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Sexual Slavery and the International Criminal Court: Advancing International Law

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SEXUAL SLAVERY AND THE INTERNATIONAL CRIMINAL COURT: ADVANCING INTERNATIONAL LAW

*Valerie Oosterveld**

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Sexual slavery is an unfortunate fact of armed conflicts around the world. For example, during World War II, more than 200,000 girls and women were enslaved in so-called “comfort stations” associated with the Japanese Imperial Army located throughout Asia.¹ In more recent armed conflicts, girls and women have been forced into sexual slavery in East and West Timor,² the former Yugoslavia,³ Angola,⁴ Côte d’Ivoire,⁵

1. *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. Comm’n on Hum. Rts., Sub-Comm’n on the Promotion and Protection of Hum. Rts., 52d Sess., Agenda Item 6, ¶ 71, U.N. Doc. E/CN.4/Sub.2/2000/21 (2000) [hereinafter *McDougall 2000 Report*]; *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. Comm’n on Hum. Rts., Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, 50th Sess., App. ¶ 1, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter *McDougall 1998 Report*]. While the issue of sexual slavery touches on the mandates of several Special Rapporteurs within the United Nations system, two in particular have addressed the crime in detail, the Special Rapporteur on contemporary forms of slavery, systematic rape, sexual slavery and slavery-like practices during armed conflict and the Special Rapporteur on violence against women, its causes and consequences.

2. An international commission of inquiry appointed by the Secretary-General of the United Nations found evidence that the militia in East Timor subjected women to humiliation and different forms of harassment, including stripping and sexual slavery, in 1999. *Identical Letters Dated 31 January 2000 from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, U.N. GAOR, 54th Sess., ¶ 127, U.N. Doc. A/54/726 (2000) (attaching the East Timor Commission’s report). In her 2001 report, the Special Rapporteur on Violence Against Women notes “numerous, credible reports that women are used as forced labourers and sex slaves” in West Timor. *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2000/45, Violence Against Women Perpetrated and/or Condoned by the State during Times of Armed Conflict (1997–2000)*, U.N. Comm’n on Hum. Rts., 57th Sess., ¶ 90, U.N. Doc. E/CN.4/2001/73 (2001) [hereinafter *Coomaraswamy Report*].

3. *Prosecutor v. Kunarac et al.*, ICTY Case No. IT-96-23-T & IT-96-23/1-T (ICTY Trial Chamber Feb. 22, 2001), available at <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>, *aff’d*, (ICTY Appeals Chamber June 12, 2002), available at <http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.pdf> (finding the two accused guilty of enslavement for sexual purposes as a crime against humanity).

4. Human Rights Watch, *Angola Unravels: The Rise and Fall of the Lusaka Peace Process* (1999), at <http://www.hrw.org/reports/1999/angola/index.htm> (last visited Feb. 6, 2004). “UNITA’s rape and enslavement of women and girls for sex is not only a vicious expression of power over the individual, but also a means of expressing dominance over the community and acts as a reward system for UNITA soldiers and commanders”. *Id.*

5. Human Rights Watch, *Trapped Between Two Wars: Violence Against Civilians in Western Côte d’Ivoire* (2003), at <http://www.hrw.org/reports/2003/cotedivoire0803/>

Democratic Republic of Congo,⁶ Rwanda,⁷ Sierra Leone,⁸ Sudan,⁹ Uganda,¹⁰ and other countries. Sexual slavery is also prevalent during peacetime, in the form of trafficking for sexual purposes. 700,000 human beings—mostly women and girls—are trafficked into sexual exploitation and forced labour every year.¹¹ They are bought and sold, kidnapped, deceived and coerced into being trafficked within and across borders in all regions.¹² While clearly a global problem, sexual slavery was not recognized under international law as a crime against humanity, nor as a war crime, until 1998, when it was explicitly included in the Rome Statute of the International Criminal Court (ICC).¹³ The finalization of the ICC's Elements of Crimes in 2000 resulted in another important step forward in international law, as the specific elements of the crime of sexual slavery were enumerated for the first time.¹⁴

index.htm (last visited Feb. 6, 2004) (describing sexual slavery committed by Ivorian rebel groups and Liberian fighters).

6. *Report on the Situation of Human Rights in the Democratic Republic of the Congo, Submitted by the Special Rapporteur, Ms. Julia Motoc, in Accordance with Commission on Human Rights Resolution 2002/14*, U.N. Comm'n on Hum. Rts., 59th Sess., ¶ 66, U.N. Doc. E/CN.4/2003/43 (2003) [hereinafter *Motoc Congo Report*].

7. HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* 52–62 (1996) (describing cases of collective and individual sexual slavery, including forced “marriage” during and after the genocide).

8. *McDougall 2000 Report*, *supra* note 1, at ¶ 17; HUMAN RIGHTS WATCH, *WE’LL KILL YOU IF YOU CRY: SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT* (2003) [hereinafter *WE’LL KILL YOU IF YOU CRY*] (describing sexual slavery by rebel forces during the decade-long armed conflict in Sierra Leone); PHYSICIANS FOR HUMAN RIGHTS, *WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE: A POPULATION-BASED ASSESSMENT* 50 (2002) (describing the results of a survey in which respondents reported incidents of sexual slavery).

9. Asma Abdel Halim, *Attack with a Friendly Weapon*, in *WHAT WOMEN DO IN WAR-TIME: GENDER AND CONFLICT IN AFRICA* 85, 92–96 (Meredith Turshen & Clotilde Twagiramariya eds., 1998) (describing sexual slavery in Sudan).

10. *Abduction of Children from Northern Uganda: Report of the Secretary-General*, U.N. Comm'n on Hum. Rts., 55th Sess., ¶ 5, U.N. Doc. E/CN.4/1999/69 (1999).

11. *The United Nations Response to Trafficking in Women and Girls*, Division for the Advancement of Women, Dep't of Econ. and Social Affairs, U.N. Doc. EGM/TRAF/2002/WP.2 (2002), available at <http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/WP-DAW.PDF> (last visited May 19, 2004).

12. The link between peace and war is a lucrative one for traffickers, who often target conflict and post-conflict zones for women and girls to traffic, and traffic women and girls into armed conflict zones to sexually service combatants. *Coomaraswamy Report*, *supra* note 2, at ¶ 53.

13. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), 37 I.L.M. 999, 1004, 1008, 1009 (entered into force Jul. 1, 2002) [hereinafter *Rome Statute*].

14. The Elements of Crimes document was included in the report of the Preparatory Commission sent to the Assembly of States Parties. *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes*, Preparatory Comm'n for the International Criminal Court, addendum part II, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter *Elements of Crimes*].

There was widespread agreement that the crime of sexual slavery needed to be specifically named in the Rome Statute. It was not only an obvious codification of a specific kind of slavery increasingly recognized as a major problem worldwide, but it was also a contemporary and more correct way to describe certain harms that might otherwise have been narrowly referred to as “enforced prostitution” in an earlier era. With the addition of sexual slavery as a defined crime, the previous international law paradigm, which has cast crimes of sexual violence as crimes related solely to the honor and dignity of the victim, was definitively shifted.¹⁵ The ICC’s Elements of Crimes also rightly refocused attention on the actions of the perpetrator, who exercises powers attaching to the right of ownership over another person and forces that person to engage in sexual acts. This definition clearly links the crime of sexual slavery with the well-recognized and widely condemned crime of enslavement.

The inclusion of the crime of sexual slavery in the Rome Statute occurred without much debate, and has since been recognized as simply reflecting customary law.¹⁶ However, certain questions did arise during the negotiations that deserve exploration. For example, some asked whether and how sexual slavery differed from enforced prostitution. Others asked whether and how sexual slavery was different from enslavement. More questions arose during the drafting of the ICC’s Elements of Crimes. Must a person be bought or sold for money (or pecuniary exchange) in order for the crime to be considered sexual slavery? Does pecuniary exchange differentiate sexual slavery from enforced prostitution? While all agreed that the elements of the crime of sexual slavery should be based, at least in part, on the definition of slavery found in international instruments, some asked how the exercise of powers attaching to the right of ownership might be demonstrated in the case of sexual slavery. In addition, others asked if the clearly overlapping circle should be completed, linking the crimes of enslavement, trafficking in persons and sexual slavery. These discussions mirrored, to some

15. Kristen Boon, *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 630–31 (2001). According to Boon:

The ICC Statute shifts the legal framework of sexual crimes in armed conflict from assuming that the central legal harm is the violation of honor, to considering the harms to the victim’s bodily integrity and infringement of their agency. This structure signals a new paradigm for the international criminalization of sexual crimes—one based on broader principles of human dignity, autonomy, and consent.

Id. This article explores how the crime of sexual slavery is clearly a part of that paradigm shift.

16. Antonio Cassese, *Crimes Against Humanity*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 374–75 (Antonio Cassese et al. eds., 2002).

extent, the wider discussions on sexual agency and control over one's body that surrounded all of the crimes of sexual violence. For example, the discussion of the exercise of powers attaching to ownership took into account the same concerns and issues as those raised during the drafting of the Rules of Procedure and Evidence on the principles of evidence of consent and prior sexual conduct in cases of sexual violence. The outcome of these debates on sexual autonomy (and loss of such autonomy) affected how the elements of the crime of sexual slavery were ultimately described.

This Article explores the advancement of the international crime of sexual slavery, from its initial inclusion in the Rome Statute of the International Criminal Court through further development in the delineation of the ICC's Elements of Crime document. This Article begins with a detailed exploration of the negotiation process that led to the inclusion of the crime of sexual slavery in the Rome Statute. The first Section describes the decision to include both sexual slavery and enforced prostitution as crimes, as well as the debate on listing sexual slavery as a crime separate from that of enslavement. Next, the Section turns to the listing of sexual slavery as a crime against humanity in the Statute of the Special Court for Sierra Leone. The second Section begins with the history of the drafting of the elements for sexual slavery in the Elements of Crime. This Section outlines various debates, such as those related to pecuniary exchange as an aspect of either slavery or enforced prostitution. Criticism of the elements of crime for sexual slavery is then explored. The third and final Section compares the approaches of the ICC and the International Criminal Tribunal for the Former Yugoslavia with respect to the crime of sexual slavery. The Article concludes by noting that the inclusion of sexual slavery in two important legal documents—the Rome Statute and the Statute of the Special Court for Sierra Leone—marks a turning point in the overt recognition of a particular form of slavery affecting many people worldwide, especially women and girls.

Given the prevalent nature of sexual slavery during peacetime and wartime, it is not surprising that the first two situations being examined by the Prosecutor of the International Criminal Court potentially involve occurrences of sexual slavery. On July 16, 2003, the ICC's Prosecutor announced that he was closely following the situation in Ituri, Democratic Republic of Congo (DRC).¹⁷ The Prosecutor noted that crimes

17. Press Release, Prosecutor of the International Criminal Court, Communications Received by the Office of the Prosecutor of the ICC 2 (July 16, 2003), available at http://www.icc-cpi.int/library/newspoint/mediaalert/pids009_2003-en.pdf (last visited July 8, 2004). On June 23, 2004, the Prosecutor announced his decision to open the first investigation of the ICC, to investigate crimes allegedly committed in the territory of the DRC: Press

specifically targeting women have been reported as taking place frequently in Ituri, including rape and other forms of sexual violence.¹⁸ The United Nations Special Rapporteur on the situation of human rights in the DRC specifically mentioned the targeting of women and children by armed groups in Ituri, and recurrent sexual violence, including sexual slavery, in the area.¹⁹ In addition, human rights organizations such as Amnesty International and Human Rights Watch have reported that “thousands of women and girls have been abducted from their homes and forced to remain with armed groups as sexual slaves.”²⁰ On January 29, 2004, the ICC announced that the President of Uganda had decided to refer the situation concerning the Lord’s Resistance Army (LRA) to the Prosecutor.²¹ After considering the request, the Prosecutor determined that there was a sufficient basis to start planning for the ICC’s first investigation.²² There are numerous reports of girls and women being kidnapped by the LRA and subjected to forced “marriage.”²³ Girls as young as 12 are given to commanders as “wives” and each soldier may have several such wives.²⁴ Many of these “wives” have become pregnant and have contracted sexually transmitted diseases.²⁵ Human Rights Watch has reported that abducted girls are initially assigned to commanders as domestic servants and, after puberty, as “wives.” These “wives” are subjected to sexual and other abuse, with many girls giving

Release, Prosecutor for the International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004), available at <http://www.icc-cpi.int/newspoint/pressrelease/26.html> (last visited July 23, 2004).

18. *Id.* at 3.

19. *Motoc Congo Report*, *supra* note 6, at ¶¶ 20, 36, 66.

20. AMNESTY INTERNATIONAL, DEMOCRATIC REPUBLIC OF CONGO: ADDRESSING THE PRESENT AND BUILDING A FUTURE 5 (2003); *see also* HUMAN RIGHTS WATCH, POLICY PARALYSIS: A CALL FOR ACTION ON HIV/AIDS-RELATED HUMAN RIGHTS ABUSES AGAINST WOMEN AND GIRLS IN AFRICA 59 (2003), at <http://www.hrw.org/reports/2003/africa1203/index.htm> [hereinafter HRW CALL FOR ACTION] (noting: “In many cases in the eastern DRC, combatants abducted women and girls and took them to their bases in the forest where they forced them to provide sexual services and domestic labor, sometimes for periods of more than a year.”)

21. Press Release, International Criminal Court, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC (Jan. 29, 2004), available at <http://www.icc-cpi.int/newspoint/pressreleases/16.html> (last visited July 8, 2004).

22. *Id.*

23. Human Rights Watch has reported that the LRA has abducted, by a conservative estimate, more than 20,000 children and subjected them to brutal treatment as soldiers, laborers and sex slaves, noting that UNICEF in fact reported to Human Rights Watch that over 38,000 adults and children have been abducted during the course of the conflict. HRW CALL FOR ACTION, *supra* note 20, at n.196 (2003).

24. *Abduction of Children from Northern Uganda, Report of the Secretary-General*, *supra* note 10, at ¶ 5.

25. *Id.*

birth in the bush with only other young girls to assist them.²⁶ Given the incidence of sexual slavery in the Democratic Republic of Congo and northern Uganda, this crime is therefore likely to be one of the first gender-based crimes to be considered by the International Criminal Court.

I. INCLUSION OF SEXUAL SLAVERY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

A. *History of the Negotiation Process*

The crime of sexual slavery did not appear in the draft ICC Statute until December 1997, mirroring the relatively slow, piecemeal inclusion of other kinds of sexual violence crimes throughout the negotiations.²⁷ The International Law Commission's 1994 Draft Statute for an ICC simply listed the crimes of genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and treaty-based crimes, without enumeration of the content of each crime.²⁸ At the 1995 Ad Hoc Committee discussions of this Draft Statute, some delegations called for the inclusion of rape and other similar offences in any elaboration of war crimes and crimes against humanity

26. HRW CALL FOR ACTION, *supra* note 20, at 66.

27. Discussions on the ICC Statute took place over a number of years, in 1995 in the Ad Hoc Committee for the Establishment of an International Criminal Court, from 1996–1998 in the Preparatory Committee for the Establishment of an International Criminal Court and from June 15–July 17, 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Preparatory Commission for the International Criminal Court took place from 1999–2002, to discuss certain subsidiary documents related to the ICC, such as the Elements of Crimes and Rules of Procedure and Evidence.

28. *Report of the International Law Commission on the Work of its Forty-Sixth Session: Draft Statute for an International Criminal Court*, U.N. GAOR, 49th Sess., Supp. No. 10, art. 20, annex, U.N. Doc. A/49/10 (1994) [hereinafter *ILC Draft Statute*]. The annex listed, *inter alia*, the Geneva Conventions and Protocol I Additional to the Geneva Conventions. Certain crimes of sexual violence, such as rape and enforced prostitution could therefore be considered to be included in the draft Statute by reference, as they are included in Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306 (entered into force Oct. 21, 1950); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, arts. 75, 76, 16 I.L.M. 1391, 1423–25 (1977) [hereinafter Protocol I]; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, art. 4, 16 I.L.M. 1442, 1444 (1977) [hereinafter Protocol II]. As well, in its commentary to Article 20, the International Law Commission referenced Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, which includes *inter alia* rape as a crime against humanity: *ILC Draft Statute, supra*, at ¶ 14.

falling under the jurisdiction of the ICC.²⁹ The negotiations in 1996 and early 1997 saw many different delegations struggling with how to identify and list these “other similar offences.” There were various proposals to add crimes of sexual violence, either in the text or in footnotes, into the war crime of outrages on personal dignity, into the war crime of violence to the life, health and physical or mental well-being of persons, or to list rape and other sexual violence crimes in a separate category apart from other crimes.³⁰ Many delegations felt that the separate listing was

29. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, ¶¶ 76, 78, U.N. Doc. A/50/22 (1995) (summarizing the discussion on listing rape and other similar offences as serious violations of the laws and customs applicable in armed conflict).

30. Proposals were made during the 1996 negotiations to include “rape committed on national or religious grounds,” “rape, other serious assaults of a sexual nature, such as forced impregnation,” or outrages on personal dignity, in particular humiliating and degrading treatment, rape or enforced prostitution. *ICC Establishment Report*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 98, U.N. Doc. A/51/22 (1996). The end result was the inclusion of the crime against humanity of “rape [or other serious assaults of a sexual nature],” with no agreement on whether to enumerate further the kinds of serious assaults that might fall under this heading, and the inclusion of the war crime of “violence to the life, health and physical or mental well-being of persons, in particular murder, manslaughter, [rape] [and sexual violence]. . . .” *ICC Establishment Report, Volume II (Compilation of Proposals)*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶¶ 61, 66, U.N. Doc. A/51/22 (1996). In February 1997, gender-based crimes against humanity were again discussed, with the text amended to include “rape or other sexual abuse [of comparable gravity,] or enforced prostitution”. In addition, the crime of gender-based persecution was listed, albeit with the reference to gender in brackets. *Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997*, U.N. GAOR, Preparatory Comm. on the Establishment of the Int’l Criminal Ct., 4–5, U.N. Doc. A/AC.249/1997/L.5 (1997). This represented progress, as the lack of brackets on rape, other sexual abuse and enforced prostitution meant widespread agreement had been reached that these crimes should be listed. “Outrages on personal dignity, in particular rape, enforced prostitution and other sexual violence of comparable gravity” was included as unbracketed text under the enumeration of “other serious violations of international humanitarian law,” demonstrating further agreement. *Id.* at 11, ¶ n. A proposal was also made to enlarge the understanding of the grave breach of “willfully causing great suffering, or serious injury to body or health” to include “rape, enforced prostitution and other sexual violence of comparable gravity”, but this proposal remained bracketed. *Id.* at 6, ¶ c. No agreement was possible for the listing of serious violations of Article 3 common to the four Geneva Conventions in the case of internal armed conflicts. Three different sets of proposed wording were included in brackets:

[outrages upon personal dignity, in particular humiliating and degrading treatment [rape and enforced prostitution];]

[outrages upon personal dignity, in particular rape, enforced prostitution and other sexual violence of comparable gravity;]

[willfully causing great suffering, serious injury to body or health, including rape, enforced prostitution and other sexual violence of comparable gravity].

Id. at 12, ¶ c.

The February 1997 negotiations therefore led to certain advances in recognizing a range of sexual violence crimes, with the enumeration of enforced prostitution and the inclusion of a “basket” clause recognizing other forms of sexual violence, but also demonstrated a fair

warranted, as they were concerned that listing sexual violence crimes as “outrages on personal dignity” would represent a step backward, and send the outdated and potentially harmful message that these violent, physical crimes were to be evaluated based on the harm done to the victim’s honour, modesty or chastity.³¹

A breakthrough came at the December 1997 negotiations, when delegations widely supported a proposal to further delineate the list of sexual violence crimes. At that session, war crimes were again discussed and a proposal was put forward to include under the listing of “other serious violations of the laws and customs applicable in international armed conflict” a list of sexual violence crimes separate from the listing for the crime of “outrages on personal dignity.” This new list included “committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and other sexual violence amounting to a grave breach of the Geneva Conventions.”³² This list was replicated in the section for “other serious violations of the laws and customs applicable in armed conflicts not of an international character,” albeit with a final reference to Article 3 common to the four Geneva Conventions instead of grave breaches.³³ Nongovernmental organizations such as the Women’s Caucus for Gender Justice in the International Criminal Court

amount of disagreement as to exactly where and how sexual violence crimes should be included.

31. Delegates were aware of the criticism of such a categorization made by various academics. See, e.g., Judith G. Gardam, *The Law of Armed Conflict: A Gendered Regime?*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 171 (Dorinda G. Dallmeyer ed., 1993); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women In Humanitarian Law*, 5 *HASTINGS WOMEN’S L.J.* 243 (1994); Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 *INT’L & COMP. L.Q.* 55 (1997).

32. *Informal Working Paper on War Crimes*, U.N. GAOR, Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Definitions and Elements of Crimes, at 4, U.N. Doc. A/AC.249/1997/WG.1/CRP.8 (1997) (changing the final portion of the proposal to read “also constituting a grave breach of the Geneva Conventions.”); see also *Decisions Taken by the Committee at its Session Held From 1 to 12 December 1997*, U.N. GAOR, Preparatory Committee on the Establishment of an International Criminal Court, at 11, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997). A similar listing was proposed by the nongovernmental organization, the Women’s Caucus for Gender Justice in the International Criminal Court: “rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other sexual and gender violence. . . .” Women’s Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary for December 1997 Prep. Com., Part III: War Crimes, Recommendation 7* (Dec. 1–12, 1997) [hereinafter *Women’s Caucus Recommendations*].

33. *Decisions Taken by the Preparatory Committee at its Session Held 1 to 12 December 1997*, *supra* note 32, at 14, ¶ e. Agreement was also reached in these negotiations to exclude “rape, enforced prostitution and other sexual violence of comparable gravity” from the listing of grave breaches, in order to simply replicate the language of the Geneva Conventions for the crime of “willfully causing great suffering, or serious injury to body or health.” This was considered a consequential change stemming from the inclusion of the detailed list. *Id.* at 4; see also *Informal Paper on War Crimes*, *supra* note 32, at 5 n.4.

lobbied for the inclusion of such a list, and for sexual slavery to be included within that list.³⁴ The vast majority of delegations stated their support for the new list, with a small number of delegations preferring other language. There was one proposal, by the Holy See, to delete the reference to “sexual slavery, enforced prostitution, enforced pregnancy” in the list and add instead a separate subsection listing “enslavement or any other kind of involuntary servitude that emerges from the theatre of war or armed conflict”.³⁵ However, this proposal was not adopted.³⁶ The March 1998 negotiations did not revisit the sexual violence crimes³⁷ and the listing of “rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and other sexual violence” was adopted without debate, apart from a passionate and lengthy debate with respect to the crime of (en)forced pregnancy, at the Rome Diplomatic Conference. A definition of “enslavement” incorporating a reference to trafficking in persons, in particular women and children, was proposed by Italy and added at the Rome Diplomatic Conference.³⁸

It is not surprising that the inclusion of the crime of sexual slavery was widely accepted by the Preparatory Committee and the Diplomatic Conference. The 1993 Vienna Declaration and Programme of Action,³⁹ the 1995 Beijing Platform for Action,⁴⁰ resolutions of the Commission on

34. Women’s Caucus Recommendations, *supra* note 32, at 10–11. The Women’s Caucus also argued that the range of actions that could be considered sexual slavery was wide, including taking women as “temporary wives” and forced “temporary marriage” as well as holding women in prisons, occupied towns and rape camps where they are held and repeatedly raped. *Id.*

35. *Proposal submitted by the Holy See*, U.N. GAOR, Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/1997/WG.1/DP.12 (1997) [hereinafter Holy See Proposal].

36. This proposal was likely not directed at the reclassification of the crimes of sexual slavery and enforced prostitution, but rather at the deletion of the crime of forced pregnancy. Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS* 357, 365–66 (Roy S. Lee ed., 1999).

37. Except for a proposal from the Holy See with respect to the crime of enforced pregnancy: see Holy See Proposal, *supra* note 35.

38. Rome Statute, *supra* note 13, art. 7(1)(c), 37 I.L.M. at 1004. As defined in 7(2)(c), “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” *Id.* at 1005.

39. Vienna Declaration and Programme of Action, U.N. Secretariat, U.N. Doc. A/CONF.157/23 (1993) states at Part II, ¶ 38: “Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular, murder, systematic rape, sexual slavery and forced pregnancy, require a particularly effective response.”

40. Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995) states at ¶ 114: “Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy.” See also *id.* ¶¶ 132, 135.

Human Rights⁴¹ and reports of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict⁴² had all used the term when listing crimes commonly committed against women in situations of armed conflict. In addition, the plight of the World War II “comfort women” had become well known by that time, with many referring to these women as military sexual slaves.⁴³ The Special Rapporteur on violence against women, its causes and consequences issued a report in 1996 stating that she “holds the opinion that the practice of ‘comfort women’ should be considered a clear case of sexual slavery and a slavery-like practice . . .”⁴⁴ These references all provided evidence that the crime of sexual slavery had entered customary international law, and therefore was appropriate to include in the ICC Statute.⁴⁵

There were two questions raised among delegates, both in the negotiations and in corridor discussions, regarding the crime of sexual slavery. The first question was ‘what is the difference between enforced prostitution and sexual slavery?’ The second question was captured in the proposal by the Holy See to delete the reference to sexual slavery, enforced prostitution and enforced pregnancy and replace it with a new subsection on enslavement: ‘how is sexual slavery different from the crime of enslavement, and if it is subsumed within that crime, why should it be listed?’

41. See, e.g., The Elimination of Violence Against Women, U.N. Comm’n on Hum. Rts. Res. 1998/52, U.N. ESCOR, Comm’n on Hum. Rts., 52d mtg., at 172, ¶ 4, U.N. Doc. E/1998/23 (1998) (condemning “all violations of the human rights of women in situations of armed conflict, recognizes them to be violations of international human rights and humanitarian law and calls for a particularly effective response to violations of this kind, including in particular murder, systematic rape, sexual slavery and forced pregnancy.”) This resolution is considered annually.

42. *McDougall 2000 Report*, *supra* note 1; *McDougall 1998 Report*, *supra* note 1.

43. USTINIA DOLGOPOL & SNEHAL PARANJAPÉ, COMFORT WOMEN: AN UNFINISHED ORDEAL (1994). Some authors refer to the violations against “comfort women” as sexual slavery. See KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 74, 77, 81, 86 (1997); YAYORI MATSUI, *History Cannot be Erased, Women Can No Longer Be Silenced*, in COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS 26, 26–28 (Indai Lourdes Sajor ed., 1998) (describing the involvement of Japanese women in seeking redress for Asian victims of Japanese military sexual slavery in World War II).

44. *Report on the Mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime: Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, U.N. Comm’n on Hum. Rts., 52d Sess., ¶ 8, U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

45. There was agreement reached in the 1997 negotiations that the crimes included in the Statute should be crimes already established under customary international law. HERMAN VON HEBEL, *The Making of the Elements of Crimes*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 3, 5 (Roy S. Lee et al. eds., 2001) [hereinafter ICC ELEMENTS AND RULES]; see also *ICC Establishment Report*, *supra* note 30, ¶ 54.

B. *Enforced Prostitution and Sexual Slavery*

The crimes of sexual slavery and enforced prostitution have long shared linkages, though, unlike sexual slavery, enforced prostitution has been listed in legal documents since the early 1900s. Initially, enforced prostitution was considered to be the end result of trafficking in women and children, and thus was addressed in a series of agreements between 1904 and 1950 prohibiting international trafficking.⁴⁶ This interconnection between enforced prostitution and trafficking continued until 1974, when the United Nations Working Group on Slavery classified trafficking in women and children for the purposes of enforced prostitution as a form of slavery.⁴⁷ This approach equating enforced prostitution, trafficking and slavery was later followed by others within the United Nations,⁴⁸ including in the 1985 Nairobi Forward-Looking Strategies, which referred to enforced prostitution as “a form of slavery imposed on women by procurers.”⁴⁹ More recently, the United Nations Working Group on Contemporary Forms of Slavery listed various categories of contemporary forms of slavery, including trafficking in people for purposes of forced prostitution (and the resulting forced prostitution), child prostitution, and the forced prostitution of women during wartime.⁵⁰ Demleitner notes: “Labeling forced prostitution “slavery” might have been considered an advancement because by subsuming the practice under a well-

46. Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 *FORDHAM INT'L L.J.* 163, 167–74 (1994). Demleitner outlines the history of the 1904, 1910, 1921, 1933 and 1950 conventions relating to trafficking and enforced prostitution.

47. *Activities for the Advancement of Women: Equality, Development and Peace*, U.N. Dep't of Int'l Economic and Social Affairs, at 6, U.N. Doc. ST/ESA/174 (1985), cited in Demleitner, *supra* note 46, at 176 n.70. This was a Working Group formed under the auspices of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights.

48. Demleitner notes that this categorization was adopted by the U.N. Commission on the Status of Women, the 1980 Report on the Exploitation on Child Labour and the 1982 Report on Slavery by Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the 1985 Nairobi Forward-Looking Strategies and the European Parliament. Demleitner, *supra* note 46, at 176–79. She notes, however, that the Special Rapporteur on Slavery listed the crime instead as a “slavery-like practice.” *Id.* at 192.

49. *NAIROBI FORWARD-LOOKING STRATEGIES: REPORT OF THE WORLD CONFERENCE TO REVIEW AND APPRAISE THE ACHIEVEMENTS OF THE UNITED NATIONS DECADE FOR WOMEN, EQUALITY, DEVELOPMENT AND PEACE* ¶ 290, U.N. Doc. A/CONF.116/28/Rev.1, U.N. Sales No. E.85.IV.10 (1986).

50. *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Report of the Working Group on Contemporary Forms of Slavery*, U.N. ESCOR, 45th Sess. 27–32, U.N. Doc. E/CN.4/Sub.2/1993/45 (1993), cited in A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 *VA. J. INT'L L.* 303, 317 (1999).

established label, it became generally viewed as a serious human rights violation.”⁵¹

Enforced prostitution has also been recognized for almost a century as a war crime. The 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, created by the Paris Peace Conference to inquire into the responsibility of those countries defeated in World War I for offences committed during the war, listed “abduction of girls and women for the purpose of enforced prostitution” in its list of war crimes.⁵² Following World War II, while the Nuremberg and Tokyo Tribunals did not prosecute the crime of enforced prostitution,⁵³ some national courts heard allegations of enforced prostitution.⁵⁴ A Netherlands court in Batavia found Washio Awochi guilty of “the war crime of enforced prostitution.”⁵⁵ The Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War included a direct reference to enforced prostitution: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁵⁶ The reference to enforced prostitution was added in recognition of the events of World War II, where thousands of women were made to enter brothels against their will.⁵⁷ Enforced prostitution was defined by the drafters of the Geneva Convention as “the forcing of a women into immorality by violence or threats.”⁵⁸ The 1977 Protocol I to the Geneva Conventions prohibits enforced prostitution at all times and expanded the scope of the law by applying it to everybody, regardless of sex.⁵⁹ Protocol II, applying to non-international armed

51. Demleitner, *supra* note 46, at 176.

52. YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 11–12 (1982).

53. This is despite the widespread nature of the “comfort women” system in areas occupied by Japan, *Report on the Mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, *supra* note 44, ¶ 11–22.

54. THEODOR MERON, WAR CRIMES LAW COMES OF AGE 206 n.13 (1998).

55. Case No. 76, Trial of Washio Awochi, in UNITED NATIONS WAR CRIMES COMMISSION, XIII LAW REPORTS 123 (1949).

56. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 28, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

57. THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY (Jean Pictet ed., 1960). This paragraph was based on a provision introduced at the Prisoner of War Convention of 1929 and a proposal submitted by the International Women’s Congress and the International Federation of Abolitionists.

58. *Id.* at 206.

59. Protocol I, *supra* note 28, arts. 75(2)(b), 76(1), 16 I.L.M. at 1423, 1425. According to COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 14 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY], this provision extends the circle of beneficiaries of the Fourth Geneva Convention—Article 75 to both sexes, and Article 76 to those who are in the territory of the

conflicts, also prohibits “outrages on personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”⁶⁰ The drafters recognized that children and adolescents can be the subject of enforced prostitution, which is why the reference was made gender- and age-neutral.⁶¹ More recently, while the crime of enforced prostitution was not specifically listed in the Statute of the International Criminal Tribunal for the Former Yugoslavia, it was considered by the Secretary-General of the United Nations, when recommending the creation of the Tribunal, as a crime against humanity.⁶² As well, the International Law Commission’s Draft Code Against Peace and Security of Mankind lists “enforced prostitution” as a crime against humanity and a war crime.⁶³

Thus, there is no doubt that it was important for the overt recognition of gender-based crimes that enforced prostitution was listed as a crime separate from rape in past international criminal and humanitarian law documents. However, the question arose during the ICC negotiations as to whether the crime of enforced prostitution (as a war crime and crime against humanity) represented an outdated reference that should be simply replaced in the Statute by a reference to sexual slavery.

Academic and nongovernmental commentators disagreed at the time, and still disagree, on the answer to that question. Some feel that sexual slavery is a broader, more sensitive—and therefore more useful—term that encompasses or replaces enforced prostitution. Others argue that both sexual slavery and enforced prostitution are different terms with different elements, and that enforced prostitution should not be considered to be subsumed within sexual slavery. Askin states that “[w]hile “(en)forced prostitution” is usually the term used when women are forced into sexual servitude during wartime, the term “sexual slavery”

Parties to the conflict, whether affected by the armed conflict, protected by the Geneva Convention, or not. *Id.* at 861, 891. The use of both “enforced” in Article 75(2)(b) and “forced” in Article 76(1) presumably was simply the result of a drafting inconsistency, as the Commentaries do not record any discussion on the use of one term versus the other.

60. Protocol II, *supra* note 28, art. 4(2)(e), 16 I.L.M. at 1444.

61. PROTOCOL COMMENTARY, *supra* note 59, art. 4(2)(e), at 1375. “Slavery and the slave trade” are also prohibited in the same paragraph in (f), and this was understood to prohibit the purchase of wives. *Id.* at 1376.

62. *Report of the Secretary-General Pursuant to Paragraph 8 of Security Council Resolution 808 (1993)*, U.N. SCOR, U.N. Doc S/25704, (1993) (commentary to art. 5(48)).

63. *Draft Code of Crimes Against the Peace and Security of Mankind, 1996*, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION, 6 MAY–26 JULY 1996, U.N. GAOR, 51st Sess., Supp. No. 10, arts. 18(j), 20(d), 20(f)(v), at 14, 94, 111–12, U.N. Doc. A/51/10 (1996). At its fifty-first session, the U.N. General Assembly recommended that the ICC Preparatory Committee consider the relevance of the Draft Code to its work: General Assembly Resolution 51/160 of 16 December 1996.

more accurately identifies the prohibited conduct.”⁶⁴ Fan notes that enforced prostitution shares the most fundamental characteristics of slavery, and while the terms might be used interchangeably, a reference to commodified sexual slavery is more accurate.⁶⁵ Argibay elaborates on this argument, stating that the term “enforced prostitution” suggests a level of voluntarism that is not present, and stigmatizes the victims; because prostitution is a crime in many countries, the use of the term “prostitution” confuses the victim and perpetrator and therefore does not communicate the same level of egregiousness as sexual slavery.⁶⁶ This confusion with respect to voluntarism perhaps stems from the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, article 1 of which obliges states to punish any person who “[p]rocur[es] [or] entic[es] . . . for prostitution, another person, even with the *consent* of that person” [emphasis added].⁶⁷ Argibay further argues, “[f]orced prostitution tends to reflect the male view: that of the organizers, procurers, and those that take advantage of the system by raping the women.”⁶⁸ She also notes that “the terms “prostitute” and “prostitution” reflect profoundly discriminatory attitudes towards women” and therefore sexual slavery is a more accurate term.⁶⁹ The Special Rapporteur on Violence Against Women takes a similar approach.⁷⁰

64. Kelly D. Askin, *Women and International Humanitarian Law*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 41, 48 n.29 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

65. Mary De Ming Fan, Comment, *The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery*, 27 YALE J. INT'L L. 395, 412–17 (2002). While Fan focuses her analysis on the issue of World War II sexual slaves, her comment is also relevant to contemporary forms of sexual slavery.

66. Carmen M. Argibay, *Sexual Slavery and the “Comfort Women” of World War II*, 21 BERKELEY J. INT'L L. 375, 387–88. Askin makes a similar argument—she is concerned that the term “enforced prostitution” could lead many to assume that the victims were compensated in a similar manner as during “voluntary” prostitution, which often involves the exchange of sex for money. Askin, *supra* note 64, at 85.

67. 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, Mar. 21, 1950, art. 1, 96 U.N.T.S. 271, 280 (1951).

68. Argibay, *supra* note 66, at 387.

69. *Id.* at 386. In this case, the author was referring to the situation of the World War II “comfort women,” but the argument can be applied in any similar case.

70. *Report on the Mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, *supra* note 44, ¶ 6 (“The Special Rapporteur would like to clarify . . . that she considers the case of women forced to render sexual services in wartime by and/or for the use of armed forces a practice of military sexual slavery.”); see also *id.* ¶ 10: (“for the purpose of terminology, the Special Rapporteur concurs entirely with the view held by members of the Working Group on Contemporary Forms of Slavery, as well as representatives of non-governmental organizations and some academics, that the phrase “comfort women” does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in

The Women's Caucus for Gender Justice in the International Criminal Court addressed this issue in their publication distributed at the December 1997 ICC negotiations. The Caucus argued that the crime of sexual slavery had been assumed in the past to be the same as enforced prostitution, but this assumption should not be repeated in the Rome Statute:

Just as the severity of rape has been diminished by calling it humiliating and degrading treatment . . . sexual enslavement has been diminished by calling it only "enforced prostitution." The term "enforced prostitution" lacks a clear legal definition and has been misapplied in the past to situations of sexual slavery and serial rape. It was originally coined early this century to describe the phenomenon of the coercing of young girls and women into brothels. It was adopted into the Geneva Conventions, and later repeated in the Protocols in response to the use of women to "service" armies during the Second World War

. . . .

The term "enforced prostitution" muffles the degree of violence, coercion and control that is characteristic of sexual slavery. It suggests that sexual services are provided as part of an exchange albeit one coerced by the circumstances

. . . .

History has taught us that most so-called "forced prostitution" during armed conflict constitutes sexual slavery.⁷¹

Clearly, commentators are concerned about the misapplication of the term "enforced prostitution" in cases that should be characterized as sexual slavery, given the potential for courts to read inherent consent into the term "prostitution."

Demleitner takes a different approach, arguing that it is more advantageous to retain a reference to the crime of enforced prostitution as a category separate from that of slavery because the concept of slavery in wartime and slavery in peacetime is different.⁷² She agrees that "during war forced prostitution is relatively easily analogized to historical forms of slavery."⁷³ However, she lists four ways in which

wartime. The Special Rapporteur, therefore, considers with conviction that the phrase "military sexual slaves" represents a much more accurate and appropriate terminology.")

71. Women's Caucus Recommendations, *supra* note 32, at 10–11.

72. Demleitner, *supra* note 46, at 193–94. Crimes against humanity can occur in peacetime and in wartime, which is why she makes the distinction.

73. *Id.* at 194.

enforced prostitution (especially in peace time) contains discrete elements that distinguish it from slavery. First, slaves do not suffer the stigma attaching to women lured or forced into prostitution. Second, prostitutes “tend to be viewed as a threat to the health of society” in a way that slaves are not. Third, women lured or forced into prostitution are often seen as needing “rehabilitation,” as opposed to slaves, who may need counseling. Lastly, slavery tends to only have one set of offenders (slave traders and owners), while customers of slave-made products are considered not liable; “customers” of prostitutes have direct contact but can similarly escape liability if analogized to slavery.⁷⁴ Askin disagrees with Demleitner, feeling that these arguments are unconvincing.⁷⁵

The Women’s Caucus for Gender Justice in the International Criminal Court, in lobbying for the addition of the crime of sexual slavery to the Statute of the International Criminal Court, also argued for retaining a reference to enforced prostitution:

[A] category of forced prostitution may exist involving less than slave-like conditions. Women may be forced to submit to serial rape in exchange for their safety or that of others or the means of survival. Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for one or more men in a dominant position of power. But even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them little more than sex slaves. The decision whether to charge someone with forced prostitution, sexual slavery or serial rape, would depend upon a thorough analysis of the facts in each case from the perspective of the woman.⁷⁶

The Special Rapporteur on systematic rape, sexual slavery and slavery-like practices takes a similar view, noting in her final report that the crime of sexual slavery encompasses most, if not all, forms of enforced prostitution, which she defines as “conditions of control over a person who is coerced to engage in sexual activity.”⁷⁷ She notes that it is likely easier to prosecute cases of enforced prostitution as sexual slavery cases, but she also recognizes that enforced prostitution remains a potential,

74. *Id.* at 195–96.

75. Askin, *supra* note 64, at 84.

76. Women’s Caucus Recommendations, *supra* note 32, at 11.

77. *McDougall 1998 Report*, *supra* note 1, ¶ 31.

albeit limited, alternative tool for future prosecutions of sexual violence in armed conflict situations.⁷⁸

Since the answer to the question of whether enforced prostitution can always be considered a form of sexual slavery, or if there are times when an act of enforced prostitution might not rise to the level of sexual slavery, was unclear, delegates opted to include both crimes in the lists of crimes of sexual violence in the Rome Statute.⁷⁹ In addition, with examples given from the serious sexual crimes committed in the former Yugoslavia and Rwanda, there was a strong presumption in favour of including gender-based crimes already listed in the 1949 Geneva Conventions (such as enforced prostitution) rather than excluding them. Thus, the inclusion of the crime of sexual slavery in the Rome Statute was more than simply renaming the crime of enforced prostitution.⁸⁰ It was a recognition that the crime of enforced prostitution might be too narrow to capture all of the violations that the crime of sexual slavery can capture⁸¹ and thus that it is appropriate to distinguish between the two crimes.⁸²

C. Enslavement and Sexual Slavery

The next issue delegates addressed was the overlap of, or difference between, the crimes of enslavement and sexual slavery. When the Holy See introduced its proposal to delete the reference to sexual slavery and replace it with a new subsection on the crime of enslavement,⁸³ some delegates asked in corridor discussions how sexual slavery was different from the crime of enslavement. They reasoned that, if sexual slavery was a form of enslavement, then the proposal of the Holy See would, if adopted, reduce overlap of crimes within the Statute. There was a desire among many delegations to avoid repetition or undue overlap within the

78. *Id.* ¶ 32–33.

79. Note that the discussion was not the other way around (enforced prostitution encompassing sexual slavery) as it was widely regarded as evident *prima facie* that slavery was a wider term than enforced prostitution.

80. Argibay refers to the identification of the crime of sexual slavery as “a long overdue renaming of the crime of enforced prostitution.” Argibay, *supra* note 66, at 387. She refers to the historical designation of the crime of enforced prostitution as not including the World War II military sexual slavery.

81. Thus, the negotiators did not come to the same conclusion as Argibay, who states: “The term “forced prostitution” describes essentially the same conduct as sexual slavery.” *Id.* at 387. Rather, enforced prostitution can be an aspect of sexual slavery, but sexual slavery can also capture a wider range of actions.

82. Askin notes that contemporary legal analyses are beginning to distinguish between enforced prostitution and sexual slavery. Askin, *supra* note 64, at 83 and n.190.

83. *Holy See Proposal*, *supra* note 35.

Statute, as well as to ensure that the Statute only contained the most serious crimes of concern to the international community as a whole.⁸⁴

Other delegates countered that clear overlap between crimes recognized under existing customary and conventional international law already exists, for example the crimes against humanity of murder and extermination, or the crimes against humanity and war crimes of torture and rape. They argued that there is a need to include an accurate and specific listing of the kinds of serious crimes that occur in today's world, such as sexual slavery. Many delegates pointed to rape camps and the detention of women to secure sexual access as examples of crimes that had occurred during the conflict in the former Yugoslavia that needed to be specifically acknowledged in the Rome Statute.⁸⁵ These delegates agreed with the Holy See and others that there was a need to ensure that the categories of crimes are clear enough to satisfy the doctrine of *nullem crimen sine lege*, but they also felt that the categories must be wide enough to capture serious violations of the future. They felt that the addition of the crime of sexual slavery satisfied both requirements, by including a description of a specific kind of enslavement with a sexual violence aspect, and by listing a contemporary example of slavery that, unfortunately, could potentially occur in many forms. In addition, these delegates felt that it was particularly important to name in the ICC Statute violations such as sexual slavery that were clearly crimes under customary international law but that had not been previously enumerated, as this would advance international law's recognition of crimes of sexual violence.⁸⁶ As well, it would bring the ICC Statute in line with international human rights law's recognition of sexual slavery as a form of slavery that should be specifically named.⁸⁷

84. This discussion resulted in the inclusion of a preambular paragraph in the Rome Statute stating: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . ." Rome Statute, *supra* note 13, pmbll., 37 I.L.M. at 1002.

85. Many referred to the "Foca" indictment issued by the International Criminal Tribunal for the Former Yugoslavia, which listed such crimes: *Prosecutor v. Gagovic et al.*, ICTY Case No. IT-96-23-I (indictment, later amended to *Prosecutor v. Kunarac et al.*, ICTY Case No. IT-96-23-T & IT-96-23/1-T).

86. They understood that the historical silence of sexual violence crimes needed to be overcome.

As Rassam notes, international *opinio juris* of the term "slavery" has evolved under United Nations practice to include a wide variety of violations, such as sex trafficking, enforced prostitution, debt bondage, and exploitation of immigrant domestic workers. Rassam, *supra* note 50, at 309. The Women's Caucus Recommendations argued: "[t]he minimization of sexual violence and the failure to condemn gender violence violate humanitarian law's core principle against discrimination based on sex." Women's Caucus Recommendations, *supra* note 32, at 4.

87. See *supra* notes 39–44, 47–51 and accompanying text.

Academics and nongovernmental organizations also supported the separate listing of enslavement and sexual slavery. Bassiouni had long proposed the inclusion of the specific form of enslavement of “sexual bondage” in the statute of an international criminal court.⁸⁸ Askin also argued that it was appropriate to list sexual slavery as a separate crime, noting that enslaving persons to perform sexual services must be an international crime just as enslaving persons to perform other services is a crime, and therefore reference to sexual slavery rather than simply enslavement more accurately identifies and appropriately characterizes the nature of the crime.⁸⁹ Argibay, writing more recently but echoing many of the arguments made at the time by the Women’s Caucus for Gender Justice in the International Criminal Court,⁹⁰ believes that it is important that both crimes are listed in the ICC Statute because there may be circumstances in which enslavement and sexual slavery charges would both be laid, with each capturing different interests or elements of the violation:

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.⁹¹

The Women’s Caucus notes that women may be forced into maternity or “temporary” marriage complete with domestic duties, both of which might have sexual and non-sexual aspects. In this situation, a Prosecutor could charge both enslavement and sexual slavery.⁹² Argibay outlines other ways the crime of enslavement might be viewed differently than the crime of sexual slavery. Under international humanitarian law, the 1907 Hague Convention IV prohibits using prisoners of war or occupied civilian populations as slaves, with the exception “for the needs of the army of occupation.”⁹³ However, there is no “necessity” argument

88. M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 147 (1987).

89. Askin, *supra* note 64, at 83.

90. Women’s Caucus Recommendations, *supra* note 32, at 10–11.

91. Argibay, *supra* note 66, at 386.

92. Women’s Caucus Recommendations, *supra* note 32, at 11.

93. Argibay, *supra* note 66, at 380–81.

that can justify subjecting a person to sexual slavery, “because sex is not a military necessity.”⁹⁴ Similarly, she cites the work of the International Labour Organization’s Committee of Experts, which examined the “comfort women” system of World War II and found that the exceptions listed in the 1930 Convention Concerning Forced Labour could never apply to military sexual slavery.⁹⁵

The arguments in favour of retaining the separate listings of the crimes of enslavement and sexual slavery—that sexual slavery is a prevalent contemporary crime warranting express recognition, that the prohibition was sufficiently established in existing law, that listing the crime increases the gender-sensitivity of the Rome Statute, and that sexual slavery is conceptually distinct from certain other forms of enslavement or slavery-like practices—proved persuasive for delegates, and both crimes remained in the Statute.⁹⁶

D. *Inclusion in the Statute of the Special Court for Sierra Leone*

The Statute of the Special Court for Sierra Leone lists sexual slavery as a crime against humanity within the jurisdiction of that Court. The inclusion of sexual slavery within the Statute was crucial, as the crime was prevalent in the decade-long armed conflict in Sierra Leone.⁹⁷ Security Council Resolution 1315 of August 14, 2000 requested the

94. *Id.* at 381.

95. The 1930 Convention prohibits forced labour but does provide for two exceptions: compulsory military service and compulsory labour in the event of a war or other calamity. The International Labour Organization’s Committee of Experts found that sexual slavery is not “work of a purely military character” as is required to engage the exception related to compulsory military service. In addition, the second exception is strictly limited to genuine public emergencies requiring immediate action and the scope and the purpose of the involuntary labour must be restricted to meeting the exigencies of the situation. Women’s sexual integrity and autonomy may never be sacrificed in the name of emergency. *Id.* at 381.

96. The International Criminal Tribunal for the Former Yugoslavia later noted that “[t]he setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not a form of enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together.” Prosecutor v. Kunarac et al., ICTY Case No. IT-96-23-T & IT-96-23/1-T, at n.1333 (ICTY Trial Chamber Feb. 22, 2001), available at <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>.

97. PHYSICIANS FOR HUMAN RIGHTS, *supra* note 8, at 50; Lynn Amowitz et al., *Prevalence of War-Related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone*, 287(4) JAMA 513 (2002); see also Human Rights Watch, *Abduction, Sexual Slavery, Forced Labour, and Conscripted*, in WE’LL KILL YOU IF YOU CRY, *supra* note 8; Human Rights Watch, *Human Rights Abuses Committed by RUF Rebels, Rape and Sexual Assault*, in SIERRA LEONE: GETTING AWAY WITH MURDER, MUTILATION, RAPE—NEW TESTIMONY FROM SIERRA LEONE (1999); Human Rights Watch, *Human Rights Abuses Committed Against Civilians*, in SOWING TERROR: ATROCITIES AGAINST CIVILIANS IN SIERRA LEONE (1998).

Secretary-General of the United Nations to submit a report to the Security Council on the establishment of an independent special court in Sierra Leone to try those who bear the greatest responsibility for the commission of crimes against humanity, war crimes and crimes under Sierra Leonean law during that country's armed conflict.⁹⁸ The Secretary-General's report, issued on October 4, 2000, recommended, *inter alia*, that the listing of crimes against humanity include "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence."⁹⁹ This list was based on the list included in the Rome Statute, as the ICC's list was the most recent codification of sexual violence crimes in international law.¹⁰⁰ There was widespread agreement among the members of the Security Council that this listing of crimes was appropriate and necessary, given the reports received from Sierra Leone.¹⁰¹ Therefore, this aspect of the Secretary-General's proposed draft was left unchanged throughout subsequent studies of the draft Statute and was adopted in the final Statute.¹⁰²

The listing of sexual slavery as a crime against humanity in the Statute of the Special Court for Sierra Leone provided important recognition for this specific form of slavery. While the Rome Statute produced the first acknowledgement of sexual slavery as a violation of international humanitarian law, the inclusion of this crime in the Statute for the Special Court for Sierra Leone solidified the concept and helped advance the international norm prohibiting sexual slavery. In addition, it is likely that the Special Court will be the first of the two institutions to prosecute an individual for the crime of sexual slavery, given the number of extant

98. S.C. Res. 1315, U.N. SCOR, 4186 mtg., ¶ 6, U.N. Doc. S/RES/1315 (2000).

99. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, at 21, U.N. Doc. S/2000/915 (2000).

100. Interview with Daphna Shrager, Senior Legal Officer, United Nations Office of Legal Affairs (Dec. 1, 2000). The list was compiled following a visit by a United Nations team (which included Shrager) to Freetown, Sierra Leone from Sept. 18–20, 2000, and did not include the crime of enforced sterilization as that crime was not reported in the conflict.

101. See, e.g., S.C. Res. 1260, U.N. SCOR, ¶ 16, U.N. Doc. S/RES/1260 (1999) (encouraging those involved in the long-term rehabilitation of child combatants in Sierra Leone to address the special needs of child victims of sexual exploitation).

102. Security Council discussions on the proposed draft Statute were reflected in a series of letters between the President of the Security Council and the United Nations Secretary-General: *Letter Dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General*, U.N. SCOR, U.N. Doc. S/2000/1234 (2000); *Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. S/2001/40 (2001); *Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General*, U.N. SCOR, U.N. Doc. S/2001/95 (2001). The Statute was signed by a representative of the United Nations Secretary-General and the President of Sierra Leone on January 16, 2002.

indictments charging this crime and the short timeline for the work of the Court.¹⁰³

II. SEXUAL SLAVERY AND THE INTERNATIONAL CRIMINAL COURT'S ELEMENTS OF CRIMES

A. History of the Negotiation Process

Article 9 of the Rome Statute states that the “Elements of Crimes shall assist the Court in the interpretation and application” of the articles listing the crimes in the Statute.¹⁰⁴ This Article was adopted late in the negotiations on the Rome Statute, and was the result of a compromise between the United States and a small group of strong proponents who wished to see a binding list of elements included in the Statute, and a large group of others who did not believe such a list was necessary.¹⁰⁵ The Elements of Crimes, which are non-binding but persuasive, were drafted in 1999 and 2000 in the Preparatory Commission that followed the adoption of the Rome Statute. The elements for the crime of sexual slavery were discussed, as part of the group of sexual violence crimes, at each session of the Preparatory Commission in 1999 and 2000. The final text of the Elements document was adopted by the ICC’s Assembly of States Parties in September 2002.¹⁰⁶

The drafting of the elements for the crime of sexual slavery led to lengthy discussions on various issues. Delegates debated whether an “attack” was required, whether the notion of “chattel” was appropriate,

103. The Special Court is expected to exist for approximately three years. Charles Taylor has been charged with rape as a crime against humanity, sexual slavery and any other form of sexual violence as a crime against humanity and outrages upon personal dignity, a violation of article 3 common to the Geneva Conventions and of Additional Protocol II. *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I (Mar. 3, 2003) (counts 6–8). Several others have been similarly charged, such as Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu. See Special Court of Sierra Leone Website, at <http://www.sc-sl.org>.

104. Rome Statute, *supra* note 13, art. 9, 37 I.L.M. at 1009–10.

105. Von Hebel, *supra* note 45, at 3. For a detailed account of the inclusion of the Elements, see *id.* at 3–18, and subsequent chapters detailing the negotiations of the elements for each crime listed in the Rome Statute.

106. This was done pursuant to Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, UN. Doc. A.CONF/183/10 (1998). The *Elements of Crimes*, *supra* note 14, was included in the Report of the Preparatory Commission sent to the Assembly of States Parties. The finalized draft text was adopted by the Assembly of States Parties without changes in September 2002. See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., ICC Doc. No. ICC-ASP/1/3 and Corr.1 (2002) [hereinafter Official Records of Parties to Rome Statute].

whether any element of purchase or sale is necessary, what might qualify as an example of the exercise of powers attaching to the right of ownership and whether and how to express these examples. The negotiations were often difficult, and thus eventually resulted in helpful, but rather inelegant, elements.

1. United States Proposal: "Attack" and "Universally Recognized"

The United States was the first country to make a proposal on the elements for the war crime and crime against humanity of sexual slavery.¹⁰⁷ These two proposals were similar, albeit with certain different, more general, elements required for all war crimes in international and internal armed conflicts and crimes against humanity. The common elements were: 1) "[t]hat the accused intended to attack one or more persons by causing them to engage in acts of a sexual nature;" 2) "[t]hat the accused deprived one or more persons of their liberty;" and 3) "[t]hat the accused, through force or threat, caused the person or persons to engage in acts of a sexual nature." The United States appended the same comment to each proposal, elaborating on the intended expansive meaning of the terms "deprived" and "deprivation:" "Besides physically detaining or confining a person to a particular place without consent, the deprivation of liberty required by this offence could also include severe deprivations of autonomy and freedom of movement, which are universally recognized as impermissible under international law."¹⁰⁸ As well, the U.S. proposal recognized that the elements of the sexual violence crimes could also constitute an essential element of some other

107. The United States issued its proposal at the first session of the Preparatory Commission, in February 1999. *Proposal submitted by the United States of America: Draft Elements of Crimes*, Preparatory Comm'n for the Int'l Criminal Ct., U.N. Doc. PCNICC/1999/DP.4/Add.1 (1999) [hereinafter *U.S. Crimes Against Humanity Proposal*]; *Proposal submitted by the United States of America: Draft Elements of Crimes*, Preparatory Comm'n for the Int'l Criminal Ct., U.N. Doc. PCNICC/1999/DP.4/Add.2 (1999) [hereinafter *U.S. War Crimes Proposal*]. Some delegations were aware of academic proposals for elements of crimes for sexual slavery. For example, Bassiouni had proposed the following elements for the crime of sexual bondage: "an institution or practice whereby a person is forcibly transferred or held for the purpose of performing any sexual conduct whatsoever, whether for reward or not." BASSIOUNI, *supra* note 88, art. VII (1.2)(e), at 147. Askin proposed the following elements for the crime of enforced prostitution: "(a) That the accused unlawfully forced or coerced a certain named or described person to engage in sexual acts; and (b) As a result of the force or coercion, the person's reproductive capacity was affected." ASKIN, *supra* note 43, at 398. Askin did not include the crime of sexual slavery in her proposed definitions of sex crimes, therefore this definition was considered helpful when considering the crime of sexual slavery, as well as the crime of forced prostitution.

108. *U.S. Crimes Against Humanity Proposal*, *supra* note 107, at 6; *U.S. War Crimes Proposal*, *supra* note 107, at 15-16.

offence under the Statute, such as torture or enslavement.¹⁰⁹ The U.S. proposal came under some criticism because delegations were concerned about the use of the word “attack” in the first element, fearing that this word was inappropriate and could set an unnecessarily high threshold for the Prosecutor to meet. Delegates also had problems with the comment on “deprived” and “deprivation,” which, by using the term “universally recognized as impermissible under international law,” could also wrongly set an unduly high threshold—one not normally seen (indeed, one expressly avoided) in international instruments.

2. Costa Rica, Hungary and Switzerland Proposal: “Chattel”

In July 1999, Costa Rica, Hungary and Switzerland therefore proposed a different set of elements for the war crime of sexual slavery, drafted to avoid the problems raised by the U.S. proposal: “The perpetrator treated a person as chattel by exercising any or all of the powers attaching to the right of ownership, including sexual access through rape or other forms of sexual violence.” Generally, this proposal more closely tracked the definition of enslavement found in the Rome Statute¹¹⁰ and reflected the definition of sexual slavery set out by the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices.¹¹¹ However, the reference to chattel in the Swiss proposal was an addition not found in either the definition of enslavement in the Rome Statute, nor the definition of sexual slavery set out by the Special Rapporteur, though the Special Rapporteur did refer in her reports to sexual slavery as “involving the treatment of women as chattel.”¹¹² Many delegations

109. *U.S. War Crimes Proposal*, *supra* note 107, at 15 (“It should be noted that the existence of specific crimes of sexual violence in articles 8.2(b)(xxii) and 8.2(e)(vi) does not undermine the fact that those same acts might constitute the essential element of some other offence under the Statute.”).

110. The enslavement definition in the ICC Statute states: “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children,” Rome Statute, *supra* note 13, art. 7(2)(c), 37 I.L.M. at 1005; *see also Proposal submitted by Costa Rica, Hungary & Switzerland on certain provisions of Article 8 para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)*, Preparatory Comm’n for the Int’l Criminal Ct., Working Group on Element of Crimes, at 4, U.N. Doc. PCNICC/1999/WGEC/DP.8 (1999) [hereinafter *Costa Rica, Hungary, & Switzerland Proposal*].

111. The Special Rapporteur defined 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.” *McDougall 1998 Report*, *supra* note 1, ¶ 27.

112. *Id.* ¶ 8. The Women’s Caucus for Gender Justice recommended deletion of the “chattel” reference as inconsistent with the Rome Statute and international law, since “to be reduced to chattel generally refers to a form of moveable property (as opposed to property in

felt that the reference to chattel was outdated, inappropriate¹¹³ and imprecise, and unduly linked the concept of sexual slavery to the issue of ownership of saleable property. Others noted that present-day forms of enslavement as a crime against humanity were not meant to capture classic concepts of chattel slavery.¹¹⁴

3. United States Proposal: Purchase or Sale Requirement

At the July 1999 session, a small, informal drafting group, consisting of a number of interested delegations, quickly agreed on a general approach to the elements for sexual slavery.¹¹⁵ The first element would define the concept of slavery, and this definition would also be applied to the crime against humanity of enslavement, and the second element would describe the sexual aspect of the crime.¹¹⁶ Once the decision was made to link the elements of enslavement and sexual slavery, the U.S. proposal on the elements of the crime against humanity of enslavement came under criticism. Many delegations felt that the U.S. proposal included a requirement that should not be linked to either enslavement or sexual slavery: "That the accused either purchased or sold one or more persons or deprived them of their liberty and forced them to do labour without compensation."¹¹⁷ Many criticized the U.S. proposal's reference to purchase or sale as too limited, because both purchase and sale have

land) and is an example of exercising *all* [as opposed to "any" of] the powers of ownership." Women's Caucus for Gender Justice, *Recommendations & Commentary for the Elements Annex, Submitted to the Preparatory Comm'n for the Int'l Criminal Ct.* 9–10 (July 26–Aug. 13, 1999) (on file with author).

113. Eve La Haye, *Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence*, in ICC ELEMENTS AND RULES, *supra* note 45, at 191.

114. Roger S. Clark, *Crimes Against Humanity and the Rome Statute of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 75, 83 (Mauro Politi & Giuseppe Nesi eds., 2001).

115. La Haye, *supra* note 113, at 191.

116. *Id.*

117. *U.S. Crimes Against Humanity-Proposal*, *supra* note 107, at 4. Another element of the proposal on enslavement came under criticism: "That the deprivation of liberty or forced labour was without, and the accused knew it was without, lawful justification or excuse." *Id.* Delegates argued that this was not an appropriate element for an offence, because it blurred the difference between the elements of an offence on the one hand, and defence by an accused, on the other. The issue was ultimately resolved by including two paragraphs in the General Introduction that stated: "5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime. [footnote omitted] 6. The requirement of "unlawfulness" found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements." *Id.* For a more detailed explanation, see Maria Kelt & Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, in ICC ELEMENTS AND RULES, *supra* note 45, at 38–39.

commercial or pecuniary connotations and slavery can occur as a result of non-commercial and non-pecuniary methods such as force, coercion, threats, and deceit. Some noted that the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict had emphatically stated that, under customary international law, there are no requirements of any payment or exchange for the crime of sexual slavery.¹¹⁸

The United States conceded that the reference to purchase or sale might be too limiting, but it was concerned that simply reproducing the definition of enslavement found in the Rome Statute might be too imprecise to satisfy the doctrine of *nullem crimen sine lege*. The United States put forward the idea of including an illustrative list of actions that qualify as the exercise of powers attaching to the right of ownership, in order to capture enslavement methods without a commercial or pecuniary aspect. In addition to comments on the reference to purchase and sale, others criticized the direct link in the U.S. proposal between the accused and the purchase or sale. They believed that this might exclude those who facilitate slavery but who are not directly involved in the actual exploitation. Lastly, some delegations questioned the reference to labour without compensation, because slavery with compensation should also be recognized as a crime.¹¹⁹

4. Inclusion of an Illustrative List: Debate over the Content of the List and “Similar Deprivation of Liberty”

The outcome of the “elements” discussions was a rolling text, the relevant portions of which were:

2. The accused exercised a power 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.
3. The accused caused such

118. *McDougall 1998 Report*, *supra* note 1, ¶ 28; *see also McDougall 2000 Report*, *supra* note 1, ¶¶ 8, 29, 50; Askin, *supra* note 64, at 85. Note that two commentaries do not contain a pecuniary aspect. *See* 4 THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, *supra* note 57, at 205–06; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 14 AUGUST 1949, *supra* note 59 arts. 75, 76.

119. *See, e.g., Women’s Caucus for Gender Justice, Recommendations and Commentary for the Elements Annex, Part I, Submitted to the Preparatory Comm’n for the Int’l Criminal Ct.* 10 (Nov. 29–Dec. 17, 1999) (“Enslavement is not negated by compensation to the victim. Payment of other benefit received for labour does not preclude the crime of either enslavement or sexual slavery”) (citing Askin, *supra* note 64, at 85) (on file with author). Debt bondage usually involves some form of compensation even if inadequate. Forced labour can be paid labour. Rather, it is the loss of ownership rights to one’s self that makes forced labour sexual slavery, even if one is given some money or other compensation.

a person or persons to engage in one or more acts of a sexual nature.”¹²⁰

This rolling text eliminated the reference to chattel, kept the definition of enslavement as set out in the Rome Statute, included an open list of examples (through the “such as”) of how the right of ownership might be exercised, and made the specific link to the sexual aspect of sexual slavery.

Further, in-depth, debate on the elements for the crimes of enslavement and sexual slavery took place at the December 1999 session of the Preparatory Commission. A general proposal on crimes against humanity submitted by Canada and Germany reproduced the August rolling text, albeit with a footnote stating that the authors remained open to improvements in the drafting of the provision.¹²¹ However, the need for a change in the provision was immediately clear in the negotiations. Many delegations stated that they were uncomfortable with the second element for two reasons: first, the illustrative list of ways in which the right of ownership might be exercised was still too narrow, although wider than the original U.S. proposal for enslavement, and unduly focused on examples with a commercial or pecuniary aspect, and second, the use of the term “similar deprivation of liberty” compounds the problem of the narrow list because “similar” could be read to mean “similar to actions with a commercial or pecuniary nature”. They were concerned that, without any additional examples, the ICC’s judges would read the elements as a signal that some kind of commercial or pecuniary exchange was required before an action could be called sexual slavery, which would be a retrogressive step for international law and contrary to the findings of the Special Rapporteur on systematic rape. They argued that a wide interpretation of action that can constitute a deprivation of liberty would simply be in line with international law, especially the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,¹²² and the approach of the International Criminal Tribunal for the Former Yugoslavia.¹²³ Colombia

120. *Discussion Paper Proposed by the Coordinator*, Preparatory Comm’n for the Int’l Criminal Ct., Working Group on Elements of Crimes, at 2, U.N. Doc. PCNICC/1999/WGEC/RT.6 (1999).

121. *Proposal submitted by Canada and Germany on Article 7*, Preparatory Comm’n for the Int’l Criminal Ct., Working Group on Elements of Crimes at 3–4, U.N. Doc. PCNICC/1999/WGEC/DP.36 (1999).

122. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Sept. 7, 1956, 266 U.N.T.S. 3 (1957). This Convention is very widely ratified. It had 119 States Parties as of Feb. 5, 2002. See <http://www.unhcr.ch/html/menu3/b/treaty4.htm> (last visited September 24, 2003).

123. For example, the Women’s Caucus for Gender Justice pointed out that the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia listed, in paragraphs 37

issued a proposal calling for an illustrative list that was clearly open enough to cover any new form of slavery that might emerge in the future.¹²⁴ Some argued that the list be either deleted or expanded, in order to shift the focus from (pecuniary) transactions to the issue of ownership. Others argued that it was more sensible to de-emphasize the issue of ownership and examples of exercising powers attaching to the right of ownership, and focus on the *de facto* and *de jure* exercise of power itself.¹²⁵ This back-and-forth led to a discussion among delegations of the point at which a situation could shift legally from “deprivation of liberty” to “freedom,” with agreement that no specific shifting point should be identified in the elements, as this would need to be decided by the ICC’s judges on a case-by-case basis.

On the other hand, some delegations felt that the term “lending” did not necessarily have commercial or pecuniary aspects and therefore this was a signal to the ICC’s judges that “similar” deprivations did not require any commercial or pecuniary linkage. Therefore, they argued, the illustrative list did not need to be revisited. In addition, the United States and others in favour of the list reminded all that the list was open and illustrative, that “purchasing, selling, lending or bartering” were meant simply to provide some guidance to the ICC judges but not to limit them, and that the list was the result of a delicate compromise made at the previous session.

This debate ended up being overtaken by the wider discussions on an overall compromise package on the elements of crimes against

and 42 of a pre-trial brief in *Prosecutor v. Kunarac et al.*, “descriptive rather than definitional” factors that occur in slave-like conditions: control of 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 or abuse, control of sexuality, forced labour, and ability to buy or sell.” Women’s Caucus for Gender Justice, *supra* note 119, at 7. During the December 1999 negotiations, Switzerland provided the Preparatory Commission with a commentary on relevant caselaw of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and other legal sources, noting that (at that time) neither Tribunal had issued a judgement on the crime of sexual slavery, but the International Criminal Tribunal for the Former Yugoslavia had issued the “Foca” indictment charging Dragolub Kunarac and another accused with the crime against humanity of rape and enslavement for detaining women, subjecting them to repeated rapes and sexual assaults, and treating them as private property: *Commentary Submitted by Switzerland on Article 7 of the Statute of the International Criminal Court*, Preparatory Comm’n for the Int’l Criminal Ct., Working Group on Elements of Crimes, at 24–25, U.N. Doc. PCNICC/1999/WGEC/DP.35 (1999). The indictment stated that the women were not locked in the house and were not guarded, but they could not escape as they were surrounded by soldier and civilian Serbs. This example was referred to several times in the negotiations, in order to ensure that the illustrative list would capture the actions described in the indictment.

124. *Proposal submitted by Colombia*, Preparatory Comm’n for the Int’l Criminal Ct., Working Group on Element of Crimes, U.N. Doc. PCNICC/1999/WGEC/DP.43 (1999).

125. *See Clark, supra* note 114, at 83.

humanity,¹²⁶ and the unchanged August 1999 rolling text became part of that package. Countries decided to resolve their disagreement by including a footnote to the element containing the illustrative list. This footnote, proposed by Canada, explained that the deprivation of liberty should take into account actions not listed but which are also major indicia of the exercise of ownership under international law,¹²⁷ specifically trafficking in persons (particularly women and children), exacting forced labour and reducing a person to a servile status. The footnote reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particularly women and children.¹²⁸

This footnote proved to be an important addition for two reasons. First, the inclusion of a reference to trafficking in the elements for sexual slavery represented an important cross-reference within the Elements of Crimes, as trafficking is only mentioned in the Rome Statute in relation to enslavement. Since the kind of enslavement of women and children that often occurs through trafficking is of a sexual nature, it made sense to overtly list trafficking as an example of sexual slavery. Thus, what is an assumed linkage in the Rome Statute (since sexual slavery is one form of enslavement) is made explicit in the Elements of Crimes.

The second important aspect of the footnote is the mention of forced labour and reducing a person to a servile status as defined in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. The 1956 Supplementary Convention defines “a person of servile status” as a person in the condition or status of debt bondage or serfdom.¹²⁹ It also includes in that definition any institution or practice whereby:

1. a woman, without the right to refuse, is promised or given in marriage or payment of a consideration in money or in kind to her parents, guardian, family or any other person or group;
or

126. Darryl Robinson, *The Course of Negotiations: Cultural Relativism Versus a Common Standard of Humanity*, in ICC ELEMENTS AND RULES, *supra* note 45, at 65–69.

127. As La Haye notes, “[i]t was agreed not to include in this list minor indicia of ownership.” La Haye, *supra* note 113, at 191.

128. *Elements of Crimes*, *supra* note 14, at 13 n.18, 34 n.53, 44 n.65.

129. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 122, arts. 1, 7(b), 266 U.N.T.S. at 41, 43.

2. the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
3. a woman on the death of her husband is liable to be inherited by another person; or
4. any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.¹³⁰

The footnote expands the understanding of what constitutes “powers attaching to the right of ownership,” and therefore what might fall under “similar deprivation of liberty,” to include a number of practices that have traditionally been understood as slavery or slavery-like practices but yet do not have a commercial or pecuniary aspect.

The crime of forced labour is not specifically defined in the 1956 Supplementary Convention, but the Convention, in its preamble, mentions the Forced Labour Convention of 1930 and subsequent action by the International Labour Organization in regard to forced or compulsory labour.¹³¹ The 1930 Convention defines forced labour as “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹³² In addition, since the preamble references the 1926 Slavery Convention, that Convention is also relevant to the ICC’s judges.¹³³ It was therefore in this rather roundabout manner that diverse examples of deprivation of liberty are recognized in the elements of crimes for sexual slavery.¹³⁴ The same footnote is attached to the crime of enslavement.¹³⁵

130. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 122, arts. 1, 7(b), 266 U.N.T.S. at 41, 43.

131. The relevant preambular paragraph states: “Having regard to the Forced Labour Convention of 1930 and to subsequent action by the International Labour Organization in regard to forced or compulsory labour.” *Id.* pmb1.

132. Convention Concerning Forced or Compulsory Labour, June 28, 1930, art. 2, 39 U.N.T.S. 55, 58 (1949) [hereinafter Forced Labour Convention 1930].

133. Slavery Convention, Sept. 25, 1926, art. 5, 212 U.N.T.S. 17, 20–22 (1955). As of February 5, 2002, this Convention had 95 States Parties, see <http://www.unhchr.ch/html/menu3/b/treaty3.htm> (last visited July 12, 2004).

134. Note that delegations decided not to list “recruitment” or “abduction”, because they define the means of “obtaining” a person and do not describe directly an exercise of ownership over a person. La Haye, *supra* note 113, at 191. The same argument could be made against including a reference to trafficking, which was included.

135. *Elements of Crimes*, *supra* note 14, at 10.

5. Proposal by a Group of Arab States: Powers Attaching to the Right of Ownership and Marriage

Early in the December 1999 negotiations, a group of Arab states issued a proposal on the elements of crimes against humanity, including the elements for the crime of sexual slavery:

1. The accused exercised a power attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons.
2. The accused caused such person or persons to engage in one or more acts of a sexual nature.
3. Powers attaching to the right of ownership do not include rights, duties and obligations incident to marriage between a man and a woman.¹³⁶

A similar third element was included in the elements for the crime of enslavement, but with the addition of "or between parent and child" at the end.¹³⁷ This proposal on sexual slavery was one aspect of an overarching concern expressed by the group (and others) that the elements not be drafted so wide as to characterize certain domestic practices as crimes against humanity. These states "feared that the law on crimes against humanity was too ambiguous and might be used by activist judges not simply to deal with atrocities but as a tool of 'social engineering.'" ¹³⁸ These countries explained in the negotiations that protecting religious or cultural practices and traditions was a particular priority.¹³⁹ In some of the Arab states making the proposal, national laws made obtaining a divorce more difficult for women than for men, and some cultural practices required wives to have their husbands' permission to participate in public activities. These states were concerned that an argument might be made that these practices amounted to sexual slavery.¹⁴⁰ They knew

136. *Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity*, Preparatory Comm'n for the Int'l Criminal Ct., Working Group on Elements of Crimes, at 3, U.N. Doc. PCNICC/1999/WGEC/DP.39 (1999).

137. *Id.* at 2.

138. Robinson, *supra* note 126, at 65.

139. *Id.*

140. *Id.* The concerns were not limited to the Arab group. For example, the conservative NGO Coalition for Women, Children and The Family claimed that the crimes against humanity were defined so vaguely that they could be used to criminalize "[g]overnment officials or religious leaders who stress the role of women as mothers and homemakers," using the crimes of "imprisonment" or "sexual slavery." NGO Coalition for Women, Children & The Family, *A Court for "The Most Serious Crimes of Concern to the International Community as a Whole,"*

that others might view these as human rights concerns, but they felt strongly that these practices did not amount to crimes against humanity.¹⁴¹

Most delegations could not accept such culturally specific exemptions as described in the third proposed element of sexual slavery, because crimes against humanity represent a basic law for all humanity, and the negotiations on all crimes against humanity ground to a halt.¹⁴² In addition, many delegations were concerned about setting a precedent that could have an adverse impact in the human rights field, given that crimes against humanity fall both within international human rights law and international criminal law. Eventually, after intense informal negotiations, a solution was agreed upon that led the group of Arab states and others to drop the references in the elements of individual crimes to, *inter alia*, marriage and instead focus upon the introduction for the elements of crimes against humanity.¹⁴³

6. Other Footnotes Added to the Elements of Sexual Slavery

The negotiations also led to the addition of a second footnote to the elements of crimes for sexual slavery in June 2000. Many delegations expressed the lingering concern initially raised in response to the U.S. proposal¹⁴⁴ that the crime of sexual slavery is one, like the crime of enforced disappearance, where many people might be involved.¹⁴⁵ While it is possible that one person could be responsible both for exercising powers attaching to the right of ownership over a person and for causing the enslaved person to engage in acts of a sexual nature, it was also possible (and likely) that two or more people could be involved. For example, a group of soldiers could be jointly responsible for enslaving a number of civilian women and girls and offering them as sex slaves to other soldiers. In addition, trafficking in women and children for the purposes of sexual slavery often involves chains of people in different localities.

Not a Court to Undermine Traditional Societies and Cultures (Dec. 12, 1999) (on file with the author).

141. Robinson, *supra* note 126, at 65.

142. *Id.* at 66.

143. See, e.g., *id.* at 65–69.

144. The United States originally proposed an element for enslavement that stated: “That the accused either purchased or sold one or more persons or deprived them of their liberty and forced them to do labour without compensation.” *U.S. Crimes Against Humanity Proposal*, *supra* note 107, at 4. Some delegates expressed concern that this proposal would require that the same person both enslave a person and force the person to do labour, which might exclude violations that occur with the assistance of a chain of people.

145. France proposed the redrafting of the elements of this crime, along the lines of the elements for enforced disappearances, for this reason. The proposal to redraft did not attract sufficient support, but the idea was included through the footnote. La Haye, *supra* note 113, at 192.

Therefore, a footnote was added to the entire set of elements for the crime of sexual slavery stating: "Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as part of a common criminal purpose."¹⁴⁶

One final footnote may also be relevant to the crime of sexual slavery, even though it is not appended specifically to the elements for that crime. A footnote attached to the crime of genocide by causing serious bodily or mental harm states: "This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."¹⁴⁷ As sexual slavery is a form of sexual violence, and can also be composed of rape incidents, it is likely that sexual slavery could fall under this footnote and be considered conduct causing serious bodily or mental harm for the purposes of charging the crime of genocide. Crimes of sexual violence are not explicitly listed as acts of genocide in the Rome Statute because delegations were reluctant to deviate from the wording found in the 1948 Genocide Convention.¹⁴⁸ However, this footnote signals to the ICC's judges that serious bodily or mental harm can result from acts of sexual violence such as rape or (presumably) sexual slavery. This is consistent with the overall introduction to the Elements of Crimes document, which states that a "particular conduct may constitute one or more crimes."¹⁴⁹

146. *Elements of Crimes*, *supra* note 14, at 13 n.17. This same footnote is attached to the crime against humanity of enforced disappearance of persons.

147. *Id.* at 6 n.3.

148. *See, e.g., ICC Establishment Report*, *supra* note 30, ¶ 59.

149. *Elements of Crimes*, *supra* note 14, at 5 (General Introduction). This is also consistent with the initial proposal made by the United States on sexual slavery, which stated: "It should be noted that the existence of specific crimes of sexual violence in articles 8.2(b)(xxii) and 8.2(e)(vi) does not undermine the fact that those same acts might constitute the essential element of some other offence under the Statute." *U.S. Crimes Against Humanity Elements Proposal*, *supra* note 107. In addition, at the July 1999 Preparatory Commission session, Colombia proposed that, if the conduct listed in the elements for sexual slavery also overlaps with conduct described in the grave breaches of the Geneva Conventions, the definition of sexual slavery would take precedence. Colombia proposed that this precedence should be recorded in the elements of crimes for the crime of sexual slavery. *Proposal submitted by Colombia*, Preparatory Comm'n for the Int'l Criminal Ct., Working Group on Elements of Crimes, U.N. Doc. PCNICC/1999/WGEC/DP.16 (1999); *see also Comments by Colombia on document PCNICC/1999/WGEC/RT.6 proposed by the Coordinator*, Preparatory Comm'n for the Int'l Criminal Ct., Working Group on Elements of Crimes, U.N. Doc. PCNICC/1999/WGEC/DP.30 (1999). While delegations made an effort to ensure as much as possible that each crime had a distinct set of elements and that common elements be identified (such as between enslavement and sexual slavery), this proposal did not gain widespread support, as it might unwittingly restrict the Prosecutor's choice of charging options, and it was not pursued in the negotiations.

7. The Issue of Consent as a Defence

Delegates drafting the elements of crimes for sexual slavery briefly considered the issue of consent as a defense, for the most part in corridor discussions with those delegates drafting the principles of evidence in cases of sexual violence included in the ICC's Rules of Procedure and Evidence.¹⁵⁰ As noted by Boon, traditionally, international prohibitions of sexual crimes assumed that the harm arose from the violation of the victim's dignity.¹⁵¹ The ICC's provisions shifted this approach by requiring an examination into whether the victim exercised his or her agency through consenting to the sexual encounter, or whether external circumstances negated that consent.¹⁵² Rule 70 of the ICC's Rules of Procedure and Evidence was drafted according to this approach:

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- a. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- b. Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- c. Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- d. Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.¹⁵³

Delegates quickly realized that this rule will apply differently in cases of sexual slavery, because the issue of consent will be determined at the very first step, when considering whether a person exercised any

150. The elements of the crime of sexual slavery were being negotiated at the same time as the Rules of Procedure and Evidence on principles of evidence in cases of sexual violence, in two separate Working Groups.

151. Boon, *supra* note 15, at 634.

152. *Id.*

153. The Rules of Procedure and Evidence document was included in the Report of the Preparatory Commission sent to the Assembly of States Parties. *Finalized Draft Text of the Rules of Procedure and Evidence*, Preparatory Comm'n for the Int'l Criminal Ct., at 37, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000). The finalized draft text was adopted by the Assembly of States Parties without changes in September 2002. See Official Records of Parties to Rome Statute, *supra* note 106, at 37.

or all of the powers attaching to the right of ownership. By definition, a finding of the exercise of these powers involves a negation of consent, which is why the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict stated:

As a *jus cogens* crime, neither a State [n]or its agents, including government or military officials, can consent to the enslavement of any person under any circumstances. Likewise, a person cannot, under any circumstances, consent to be enslaved or subjected to slavery. Thus, it follows that a person accused of slavery cannot raise consent of the victim as a defence.¹⁵⁴

If a judge finds that the actions of the perpetrator fall within the first element of the crime of sexual slavery, an evaluation of whether a defence of consent can apply to the sexual acts of the second element is not necessary. Rather, the judge will simply need to determine if sexual acts took place and if the perpetrator was linked to them. *Prima facie*, a finding of enslavement means that a victim has no ability to give voluntary or genuine consent.¹⁵⁵ The Special Rapporteur argues that the additional element (over and above the crime of enslavement) applicable to sexual slavery does not affect the issue; a defense of consent clearly should not be allowed in either case.¹⁵⁶ This approach has been confirmed in the decisions of the Trial and Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac, Kovac & Vukovic*, discussed *infra*. The fact that consent cannot serve as a defense to the crime of sexual slavery is another advance in international law. The focus of the crime remains on the actions of the perpetrator in enslaving the victim.

8. Summary

In summary, the final text of the elements of crimes of sexual slavery reflected three main areas of debate. First, delegates adopted a test for determining slavery—the exercise of any or all of the powers attaching to the right of ownership—rejecting references to “attack” or “chattel”. Second, an open, illustrative list of examples of the exercise of the powers attaching to the right of ownership was adopted, instead of a closed list or no list. This was clearly a compromise between those who felt that no list was necessary because the ICC’s judges would evaluate the exercise of powers on a case-by-case basis, and those who felt that further

154. *McDougall 2000 Report, supra* note 1, ¶ 51.

155. In this way, the way the Prosecutor will prove a crime of rape differs fundamentally with how the Prosecutor will prove the crime of sexual slavery.

156. *McDougall 2000 Report, supra* note 1, ¶ 51 n.61.

precision was needed for the judges, the Prosecutor and the perpetrators. Third, as the wording in the illustrative list did not satisfy many, who feared that it would lead the ICC's judges to the wrong conclusion that the exercise of powers required a commercial or pecuniary aspect, a footnote was added to expand the illustrative list. This footnote made it clear that the illustrative list is to be read broadly, and in line with international law instruments such as the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. While a somewhat awkward way to broaden the illustrative list and resolve the issue, the addition of the footnote confirmed that commercial or pecuniary exchange or advantage was not necessary to demonstrate that a person exercised powers attaching to the right of ownership. This can be contrasted with the elements for the crime of enforced prostitution, discussed below.

B. Criticism of the Elements of Crime for Sexual Slavery

The finalized common elements of crime for sexual slavery listed under the crime against humanity and war crimes sections read:

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. [footnote: It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.]
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.¹⁵⁷

In addition to these common elements, the title for each section (for example, "Crimes against humanity of sexual slavery") contains a footnoted reference stating: "Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as part of a common criminal purpose."¹⁵⁸

157. *Elements of Crimes*, *supra* note 14, at 13 n.18, 34 n.53, 44 n.65.

158. *Id.*

These elements came under some criticism at the time of drafting, and continue to be criticized. During the negotiations, Human Rights Watch and the Women's Caucus for Gender Justice expressed concern that the language of the illustrative list could be read narrowly and therefore exclude modern day slavery-like practices.¹⁵⁹ For example, Human Rights Watch stated: "The illustrative list works to limit the scope of the Statute . . . By restricting the examples of enslavement to traditional forms of slavery involving commercial transaction, and other 'similar' forms of deprivation of liberty, the text fails to embrace prevalent modern slavery-like practices such as debt bondage and forced labour."¹⁶⁰ These comments were made prior to the adoption of the footnote referencing forced labour and reducing a person to servile status as defined in the 1956 Supplementary Convention. Since the footnote specifically incorporates modern slavery-like practices, including practices with no commercial or pecuniary aspects, presumably it goes some way to addressing these concerns.

Argibay recently argued that the Elements document "adopts an unreasonably narrow definition of enslavement which it then extends to sexual slavery."¹⁶¹ She feels that the elements put the emphasis on commercial exchange or similar deprivation of liberty, which is "not only antiquated but also contrary to the lived experience of women and men coerced or deceived into enslavement situations and sexual slavery."¹⁶² She states that it is "important to note the absence of relevant and non-commercial means of enslavement such as 'using' another person as one's property."¹⁶³ Similar criticism is made by the Special Rapporteur on

159. Human Rights Watch, *Commentary to the Preparatory Commission of the International Criminal Court, Elements of Crimes and Rules of Evidence and Procedure*, March 2000, at 9 (2000), available at <http://www.hrw.org/campaigns/icc/negotiating.htm>; see also, Women's Caucus for Gender Justice, *supra* note 119, at 9; Women's Caucus for Gender Justice, *Revised Proposal for Elements under Article 8(2)(b)(xxii) Taking into Consideration the Informal Text of August 4, 1999* 2-3 (Aug. 6, 1999) (on file with author). These papers were written prior to the adoption of the footnote. In addition, Roger Clark, adviser to the delegation of Samoa during the negotiations, wrote:

To my taste, the draft definition of the elements of "sexual slavery" as a war crime produced at the August 1999 session of the Preparatory Commission emphasizes the property aspect too much . . . There is some useful discussion which introduces the concept of 'sexual servitude' which avoids some of the ownership hang-ups in Report of the Standing Committee of Australian Attorneys-General. . . .

Clark, *supra* note 114, at 83 n.42. Presumably, the footnote ultimately adopted incorporating the 1956 Supplementary Convention's reference to reducing a person to servile status would go some way to addressing Clark's concern.

160. Human Rights Watch, *supra* note 159, at 9.

161. Argibay, *supra* note 66, at 388.

162. *Id.* at 388-89.

163. *Id.* at 389.

systematic rape, sexual slavery and slavery-like practices during armed conflict, who cited the “purchasing, selling, lending or bartering” language and stated that “it is unnecessary and inappropriate to require any element of commercial transaction for the crime of sexual slavery.”¹⁶⁴

The criticism of Argibay and the Special Rapporteur is unduly harsh. Understandably, both (and many delegations) would have likely preferred that the element simply stated “The perpetrator exercised any or all of the powers attaching to the right of ownership”. However, there are several factors which, when examined together, lead one to the conclusion that the ICC’s judges will be able to read the element as widely as needed, even with the illustrative list, and will not conclude that there is any requirement of a commercial transaction. First, the clause begins with the term “such as,” a plain reading of which is “for example.” This language makes it clear that the list that follows is open and merely illustrative, and not closed. Second, while the illustrative list contains examples of actions that have a commercial or pecuniary element (i.e., purchasing, selling, bartering) it also contains examples of actions that may or may not (i.e., lending, reducing a person to a servile status, child and forced labour). In this way, a plain reading of the reference to “similar deprivation of liberty” that follows demonstrates that it is not linked solely to deprivations occurring with a commercial or pecuniary aspect. Third, the negotiating history, which included a robust discussion of ways to ensure that force, coercion, threats, deceit and other methods of exercising powers attaching to the right of ownership can be understood as included in the list, supports this reading of the element. Finally, the ICC’s judges will be able to refer to the decision of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac, Kovac & Vukovic*, described *infra*, which comes to a similar conclusion.

C. Elements of the Crime of Enforced Prostitution

The negotiations on the elements of crime of enforced prostitution were intertwined with the negotiations for the crime of sexual slavery, because delegations felt that it was important to set out in the elements exactly how enforced prostitution is different from sexual slavery. As with the crime of sexual slavery, there was much discussion as to whether a pecuniary element was necessary for the crime against humanity and war crime of enforced prostitution. The first proposal was made by the United States, which specified the following common elements:

1. That the accused intended to attack one or more persons by causing them to engage in acts of a sexual nature.

164. *McDougall 2000 Report, supra* note 1, ¶¶ 8, 29, 50.

2. That the accused, in furtherance of this intent, deprived one or more persons of their liberty and forced them to engage in acts of a sexual nature with one or more other persons.
3. That the accused received some pecuniary or other material benefit in exchange for or in connection with the sex acts of the person or persons.¹⁶⁵

This approach was quite different from that of the Special Rapporteur on systematic rape, who defined enforced prostitution as “conditions of control over a person who is coerced by another to engage in sexual activity.”¹⁶⁶ In July 1999, Costa Rica, Hungary and Switzerland followed the lead of the Special Rapporteur in stressing control and proposed an alternative formulation to the U.S. proposal: “The perpetrator imposed conditions of control over a person and coerced that person to engage in sexual activity.”¹⁶⁷

Delegates expressed concern about the differences between the proposal by the United States and Costa Rica, Hungary and Switzerland. There was general agreement that the crime of enforced prostitution involved exerting some kind of control over a person so that person would engage in sexual acts. However, there was an in-depth discussion around two interlinked issues: first, how a person might be forced to engage in sexual acts, short of enslavement, and second, whether a benefit was necessary, what might constitute a benefit, and to whom must the benefit accrue. On the first issue, delegates argued, citing the *Furundzija* case decided by the International Criminal Tribunal for the Former Yugoslavia and the *Akayesu* case of the International Criminal Tribunal for Rwanda, that the elements must make it clear that physical force is not required in order to prove enforced prostitution.¹⁶⁸ Rather, the victim could be forced into prostitution through threats (against the victim or another person) of violence, detention, duress or psychological oppression, express or implied, or intimidation, extortion and other forms of duress which prey on fear or desperation.¹⁶⁹ Thus, the first element was drafted to reflect these

165. *U.S. Crimes Against Humanity Proposal*, *supra* note 107, at 6.

166. *McDougall 1998 Report*, *supra* note 1, ¶ 31.

167. *Costa Rica, Hungary & Switzerland Proposal*, *supra* note 110, at 4.

168. *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1-T, ¶ 174 (ICTY Trial Chamber Dec. 10, 1988), available at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf> (last visited July 16, 2004); *Prosecutor v. Akayesu*, ICTR Case No. ICTR-96-4, ¶ 688 (ICTR Trial Chamber Sept. 2, 1998), available at <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (“The Tribunal notes in this context that 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, such as armed conflict . . .”).

169. *Furundzija*, ICTY Case No. IT-95-17/1; *Akayesu*, ICTR Case No. ICTR-96-4.

methods of force or control. In addition, some delegates argued for the inclusion of a reference to taking advantage of a person's incapacity to give genuine consent. While this reference was developed in the negotiations on the crime of rape,¹⁷⁰ it was agreed that it added additional depth to the list of ways in which a victim might be forced into prostitution.

The second issue debated at some length was whether a benefit was necessary and what constituted a benefit. Delegates specifically questioned whether the accused needed to receive some kind of monetary or other benefit in exchange for the sexual acts. For example, some delegates considered the following scenario to amount to enforced prostitution: a person captured a number of women, kept them confined and offered them freely to soldiers, with no money or other material benefit changing hands. Others felt that this was instead an example of sexual slavery and argued that it was the monetary or material benefit received that distinguished the crime of enforced prostitution from that of sexual slavery or other forms of sexual violence. In the end, a majority of delegations felt that the common understanding of prostitution encompasses the idea that the perpetrator or another person obtains or expects to obtain pecuniary or other advantage in exchange for, or in connection with, the sexual acts.¹⁷¹ They also agreed that the advantage need not be purely monetary and it need not accrue to the perpetrator: it could be an advantage of sexual access to the perpetrator or another person linked to the perpetrator, material advantage (exchange of sex for goods or services, for example) benefiting the perpetrator or another person, or psychological advantage of the perpetrator or another person over the victim or a person somehow linked to the victim. In addition, some delegations specifically explained that the person expecting an advantage could be the victim, hoping not to be killed or tortured.¹⁷²

The text of the elements for enforced prostitution was settled by August 1999, relatively early in the negotiation process. By August 1999, the draft text reflected the final text ultimately adopted, save for the change later implemented throughout the elements to refer to the "perpetrator" rather than the "accused:"

2. The accused caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking

170. Boon, *supra* note 15 (exploring the negotiations with respect to consent and rape.)

171. La Haye, *supra* note 113, at 193.

172. *Id.*

advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

3. The accused or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.¹⁷³

The December 1999 proposal by a group of Arab states attempted to remove the references to coercion, psychological oppression and abuse of power, but these changes were not accepted and the text was adopted as agreed in August.¹⁷⁴

The elements for enforced prostitution distinguish this crime, to some extent, from the crime of sexual slavery. The crime of sexual slavery does not require any commercial exchange or showing of advantage, as the test focuses on the exercise of powers attaching to the right of ownership. However, some commercial exchange or advantage may be a part of the crime, if the exercise of powers attaching to the right of ownership is done through the purchase, sale or bartering of a victim, for example. The elements of the crime of enforced prostitution stipulate that the crime requires that a person (not necessarily the perpetrator) expected to obtain a pecuniary or other advantage in exchange for the prostitution. Therefore, there may be occasions when an action involving pecuniary or other advantage in exchange for sexual services can fall both within the elements for sexual slavery and enforced prostitution. On the other hand, there may also be occasions when a particular set of facts does not involve any advantage stemming from the sexual acts; those cases could instead be treated as sexual slavery cases but would not be charged as enforced prostitution. While the areas of overlap and non-overlap between the two crimes were discussed during the drafting of the Rome Statute, the drafting of the Elements of Crimes brought additional, and welcome, clarity.

173. *Discussion Paper Proposed by the Coordinator*, Preparatory Comm'n for the Int'l Criminal Ct., at 2, U.N. Doc. PCNICC/1999/WGEC/RT.6 (1999).

174. *Id.* at 3. The proposal read:

1. The accused caused one or more persons to engage in one or more acts of a sexual nature with a person by force, or by threat of force such as violence, duress, detention of or against such person or another person, or by taking advantage of a person's or persons' incapacity to give genuine consent.

2. The accused or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

III. SEXUAL SLAVERY AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The International Criminal Tribunal for the Former Yugoslavia decided the case of *Kunarac, Kovac & Vukovic* after the conclusion of the negotiations on the ICC's Elements of Crime.¹⁷⁵ The Tribunal's Trial and Appeals Chamber decisions were precedent-setting in their consideration of the crime of enslavement for sexual purposes.¹⁷⁶ Never before had an international tribunal ruled on a case of sexual enslavement and, arguably, if this case had been decided prior to the negotiations on the ICC's elements of crimes for sexual slavery, the discussions around the illustrative list in the first element would have been simpler.

In *Kunarac, Kovac & Vukovic*, the Tribunal found that Muslim women and girls from the Foca region were detained in a high school, a sports hall (which was next to the municipal police building) and in private houses by Serb soldiers. They were raped, sometimes over the course of months. The women were personally raped by the three accused, and were also lent, "rented out" and sold to soldiers for the purpose of being raped. Two of the accused were found by the Tribunal to have treated the women as their personal property. One accused forced two of the women to dance naked on a table while watching them.¹⁷⁷

The Trial Chamber defined the *actus reus* of the crime against humanity of enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person."¹⁷⁸ The *actus reus* is functionally identical to that in the ICC's elements of crimes for sexual slavery. The Tribunal does not include an illustrative list, but does outline

175. Prosecutor v. Kunarac et al., ICTY Case Nos. IT-96-23-T & IT-96-23/1-T (ICTY Trial Chamber Feb. 22, 2001), available at <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>, *aff'd*, (ICTY Appeals Chamber June 12, 2002), available at <http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.pdf>

176. The Statute of the International Criminal Tribunal for the Former Yugoslavia does not specifically list sexual slavery as a crime, but it does list enslavement as a crime against humanity. The Prosecutor therefore charged the accused with enslavement, specifying that the enslavement was done for sexual purposes (such as rape). Even though the Trial and Appeals Chambers analyzed the crime of enslavement and not sexual slavery, this case will be an important one for the ICC's judges to consider.

177. See Prosecutor v. Kunarac et al., ICTY Case Nos. IT-96-23-T & IT-96-23/1-T, ¶¶ 728–45, 747–82, 783–822 (ICTY Trial Chamber Feb. 22, 2001), available at <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf> (findings with respect to Kunarac on enslavement, Kovac on enslavement, Vukovic on rape).

178. *Id.* ¶ 540. The *actus reus* was taken from the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention. *Id.* ¶¶ 519–20. Note that the Trial Chamber lists the *mens rea* of the crime against humanity of enslavement as "the intentional exercise of such powers." *Id.* ¶ 540. While the *mens rea* is not listed in the specific elements for enslavement or sexual slavery in the ICC's Elements of Crimes, it is dealt with in paragraphs 2 & 3 in the General Introduction to the Elements of Crime, *supra* note 14, at 5.

indicators or factors to be taken into consideration in determining whether enslavement was committed: 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;¹⁷⁹ assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; forced labour; and the buying, selling or inheriting of a person or his or her labours or services.¹⁸⁰ As these are indicators and not elements of the crime, not all of these factors need to be present in order to demonstrate that the crime of enslavement has taken place. This list of indicia of enslavement will be helpful for the ICC's judges as they consider actions that might fall within the phrase "a similar deprivation of liberty," apart from the illustrative list of "purchasing, selling, lending or bartering" and the additional examples of exacting forced labour, reducing a person to servile status, trafficking, serfdom, debt bondage and other actions listed in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. One important factor for the judges to consider for the purposes of sexual slavery is that of control of sexuality. Lack of control of a person's sexuality is a specific indicator of sexual slavery. This key indicator often exists alongside other indicia, such as control of physical environment.

The Tribunal made it clear that there is no commercial or pecuniary element required in the exercise of powers of ownership: "The "acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement."¹⁸¹ This ruling should provide further evidence that the reference to "similar deprivation of liberty" in the ICC's elements of crime for sexual slavery does not somehow limit the evaluation of powers attaching to a right of ownership to actions with a commercial or pecuniary aspect. The Appeals Chamber also clarified that the definition of contemporary forms of slavery is different from the traditional definition of chattel slavery. Therefore, the victim does not need to be subjected to the more extreme rights of ownership associated with "chattel slavery" in order to qualify as sexual slavery.¹⁸²

Additionally, the Trial Chamber provided further evidence that consent is not an issue in cases of sexual slavery: "indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of

179. With respect to the indicator of duration, the Trial Chamber also noted that "its importance in any given case will depend on other indications of enslavement." *Kunarac*, ICTY Case Nos. IT-96-23-T & IT-96-23/1-T, ¶ 542.

180. *Id.* ¶ 543.

181. *Id.* ¶ 542.

182. *Id.* ¶ 117.

movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent.”¹⁸³ The Appeals Chamber further stated:

[T]he Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from the evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.¹⁸⁴

This ruling will likely prove to be persuasive to the ICC’s judges in considering whether Rule 70 of the Rules of Procedure and Evidence applies in the case of sexual slavery, leading the judges to the same conclusion as the delegates in the negotiations.

IV. CONCLUSION: ADVANCING INTERNATIONAL LAW THROUGH RECOGNITION OF INDIVIDUAL AUTONOMY AND AGENCY

The inclusion of the crime of sexual slavery in the Rome Statute of the International Criminal Court and the Statute of the Special Court for Sierra Leone was an important advance in international law. This specific form of slavery was finally named as an international offence, over half a century after the “comfort women” of World War II suffered from military sexual slavery. By codifying the crime of sexual slavery, the Prosecutors of the ICC and the Special Court for Sierra Leone are offered a broader and more appropriate charge than that of enforced prostitution. The delineation of the elements of sexual slavery in the ICC’s Elements of Crime also represented progress in international law. While the elements are not binding upon the ICC’s judges, they will undoubtedly provide a persuasive guide to determining whether a particular situation amounted to sexual slavery. Most crucially, the elements for the

183. *Id.* ¶ 542.

184. Prosecutor v. Kunarac et al., ICTY Case Nos. IT-96-23-T & IT-96-23/1-T, ¶ 120 (ICTY Appeals Chamber June 12, 2002), available at <http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.pdf>.

crime of sexual slavery reinforce the fact that the crime is one of denial of individual autonomy through sexual means.

The first element, which is common to both the crimes of enslavement and sexual slavery, emphasizes the control the enslaver exerts over his or her victim. The enslaver exercises powers attaching to the right of ownership over the victim. As the negotiations demonstrated, the exercise of powers is not limited to the traditional treatment of a person as chattel. Examples are given in the text and the footnote of how the powers might be exercised: through purchasing, selling, lending, bartering, forced labour, trafficking, reducing a person to a servile status, keeping a person in debt bondage or serfdom, inheriting a person or child exploitation. Ownership may also be exercised by imposing on a victim a similar deprivation of liberty, with the term "similar" to be interpreted widely and in light of the indicia listed in the decision by the International Criminal Tribunal for the Former Yugoslavia in *Kunarac, Kovac & Vukovic*, in order to capture all methods by which a person might be enslaved. The crux of the exercise of powers attaching to the right of ownership is that the perpetrator exercises some kind of power over the victim, and this power removes the victim's autonomy and agency.

This concentration on the denial of individual freedom is a definitive shift from the older paradigm, which focused on perceived violations of the victim's honour or dignity and on morality.¹⁸⁵ The earlier conception of crimes of sexual violence as linked to a victim's honour or dignity is reflected in the history of the crime of enforced prostitution (arguably a precursor to the crime of sexual slavery). Under the Fourth Geneva Convention, "[w]omen shall be especially protected against any attack on their honour, in particular against . . . enforced prostitution."¹⁸⁶ Enforced prostitution was considered to be "the forcing of a woman into immorality. . . ."¹⁸⁷ Additional Protocol I to the Geneva Conventions similarly lists enforced prostitution as an act against which women should be protected.¹⁸⁸ Similarly, Additional Protocols I and II both list enforced prostitution as an outrage upon personal dignity.¹⁸⁹ As many commentators have noted, the focus on the victim's protection, dignity and honour

185. Boon, *supra* note 15, at 627. While Boon was discussing the crime of rape, her observation is equally applicable to the crime of sexual slavery.

186. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 28, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

187. THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, *supra* note 57; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, *supra* note 28, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

188. Protocol I, *supra* note 28, art. 76, 16 I.L.M. at 1425.

189. *Id.* art. 75(2)(b), 16 I.L.M. at 1423; Protocol II, *supra* note 28, art 4(2)(e), 16 I.L.M. at 1444.

serves to distance the crime from the perpetrator.¹⁹⁰ This distance is potentially harmful. It could lead prosecutors and judges considering charges of sexual slavery (or enforced prostitution) to focus an evaluation of harm on honor or dignity and overlook consideration of sexual autonomy.¹⁹¹ The ICC's elements of crimes for sexual slavery redirect the ICC's judges toward an examination of the perpetrator's actions taken to exercise powers attaching to the right of ownership. Therefore, the ICC's elements more accurately describe the crime of sexual slavery in the same kind of terms used to describe other violent crimes, while not denying that a victim's honour and dignity may be affected when subjected to sexual slavery.

The second element of the crime of sexual slavery, under which the perpetrator causes the victim to engage in one or more acts of a sexual nature, denotes the form of the slavery and therefore differentiates the crime of sexual slavery from the broader crime of enslavement. This differentiation does not mean that sexual slavery is not a form of enslavement: "[i]n all respects and in all circumstances, sexual slavery is slavery."¹⁹² Including the crime of sexual slavery in the Rome Statute, and later in the Statute of the Special Court for Sierra Leone, was an important step in naming a harm often suffered by women and girls. The ICC negotiations advanced the step further by making it clear, through the Elements of Crimes, that the focus of the ICC's judges must center on the perpetrator's actions, on whether he or she exercised powers attaching to the right of ownership and in doing so caused a victim to engage in acts of a sexual nature. In other words, the judges will determine whether the victim lost her fundamental right to sexual self-determination. Harm to the victim's dignity and honour, while relevant to the evaluation of the overall effect of the violation on the victim and her community, is no longer the main consideration. This shift in focus allows for an appropriate, sensitive and modern approach to the prosecution of the grave crime of sexual slavery.

190. See, e.g., Askin, *supra* note 64, at 55; JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* 95–97 (2001).

191. Boon, *supra* note 15, at 634.

192. *McDougall 1998 Report*, *supra* note 1, ¶ 30.