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## Forced Prostitution: Naming an International Offense

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## Forced Prostitution: Naming an International Offense

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# Forced Prostitution: Naming an International Offense

Nora V. Demleitner

## **Abstract**

This paper presents an argument for recognizing “forced prostitution” as an international offense in its own right for which the procurers, brothel owners and managers, and financiers as well as the women’s customers can be held criminally liable. While the international debate has attempted to characterize forced prostitution as slavery, the term “slavery” fails to evoke the images of all the violations that encompass forced prostitution. Were the United Nations and regional organizations to acknowledge and label forced prostitution as an international crime, their member states would be required to enact domestic legislation outlawing and criminalizing it as well as strictly enforcing those provisions. While forced prostitution could be prosecuted in most countries under a variety of statutes, the international community has not succeeded in its attempts to decrease the prevalence of the practice because it lacks a universal rallying point that would focus attention on the dismal practice.

# FORCED PROSTITUTION: NAMING AN INTERNATIONAL OFFENSE

Nora V. Demleitner\*

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## INTRODUCTION

Chinese women forced to sell their bodies in New York City;<sup>1</sup> trafficking of Burmese women and girls into Thailand's brothels;<sup>2</sup> a growing sex market for children in Europe;<sup>3</sup> the forced prostitution of women and children has turned into an internationally organized market.<sup>4</sup> However, world-wide con-

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1. Michelle V. Agins, *Voyage to Life of Shattered Dreams*, N.Y. TIMES, July 23, 1993, at B1.

2. ASIA WATCH & THE WOMEN'S RIGHTS PROJECT, A MODERN FORM OF SLAVERY (1993).

3. Rebecca Irvin, *W. European Justice Ministers Agree to Fight Child Sex Trade*, REUTER LIBR. REP., June 23, 1988, available in LEXIS, NEWS Library, ARCNWS File.

4. This Article addresses merely the issue of forced prostitution, i.e., forcing a wo-

cern with the sex trade has increased only because of mass rapes in the former Yugoslavia and allegations that Muslim women have been forced to work in Serbian brothels. Although international treaties dating back to the beginning of this century have focused on the trafficking in women, so far international and domestic efforts to curb forced prostitution - in war and peace - have failed miserably. In many regards, forced prostitution has not only become more lucrative but also has taken on increasingly cruel features. In addition, with the advent of AIDS, forced prostitution has begun to expand to the sale of young female children who are valued because of their virginity and innocence.

This paper presents an argument for recognizing "forced prostitution" as an international offense in its own right for which the procurers, brothel owners and managers, and financiers as well as the women's customers can be held criminally liable. While the international debate has attempted to characterize forced prostitution as slavery, the term "slavery" fails to evoke the images of all the violations that encompass forced prostitution. Were the United Nations and regional organizations to acknowledge and label forced prostitution as an international crime, their member states would be required to enact domestic legislation outlawing and criminalizing it as well as strictly enforcing those provisions. While forced prostitution could be prosecuted in most countries under a variety of statutes, the international community has not succeeded in its attempts to decrease the prevalence of the practice because it lacks a universal rallying point that would focus attention on the dismal practice.

### I. *INTERNATIONAL EFFORTS TO COMBAT FORCED PROSTITUTION: WHY IS THE PRACTICE NEVER CALLED BY ITS NAME?*

How important the labelling of "forced prostitution" has been is best illustrated by the failed historical efforts to combat its practice. The international trafficking of women and chil-

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man or child to provide her body for sexual services to men in exchange for money either because she has been put under psychological or economic pressure or been threatened with violence. The moral, economic, and especially gender-related issues surrounding the topic of "voluntary" prostitution are beyond the scope of this Article.



dren for the purpose of prostitution has been recognized as an international offense for almost one hundred years. While initial attempts to curb the practice of "white slavery" in Europe and the United States succeeded in part, since the 1920's national and international actions against it have not been as effective as hoped, partly because the practice rarely has been labelled consistently.

#### A. 1900-1945

Until World War II, international conventions addressing the practice of forced prostitution focused on the international trafficking in women and children. Official and private actions pursued a dual purpose: protection of the female victim and punishment of the procurer. However, in concentrating on the trafficking aspect, none of the international conventions adopted directly dealt with the issue of forced prostitution, which underlies the question of trafficking.<sup>5</sup>

#### 1. "White Slavery"

The First Congress of the International Abolitionist Federation in 1877 was responsible for initially generating public awareness of and interest in the organized trafficking in women.<sup>6</sup> In the following years, progressive reformers in the United States fervently pursued the minimization of all forms of prostitution, driven by their belief in the ability to modify behavior.<sup>7</sup> In many respects, their crusade against trafficking in women and forced prostitution resembled that against black slavery.<sup>8</sup> Therefore, it is not surprising that they would have easily adopted the term "white slavery" to describe the targeted practice.

The term "white slave" had originally been used to apply to factory workers in England but fell into disuse after the passage of the ten-hour factory law. Addressing the struggle against the Contagious Diseases Act, Victor Hugo breathed new life into the

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5. U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION at 1-2, U.N. Doc. ST/SOA/SD/8, U.N. Sales No. 59.IV.5 (1959) [hereinafter STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION].

6. PROSTITUTION IN AMERICA: THREE INVESTIGATIONS, 1902-1914 197 (Edwin R.A. Seligman ed., reprint 1976) [hereinafter PROSTITUTION IN AMERICA].

7. Egal Feldman, *Prostitution, the Alien Woman and the Progressive Imagination, 1910-1915*, 19 AM. Q. 192, 192-93 (1967).

8. *Id.* at 192.

term in an 1870 letter to Josephine Butler, the British social reformer: "The slavery of black women is abolished in America; but the slavery of white women continues in Europe."<sup>9</sup> At the 1902 Paris Conference, the delegates employed the term *traite des blanches*, meaning "trade in whites," to discuss the abolition of the international trafficking in women. The term contrasts with *traite des noires*, meaning "trade in blacks," which had been used at an earlier international conference on the African slave trade. While "[t]he British government translated the French term as 'White Slave Traffic or Trade,' " in the United States the abbreviated term "white slavery" came into common usage.<sup>10</sup> The delegates to the 1910 Madrid Conference for the first time discussed the use of the label and challenged it because it was not sufficiently broad to cover women of all colors.<sup>11</sup> Nevertheless, the conference decided to retain the term because it had become a household word.

The usage of "white slavery" indicates the emphasis of the progressive movement on the protection of white women. "Progressive era reformers . . . used the catchwords 'white slavery' to promote the vision of women held in bondage against their will, of mysterious druggings and abductions of helpless young girls, and of unexplained disappearances of innocent and naive immigrants forced into lives of prostitution and vice."<sup>12</sup> While the focus of most domestic reformers was on "their" women being forced into prostitution either at home or abroad, as well as on white immigrant women turned into prostitutes upon arrival, the reformers' concern did not extend to women abroad. In part, this might have been due to the perception that "white slavery" flourished particularly in the most highly developed nations because there men had greater financial means to afford the "services" of prostitutes.<sup>13</sup> Those nations in turn could be trusted to address the practice themselves as it occurred within their territories.

The term "white slavery" has numerous racial overtones that made its continued use inopportune, impossible, and even

9. PROSTITUTION IN AMERICA, *supra* note 6, at 196 (citation omitted).

10. Marlene D. Beckman, Note, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1111 n.2 (1984) (citation omitted).

11. CLIFFORD G. ROE, *THE GREAT WAR ON WHITE SLAVERY* 403 (1911).

12. Beckman, *supra* note 10, at 1111.

13. ROE, *supra* note 11, at 398.



counterproductive.<sup>14</sup> However, the leaders of the Progressive reform movement understood the importance of employing a term they could fill with a vision and around which a large number of people could rally. In addition, in light of the then recent demise of official black slavery, the term "white slavery" might have also connoted eventual victory to the reformers.

## 2. The Early Conventions

The first international treaty on the trafficking of women, signed in 1904, was the International Agreement for the Suppression of the White Slave Traffic,<sup>15</sup> ("1904 Agreement"). "Conditions were considered to be so bad in some European cities, and the sale of women into prostitution so prevalent, that [eventually] thirteen countries signed an agreement to take action to stop the international traffic in prostitutes."<sup>16</sup> The 1904 Agreement was primarily designed to protect the female victims of the international traffic in women rather than to punish the procurers.<sup>17</sup> Its language, however, distinguishes between women who have not yet fallen prey to "the procuration . . . with a view to their debauchery in a foreign country"<sup>18</sup> and therefore must be protected from being approached, and those foreign women "who surrender themselves to prostitution"<sup>19</sup> and will eventually be repatriated.

Although the 1904 Agreement refers to both categories of women as victims, it seems to implicitly distinguish between "pure and innocent" women and those who have worked as prostitutes. Consequently, this agreement already incorporated the still prevailing ambivalent attitude toward female victims of forced prostitution. This notion of women as "madonnas or

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14. The Author has not come across any source from that era that expressed concern about the forced prostitution of African-American, let alone Native American, women.

15. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 426, 1 L.N.T.S. 83 [hereinafter 1904 Agreement]. For the United States, the agreement went into force on June 6, 1908. *Id.* The 1904 Agreement was amended by the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, Signed at Paris on 18 May 1904, and the International Convention for the Suppression of White Slave Traffic, Signed at Paris on 4 May 1910, May 4, 1949, 2 U.S.T. 1997, 30 U.N.T.S. 23.

16. Beckman, *supra* note 10, at 1113.

17. STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, *supra* note 5, at 1.

18. 1904 Agreement, *supra* note 15, art. 1, 35 Stat. at 426, 1 L.N.T.S. at 85-86.

19. *Id.* art. 3.



whores" has been exacerbated by labelling forced prostitution "white slave traffic." Is the woman no longer a slave or victim once she arrives at the destination of the trafficker and has begun to work as a prostitute?<sup>20</sup>

The substantive scope of the 1904 Agreement is limited. The states parties to it promised to set up authorities in their respective countries to collect and coordinate information on the procurement of women for prostitution abroad.<sup>21</sup> In addition, they pledged themselves to supervise train stations and port cities to search for the procurers of women.<sup>22</sup> Moreover, they agreed to provide shelter to indigent victims of trafficking, and to return them to their home countries with the cost, if necessary, split between the country of the women's residence and the country of their origin.<sup>23</sup>

Since the 1904 Agreement did not work effectively in decreasing the "white slave traffic,"<sup>24</sup> six years later a number of the states parties to the 1904 Agreement signed the International Convention for the Suppression of the White Slave Traffic<sup>25</sup> ("1910 Convention"), which criminalized the procurement of women. The 1910 Convention bound its thirteen signatories to severely punish any person who hired, abducted, or enticed for immoral purposes any women under the age of twenty-one, or used violence, threats, fraud, or any compulsion on a women

20. Although the 1904 Agreement referred to the "White Slave Traffic," it did not focus on the slavery component but rather on the trafficking or trading aspect. *Id.* The most likely reason for this is the fact that states considered the concrete acts of prostitution to fall solely under their domestic jurisdiction rather than deemed them subject to international regulation. *STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION*, *supra* note 5, at 1. However, as the content of the 1950 Convention indicates, this notion has become outdated. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, art. 28, Mar. 21, 1950, 96 U.N.T.S. 271, 280 [hereinafter 1950 Convention]. Therefore, the trafficking label could and should be discarded in favor of a more accurate term such as "forced prostitution."

21. 1904 Agreement, *supra* note 15, art. 1, 35 Stat. at 426, 1 L.N.T.S. at 85-86.

22. *Id.* art. 2, 35 Stat. at 428, 1 L.N.T.S. at 86.

23. *Id.* arts. 3-4, 35 Stat. at 428, 1 L.N.T.S. at 86-87.

24. H. WILSON HARRIS, *HUMAN MERCHANDISE: A STUDY OF THE INTERNATIONAL TRAFFIC IN WOMEN* 38 (1928).

25. International Convention of the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 1912 Gr. Brit. T.S. No. 20, at 267, *amended by* the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, Signed at Paris on 18 May 1904, and the International Convention for the Suppression of White Slave Traffic, Signed at Paris on 4 May 1910, May 4, 1949, 2 U.S.T. 1997, 30 U.N.T.S. 23 [hereinafter 1910 Convention].

over twenty-one to accomplish the same purpose, even if he or she committed the acts constituting the offense in different countries.<sup>26</sup> Similar to the 1904 Agreement, the 1910 Convention only addressed issues of trafficking and did not cover those who held women in brothels because this aspect of forced prostitution was considered to fall under the domestic jurisdiction of each signatory.<sup>27</sup> Therefore, it is not surprising that the 1910 Convention continued to be labelled an anti-“trafficking” rather than an anti-“forced” prostitution agreement. Since the label determined the content of the agreements, it served to substantially limit their effectiveness.

### 3. The Intermediate Years

After World War I, the League of Nations (the “League”) became involved in the international efforts against the trafficking of women and children for purposes of prostitution. The League’s Member States agreed in Article XXIII of the Covenant of the League of Nations to “intrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs.”<sup>28</sup> The International Convention for the Suppression of the Traffic in Women and Children<sup>29</sup> (“1921 Convention”) was concluded in 1921 under the auspices of the League, and was ratified by a substantially larger number of

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26. *Id.* art. 1, 211 Consol. T.S. at 46, Gr. Brit. T.S. No. 20, at 267.

27. STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, *supra* note 5, at 1. This view changed dramatically in the 1920’s when the League of Nations began to attack the so-called licensed house system because it viewed brothels as the centers of trafficking, and therefore considered their existence an international rather than a purely domestic issue. HARRIS, *supra* note 24, at 244.

28. LEAGUE OF NATIONS COVENANT art. XXIII, para. 1(c). Probably unwittingly, the Article’s parallel construction and language captured the treatment of women and children in forced prostitution as property, comparable to “opium and other dangerous drugs.” HARRIS, *supra* note 24, at 25-26 (quoting Article XXIII of the Covenant of the League of Nations). However, trafficking in women as opposed to illegal narcotics carries with it a distinct problem constellation, especially with regard to enforcement. After all, women are human, drugs are not.

29. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415, *amended by* the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933, Nov. 12, 1947, 53 U.N.T.S. 13 [hereinafter 1921 Convention].



states than the earlier conventions.<sup>30</sup> While the 1921 Convention changed the then prevalent terminology from "white slave traffic" to the color-blind "traffic in women and children,"<sup>31</sup> it retained the focus on trafficking rather than shifting it to the way in which prostitution was being practiced. Consequently, international actions could not be expected to go far beyond earlier measures.

In defining "children," the 1921 Convention extended the protective measures guaranteed under the 1904 Agreement to male minors and raised the relevant age limit.<sup>32</sup> It especially encouraged states to take legislative and administrative measures for the licensing and supervision of employment agencies and for the protection of immigrating and emigrating women and children.<sup>33</sup> To secure the general adherence to the 1921 Convention, the League established an Advisory Committee on the Traffic in Women and Children to which states had to report periodically and which assumed general supervision over the execution of the 1921 Convention.<sup>34</sup>

In the mid-1920's, the Council of the League commissioned a special body of experts to engage in fact-finding with regard to the traffic in women and children in selected countries of the Middle East, Europe, and North and South America.<sup>35</sup> The experts found it difficult to distinguish between the international trafficking and the national aspect of commercialized prostitution. They determined that "the existence of licensed houses is undoubtedly an incentive to traffic, both national and international." <sup>36</sup> A subsequently appointed body of experts that investigated conditions in Asia and the Far East confirmed this finding.<sup>37</sup> However, none of the then existing conventions criminalized the owning or managing of a brothel because that had always been considered to fall within a country's domestic jurisdiction. Again, it had been the limited view of the reach of inter-

30. HARRIS, *supra* note 24, at 40. The 1921 Convention was originally signed by 33 states, 26 of which ratified it. *Id.* By January 1928 an additional eight states adhered to the agreement. *Id.*

31. *Id.* at 43.

32. 1921 Convention, *supra* note 29, arts. 2, 5, 9 L.N.T.S. at 423-25.

33. *Id.* art. 6, 9 L.N.T.S. at 425.

34. Harris, *supra* note 24, at 27, 39.

35. STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, *supra* note 5, at 2.

36. *Id.* (citation omitted).

37. *Id.*



national law combined with the label used to describe the practice that prevented a more successful assault on forced prostitution.

The fact-finding missions also established that "profit . . . is at the root of the whole business [of forced prostitution]." <sup>38</sup> They condemned the "business of prostitution" more strongly than prostitution itself primarily for two reasons. First, forced prostitution allowed a third party to live comfortably by furnishing women to meet the demand for prostitutes and by indirectly stimulating such demand. Second, prostitution abroad was more certain to completely demoralize the victimized women who depended greatly on their exploiters since they were unfamiliar with the language or customs of the country in which they worked and did not have any friends or relatives abroad on whom they could rely for assistance. <sup>39</sup>

The International Convention for the Suppression of the Traffic in Women of Full Age, <sup>40</sup> signed in 1933, extended the scope of punishable acts that had previously been criminalized only with regard to minors to women of age and declared that even consent did not exempt from penalty preparatory acts, attempts, and the actual procurement of adult women for immoral purposes in another country. As a consequence of the two fact-finding missions and the two League Conventions, in 1937 the League prepared a draft convention that was designed to consolidate earlier treaties and secure international co-operation in the abolition of brothels, as well as the prosecution and punishment of brothel owners and managers. It was to be the first international treaty to address the practice of prostitution, which underlies trafficking. The League justified its new focus by arguing that the existence of the brothel was no longer a purely domestic question since it was the center of the trafficking system. The overall goal of the so-called "Consolidated Convention" of 1937 was to abolish any regulation of prostitution, repress third-party profiting from prostitution, and rehabilitate the female victims.

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38. HARRIS, *supra* note 24, at 49.

39. *Id.* at 53.

40. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431, *amended by* the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933, Nov. 12, 1947, 53 U.N.T.S. 13.

However, due to the outbreak of World War II, the Consolidated Convention was never opened for signature.<sup>41</sup>

### B. *The United Nations: 1945-Present*

The United Nations continued the work of the League on the trafficking of women and children. Under its auspices, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>42</sup> (the "1950 Convention") was opened for signature only two years after the United Nations General Assembly had publicized the Universal Declaration of Human Rights.<sup>43</sup> As had been the intention of the Consolidated League of Nations' Convention, the purpose of the 1950 Convention was to consolidate prior treaties. Article 28 states unequivocally that the 1950 Convention shall supersede the 1904, 1910, 1921, and 1933 treaties, which shall be considered terminated when all of their signatories have ratified the 1950 Convention.<sup>44</sup> While only little over half of the U.N. Member States initially adopted the 1950 Convention, and less than one third of them have ratified it, the 1950 Convention "now reflects the philosophy of the overwhelming majority of members of the international community."<sup>45</sup> The 1950 Convention is the first to speak of trafficking in gender-neutral terms and to drop the requirement that the traffic be international in character. In its title it explicitly refers to "prostitution," thereby indicating its focus on previously domestic aspects of the practice. Nevertheless, it continues to name trafficking in its title before it speaks of the exploitation of prostitution. In addition, it does not condemn forced prostitution, but rather the "exploitation" of prostitution, a term that does not carry the same violent connotation as "forced prostitution."

As did the 1910 Convention, the 1950 Convention sets out to punish any person who "[p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent

41. STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, *supra* note 5, at 2-3.

42. 1950 Convention, *supra* note 20, 96 U.N.T.S. at 271.

43. *Universal Declaration of Human Rights*, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948).

44. 1950 Convention, *supra* note 20, art. 28, 96 U.N.T.S. at 289.

45. U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, ACTIVITIES FOR THE ADVANCEMENT OF WOMEN: EQUALITY, DEVELOPMENT AND PEACE at 17, U.N. Doc. ST/ESA/174 (1985) [hereinafter 1985 REPORT].



of that person; [e]xploits the prostitution of another person, even with the consent of that person."<sup>46</sup> Article 1 makes these acts punishable even if the victim was not transported across international borders.<sup>47</sup> In addition, the acts are criminalized independent of the gender, age, or race of the victim.<sup>48</sup> Finally, the prosecuting authorities do not have to show that the perpetrators of these offenses gained financially from their acts.<sup>49</sup> The states which are party to the 1950 Convention agree to punish the owners, managers, and financiers of brothels as well as those who rent a space for the purpose of prostitution.<sup>50</sup> Similar to the 1904 Convention, the 1950 Convention also requires member states to establish or maintain an authority that coordinates and centralizes any information concerning offenses covered by the 1950 Convention.<sup>51</sup>

In accordance with the spirit of the Consolidated Convention of 1937, Article 6 mandates that states repeal any provisions making prostitutes subject to special registration or supervision.<sup>52</sup> This provision was based on the result of studies done in the late 1920's and early 1930's indicating that the closing of "licensed or tolerated houses," i.e., brothels, in a number of countries had caused neither an increase in the incidence of venereal disease nor had it damaged public order.<sup>53</sup> On the other hand, in excessively regulating brothels and prostitution in general, a state indicates that it tolerates or even sanctions the practice, even if it is forced. Furthermore, it marginalizes prostitutes and usually criminalizes their behavior if they violate "public decency" or hygienic commands. Such regulations, therefore, make it virtually impossible for the women to escape, since they often view themselves as deviants.<sup>54</sup> The studies asserted that only when such regulation ceases will the entire brothel system wither away, which thrived in part on the supply of women provided through the international trafficking network. Consequently, the 1950 Convention rejected the regulatory approach

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46. 1950 Convention, *supra* note 20, art. 1, 96 U.N.T.S. at 274.

47. *Id.* art. 1, 96 U.N.T.S. at 274.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* art. 14, 96 U.N.T.S. at 281.

52. *Id.* art. 6, 96 U.N.T.S. at 277.

53. STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, *supra* note 5, at 8.

54. 1985 REPORT, *supra* note 45, at 18.



to prostitution, which it considered an incentive to forced prostitution. Rather, it aimed at the abolition of forced prostitution. Under this approach, "prostitution is considered incompatible with the dignity of the human person, it is not prohibited, for it is regarded as a personal choice and hence a private matter."<sup>55</sup> Therefore, its goal is merely to abolish the exploitation of prostitution rather than the practice in all its forms.<sup>56</sup> While the title of the 1950 Convention speaks of the "exploitation of prostitution," the text tends to refer solely to prostitution. This created a certain degree of ideological confusion, since the 1950 Convention's focus remained ambiguous as to whether all kinds of prostitution or only forced prostitution were at issue.

With regard to the victims of prostitution, the states parties to the 1950 Convention "agree to take or to encourage . . . measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offenses referred to in the present Convention."<sup>57</sup> Among the enumerated preventive measures are the protection of immigrants and emigrants at points of arrival and departure, publicity to warn of the dangers of trafficking, the supervision of railway stations, airports, and seaports, informing the appropriate authority of the arrival of persons who appear to be either procurers or victims,<sup>58</sup> and the control of employment agencies.<sup>59</sup> In addition, the states who were parties committed to repatriate victims "who desire to be repatriated or who may be claimed by persons exercising authority over them or whose expulsion is ordered in conformity with law." The states of the person's residence and of the person's origin must agree on the repatriation and must split its cost if the victim is indigent.<sup>60</sup> Finally, the parties must annually report any relevant laws promulgated to the Secretary-General of the United Nations.<sup>61</sup>

In the late 1950's the United Nations commissioned a study (the "1959 Study") on the traffic in persons and prostitution to

55. *Id.*

56. *Id.* There seems to be a contradiction between an abolitionist approach and the criminalization of procurement in cases where the "victims" agreed to engage in prostitution.

57. 1950 Convention, *supra* note 20, art. 16, 96 U.N.T.S. at 281.

58. *Id.* art. 17(4), 96 U.N.T.S. at 282.

59. *Id.* art. 20, 96 U.N.T.S. at 284.

60. *Id.* art. 19(2), 96 U.N.T.S. at 282-84.

61. *Id.* art. 21, 96 U.N.T.S. at 284.

ascertain the effect of the 1950 Convention.<sup>62</sup> The 1959 Study concluded that the percentage of foreign prostitutes was very low in most countries. It credited three factors for this positive development. First, the domestic legislation of a large number of states incorporated the mandates of the international instruments for the suppression of trafficking and thereby thwarted the activities of many traffickers. Second, "the improvement in the status of women and the higher standard of living and education have greatly reduced the risks for women and girls to fall prey to traffickers." Finally, international trafficking had lost one of its major incentives with the closing of brothels all over the world.

Nevertheless, the study did not find that trafficking and forced prostitution had entirely disappeared, and therefore suggested that "any programme of action to combat the traffic should necessarily include in its scope the problem of prostitution itself."<sup>63</sup> It also viewed "[t]he abolition of the regulation of prostitution [as] a necessary prerequisite to any [such] programme."<sup>64</sup> Such an action had "to be supplemented by other measures aimed primarily at the maintenance of public order, the prevention of venereal disease, the suppression of the exploitation of the prostitution of others, the prevention of prostitution, and the rehabilitation of persons engaged in prostitution."<sup>65</sup>

For purposes of deterrence, the study suggested that the domestic punishment of brothel owners include high fines, repressive measures, the confiscation of direct profits, and the closure of the brothel even if it also carried on legitimate activities.<sup>66</sup> Prostitutes, however, should not be imprisoned, but rehabilitated, if they desire.<sup>67</sup> Finally, the study compiled a list of social and economic measures to improve the situation of women in general and prevent them from falling into prostitution.<sup>68</sup> Based on the 1959 Study, that year the U.N. Economic and Social Council adopted a resolution requesting governments "to take

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62. STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, *supra* note 5, at v-vi.

63. *Id.* at 6.

64. *Id.* at 9.

65. *Id.*

66. *Id.* at 29.

67. *Id.* at 30-31.

68. *Id.* at 32-34.



all appropriate measures for the elimination of the causes leading to the traffic in persons and of the exploitation of the prostitution of others through constant improvement of social and economic living conditions of their peoples."<sup>69</sup>

In 1974, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights formed a Working Group on Slavery. This Working Group classified trafficking in women and children as a form of slavery,<sup>70</sup> a label that was also adopted by the U.N. Commission on the Status of Women.<sup>71</sup> Because of this classification, the 1980 report on the Exploitation of Child Labour also included several paragraphs on child prostitution.<sup>72</sup> In addition, the 1982 Whitaker report on slavery contained information on the exploitation of prostitution and of child labor, which encompasses bonded service and child prostitution.<sup>73</sup> Labelling forced prostitution "slavery" might have been considered an advancement because by subsuming the practice under a well-established label, it became generally viewed as a serious human rights violation. Also, in 1982, the U.N. Economic and Social Council requested that a Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others be appointed.<sup>74</sup>

Jean Fernand-Laurent, the Special Rapporteur, presented a report that synthesized the data, available from U.N. organizations and agencies as well as other international bodies, non-governmental groups, and official government publications, on the issue of trafficking and prostitution.<sup>75</sup> The report defined "traffic in persons" as "the exploitation of the prostitution of women and children" and viewed it as a human rights violation.<sup>76</sup> Although the Special Rapporteur deemed the combat against procurement the short-term goal, he envisioned the overall re-

69. *Id.* at v.

70. 1985 REPORT, *supra* note 45, at 6.

71. *Updating of the Report on Slavery by Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/1982/20/Rev.1 [hereinafter 1982 Whitaker Report on Slavery].

72. 1985 REPORT, *supra* note 45, at 6-7.

73. 1982 Whitaker Report on Slavery, *supra* note 71.

74. 1985 REPORT, *supra* note 45, at 5.

75. *Id.* at 7.

76. *Id.* at 5. This definition renders the term "traffic" immaterial. "Exploitation of prostitution" connotes the forced aspect of the practice.



duction of prostitution as the ultimate aim. He suggested that the latter could be achieved if "economic and social inequalities between countries and within each country [were] lessened and women [were given] access to a variety of properly paid jobs."<sup>77</sup>

In addition, the Special Rapporteur drew on the recommendations of the 1959 Study and declared four elements to be necessary to fight prostitution successfully: "(1) before prostitution, preventive measures; (2) at the time of prostitution, elimination of isolating discrimination; (3) suppression of procuring; and (4) after prostitution, assistance in rehabilitation."<sup>78</sup> To accomplish these goals, he advocated an information campaign that would sensitize public opinion, the elimination of discrimination against women in general and prostitutes in particular, and, finally, the imposition of deterrent penalties on procurers, such as minimum prison terms of five years, as well as sanctions to punish all forms of procurement, including classified advertisements.<sup>79</sup> In addition, he suggested an increased international exchange of information on procurement networks, which should also include the resources of Interpol and the U.N. Centre for Human Rights.<sup>80</sup>

The Nairobi Forward-Looking Strategies ("Strategies") that were drafted at the 1985 International Women's Conference referred to forced prostitution as "a form of slavery imposed on women by procurers."<sup>81</sup> The document viewed forced prostitution as follows:

*inter alia*, [as] a result of economic degradation that alienates women's labour through processes of rapid urbanization and migration resulting in underemployment and unemployment. It also stems from women's dependence on men. Social and political pressures produce refugees and missing persons. Often these include vulnerable groups of women who are victimized by procurers. Sex tourism, forced prostitution and pornography reduce women to mere sex objects and

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77. *Id.* at 19.

78. *Id.* at 20.

79. *Id.* at 21.

80. *Id.* at 23.

81. REPORT OF THE WORLD CONFERENCE TO REVIEW AND APPRAISE THE ACHIEVEMENTS OF THE UNITED NATIONS DECADE FOR WOMEN: EQUALITY, DEVELOPMENT AND PEACE at 70, ¶ 290, U.N. Doc. A/CONF.116/28/Rev.1 (1986).

marketable commodities.<sup>82</sup>

In its recommendation section, the Strategies restate many of the earlier proposals, such as increased international cooperation of police forces, implementation of the 1950 Convention, improvement of international measures to combat trafficking, reintegration of prostitutes through increased economic opportunities and the provision of health facilities, and strict enforcement of criminal provisions to protect women against violence, drug abuse, and crime related to prostitution.<sup>83</sup>

In addition to the international struggle against trafficking in women, which is coordinated through the United Nations, regional organizations have also become involved in the crusade. Apparently adopting the United Nations' definition of forced prostitution as slavery or a slave-like practice, in a 1989 resolution (the "1989 Resolution"), the European Parliament called the traffic in persons for the purpose of prostitution "one of the most degrading forms of slavery to which individuals can be subjected."<sup>84</sup> It suggested a common policy of all European Community ("EC" or "Community") Member States to repress procurement, change the attitude of society, which often regards women as mere sexual objects, and prevent prostitution through "the provision of employment, education, vocational training and equal opportunities for women."<sup>85</sup>

To assist such projects in countries where the traffic originates, the European Parliament urged the Community to support women's information and employment projects abroad.<sup>86</sup> In addition, the 1989 Resolution called for a number of legal measures. First, it urged EC Member States to accede to the 1950 U.N. Convention if they had not yet ratified it.<sup>87</sup> Second, it suggested introducing or strengthening legal penalties directed against the exploiters of prostitution, and equalizing the penalties for traffickers in women with those for slave trad-

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82. *Id.* The Strategies appear to distinguish between sex tourism and forced prostitution. *Id.* While they could be separate phenomena, in most cases the two overlap.

83. *Id.* at 71, ¶ 291.

84. Eur. Parl., Resolution on the Exploitation of Prostitution and the Traffic in Human Beings, Doc. A2-52/89, O.J. C 120, at 352, 353 (1989).

85. *Id.* art. 5, O.J. C 120, at 353 (1989).

86. *Id.* art. 6, O.J. C 120, at 353 (1989).

87. *Id.* art. 8.1, O.J. C 120, at 354 (1989).



ers.<sup>88</sup> Third, although it advocated the repatriation of women who so desire, it also recommended the legalization of residence status for those women whose personal safety might be endangered upon return to their homeland or who, upon their arrival there, might again become victims of exploitation.<sup>89</sup> The 1989 Resolution also called for rehabilitative measures, including employment programs, shelters, education and training, social rehabilitation, and free health care.<sup>90</sup>

## II. HUMANITARIAN LAW: PROGRESS, BUT WHY IS FORCED PROSTITUTION ONLY SOMETIMES CALLED BY ITS NAME?

In contrast to international human rights law, which applies in peace time, war is governed by the rules of international humanitarian law. Whereas human rights law so far has failed to call forced prostitution by its name, the law of war has been more inclined to do so. Although humanitarian law has sometimes managed to label the practice, its enforcement record is dismal because it does not view forced prostitution as a grave breach of international norms. Nevertheless, this does not imply that we should not attempt to label forced prostitution, but rather that we should enforce its prohibition more vigorously even under the most trying circumstances in which human rights standards tend to be violated on a regular basis.

Humanitarian law generally applies the principle of gender equality by protecting women against unfavorable distinctions. However, it also subscribes to the notion that "[w]omen shall be treated with all the regard due to their sex."<sup>91</sup> While this particular provision does not detail what constitutes "all the regard due to [women's] sex," the term "covers certain concepts, such as physiological specificity, honour and modesty, pregnancy and childbirth."<sup>92</sup> The Third Geneva Convention, for example, fulfills this mandate by including an article that requires separate

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88. *Id.* art. 8.2, O.J. C 120, at 354 (1989).

89. *Id.* art. 8.2(e), O.J. C 120, at 354 (1989).

90. *Id.* art. 9, O.J. C 120, at 354-55 (1989).

91. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION 146 (1960).

92. Françoise Krill, *The Protection of Women in International Humanitarian Law*, 25 INT'L REV. RED CROSS 337, 340 (1985).

dormitories or places of detention for men and women.<sup>93</sup>

Humanitarian law has developed its own approach toward forced prostitution occurring in times of war or civil strife. However, even if listed as a separate offense, in practice forced prostitution has often been subsumed under the analysis of the rape that precedes or accompanies its practice.<sup>94</sup> Article 44 of the American military's Lieber Code of 1863, which codified existing legal proscriptions, prohibited "all rape" in times of war under either penalty of death or other severe punishment,<sup>95</sup> but did not separately address forced prostitution. Nevertheless, the Lieber Code stated in Article 23 that "[p]rivate citizens are no longer [to be] . . . enslaved, or carried off to distant parts,"<sup>96</sup> a formulation which would presumably include a ban on forced prostitution.

The Hague Regulations that were annexed to the Hague Convention of 1907 provided only partial and indirect protection against rape.<sup>97</sup> Although Article 46, which mandates respect for "[f]amily honour and rights," could have been construed to cover rape and forced prostitution, in practice it has rarely been interpreted in this way.<sup>98</sup> Relying on the Hague Regulations, the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (the "1919 Commission"), which had been created by the preliminary Paris Peace Conference to inquire into the responsibility of the defeated World War I powers for offenses committed during the war, listed "rape" and the "abduction of girls and women for the purpose of enforced prostitution" in its compilation of war crimes.<sup>99</sup> Although no international tribunal was ever established, for the first time in modern history forced prostitution was labelled as a war crime. However, post-World War I treaties

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93. *Id.*

94. *Cyprus v. Turkey*, 4 Eur. Comm'n H.R. 482, 483 (1976) (allegations of rape and enforced prostitution were collapsed into consideration of rape incidents as inhuman treatment).

95. Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 30 (1992) [hereinafter Meron, *Henry the Fifth*].

96. YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 6 (1982) (quoting Article 23 of Lieber Code).

97. Meron, *Henry the Fifth*, *supra* note 95, at 30.

98. Theodor Meron, Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993) [hereinafter *International Humanitarian Law*].

99. KHUSHALANI, *supra* note 96, at 11-12.



again failed to call "forced prostitution" by its name. For example, the general protection for women expressed in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War was too vague to effectively shelter women from rape or forced prostitution.<sup>100</sup>

During World War II, the Japanese and the Germans forced thousands of women into brothels.<sup>101</sup> However, only a few of those acts were ever prosecuted or punished. Some national courts outside of Germany, Japan, and Italy heard allegations of forced prostitution.<sup>102</sup> A Netherlands court in Batavia, for example, tried some Japanese for engaging in the "abduction of girls and women for the purpose of enforced prostitution." The offense was defined as a war crime in municipal law and in the list of war crimes drawn up by the 1919 Commission.<sup>103</sup> Focusing on the forced prostitution of the women which included their confinement, ill-treatment, and loss of liberty rather than their abduction or deportation for the purpose of prostitution, the court found Washio Awochi guilty of violating the laws and usages of war.<sup>104</sup>

Nevertheless, forced prostitution was not an issue either during the Nuremberg War Crimes Trials or the trials conducted in the Pacific war theater in the late 1940's. This is even more surprising given that the U.S. military was in possession of numerous Japanese documents that indicated the involvement of the Japanese government and military in the forced prostitution of thousands of Korean and Chinese women. In addition, the U.S. military had captured a fair number of these women, whose testimony supported the documentary evidence of the coercive nature of their "services."

The Rules for Authorized Restaurants and Houses of Prostitution in Manila (the "Rules"), issued in February 1943, prove that the Japanese government regulated the management of brothels in the local war theaters and would go even so far as to

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100. Meron, *Henry the Fifth*, *supra* note 95, at 30.

101. ANNE TIERNEY GOLDSTEIN, THE CENTER FOR REPRODUCTIVE LAW & POLICY, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW 11 (1993); Meron, *Henry the Fifth*, *supra* note 95, at 30.

102. *International Humanitarian Law*, *supra* note 98, at 426 n.13.

103. U.N. WAR CRIMES COMMISSION, XIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 122, 124 (1949).

104. *Id.*; see PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 180 (1979) (court held accused directly responsible for exploitation of women).

compensate brothel managers and owners who had to close down. Army physicians conducted weekly examinations of prostitutes and the officers in charge set the prices at local brothels. Although the Rules do not recognize the coercive character of the prostitutes' employment, they include a provision prohibiting the women from leaving the brothels without permission.<sup>105</sup>

While this document clearly establishes that the Japanese military controlled and regulated "houses of relaxation," as they euphemistically referred to the brothels, the accounts of women who had worked in them as well as of brothel owners unequivocally confirmed that the women had been forced into prostitution. One brothel owner testified that upon suggestion from Japanese army headquarters, he had "purchased" twenty-two Korean women and paid their families for them.<sup>106</sup> The U.S. army interrogation document proceeds to state that "[w]hen a girl is able to repay the sum of money paid to her family plus interest, she should be provided with a free return passage to Korea, *and then [be] considered free.*"<sup>107</sup> In addition, the U.S. military's analysis of the recruitment of Korean "comfort women" clearly indicates that the women did not know that the Japanese agents recruiting them intended for them to work as prostitutes.<sup>108</sup> In spite of this evidence, the United States did not prosecute any Japanese military or government officials for forcing civilians in conquered territories into prostitution.

The Nuremberg Principles, which were eventually adopted by the U.N. General Assembly, recognized rape as both a war crime and a crime against humanity.<sup>109</sup> Control Council Law No. 10 included rape, enslavement, deportation, and torture as crimes against humanity but did not separately mention forced prostitution.<sup>110</sup> In response to the crimes committed during

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105. Rules for Authorized Restaurants and Houses of Prostitution in Manila, issued by Lt. Col. Onishi, Manila District Line of Communication Squad (Feb. 1943), *reprinted in* GENERAL HEADQUARTER, SUPREME COMMANDER FOR THE ALLIED POWERS, AMENITIES IN THE JAPANESE ARMED FORCES 9-11 (Nov. 15, 1945).

106. SOUTH-EAST ASIA TRANSLATION AND INTERROGATION CENTER, PSYCHOLOGICAL WARFARE (INTERROGATION BULLETIN No. 2) 10 (Jan. 2, 1945) (testimony of M. 739, a civilian brothel-owner).

107. *Id.* at 11 (emphasis added).

108. U.S. OFFICE OF WAR INFORMATION, INTERROGATION REPORT OF 20 KOREAN COMFORT GIRLS 1 (Oct. 1, 1944).

109. Goldstein, *supra* note 101, at 8.

110. *International Humanitarian Law*, *supra* note 98, at 426. The U.S. Department of State has labeled rape alternatively a war crime or a grave breach of customary inter-



World War II, the 1949 Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"), however, states unambiguously that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."<sup>111</sup> However, the infringement of this provision is not considered a "grave breach" under Article 147 of the Fourth Geneva Convention, and therefore the provision does not require the imposition of penal sanctions or extradition nor does it grant universal jurisdiction over the offense.<sup>112</sup>

Nevertheless, the International Committee of the Red Cross has interpreted Article 147 to encompass "rape, enforced prostitution, or any form of indecent assault" because they fall under the overall category of "inhuman treatment."<sup>113</sup> However, even if this interpretation were considered binding, in practice, rape and other sexual abuses, including forced prostitution, committed during wartime are rarely prosecuted.

Euphemisms concerning 'honour,' prosecutors' refusals to discuss evidence out of an ostensible desire to protect the victim from further shame, systemic distrust of women's testimony, and the persistent notion that rape is inevitable in war — more of a technical violation than a war crime — have combined to make [these offenses] . . . largely invisible in the history of international law.<sup>114</sup>

The lack of effectiveness of international conventions became obvious during the 1971 Bangladesh conflict in the course of which Pakistani soldiers raped thousands of women. As a consequence, Article 75(2)(b) of Protocol I to the Geneva Conventions ("Protocol I") explicitly prohibits enforced prostitution at any time and in any place whatsoever.<sup>115</sup> Since Article 75 is la-

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national law and the Geneva Conventions. Rape can be more easily prosecuted under either of these two theories than as a crime against humanity because the latter requires a showing of the mass character of the offense. *Id.* at 427.

111. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287, 306 [hereinafter Fourth Geneva Convention].

112. Meron, *Henry the Fifth*, *supra* note 95, at 30-31; see Fourth Geneva Convention, *supra* note 111, art. 147, 75 U.N.T.S. at 388.

113. Goldstein, *supra* note 101, at 9 n.22.

114. *Id.* at 3.

115. Protocol Additional to the Geneva Convention of 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75(2)(b),

beled a "fundamental rights" provision, it marks an important step in international law by declaring certain acts always and universally outlawed and by prohibiting any derogation.<sup>116</sup> Article 76(1) of Protocol I expands upon the previous provision and repeats the earlier prohibitions on rape and enforced prostitution.<sup>117</sup> In international conflicts, states have an imperative duty to protect women against these offenses.<sup>118</sup> In addition, Article 4(2)(e) of Protocol II to the Geneva Conventions, which applies to non-international conflicts, forbids "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."<sup>119</sup> It appears that the Geneva Conventions have now accepted forced prostitution as a separate crime, even if the imposition of sanctions for violations of these provisions continues to be practically non-existent.

With regard to the Yugoslavian War Crimes Tribunal, the Secretary-General of the United Nations considered rape and enforced prostitution crimes against humanity.<sup>120</sup> France had suggested extending the tribunal's jurisdiction to "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, [systematic mass] rape, forced prostitution and indecent assault." The U.S. draft statute, while explicitly including torture and rape, did not refer to forced prostitution.<sup>121</sup> The

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1125 U.N.T.S. 3, 37, *reprinted in* 16 I.L.M. 1391, 1423 (1977) [hereinafter Protocol I]; *see* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter 1987 COMMENTARY] (providing in-depth commentary on individual provisions of two Protocols).

116. KHUSHALANI, *supra* note 96, at 55-56.

117. Protocol I, *supra* note 115, art. 76(1), 1125 U.N.T.S. at 38, 16 I.L.M. at 1425.

118. KHUSHALANI, *supra* note 96, at 57.

119. Protocol Additional to the Geneva Convention of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(2)(e), 1125 U.N.T.S. 609, 612, *reprinted in* 16 I.L.M. 1442, 1444 (1977).

120. *Report of the Secretary General Pursuant to Paragraph 8 of Security Council Resolution 808* (1993), U.N. SCOR, U.N. Doc. S/25704, commentary to art. 5(48) (1993); *see* Goldstein, *supra* note 101, at 12-13 (noting that Security Council approved Secretary-General's report listing rape and other forms of sexual assault as crimes that should fall under jurisdiction of international tribunal).

121. U.N. Doc. S/25575, Ann. II, art. 10 (1993). Article 10 of the U.S. draft statute states:

The Tribunal shall have the power to try and to punish persons for any of the following violations of international law arising out of the conflict in the former Yugoslavia on or after January 1, 1991: . . . (b)(i) Acts of murder, torture, extrajudicial and summary execution, illegal detention, and rape that are part



ultimately adopted Statute of the International Tribunal failed to include "enforced prostitution and other forms of sexual assault" in the list of punishable offenses, although it explicitly mentions rape as a crime against humanity.<sup>122</sup>

Absent from any of these proposals was also a recognition of forced mass impregnation as a war crime. The arguments against classifying it as a separate offense are similar to those that could be used against recognizing forced prostitution as a separate war crime. First, mass impregnation is an inevitable by-product of mass rape. Second, it can be subsumed under the traditional categories of torture, inhuman treatment or genocide.<sup>123</sup> However, only if forced prostitution is always prosecuted as a separate offense will the international proscriptions laid out in the Geneva Convention and the additional protocols against its practice in wartime become credible. The prosecution of forced prostitution as torture or inhuman treatment would only reinforce its secondary status as an offense against the rules of war.

### III. THE POWER OF LANGUAGE

Forced prostitution has been defined as a situation in which its victims "cannot change the immediate conditions of their existence; where regardless of how they got into those conditions they cannot get out; and where they are subject to sexual violence and exploitation."<sup>124</sup> As indicated above, the practice may be analyzed in a number of different ways. Not only can it be viewed as an ethnological or sociological issue, a question of cultural history or political economy, a criminological problem, but it can also be addressed in terms of public health, religion, morality, or human rights.<sup>125</sup> These different analytical methods have made it more difficult for international and national agen-

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of a campaign or attack against any civilian population in the former Yugoslavia on national, racial, ethnic, or religious grounds. . . .

*Id.*; see Meron, *International Humanitarian Law*, *supra* note 98, at 427 (discussing U.S. adoption of definition of crimes against humanity).

122. Goldstein, *supra* note 101, at 13 n.32.

123. *Id.* at 5-6.

124. Joyce Yu, *Introduction*, in *FEMALE SEXUAL SLAVERY AND ECONOMIC EXPLOITATION: MAKING LOCAL AND GLOBAL CONNECTIONS* [hereinafter *FEMALE SEXUAL SLAVERY AND ECONOMIC EXPLOITATION*] 1, 1 (1985) (quoting Kathleen Barry).

125. 1985 REPORT, *supra* note 45, at 9.

cies to approach the issue of forced prostitution in a coherent manner.

Much of the missing focus in the analysis of forced prostitution is due to the reluctance of the international community to call the practice of forced prostitution by its name. In part, this might be due to the traditional hesitation to correctly label any action that is even remotely related to sex.<sup>126</sup> Moreover, those combatting the practice might also fear being perceived as moralists who attempt to abolish all prostitution even in those cases where the women are not coerced into selling their bodies but rather do so voluntarily.

#### A. *A Question of Power: Gender and Nationality*

Because its victims are usually women, forced prostitution has been characterized as an issue of the gender power construct.<sup>127</sup> Men involved in the trafficking of women for purposes of prostitution dominate their victims in all aspects of life and consider them mere sexual objects that can be subjugated and exploited as needed.<sup>128</sup> They tend to treat women like property that can be bought and sold on the market.<sup>129</sup>

One commentator has argued that the unifying factor behind forced prostitution, the international traffic in women, international sex tourism, the trade in South East Asian women, boy prostitution, and mail-order brides is "the adult male agent of slavery, trafficking and prostitution."<sup>130</sup> Such an analysis of the relative gender power subsumes other approaches to the question of forced prostitution, such as the exploitation of labor.<sup>131</sup> The commentator makes the following claim regarding

126. Aihwa Ong, *Industrialization and Prostitution in Southeast Asia*, in *FEMALE SEXUAL SLAVERY AND ECONOMIC EXPLOITATION*, *supra* note 124, at 11, 19. Within the highest circles of Thailand's elite, for example, the use of the term "prostitute" is forbidden. *Id.*

127. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 5 (1987); PROSTITUTION 8 (Nannette J. Davis ed., 1993). See generally SHANNON BELL, *READING, WRITING, AND REWRITING THE PROSTITUTE BODY* (1994) (analysis of discourse viewing prostitute alternately as powerful sexual being and as disempowered sexual victim).

128. Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 *AM. J. INT'L L.* 613, 630 (1991).

129. 1985 REPORT, *supra* note 45, at 10-11. See generally ASIA WATCH & THE WOMEN'S RIGHTS PROJECT, *supra* note 2 (report on trafficking of Burmese women and girls into brothels in Thailand).

130. Susanne Kappeler, *The International Slave Trade in Women, or, Procurers, Pimps and Punters*, 1 *LAW & CRITIQUE* 219, 219 (1990).

131. *Id.* at 225.



the effect that the increasing liberation and political and economic power of Western women has had:

[Western men have shifted] the business to where labour and resources are still more easily exploitable, and where money is still the prerogative of men. As with the general expansion of the 'market' to the transnational global village, the men of East and West, North and South, First and Third World, are bonding harmoniously to build a multinational traffic in women . . . .<sup>132</sup>

In many developing countries, the economic situation of women is so dismal that any offer of employment, whether in a legitimate profession or as a prostitute, might appear desirable because it is often a woman's sole way to support her family. In addition, frequently women can make more money as prostitutes than in any other line of employment. Therefore, the advocates of rational choice have often claimed that prostitution is almost never forced but rather presents a rational and free choice on the part of women working as prostitutes. However, the Special Rapporteur has refuted this argument by in fact turning it on its head and stating that "even when prostitution seems to have been chosen freely, it is actually the result of coercion," whether it be due to economics, an insufferable family situation, rape, or the seduction or violent "persuasion" of a procurer.<sup>133</sup> A number of women's rights' advocates and feminist groups have also advocated this view.<sup>134</sup>

The question of a woman's free will is in part an issue of timing. Is a woman forced to prostitute herself only when she did not intend to sell her body at the time the procurer approached her? Should it matter that she is either psychologically or physically forced to stay at a brothel against her will and to "serve" customers there sexually although she had planned on working as a prostitute when she started? If original intent matters, the label "forced prostitution" will cover only women who never wished to work as prostitutes. Under the second, broader

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132. *Id.* at 235.

133. 1985 REPORT, *supra* note 45, at 10.

134. See PROSTITUTION, *supra* note 127, at 7 ("Choice . . . makes little sense in the typical context of moral stigma, social ostracism, and political and economic powerlessness . . . ."); see also, BELL, *supra* note 127, at 77, 125 (quoting Carole Pateman, who views prostitute as sexual slave akin to worker who is wage slave, and quoting Kathleen Barry, who does not distinguish between voluntary and involuntary prostitution).

approach all those women who " 'cannot change the immediate conditions of their existence [and] . . . are subject to sexual violence and exploitation' " <sup>135</sup> will fall under the term's coverage. <sup>136</sup> The two approaches can be analogized to the prosecution of date rape. While it is irrelevant whether the woman planned on engaging in sex when she consented to joining a man in his apartment, her actions there determine whether the sex act will be classified as date rape or consensual sex.

Because of the difficulty of assessing a woman's free will in light of the above debates, it appears that international treaties on the issue of forced prostitution have focused on the "trafficking" aspect and therefore on women who are about to be coerced or seduced into engaging in prostitution. The post-World War II treaties implicitly assume that procurement into prostitution can never be the product of a woman's free choice. This is a legitimate assumption in view of the gender power construct, large-scale economic discrimination against women and the violence usually employed against them.

Although most women forced to work as prostitutes are nationals of the states in which they reside, often traffickers bring women across international borders for purposes of prostitution. <sup>137</sup> Economically this makes sense for the traffickers since foreign women appeal to a certain segment of the male clientele of brothels. The racial aspect involved in trafficking appears to be confirmed by the fact that with a prostitute of another culture many men feel free to engage in practices they would never consider when at home. <sup>138</sup> This indicates that where a man's main motivation is to consummate a sexual relationship with a *foreign* woman, sex tourism or trafficking becomes a form of imperialism that often manifests itself in the racist degradation of prostitutes. <sup>139</sup>

The traffickers, as well as the brothel owners and managers, can also more easily subjugate foreign women because they are

135. Lan Cao, Note, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 *YALE L.J.* 1297, 1297 n.1 (1987) (citation omitted).

136. The use of the broader definition of forced prostitution provides fewer problems of proof since it focuses on the conditions under which a woman must work as a prostitute rather than relying on her past intentions.

137. 1985 REPORT, *supra* note 45, at 13-14.

138. Charlotte Bunch & Patricia Lee, *Workshop I: International Trafficking in Women*, in *FEMALE SEXUAL SLAVERY AND ECONOMIC EXPLOITATION*, *supra* note 124, at 25, 26.

139. Ong, *supra* note 126, at 20.



doubly disadvantaged as women and foreigners. Many of the women do not speak the language of the country of their residence; they are afraid of local police which are often corrupt and work together with the procurers and brothel owners; and they fear deportation to their home countries where their fate might be uncertain or where they would be treated as criminals for having engaged in prostitution.<sup>140</sup> Although the term "forced prostitution" does not encompass the racial aspect of the practice, it focuses on the gender component, and therefore also the power aspect which is a crucial part of the practice.

### B. A Question of Economics

As was black slavery in the nineteenth century, forced prostitution is not only a human rights issue but also an economic phenomenon. Trafficking in women has become a huge international business that brings immense economic benefits to everyone involved except the women forced to work as prostitutes.<sup>141</sup> The demand for prostitutes determines their supply. In the past, trafficking in women meant that poor women were brought to wealthy men.<sup>142</sup> For example, in the 1920's the trafficking in women was organized so as to serve rich men in North and South America and Europe.<sup>143</sup> Today, affluent men often travel to countries that are advertised as "sex paradises."

To a large extent, the increase in trafficking in women in the Third World stems from growing economic disparities on the national and international levels. Once caught up in the trafficking networks, penniless women in foreign countries are at the mercy of those who arrange and profit from the trade.<sup>144</sup>

Although theoretically some of the existing international law treaties, such as the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>145</sup> and the Convention on the Elimination of All Forms

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140. See generally ASIA WATCH & THE WOMEN'S RIGHTS PROJECT, *supra* note 2 (discussing forced prostitution of Burmese women in Thai brothels).

141. Charlesworth et al., *supra* note 128, at 631.

142. 1985 REPORT, *supra* at 45, at 14.

143. HARRIS, *supra* note 24, at 49, 52.

144. Charlesworth et al., *supra* note 128, at 630.

145. 1950 Convention, *supra* note 20, 96 U.N.T.S. at 271.

of Discrimination Against Women<sup>146</sup> ("CEDAW"), could be used to combat at least the most egregious forms of exploitation of women through prostitution, some feminists have argued that "a real commitment to the prevention of sexual trafficking in women is unlikely to be made unless it does not adversely affect other economic interests."<sup>147</sup> Since technology has not yet advanced enough to replace women's sexual services, the demise of forced prostitution based on economic considerations is far from imminent.<sup>148</sup> In this regard, forced prostitution differs from slavery which became outmoded with the onset of industrialization and automation. While the Axis powers used slave labor during World War II, the "modern" (social welfare) nation prohibits wage slavery which becomes increasingly unrealistic with the continual development of specialized industries that rely on highly trained employees. Prostitution, on the other hand, requires no formal training and tends to trap the least educated. Therefore, it lends itself to exploitation.

In fact, forced prostitution might be a "growth industry" in light of the increasing number of wealthy tourists desiring sexual "services" when travelling abroad and the growing demand for mail-order brides in Western countries. In addition to the tourist agencies, hotels, and transportation services, the police and the government bureaucracy all benefit directly or indirectly from forced prostitution which has turned into a large industry.<sup>149</sup> In some countries, such as Thailand, government officials and the local elites have come to accept the institutionalization of violence in the form of forced prostitution because they view the practice as the key to regional development and an important source of foreign currency.<sup>150</sup>

The economic approach to forced prostitution indicates that, because of the profit margins at stake and the large number of beneficiaries involved, it will not wither away. Rather

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146. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

147. Charlesworth et al., *supra* note 128, at 630.

148. *Id.* at 631.

149. Ong, *supra* note 126, at 19. The analogy to an "industry" might not be too far-fetched in light of the women's working conditions which resemble those of assembly line workers. See, e.g., ASIA WATCH & THE WOMEN'S RIGHTS PROJECT, *supra* note 2, at 68-69 (stating that some Burmese prostitutes in Thailand appear to "serve" between ten and twenty men a day).

150. Ong, *supra* note 126, at 18.



its existence must be actively assailed by addressing the supply as well as the demand side. In order to do so effectively, the practice must be named first to provide a focal point for public actions which could eventually culminate in successful prosecutions of all those benefitting from forced prostitution.

C. *A Question of Labelling: Slavery or Slave-Like Practices?*

The trafficking of women and children violates a number of international human rights norms, such as the proscriptions against slavery, torture, forced labor, and gender discrimination. Therefore, the question arises why it should receive another label rather than be subsumed under one or more of the above constructs. While forced prostitution legally can be attacked as an infringement of any of the above rules, rather than clarifying the issue, the number of possible labels that can be attached to forced prostitution contribute to the lack of a clear enforcement focus. This is demonstrated by the unorganized, uncoordinated, and often contradictory approaches the United Nations and its agencies have taken to combat forced prostitution. Although, as a 1985 United Nations report on the suppression of the traffic in persons and the exploitation of the prostitution of others indicated, many U.N. agencies have a potential interest in addressing the issue of enforced prostitution, all of them deal with the question differently.<sup>151</sup>

One of the United Nations' dominant methods of analysis with regard to forced prostitution is to equate its practice with slavery.<sup>152</sup> According to the 1926 Slavery Convention, slavery is "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."<sup>153</sup> Forced prostitution fits this definition of slavery.<sup>154</sup> The procurement of women into forced prostitution is sometimes based on seduction or, more frequently, on fraudulent promises of marriage or employment. It also takes the form of forceful ab-

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151. 1985 REPORT, *supra* note 45.

152. 1982 *Whitaker Report on Slavery*, *supra* note 71; 1985 REPORT, *supra* note 45, at 12-13.

153. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, art. I, 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263, *amended by* Protocol Amending the Slavery Convention Signed at Geneva on September 25, 1926, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51.

154. Goldstein, *supra* note 101, at 25.

duction, often involving drugs that make it easier to kidnap, beat, torture, and threaten the victims.<sup>155</sup> Once inducted into the "profession," women are sold like property. They have no opportunity to escape from their state of servitude.<sup>156</sup>

The practice of slavery violates countless human rights treaties and humanitarian law conventions as well as customary international law.<sup>157</sup> However, the United Nations and its agencies do not seem to take a uniform view towards forced prostitution as slavery. Whereas the U.N. Commission on the Status of Women considers forced prostitution to be slavery, the Special Rapporteur on slavery deems it merely a slavery-like practice.<sup>158</sup>

According to its 1958 Commentary, the Red Cross, which interprets humanitarian law treaties such as the Geneva Conventions, regards forced prostitution, which it defines as "the forcing of a woman into immorality by violence or threats," as a form of "inhuman treatment" rather than slavery.<sup>159</sup> Based on the 1987 Commentary on the Additional Protocols, however, it has become questionable whether the Red Cross would not subsume forced prostitution under "slavery and the slave trade in all forms," which are outlawed under Article 4 of Protocol II.<sup>160</sup> The Commentary states that to better understand the scope of the prohibition, it is necessary to consider that "practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour," are also banned under the Protocols. However, it fails to explicitly mention forced prostitution in its enumeration of slavery-like practices.<sup>161</sup>

#### D. *A Question of Language*

As indicated above, the difficulties that the international community faces in addressing the issue of forced prostitution is at least in part due to its reluctance to properly name the prac-

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155. 1985 REPORT, *supra* note 45, at 11.

156. *Id.* at 12-13.

157. Goldstein, *supra* note 101, at 24.

158. *Id.* at 25-26.

159. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTION OF 12 AUGUST 1949 COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 206 (J. Pictet ed., 1958); see Goldstein, *supra* note 101, at 26 & n. 59.

160. 1987 COMMENTARY, *supra* note 115, at 1367.

161. *Id.* at 1376.



tice. Only the use of the term "forced prostitution" connotes the full meaning of the inhumane treatment of women and children. Many international conventions do not explicitly refer to forced prostitution but rather have called the practice "trafficking in women and children"<sup>162</sup> or have subsumed its analysis under the categories of inhumane treatment, torture, forced labor, gender discrimination, slavery or slave-like practices.<sup>163</sup> While in the past this renaming of the practice may have been the sole avenue to give jurisdiction to the United Nations and international and domestic tribunals to address the issue of forced prostitution and to allow for its prosecution, it has also contributed to conceptual confusion.

Legal language does more than express thoughts. It reinforces certain world views and understandings of events. Its terms and its reasoning structure are the procrustean bed into which supplicants before the law must express their needs. Through its definitions and the way it talks about events, law has the power to silence alternative meanings — to suppress other stories.<sup>164</sup>

In addition, denying forced prostitution its name deprives organizations and individuals attempting to combat its practice of a clearly defined single term around which they could rally. Therefore, I propose that international human rights and humanitarian law conventions begin to call forced prostitution by its name and explicitly refer to it as a violation of international norms. Although for prosecutorial purposes, in the past, it may have been desirable to categorize forced prostitution as slavery, in the long run it will be more advantageous to provide the practice with its own legal framework while continuing to view it as a serious human rights violation.

Comparing the use of the term "forced prostitution" with the label "slavery" will illuminate the advantages of using the former. While forced prostitution might resemble "slavery" in war time, in peace time the concept of "slavery" carries a different connotation than "forced prostitution." During war women who

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162. See *supra* notes 15-41 and accompanying text (discussing how early international conventions referred to "forced prostitution").

163. See *supra* notes 151-61 and accompanying text (discussing how international organizations have analyzed "forced prostitution").

164. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989).

are forced into prostitution are either detained in camps or transported into occupied territories to "serve" troops in brothels or brothel-type establishments. The women are "different" from their customers, either with regard to nationality, ethnicity, religion, or race. That is, the women forced to work as prostitutes do not belong to the group of females whom the military forces or the government would consider "their" women. Because of this racial, ethnic, or religious difference and the unambiguous force with which these women are being detained, during war forced prostitution is relatively easily analogized to historical forms of slavery.<sup>165</sup>

Many governments and wide segments of the population seem to be less inclined to accept the analogy of forced prostitution to the traditional form of slavery in peace time. Slavery tends to be viewed in terms of nineteenth-century black slavery rather than be deemed a more general and all-encompassing concept. The problem with labelling forced prostitution as "slavery" is one of rhetoric and linguistics. Individuals react to and interpret data and stimuli with regard to similar happenings in their past that provide meaning to the new data.<sup>166</sup> "Our interpretation of any sign is our psychological reaction to it, as determined by our past experience in similar situations, and by our present experience."<sup>167</sup> Because our past experience with the word "slavery" has been shaped primarily by nineteenth-century black slavery, the word denotes "whatever meaning it has through belonging to a [. . .] group of events, which may be called its context."<sup>168</sup> It is difficult for lay persons to conceive of forced prostitution in the same overall framework as slavery even if the individual elements of the term legally fit into the definition of slavery.

The use of the terms "force" and "prostitution" together carries a powerful evocative meaning. Whereas the former indicates violence, physical or psychological duress, and abuse, the latter denotes the gendered elements of the practice. "Prostitu-

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165. It is interesting to note, however, that humanitarian law rather than human rights law explicitly uses the term "enforced prostitution" in its primary legal documents.

166. *THE RHETORIC OF WESTERN THOUGHT* 193 (James L. Golden et al. eds., 3d ed. 1983).

167. *Id.* (citation omitted).

168. *Id.* at 205.



tion" automatically evokes the image of a woman or a girl-child giving her body to a man in exchange for money without excluding a possible later extension to boys forced to work as male prostitutes. While the element of force in the practice makes it a legitimate concern for human rights inquiries and criminal investigations, the term "prostitution" clearly renders the issue an important one for women's groups.

The use of a term different from "slavery" also indicates that forced prostitution contains certain discrete elements that distinguish it from slavery. First, while slaves have never been blamed for their status, in many cultures a stigma attaches to women lured or forced into prostitution. It is the cultural context that often compels these women, even upon liberation from direct oppression, to return to prostitution because it is the only way of life that remains open to them. After having worked as prostitutes, many women are prevented from ever marrying and having families. Therefore, their first "customer" turns them into social outcasts, pariahs, and leaves them no other opportunity than to remain prostitutes.

Second, although the health of slaves might have suffered in the course of their bonded status, prostitutes are often infected with venereal diseases or the HIV virus. Therefore, they tend to be viewed as a threat to the health of society even though they were not the original source of the infection. Consequently, their status as former prostitutes determines their long-term health prospects and their entire future.

Third, slaves or crime victims have never been considered in need of rehabilitation. While counseling might generally be suggested for rape victims, prostitutes are often "to be rehabilitated,"<sup>169</sup> a term normally reserved for the offender rather than the victim. Lastly, slavery tends to have only one set of offenders, the slave traders and owners. The customer of products made with slave labor was usually so far removed from the chain of events that he or she could not be held liable. However, the "customer" of a prostitute has direct contact with her, and is usually aware of the conditions under which she has to work. Therefore, while calling forced prostitution "slavery" in peace time al-

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169. See *supra* note 78 and accompanying text (listing four steps necessary to fight prostitution successfully).

lows the customer to remain without liability,<sup>170</sup> recognition of forced prostitution as a crime makes it possible to punish the customer.

The recognition of forced prostitution as an international violation in its own right does not deprive local or international prosecutors from charging other offenses in addition to the crime of forced prostitution, such as rape, torture, murder, or arbitrary detention. As the above analysis has indicated, numerous international instruments, including the 1950 Convention, as well as the Geneva Convention and its Additional Protocols,<sup>171</sup> provide the international community with the legal means to enforce the prohibition of forced prostitution in peace time, as well as in war. Without even naming the practice, these documents provide the legal basis for the prosecution of the perpetrators since they are slave-holders, torturers, often rapists, and sometimes even murderers.<sup>172</sup> In many cases forced prostitution also subsumes numerous individual offenses that are defined as crimes under every country's penal code.

Giving a name to "forced prostitution," therefore, does not create a crime that did not previously exist. Consequently, adding forced prostitution to the list of international offenses does not violate the principle of *nullum crimen sine lege*, meaning "no crime without law."<sup>173</sup> Rather, it follows logically from the fact that since "human cruelty has found new forms of expression and new means of inflicting agony, international law has given them names."<sup>174</sup> For the general public, the term "forced prostitution" will become a rallying cry that will evoke images of all of the above offenses while retaining its own separate niche in public consciousness.

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170. The situation is different in war time since customer, owner, and procurer are, if not identical, at least closely related, i.e., government, military, and individual soldiers.

171. See *supra* notes 15-123 and accompanying text (discussing various international instruments).

172. See Goldstein, *supra* note 101, at 6 (stating that although medical experiments of Nazis could have been prosecuted as torture, Fourth Geneva Convention explicitly labels them "a form of inhuman treatment constituting a 'grave breach' of the Convention").

173. *Id.* at 6-7.

174. *Id.* at 6.



*CONCLUSION*

It is not the absence of international treaties that makes it impossible or difficult to prosecute and punish the traffic in women and children and their forced prostitution. Rather it is a general unwillingness to recognize forced prostitution as an offense in its own right. This might be partially due to the fact that internationally the acts that make up the crime of forced prostitution are labelled as individual offenses, such as torture and rape, rather than acknowledged as a composite crime. Once the label "forced prostitution" is attached to the whole range of abuses it encompasses and the procurer/financier as well as the customer are recognized as offenders, it will also be easier to prosecute the offense domestically, which is crucial since no international enforcement body exists at this point.