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Sexual Slavery and the Comfort Women of World War II

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Sexual Slavery and the "Comfort Women" of World War II*

By
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I.
INTRODUCTION

International law prohibited slavery well before the Japanese army created "comfort stations" during World War II. Slavery, correctly defined, is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[1] Slavery is often equated with forced labor or deprivation of liberty; however, sexual autonomy is a power attaching to the right of ownership of a person, and controlling another person's sexuality is, therefore, a form of slavery. The Japanese "comfort system" combined these forms of control. In addition to restricting its victims' freedom of movement, it forced them to perform sexual labor. Thus, it constituted a system of slavery that violated international law.

The treaties and customary law that provide the basis for criminalizing slavery have used different language in their attempts to define the crime. As both the Special Rapporteur to the UN Commission on Human Rights and the ITCY have recognized, however, the language of the 1926 Slavery Convention, by focusing on the exercise of the rights of ownership, provides the best definition of slavery and one that encompasses sexual slavery. The recent Rome Statute of the International Criminal Court (ICC),[2] on the other hand, adopts a definition of sexual slavery that emphasizes commercial trafficking and deprivation of liberty, rather than control over sexuality. Although the Rome Statute

* I must start by thanking all the people who contributed to the Women's War Crimes International Tribunal (Tokyo Tribunal 2000) and who invited me to participate as a Judge. I am honored that the organizers of the Tokyo Tribunal 2000 felt that I was qualified to participate in this important event. I give my heartfelt thanks to Judges Gabrielle Kirk McDonald (USA), Christine Chinkin (UK) and Willy Mutunga (Kenya); legal advisers Rhonda Copelon and her students at CUNY (USA), Kelly Dawn Askin (USA), Barbara Bedont (Canada) and Betty Murungui (Kenya); and the International Organizing Committee (IOC) members Indai Sajor (Philippines), Yun Chung Ok (South Korea) and Yayori Matsui (Japan). I also would like to thank the courageous survivors for whom I have the deepest admiration.

** International Criminal Tribunal for the former Yugoslavia (ICTY) *ad litem* Judge.

1. *See, e.g.*, Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 U.N.T.S. 253 [hereinafter 1926 Slavery Convention].

2. The Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF.183/9 (1998) *available at* http://www.un.org/law/icc/ (last visited Dec. 17, 2002) [hereinafter Rome Statute].

reiterates the ban on sexual slavery, its overly narrow definition represents a step backward from the 1926 Slavery Convention.

II.
HISTORICAL BACKGROUND

In 1895, the island of Taiwan became a colony of Japan. In 1905, Japan forced Korea to become a Japanese protectorate; in 1910, Korea became a colony of Japan. Japan controlled Taiwan and Korea up to and through the start of World War II. From Korea, Japan began a war of aggression against China, aiming to form an Asia-Pacific Empire under its domination. It also established in the north of China a "puppet" state named "Manchuguo." Japanese military forces fully controlled Manchuguo and deployed from there to the south with the intent of conquering all of China. Japanese history books dismissively refer to this as the "Manchurian Incident" (Manshuu Jihen).

As the Japanese military moved across mainland Asia, its soldiers and officers committed widespread atrocities. In 1937, for example, the Japanese military invaded and destroyed the city of Nanking, an incident which became known as "The Rape of Nanking." The atrocities that the Japanese forces committed there—especially the large scale rape of young women and girls, and the barbaric treatment of the general population—created an outcry in the international press.

The press reports of the Rape of Nanking reached Emperor Hirohito, who was appalled by the negative image of the Imperial Army that the incident had created. According to Japanese historians, the Emperor asked his Ministers, Counselors and Military Chiefs to devise ways to restore the "honor of Japan" and stop the condemnation by the international press. The Emperor's aides proposed two ideas. The first was a reform of the Military Code, a task in which the Emperor as well as his Army and Navy Commanders, and his Ministers were involved. The second was the creation and systematic extension of what the Japanese military euphemistically called "comfort stations."

Comfort stations had existed since 1932. The Japanese military created the first such stations near some barracks in continental China. Japanese soldiers referred to them as whore houses or brothels. As licensed prostitution existed at that time in Japan, it is possible that those first comfort stations employed licensed prostitutes. After the Rape of Nanking, however, military regulation of comfort stations changed them into facilities for sexual slavery.

III.
JAPANESE GOALS

Japan had four reasons for establishing comfort stations. As stated previously, one of the main reasons was the desire to restore the image of the Imperial Army. By confining rape and sexual abuse to military-controlled facilities, the Japanese government hoped to prevent atrocities like the Rape of Nanking or, if such atrocities did occur, to conceal them from the international press.

A second reason for establishing comfort stations was to prevent anti-Japanese sentiment from fomenting among local residents in the occupied territories. Rape increased anti-Japanese sentiment and stimulated resistance in the occupied countries, which in turn complicated military actions for the Japanese army during World War II.

Third, Japan hoped to keep its military personnel healthier and reduce medical expenses. Because Japanese soldiers were committing rape indiscriminately and on a large scale, they often contracted venereal diseases and other illnesses. These diseases caused loss of strength and required expensive medical treatment before soldiers and officers could resume their war duties. Military oversight of the comfort stations, even where the facilities were run by private operators, included medical examination of the women by Japanese military doctors to assert their virginity and health, thus reducing the incidence of venereal disease and the attendant loss of manpower and expense of treatment.

There was a fourth reason for establishing comfort stations. The women kept there for the pleasure of Japanese military personnel were isolated. Many of them had been trafficked from distant countries, did not know the local language, could not leave the facilities and were abused if they did not comply with their captors' orders. Therefore, they could not communicate any military secrets confided to them. This isolation provided a distinct advantage over local brothels which, the Japanese believed, could hide dangerous spies.

IV.
THE "RECRUITMENT"

At the end of World War II, the Japanese military destroyed or withheld many documents on the comfort stations system. Nevertheless, some important documents survived, such as the one uncovered in 1992 by Professor Yoshiaki Yoshimi, the author of a book entitled *Comfort Women*.[3] This memorandum, entitled "Matters Concerning the Recruitment of Women to Work in Military Comfort Stations" ("Recruitment Memo"),[4] was sent on March 4, 1938, by an adjutant in the Japanese War Ministry to the Chiefs of Staff of the North China Area Army and the Central China Expeditionary Force.

This document addresses so-called social problems caused by unsupervised recruiters. It states: "You are hereby notified of the order [of the Minister of War] to carry out this task with the utmost regard for preserving the honor of the army and for avoiding social problems." The document does not mention the need to ensure that the women consent to their recruitment into the comfort station system or to avoid recruiting minors. As usual, the most important issue to the Japanese was "the honor of the army."

The Japanese used several means to recruit women for the comfort stations. One such means was deception. The colonies—Taiwan and Korea—and the

3. Yoshiaki Yoshimi, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II (Suzanne O'Brien trans., 2000).

4. *Id.* at 59.

occupied territories were very poor because Japan had taken for the war effort any available means of production of food and clothing. Many young women and girls were living in poverty and had been working from a very early age to support their families. Recruiters promised these women better jobs as nurses, waitresses, maids, or typists, along with a salary that could help their families. Even when recruiters did mention the comfort stations, they misrepresented the nature of "comfort service." The U.S. Office of War Interrogation Report No. 49 ("OWI Report")[5] indicates that, initially, Korean women assumed that comfort service consisted of visiting wounded soldiers and generally making the soldiers happy, and that many Korean women enlisted on the basis of these misrepresentations.

In another means of recruitment, girls or young women were purchased from their economically destitute families, or became debt bonded, that is, indentured servants. The Southeast Asia Translation and Interrogation Center (SEATIC) Psychological Warfare Interrogation Bulletin No. 2[6] states that the Japanese manager of a comfort station in Burma, who operated under military authority, purchased the Korean women from their families for 300 to 1000 yen each "depending on the girls' characters, appearance, and ages," and that once bought the women became his sole property. The OWI Report on debt bondage states that the term of the servitude contracts varied from "six months to a year depending on the size of the family debt advanced." The OWI Report also indicates that the women could not leave the comfort stations even after they had fulfilled the terms of their contracts.

The Japanese army also forcibly abducted women and girls both in the colonies and the occupied territories. Survivors who gave testimony before The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery stated that they were enslaved through abduction in the Philippines, Malaysia, East Timor, Korea, China, Taiwan and Indonesia. In most of these cases, the women witnessed the Japanese army or its recruiters murder family members who tried to defend the women from being taken.

Sometimes the Japanese military told the heads of small villages to round up girls of a certain age—usually between 15 and 22—and deliver them to the Japanese forces for "work." If the women refused, the Japanese threatened to destroy the village, kill the elders and children and commit other violent measures. That was a means of coercion to induce villagers to sacrifice their daughters. One survivor said that her mother was convinced to sign "some papers" sending her to the Japanese military as contribution to the war effort because she had no sons to give to the army.

In Java, the Japanese army used civilian internment camps as the source of young women and girls for the comfort stations. Jan Ruff O'Herne, from the Netherlands, told the Tokyo Tribunal 2000 that she was in one of those camps with her mother and sisters when a group of Japanese soldiers, including a high

5. *Id.* at 105-106.
6. *Id.* at 105-108.

ranking officer, arrived and ordered women between 17 and 28 years old to be inspected. They selected several girls and women and took them away despite their protests and those of their mothers. The Japanese army placed these women in a comfort station against their will and despite their resistance.[7]

In other places, the Japanese military took women into the facilities for sexual slavery because they suspected them of having a relationship with members of the resistance or participating themselves as such. Police forces also contributed by arresting women and girls in the street and forcing them into comfort stations. The Japanese military employed any form of force or violence to obtain the increasing number of women needed to "comfort" soldiers.

Even in the few cases where the Japanese military brought licensed prostitutes to work at comfort stations, the living conditions in the facilities—the harsh control over movement, the medical examinations, the mistreatment, and the deprivation of control over their sexuality—dehumanized and objectified the women to the extent that they, too, became sexual slaves.

V.
SLAVERY

Several treaties in effect at the start of World War II establish that slavery was an international crime, and that forced sex was a form of slavery. As the various treaties make clear, the comfort stations were a system of sexual slavery that violated international law. Although the recent Rome Statute continues the international prohibition of sexual slavery, it defines the crime too narrowly.

A. Freedom

Freedom is the "birthright of every human being."[8] It is both central to, and interdependent on, other human rights. Freedom is the source of many other rights, including the right to protect, control, and determine the disposition of one's body and self in relation, for example, to work, sexuality, and reproduction; to practice one's religion or spirituality; to express opinions; to form relationships of one's choice and to decide whether to have a family; to vote, join trade unions, and participate in political, economic, social and cultural community life. Freedom means dignity and the full and free development of personal potential. Slavery is the antithesis of freedom. As a basic principle of the rule of law, freedom cannot be relinquished. It is not an exercise of paternalism to say that no one can consent to enslavement; it is fundamental to the nature of freedom itself. Freedom and equality under international law are based on a concept of the human being as free and able to fulfill his or her capabilities. Freedom requires protection of individual autonomy, respect for every person's potential and development, and the presence of enabling economic social and cultural conditions.

7. YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 93-94 (1996).

8. 1926 Slavery Convention, *supra* note 1.

Consent, to be valid, must be based on knowledge and sustained by reason and the ability to make free and informed choices. Consent is not valid when it is not knowingly and freely given; when there is deceptive or distorted information, or no information at all; when there is coercion, violence, or the threat thereof; when the victim is subject to inhumane and debilitating conditions, kept isolated from social support or denied the means of survival and without access to means of communication, assistance, or redress; or when there is exploitation of the victim's vulnerability. Consent is not free when the victim fears retaliation in the form of physical or mental abuse.

B. The International Prohibition of Slavery before World War II

Slavery, as one of the most profound violations of a human being's inherent freedom and dignity, was one of the first crimes to be proscribed under international law. A 1944 survey of a representative group of states demonstrates that virtually all had prohibited slavery as a matter of national law. International law also banned slavery before World War II. In fact, the existence of an international prohibition of slavery prior to the development of the comfort system draws support from at least five sources.

First, the 1926 Slavery Convention provides that every person has a right to be free from slavery. The 1926 Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[9] The 1926 Convention was the culmination of a century-long development of the norms against slavery, the slave trade and forced labor. Even before the Convention came into effect on March, 9, 1927, however, multilateral declarations and treaties prohibited slavery and the slave trade, and increasingly strengthened the criminal nature and universal obligation to prosecute slavery. As an example, Argentina (then under the name of United Provinces of the Rio de la Plata) prohibited and criminalized slavery in 1813.

Although Japan was not a signatory to the 1926 Slavery Convention and its criminal code did not specifically address slavery before 1944, in a 1972 case in which Peruvian slave-traders were convicted, Japan appears to have declared that it had always prohibited the slave trade.[10] By the time of the Rape of Nanking in 1937, the 1926 Slavery Convention was clearly understood as declaratory of customary international law[11] and, therefore, binding upon Japan regardless of whether it had ratified the 1926 Convention.

The second source of recognition for the crime of sexual slavery during the Second World War is the 1907 Hague Convention IV and annexed Regula-

9. 1926 Slavery Convention, *supra* note 1, at art. 1.

10. *See* U. N. Commission on Human Rights: Final Report on Contemporary Forms of Slavery; Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict: Report of the Special Rapporteur, Gay J. McDougall, U.N. ESCOR, 50th Sess., Prov. Agenda Item 6 app. at para. 13, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter McDougall Report].

11. *Id.* at para. 14.

tions,[12] to which Japan was a signatory. The 1907 Convention codified the customary law prohibition on making slaves of prisoners of war or occupied civilian populations. Although the 1907 Convention stipulates an exception for "the needs of the army of occupation,"[13] this exception can never include sexual slavery because sex is not a military necessity. Furthermore, the 1907 Convention prohibits rape and emphasizes the prohibition in article 46, which requires respect for "family honor."[14] When read together, these provisions prohibit, among other things, what is now understood as the crime of sexual slavery.

The 1929 Geneva Convention Relative to the Treatment of Prisoners of War reinforced and broadened this protection.[15] Article 29 provides: "No prisoner of war may be employed at labors for which he is physically unfit"; and article 32 states: "It is forbidden to use prisoners of war at unhealthful or dangerous work."[16] Sexual slavery is obviously dangerous and unhealthy and falls within the purview of these protections.

Third, in 1996,[17] the International Labour Organization (ILO) Committee of Experts ruled that Japan's system of military sexual slavery violated the 1930 Convention Concerning Forced Labour. The Committee stated that article 2(a), which permits compulsory military service, does not apply to the "comfort women" system because that exception applies only to "work of a purely military character."[18] Further, it found no justification for applying article 2(d),[19] which permits compulsory labor in the event of war or other calamities which threaten the safety or well-being of the population. The Committee found that this exception is strictly limited to genuine public emergencies requiring immediate action and that the scope and purpose of the involuntary labor must be restricted to those meeting the exigencies of the situation. Women's sexual integrity and sexual autonomy may never be sacrificed in the name of emergency.

Sexual servitude can never be a permissible form of compulsory labor. There is no "necessity" argument that can justify subjecting a person to sexual violence. Nor can rape, sexual bondage, or other forms of sexual violence ever be rendered acceptable by payment, by providing amenities such as health care, or by limiting the days of service. In this sense, forced sexual labor is different from other forms of forced labor, which may be permissible under narrowly

12. Law and Customs of War on Land (Hague, IV), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, reprinted in 1 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 247, 631 (1968) [hereinafter BEVANS].

13. *Id.* at art. 52.

14. *Id.* at art. 46.

15. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 BEVANS 932.

16. *Id.* at art. 29, 32.

17. Report of the Committee of Experts on the Application of Conventions and Recommendations, Int'l Lab. Conf., 83rd Session, Report III (Part 4A), Convention 29 on Japan, Int'l Lab. Org. (1996). *See also* Report of the Committee of Experts on the Application of Conventions and Recommendations, Int'l Lab. Conf., 85th Session, Report III (Part 1A), Convention 29 on Japan, Int'l Lab. Org. (1997) (reaffirming the 1996 Report).

18. *Id.*

19. *Id.*

defined circumstances, because forced sex constitutes an exercise of ownership over a person.

Fourth, the Trafficking Conventions of 1904,[20] 1910[21] and 1933[22] provide further evidence that the international community considered sexual slavery a criminal offense before and during World War II. The 1910 Convention provides, in article II, that parties must punish those who have "by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed" a girl or woman for "immoral purposes," which was a reference to prostitution.[23] To traffic a woman or girl against her will or by deception was an aggravating circumstances requiring greater punishment than trafficking with her consent.

The 1921 International Convention for the Suppression of the Traffic in Women and Children is particularly relevant.[24] Under articles 2 and 3, states parties had to take all steps necessary to discover and prosecute persons engaged in the traffic of women and children.[25] All the conventions are cumulative in the sense that the later conventions reaffirmed the earlier ones. Moreover, the General Assembly of the League of Nations considered the prohibition on trafficking in women and girls to have become part of customary international law before World War II.[26] Thus, both conventional and customary law provide forceful evidence that sexual slavery was a crime well before Japan instituted the system of militarily-controlled sexual slavery.

The fifth and final source of the prohibition on sexual slavery at the time of the World War II was the customary humanitarian law prohibition on forced prostitution. The 1919 War Commission Report of World War I listed "abduction of girls and women for the purpose of enforced prostitution" as a war crime.[27]

C. *Developments in International Slavery Law after World War II*

With the exception of the post-war Allied military proceedings, the prosecution of war crimes was largely a domestic matter. After World War II, the Dutch Military Tribunal at Batavia (now Jakarta) prosecuted and convicted Japanese defendants on charges of "enforced prostitution" as a violation of the

20. International Agreement for the Suppression of the White Slave Traffic, Mar. 18, 1904, 11 L.N.T.S. 83 [hereinafter 1904 Agreement].

21. Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45 [hereinafter 1910 Convention].

22. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49 [hereinafter 1933 Convention].

23. 1910 Convention, *supra* note 21, at art. II.

24. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, arts. 2, 5, 53 U.N.T.S. 39, 42 [hereinafter 1921 Convention].

25. *Id.* at art. 2.

26. Yoshimi, *supra* note 3 at 161.

27. *See* Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Mar. 29, 1919, reprinted in 14 AM. J. INT'L L. 95, 115 (1920).

Dutch war crimes statutes, for crimes related to Japan's system of military sexual slavery committed against Dutch women.[28]

The charters and jurisprudence of the post-war Tribunals confirm the status of enslavement and forced labor as international crimes and outline conditions for these crimes in the context of non-sexual forced labor. These conditions were also prevalent in the military comfort women system and demonstrate that the comfort stations violated international law.

Both post-war military tribunals, the International Military Tribunal at Nuremburg (IMT) and the International Military Tribunal for the Far East (IMTFE), found that both the German and Japanese slave labor systems were governmentally organized. With limited exception, the post-war proceedings did not define slavery or enslavement; nor did they attempt to define or draw clear distinctions between slavery, forced labor, and the slave trade. At times, they made statements that have become important to developing concepts on slavery. For instance, *In re Pohl and Others*[29] defines slavery as "involuntary servitude." *Pohl* also states: "Involuntary servitude, even if tempered by humane treatment, is still slavery."[30] The detailed treatment and prosecution of both the Japanese and German slave labor system stands in sharp contrast to the absence of consideration of its gender analogue, the comfort women system. Nonetheless, the judgments of the post-war tribunals make clear that the comfort women system was in fact a slavery system, and should have been prosecuted as such. Largely at the insistence of the comfort women survivors, the term "sexual slavery" has been widely recognized today, most significantly in the Rome Statute,[31] which more than 120 countries have signed.

D. Determining When Slavery Occurs

Considering the various international sources of law from 1937 to 1945, it is clear that enslavement is built upon two interrelated forms of subordination: chattel slavery and forced labor. Sexual slavery combines both concepts of slavery.

1. Chattel Slavery

Chattel slavery occurs when a person is treated as an object or as property subject to use or disposal by another person. Such use may be for economic, recreational, domestic or other purposes. A person is treated as a chattel if he or she is regarded as merely an item of property or economic value, while the person's humanity is disregarded. Where a person's body is placed at the dispo-

28. *See* USTINIA DOLGOPOL & SNEHAL PARANJAPE, COMFORT WOMEN, AN UNFINISHED ORDEAL: REPORT OF A MISSION, INTERNATIONAL COMMISSION OF JURISTS 135-37 (1994).

29. *In re Pohl and Others* (WVHA Judgment), 14 I.L.R. 290 (case summary), V Nuremberg Trials, 958, 1020 (U.S. Milit. Trib. 1947)

30. TELFORD TAYLOR, NUREMBERG TRIALS: WAR CRIMES AND INTERNATIONAL LAW, IN INTERNATIONAL CONCILIATION 241, 295 (Carnegie Endowment for Int'l Peace No. 450, 1949) (quoting transcript of *Pohl*).

31. Rome Statute, *supra* note 2.

sal of another to use sexually without his or her valid or genuine—that is, knowing and voluntary—consent, that is a form of chattel slavery. Sexual slavery is particularly heinous because using a person as, or reducing a person to, sexual property violates the physical and mental integrity of the victim on the most profoundly personal level. The victim is deprived of control over not only his or her body, but also sexual activity and autonomy, which denies some of the most fundamental components of human dignity. Moreover, because of the sexual nature of this form of enslavement, the victim often suffers either in silence or from socially-induced rejection and marginalization.

2. Forced Labor

Forced labor exists when a person is made to perform labor against his or her will. Forced labor involves fundamental disregard for a person's right of self-determination; physical, mental and spiritual integrity; right to livelihood; and human dignity. Depriving a person of control over sexuality and denying his or her sexual integrity in order to satisfy the demands of another is a particularly atrocious form of forced labor, using and abusing the victim's body and spirit. It is axiomatic that rape and other forms of sexual violence or abuse can never be legitimate forms of labor. Neither remuneration nor the satisfaction of one's survival needs mitigates the conditions involving servitude.

3. The 1926 Slavery Convention

The 1926 Slavery Convention, which defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," provides the overarching and enduring definition of slavery. This definition incorporates both the chattel and forced labor concepts and applies with full force to sexual slavery. Using the 1926 Convention, it is easy to recognize that the acts involved in acquiring persons for enslavement are an integral part of the enslavement process.

The *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy. Control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership. The *mens rea* is the intentional exercise of such powers.

4. Kunarac

Recent jurisprudence and the writing of jurists support this approach to the elements of the crime of sexual slavery. However, this approach differs from the elements of sexual slavery adopted in the non-binding Elements Annex to the Rome Statute of the International Criminal Court. In *Prosecutor v. Kunarac*,[32] the Trial Chamber of the ICTY reached a similar conclusion and laid a sound foundation for the subsequent prosecution of the crime of sexual slav-

32. Prosecutor v. Kunarac, Nos. IT-96-23-T & IT-96-23/1- T, Judgment (Feb. 22, 2001).

ery. Because the ICTY Statute[33] does not distinguish sexual slavery as a separate crime, two of the accused in *Kunarac* were instead charged with both "rape" and "enslavement" as crimes against humanity. The indictment charged that these defendants enslaved women and young girls and subjected them to repeated rape and other forms of sexual violence, including forced nudity and sexual entertainment, over a period of weeks or months. In addition to the sexual servitude, the victims were also required to perform domestic labor.

Kunarac adopted the 1926 Slavery Convention's definition of enslavement, and went on to illustrate in broad terms what is meant by "the powers attaching to the right of ownership." It said:

> Indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, not all labour or service by civilians in armed conflicts, is prohibited—strict conditions are, however, set for such labour or service. The "acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor whose importance will depend on the existence of other indications of slavery. [The basic factors include] the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor.[34]

These are all factors "to be taken into account in determining whether enslavement was committed." Significantly, *Kunarac* does not place greater weight on any one factor and treats "control of sexuality" as an exercise of a power of ownership every bit as much as more traditional factors such as control of movement or forced labor.

Control of sexuality is itself an indicium of the general crime of enslavement. This is true regardless of whether the enslavement encompasses the use of a person as sexual property or for forced sexual labor. Otherwise, the definition of enslavement would erroneously exclude one of the most common forms of servitude imposed upon women, sexual servitude.

While exercising control over sexuality may be an essential factor in a case of enslavement, it need not be the dominant factor. Such exercise of sexual

33. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 2, U.N. Doc. S/25704, annex (1993), reprinted in 32 I.L.M. 1192 (amended 2002) [hereinafter ICTY Statute].

34. *Kunarac*, *supra* note 32.

control will usually entail some other indicia of enslavement, such as control over movement, coercion, repetition, or duration. Where control of sexuality is a factor in enslavement, the crime of sexual slavery can also be charged separately. Both sexual slavery and enslavement should be charging options because both crimes may be applicable as their elements and the interests they protect are distinct. Sexual slavery recognizes the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves. Moreover, victims of the crime of sexual slavery may need somewhat different forms of protective measures or redress than victims of other forms of slavery.

5. *The Special Rapporteur to the UN Commission on Human Rights*

This approach to the essential elements of sexual slavery finds support in the Special Rapporteur's Final Report on Contemporary Forms of Slavery; Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict, by Gay McDougall,[35] a leading expert in international law. In her Final Report to the UN Commission on Human Rights, McDougall defines "sexual slavery" as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence. Slavery, when combined with sexual violence, constitutes sexual slavery."[36]

Like *Kunarac*, the strength of the Special Rapporteur's approach is to recognize that the violation of sexual autonomy through rape or other forms of sexual violence is a power attaching to the right of ownership of a person. Further, the McDougall Report explained:

> The Special Rapporteur understands that based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange; of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a "status or condition" of slavery exists. While the most commonly recognized form of slavery involves the coerced performance of physical labour or service of some kind, again, this is merely a factor to be considered in determining whether a "status or condition" exists, which transforms an act, such as rape, into sexual slavery. It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape.[37]

E. Sexual Slavery

Because the terms "prostitute" and "prostitution" reflect profoundly discriminatory attitudes toward women, the situation of the former comfort women and girls is more accurately termed "sexual slavery" rather than "forced prostitution."

35. McDougall Report, *supra* note 10.
36. *Id.*
37. *Id.*

Identifying sexual slavery as a crime under international law today results in a long overdue renaming of the crime of forced prostitution. As such, it responds to a very important concern expressed by the survivors of the comfort system, which is that the term "forced prostitution" obscures the terrible gravity of the crime, suggests a level of voluntarism, and stigmatizes its victims as immoral or "used goods." Thus, the crime historically denominated as "forced prostitution" is more appropriately named "sexual slavery."

Obscuring the offense of sexual slavery by calling it prostitution did not end with the close of the war. Japan's sympathizers who deny its responsibility for the systematic atrocities committed against comfort women and girls continue to characterize them as "prostitutes" and "camp followers" to assert both the voluntarism and immorality of the comfort women, and thus Japan's own innocence.

The 1933 Trafficking Convention's use of the term "immoral purposes" to refer to both voluntary and coerced prostitution illustrates the problematic character of the term "forced prostitution." The definition of the word "prostitute," a term historically associated primarily with women, is often referred to in terms such as "base behavior," "promiscuous lewdness," and "purposeful evil." In many countries, prostitution—the exchange of sex for money or other value—is a crime. Moreover, "prostitute" refers both to those who sell sex and to women who violate social rules against sex outside of marriage or who otherwise break the rules of "proper" female sexual conduct.

The term "forced prostitution" describes essentially the same conduct as "sexual slavery," but it does not communicate the same level of egregiousness. "Forced prostitution" tends to reflect the male view: that of the organizers, procurers, and those who take advantage of the system by raping the women. The term "sexual slavery" reflects the victims' view. It focuses on the enslavement and the rape, and captures more accurately the enormity of subordination and suffering.

Many survivors of the comfort system testified before the Tokyo 2000 Tribunal. They said that, even after the ordeal they had survived, being stigmatized as prostitutes cruelly exacerbated their suffering. Instead of being welcomed back to their communities as victims of a terrible wrong, they experienced indescribable shame and isolation. Naming the crime "sexual slavery" is intended to lessen the misplaced stigma for these survivors as well as for future victims of such crimes.

VI.
INDICIA OF SEXUAL SLAVERY IN THE "COMFORT SYSTEM"

The instances of slavery discussed in the IMT and IMTFE cases demonstrate some common characteristics of slavery. *Kunarac* also contains a useful summary of many of the various characteristics or indicia of enslavement and sexual slavery. The indicia are not elements that must exist in all cases, but rather a guide to determining when the status or condition of being enslaved

exists. The presence or absence of any one indicium is not conclusive evidence of whether a person has been enslaved. In discussing the pertinent indicia of sexual slavery, the Tokyo 2000 Tribunal also addressed the significance of either their presence or absence in the comfort system. The most common indicia are listed as: 1) involuntary procurement, 2) treatment as disposable property, 3) restriction of fundamental rights and basic liberties, 4) absence of consent or of conditions under which consent is possible, 5) forced labor, and 6) discriminatory treatment. As stated previously, these are not requirements of the crime of slavery. One or more of these indicia can be missing in a particular case, but nevertheless the other remaining indicia may suffice to create the status or condition of slavery or sexual slavery.

The Tokyo 2000 Tribunal found all of these indicia in the comfort system. It stated that the Japanese military and government officials and their agents committed the crimes of rape and sexual slavery against women and girls as a part of, and in the course of, their war of aggression in the Asia-Pacific. These crimes were widespread—occurring on a vast scale and over a huge geographic area—and systematic—being highly organized, heavily regulated, and sharing common characteristics. They were crimes against humanity committed against tens of thousands of civilian women and girls who were forced into sexual servitude to the Japanese military as part of the comfort system during World War II.

VII.
CONCLUSION

The Rome Statute criminalizes sexual slavery but contains no definition of the crime. The statute defines enslavement, as does the 1926 Slavery Convention, as "the exercise of any or all of the powers attaching to the right of ownership over a person," and provides, significantly, that enslavement "includes the exercise of such power in the course of trafficking in persons, in particular women and children." Unlike the 1926 Convention, however, the Rome Statute later specifically addressed the crime of sexual slavery.

Subsequent to the adoption of the Statute, the Preparatory Commission negotiated an Elements Annex to guide the ICC in interpreting the crimes within its jurisdiction. The Elements Annex adopts an unreasonably narrow definition of enslavement which it then extends to sexual slavery. Hence the elements adopted do not adequately reflect the crime under international law. It defines the *actus reus* of sexual slavery thus: "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of liberty. 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature."[38] While this definition contains potential flexibility in the phrase "such as," it puts the emphasis on commercial exchange or similar deprivation of liberty, which is not

38. Report of the Preparatory Commission for the International Criminal Court, Addendum Part II: Finalized draft text of the Elements of Crimes, PCNICC/2000/Add.2, July 6, 2000.

only antiquated but also contrary to the lived experience of women and men coerced or deceived into enslavement situations and sexual slavery. It is important to note the absence of relevant and non-commercial means of enslavement such as "using" another person as one's property.

Since at least 1907, the international community has recognized the crime of sexual slavery. As the comfort system of World War II made clear, sexual slavery involves both chattel slavery and forced labor. The 1926 Slavery Convention's definition encompasses both kinds of slavery, and thus provides the seminal definition of the crime. The ICC and the Preparatory Commission should adopt that definition instead of using an unnecessarily narrow definition.

The International Community must be aware of this crime and the scope of sexual slavery around the world—whatever guise it may take—and should make all possible effort to eliminate it as well as discrimination, which is the basis of slavery. Only then can humanity hope for a better century.