. Newly Elected President Erik Mose Addresses Staff, ICTR Newsletter Vol. 1, No. 2, at 1 (July 2003), available at www.ictr.org/ENGLISH/newsletter/july03/july03.pdf (last visited Mar. 3,

jurisprudence emerging from the ICTR was apparent even before the issuance of the Akayesu decision on sexual violence.¹¹² Members of the international community, for example, report that the ICTR decisions have been cited in proceedings at the International Court of Justice,¹¹³ the European Court of Human Rights, the Inter-American Commission on Human Rights, and in the United States Joint Services' Law of War Manual.¹¹⁴ The Akayesu decision has also influenced other states negotiating for improved standards in the prosecution of sexual violence as well as the definition of gender-based violence in the statute for the permanent International Criminal Court ("ICC").¹¹⁵ Ideally, the ICTR's

2004). During the second mandate from 1999-2003, the Tribunal "doubled [its] judicial output." *Id.* The third mandate began in 2003 and should conclude in 2008. *Id.* The justice is slow and one detainee has been in custody since 1999, while several others since 2000. *See Eighth Annual Report, supra*, para. 80. A total of thirty-one accused are awaiting trial at the detention facility with several more accused still at large. *Id.* *But see Newly Elected President Erik Mose Addresses Staff, supra* (statements by President Mose reminding the audience that when the Tribunal began its work judges worked by candlelight and there were no tarmac roads in Arusha and only limited supplies, so in retrospect "[t]he improvements from May 1999 to May 2003 have been amazing").

¹¹² *See* Symposium, War Crime Tribunals: The Record and the Prospects: The Contribution of Ad Hoc Tribunals in International Humanitarian Law, 13 Am. U. Int'l L. Rev. 1509, 1531 (1998) [hereinafter The Contribution of Ad Hoc Tribunals] (Patricia Visser-Sellers stating that the International Court of Justice and the European Court for Human Rights cite the jurisprudence of the tribunals). *See also id.* at 1532 (W. Hays Parks explaining that the tribunals' decisions are absolute "gold mines of information" and assist very substantially in drafting the U.S. Joint Services Law of War Manual); *id.* at 1536 (Robert K. Goldman noting "[w]e routinely review the cases decided by the Tribunal and cite its jurisprudence in new decisions of the [Inter-American Commission on Human Rights]").

¹¹³ *See generally* The International Court of Justice, General Information: The Court at a Glance, at 212.153.43.18/icjwww/igeneralinformation/icjgnnot.html (last visited Mar. 3, 2004). The International Court of Justice ("ICJ") is unique from the ad hoc tribunals because it resolves conflicts between states. *Id.* It is the principal judicial organ of the United Nations and derives its authority from the U.N. Charter. *Id.* It was created in 1946 to replace the Permanent Court of International Justice and is located in The Hague, Netherlands. *Id.*

¹¹⁴ *See The Contribution of Ad Hoc Tribunals, supra* note 112 and accompanying text (describing how members of the international community are using the ICTR precedent).

¹¹⁵ *See Rape and Genocide in Rwanda: The ICTR's Akayesu Verdict*, Teaching Human Rights Online, at homepages.uc.edu/thro/rw/ (last visited May 3, 2004) (describing the significance of the Akayesu verdict). The ICC is unique because it is an independent body that adjudicates crimes committed by individuals, whereas the ICJ and the two ad hoc tribunals operate within the U.N. framework. *See* International Criminal Court, Historical Introduction, at www.icc-cpi.int/php/show.php?id=history (last visited Mar. 3, 2004). In 1998, the ICC was created by the Rome Statute, which entered into force in 2002. *Id.* The court's general mission is to secure universal respect for human rights and fundamental freedoms of individuals through the prosecution of individuals for war crimes. *Id.* *See also* Press Release, First Anniversary of the Court, International Criminal Court, at www.icc-cpi.int/library/newspoint/mediaalert/kit_1_year.doc (last visited Mar. 3, 2004).

progressive definitions of sexual violence will reverberate throughout the international community and filter into domestic court systems.¹¹⁶

The ICTR's definitions of rape and sexual violence are the first of their kind in international law and are more progressive than those implemented in U.S. criminal courts¹¹⁷ because they recognize the reality of many different forms of gender-based violence.¹¹⁸ In the *Akayesu* decision, the ICTR analyzed rape and sexual violence using the conceptual framework of torture to define it as "a violation of personal dignity."¹¹⁹ The Tribunal emphasized that "rape is a form of aggression" and that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."¹²⁰ The Tribunal defined rape broadly as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."¹²¹ Sexual violence was defined as any act of a sexual nature committed on a person in coercive circumstances, "but not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."¹²² The

¹¹⁶ See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing the European Convention on Human Rights in support of its decision to invalidate all state laws in the United States criminalizing same-sex sexual conduct); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination to support the majority's decision, which held that diversity is a compelling state interest, but durational limits should exist for affirmative action programs); see also *Kadic v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994), *rev'd by* 70 F.3d 232 (1995) (holding individuals responsible domestically for international war crimes by basing subject matter jurisdiction on the Alien Tort Claims Act, 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1331); see generally Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 Fordham Int'l L.J. 378, 381-87 (1999) (positing that a lack of appropriate domestic jurisdiction and substantive legislation contributes to the inability of the U.S. courts to prosecute genocide and crimes against humanity).

¹¹⁷ Compare *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998), at www.ictor.org/default.htm (last visited Apr. 10, 2004), paras. 733-34 (excluding the nonconsensual requirement from the definition of rape), with George E. Burns, Jr., *Rape, Consent & Force: Legal Mystery—Modern Problem*, 34 Md. B.J. 44, 44 (2001) (noting that in Maryland, for example, second-degree rape requires the prosecution to prove: (1) that the defendant had vaginal intercourse with the victim; (2) that the act was committed by force or threat of force; and (3) that the act was committed without the consent of the victim).

¹¹⁸ See Viseur-Sellers, *supra* note 107, at 312 (describing how the *Akayesu* decision is "singularly significant" in advancing sexual violence jurisprudence in international law); Askin, *supra* note 10, at 109 (describing the progressive language of the *Akayesu* decision).

¹¹⁹ See *Akayesu*, Case No. ICTR-96-4-T, para. 687.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* para. 688.

ICTR also acknowledged that sexual assaults did not require physical force. Importantly, the Tribunal explained that “coercive circumstances need not be evidenced by a show of physical force[:] [t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or other military presence.”¹²³ The ICTR thus presumed that in the coercive environment of armed conflict proof of non-consent was unnecessary, and it was not included as an element in the definition of rape.¹²⁴ The use of the term “physical invasion” was also progressive in that it recognized the victim’s point of view as opposed to the perpetrator-focused word “penetration” used in the common law.¹²⁵ This broad definition recognized the existence of types of sexual violence experienced by Rwandan women heretofore not addressed under common law definitions or state statutes, such as rape using physical objects and forced nudity used to intimidate, degrade, and humiliate its victims.¹²⁶

The *Akayesu* judgment explained that rape constitutes genocide when it is committed with the “specific intent to destroy, in whole or in part, a particular group.”¹²⁷ The Tribunal found that during the genocide, sexual violence was an integral part of the process of destruction because it was aimed at the destruction of the “[T]utsi group—destruction of the spirit, the will to live, and of life itself.”¹²⁸ The intentional and unintentional use of soldiers infected with the AIDS virus as rapists also aided prosecutors in focusing on rape as a genocidal act.¹²⁹

In comparison, although the International Criminal Tribunal for Yugoslavia reviewed the definition of rape used by the ICTR, it also conducted a survey of national legislation defining rape and chose a more narrow definition.¹³⁰ In *Prosecutor v. Furundzija*, the ICTY outlined the

¹²³ *Id.*

¹²⁴ Kristen Boon, *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum. Hum. Rts. L. Rev. 625, 647 (2001).

¹²⁵ See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 1000-01 & nn.280-84 (1998) (reviewing definitions for rape in the criminal statutes of all fifty U.S. states and the District of Columbia).

¹²⁶ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-I, Amended Indictment (June 1997), para. 10A (describing the forced nudity Hutus inflicted upon Tutsis at the Taba police bureau).

¹²⁷ See *Akayesu*, Case No. ICTR-96-4-T, paras. 731, 733-34 (enumerating the requirements for genocidal intent).

¹²⁸ *Id.* para. 734.

¹²⁹ See Landesman, *supra* note 2, at 116 (explaining that intentional HIV infection is murder because it intends to annihilate the procreators and perpetuate death unto the next generation so that the killing continues).

¹³⁰ See *Prosecutor v. Furundzija*, Judgment, IT-95-17/1, paras. 175, 179-85, 273 (Dec. 10, 1998), at www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf (last

objective elements of rape to include: (i) the sexual penetration, however slight; (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.¹³¹

In negotiations to establish the legal standard for rape in the ICC Statute, the ICTR, ICTY, and common law legal definitions were discussed.¹³² The ICC legal definition of rape most closely resembles the language used by the ICTY in *Furundzija*; however, the negotiations reveal an attempt to integrate the three legal models discussed above.¹³³ While rape is not specifically defined in the ICC Statute, the elements of rape are included in the Elements of Crimes, which is intended to serve as a guideline for ICC judges.¹³⁴ In contrast to the *Furundzija* definition, the ICC modified the language, making it gender-neutral and requiring a showing that “the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ.”¹³⁵ The change in terminology from “penetration” to “invasion” enhances the gender-neutral aspect of the definition terminology and shifts the perspective of the act to a victim narrative. This choice of language also focuses the legal inquiry on the harm to the victim caused by the perpetrator’s assault.¹³⁶

Like the ICTR’s definition, the ICC Statute also encompasses a broader definition of force or coercion than that found in traditional common law doctrine. While still requiring the physical act of penetration and proof of force, such a showing can include circumstances “caused by fear of violence, duress, detention, psychological oppression[,] abuse of

visited Mar. 26, 2004) (finding *Furundzija* guilty of aiding and abetting the rape and sexual assault on a woman even though he was not physically present during the actual assault based on the grounds that his “presence and continued interrogation of [the woman] encouraged Accused B and substantially contributed to the criminal acts committed by him.”). This was the first decision issued by a U.N. tribunal convicting someone of rape as a war crime. Associated Press & Reuters, *War Crimes Tribunal Convicts Bosnian Croat of Rape*, at www.cnn.com/WORLD/europe/9812/10/bosnia.war.crimes/ (last visited Mar. 3, 2004).

¹³¹ *Furundzija*, IT-95-17/1, para. 185.

¹³² See Boon, *supra* note 124, at 644-45.

¹³³ See *id.* (“While the ICC approach most closely resembles the [ICTY definition], all three formulations were apparent during the negotiations and are thus relevant to an understanding of the ICC elements of rape.”).

¹³⁴ See *id.*

¹³⁵ Preparatory Comm’n for the Int’l Crim. Ct., *Elements of Crime*, arts. 7(1)(g)-1(1) n.16, 8(2)(b)(xxii)-1(1) n.51, available at www.un.org/law/icc.statute/elements/English/ (last visited Nov. 16, 2003) [hereinafter *Elements of Crime*].

¹³⁶ See Boon, *supra* note 124, at 649.

power,” or situations where the perpetrator has taken “advantage of a coercive environment.”¹³⁷ The language provides these circumstances as examples, but it is not an exhaustive list. Similar to the ICTR’s Statute and the Akayesu judgment, the Rome Statute of the ICC includes rape, other sexually violent crimes, and gender-persecution in the classification of war crimes and crimes against humanity.¹³⁸

Surpassing all historical treatment of rape as a war crime, the Akayesu decision thus represents the first conviction of a government official for rape as a crime against humanity and a tool of genocide by a government official.¹³⁹ The Appeals Chamber affirmed Akayesu’s conviction and he received three concurrent life sentences,¹⁴⁰ the maximum punishment available to the Tribunal.¹⁴¹ As mentioned above, the conviction may not have been possible without relentless pressure from women’s organizations to turn historical ambivalence into international condemnation.¹⁴² Without such external pressure, the ICTR was destined to repeat the ambivalence toward gender-based violence evident in the war crime trials held after the Second World War.¹⁴³ While the Akayesu decision was momentous in officially recognizing gender-based violence as the most serious war crime,¹⁴⁴ significant problems in the ICTR’s prosecution of gender-based violence threaten to diminish the Tribunal’s

¹³⁷ See Elements of Crime, *supra* note 135.

¹³⁸ See Human Rights Watch, Women’s Human Rights, *supra* note 8, at 440.

¹³⁹ See Amnesty International, *supra* note 14, at 1 (emphasizing the significance of the Akayesu decision).

¹⁴⁰ See Akayesu, Sentence, Case No. ICTR-96-4-T (Oct. 2, 1998), at www.ictor.org/default.htm (last visited May 3, 2003) (listing his sentences for nine out of fifteen counts, which included three life sentences, four fifteen-year terms, and two ten-year terms, all to run concurrently); see also Akayesu, Appeals Chamber Judgment, Case No. ICTR-96-4-T (June 1, 2001), at www.ictor.org/default.htm (last visited May 3, 2004) (affirming Akayesu’s judgment and sentence).

¹⁴¹ See Mary Margaret Penrose, Lest We Fail: The Importance of Enforcement in International Criminal Law, 15 Am. U. Int’l L. Rev. 321, 374 (1999) (noting that unlike the Rwandan national court system, the Tribunal cannot execute criminals).

¹⁴² See Crossette, *supra* note 106, at 2 and accompanying text (asserting that the Akayesu indictment would not have been amended to include sexual charges without pressure from women’s organizations); see also Human Rights Watch, Shattered Lives, *supra* note 3, at 94 (stating that in 1996 Human Rights Watch concluded that if the ICTR continued in its current manner, “it may fail to mount even one rape prosecution”); see generally MacKinnon, *supra* note 20, at 8 (“Women have created the idea that women have human rights out of a refusal to believe that the reality of violation we live with is what it means for us to be human—as our governments seem largely to believe.”).

¹⁴³ See Askin, *supra* note 10 and accompanying text (describing the failure of the post-World War II tribunals to prosecute rape as a serious war crime).

¹⁴⁴ See Viseur-Sellers, *supra* note 107, at 312 (describing the significance of the Akayesu verdict).

legitimacy and legacy, in turn possibly limiting or preventing the application of this significant precedent by other domestic and international legal bodies.¹⁴⁵ In order to ensure a continuing role in overcoming this ambivalence by convicting perpetrators of such crimes, the Tribunal should implement improvements in three major areas of its internal legal structure, to be discussed below.

It should be briefly noted that the significance in explicitly indicting and prosecuting rape as one of the most serious war crimes lies in the theory behind international criminal law.¹⁴⁶ International crimes include offenses which conventions or customary law either authorize or require states to criminalize, prosecute, and/or punish.¹⁴⁷ By condemning these offenses, the international community creates moral deterrents against similar conduct in the future.¹⁴⁸ With the establishment of the two ad hoc tribunals in the former Yugoslavia and Rwanda and the permanent ICC, international criminal law now imposes obligations on individuals—not just states¹⁴⁹—who are subject to prosecution and punishment by an international court.¹⁵⁰ International enforcement ensures that future perpetrators will be held accountable for the commission of these heinous crimes.¹⁵¹

¹⁴⁵ See Symposium, *War Crime Tribunals: The Record and the Prospects: Conference Convocation*, 13 Am. U. Int'l L. Rev. 1383, 1393-94 (1998) [hereinafter *Conference Convocation*] (David J. Scheffer, U.S. Ambassador-at-Large for War Crimes Issues, discussing how inefficiencies at the ICTR are tarnishing its reputation).

¹⁴⁶ See Judith G. Gardam & Michelle J. Jarvis, *Women, Armed Conflict and International Law* 253 (2001) (book review) (explaining that substantive law must be sufficiently clear and well-established at the time of the crime so as not to violate the principle of *nullem crimen sine lege* (no crime without law)). If there is no international law explicitly addressing rape as a serious crime, there can be no enforcement of women's human rights violations. *Id.* See also Combs, *supra* note 110, at n.57 (describing how the ICTR prosecuted sexual violence to incorporate the legal definitions of the most serious war crimes).

¹⁴⁷ See Orentlicher, *supra* note 99, at 2552-53 (providing a theoretical explanation of international crimes).

¹⁴⁸ See Harvard Law Review Association, Survey, *The Promises of International Prosecution*, 114 Harv. L. Rev. 1957, 1967 (2001) (describing how prosecution of war crimes creates a deterrent against similar conduct in the future).

¹⁴⁹ See Orentlicher, *supra* note 99, at 2553, 2560-61 (asserting that international law relies upon criminal sanctions to secure compliance with the norms it deems essential to order and peace). When international law establishes "human rights guarantees, it [is] therefore natural that criminal law would play a role in securing rights that are of paramount importance." *Id.* at 2561.

¹⁵⁰ See MacKinnon, *supra* note 20, at 14 (explaining that the slow international response to women's human rights violations was due to the structure of traditional human rights instruments, which empowered states to act against states and did not take into account non-state actors—i.e., individuals or groups committing sexual violence against women).

¹⁵¹ See *Conference Convocation*, *supra* note 145, at 1396 (Ambassador Scheffer noting that the long-term goal for international criminal justice is prevention of heinous

B. Challenges Facing the ICTR in Prosecuting Gender-based Violence

In order for international criminal prosecution to be an effective deterrent, the legal institution and the norms it seeks to enforce must have a threshold level of legitimacy.¹⁵² Legitimacy is influenced by a social consensus that the prosecutorial process is fair, effective, and timely.¹⁵³ Current problems in the prosecution of gender-based violence may play an important role in preventing a large proportion of Rwandans from viewing the ICTR as “sufficiently legitimate to heed the moral lessons the Tribunal seeks to teach.”¹⁵⁴ In order for the ICTR to preserve its legacy in prosecuting gender-based violence, critical improvements must be made to its prosecutorial processes via inclusion of sexual violence charges in more indictments and to its policies regarding sensitivity and privacy for survivor witnesses throughout the trial process.¹⁵⁵

Human Rights Watch recently declared 2003 to be the ICTR’s “most troubled year to date.”¹⁵⁶ In the fall of 2003, newly-elected ICTR Chief Prosecutor Hassan Jallow announced several strategies aimed at reducing the Tribunal’s case load and streamlining the prosecutorial process.¹⁵⁷ While creating procedural time savers, these strategies did little

crimes through the deterrence of a permanent international court); *see infra* notes 152-154 and accompanying text (explaining how international law creates general deterrence).

¹⁵² *See* Harvard Law Review Association, *supra* note 148, at 1967 (concluding that a threshold level of legitimacy needs to exist to be considered an effective legal institution).

¹⁵³ *Id.*

¹⁵⁴ *Id.* *See also* Press Release, Human Rights Watch, Security Council: Do Not Undermine ICTR’s Independence, Aug. 7, 2003, at www.hrw.org/press/2003/08/rwand080703.htm (last visited Apr. 14, 2004) (explaining that unlike the ICTY, which has prosecuted individuals on both sides of the conflict in the former Yugoslavia, the Rwandan government has resisted any efforts by the ICTR to prosecute members of the Rwandan Patriotic Army (“RPA”). The failure to hold both sides of the conflict accountable for breaches of international humanitarian law has garnered much criticism for the ICTR. *Id.*

¹⁵⁵ *See infra* Part III.C (evaluating the ICTR’s prosecutions and how to improve sexual violence-related prosecutions in internal law).

¹⁵⁶ Human Rights Watch, World Report 2003: Africa: Rwanda 65, available at www.hrw.org/wr2k3/africa9.html (last visited Mar. 3, 2004). Among several obstacles that the ICTR faced in 2003, the United Nations “delayed approval of the Tribunal’s U.S.\$192 million biennial budget for three months because the Tribunal lacked a clear strategy for finishing trials by 2008.” *Id.* The United Nations approved additional *ad litem* judges for the Tribunal; however, even with these additional judges “the prosecutor’s initial plan of issuing 136 new indictments threatened to overwhelm a tribunal that already had more than fifty suspects in custody and that had issued only eight judgments between January 1997 and October 2002. In October, the Prosecutor scaled back her plan to 26 new indictments.” *Id.*

¹⁵⁷ *See* War Crimes Research Office, American University Washington College of Law, ICTR Status Reports, Oct. 9, 2003, at www.wcl.american.edu/warcrimes/

to address substantive deficiencies in the Tribunal's processes. The strategies for the Prosecutor's Office included: (1) consideration of whether cases awaiting trial could be referred to national jurisdictions or suspended, (2) acceptance of more guilty pleas to reduce the number of individuals awaiting trial, (3) better utilization of the Tribunal's Rules of Procedure and Evidence, and (4) review of witness testimony to avoid duplication.¹⁵⁸ Yet, these suggestions serve only as quick fixes to procedural issues—if the Tribunal is to stop alienating and disappointing survivor witnesses, greater substantive deficiencies must be addressed.¹⁵⁹ Despite the pervasive sexual violence that occurred, in addition to Akayesu, the ICTR Trial Chamber has convicted only one other individual for sexual violence, and those charges were ultimately reversed on appeal.¹⁶⁰ Only by adequately investigating the crimes of the accused and punishing the guilty can a society build support among a general populace of genocide survivors for the rule of law and a belief that their perpetrators will be held accountable.¹⁶¹

Three key weaknesses in the ICTR's prosecution of gender-based violence are hampering its ability to deliver justice for violations of women's human rights. First, the ICTR failed to indict for sexual crimes from the outset, thereby diminishing the likelihood of an adequate historical and legal record of the gender-based violence that occurred during the genocide.¹⁶² Second, a tension between the needs of legal justice and survivors' interests has created a witness crisis further hampering the

ictr_status.cfm (last visited May 3, 2004) [hereinafter ICTR Status Reports] (reporting Chief Prosecutor Hassan Jallow's announcement of four new strategies).

¹⁵⁸ *Id.*

¹⁵⁹ See *infra* Part III.B.

¹⁶⁰ See Human Rights Watch, World Report 2003: Africa: Rwanda, *supra* note 156, at 65 (summarizing the ICTR's jurisprudence on sexual violence). Currently, nineteen outstanding indictments include crimes of sexual violence. *Id.* Alfred Musema, former director of the Gisovu Tea Factory and economic leader in his prefecture was originally sentenced to life imprisonment for genocide, extermination, and rape as crimes against humanity; however, his conviction for rape as a crime against humanity was overturned on appeal. See also Human Rights Watch, Summary of Judgments Against the Accused, in Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case Law Summary of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, at www.hrw.org/reports/2004/ij/ (last visited May 3, 2004).

¹⁶¹ See Julie A. Mertus, Only a War Crimes Tribunal, in War Crimes: The Legacy of Nuremberg 10 (Belinda Cooper ed., 1999) (explaining the tension between the legal functions of a war crimes tribunal and the individual interests of survivors).

¹⁶² See Symposium, War Crimes Tribunals: The Record and the Prospects: Tribunal Justice: The Challenges, the Record, and the Prospects, 13 Am. U. Int'l L. Rev. 1541, 1549 [hereinafter Tribunal Justice] (Ivana Nizich describing how focusing on certain crimes and excluding others in an indictment may result in a partial prosecution affecting the historical and legal record of the events and that person's culpability).

ICTR's ability to fulfill its mandate.¹⁶³ Third, delays in arresting and prosecuting perpetrators dilute the effectiveness of the Tribunal's function in punishing the leaders and organizers of the rape warfare.¹⁶⁴ Improvements in these three areas will allow the ICTR to create legitimate, binding precedent by which to hold perpetrators of gender-based war crimes accountable and condemn impunity for violating women's human rights.

1. Failure to Adequately Indict for Gender-based Crimes

The ICTR inadequately investigates sexual violence prior to indicting and must resort to amending indictments to charge defendants with rape and other crimes of sexual violence during trial.¹⁶⁵ The function of naming crimes in a formal indictment provides the international community with a platform from which to express its moral condemnation.¹⁶⁶ If rape or sexual crimes are not named in an indictment, there is no conduit through which to express condemnation for such gender-based violence.¹⁶⁷ Although the ICTR Statute included definitions of rape

¹⁶³ See *infra* Part III.B (discussing the deficiencies in the ICTR's relationship with witnesses and how the legal roles of the prosecutor and defense counsel retraumatize and dehumanize sexual violence survivors).

¹⁶⁴ See *Conference Convocation*, *supra* note 145, at 1393-94 and accompanying text.

¹⁶⁵ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 94 (highlighting the ICTR's failure to include charges of sexual violence in the original indictments).

¹⁶⁶ See Mertus, *supra* note 161, at 9 (discussing the function of naming crimes for a war crimes tribunal).

¹⁶⁷ See ICTR Statute, *supra* note 104 and accompanying text (according to the ICTR statute, the Tribunal has jurisdiction to prosecute individuals responsible for genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and Additional Protocol II). Article 2 of the ICTR statute includes reference to rape and defines genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group." *Id.* Article 2 further specifies that genocide can include: "(a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group." See also Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. II, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); see generally International Crisis Group, *supra* note 9, at 163-67 (discussing the mens rea and actus reus required to prove genocide as a war crime). Public incitement of genocide is direct provocation to commit genocide through speeches, shouting, threats uttered in public places or at public gatherings, or through the sale or dissemination of written or printed material. See ICTR Statute, *supra* note 104, art. 2(3)(c). Crimes against humanity do not require specific intent, but they are inhumane acts involving persecution as part of "a widespread or systematic attack" against any civilian population. *Id.* at art. 3.

and sexual violence as serious war crimes,¹⁶⁸ prosecutors did not include charges for these crimes in any indictments until external pressure was applied in the Akayesu case.¹⁶⁹ As a result, Rwandan women expressed a complete lack of confidence in the Tribunal's ability to address the widespread gender-based violence that occurred during the genocide.¹⁷⁰

Although Human Rights Watch documented and publicized evidence of widespread rape in the Taba commune, Akayesu's original 1996 indictment included no such charges.¹⁷¹ Once Akayesu's prosecution began, women's human rights scholars and non-governmental organizations ("NGOs") submitted petitions and an amicus curiae brief, signed by forty-six organizations, demanding that Akayesu be charged with crimes of sexual violence.¹⁷² Due to the NGOs exerting pressure, the Prosecutor amended Akayesu's indictment in June 1997—using the language outlined in the amicus brief—to include crimes of sexual violence.¹⁷³

¹⁶⁸ See Human Rights Watch, Shattered Lives, *supra* note 3, at 93 (noting the inclusion of rape and sexual violence in the ICTR Statute as possible crimes against humanity and/or genocide); see also Viseur-Sellers, *supra* note 107, at 312 (discussing prosecutor's decision to amend Akayesu's indictment to include sexual violence charges); see generally Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment (June 1997), paras. 12A-12B, at www.icttr.org/ENGLISH/cases/Akayesu/indictment/actamond.htm (last visited Mar. 3, 2004) (adding counts thirteen and fourteen against Akayesu for committing crimes against humanity by facilitating the commission of sexual violence (rape and other inhumane acts) at the bureau communal he was in charge of).

¹⁶⁹ See Crossette, *supra* note 106, at 2 (emphasizing that the ICTR prosecutors failed to indict one criminal for sexual charges until amending the Akayesu indictment under pressure from women's groups).

¹⁷⁰ *Id.*

¹⁷¹ See *infra* note 172 and accompanying text (noting that Akayesu's indictment contained no charges of sexual violence).

¹⁷² See Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal in Akayesu, ICTR-96-4-1 (May 27, 1997), at www.ichrdd.ca (last visited Mar. 3, 2003) [hereinafter Amicus Brief] (urging the Trial Chamber to exercise its supervisory authority and call upon the Prosecutor to amend Akayesu's indictment to charge rape or other serious acts of sexual violence as crimes and examine why none of the Tribunal's indictments have included charges of rape or sexual violence); Press Release, Human Rights Watch, Rwanda Tribunal to Rule on Akayesu Case, Sept. 1998 (reporting that the Amicus Brief became an official part of the Akayesu case file and greatly influenced the first verdict from an international tribunal to include sexual violence), at www.hrw.org/press98/sept/rwand901.htm (last visited Jan. 26, 2004).

¹⁷³ See Crossette, *supra* note 106, at 2 (explaining that pressure from women's organizations and the support of then Prosecutor Richard Goldstone succeeded in elevating sex crimes to the level of genocide and crimes against humanity). "These tribunals were literally forced to pay attention to a series of petitions and pressures from women's organization demanding that rape be recognized." *Id.* (quoting Felice Gaer, an expert on human rights and international organizations for the American Jewish Committee).

The amended indictment alleged that Akayesu knew of and was physically present while sexual violence was inflicted against Tutsi female civilians who sought refuge at his police bureau.¹⁷⁴ At trial, evidence of massive and systematic sexual violence used as a tool of the Rwandan genocide, specifically in the Taba commune, was presented.¹⁷⁵ As a result, the ICTR found Akayesu guilty of committing sexual assault with a specific genocidal intent, and individually responsible for genocide committed in the police bureau;¹⁷⁶ he was thus the first international war criminal to be convicted of genocide by using rape as a tool of genocide.¹⁷⁷

Even after the Akayesu judgment, considering the pervasive sexual violence during the genocide, indictments of suspected organizers and leaders of the genocide for sexual crimes are surprisingly few.¹⁷⁸ By late 1998, only one of the thirty-five defendants in custody was charged with crimes of sexual violence.¹⁷⁹ After the 1998 Akayesu decision, prosecutors amended only two more indictments to add rape charges,¹⁸⁰ including Nyiramasuhuko's indictment.¹⁸¹ However, despite extensive documented

¹⁷⁴ See Campanaro, *supra* note 35, at 2583-84 (describing the charges against Akayesu).

¹⁷⁵ See *id.* (explaining how additional evidence not included in the amended indictment became known during the trial).

¹⁷⁶ See *id.* (describing that Akayesu was convicted in his official capacity for being present for and not preventing the gender-based violence that occurred at the police bureau).

¹⁷⁷ See Amnesty International, *supra* note 14, at 1 (describing the Akayesu conviction). Women's groups encouraged the Prosecutor's Office and the Tribunal to explore the link between rape and the most serious war crimes under the ICTR Statute. See NGO Coalition On Women's Human Rights in Conflict Situations, Letter to Justice Louise Arbour, Chief Prosecutor of the ICTY and ICTR (Oct. 17, 1997), at www.ichrdd.ca (last visited May 2, 2004) (suggesting as follow-up to the amicus brief submitted to the ICTR in May 1997 that additional attention be given to sexual violence in the legal instruments of the ICTR).

¹⁷⁸ See also Landesman, *supra* note 2, at 116 (describing how the number of indictments for sexual violence is disproportionate to the amount of sexual crimes survivors endured).

¹⁷⁹ See Human Rights Watch, Women's Human Rights, *supra* note 8, at 427 (noting that only one defendant in custody was charged with sexual violence even after Akayesu's successful conviction for rape as a tool of genocide).

¹⁸⁰ See Prosecutor v. Musema, Case No. ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment (Nov. 18, 1998), at <http://www.ictor.org/ENGLISH/cases/Musema/decisions/amend.htm> (last visited July 18, 2004) (the indictment was amended in this case after the trial began, raising concerns about the quality of investigations prosecutors undertook). The Tribunal's decision to amend cites, *inter alia*, the Akayesu decision and the "Decision on the Status of the Hearings for the Amendment of the Indictment" in Nyiramasuhuko's case. *Id.*

¹⁸¹ See Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-I, Amended Indictment (Aug. 10, 1999), at www.ictor.org/ENGLISH/cases/Nyira/indictment/index.pdf (last visited Apr. 10, 2004). Her indictment also includes the following charges: conspiracy

evidence provided by NGOs,¹⁸² and the successful prosecution of Akayesu for similar crimes, prosecutors remain reluctant to include charges of sexual violence in their indictments.¹⁸³

Furthermore, prosecutors are failing to investigate sexual violence in a timely manner, and to document sufficient evidence of the crimes that could later be used to indict more perpetrators.¹⁸⁴ Because the investigatory process creates a factual overview of the crimes perpetrated, it influences what types of crimes will be indicted and prosecuted.¹⁸⁵ Sometimes prosecutors include a limited scope of crimes in their indictment to facilitate proving their case,¹⁸⁶ since a limited indictment makes it quicker and easier to prosecute their case. However, this may have more serious and far-reaching consequences, resulting in an inadequate representation of the events, the perpetrators' culpability, and the experiences of the survivors.¹⁸⁷ Some prosecutors come to the Tribunal with domestic experience in investigating and prosecuting local murders and homicides.¹⁸⁸ When these individuals investigate in the field, they may ask leading questions that do

to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity, violation of Common Article 3 of the Geneva Conventions and Additional Protocol II. *Id.* Nyiramasuhuko has pled not guilty to all charges and consistently denied them. *See* Landesman, *supra* note 2, at 86. According to observers, at the beginning of the trial, Nyiramasuhuko "shook her head and smirked" as charges were read against her. *Id.* But as more survivors testified against her, she became more subdued. *Id.*

¹⁸² *See* Human Rights Watch, *Shattered Lives*, *supra* note 3 and accompanying text. Other organizations documenting the violations of international law committed during the genocide include: the U.N. Commission of Experts, the Rwanda Field Office of the U.N. High Commissioner for Human Rights, U.N. Assistance Mission for Rwanda (UNAMIR), the U.N. High Commissioner for Refugees, and Amnesty International. *See* Human Rights Watch, *Security Council: Do Not Undermine ICTR's Independence*, *supra* note 154, at 2.

¹⁸³ *See infra* notes 197-203 and accompanying text (describing the consequences of inadequately indicting and investigating for gender-based violence).

¹⁸⁴ *See* Human Rights Watch, *Shattered Lives*, *supra* note 3, at 89 (describing the disproportionate number of indictments for sexual violence despite the documented existence of the crimes).

¹⁸⁵ *See* *Tribunal Justice*, *supra* note 162, at 1548-49 (Nizich explaining the indictment process at a war crimes tribunal).

¹⁸⁶ *See id.* (noting that the investigation process greatly influences which crimes will be indicted and prosecuted). Failure to conduct adequate investigations will hamper the prosecutor's ability to indict for certain crimes. *Id.*

¹⁸⁷ *See id.* (discussing how prosecutors use their subjective discretion in deciding what crimes they will indict perpetrators for). If prosecutors do not investigate crimes of sexual violence, they will not include these crimes in the indictment. *Id.* On the other hand, some prosecutors may be reluctant to charge sexual violence in indictments due to inexperience at doing so. *Id.*

¹⁸⁸ *See id.* (demonstrating how the Tribunal staff is not always fully equipped to deal with the atrocities that are part of a genocide).

not allow survivors to paint a full picture of the suffering they endured.¹⁸⁹ This tendency reduces opportunities for additional indictments as well as the possibility of more convictions for sexual violence.¹⁹⁰

The problem of incomplete investigations is further exacerbated because female survivors are reluctant to discuss the sexual violence they incurred with male investigators.¹⁹¹ Human Rights Watch has reported that many survivors indicated that they would report rape only to female investigators.¹⁹² As a result, the occurrence of sexual violence remains severely under-reported.¹⁹³ The ICTR has fewer women in positions of authority than other tribunals;¹⁹⁴ and a lack of female investigators¹⁹⁵ seems

¹⁸⁹ See, e.g., *The Contribution of Ad Hoc Tribunals*, *supra* note 112, at 1545-46 (Nizich noting that the Tribunal staff comes from a variety of different backgrounds and are not always fully trained in the crimes of genocide).

¹⁹⁰ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 94-95.

¹⁹¹ *Id.* at 90 (reporting that survivors interviewed by female investigators admitted that they did not and would not disclose the sexually violent crimes they suffered during the genocide to a male investigator or when other males were present during interviews).

¹⁹² *Id.* ("If it was a woman [investigator], I would have told her everything," said one survivor. Another noted, "if there were women judges, maybe women would be more willing to go to women about cases of rape.").

¹⁹³ See *Tribunal Justice*, *supra* note 162, at 1565 (Warrick describing the under-reporting of sexual violence to the Prosecutor's Office).

¹⁹⁴ Compare *Eighth Annual Report*, *supra* note 111, para. 81 (reporting that of 299 professionals, 38 percent are female, and at the P-5 level and above approximately 18 percent are female), with *Tenth Annual Report 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*, para. 335 (2003), at www.un.org/icty/rappannu-e/2003/index.htm (last visited Mar. 3, 2004) (reporting that 40 percent of the professional staff are female at the ICTY).

¹⁹⁵ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 95 (reporting that in 1996, four out of thirty investigators were female); see also Press Release, Division for the Advancement of Women, U.N. Dept. of Econ. and Soc. Affairs, *States Parties to International Criminal Court Elect Final Four Judges; in Total, 18 Selected, Requiring 33 Ballots over Four Days* (Feb. 7, 2003), at www.un.org/News/Press/docs/2003/L3026.doc.htm (last visited May 4, 2004) (announcing that ten of the final eighteen judges selected for the ICC are women, including the author of the *Akayesu* decision, Navanethem Pillay); see generally Angela E.V. King, Opening Remarks, *Fair Representation: The ICC Elections and Women* (Jan. 29, 2003), at www.un.org/womenwatch/osagi/statements/Panel-ICC.html (last visited Mar. 8, 2003) (reporting that despite the United Nations's goal of equal representation of men and women in professional and higher level posts, at the time of her speech, only one of fifteen judges in the ICJ is female, only three of sixteen judges in the ICTR are female, and only one female judge sits on the bench in the ICTY); *Tribunal Justice*, *supra* note 162, at 1547 (describing the need for more translators who are essential in translating interviews and searching documents for evidence).

to be adversely affecting the ability to indict adequately for the sex crimes that occurred during the genocide.¹⁹⁶

Inadequate investigations affect the indictment and prosecution stages, abridging the accountability of the perpetrators.¹⁹⁷ The importance of creating a full historical record is to warn potential perpetrators of the force of international humanitarian law protecting women's human rights.¹⁹⁸ Although Akayesu's indictment was amended, a complete investigation before trial never took place.¹⁹⁹ For example, at trial the judge elicited witness testimony about a six-year-old girl who was raped at Akayesu's police bureau by questioning the witness beyond the prosecutor's examination.²⁰⁰ If investigators had completely investigated all of the types of crimes that occurred in the Taba commune, this charge would have been included in Akayesu's indictment.²⁰¹ The prosecutors should have complete knowledge of their witnesses' testimony before they take the witness stand.²⁰² Without adequate investigations, indictments, and prosecutions of sexual violence, women's human rights will continue to be violated and gender-based violence will continue to be viewed merely as acceptable and unavoidable spoils of war.²⁰³ Only with the successful prosecution of rape and sexual violence as serious war crimes can the

¹⁹⁶ See A Landmark Ruling on Rape, *supra* note 15 (noting that women's groups are pressuring the Tribunal to hire more female investigators to increase the amount of indictments for rape).

¹⁹⁷ See *infra* notes 198-203 and accompanying text (discussing the consequences of inadequately indicting and investigating for gender-based violence).

¹⁹⁸ See Mertus, *supra* note 161, at 21 (describing the function of creating an accurate record and how it serves the interests of the legal community and the survivors).

¹⁹⁹ See Amicus Brief, *supra* note 172 and accompanying text (documenting the charges of sexual violence that were repeated in the amended indictment). Akayesu's original indictment was spurred by the discovery of a mass grave holding 2,000 bodies near his administrative office; however, a failure to ask survivors about all types of violence they experienced at the Taba commune nearly silenced the evidence of mass rapes into historical obscurity. See A Landmark Ruling on Rape, *supra* note 15 (noting that women's groups have pressured the Tribunal to hire more female investigators in order to ensure that the number of indictments for rape increases).

²⁰⁰ See Rape and Genocide in Rwanda, *supra* note 115; see also ICTR R. Proc. & Evid. 85, available at www.un.org/ict/r/rules.html (last visited May 4, 2004) (explaining how the judge may at any stage during trial question a witness).

²⁰¹ See *infra* note 202 and accompanying text.

²⁰² See Thomas A. Mauet, Trial Techniques 95-96 (6th ed. 2002) (noting that cases are won only in a party's case-in-chief and that the attorney should already know the "script" or information the witness will provide).

²⁰³ See A Landmark Ruling on Rape, *supra* note 15, at 2 (quoting Judge Pillay after the Akayesu conviction, "From time immemorial, rape has been regarded as spoils of war. Now it will be considered a war crime. We want to send out a strong signal that rape is no longer a trophy of war.").

journey to deterrence and prevention of women's human rights violations begin.

2. Tension Between the Needs of Legal Justice and Sexual Violence Survivor's Interests

Part of the failure to indict perpetrators adequately may stem from deficiencies in handling witnesses during the prosecutorial process, which alienates the survivor witnesses, re-traumatizes them, and discourages other witnesses from testifying.²⁰⁴ The biggest challenges the ICTR faces in this area are securing witnesses' availability and willingness to testify.²⁰⁵ Without survivors who are willing and able to testify, the ICTR will be unable to fulfill its mandate.²⁰⁶ According to a former judge for the ICTY, live witness testimony is the lifeblood of the tribunals and essential to preserving the integrity and legacy of the institutions.²⁰⁷ However, the availability of witnesses has been adversely impacted by the Rwanda government's travel restrictions. Survivors' willingness to testify has also been adversely affected by their own level of frustration with the Tribunal.²⁰⁸

Due to governmental bureaucracy, some witnesses simply cannot travel to Arusha to testify.²⁰⁹ In the summer of 2002, the Rwandan government imposed new travel requirements for witnesses leaving the country to testify, causing significant delays at Nyiramasuhuko's trial and all other pending trials at the ICTR in Tanzania.²¹⁰ Previously, the

²⁰⁴ See, e.g., Patricia M. Wald, Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal, 5 Yale Hum. Rts. & Dev. L.J. 217 (2002) (discussing the importance of witnesses in war crime trials, the difficulties in securing witnesses, and avenues for reconciliation with witness groups).

²⁰⁵ See *infra* notes 206-254 and accompanying text (describing the bureaucratic difficulties in securing the availability of witness and the frustrations witnesses have with the ICTR, which decreases their willingness to testify).

²⁰⁶ See Human Rights Watch, Shattered Lives, *supra* note 3, at 71 (asserting that Rwandans do not trust the Tribunal and believe that people are forgetting the horror of the genocide).

²⁰⁷ See Wald, *supra* note 204, at 219 (noting that witnesses were the "lifeblood" of the ICTY).

²⁰⁸ See *infra* notes 214-246 (discussing the disparate objectives of survivors wishing to have their day in court and the methods used by the prosecution and defense in eliciting proper testimony).

²⁰⁹ See Human Rights Watch, Shattered Lives, *supra* note 3, at 97 (describing the difficulties in traveling from Rwanda and Tanzania due to the geographical distance and the travel restrictions imposed by the Rwandan government).

²¹⁰ See UN's del Ponte Holds Talks in Rwanda on War Crimes Court, Agence France-Press, June 28, 2002, 2002 WL 2441849 (criticizing the Rwandan government for ceasing to waive travel restrictions for witnesses traveling to Tanzania to testify which

government had waived the requirements to facilitate the witness's timely travel to the trial location, but it now refuses these accommodations to the ICTR.²¹¹ The new restrictions became the catalyst in a boycott of the Tribunal by survivor witnesses and protests by survivor-affiliated NGOs,²¹² further highlighting the lack of social consensus regarding the Tribunal's legitimacy. Without witness testimony, the Tribunal will be unable to fulfill any of its functions, thereby preventing the creation of any further international jurisprudence on sexual violence.²¹³

War crimes tribunals are established to accomplish legal justice by serving five main functions: naming crimes, blaming individual perpetrators, punishing the guilty, deterring future perpetrators, and creating a historical record.²¹⁴ While attaining these ends, the interests of survivors are often subjugated during the legal process.²¹⁵ For example, even if the

severely hampers the Tribunal's ability to provide timely trials); *see also* Lack of Witnesses: Genocide Trial in Arusha Postponed to October, Agence France-Press, June 28, 2002, 2002 WL 2441471 (describing how the lack of witnesses postponed Nyiramasuhuko's trial and many others).

²¹¹ *See* Lack of Witnesses, *supra* note 210 (noting that in the past, these travel restrictions were waived as a courtesy by the Rwanda government to the Tribunal's efforts); *see also* Human Rights Watch, Security Council: Do Not Undermine ICTR's Independence, *supra* note 154 (explaining that the Rwandan governments travel restrictions may have been intended as retaliation for Prosecutor Carla del Ponte's announced investigations against RPA soldiers, which the government was protecting). Although the government claimed that it would prosecute RPA soldiers who committed violations of international law during the genocide, "in the nine years of the current government, trials of soldiers accused of these crimes have been few and the penalties of those convicted have been light." *Id.*

²¹² *See* Thousands Turn Out to Protest UN Genocide Tribunal in Rwanda, Agence France-Press, June 27, 2002, 2002 WL 2440911 (describing the summer of rising tensions among the Tribunal, the Rwandan government, and survivors, which resulted in a large protest against the Tribunal).

²¹³ *See* Mertus, *supra* note 161, at 4 (discussing the main functions of a war crimes tribunal).

²¹⁴ *See id.* This list of the main functions excludes delivering reparations and reforming a lawless society.

²¹⁵ *See* Agence France-Press, *supra* note 212 (explaining that relations between the Tribunal and survivor-witnesses became so strained that the two main survivor organizations boycotted the Tribunal in the summer of 2002 stalling all pending trials). The witness crisis culminated in a 3,000-person protest against the ICTR on June 27, 2002. *Id.* The protests highlighted the lack of faith survivors had in the Tribunal; this lack of positive social consensus undermines the legal institution's legitimacy. *See* Harvard Law Review Association, *supra* note 148 and accompanying text (citing positive social consensus as a prerequisite to legitimacy). During the protest, one of the main survivors' organizations, Ibuka, released a statement declaring that the Tribunal was incompetent, irresponsible, revisionist, and a source of illicit corruption. *See* Ibuka, at www.ibuka.org (last visited Apr. 22, 2002); *see also* Agence France-Press, *supra* note 212 (describing Ibuka's press release). As a result, the two key Rwandan survivor associations urged their members not to testify before the ICTR in Arusha. *Id.*

restrictions are eased to facilitate travel, many witnesses are reluctant to testify because others have described the process as “dehumanizing and re-traumatizing.”²¹⁶ Despite the existence of the ICTR’s Witness Protection Unit (“WPU”), witnesses find the protective and assistance services it provides inadequate.²¹⁷ In the winter of 2003, for example, a defense attorney and his assistant went unaccompanied and unannounced to a safe house for protected witnesses.²¹⁸ The witnesses feared that their identities would be revealed and they would face reprisals because the assistant hailed from their hometown.²¹⁹ This example displays a basic failure to enforce procedures designed to protect witnesses’ well-being.

Although the ICTR claims to provide psychological counseling if needed,²²⁰ the prosecution constructs its case in order to dissect facts and illustrate legal proof of the crimes charged²²¹ in a way that does not safeguard the survivors’ emotional well-being.²²² Some witnesses have emotional and psychological concerns about confronting their perpetrators in public,²²³ while others have concerns about their physical safety.²²⁴ Many

²¹⁶ See Mertus, *supra* note 161, at 3 (discussing the deficiencies of international trials as a healing process for survivors of sexual violence and women’s abilities to exercise their agency during the adversarial process).

²¹⁷ See ICTR, About the ICTR: General Information: Witness Support and Protection at ICTR, at www.ictor.org/default.htm (last visited May 4, 2004) (describing the witness support and protection service available for witnesses); see also Human Rights Watch, Shattered Lives, *supra* note 3, at 96-97 (asserting the need for better witness protection).

²¹⁸ See ICTR Status Reports, *supra* note 157, at Dec. 1, 2003 (reporting on Defense Attorney Peter Robinson’s visit and noting that the Trial Chamber eventually ruled that no one may visit the other side’s witnesses without the party’s knowledge).

²¹⁹ *Id.*

²²⁰ See Human Rights Watch, Shattered Lives, *supra* note 3, at 95-97 (criticizing the deficiencies in the ICTR’s witness protection and assistance program).

²²¹ See Mauet, *supra* note 202 (describing the objective of the prosecution’s case presentation at trial).

²²² See Mertus, *supra* note 161, at 16 (explaining the tension between the legal functions of a war crimes tribunal and the individual interests of survivors); see also Julie A. Mertus, Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women’s Agency, 6 Int’l Feminist J. of Pol. 110 (2004) (describing the deficiencies of international trials as a healing process for survivors of sexual violence and women’s ability to exercise their agency during the adversarial process) (on file with author).

²²³ See Mertus, *supra* note 161, at 3 (describing the emotional and psychological concerns of sexual trauma survivors who may confront their perpetrators in a public courtroom).

²²⁴ See Nasser Ega-Musa, Editorial, Another Failure of Justice in Africa, Wash. Post, Mar. 6, 1997, at A21 (“In early January, Hutu extremists murdered a witness, her husband and seven children after she appeared before the U.N. trials and was promised protection. Another tribunal witness was killed with his [family] . . . last December.”); see

refuse to testify upon realizing how precarious their situation may be after testifying.²²⁵ Thus, the prosecution's case may be weakened.²²⁶

Some survivors believe that participating in the Tribunal's trials will aid their healing process, but this expectation often becomes a source of frustration and disappointment.²²⁷ Witnesses' participation in war crimes trials demonstrates that a vast disparity exists between the prosecutors' and witnesses' expectations over what kind of story will be told on the witness stand.²²⁸ Witnesses want to document the story of their suffering and survival in their natural voice,²²⁹ whereas, prosecutors and defense counsel need testimony molded to the legal requirements of evidence.²³⁰ These disparate expectations produce frustration and reluctance to participate in the process, diminishing the number of willing witnesses.²³¹

also Human Rights Watch, *Shattered Lives*, *supra* note 3, at 96-97 (emphasizing the need for better witness protection).

²²⁵ See Ega-Musa, *supra* note 224, at A21 (highlighting the ineffectiveness of the ICTR's current witness protection programs).

²²⁶ See Mertus, *supra* note 161, at 8 (explaining that survivors express their traumatic experience in a "natural voice" not often suited to the purposes of eliciting witness testimony at trial).

²²⁷ See *id.* (describing how some survivors believe that a judge hearing their story will give their suffering legitimacy).

²²⁸ See *id.* (analyzing the tension between how survivors discuss their suffering during the genocide and the legal testimony that prosecutors need to try their case).

²²⁹ See *id.* (explaining that survivors express their traumatic experience in a "natural voice" not often suited to the purposes of eliciting witness testimony at trial).

²³⁰ See *id.* at 9 (summarizing the needs of legal evidence in criminal proceedings).

²³¹ See ICTR Statute, *supra* note 104 (noting the 2008 deadline for completion of the Tribunal's mandate). Four years remain before the targeted completion deadline, and the Tribunal has entered only nine judgments. *Seventh Annual Report*, *infra* note 264, para. 3. Recently, Rwandan President Paul Kagame voiced disapproval for the huge sums of money being spent by the ICTR and the relatively few results. See Press Release, *Kagame Speaks to the BBC on DRC Peace Agreement* (2001), available at www.rwanda1.com/government/president/interviews/2001/drcpeace_bbc.html (last visited May 4, 2004) (quoting Kagame's criticisms of the ICTR); see also ICTR, *About the Tribunal: General Information*, at www.ictr.org/default.htm (last visited May 4, 2004) (enumerating the ICTR's 2002-03 appropriated budget was \$177,739,400 with 872 staff members from eighty countries). But see ICTR, *About the Tribunal: General Information: The Achievements of the ICTR*, at www.ictr.org/default.htm (last visited Feb. 9, 2003) (boasting that over six hundred witnesses have been heard in the various cases). If the head of the government believes the Tribunal is ineffective, imagine the frustration that traumatized survivors must feel. See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 71 (quoting survivors who fear that the genocide is being minimized by the Tribunal and as a result, people are forgetting the horror before retribution is achieved).

Prosecutors examine witnesses to dissect facts in a perpetrator-driven narrative according to the basic rules of evidence.²³² Although this approach is central to criminal proceedings,²³³ when dealing with emotionally traumatized witnesses, this emphasis on fact alienates and disembodies them.²³⁴ Prosecutors dissect the witness's experiences into who did what to the witness, when, and how.²³⁵ In this way, witnesses testify about "the hand that beat them, confirm the size of the room, the color of the door, [and] the width of the wooden table on which bodies were broken."²³⁶ The legal process only admits enough information to prove the legal issue,²³⁷ often times not giving survivors what they see as their "day in court."²³⁸ Prosecutors need a linear narrative without memory discrepancies; whereas many traumatized survivors' give non-linear testimony with inconsistencies due to post-traumatic stress syndrome.²³⁹ Women who have survived rape and sexual assault describe the harm suffered in words far different from the sterile language needed by the legal justice system.²⁴⁰

Defense counsel tactics further traumatize sexual violence survivors. If survivors have sought psychological counseling before trial, the defense counsel uses this to cast doubt upon their testimony.²⁴¹ In order to discredit testimony, defense counsel suggests that witnesses are untrustworthy by provoking emotional responses from them and pointing out inconsistencies in their testimony.²⁴² For example, during the Foca

²³² See Mertus, *supra* note 161, at 10 (describing how prosecutors approach witness examination at a war crimes trial).

²³³ See *id.* at 12 (stating that this approach is central to criminal proceedings).

²³⁴ See *id.* at 9 (arguing that in a trial narrative a woman is not relevant as her own agent, but only as her actions demonstrate what the perpetrator did or did not do).

²³⁵ See *id.* at 8 (discussing how eliciting witness testimony by the prosecution focuses on fact).

²³⁶ See *id.* at 3 (summarizing the kinds of questions that prosecutors ask survivors).

²³⁷ See *id.* (describing how the legal process is an open and shut process, which devalues anything said by the witnesses not required to prove the legal issue).

²³⁸ See *id.* at 2 (noting that witnesses often testify for a sense of catharsis, but giving legal testimony does not lend itself to that end).

²³⁹ See *id.* at 6, 15 (emphasizing the differences in the testimony a prosecutor wants versus how survivors often testify).

²⁴⁰ See *id.* at 10 (discussing the needs of rape survivors).

²⁴¹ See *id.* at 4 (describing the tactics used by defense counsel, but noting that counseling is imperative for many witnesses).

²⁴² See *id.* at 13 (noting a few tactics employed by defense counsel in the trials at the ICTY).

trial²⁴³ at the ICTY, after a woman described how she was not selected to be raped one night, the defense counselor asked if she was jealous of the woman who was chosen.²⁴⁴ Overall, “courts of law mistrust the natural voice of survivors,”²⁴⁵ and likewise, many survivors come to mistrust courts of law.²⁴⁶

Many witnesses are dissatisfied with their experience testifying at trial,²⁴⁷ further eroding the social consensus needed to maintain the ICTR’s legitimacy among Rwanda’s citizens.²⁴⁸ In addition, if survivors do not feel a sense of retribution, it threatens to perpetuate a cycle of conflict in the area.²⁴⁹ The court record is not a survivor’s tale;²⁵⁰ therefore, the adjudicatory process does not fulfill the kind of participatory function that

²⁴³ See *Prosecutor v. Kunarac*, Judgement, Case Nos. IT-96-23-T & IT-96-23/1-T (Feb. 22, 2001), at www.un.org/icty/kunarac/appeal/judgement/index.htm (last visited May 4, 2004) (convicting three members of the Bosnian Serb armed forces for violation of the laws and customs of war for acts of rape, torture, and enslavement committed against women in the Foca municipality). The case is often referred to as the “Foca trial.” The Foca trial was the first case before an international tribunal to focus exclusively on crimes of sexual violence. See Press Statement, Richard Boucher, Spokesman, U.S. Dep’t of State (Feb. 22, 2001), at www.state.gov/r/pa/prs/ps/2001/905.htm (last visited Mar. 3, 2004).

²⁴⁴ See Mertus, *supra* note 161, at 14 (quoting testimony of witness being cross-examined by a defense counselor). As an explanation for how the rapes had occurred by the accused, a survivor testified that “When [Klanfa, the accused] rejected me, he took AB, but he didn’t keep her for long either; he rejected her. Then he took number 87, and then he spent most of his time with her.” The defense attorney focused on her use of “rejected” and said that “as far as I understand it, when a man rejects a woman, it’s in a romantic relationship.” The witness replaced the word “rejected” with “didn’t keep me there” and “chased me away,” yet still the defense attorney persisted: “Will you agree with me that jealousy is a psychological state, when a person imbued by it is ready to do certain things which people who are not imbued by jealousy would not consider doing?” The witness asked what the defense attorney meant by jealousy. He implied that the witness was jealous when her accused rapist took another woman because “when a man rejects a woman, it is usually a person he loves and not a person who has been raped.” The witness incredulously responded by saying “How could I possibly be Klanfa’s beloved? Only dead, not even dead, could I be Klanfa’s beloved, or any one of theirs. That’s all I could say.” *Id.*

²⁴⁵ See *id.* (summarizing the dichotomy between the needs of legal justice and the needs of survivors).

²⁴⁶ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 4 (asserting that Rwandan women have no confidence in the ICTR’s ability to prosecute rape).

²⁴⁷ See Mertus, *supra* note 161, at 12 (testifying at war crimes tribunals often creates frustration and re-traumatization).

²⁴⁸ See *id.* (describing how the success of the ICTY is measured upon whether prosecutions are based on all available evidence and whether judges remain impartial).

²⁴⁹ See *id.* at 14 (warning that if victims do not feel a sense of retribution, ethnic tensions will continue to be explosive).

²⁵⁰ See *id.* at 8 (describing how participation in the adversarial process mutes and distorts survivors’ narratives).

facilitates healing for survivors.²⁵¹ In short, reform strategies focused entirely on reducing the docket, as suggested by the Chief Prosecutor Hassan Jallow²⁵² will fail to address the substantive reforms needed in the treatment of witnesses. Without witness participation, the Tribunal cannot continue producing additional convictions for sexual violence.²⁵³ Without such convictions, the effectiveness of the Tribunal as a means of deterring future rape warfare will be hindered.²⁵⁴

3. Excessive Delays Dilute the Legitimacy and Power of Legal Justice as a Deterrent

Repeated delays adversely affect the delivery of justice to survivors and the deterrent effect on perpetrators.²⁵⁵ Prosecuting human rights violations is essential for the general deterrence of war crimes.²⁵⁶ However, as an ad hoc body, the ICTR has no authority to punish crimes beyond the Rwandan genocide, so its ability to deter similar crimes elsewhere depends solely on the applicability and legitimacy of its precedent.²⁵⁷ Legal institutions are considered legitimate only if they can deliver justice in a timely, efficient, and impartial manner.²⁵⁸ Despite the importance of the Akayesu decision, the delay in his conviction as well as in the capture and prosecution of Nyiramasuhuko reflects deficiencies in the ICTR's prosecution of gender-based violence.²⁵⁹ The conflict that began in Rwanda

²⁵¹ See *id.* at 23 (explaining how the court record merely presses the words of the survivors into the language of the law).

²⁵² See ICTR Status Reports, *supra* note 157 and accompanying text.

²⁵³ See *supra* note 204, at 219 (emphasizing the importance of witness testimony at trial).

²⁵⁴ See Human Rights Watch, Shattered Lives, *supra* note 3 and accompanying text.

²⁵⁵ See *id.* at 71 ("People are forgetting. They only want to take the present and not deal with the past. People say that the genocide is too big. So, let us find huge means to deal with it, not minimize it," said survivor Ester Mujawayo).

²⁵⁶ See Mertus, *supra* note 161, at 15 (explaining how war crime tribunals contribute to general deterrence by condemning atrocities); see generally Orentlicher, *supra* note 99 (discussing the duty to prosecute human rights violation to create accountability and to deter future violations).

²⁵⁷ See Mertus, *supra* note 161, at 15-16 (describing the limitations of the ICTR and the importance of preserving the legitimacy of its precedent).

²⁵⁸ See generally Harvard Law Review Association, *supra* note 148 and accompanying text (outlining the basic requirements for a legal institution to be viewed as legitimate).

²⁵⁹ Cf. Peach, *supra* note 79 (asserting that while the law fails to acknowledge male violence against women, it also fails to recognize women as agents using violence). Women are punished more harshly for using violence "uncharacteristic" for their gender. *Id.* This

crossed into other borders and created another “hell on earth for women” in the Democratic Republic of Congo (“DRC”).²⁶⁰ Since 1998 similar rape warfare has been evident in the DRC where thousands to tens of thousands of women have been subjected to gender-based violence by all parties to the conflict—Mayi-Mayi, Interhamwe militias, Rwandan-backed rebels, and Rwandan soldiers.²⁶¹ One human rights organization notes that “[i]mpunity bred this crisis. . . . People raped with gusto and there was no one to hold them to account.”²⁶² News reporters cite the ICTR as an example of holding aggressors accountable and urge similar practices for other conflicts.²⁶³ Because the ICTR is being held out as an example for holding perpetrators of women’s human rights accountable, both its precedent and the problems it encounters in prosecuting rape warfare as a serious war crime affect other women at risk in the international community.

The ICTR admits that the process is very slow;²⁶⁴ however, it does not seem to realize how Rwandans perceive this slowness.²⁶⁵ As the ten-year anniversary passes, many Rwandan citizens have given up on

scenario is evident in the law’s treatment of battered women who kill their abusers. *Id.* When a woman strikes back at her batterer, courts punish her much more harshly than a male counterpart who used a proportionate amount of violence. *Id.*

²⁶⁰ See Rene Lefort, Congo: A Hell on Earth for Women, *Le Nouvel Observateur*, Sept. 11-18, 2003 (asserting that “[p]erpetrators of the genocide fled to neighboring Congo, herding along with them 1.5 million Hutu refugees whom they then forcibly enrolled in a struggle against the new Rwandan regime.”). “To stamp out the insurgency, the Kigali regime launched its first war within Congo’s borders in 1996, during which 200,000 of these refugees—men, women, the elderly, and children—were slaughtered as ‘genocide criminals’ because they fled the advance of the Rwandan army.” *Id.*

²⁶¹ See Ishbel Matheson, DR Congo’s Women in the Frontline, *BBC News*, Nov. 6, 2002.

²⁶² Congo Rape Victims Seek Help, Justice: The Scale of the Assaults on Females Young and Old Comes to Light as the Five-year Conflict Ends, *Assoc. Press*, Jan. 18, 2004 (quoting Marice Bahati Mashekaga Namwira of Inheritors of Justice, a Pentecostal human rights group).

²⁶³ See Matheson, *supra* note 261, at 4 (“Rape, in these circumstances, can be officially classified as a war crime. At the International Tribunals for Rwandan and Bosnia, men who committed sexual violence have been found guilty and imprisoned.”).

²⁶⁴ See Seventh Annual Report of the ICTR for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between January 1 and December 31, 1994, U.N. GAOR, para. 6, U.N. Doc. S/2002/733 (2002) [hereinafter Seventh Annual Report], available at www.ictor.org/ENGLISH/annualreports/a57/163e.pdf (last visited May 4, 2004) (admitting that the proceedings may be perceived as slow, but the judges must be scrupulous in ensuring a fair trial).

²⁶⁵ See Human Rights Watch, Shattered Lives, *supra* note 3, at 71 (quoting survivors who feel the genocide was “too big” to minimize and forget).

justice.²⁶⁶ Recently-elected President Mose has emphasized the need for timely justice: "Our main task, to deliver justice, means to ensure fair trial without undue delay;" however, the delays continue.²⁶⁷ The deficiencies in the process devalue the Tribunal's legitimacy.²⁶⁸ Although the Tribunal instituted reforms to expedite the trials, these new methods have only created more delays.²⁶⁹

In response to early criticism of its slowness, the ICTR began to prosecute individuals in group trials.²⁷⁰ However, this has slowed the process even further.²⁷¹ While four years passed between the end of the genocide and Akayesu's conviction, current trials are progressing at an even slower pace.²⁷² For example, Nyiramasuhuko is being tried as part of a group trial with four other Hutu leaders from Butare who are also accused of genocide.²⁷³ Although the Butare trial began on June 21, 2001, as of March 26, 2003 only twenty-three witnesses for the prosecution have been heard.²⁷⁴ Due to delays at trial, the defense will most likely start presenting their one hundred witnesses in the same year as the tenth anniversary of the genocide.²⁷⁵ These delays encourage the belief among Rwandans and rape survivor organizations that the guilty will never be held accountable.²⁷⁶

²⁶⁶ See *id.* (explaining how Rwandans feel that the delays are minimizing the importance of the genocide and people are forgetting the horror).

²⁶⁷ Newly Elected President Erik Mose Addresses Staff, *supra* note 111, at 1.

²⁶⁸ See Conference Convocation, *supra* note 145, at 1393-94 and accompanying text.

²⁶⁹ See *infra* notes 277-287 (explaining the new trial methods and how they have fallen short of expectations to improve efficiencies in the trial process).

²⁷⁰ See Landesman, *supra* note 2, at 86 (noting that Nyiramasuhuko is being tried in a group trial, an innovation to expedite justice at the ICTR).

²⁷¹ See Seventh Annual Report, *supra* note 264, para. 3 (describing the multiple trial system as onerous for judges, which entails elaborate planning, scheduling, and consultation with all parties involved).

²⁷² See *supra* Part II.B, II.C and accompanying text (describing the Rwandan genocide and related trials timeline of events).

²⁷³ See Marco Domeniconi, Butare Trial Adjourned to Next Year, Reuters, Nov. 13, 2002, at www.hirondelle.org (last visited May 4, 2004) (reporting that in addition to Nyiramasuhuko and her son Ntahobali, the Butare trial group includes former prefects Sylvain Nsabimana, Alphonse Nteziryayo, and former mayors of Mgoma, Joseph Kanyabashi and Mugaza Elie Ndayambaje).

²⁷⁴ See Eighth Annual Report, *supra* note 111, paras. 30-32 (providing an overview of the Butare trial and predicting that the cross-examination of each prosecution witness will be lengthy).

²⁷⁵ *Id.*

²⁷⁶ See Human Rights Watch, Shattered Lives, *supra* note 3, at 4 (noting that survivors are losing faith that the Tribunal will effectively prosecute the perpetrators and fear

In a second effort at reform, the Tribunal began to hear multiple trials contemporaneously.²⁷⁷ Under the multiple trial schemas, each Trial Chamber conducts three trials contemporaneously in phases of two to six weeks for each trial;²⁷⁸ however, these phases are exceptionally lengthy due to delays in obtaining witnesses.²⁷⁹ For example, the presiding judges have delayed Nyiramasuhuko's trial five times with several month adjournments each time.²⁸⁰ In the summer of 2003, the trial was adjourned indefinitely following changes affecting the composition of the ICTR trial chambers, and defense counsel filed a motion to re-commence the trial from the beginning because one of the original judges was not re-elected.²⁸¹ The Appeals Chamber ruled that the case will continue where it left off at the last adjournment in March 2003.²⁸² Furthermore, Nyiramasuhuko was at large for three years following the genocide, and by the projected end of her trial, it will be a decade after the conflict before a conviction could become a reality.²⁸³ In 2003, twenty-two individuals were involved in ongoing trials, while twenty-nine individuals remained in custody awaiting the commencement of their trials.²⁸⁴ In the spring of 2003, the Prosecutor's

that the genocide will be minimized); *see also* Peach, *supra* note 79, at 63 (noting the fact that female rape victims are treated as unimportant by the legal system).

²⁷⁷ *See Seventh Annual Report*, *supra* note 264, para. 2 (describing how the multiple trial system intended to expedite justice for the detainees and survivors).

²⁷⁸ *See id.* (explaining how many trials each Trial Chamber handles).

²⁷⁹ *See* Agence France-Presse, *supra* note 212 (describing delays in securing witness's availability at trial due to travel restrictions).

²⁸⁰ *See ICTR Status Reports*, *supra* note 157, at June 6, 2003 (noting the most recent adjournments on June 6, 2003 and March 23, 2003). *See also* Domeniconi, *supra* note 273 and accompanying text (explaining how one postponement was ordered after one witness for the prosecution was blocked from testifying in June 2002 due to the new travel requirements). The Butare trial resumed in October, only to be postponed again in November. *Id.* Four witnesses for the prosecution testified between October 14 and November 13. *Id.* After the eighteenth witness for the prosecution, Judge William Hussein Sekule of Tanzania announced an adjournment until February 24, 2003. *Id.* At this point, fourteen witnesses for the prosecution have testified in Nyiramasuhuko's trial with seventy-three more scheduled to appear. *See* Landesman, *supra* note 2, at 86 (describing the large number of witnesses left to testify for the prosecution).

²⁸¹ *See ICTR Status Reports*, *supra* note 157, at June 6, 2003 (explaining the indefinite adjournment beginning in June 2003).

²⁸² *See Prosecutor v. Nyiramasuhuko*, Decision in the Matter of Proceeding Under Rule 15BIS(D), Case No. ICTR-97-42-T, para. 34 (July 15, 2003), at www.ictor.org (last visited Jan. 26, 2004) (finding that applying Rule 15BIS(D) retroactively to allow the trial to continue with a substitute judge does not prejudice the rights of the accused and serves the interests of justice for a speedy trial).

²⁸³ *See* Landesman, *supra* note 2, at 86 (noting the projected end of the Nyiramasuhuko trial will be a decade after the genocide).

²⁸⁴ *See Seventh Annual Report*, *supra* note 264, para. 1 (delineating how many trials are pending at the time the final report was issued in 2002).

Office was prepared to begin trial in seven additional cases, but all the Trial Chambers were fully engaged.²⁸⁵ In eight years, the Tribunal has entered three guilty pleas, five convictions, and one acquittal.²⁸⁶ These delays adversely affect the effectiveness of the Tribunal's prosecutions and its overall legitimacy.²⁸⁷

The ICTR could improve its effectiveness in rendering justice for survivors of sexual violence by adequately indicting more perpetrators for gender-based crimes, reconciling the needs of legal justice with the interests of survivors, and reducing delays in prosecuting the alleged perpetrators.²⁸⁸ These improvements would preserve the legitimacy of the groundbreaking precedent in enforcing protections for women's human rights.

IV. LESSONS FROM RWANDA: ASSESSING THE PAST AS PREPARATION FOR THE FUTURE

Almost every female survivor of the genocide was raped, witnessed someone being raped, or knows someone who was raped, and they await vindication for the atrocities they endured. If the Tribunal fails to effectively indict, prosecute, and convict the leading perpetrators of this officially sanctioned gender-based violence, there will be no accountability for these crimes. To remedy the aforementioned deficiencies, this section will offer recommendations to facilitate the investigation of sexual violence, establish programs to protect survivors' physical safety and emotional well-being during the process, and appoint additional judges in order to expedite

²⁸⁵ See *id.* (noting that although the Prosecutor is prepared to go forward with seven more cases, all the Trial Chambers are fully engaged and cannot begin additional trials until the expiration of the judges' mandate on May 23, 2003).

²⁸⁶ See Domeniconi, *supra* note 273 and accompanying text (noting the total number of judgments issued by the ICTR by 2002). The Rwandan judicial system also demonstrates strain under the burden of adjudicating atrocities committed during the genocide. See Human Rights Watch, *World Report 2003: Africa: Rwanda*, *supra* note 156, at 64 (describing the Rwandan judicial system as functioning poorly in 2002 due to a lack of resources, interference from the executive branch, and judicial corruption). "During the first half of 2002, the regular courts tried only 757 persons for genocide (from 1997 to June 2002, the courts tried 7,211 persons, resulting in 1,386 acquittals and 689 death sentences, though no executions have occurred since 1998)." *Id.* "The acquittal rate increased from 22 percent in 2001 to almost 27 percent in the first half of 2002, while the proportion of cases ending in death sentences fell sharply from 8.4 percent in 2001 to 3.8 percent in the same period." *Id.*

²⁸⁷ See Harvard Law Review Association, *supra* note 148 (describing how prosecution may be an imperfect mechanism to achieve many of the objectives proposed by judges, prosecutors, and politicians thereby diverting attention and resources from other worthy endeavors).

²⁸⁸ See *infra* Part IV.A-C (suggesting improvements in the ICTR's prosecutorial process to ensure the legitimacy of its precedent on sexual violence as a serious war crime).

the delivery of justice.²⁸⁹ These remedies will help restore confidence in the ICTR's ability to serve as a means of retribution for crimes committed and as a deterrent of future gender-based crimes.²⁹⁰

A. Better Investigation of Gender-based Crimes Will Lead to More Indictments for Sexual Violence

Although amending indictments to include crimes of sexual violence is important, progressive steps should be taken so these charges are included in more indictments from the inception. Analysts suggest that increasing female staffing will positively aid the investigation process.²⁹¹ When making staffing decisions, the ICTR should make a conscious effort to hire more female investigators and translators with experience in working with victims of gender-based crimes.²⁹² According to survivors, interacting with female investigators would increase the likelihood that they would report the sexual violence they endured.²⁹³

Second, the Prosecutor's Office should rely on the fact-finding already done by NGOs such as Human Rights Watch.²⁹⁴ Human Rights Watch produced the earliest and most extensive documentation of the sexual violence that occurred during the 1994 Rwanda Genocide; however, the Tribunal largely ignored its findings.²⁹⁵ Human Rights Watch field researchers rely on a methodology that is creative, extensive, and credible,

²⁸⁹ See *infra* notes 291-357 and accompanying text (discussing each recommendation in detail).

²⁹⁰ See *infra* notes 291-357 and accompanying text (focusing on the importance of restoring legitimacy to the ICTR).

²⁹¹ See Human Rights Watch, *Shattered Lives*, *supra* note 3, at 90 (discussing the reports by survivors that they would only report sexual violence to female investigators).

²⁹² See Mary Hartnett, *The Need for International Women's Human Rights Lawyers: Now More Than Ever*, 29 Hum. Rts. 21 (2002) (urging the training of more lawyers to use the international framework to ensure that women's rights are provided, protected, and promoted in the context of cultures and society across the globe).

²⁹³ See Askin, *supra* note 10, at 98 & n.8 ("[I]t is highly unlikely that the *Akayesu* decision . . . which exemplifies a heightened awareness of crimes committed against women, would have demonstrated such gender sensitivity without South African Judge Navanethem Pillay's participation in both the trial and the judgment."); see also Askin, *supra* note 7, at 3 (summarizing the women in positions of authority in public international law bodies, institutions, and war crimes tribunals).

²⁹⁴ See *Conference Convocation*, *supra* note 145, at 1426 (Gabrielle Kirk McDonald noting that NGO research and reports are tremendously valuable to the ICTR).

²⁹⁵ See Human Rights Watch, *Rwanda Tribunal to Rule on Akayesu Case*, *supra* note 172 (reporting that the Amicus Brief filed in the *Akayesu* case urged the Trial Chamber to rely upon the fact-finding in the Human Rights Watch Report); see also *supra* notes 185-191 and accompanying text (explaining how an awareness of the sexual violence crimes committed will influence prosecutors to indict for gender-based crimes more frequently).

which could not easily be reproduced by the Prosecutor's Office due to time and funding constraints.²⁹⁶ One field researcher explained that she interviews nurses to look for evidence of particular war crimes, tracks local press stories, reviews forensic medical reports to assess state responses to violence against women, and interviews survivors, whose testimony she then corroborates with non-testimonial evidence.²⁹⁷ In the interest of balanced fact-finding, the Human Rights Watch field researchers always interview state officials for their comments on the findings.²⁹⁸ At a minimum, this research should be reviewed by the Prosecutor's Office on a regular basis.²⁹⁹ To the fullest extent possible, the Prosecutor's Office should rely on the NGOs' fact-finding so as not to duplicate efforts and authenticate the information when necessary before including it in an indictment.³⁰⁰ Although Human Rights Watch interviews survivors with the condition of confidentiality, they could begin asking survivors if they would like to be contacted by the Prosecutor's Office in the future.³⁰¹ If permission is obtained, then the witnesses' names could be forwarded to the Prosecutor's Office.³⁰² This approach would also neutralize the above-mentioned inadequacies in investigations and the survivors' biases toward male investigators.³⁰³ Relying on this approach would also reduce the

²⁹⁶ See Human Rights Watch, Women's Human Rights: Interview with a Researcher: Missions, at www.hrw.org/women/int-missions.html (last visited Jan. 26, 2004) (quoting a staff researcher with regard to Human Rights Watch's basic mission research methodology).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See Conference Convocation, *supra* note 145, at 1426 (explaining that the NGOs send their research to the Tribunal on an ad hoc basis and suggesting that the information exchange should be part of a structured institutional framework between the groups).

³⁰⁰ See *id.* (emphasizing how NGO research is vital to aiding the Tribunal in carrying out its legal objectives); see also Tribunal Justice, *supra* note 162, at 1548-49 (noting that many of the documents that the Tribunal receives can be used as evidence if authenticated).

³⁰¹ See Human Rights Watch, Shattered Lives, *supra* note 3, at 6 (describing the interview process); see also Human Rights Watch, Women's Human Rights: Interview with a Researcher: Missions, *supra* note 296 (quoting a staff researcher with regard to confidentiality: "We never violate the confidentiality of the witnesses and victims who have spoken to us.").

³⁰² See Conference Convocation, *supra* note 145, at 1426.

³⁰³ See *supra* notes 291-293 and accompanying text (suggesting that additional hiring and training will improve the investigation process).

amount of funding needed to hire additional female investigators or provide more training in eliciting testimony from sexual abuse survivors.³⁰⁴

If the evidence of sexual crimes was better utilized by prosecutors before the indictment stage, sexual crimes could be charged earlier and more often in the prosecutorial process.³⁰⁵ More initial charges of sexual violence would lead to greater numbers of officials being prosecuted for gender-based crimes which occurred during the genocide.³⁰⁶ Because the ICTR is primarily concerned with officials who organized and participated in the genocide, this would increase the number of their prosecutions for gender-based crimes, although it would still be disproportionate to the overall number of crimes committed by the individuals.³⁰⁷

B. Better Protection and Assistance for Witnesses Will Facilitate the Prosecution's Efforts

The ICTR staff should build upon their successes and use what they have learned to date to deliver justice more swiftly. Currently, the unavailability of witnesses is unnecessarily delaying the group trials.³⁰⁸ Improvement in the treatment of witnesses also needs to occur in order to ensure privacy, facilitate travel to Arusha to testify, and to provide better assistance before trial as well as better protection after testifying.³⁰⁹ Restoring confidence in the Tribunal's work is vital. Without it, witnesses are reluctant to come forward to testify.³¹⁰ Once confidence is restored, it may be easier to reestablish a working relationship with the two main survivor organizations that decried the Tribunal's competence.³¹¹

³⁰⁴ See *supra* notes 291-293 and accompanying text (suggesting that additional female investigators should be hired and investigators should receive training on how to interview sexually traumatized victims).

³⁰⁵ See *supra* notes 294-304 and accompanying text (relying more heavily on the research of NGOs would eliminate any need for an additional administrative burden due to hiring and training more investigators).

³⁰⁶ See *supra* Part IV.A and accompanying text (explaining how better investigation would lead to more effective prosecution).

³⁰⁷ See also Landesman, *supra* note 2, at 116 (describing how the number of indictments for sexual violence are so disproportionate to the amount of sexual crimes survivors endured that full retribution will never be achieved).

³⁰⁸ See *supra* Part III.B (explaining how deficiencies with handling sexual violence survivors adversely affect the Tribunal's ability to deliver justice to them).

³⁰⁹ See *Conference Convocation*, *supra* note 145, at 1394 (quoting President Clinton's remarks that witnesses must feel safe in order to testify at the U.N. Tribunals).

³¹⁰ See *id.* (explaining that witnesses value their personal safety over testifying and adequate care should be given to ensure their safety).

³¹¹ See *ICTR Status Reports*, *supra* note 157, at July 23, 2003 (reporting that a group of sixty NGOs operating in Rwanda sent a letter to the United Nations urging the

Cooperation with survivors is vital to achieving legal justice because their personal stories document the history of the genocide.³¹²

Basic improvements in the administrative processes already in place will make a significant difference to survivors.³¹³ First, more privacy can be afforded by transporting investigators to witnesses and witnesses to the trial site in unmarked cars.³¹⁴ The ICTY has begun to utilize such measures, and the ICTR should follow suit.³¹⁵ The Tribunal must be vigilant in protecting the witnesses' identities before and during the trial to decrease their fear of reprisals for testifying.³¹⁶ Second, further concerns for privacy can be neutralized by offering more *in camera* proceedings.³¹⁷ ICTR Rule of Evidence 75 offers several measures for the protection of victims and witnesses, but in comparison to the ICTY's measures, they are not as fully utilized by the ICTR.³¹⁸ A better relationship between the ICTR and the

resignation of Carla del Ponte, the Chief Prosecutor of the ICTR, due to her failure to prosecute an adequate number of those responsible for the 1994 Rwanda Genocide). After a review of the Prosecutor's workload, the U.N. Security Council voted to remove del Ponte from her position as Chief Prosecutor for the ICTR, but allowed her to retain her post as the Chief Prosecutor for the ICTY. *Id.* at Aug. 28, 2003. Judge Hassan Jallow, formerly a judge at the Special Court for the Sierra Leone, is nominated for the Chief Prosecutor position at the ICTR. *Id.* at Aug. 29, 2003. His nomination was later approved by the U.N. Security Council. *Id.* at Sept. 4, 2003. *See also supra* notes 209-211 and accompanying text (explaining events leading up to a boycott of the tribunals in the summer of 2002).

³¹² *See Conference Convocation*, *supra* note 294, at 1427 (describing witness testimony as vital to the tribunals' contribution to the maintenance of international peace and security).

³¹³ *See* ICTR R. Proc. & Evid. 96 (delineating several measures for cases of sexual assault whereby consent is not allowed as a defense and prior sexual conduct of the victim is not allowed as evidence or a defense); *see also* ICTR R. Proc. & Evid. 75 (describing the measures for the protection of victims and witnesses available to the Tribunal). These measures are funded within the current budget, so efforts to maximize these resources should be increased. *Id.*

³¹⁴ *See The Contribution of Ad Hoc Tribunals*, *supra* note 189, at 1566 (Warrick suggesting unmarked cars to be used by the Tribunal in transporting victims to ensure more privacy).

³¹⁵ *See* Wald, *supra* note 204, at 229 (describing how the ICTY increased efforts at witness protection through extensive use of video testimony).

³¹⁶ *See The Contribution of Ad Hoc Tribunals*, *supra* note 112, at 1566 (Warrick suggesting that better protection for witnesses' identity will increase their willingness to testify).

³¹⁷ *See* ICTR R. Proc. & Evid. 75 (delineating several measures that the Trial Chamber can take to ensure protection of witnesses' privacy).

³¹⁸ *See id.* (providing several measures for witness protection); *see also* Wald, *supra* note 204, at 220 (cautioning that the ICTY's liberal grants of witness protection measures include a heavy reliance on affidavits over live testimony, closed session, face and voice distortion, and pseudonyms).

Rwandan government would expedite the travel process for witnesses.³¹⁹ The ICTR's recent efforts at reconciliation with the Rwandan government are a positive step forward and should be continued.³²⁰

Although the ICTR has made efforts at being more gender-sensitive in the treatment of survivors, these efforts need to continue and improve.³²¹ If witnesses are educated about the legal process before they participate, it will make their expectations about the process more realistic.³²² Further, if mandatory psychological counseling is required before testimony, survivors will have an opportunity to give their complete narrative to someone professionally trained in aiding sexual trauma survivors.³²³ This opportunity will be devoid of the interruptions and insensitivities inherent in eliciting testimony during trial.³²⁴ If the Tribunal provides such counseling, it will give survivors the impression that their story is being taken seriously regardless of how their testimony at trial proceeds.³²⁵ In addition to mandatory counseling, the defense counsel should not be able to use this

³¹⁹ See *supra* notes 209-211 and accompanying text (describing the prohibitive travel restrictions imposed by the Rwandan government).

³²⁰ See *ICTR Status Reports*, *supra* note 157, at Nov. 13, 2003 (reporting that Chief Prosecutor Hassan Jallow and genocide survivor groups are working to resolve their differences by establishing new channels of communication); see also *id.* at May 8, 2003 (reporting that the Registrar of the ICTR, in a speech at the Second Ministerial Conference on Human Rights in Africa called for increased psychological and financial assistance for victims, recognizing that the Tribunal's effort to deliver retributive justice fails to satisfy all of individual victim's needs); Press Release, ICTR, Strengthening Co-operation Links Between the Tribunal and Rwanda, U.N. Doc. ICTR/INFO-9-2-338.EN (Mar. 7, 2003), at www.ictor.org/default (last visited Mar. 8, 2003) (describing cooperative efforts between the Rwandan government and officials of the ICTR). The Registrar of the ICTR reiterated that the Tribunal's objective was to cease investigations by the end of 2004. *Id.*

³²¹ See Françoise Ngendahayo, Gender and HIV/AIDS: ICTR Challenges, U.N. Doc. EGM/HIV-AIDS/2000/OP 4 (2000), at www.un.org/womenwatch/daw/csw/hiv aids/ict r.htm (last visited May 4, 2004) (explaining that since the needs of witnesses were not being met before trial, the Tribunal amended Rule 34 part (ii), which now states that victims and witnesses should "receive relevant support, including physical and psychological rehabilitation, especially counseling in cases of rape and sexual assault"). Part (b) of the rule states that a "gender sensitive approach to victims and witnesses" should be taken. *Id.* However, the interpretation and implementation of this rule remains unclear. *Id.*

³²² See Mertus, *supra* note 161, at 8 (describing that witnesses fight the legal meta-narrative in order to give testimony in their natural voice).

³²³ See *id.* at 4 (noting that counseling is imperative for many sexual violence survivors but few survivors actually receive this assistance, which would aid their healing process).

³²⁴ See *supra* notes 232-246 and accompanying text (describing how the prosecution and defense counsel discredit witness testimony).

³²⁵ See Mertus, *supra* note 161, at 8 (emphasizing how witnesses desire to tell their story to someone who is official, like a judge, because they believe it recognizes the legitimacy of their suffering).

information to discredit witnesses at trial.³²⁶ The Tribunal should also consider allowing prosecutors to file a pre-trial motion to exclude evidence of the witness's pre-trial counseling, which is imperative for most witnesses.³²⁷ The addition of Rule 90, which limits cross-examination to topics discussed during examination-in-chief, is a much needed improvement to limit the scope of topics open to the defense and could also be used to reduce inquiries into any counseling the witness may have received.³²⁸ In addition to these pre-trial measures, better protection needs to be provided post-trial.³²⁹

The Tribunal should be more active in providing protection as a matter of course.³³⁰ Currently, additional protective measures are taken only after a concern for someone's safety has presented itself.³³¹ In many cases, when this occurs, it is too late.³³² Protection should be provided from the outset and the Tribunal should ensure survivors a safe return home.³³³ In addition, the Tribunal should negotiate more witness relocation agreements³³⁴ when witnesses feel a need to relocate after testifying to avoid reprisals in the area where they previously lived.³³⁵ While the

³²⁶ See *id.* at 4 (describing how defense counsel uses evidence of previous psychological counseling as a means to discredit witness's testimony).

³²⁷ See *id.* (excluding this evidence from the trial would prohibit defense counsel from using it to discredit witnesses); see also ICTR R. Proc. & Evid. 96 (prohibiting inquiries about victims' prior sexual conduct during the trial).

³²⁸ See Newly Elected President Erik Mose Addresses Staff, *supra* note 111, at 3 (discussing several measures implemented in 2003 intended to streamline the ICTR proceedings). This rule is similar to Federal Rule of Evidence 611, which limits the scope of cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness." Fed. R. Evid. 611 (2003). "The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." *Id.*

³²⁹ See Human Rights Watch, Shattered Lives, *supra* note 3, at 96-97 (discussing the inadequacies of the witness protection program for survivors and how this makes survivors reluctant to come forward to testify).

³³⁰ See Conference Convocation, *supra* note 145, at 1427 (McDonald describing the importance of protecting witnesses and suggesting improvement in the witness protection programs for the ICTR).

³³¹ See Ega-Musa, *supra* note 224, at A21 (explaining that witness protection was offered to a witness only after a viable threat to their safety was known to exist).

³³² See *id.* (reporting that two witnesses were killed after testifying at a U.N. Tribunal despite being promised protection for their safety).

³³³ See Human Rights Watch, Shattered Lives, *supra* note 3, at 97.

³³⁴ See Conference Convocation, *supra* note 145, at 1427 (McDonald describing witness relocation agreements between the Tribunal and States whereby the witness and any immediate family members accompanying her/him are safely transported to a location where the victim will be safe from retribution after testifying).

³³⁵ See *id.* (arguing that these agreements should be an essential part of the witness protection program); see also Franc Baroni, The International Criminal Tribunal for the

administrative authority for these actions already exists, the Tribunal does not employ them unless they are requested.³³⁶ Many witnesses do not know the protective measures exist, so they either do not testify or do not know that they may request these services.³³⁷ To counteract this, the Tribunal should offer these services to every witness.³³⁸

Taking these steps will encourage more witnesses to come forward and better ensure that those who do will successfully testify.³³⁹ A trial without witnesses is an empty vessel of justice.³⁴⁰ Witnesses hold the key to the past and can unlock the door to preventing future impunity for violators of women's human rights.³⁴¹

C. Expediting the Delivery of Justice Will Restore Faith in the Tribunal and Strengthen Its Legitimacy and Ability to Prosecute Gender-based Violence Against Women

Two reforms will expedite the current system with minimal change. First, the ICTR should employ more judges so that more trials can be held simultaneously.³⁴² Currently, the Prosecutor's Office is outpacing the capacity of the docket.³⁴³ The system should work to minimize this backlog.

Former Yugoslavia and Its Mission to Restore Peace, 12 Pace Int'l L. Rev. 233, 240 (2000) (describing the reluctance of States to sign these agreements and suggesting increased cooperation).

³³⁶ See Human Rights Watch, Shattered Lives, *supra* note 3, at 35 (explaining that witness assistance is provided only upon request).

³³⁷ See, e.g., Ngendahayo, *supra* note 321 and accompanying text (illustrating how the ICTR has amended administrative procedures to develop short and long term locations for the protection of witnesses who have testified, but these measures have not been implemented).

³³⁸ *Id.* (citing Rule 34, which provides the administrative procedures for witnesses who "fear a threat to their life, property or family"). Instead of requiring sufficient evidence of a threat, the ICTR should provide the option of a short or long term protection plan to every witness and implement it if the witness believes it is necessary. *Id.*

³³⁹ See Wald, *supra* note 204, at 230 and accompanying text (explaining that witnesses must feel safe and protected before they will agree to testify).

³⁴⁰ See *id.* at 219, 230 (asserting that witnesses are the lifeblood of the ICTY trials and their live testimony is the most effective guarantor of the tribunal's legitimacy and legacy to international humanitarian law).

³⁴¹ See Conference Convocation, *supra* note 145, at 1427 (McDonald emphasizing that witness testimony is vital to achieving the Tribunals' goals of maintaining international peace by punishing perpetrators and deterring future crimes).

³⁴² See Seventh Annual Report, *supra* note 264, para. 1 (citing that currently each judge is handling the maximum amount of trials possible).

³⁴³ See ICTR Status Reports, *supra* note 157, at June 25, 2003 (reporting that the U.N. General Assembly elected an additional eighteen *ad litem* judges to join the sixteen permanent judges in an effort to expedite the judicial processes and complete the Tribunal's

Having seven trials on hold is quite serious, given that the Tribunal has entered only eight judgments in its entire existence.³⁴⁴ The Tribunal could begin hearing multiple trials in each Trial Chamber to expedite justice for the detainees, bring as many accused to trial as possible, and maximize the use of available resources and courtrooms.³⁴⁵ Adding more judges would accomplish the same goal.³⁴⁶ At the urging of the United States, the U.N. General Assembly approved the addition of eighteen *ad litem* judges to increase the Tribunal's judicial capacity.³⁴⁷ Adding *ad litem* judges will allow the Trial Chamber to divide into sections allowing the judges to operate in shifts with morning and afternoon sessions.³⁴⁸ However, according to the U.N. Security Council resolution, among these eighteen judges, only four can be used at any one time to supplement judicial assignments with the nine permanent judges.³⁴⁹ This limits the use of the *ad litem* judges because only four trial sections can be set up with one *ad litem* judge serving in each section.³⁵⁰ In comparison, the ICTY is authorized by the Security Council to use up to nine *ad litem* judges at any one time, which allows the establishment of six sections.³⁵¹ Authorizing the use of additional *ad litem* judges is needed to catch up with the efforts of the Prosecutor's Office³⁵² and ensure a timely completion of the ICTR's mandate in 2008.³⁵³

work by 2008). The Prosecutor's Office noted that it was ready to proceed with seven more trials, but there were no judges available to hear the cases. *Id.*

³⁴⁴ See Domeniconi, *supra* note 273 (reporting on the total number of judgments as of 2002).

³⁴⁵ See Seventh Annual Report, *supra* note 264, para. 3 (describing the purpose of the multiple trial system).

³⁴⁶ See ICTR Status Reports, *supra* note 157, at Oct. 9, 2003 (reporting that ICTR President Judge Erik Mose presented the Eighth Annual Report and requested additional *ad litem* judges in order to create six permanent Trial Chambers as opposed to the current three, which he concluded was necessary in order to achieve its mandate by 2008).

³⁴⁷ See Eighth Annual Report, *supra* note 111, para. 7 (authorized by Security Council Resolution 1431 (2002) adopted on August 8, 2002). The Secretary-General nominated the additional judges who were elected on June 25, 2003. *Id.* This reform follows a similar effort made for the ICTY in 2000. *Id.* The Appeals Chamber consists of five judges who are shared with the ICTY.

³⁴⁸ *Id.* para. 8.

³⁴⁹ See *id.* (citing Security Council Resolution 1431 (2002) adopted on August 8, 2002).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² The Prosecutor's Office is not without problems; however, the creation of two separate Prosecutors for each tribunal will facilitate reform. See ICTR Bulletin, Justice Jallow Will Steer the Prosecutor's Completion Strategy, Oct. 2003, at www.ictor.org/default (last visited Mar. 3, 2004) (citing the appointment of Hassan Bubacar Jallow and the

Second, the ICTR needs to utilize video technology to avoid delaying the trials in progress.³⁵⁴ If a witness is unable to travel to the trial site in Arusha, the ICTR needs to use live video testimony for the witness and proceed with the trial.³⁵⁵ This approach is maximized by the ICTY and would eliminate the largest source of the delays for the ICTR.³⁵⁶ It is much easier for an ICTR staff person to travel back and forth to set up the video testimony versus securing travel, assistance, and protection for witnesses.³⁵⁷

Overall, these steps will lead to more investigations and indictments for sexual violence, improve witnesses' physical and emotional well-being to encourage survivors to come forward, and expedite the delivery of justice, which will restore faith in the Tribunal's efforts. Restoring faith in their efforts will facilitate their relationships with witnesses, who are essential to the legal process, and allow the ICTR to preserve its precedential legacy condemning gender-based war crimes as intolerable. This condemnation will then deter future rape warfare and promote the protection of women's human rights around the world.

appointment of *ad litem* judges as evidence of the international community's "commitment to help the two Tribunals complete their mandate as expeditiously as possible"). In addition, the post of the Deputy Prosecutor was vacant for over a year and finally filled in January 2003. See Eighth Annual Report, *supra* note 111, para. 12. And the post of the Chief of Prosecution was filled on February 24, 2003, which is expected to facilitate further progress in completing the Prosecution's goals. *Id.*

³⁵³ See Seventh Annual Report, *supra* note 264, paras. 1-3 (describing the limits of the trial process due to the judges' maximum caseload in 2002). The judges' mandates expired on May 23, 2003, which was extended so each judge could finish his/her current caseload. *Id.*

³⁵⁴ See ICTR Status Reports, *supra* note 157, at Oct. 30, 2003 (reporting that the ICTR announced future plans to create video links to connect the Tribunal in Arusha with the Hague and Kigali). The Tribunal plans to allow witnesses to give testimony by video but whether these steps have been implemented is unclear. *Id.* But see Wald, *supra* note 204, at 218 (cautioning that the ICTY's liberal grants of witness protections measures include a heavy reliance on affidavits over live testimony, closed session, face and voice distortion, and pseudonyms).

³⁵⁵ See Wald, *supra* note 204, at 218 (describing the ICTY's efficient and liberal policies for using video testimony from witnesses).

³⁵⁶ See Conference Convocation, *supra* note 145, at i, iii (Diane Orentlicher explaining how the ICTY Trial Chamber established a permanent video link to Serbian controlled areas of Bosnia to take live testimony from defense witnesses who were unwilling to travel to the Hague).

³⁵⁷ See Human Rights Watch, Shattered Lives, *supra* note 3, at 10 (explaining the Rwanda government restricts citizens' travel in a way that Tribunal's staff members are not limited); see also Agence France-Press, *supra* note 212 and accompanying text (describing how witness travel delays disrupted all pending ICTR trials in the summer of 2002).

V. CONCLUSION

While the mere existence of the ICTR is a success, the Tribunal faces many important obstacles.³⁵⁸ The development of international sexual violence jurisprudence during armed conflict is a positive step forward in the enforcement of women's human rights.³⁵⁹ While recognizing that legal justice is a limited recourse, if violations are effectively and efficiently prosecuted after the fact, achieving full enforcement, it may act as a deterrent in future conflicts. Improvements in how investigations are conducted, what crimes are charged in indictments, and how assistance and protection services are provided to witnesses will increase confidence in the system, thereby influencing more witnesses to come forward and facilitate the prosecutors' jobs. The progressive thinking is in place, as evidenced by the Akayesu conviction and the Nyiramasuhuko indictment, but the ICTR must make reforms in order to prosecute gender-based violence more efficiently and effectively. While the ICTR struggles to vindicate ten-year-old—but no less poignant—atrocities, rape continues to be used as a method of warfare throughout the world. The improvements in indicting, prosecuting, and convicting perpetrators of gender-based violence made by the ICTR will provide invaluable groundwork for other tribunals as they begin to redress the atrocities experienced by women yesterday, today, and tomorrow.

³⁵⁸ See ICTR Status Reports, *supra* note 157, at May 20, 2003 (reporting that the ICTR received the Friedrich-Ebert-Stiftung Human Rights Award, which recognizes the Tribunal's dedication to the due process of law and contribution to the national reconciliation following the 1994 Rwanda Genocide).

³⁵⁹ See The Contribution of Ad Hoc Tribunals, *supra* note 112, at 1523. Patricia Viseur-Sellers remarked that she was heartened to hear so many speak on the topic of sexual violence in a "very normative fashion." She also congratulated the audience for starting to understand that "sexual violence under international humanitarian law is as normal as rape is in war." *Id.*