RWANDAN GENOCIDE: TAKING NOTES FROM THE HOLOCAUST REPARATIONS MOVEMENT

YAEL WEITZ*

INTRODUCTION

The devastating scale and scope of World War II brought about the international community's recognition of victims' rights. In the years after the war, the international community came to acknowledge victims as a distinct group, deserving of reparations for their physical and emotional damage. Moreover, the reparations movement that developed in response to the Holocaust helped solidify the practice of providing reparations as a widely accepted form of compensation to victims.

Since World War II, atrocities have continued to occur, and although the international community has improved its attitude towards victims' rights and the need for reparations, huge gaps remain between the damages suffered by victims and the availability of recourse. In the case of the Rwandan genocide, the current institutions are grossly inadequate with regard to reparations. As a result, the most vulnerable of victims—rape victims—are left uncompensated.

Part I of this Note presents background information regarding the history of events that led up to the 1994 Rwandan genocide in order to provide a context for the following discussion. Part II introduces the emergence of special tribunals, created to hold perpetrators accountable for atrocities. Part II also examines the need to adopt reparations as a means of compensating victims for emotional and physical harm. Specifically, Part II describes the International Military Tribunal of World War II—the first special tribunal established—and the Holocaust reparations movement that ensued.

Part III of this note focuses on the development of the international community's attitude towards rape. During the trials that followed World War II, war criminals were not prosecuted for rape in any meaningful way because rape was considered to be an inherent and unavoidable aspect of war. In recent years, this attitude has shifted, resulting in the approach ultimately taken during the rape prosecutions in the trials following the Rwandan genocide. Part IV explores the growing need for reparations for Rwandan rape victims and the deficiencies in the existing justice systems. Part V describes the International Criminal Court and its

* J.D. Candidate, Benjamin N. Cardozo School of Law, 2009; B.A., Binghamton University, 2005. I would like to give special thanks to Jared for his encouragement and support throughout the writing of this Note.

"female-friendly" classification of rape. Part V also describes the methods that the International Criminal Court utilizes to provide compensation to victims who fall under its jurisdiction.

Finally, Part VI of this note posits that the International Criminal Court, through its Trust Fund, may provide the best means by which to remedy the present institutions' failure to adequately compensate Rwandan genocide victims. In particular, since the Rwandan genocide currently falls outside the scope of the International Criminal Court's jurisdiction, this note suggests that cooperation between the International Criminal Court and the existing special tribunal for Rwanda, the International Criminal Tribunal for Rwanda, could provide a viable solution for victims. Such cooperation between the two institutions would address the problems facing Rwandan rape victims, while taking into account their distinct and immediate need for reparations in the most constructive way.

I. RWANDAN GENOCIDE: A BRIEF SYNOPSIS

The history of the Rwandan genocide traces its origins to the ethnic categorization of the Hutu and the Tutsi by the Belgian colonial government.[1] Under Belgian rule, which began at the end of the nineteenth century and lasted until the late 1950s,[2] the Hutu and the Tutsi were arbitrarily separated into two distinct groups based on purported physical differences.[3] Specifically, the Belgians considered the Tutsi, whom they "viewed as taller, thinner, [and] smarter," as more "European," and consequently the racially superior group.[4]

However, prior to Belgian colonization, the Hutu and the Tutsi were socially fluid and distinctions were based primarily on socio-economic factors.[5] Additionally, the ethnic groups were very similar in many respects: the groups shared the same language, culture, religion, and despite stereotypes to the contrary, the groups are not distinguishable from one another based on any particular type of physical appearance.[6]

Consequently, in order to keep the two groups clearly distinct, the Belgian colonialists created mandatory identity cards, which listed whether an individual was of Hutu or Tutsi ethnicity.[7] This rigid distinction survived Belgian colonial rule. Under the Hutu dictatorship regime that followed the Belgian occupation, all

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[1] Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 26 (2006). An estimated number of 500,000 to 1,000,000 or more Tutsi were killed as a result of the genocide. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 366 (2003).

[2] *See* Catharine Newbury, *Background to Genocide: Rwanda*, 23 ISSUE: A JOURNAL OF OPINION 12 (1995); Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN'S STUD. 167, n1 (2005).

[3] Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1244 (2000).

[4] *Id.* at n87 (citing Ian Fisher, *If Only the Problem Were as Easy as Old Hatreds*, N.Y. TIMES, Jan. 2, 2000, § 4 at 10).

[5] Waldorf, *supra* note 1, at 26; *See also* Drumbl, *supra* note 3, at 1243.

[6] Waldorf, *supra* note 1, at 26.

[7] *Id.*

Rwandans were required to continue to carry an identity card.[8] Moreover, in the ensuing genocide, the Hutu perpetrators relied on the identity cards in order to correctly identify and target the Tutsis.[9] As described by one article on the subject, the identity cards "made the lines between Tutsi and Hutu official and impenetrable."[10]

As a result of the continued categorization of the groups, the Hutu and the Tutsi grew increasingly divisive and hostile towards one another.[11] In the years after the Hutu took over the Rwandan government, the Hutu government instituted a number of anti-Tutsi campaigns, causing a large number of Tutsi to flee Rwanda into neighboring countries.[12] In 1990, a rebel movement comprised primarily of Tutsi refugees who had fled from Rwanda to Uganda, called the Rwandan Patriotic Front ("RPF"), attacked Rwanda and sparked a civil war.[13] Subsequently, despite domestic pressure to incorporate the RPF and other newly formed opposition parties into the existing Rwandan government, Rwandan President Juvenal Habyarimana attempted to unify the region by force and adopted extremist tactics that incited a number of massacres against the Tutsi.[14] In addition, the Habyarimana government spread fierce anti-Tutsi propaganda.[15] The propaganda was so severe that many Hutu consequently believed that the Tutsi were "outside the human race."[16]

On April 6, 1994, while flying back to Rwanda from peace talks with the RPF in Tanzania, unknown assassinators shot down President Habyarima's plane.[17] Within hours of the assignation, Hutu extremists seized control of the Rwandan government and military and began a genocide campaign against the Tutsi.[18] The violence that erupted against the Tutsi was monumental. Despite the fact that perpetrators did not use high-tech machinery to carry out the murders, the Hutu managed to kill at a rate even higher than that of the Nazis during the Holocaust.[19] In the span of three months, "an estimated five hundred thousand to one million Tutsi" were slaughtered.[20] Similar to the Nazis, the Hutu perpetrated a

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[8] *See also id.*

[9] *See also id*.

[10] Drumbl, *supra* note 3, at 1245.

[11] Wells, *supra* note 2, at n1.

[12] *Id.* After Rwanda's independence from colonial rule, the Hutus took over the Rwandan government, establishing a military dictatorship. *Id.*

[13] Waldorf, *supra* note 1, at 27.

[14] *Id.* at 28.

[15] Drumbl, *supra* note 3, at 1243.

[16] *Id.*, at 1243-44.

[17] Wells, *supra* note 2, at n1.

[18] Waldorf, *supra* note 1, at 27. *See also* Wells, *supra* note 2, at n1 ("His assassination provided an excuse for Hutu extremists to launch a well-planned genocide against the minority Tutsi.").

[19] Drumbl, *supra* note 3, at 1246.

[20] Waldorf, *supra* note 1, at 29.

genocide that was "well organized, coordinated, and administered; it was anything but spontaneous and random."[21]

II. THE NUREMBERG TRIAL AND HOLOCAUST REPARATIONS

In the aftermath of World War II and the Holocaust, the Allied leaders were faced with the question of how to deal with former Nazi leaders who survived the war. The Allied forces had essentially three alternatives: (1) they could take no action, as was typical of victors in the nineteenth century; (2) they could execute the remaining leaders, as was suggested by Stalin; or (3) they could prosecute the leaders in an international tribunal.[22] The Allies chose the third option, with the hope that the former Nazi leaders would be brought to justice as the whole world bore witness.[23]

There were also a number of more practical reasons for the Allies' decision. Whereas the execution of former Nazi leaders had the potential to cause future conflict with Germany, a trial would promote the legitimacy and enforceability of international law.[24] Although many Nazi leaders would ultimately be sentenced to death, the Nuremburg trial would ensure that the sentences would not be viewed as arbitrary or as a victor's revenge. Additionally, the Allies sought to punish the leaders of the Nazi party, but not German civilians.[25] With a trial, only selected individuals would be prosecuted and punished, not the general population.[26] With these goals in mind, the Allies established the International Military Tribunal ("IMT"), the first military tribunal of its kind. For the first time in history, government officials were held legally accountable for the atrocities they had committed.[27]

In the Charter of the IMT, the Allies agreed to have jurisdiction over the following crimes:

> (a) *Crimes against peace:* namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
> (b) *War Crimes:* namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not

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[21] Drumbl, *supra* note 3, at 1246.

[22] Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 61-2 (1995).

[23] *Id.* at 62.

[24] *Id.* at 62.

[25] *Id.*

[26] Chaney, *supra* note 22, at 62.

[27] Mark S. Ellis & Elizabeth Hutton, *Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia*, 20 BERKELEY J. INT'L L. 342 (2002).

> justified by military necessity;
> (c) *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[28]

Interestingly, although "murder, extermination, enslavement, deportation, and other inhumane acts" were included in the charter under crimes against humanity, genocide was not explicitly included in the list of crimes for which the Nazis could be prosecuted. Arguably, the reasoning for this exclusion was that at the time of the trial, genocide was generally considered synonymous with the term "crimes against humanity;" with the major difference being that "crimes against humanity" could be perpetrated only during times of war and could target any civilian population.[29] However, despite the difference in terminology, Nazi leaders were nonetheless prosecuted for some of the same acts that would constitute genocide today.

In addition to prosecuting the former Nazi leaders, the Allies also sought reparations for Nazi victims,[30] a significant event in the history of reparations.[31] Prior to World War II, reparation agreements were part of a "framework of relations" between nations, in which the losing side of a conflict was expected to compensate its opponents for damages incurred during the course of the war.[32] Reparations for victims, however, were not part of this framework. For example, the Treaty of Versailles following World War I required Germany to pay reparations to the Allied nations for damages suffered,[33] but did not require Germany to provide reparations to victims.

In contrast, the agreements that followed World War II specifically focused on compensation for victims. In one 1955 agreement between the Federal Republic of Germany ("FRG" or "West Germany") and the Allies, West Germany agreed to provide "adequate compensation" for individuals who were persecuted "for their political convictions, race, [or] faith... who thereby... suffered damage to life, limb, health, liberty, [or] property . . . ."[34] Additionally, instead of providing reparations

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[28] Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544.

[29] William A. Schabas, *Whither Genocide? The International Court of Justice Finally Pronounces*, 9 J. GENOCIDE RESEARCH 183, 188 (2007).

[30] Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503, 507 (2002).

[31] Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews after World War II: A Turning Point in the History of Reparations, in* THE HANDBOOK OF REPARATIONS 390, 390-1 [hereinafter HANDBOOK] (Pablo De Greiff, ed. 2006).

[32] *Id.*

[33] *See* Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT'L L. 314, 319 (2005).

[34] Termination of the Occupation Regime in the Federal Republic of Germany, U.S.- F.R.G., Oct. 23, 1954, 6 U.S.T. 4117.

for damages caused exclusively by the war, the agreement provided reparations for harms perpetrated during the Holocaust as well.[35]

Similarly, under the Federal Compensation Law, the West German government further authorized compensation to those victims and their survivors who remained in the Federal Republic of Germany.[36] Pursuant to the Federal Compensation Law, such persons could bring claims based on loss of health, loss of freedom, loss of livelihood, and death.[37] Reparations were significantly expanded when the West German government entered into a number of additional agreements with Israel and other countries, all of which included reparation payments for violations of human rights by the Nazis.[38]

These agreements all took place during the 1950s, directly following the end of the war. Since then, Germany has continued to provide compensation to victims and it is estimated that by 2030 Germany will have paid over $70 billion of reparations to Israel and to Holocaust survivors.[39] However, it is important to note that although $70 billion is a substantial sum, the amount given to each individual has been relatively small. As a result, the reparations have not covered the actual monetary losses that victims have suffered.[40] Yet, the existence of these reparations are increasingly significant. In particular, current international acceptance of reparations stems directly from World War II and the agreements that ensued.[41] Furthermore, it has become largely accepted that reparations provide a means for perpetrators of human rights violations and victims to move towards reconciliation.

Compensation facilitates reconciliation in two ways. First, the reparations provide victims with money, which may moderately improve their economic situations. Second, although the monetary compensation itself is important, the money is often viewed as an acknowledgement of responsibility for the wrongs committed.[42] Accordingly, though reparations cannot take away from the moral reprehensibility of the crimes perpetrated, they serve as a formal admission of guilt.[43]

Japan provides a contrasting example to Germany. Unlike Germany, it has consistently rejected claims for reparations by the "comfort women," women who were forced by the Japanese government into sexual slavery in service of the

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35 *Id.*

36 Vagts & Murray, *supra* note 30, at 507.

37 *Id.*

38 *Id.*

39 Ellis & Hutton, *supra* note 27, at 345.

40 *See* Michael J. Bazyler, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS xi (2003).

41 *See generally* Ellis & Hutton, *supra* note 27, at 343.

42 *Id*. at 346.

43 Colonomos & Armstrong, *supra* note 31, at 397. The authors further explain that "[t]he legal admissibility of demanding compensation for victims of war and genocide was not to be confused with the moral debt to victims." *Id.*

military during World War II.[44] As described by author Shellie K. Park, unless reparations are provided, "meaningful reconciliation is unlikely" and "the comfort women's wounds" are not likely to be healed.[45] By failing to provide the comfort women with reparations, Japan has continued to deny its responsibility in perpetrating the sexual slavery and mass rape of these women.[46] Moreover, the comfort women's continued quest for the reparations throughout the years since World War II demonstrates the inextricability of reparations with a state's admission of accountability and the victim's need for such an admission.

Author Brandon Hamber further describes the significance of reparations, noting that: "[a]t an individual level, financial reparations... have the potential to play an important role in any process of healing, coping with bereavement, and addressing the impact of violence for victims. They can symbolically acknowledge and recognize the individual's suffering."[47] Additionally, receiving reparations may help victims—who often feel guilty for surviving—by placing blame where it should lie: with the party responsible for perpetrating the crimes.[48]

In a similar discussion regarding the restitution of monetary losses associated with the Holocaust, acclaimed novelist Elie Wiesel describes: "[i]f all the money in all the Swiss banks were turned over, it would not bring back the life of one Jewish child. But the money is a symbol."[49] Although restitution, which is primarily aimed at restoring lost property, differs from reparations, Wiesel's message applies equally to both. Monetary compensation is more than just money. It provides victims with the opportunity for conciliation with their perpetrators and their pasts.

The importance of reparations and its relationship to victims' ability to move forward is clear. The trials at the IMT, also known as the Nuremburg Trials, established the link between holding state leaders accountable for their crimes and the right of victims to pursue legal action against such leaders.[50] This right, in turn, has led to the international recognition of reparation rights for such victims.[51]

III. FAILURE TO ADDRESS RAPE AS A SEPARATE CRIME

Despite the historical significance of the Nuremburg Trials and their success in prosecuting human rights violations, the trials were limited in scope in one important way. Consistent with the prevailing views and international norms of the time, rape was not prosecuted at the Nuremburg Trials or addressed by the Allies in

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44 Ellis & Hutton, *supra* note 27, at 346.

45 Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PACIFIC L. & POL'Y J. 2 (2002).

46 Ellis & Hutton, *supra* note 27, at 348.

47 Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition, in* HANDBOOK, *supra* note 31, at 566.

48 *Id.*

49 Bazyler, *supra* note 40, at 296.

50 Ellis & Hutton, *supra* note 27, at 342.

51 *Id.* at 343.

any meaningful way. Rather, rape was treated as it has been historically viewed: as an inevitable and inconsequential part of war, not requiring separate consideration as an international crime.[52]

During World War II, rape was increasingly commonplace and was perpetrated by both Axis and Allied powers. For example, the Nazis maintained concentration camp brothels, in which both Jewish and Aryan women were raped and forced into prostitution.[53] However, as one author plainly describes, "[t]he Nuremberg Judgment did not make any reference to rape and rape was not prosecuted."[54] Only limited efforts were made by the Allies to investigate rape at all, specifically focusing on allegations of mass rape of French and Belgian women, but these efforts were not made in earnest.[55] Ironically, the International Military Tribunal for the Far East did prosecute rape crimes, but completely ignored the forced sexual slavery of the "comfort women," which victimized over two hundred thousand woman and girls.[56] As described by author Rhonda Copelon, rape was an offense "against male dignity and honour, or national or ethnic honour," but not an offense in which a woman's rights were violated.[57]

The classification of rape as a crime against male dignity or ethnic honor remained static for a number of years. Following World War II, the Fourth Geneva Convention of 1950 finally classified rape as "an attack on [a woman's] honor."[58] Rape was not, however, characterized as a "grave breach."[59] Unlike other violations of the Geneva Convention, "grave breaches" required that each party to the convention "search for persons alleged to have committed . . . such grave breaches, and bring such persons, regardless of their nationality, before its own courts."[60] In other words, parties that were members to the Fourth Geneva Convention had an affirmative obligation to find perpetrators of grave breaches and prosecute such persons in court. Included in the list of grave breaches were the following:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair

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[52] Rhonda Copelon, *Surfacing Gender, Reengraving Crimes Against Women in Humanitarian Law*, *in* WOMEN AND WAR IN THE TWENTIETH CENTURY: ENLISTED WITH OR WITHOUT CONSENT 332- 347 (Nicole Ann Dombrowski ed., 1999).

[53] *Id.*

[54] Mark Ellis, *International Justice and Shifting Paradigms: Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 228 (2006/ 2007).

[55] *Id.*

[56] *Id.*

[57] Rhonda Copelon, *International Conference: Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL L.J. 217, 221 (2000).

[58] Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949, 6 U.S.T. 3516 (entered into force Oct. 21, 1950).

[59] *Id.* at art. 146.

[60] *Id.*

> and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[61]

Despite the fact that rape could have easily fit in among the other crimes characterized as "grave breaches," such as being listed among "torture" or "great suffering," rape was considered to be a crime only against a woman's honor, and not sufficiently severe to be considered a "grave breach."[62] Accordingly, the Fourth Geneva Convention's approach towards rape accurately reflected the disinterest of the international community in regard to the crime, and specifically the disinterest in prosecuting the crime in the aftermath of World War II.[63]

Furthermore, as late as the 1977 Protocols to the Geneva Conventions ("Additional Protocols"), rape continued to be described in similarly inconsequential language.[64] Although nearly three decades had elapsed since the 1950 convention, the Additional Protocols categorized rape as merely "humiliating and degrading treatment."[65] As Rhonda Copelon explains, this characterization of rape in the Additional Protocols "reinforced the secondary importance as well as the shame and stigma of the victimized women."[66] By portraying rape as merely a humiliating experience, the Additional Protocols not only reinforced the stigma associated with rape, but minimized the magnitude of the crime itself.

Ultimately, it was not until the tragic mass raping of women in the former Yugoslavia that notions about rape began to shift. Rape was finally recognized as a crime against women's rights and as deserving of separate recognition. Significantly, for the first time in history, in the case *Prosecutor v. Kunarac*, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") convicted individuals of rape under the category of crimes against humanity.[67] As defined in *Prosecutor v. Kunarac*, a crime will constitute a crime against humanity pursuant to Article 5(g) of the ICTY Statute when the following five elements are met:

(i) There must be an attack.
(ii) The acts of the perpetrator must be part of the attack.
(iii) The attack must be "directed against any civilian population."
(iv) The attack must be "widespread or systematic."
(v) The perpetrator must know of the wider context in which his acts occur

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61 *Id.* at art. 147.

62 Copelon, *supra* note 57, at 221.

63 *Id.*

64 *Id.*

65 *Id. See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 76, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating To The Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609.

66 Copelon, *supra* note 57, at 221.

67 *See* Ellis, *supra* note 54, at 229; Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001).

and know that his acts are part of the attack.[68]

Prosecutor v. Kunarac further describes when an attack may be considered "widespread or systematic." An attack may be characterized as "widespread" if it occurs on a large scale with a high number of victims.[69] An attack is "systematic" when it is both organized and when it involves "non-accidental repetition of similar criminal conduct on a regular basis."[70] For a tribunal to not only successfully prosecute the crime of rape, but prosecute it as a crime against humanity—a characterization that inherently recognizes the magnitude and seriousness of the crime—the ICTY clearly progressed in the classification of rape since the era of World War II.

The ICTY is also notable in another important regard. Prior to the establishment of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), there was no international agreement on any particular definition of rape.[71] As was stated plainly in *Prosecutor v. Furundzija*, "[n]o definition of rape can be found in international law."[72] Accordingly, with each prosecution of the crime, the definition of rape became more well-defined. In particular, the ICTY expanded the definition of rape in *Prosecutor v. Kunarac* so that the crime would not be as difficult to prove. Whereas earlier characterizations of rape necessarily included an element of coercion, force, or threat of force against a victim, under *Kunarac*, "non-consensual" or "non-voluntary" sexual acts constituted rape as well.[73] Moreover, the definition adopted by the ICTY was affirmed in the tribunal's Appeals Chamber, in which the appeals court held that a victim's resistance is not required for an act to be considered rape and that to require resistance from the victim "would be 'absurd on the facts.'"[74]

In the years following the prosecution at the ICTY, there has continued to be progress in the development of an appropriate definition of rape, but progress has been slow. Although the genocide in Rwanda occurred after the tragic events of Yugoslavia, during which the media specifically focused on the sexual violence that occurred there, reporters covering the events in Rwanda omitted discussion of the notoriously widespread rapes perpetrated during the Rwandan genocide.[75] In fact, it took nearly a year after the original news of the genocide in Rwanda for the European press to address the issue for the first time.[76] The coverage by the media was triggered by the mission of a Belgian physician, which revealed that approximately 2,000 to 5,000 women in Rwanda were pregnant and had given birth as a result of the conflict, suggesting that a majority of women who survived the

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[68] Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 410 (Feb. 22, 2001).

[69] *Id.* at ¶ 428.

[70] *Id.* at ¶ 429.

[71] Ellis, *supra* note 54, at 229.

[72] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 175 (Dec. 10, 1998).

[73] Ellis, *supra* note 54, at 229.

[74] *Id.* at 230 (citing Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001)).

[75] Ellis, s*upra* note 54, at 224.

[76] *Id.*

genocide had been raped.[77] Thereafter, the Rwandan National Population Office confirmed the number.[78]

The media's initial disinterest in the systematic rapes perpetrated as part of the Rwandan genocide was later mirrored by the actions of the ICTR. In *Prosecutor v. Akayesu*,[79] which would come to be recognized as the first international tribunal case in history to recognize rape and sexual violence as a form of genocide, the indictment did not originally include rape at all.[80] Rather, it was only during a witness's testimony on the other counts of Akayesu's indictment, which included genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions,[81] that the prosecutor requested leave to investigate the crimes of sexual violence to which the testimony had referred.[82] Following further investigation, the indictment was amended to include rape and Akayesu was prosecuted accordingly.[83]

The ICTR made a number of relevant findings with regard to the prosecution of rape during the *Akayesu* trial. The court found that sexual violence could be characterized as a form of genocide when the perpetrator had "the specific intent to destroy" a targeted group, as in this case the Tutsi women.[84] Moreover, the court recognized rape as "one of the worst ways" to harm a victim, since victims inevitably suffer "both bodily and mental harm."[85] The *Akayesu* court further stated that the rapes characterized as genocide in Rwanda acted as an "integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole . . . destruction of the spirit, of the will to live, and of life itself."[86]

In addition to considering rape to be a form of genocide when it is intended as a means of destroying a targeted group, the ICTR also considered rape to constitute genocide in instances where the intent of the perpetrator was to prevent future births by the victim and her group.[87] Significantly, the *Akayesu* court stated that if a victim of rape refuses to have children in the future as a result of the rape, the crime of rape as genocide has been committed.[88] Thus, regardless of whether a

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[77] Copelon, *supra* note 57, at 221. The actual number of women and girls who were raped during the massacre has been estimated by the United Nations to be at least 250,000, but this number is thought to underestimate the actual figure. Alexandra A. Miller, Comment, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN. ST. L. REV. 349, 356 (2003).

[78] Copelon, *supra* note 57, at 224.

[79] *Prosecutor v Akayesu*, Case No. ICTR 96-4-T, Judgment, (Sept. 2, 1998).

[80] Ellis, *supra* note 54, at 232-233.

[81] *Akayesu*, ICTR 96-4-T, ¶ 6.

[82] Ellis, *supra* note 54, at 232.

[83] *Id.*

[84] *Id.* at 233.

[85] *Id.*

[86] Copelon, *supra* note 57, at 227.

[87] Ellis, *supra* note 54, at 233.

[88] *Id.*

victim is physically unable or emotionally unwilling to have children as a result of being raped, rapes that have the result of preventing future births constitute genocide. However, as Copelon notes, the tribunal was careful not to characterize the woman's physical and emotional harm as secondary to the "reproductive impact on the community," since doing so would hearken to earlier classifications of rape, in which the woman herself was of lesser importance than the honor or stigma that was at stake as a result of the rape. [89]

The *Akayesu* court also made a number of general statements regarding the nature of rape. Among its findings, the ICTR established that in certain circumstances, rape qualifies as a form of torture and further described forced nudity as a form of inhumane treatment and sexual abuse.[90] The court offered an explanation for its characterization of rape as torture by drawing comparisons between the two:

> [l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[91]

The court goes on to state that although forced nudity does not involve physical invasion of the body, and does not require any physical contact between the perpetrator and the victim, it is nonetheless a sexually violent crime.[92] In support of its assertion, the court offered an example in which Akayesu ordered a female student to be undressed by *Interahamwe* militia and subsequently forced the student "to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd."[93] According to the court, such acts clearly constitute a form of sexual violence.[94]

Furthermore, the *Akayesu* judgment was the first case to explicitly discard traditional descriptions of rape.[95] Prior to *Akayesu*, rape necessarily involved a witness' in-court "mechanical description of objects and body parts."[96] However, in recognition of the personal nature of sexual matters and the pain associated with recounting such details, the tribunal opted for redefining rape.[97] Specifically, many witnesses were not only reluctant to discuss such matters in the public setting of the court, but also were unable to "disclose graphic anatomical details of [the]

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[89] Copelon, *supra* note 52, at 228.
[90] *Id.* at 227; *Akayesu*,. ICTR 96-4-T, ¶ 10A.
[91] *Akayesu*, ICTR 96-4-T, ¶ 597.
[92] *Id.* at ¶ 688.
[93] *Id.*
[94] *Id.*
[95] Copelon, *supra* note 57, at 227.
[96] *Akayesu*, ICTR 96-4-T, ¶ 687.
[97] *Id.* at ¶ 687.

sexual violence they endured."[98] Consequently, the ICTR adopted a more victim-conscious approach to defining rape: "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[99]

The tribunal also offered a definition of "coercive" within the context of the prosecution: "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances . . . ."[100] By allowing coercion to be demonstrated by the existence of "certain circumstances" and not by actual evidence of the use of physical force, the ICTR emphasized its recognition of the difficulty that rape victims have in providing testimony about their experiences.

As a result of the multiple descriptions and definitions, the *Akayesu* court ultimately characterized rape and similar crimes of sexual violence as both genocide and as crimes against humanity.[101] This expanded definition, along with the subsequent prosecution of rape, is a significant step forward for women's rights and has contributed to the development of international humanitarian law as a whole. Notably, the successful prosecution of rape at the ICTR has contributed to the establishment of customary international law prohibiting rape.[102] Moreover, by categorizing rape as one of the most heinous of crimes, the ICTR highlighted the glaring deficiencies of the tribunal and the Rwandan government in failing to provide rape victims with reparations.

IV. COMPENSATION FOR VICTIMS OF RAPE IN RWANDA AND THE FAILINGS OF THE EXISTING MECHANISMS FOR PROVIDING AID

Although the international community has recognized the need for war victim reparations, the women of Rwanda have not received any such compensation. The lack of reparations stems not from the lack of acknowledgment of the crime, as was the case with the rape victims of World War II, but from deficiencies in the existing justice system in Rwanda.

Undoubtedly, all victims of genocide deserve compensation. However, victims of rape form a unique subsection, since the need for effective distribution of reparations is arguably even more urgent than for other victims. This is true for a number of reasons. First, in cases like Rwanda, where hundreds of thousands of people were massacred, it is the rape victims who physically survive, yet have nonetheless been subjected to genocide.[103] In addition, the years that have followed the genocide have been especially difficult for Rwandan rape victims

98 *Id.*

99 *Id.* at ¶ 688.

100 *Id.*

101 Ellis, *supra* note 54, at 229.

102 Theodore Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM.J.INT'L L. 551, 567 (2006).

103 Wells, *supra* note 2, at 183.

because female survivors are considered "five times more likely than male survivors to be widowed," and are frequently the head of the household.[104] Unlike male heads of households, however, women have far fewer material resources and are therefore rendered more vulnerable and in greater need of community support.[105] Furthermore, women who have been widowed as a result of violent conflicts are often denied any material assets that may have survived the violence upon returning home.[106] As described by one source, "when widows return to villages [they] find that they have lost established property rights or that their land has been given by a local chief to a demobilized combatant."[107] This means that these women suffer not just from the mental and physical harm that was inflicted upon them, but from increasing poverty and dependency on their communities.

Finally, recent estimates indicate that of the women raped during the genocide, seventy percent have HIV and the majority of them will eventually die from AIDS.[108] While it is impossible to know the precise number of women who have been infected by HIV/AIDS as a result of the genocide, it is widely accepted that a large proportion of the rape victims contracted HIV/AIDS as a result of the sexual violence.[109] According to recent reports, the former Hutu government deliberately released AIDS patients from hospitals in order to use AIDS as a tool of warfare against Tutsi women. The government intended for women who survived the rapes to die "slowly and more agonizingly."[110]

Fortunately, some efforts have been made to provide support for these women by the ICTR. For instance, under the Witness and Victims Support Section of the ICTR Statute, witnesses who have been victims of sexual violence are provided with psychological counseling and access to medical care, including care for those women who have tested positive for HIV/AIDS.[111] Furthermore, among other steps taken to ensure the safety and well-being of victims who testify at the ICTR, the identities of the witnesses are protected and in camera testimony is available.[112]

However, only women who come forward to testify are provided any help. Because there are no provisions within the ICTR Statute that deal specifically with providing reparations to victims, a victim who is not a witness will not receive any of the benefits provided by the tribunal. Additionally, there have been no ICTR cases that discuss methods for providing assistance or protection for victims

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104 *Id.*

105 *Id.*

106 Colleen Duggan & Adila Abusharaf, *Reparation of Sexual Violence in Democratic Transitions: the Search for Gender Justice, in* HANDBOOK 628, *supra* note 31.

107 *Id.*

108 Russell-Brown, *supra* note 1, at 354.

109 Wells, *supra* note 2, at n100.

110 Russell-Brown, *supra* note 1, at 354.

111 *See* Int'l Crim. Trib. for Rwanda, Tribunal at a Glance, http://69.94.11.53/default.htm (follow "About the Tribunal" hyperlink; then follow "Fact Sheets" hyperlink to "The Tribunal at a Glance").

112 *Id.*

beyond their role as witnesses.[113] On the contrary, the ICTR judges specifically reject efforts to amend the ICTR Statute in order to provide victims with direct compensation.[114]

In the words of Judge Navanethem Pillay, former president and judge of the ICTR, the Tribunal would be overwhelmed by the additional responsibility: "[i]f the Tribunal adds to its responsibilities a whole new area of law relating to compensation, then the Tribunal will not only have to develop a new jurisprudence; it will also have to expand its staffing considerably and establish new rules and procedures for assessing claims."[115] Other judges have made similar arguments, arguing that amending the ICTR Statute to include a provision for providing reparations to victims "would not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal."[116]

ICTR judges have also argued that although they support the concept of reparations in theory, victims would be dissatisfied and frustrated with filing claims, since compensation procedures are often complicated and time consuming.[117] However, as noted by author Ilaria Bottigliero, most victims would be willing to undergo a certain degree of frustration in order to gain the reparations they are owed:

> [O]ne wonders whether victims and survivors of genocide, torture, rape and other serious human rights violations in Rwanda would prefer more the Judges' "'wholehearted empathy with the principle of compensation for victims,'" or whether they would be willing to put up with a measure of "'disappointment and frustration'" in connection with claim procedures.[118]

Although it is true that the Tribunal has had a heavy workload since its inception,[119] it is not clear that providing reparations would pose great difficulties for ICTR judges. For example, the prosecutor of the ICTR has argued that since the ICTR Statutes grant judges the power to rule "on sentences and sanctions," these judges could "confiscate the defendant's assets to compensate for victims as part of a 'sanction.'"[120] In other words, the prosecutor suggests that ICTR judges have sufficient discretion to remedy the victims' lack of reparations if they so choose.

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113 Ilaria Bottigliero, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW, 210 (2004).

114 *Id.*

115 *Id.* at 207. (quoting Letter of the President of the ICTR to the UN Secretary-General, annex to a letter of December 14 , 2000 by the UN Secretary-General, Kofi Annan, to the UN Security Council, UN Doc. S/2000/1198 of December 15, 2000) [hereinafter Letter of the President of the ICTR].

116 *Id.*

117 *Id.* at 208.

118 Bottligiero, *supra* note 113, at 208 (quoting Letter of the President of the ICTR, *supra* note 115).

119 Bottigliero, *supra* note 113, at 211.

120 *Id.* at n32.

The problem of not extending protections to victims who do not testify is further exacerbated by the nature of the harms that the victims have suffered. Overall, despite the safety measures provided by the ICTR, such as protecting the witness' identities, there has been only limited success in prosecuting crimes of sexual violence. In reality, many of the female survivors are reluctant to testify.[121] Primarily, the witnesses feel re-victimized by testifying, both at the ICTR trials and at the domestic trials, and a majority of survivors of the sexual violence report "increased emotional and psychological suffering after testifying."[122] Moreover, there is a great deal of social stigma associated with rape, which is likely to deter women from coming forward to testify or claim that they had been raped.[123] Thus, despite the high number of women who were raped and survived the Rwandan genocide, relatively few prosecutions for sexual violence have occurred.[124]

This means that aside from the limited execution of justice for rape crimes, there are fewer women who are likely to receive the aid provided for by the Witness and Victims Support of the ICTR due to their reluctance to come forward. Furthermore, there is the possibility that women may not know the extent of the provisions offered by the ICTR. As described in the next section of this Note, the International Criminal Court has addressed this issue by reaching out directly to rape victims so that they can be made aware of their rights.[125] Since the ICTR does not do this, it is likely that victims are less informed under the ICTR method, thereby further diminishing the number of rape prosecutions.

In addition to the measures taken by the ICTR, there have been domestic and local efforts in Rwanda to address the issue of compensation. In 1996, Rwanda passed criminal legislation against genocide,[126] making it the first country to pass such legislation domestically.[127] Notably, this law, which creates four categories of genocide crimes based on the severity of the crime and sets forth the punishment accordingly, characterizes crimes of sexual torture as a Category 1 genocide crime.[128] Other crimes also included in Category 1 are: planning, organizing, supervising, or encouraging crimes of genocide or crimes against humanity and murdering so zealously so as to be notoriously known for one's excessive

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121 Wells, *supra* note 2, at 192.

122 *Id.*

123 *Id.* at 187.

124 Waldorf, *supra* note 1, at 62.

125 *See* Ellis, *supra* note 54, at 245.

126 Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990, Article 32 *available at* http://www.preventgenocide.org/law/domestic/rwanda.htm (last visited on Feb. 12, 2008) [hereinafter Organic Law No. 08/96].

127 Waldorf, *supra* note 1, at 43.

128 Wells, *supra* note 2, at 184. The classification of sexually violent crimes as Category 1 resulted in large part by efforts of women's rights activists, both internationally and domestically, following the genocide. *Id.*

wickedness.[129] Persons convicted of Category 1 crimes are punishable by the death penalty.[130]

By comparison, Category 2 includes crimes of perpetrating, conspiring, or acting as an accomplice to intentional homicides or other serious assaults that cause death.[131] Category 3 includes crimes of serious assault, and Category 4 encompasses offenses against another's property.[132] Persons convicted of Category 2, 3, and 4 crimes may reduce their sentences by pleading guilty.[133] However, such modifications to the sentence are not an option for those convicted of Category 1 crimes.[134] Accordingly, by placing rape and other sexually violent crimes in Category 1, these acts are appropriately considered some of the most grievous of crimes.

The 1996 Genocide Law, which also sets out the organization of criminal proceedings for the Rwandan genocide in domestic courts, includes a reference to the creation of a "Compensation Fund."[135] This fund, called the Compensation Fund for Victims of the Genocide and Crimes against Humanity, was intended to provide damage awards for victims of the Rwandan genocide.[136] The 2001 Gacaca Law,[137] which was created to organize prosecutions for genocide crimes in Rwanda, refers to the Compensation Fund as well.[138]

Although over a decade has passed since the end of the genocide, the Rwandan government still has not created the Compensation Fund.[139] Moreover, Rwandan officials have recently maintained that Rwanda cannot afford to maintain such a fund; as stated by the Rwandan Minister of Justice, the country "is not in a position today to promise what it will never have the means to deliver."[140] This fact serves to highlight the lack of political power of genocide victims and the continued need for reparations among survivors. [141]

With regard to the victims of sexual violence who have become HIV/AIDS positive, even the government-established *Fonds d'Assistance aux Rescapes du Genocide* ("FARG"), which provides for survivors most in need of assistance, has

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129 Organic Law No. 08/96, *supra* note 126.

130 *Id.* at Article 14(a).

131 *Id.*

132 *Id.*

133 *Id.* at Articles 15-16. *See also* Wells, *supra* note 2, at 172.

134 Organic Law No. 08/96, *supra* note 126, at Articles 15-16.

135 Waldorf, *supra* note 1, at 56 (quoting Organic Law No. 08/96, *supra* note 110).

136 *See* Organic Law No. 08/96, *supra* note 126; *see also* Organic Law No. 40/2000 of 26/01/2001 Setting up Gacaca Jurisdiction and Organizing Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994 *available at* http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf [hereinafter Organic Law No. 40/2000 of 26/01/2001].

137 *See* Organic Law No. 40/2000 of 26/01/2001, *supra* note 136.

138 Waldorf, *supra* note 1, at 56.

139 *Id.*

140 *Id.* at n314 (quoting Aimable Twahira, Rwanda: Genocide Survivors Tire of "Unrealistic Promises," Inter Press Serv., Apr. 20, 2006 (quoting Minister of Justice)).

141 *Id.* at 57.

ignored the needs of these women by failing to provide antiretroviral treatment for the female victims of sexual violence.[142] Additionally, FARG does not make its fund available to national or Gacaca courts, thereby further limiting the scope of the organization.[143]

The lack of the Compensation Fund is especially problematic in light of the fact that most judgments have been impossible to enforce against convicted perpetrators of the genocide.[144] Overwhelmingly, those convicted are simply too poor to pay the judgment amount.[145] As described by one article on the subject: "[n]ational courts have already awarded millions of dollars in compensation to civil parties (victims) in criminal proceedings, but those judgments have not been enforced largely because the convicted genocidaires are indigent."[146] In addition, based on the premise of the fund's existence, the Rwandan government has made itself legally immune from civil liability, claiming that it provides compensation to victims by paying a percentage of the annual budget to the Compensation Fund.[147] In the meantime, no fund has been created, judgments are not executed, and the victims are unable to collect compensation for their damages.[148]

Furthermore, there is the added issue in domestic courts of the "impossible task" of trying to bring to justice an unmanageably high number of Hutu suspects.[149] According to several sources, millions of Hutus allegedly participated in the genocide.[150] As a result, the overwhelmingly large number of people incarcerated has clogged the domestic judicial system.[151] Funds that could potentially be used for providing reparations to victims are largely spent keeping suspects imprisoned.[152]

Despite actions taken by the ICTR to advance the international categorization of rape as a crime warranting separate attention, its efforts to provide aid to rape victims has not been successful on a large scale. The failings of the domestic courts and of the ICTR in providing reparations to Rwandan victims, and specifically to rape victims, suggest that the solution may ultimately lie outside the existing court systems.

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142 *Id.* FARG was created in 1998 and most of its fund is spent on education and other health care. FARG has also been involved in corruption scandals. Waldorf, *supra* note 1, at 57.

143 *Id.*

144 *Id.*

145 *Id. See also* Drumbl, *supra* note 3, at 1221, 1275 (stating that there is no "viable way to enforce a civil judgment" since "most aggressors are far too poor to pay").

146 Waldorf, *supra* note 1, at 56-57. The term "genocidaires" refers to the perpetrators of the Rwandan genocide.

147 *Id.* at n318. The Rwandan government also bases its immunity on the fact that it has formally recognized the former government's role in perpetrating the genocide. *Id.* at 57.

148 *See id.* at 56.

149 *Id.* at 85.

150 *Id.* at 33.

151 Waldorf, *supra* note 1, at 85.

152 *Id.*

V. THE INTERNATIONAL CRIMINAL COURT AND ITS CLASSIFICATION OF RAPE

Although the International Criminal Court ("ICC") may be the best forum for providing Rwandan rape victims with compensation, under its current structure, the Rwandan genocide does not fall within the court's jurisdiction.[153] Before discussing possible reforms or reinterpretations of the ICC statute that may provide Rwandan rape victims with reparations, a brief background on the establishment of the ICC and its relationship to rape as a prosecutable crime is warranted.

The ICC was created in 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("Rome Conference").[154] At the Rome Conference, which was attended by representatives from 160 countries and over 200 NGOs, the United Nations adopted the Rome Statute of the International Criminal Court ("Rome Statute" or "ICC Statute"), which provides the scope, procedure, and organization of the ICC.[155] In order for the Rome Statute to take effect, however, a minimum of sixty countries needed to ratify and sign the statute.[156] By April 2002, 139 countries had signed the ICC Statute, and sixty-six countries had ratified it.[157] The statute was put into force on July 1, 2002.[158]

The sheer number of countries that participated in drafting and later joining the ICC Statute suggests that the statute is truly representative of the international community's legal views on the issues addressed.[159] Consequently, the statute's approach towards the various crimes, including crimes against humanity and war crimes, are the present norms of international law, and are not just "merely aspirational."[160] This is relevant with regard to the ICC's classification of rape.

In its definition of the various types of sexual violence that may be prosecuted under the ICC, the statute includes "sexual slavery, enforced prostitution, forced pregnancy... enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions."[161] This list is significant for two main reasons. First, by

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153 *See generally infra* Part VI *infra* for a full discussion of this issue.

154 Rana Lehr-Lehnardt, One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court, 16 BYU J. PUB. L. 317, 336 (2002).

155 *Id.* at 336-337.

156 *Id.* at 337.

157 *Id.* Rwanda is not one of the countries to have joined the Rome Statute, and is not a member of the ICC. *See generally* International Criminal Court: Assembly of States Parties, http://www.icc-cpi.int/asp/statesparties.html (last visited on Jan. 30, 2009), which lists the states that are currently members of the ICC. By signing on to the ICC Statute, a state agrees to subject itself to the ICC's jurisdiction. *See* Rome Statute of the International Criminal Court, Article 12, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf (last visited on Jan. 30, 2009) [hereinafter Rome Statute].

158 Lehr-Lehnardt, *supra* note 154, 336.

159 David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 242 (2005).

160 *Id.*

161 Rome Statute, *supra* note 157, Article 8(c)(vi).

including sexual violence as a violation of the Geneva Conventions, the Rome Statute further emphasizes that committing such acts is a breach of international custom, since the Geneva Conventions have "moved beyond their status as a multilateral treaty" and are currently recognized as "customary international law."[162] Second, the ICC is the first international treaty to include sexual slavery, forced pregnancy, and gender-based persecution within its definition of prosecutable sexually violent crimes.[163] For this reason, the ICC Statute demonstrates considerable progress with regard to the international community's approach towards rape and the gravity of the crime.

Additionally, the ICC Statute codifies rape as both a crime against humanity and as a war crime.[164] This dual classification is a major step forward compared to the ICTR Statute, where rape is listed only as a crime against humanity.[165] By having rape fall under both types of crimes, prosecutors are given greater discretion in choosing the best method by which to prosecute those accused of rape. Thus, if one crime is easier to prove based on the available evidence, the prosecutor may chose to build a case around that crime alone. In most cases, to prove a war crime, the prosecutor only needs to show that the rape was "part of a plan or policy," while a crime against humanity requires a showing that the rape was "part of a widespread or systematic attack," which is generally more difficult to prove.[166] Accordingly, the ICC Statute makes it more likely that a prosecutor will succeed in prosecuting individuals for crimes of rape.

Arguably, this innovative characterization of rape is a result of rigorous lobbying by the feminist NGOs that attended the Rome Conference. These NGOs lobbied for the inclusion of provisions that would criminalize acts of sexual violence, offer protection to witnesses, and provide equality of representation for women in the ICC.[167] As a result of their active participation, a number of provisions geared towards the well-being of women were incorporated into the Rome Statute, including training for judges and staff for dealing with sexual violence victims and allowing the prosecutor to hire legal experts on issues of gender-based violence.[168]

The lobbying is also correlated with the creation of a Victims and Witnesses Unit, which provides protection, counseling, and other services to aid women in dealing with the trauma associated with sexual violence.[169] This protection is similar to the Witness and Victims Support Section of the ICTR. However, the ICC Statute goes far beyond the ICTR in one important regard: the ICC is required to conduct an extensive outreach campaign to notify victims of rape and other

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[162] Ellis, *supra* note 54, at 240. *See also* Mitchell, *supra* note 163, at 244.
[163] Mitchell, *supra* note 163, at 245.
[164] Ellis, *supra* note 54. *See also* Rome Statute, *supra* note 157, Articles 7 and 8. .
[165] Lehr-Lehnardt, *supra* note 154, at 341.
[166] *Id.* (internal quotations omitted).
[167] *Id.* at 337.
[168] *Id.* at 339.
[169] *Id.* at 344.

sexual violence of their rights under the ICC Statute.[170] Thus, although only those women who are aware of the ICC may benefit from its services, it is likely that a far greater number of women could be made aware of the ICC's services than those of the ICTR.

The ICC Statute also provides protection to witnesses, as does the ICTR, by ensuring that the identities of the witnesses remain confidential.[171] This measure is particularly important because of the barriers that exist for rape victims associated with testifying. In the same way that Rwandan women would not be inclined to testify at the ICTR due to the fear of stigma, rape victims testifying before the ICC would fear similar social discrimination.

Accordingly, the ICC has taken measures to deal with this particular issue. Under the ICC Statute, the Court may "conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means"[172] in order to protect victims, and "such measures shall be implemented in the case of a victim of sexual violence . . . unless otherwise ordered by the Court."[173] The ICC makes special note of the unique position of women who are victims of sexual violence and therefore makes the measures to safeguard victims from exposure as part of its default procedures.[174]

VI. THE ICC AS A POTENTIALLY APPROPRIATE MECHANISM FOR PROVIDING REPARATIONS TO RAPE VICTIMS OF RWANDA

Pursuant to Article 75 of the Rome Statute, the ICC has the power to issue reparations to victims brought before the ICC, which includes providing "restitution, compensation and rehabilitation."[175] Additionally, the court may order a convicted person to pay reparations directly to the victim, or the court may order that the Trust Fund, which is comprised of funds established by "the Assembly of State Parties for the benefit of victims," provide the victim with reparations.[176]

The ICC is the first international court to have the power to order an individual to pay reparations directly to another individual.[177] This ability is significant in cases where the convicted has sufficient funds to pay damages because it may provide victims with closure in a more expedited fashion. However, since most of the perpetrators in Rwanda do not have the requisite funds to pay compensation to their victims, if Rwandan rape victims were able to bring a

170 Ellis, *supra* note 54, at 245.
171 *Id.*
172 Rome Statute, *supra* note 157, at Article 68(2).
173 *Id.*
174 *Id.*
175 *Id.* at Article 75.
176 *Id*.
177 *See* Reparations for Victims, *available at* http://www.icc-cpi.int/victimsissues/victimsreparation.html (last visited Dec. 26, 2007).

case before the ICC, the court could award victims compensation through the ICC Trust Fund.

In addition, the United Nations, through its Office of the High Commissioner for Human Rights ("OHCHR"), has expressed support for the notion of reparations for rape victims.[178] As noted in the OHCHR Report of the Independent Expert to Update the Set of Principles to Combat Impunity, providing reparations to rape victims is especially important because of the historical marginalization of victims of sexual violence.[179] As stated in the OHCHR Report, "[r]ecent experience has also highlighted the need to ensure that victims of sexual violence know that the violations they endured are included in reparations programmes."[180] This report, combined with the various measures to promote the safety and well-being of witnesses who have been victims of sexual violence, suggests a growing awareness of the importance of providing these victims with compensation.

Despite the increasing support for reparations to victims of war crimes, however, the actual provision of compensation remains fraught with obstacles. Significantly, the ICC limits its scope in a fundamental way. According to the Rome Statute, the ICC only has jurisdiction over cases that have been referred to the court since its inception in 2002.[181] In addition, pursuant to Article 79 of the Rome Statute, the Trust Fund is only available to victims who fall under the ICC's jurisdiction.[182] For the victims of Rwanda, this means that they are currently shut out from receiving reparations from the ICC. Since the ICC provides the best framework for providing meaningful reparations, this exclusionary structure proves increasingly problematic and should be reformed to allow victims of the Rwandan genocide to receive compensation.

The most obvious, but also most unlikely means for changing the structure of the ICC would be to amend the Rome Statute so that it could apply retroactively. This solution would raise a number of issues. First and foremost, countries would be disinclined to join the Rome Treaty because of the potential it would cause for the prosecution of their past crimes. For example, Japan recently joined the ICC and has been considered a member since October 2007.[183] If the statute were to apply retroactively, the comfort women who have been consistently denied relief could potentially bring a case before the ICC for reparations. Although this would be a positive result, it would likely be disfavored by the international community. Rather than try to remedy past problems, the party states to the Rome Statute would

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[178] DIANE ORENTLICHER, REPORT OF THE INDEPENDENT EXPERT TO UPDATE THE SET OF PRINCIPLES TO COMBAT IMPUNITY, E/CN.4/2005/102/Add.1 (Feb. 18, 2005), *available at* http://www.swisspeace.ch/typo3/fileadmin/user_upload/pdf/KOFF/11unhcr.pdf.

[179] *Id.*

[180] *Id.* S*ee also* Ellis, *supra* note 54, at 243.

[181] Rome Statute, *supra* note 157, Article 11.

[182] Rome Statute, *supra* note 157, at Article 79.

[183] Accession of Japan to Rome Statute (July 17, 2007), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/accession%20of%20japan%20to%20the%20rome%20statute (last visited Jan. 31, 2009).

undoubtedly prefer to have a higher number of countries, including Japan, join the ICC. Accordingly, retroactivity is not a viable option.

A more likely solution for Rwandan rape victims would be for ICC member states to either amend or reinterpret the meaning of Article 79 of the Rome Statute so as to expand what constitutes as falling "within the jurisdiction of the Court."[184] Specifically, Article 79(1) states the following: "[a] Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."[185] This statement, in conjunction with Article 11, which limits the jurisdiction of the ICC to cases since 2002, has been interpreted by member states to mean that the Trust Fund only applies to cases since 2002.[186] However, there may be more than one way to properly understand the limitation imposed by Article 79.

Since very little is provided in the Rome Statute with regard to the operation of the fund, this "open approach" provides "considerable flexibility in determining the future operation of the Trust Fund."[187] Accordingly, member states could utilize this flexibility to opt for a broader application of the Trust Fund in order to better comport with its intended purpose: to "benefit... victims of crimes."[188] Additionally, author Ilaria Bottigliero further argues that because of this flexibility, members could avoid going through the lengthy procedure of amending the statute, while still interpreting the statute to take on a more desirable meaning.[189]

Thus, depending on the will of the member states, the ICC jurisdiction could be broadened to provide redress for Rwandan rape victims. For instance, Article 79(1) states that the Trust Fund is intended to apply to victims of crimes within the court's jurisdiction, but does not provide any reference to other articles within the Rome Statute with which to define "jurisdiction."[190] Additionally, in Article 5(1) of the Statute, "jurisdiction" is described as encompassing "the most serious crimes of concern to the international community as a whole," including genocide, crimes against humanity, war crimes, and crimes of aggression.[191] However, within Article 5, there is no temporal restriction with regard to the court's jurisdiction.[192] The member states could interpret the meaning of "jurisdiction" in Article 79 to refer only to Article 5, and not Article 11. In this way, the term "jurisdiction" would refer to the *types* of crimes deserving of reparations by the Trust Fund, and not to the *time* in which the crimes were committed.

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184 Rome Statute, *supra* note 157, at Article 79 (1).

185 *Id.*

186 Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 2 AM. U. INT'L L. REV. 539, 543 (2007).

187 Bottigliero, *supra* note 113, at 226.

188 Rome Statute, *supra* note 157, at Article 79 (1).

189 Bottigliero, *supra* note 113, at 226.

190 *See* Rome Statute, *supra* note 157, at Article 79(1).

191 *Id.* at Article 5(1).

192 *See id.* at Article 5.

Ostensibly, this interpretation could raise issues similar to those associated with applying the statute retroactively. However, in light of the flexibility described by Bottigliero, the member states could decide how to limit the extension as well.[193] For example, while it may be an overly broad application to allow all victims of Article 5 crimes to receive reparations from the fund, the extension could be sufficiently narrowed if applied only to existing UN cases, such as those associated with the ICTR and the ICTY. Specifically, since the ICTR does not consider reparations within the jurisdiction of the tribunal, the Trust Fund could extend its scope in order to work not just with the ICC, but with the ICTR, as well.

If the jurisdiction of the ICC Trust Fund could be extended in such a manner, the Fund might best serve the needs of Rwandan victims. For example, in situations where a domestically convicted person is too indigent to provide compensation to a rape victim, the ICTR could provide the victim with reparations through the Trust Fund. Furthermore, this solution could address a number of issues associated with the ICTR's current system. With the cooperation of the two institutions, the ICTR may be more inclined to reform other aspects of its program because of the Trust Fund's association with the ICC. For instance, the ICTR may choose to provide outreach to victims, so that they can be made aware of their right to testify and receive reparations.

Conversely, by working with the ICTR, the ICC Trust Fund would potentially be better able to provide for the specific needs of the rape victims. Since the ICTR has been dealing exclusively with cases relating to the Rwandan genocide, the tribunal would have a greater body of knowledge regarding the specific problems that face Rwandan rape victims. With the support of the Trust Fund, the ICTR could provide reparations to rape victims according to the particular needs of Rwandan women.

Having the ICC Trust Fund associated with the ICTR could provide a viable solution to the problem of reparations for Rwandan rape victims. While rape victims would continue to receive the benefits set out in the ICTR, more victims could be made aware of their rights and protections, which would lead to a higher number of rape victims receiving reparations.

CONCLUSION

In the years since World War II and the Nuremburg Trials, the international community has greatly expanded its definition of rape and the manner in which sexual crimes of violence may be prosecuted. Significantly, the ICTR currently characterizes rape as belonging to the most grievous of crimes and characterizes certain forms of rape as genocide. Additionally, owing to the Holocaust reparations movement following World War II, there is an international acceptance of reparations as necessary to compensate victims for harms suffered and as a means of recognizing the perpetrator's accountability.

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[193] *See* Bottigliero, *supra* note 113, at 226.

Despite these improvements, both the ICTR and the Rwandan government have failed to provide Rwandan rape victims with reparations. Although years have passed since the conclusion of the Rwandan conflict, the need for reparations has not lessened. This continuing need is clearly demonstrated by the comfort women in Japan who continue to seek reparations despite the growing number of years that have elapsed since the end of World War II. Consequently, aggressive steps should be taken to remedy the lack of reparations for the Rwandan rape victims. Since the existing mechanisms have failed in this regard, a viable solution may be to incorporate the ICC Trust Fund together with the ICTR in order to provide rape victims with greater resources, while maintaining the utmost protections for the identities and testimonies of the victims.