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Sexual Slavery as a War Crime: A Reform Proposal

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SEXUAL SLAVERY AS A WAR CRIME: A REFORM PROPOSAL

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I. INTRODUCTION

On July 8, 2019, the Trial Chamber VI of the International Criminal Court ("ICC") convicted Bosco Ntaganda—a warlord in charge of the *Forces Patriotiques pour la Libération du Congo*—on eighteen counts of war crimes and crimes against humanity committed in the region of Ituri (Democratic Republic of Congo) in 2002-2003.[1] The 539-page long decision contained the first conviction for sexual slavery as a war crime and as a crime against humanity (counts 7, 8, and 9), twenty years after the crime was listed in the court statute.[2]

The ICC Elements of Crimes, as the primary source of substantive law for the judges on the ICC,[3] define sexual slavery *as a War Crime* in the following terms (emphasis my own):

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[4]

Despite the immediate widespread praise that both the Office of the Prosecutor and the Trial Chamber received following the decision,[5] the

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1. *See generally* Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment (July 8, 2019).

2. *Id.* at 536.

3. Rome Statute of the Int'l Crim. Ct., art. 21, Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

4. Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, art. 8(2)(b)(xxii)-2, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (emphasis added) [hereinafter ICC Elements of Crimes].

judgment's reasoning highlights the inadequacy of the current definition of sexual slavery in the ICC statute.[6] This note will argue that the language of the first element does not serve the intent of the drafters. Moreover, it is not attentive to the nature of the crime; and it can lead a court to reach theoretically weak conclusions—as was the case in the decision of *Ntaganda*. As a result, this note makes a case for the revision of the first element and proposes a viable reform.

Two earlier critiques by Carmen M. Argibay and Kelly D. Askin form the foundation this piece aims to develop, and they will be discussed throughout the text.[7] Additionally, two thorough accounts of the negotiation process at the Rome Conference with respect to sexual crimes provide the necessary insights to analyze the intent of the drafters and critique their arguments.[8] This note will analyze these early works in light of the *Ntaganda* decision, and it will explore the distinction between sexual slavery and labor slavery, hinted by Argibay and other commenters, but so far scarcely explored by academic literature.

After this introduction, Part II will focus on the intent of the drafters of the Rome Statute in listing and defining the crime of sexual slavery, highlighting a discrepancy between the drafters' intention and the ultimately adopted language to define sexual slavery. Part III will analyze the judgment in *Ntaganda*, which favors an understanding of sexual slavery that is rooted in the concept of economic exploitation and forced labor. Part IV will address the reform proposed by Argibay and provide two arguments

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5. *See, e.g.*, Douglas Guilfoyle, *A Tale of Two Cases: Lessons for the Prosecutor of the International Criminal Court? (Part I)*, EJIL: TALK! (Aug. 28, 2019), https://www.ejiltalk.org/a-tale-of-two-cases-lessons-for-the-prosecutor-of-the-international-criminal-court/; *ICC: Congo Warlord Guilty of Crimes Against Humanity*, HUM. RTS. WATCH (Jul. 8, 2019), https://www.hrw.org/news/2019/07/08/icc-congo-warlord-guilty-crimes-against-humanity; Ivana Kottasová, *Bosco Ntaganda, Warlord Known as 'Terminator,' Convicted of War Crimes*, CNN (Jul. 8, 2019), https://edition.cnn.com/2019/07/08/africa/drc-bosco-ntaganda-convicted-intl/index.html. *But see* Vava Tampa, *A Brutal Warlord has Been Convicted—So Why Doesn't It Feel Like a Triumph?*, GUARDIAN (Jul. 8, 2019), https://www.theguardian.com/commentisfree/2019/jul/08/warlord-bosco-ntaganda-democratic-republic-of-the-congo-congolese.

6. The author does emphatically agree with the holding reached by the court, that Mr. Ntaganda was culpable of sexual slavery under the current definition, and under any other definition discussed in the note. The present work is an attempt to criticize the practical and theoretical implications of the current definition of sexual slavery in the ICC Elements of Crimes, not to disagree with the overall conclusion reached by the court.

7. Carmen M. Argibay, *Sexual Slavery and the Comfort Women of World War II*, 21 BERKELEY J. INT'L L. 375 (2003); 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).

8. Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605 (2004); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008).

why—despite being correctly pointed—her proposal would be exposed to arguments raised at the Rome Conference, and would not entirely solve the issues she identified. Part V will analyze why, from a theoretical point of view, a definition based on the exercise of power inevitably proves to be unfit to identify a specific form of sexual violence. Part VI will propose a reformed language for the first element of sexual slavery.

II. ORIGIN OF THE LANGUAGE AND INTENT OF THE DRAFTERS

The negotiators of the Rome Statute of the International Criminal Court ("Rome Statute") defined sexual slavery as a war crime by focusing on two characteristics: a crime originating from (and facilitated by) the context of war, involving the ownership of an individual's body. This section, however, shows that the language adopted in the Rome Statute undercuts the intent of the very drafters who wrote it.

A. *Intent of the Drafters*[9]

After decades of "legal silence" on the issue of sexual violence at war,[10] the drafters of the Rome Statute realized that there was an impellent need to define a comprehensive list of sexual crimes,[11] and finally "speak the unspeakable."[12]

The statutes of the *ad-hoc* international criminal tribunals established to address the crisis in the former Yugoslavia ("ICTY") and Rwanda ("ICTR") were jurisdictional only. They were treaties establishing jurisdiction over certain crimes (egregious breaches of the Geneva Conventions, crimes against humanity, war crimes, and genocide),[13] but did not provide a substantive source of law to define the elements of such crimes.[14] The tribunals

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9. Valerie Oosterveld's recollection of the negotiation process leading to the current definition of Sexual Slavery as a War Crime (and as a Crime Against Humanity) is an excellent source of information regarding the (sometimes conflicting) intents of the delegations involved in the adoption of the Rome Statute, and in the drafting of the related ICC Elements of Crimes. *See* Oosterveld, *supra* note 8, at 605 ("Ms. Oosterveld was a member of the Canadian delegation to the United Nations Diplomatic Conference of Plenipotentiaries of the Establishment of the International Criminal Court (focusing on gender-related issues) [. . .]"). This section and the note as a whole rely extensively on her summary.

10. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 288 (2003).

11. *See infra* text accompanying note 33.

12. *See generally* Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845 (1995).

13. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 26–27, 27 n.12 (Oxford Univ. Press 2003).

14. *Id.* at 26–27, 47; Statute of the International Criminal Tribunal for the Former Yugoslavia, ¶¶ 2–5, S.C. Res. 827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the In-

relied upon other sources of law in handing down their judgments. These included treaties of international human rights and humanitarian law, customary international law, general principles of international criminal law and of international law, and general principles of criminal law recognized by the community of nations.[15]

The delegations at the Rome Conference, thus, encountered a new challenge. Article 21 of the Rome Statute provided that the "Elements of Crimes" would be among the primary sources of law for the newly founded ICC,[16] which came to be drafted in the years immediately following the signature at Rome.[17] It then became imperative to agree on a list of crimes and relative elements, to "spell out" the applicable law in greater detail and with stricter definitions as a means of enhancing the cohesiveness and codification of the system.[18] The aim was to ground the jurisprudence of the ICC in the strict legality principle typical of domestic criminal systems,[19] which was itself incorporated in article 22 of the Rome Statute.[20]

During the 90s, the status of sexual violence in international human rights and international criminal law ("ICL") instruments was a central topic in both international law and feminist debates.[21] In the words of Professor MacKinnon, Special Adviser to the ICC Chief Prosecutor on Gender Crimes,[22] at least until 1993, in human rights and humanitarian law "the rules that govern[ed] the [. . .] treatment of women elsewhere pertain[ed]

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ternational Criminal Tribunal for Rwanda, ¶¶ 2–5, S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute].

15. *See* CASSESE, *supra* note 13, at 25–37.

16. Rome Statute, *supra* note 3, art. 21. The final version of the Rome Statute of the International Criminal Court was adopted on July 17, 1998, when it was opened for signature. It entered into force on July 1, 2002.

17. The document defining the elements of the crimes enlisted in the Rome Statute was attached to the report of the Preparatory Commission presented to the Assembly of State Parties. See ICC Elements of Crimes, *supra* note 4.

18. CASSESE, *supra* note 13, at 59; Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321, 347 (2011).

19. Claus Kreβ, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 143, 145–46 (Antonio Cassese ed., 2009). This represents a radical shift from the position of drafters of early treaties and judges of post-war international military tribunals considering the principle of *nullum crimen sine lege* inapplicable to the context of international criminal law ("ICL"). *See, e.g.*, ADVISORY COMMITTEE OF JURISTS FOR THE PERMANENT COURT OF INTERNATIONAL JUSTICE, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE WITH ITS ANNEX 504 (Van Langenhuysen Brothers, 1920); *Separate Opinion of the President*, *in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 632, 635 (Neil Boister & Robert Cryer eds., Oxford Univ. Press 2008).

20. Rome Statute, *supra* note 3, art. 22.

21. *See* Halley, *supra* note 8, at 3–48.

22. Press Release, International Criminal Court, ICC Prosecutor appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes, ICC-OTP-20081126-PR377 (Nov. 26, 2008).

here as well: a human is not one who is sexually and reproductively violated. One is not human 'down there.'"[23] By the end of the decade, the theme of sexual violence at war was further underscored by the ICTY and ICTR caselaw,[24] where the marginal role that sexual violence retained in the respective statutes[25]—in which only rape was mentioned but not defined[26]—forced the tribunals to take expansive interpretations in landmark decisions such as *Prosecutor v. Furundžija*,[27] *Prosecutor v. Tadić*,[28] *Prosecutor v. Kunarac, Kovac & Vuković*,[29] and *Prosecutor v. Akayesu*,[30] all which subsequently impacted the negotiations in Rome.[31]

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23. Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 68 (1993).

24. *See generally* Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97 (1999).

25. The only sexual crime enlisted in the ICTY and ICTR statutes is rape as a crime against humanity (not as a war crime). ICTY Statute, *supra* note 14, ¶¶ 3, 5; ICTR Statute, *supra* note 14, ¶¶ 3, 5.

26. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 686 (Sept. 2, 1998) ("In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribunal must define rape, as there is no commonly accepted definition of the term in international law.").

27. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, ¶ ¶ 172–186, 188 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (finding that forced oral penetration can constitute rape, and that rape can constitute a war crime and a crime against humanity under "other inhumane acts" and "outrages upon personal dignity," and it can also amount to a "grave breach of the Geneva Conventions" or to an act of genocide).

28. Prosecutor v. Tadi , Case No. IT-94-I-T, Trial Judgment, ¶ 703 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (holding that rape can constitute an act of persecution). Amici briefs filed by the International Women's Human Rights Law Clinic, the Harvard Human Rights Program, and the Jacob Blaustein Institute "underscored the trivialization of violence against women" in the prosecution's attitude. Halley, *supra* note 8, at 14. Such advocacy proved to be fruitful, as "Prosecutor Goldstone very promptly [. . .] wrote a personal letter to Copelon and other feminists on the amicus brief, in which he stated:

> We essentially concur with your comments as to the characterization of rape. The Declaration's discussion of rape does not sufficiently reflect our policy of equating rape to other serious transgressions of international law. Apart from the relevance to charges of genocide and crimes against humanity, rape and other sexual assaults will be prosecuted under the Statute's provisions for torture, inhumane treatment, willfully causing great suffering or serious injury to body, and inhumane acts, and other provisions that adequately encompass the nature of the acts committed and intent formulated."

Id. at 14–15 (quoting Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 253–54 n.46 (1994)).

29. Prosecutor v. Kunarac, Kovac & Vukovi , Case Nos. IT-96-23-T & IT-96-23/I-T, Trial Judgment, ¶¶ 629–822 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (finding the accused guilty of rape, enslavement, torture and outrages upon personal dignity, upon an extensive crime base of systematic sexual violence). The evidence of the case further showed that sexual violence was not a byproduct of war, but rather a systematic and facilitated strategy of terror to subject the non-Serb civilian population. *See, e.g.*, *id.* ¶¶ 577–578, 584.

Half a century after the establishment of the post-war military tribunals of Nuremberg and Tokyo, and after only a few years of experience of the two *ad hoc* tribunals mentioned above, the international community started working on the establishment of a permanent International Criminal Court. Acting upon U.N. mandate, a Preparatory Committee met six times between March 25, 1996, and April 3, 1998, and produced the first official draft of the Rome Statute, then revised and adopted by a six-week conference of the parties in Rome (Rome Conference), and finally supplemented with follow-up documents on procedure, evidence, and definition of the crimes.[32]

A key point of discussion at the drafting stage of the Rome statute was whether sexual crimes were to have a separate, independent listing, or whether they were to fall within the crime of "outrages upon personal dignity."[33] Many delegations argued for a separate listing, in order to depart from an outdated view of sexual violence as an infringement on the victim's honor or chastity.[34] The Women's Caucus for Gender Justice in the International Criminal Court, arguably the most influential feminist NGO involved,[35] also advocated for a separate and independent listing of sexual crimes.[36]

Despite the opposition of some delegations (such as the Holy See), the listing of "rape, sexual slavery, enforced prostitution, enforced [*sic*] pregnancy, enforced sterilization, and other sexual violence" was adopted at the Rome Diplomatic Conference and became part of the Rome Statute.[37] The

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The case is particularly important for our inquiry, as it is the first case that essentially defined sexual slavery, drawing the language ("exercise of powers attaching to the right of ownership") from the 1926 Convention on Modern Slavery. Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, 18 (2004).

30. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 688 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2, 1998) (holding "Sexual violence falls within the scope of 'other inhumane acts,' set forth Article 3(i) of the Tribunal's Statute, 'outrages upon personal dignity,' set forth in Article 4(e) of the Statute, and 'serious bodily or mental harm,' set forth in Article 2(2)(b) of the [ICTR] Statute.").

31. Halley, *supra* note 8, at 9.

32. *Id.* at 9–10.

33. Oosterveld, *supra* note 8, at 612.

34. *Id.* at 612–14; *see also* Teresa Godwin Phelps, *Feminist Legal Theory in the Context of International Conflict*, 39 U. BALT. L.F. 173, 174–75 (2009).

35. Halley, *supra* note 8, at 22 ("Despite the large number of participating NGOs advocating for women, every single explicit statement that I have been able to find identifying the NGOs that actually influenced the process for setting rules relevant to a feminist agenda leads to one entity in particular: the Women's Caucus for Gender Justice (WCGJ).").

36. 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) ("Following the approach of the article on crimes against humanity, the enumeration of war crimes in both internal and international armed conflict should include a subparagraph identifying rape, sexual slavery, enforced prostitution, forced sterilization and other forms of sexual and gender violence as war crimes in themselves.").

37. Oosterveld, *supra* note 8, at 614.

intent was to provide an independent standing to the crime of sexual slavery, as separate from other forms of sexual violence[38] and at the same time as different from the broader concepts of enslavement and modern slavery, as well as separate from enforced prostitution.[39]

As reported by Oosterveld,[40] arguments in favor of the separate listing for the crime of sexual slavery were also presented by scholars like Kelly Dawn Askin, then executive director of the International Criminal Justice Institute and American University's War Crimes Research Office,[41] and Argibay, *ad litem* judge at the ICTY and first woman appointed Justice on the Argentina Supreme Court.[42] Both women influenced the negotiations in Rome.[43] Askin, advocating for a separate listing, argued that sexual slavery "accurately identify and appropriately characterize the *sexual nature* of the crime."[44] Similarly, Argibay noted that "[b]oth sexual slavery and enslavement should be charging options because both crimes may be applicable as their elements and the *interests* they protect are distinct."[45]

However, the language adopted by the drafters in defining sexual slavery failed to grant it the independent standing they sought and relegated it to a subset of enslavement still centered on labor exploitation.

B. *The Language of the First Element Undercuts the Intent of the Drafters*

The first problem with the definition of sexual slavery as a war crime is in the language adopted in the first element of the crime itself. The ICC Elements of Crimes undercut the drafters' intent to provide an independent standing for sexual slavery, and frame it as a subset of enslavement.

Sexual slavery as a War Crime encompasses four elements,[46] of which the last two respectively require the existence of armed conflict and the per-

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38. *See id.* at 614–15, 621.

39. *See id.* at 623, 643.

40. *Id.* at 624.

41. *Profile of Invited Expert Askin*, ICC F., https://iccforum.com/user/8105 (last visited Feb. 13, 2020).

42. *Carmen Argibay*, GRUBER FOUND., https://gruber.yale.edu/justice/carmen-argibay (last visited Feb. 13, 2020).

43. *See* Halley, *supra* note 8, at 22 n.81, 24 n.95. Valerie Oosterveld extensively cites to both Argibay and Askin in her account. *See, e.g.*, Oosterveld, *supra* note 8, at 615 n.43, 618–24.

44. Askin, *supra* note 7, at 83 (emphasis added). The insistence on the "sexual nature" of the crime, as opposed to its "economic" component—which Askin however mentions in the same page—will be the focus of this inquiry, in Part IV.

45. Argibay, *supra* note 7, at 386 (alteration and emphasis added).

46. ICC Elements of Crimes, *supra* note 4 art. 8(2)(b)(xxii)-2 (version related to international conflicts), 8(2)(e)(vi)-2 (version related to conflicts of non-international nature). Sexual Slavery as a Crime Against Humanity has only the contextual elements (3 and 4) that differ from the War Crime definition, while elements (1) and (2) are the same. *Compare* ICC

petrator's knowledge of it. These contextual elements are common to every war crime. At the center of the debate at the drafting stage, however, was the first element,[47] which recites: "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."[48] The language of this first element echoes the definition of enslavement in modern slavery instruments. For example, the 1926 Slavery Convention — which is considered the first international instrument to address the phenomenon of modern slavery — defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[49] The Supplementary Convention of 1956 reiterated the same definition.[50] This first element is identical to the first element of Enslavement as a Crime Against Humanity in the same ICC Elements of Crimes.[51]

The footnote at the end of the first element in all four occurrences (enslavement and sexual slavery as crimes against humanity, and both versions of sexual slavery as a war crime) further links the definition to modern slavery instruments, providing that:

> 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.[52]

Thus, the drafters had in mind the framework of enslavement and modern slavery when defining sexual slavery as "a specific kind of slavery."[53] Argibay too references the slavery instruments extensively, and argues that the "1926 Slavery Convention, by focusing on the exercise of the rights of ownership, provides the best definition of slavery and one that encompasses

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Elements of Crimes art. 7(1)(g)-2 (Sexual Slavery as a Crime Against Humanity), *with* art. 8(2)(b)(xxii)-2 *and* art. 8(2)(e)(vi)-2.

47. *See* Oosterveld, *supra* note 8, at 640.

48. ICC Elements of Crimes, *supra* note 4 arts. 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2 (emphasis added).

49. Slavery Convention art. 1, Sept. 25, 1926, 60 L.N.T.S. 254 [hereinafter Slavery Convention of 1926].

50. Economic and Social Council, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery arts. 6(1), 7, Apr. 30, 1956, 266 U.N.T.S. 3 [hereinafter Supplementary Convention on the Abolition of Slavery].

51. ICC Elements of Crimes, *supra* note 4 art. 7(1)(c).

52. *Id.* at 10 n.11, 13 n.18, 34 n.53, 44 n.65.

53. Oosterveld, *supra* note 8, at 608.

sexual slavery."[54] In fact, the only difference between the crime of enslavement and that of sexual slavery is the second element of sexual slavery,[55] which provides that the perpetrator caused the enslaved person "to engage in one or more acts of a sexual nature."[56] The result is that sexual slavery *equals* enslavement *plus* rape, or in other words it defines a crime based on enslavement,[57] where rape works as a sort of aggravating factor. This structure is readily translatable in Aristotelean logic, where every definition is composed by genus and difference:[58] In the definition "sexual slavery," "slavery" is the *genus* of the offence, the substrate to which specific attributions apply, while "sexual" is its *difference*, the specific attribution that qualifies the *genus*.[59]

As Parts III and IV will elucidate, framed this way the definition undermined arguments that were raised at the drafting stage to enlist sexual slavery separately from Enslavement: that each captures a different interest and that they are two conceptually distinct crimes.[60]

III. *NTAGANDA* AND THE PRACTICAL LIMITS OF THE DEFINITION

For the reasoning of *Ntaganda*, the language of the first element of the crime of sexual slavery played a crucial role, where the prosecution charged the accused with sexual slavery as a war crime and as a crime against humanity.[61] The charges were based on evidentiary findings related to seven women, some of them participated as witnesses in the case, that the prosecution claimed were sexually enslaved by soldiers of the *Forces Patriotiques pour la Libération du Congo* ("FPLC"), the military force led by Bosco

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54. Argibay, *supra* note 7, at 375.

55. Strictly speaking, this statement holds true when comparing Enslavement (which is only defined as a Crime Against Humanity) to Sexual Slavery as a Crime Against Humanity. Sexual Slavery as a War Crime has the contextual elements of war crimes (as opposed to those of crimes against humanity), but the statement is still true with regards to the *specific* elements of the crimes. ICC Elements of Crimes, *supra* note 4, arts. 8(2)(b)(xxii)-2, art. 8(2)(e)(vi)-2.

56. *Compare* ICC Elements of Crimes, *supra* note 4 art. 7(1)(g)-2 (Sexual Slavery), *with id.* art. 7(1)(c) (Enslavement).

57. Oosterveld, *supra* note 8, at 608 ("[a]ll 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.").

58. 2 ARISTOTLE, *VI Topics I*, *in* II ORGANON, OR LOGICAL TREATISES, at 469 (Octavius Freire Owen trans., George Bell & Sons 1908).

59. *Cf.* ARISTOTLE, V METAPHYSICS 28, at 285 (Hugh Tredennick trans., William Heinemann Ltd.1933) ("In the sense that in formulae the first component, which is stated as part of the essence, is the genus, and the qualities are said to be its differentiae.").

60. Oosterveld, *supra* note 8, at 624–25.

61. Prosecutor v. Ntaganda, ICC-01/04-02/06-203-AnxA, Document Containing the Charges, Annex A ¶¶ 36–37 (Jan. 10, 2014), https://www.icc-cpi.int/RelatedRecords/CR2014_00587.PDF.

Ntaganda.[62] The chamber entered a thorough case-by-case analysis to decide whether any one of these women was in fact sexually enslaved, so to justify a conviction of Ntaganda as an "indirect co-perpetrator."[63] The exercise of power of ownership was the only disputed element, since sexual violence and the contextual elements were easily established by uncontroverted evidence.[64] It took only a paragraph for the court to affirm that "the second material element of the crime of sexual slavery, i.e. that the perpetrator caused the person to engage in one or more acts of a sexual nature, was met."[65] The judges decided that the "exercise of powers attaching to the right of ownership" was proved for some victims, but not for others, thus creating two groups. An analysis of the two groups illuminates that the chamber intended sexual slavery to be a subset of enslavement, and to be inherently linked to forced labor and economic exploitation.

Witness P-0018 was kidnapped by FPLC soldiers during an attack in the municipality of Sangi, and forced to carry items for them between two villages.[66] She was then taken with other women to a building, where she was separated from the group and left with other women to spend the night outside.[67] The morning after, multiple groups of soldiers came by the tree and started to take two or three women at a time, raping and sometimes killing them.[68] P-0018, who was carrying her child, was also taken to the bush by a soldier that raped her and shot her in the head as she tried to resist.[69] She survived and was able to testify in court. The chamber found that "the capture and having been made to carry items the day before" was not lawful, but that there was "no evidence to indicate that any or all of the powers attaching to the right of ownership were exercised by the soldiers raping her the next day."[70]

This conclusion is significant in two ways. First, it declares that a deprivation of liberty lasting over a day during which a rape occurs is not an "exercise of power of ownership," and does not amount to sexual slavery. It does so notwithstanding the same chamber's consideration that a deprivation of liberty "may cover situations in which the victims may not have been physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives,"[71] and that "the sexual acts need

62. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶¶ 955–986 (Jul. 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF.

63. *Id.* ¶ 781.

64. *Id.* ¶¶ 600 n.1863, 611 n.1896, 954.

65. *Id.* ¶ 955.

66. *See id*. ¶ 600, 957.

67. *Id.* ¶ 600.

68. *Id*. ¶ 600.

69. *Id*. ¶ 600.

70. *Id*. ¶ 957.

71. *Id*. ¶ 952.

not have been perpetrated by the one who exercised the rights attaching to ownership."[72] And, finally, it does so despite the intention of the drafters to follow the Special Rapporteur's recommendations, since her report clearly states that sexual violence itself *is* an exercise of power of ownership.[73]

Second, by acknowledging that the previous day's conduct was unlawful although not charged as such, the court suggests that the prosecution provided enough reference to prove the crime of enslavement the day before, which ceased overnight and was not present "the next day." This conclusion proves a point that Argibay raised immediately after the statute was adopted, and that will be addressed in Part III: That the current language of sexual slavery is centered on the dimension of forced labor, and neglects other forms in which slavery can occur.[74] Applied to P-0018, the current definition is so centered on labor and economic exploitation, that in the absence of this kind of exploitation, the "powers attaching to the right of ownership" cease to be exercised. This is what, in the sections above, was referred to as a complete subjugation of the sexual component of this crime to the framework of modern slavery, which leads to the failure of a standing of sexual slavery as an independent crime from enslavement as labor exploitation.[75]

Witness P-0019 experienced similar treatment when she was captured and forced to carry items for FPLC soldiers.[76] She was taken to a house where civilian women and men were detained and raped.[77] A commander raped her, and then told her to flee.[78] She attempted to do so, but another soldier saw her in the street and shot her.[79] She, too, survived and testified in court. The court found that, similarly to P-0018, "while P-0019's capture and her having been made to carry items were not lawful, this conduct is not separately charged as such. On the basis of evidence before the Chamber, it cannot conclude that the first element of sexual slavery is fulfilled."[80]

It is unclear whether the court considered the deprivation of liberty to be too short to amount to slavery, or whether (since the forced labor was unlawful although not separately charged) the court considered the condition of enslavement to be terminated at the time when the sexual violence occurred. Comparing these findings to those related to witness P-0113, whom the court determined to be sexually enslaved, there are three identifiable dif-

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72. *Id.* ¶ 980.

73. *See infra* note 142, and accompanying text (showing the influence of McDougall's report at the Rome Conference).

74. *See infra* Part IV.

75. *See supra* Part II; *see also infra* Part IV for a further analysis on this issue.

76. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶ 599.

77. *Id.* ¶¶ 622–623.

78. *Id.* ¶¶ 622, 958.

79. *Id.* ¶ 958.

80. *Id.* ¶ 958.

ferences: First, P-0113 was raped while engaged in forced labor; second, P-0113's deprivation of liberty lasted for two days (the court indeed acknowledged a "prolonged deprivation of liberty"); third, P-0113 was raped multiple times during her captivity.[81] The last factor should not be determinative, since a single occurrence of a sexual act is enough to find sexual slavery based on its definition.[82]

Consider those victims for which the first element of sexual slavery was met after they were held in captivity for several days to months: in the absence of forced labor, extended captivity seems to be the determinative factor that allows the court to find the "exercise of powers attaching to the right of ownership."[83] For shorter periods, the presence of forced labor may lead the court to find that the right of ownership was exercised. For example, this was stressed in the opinion with P-0113.[84] Such emphasis on duration and forced labor creates a problem both in terms of theoretical justification and of expressive function of ICL;[85] it tells us that sexual violence in itself is not an exercise of power of ownership, and that a woman held in captivity for hours, displaced, verbally and sexually abused had no "powers of ownership" exercised over her.[86]

In the next two parts, the inquiry will turn to the questions raised by the considerations above: How and whether a crime of sexual slavery can be truly independent of enslavement intended as forced labor, framed with a focus on sexual violence and sexual rights?

IV. The Proposal of Carmen Argibay

Carmen Argibay was the first one to question the definition of sexual slavery in the Rome Statute. This Part will shed light on how she correctly identified the problem in the definition, i.e. a too narrow focus on forced la-

81. *Id.* ¶¶ 606–611, 959–960.

82. ICC Elements of Crimes, *supra* note 4, art. 8(2)(b)(xxii)-2.

83. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶¶ 410–411, 579, 961, 977–978.

84. *Id.* ¶¶ 606–611, 959–960 ("[S]he was forced together with three other women to cook for the UPC/FPLC soldiers and told to fetch water. From there, she was made to carry a mattress to Kobu. When she was made to fetch water and on the way to Kobu, she was raped by UPC/FPLC soldiers. [. . .] During this period she was raped various times, only to afterwards be made to carry on with what she was forced to do by the UPC/FPLC, such as cooking or carrying goods. The Chamber therefore considers that the first element of the crime of sexual slavery is established with regard to P-0113.").

85. *See* Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 69–71 (2007). *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144(5) U. PENN. L. REV. 2021 (1996).

86. The court indeed stated, in its judgment, that no exercise of powers of ownership was found with regards to P-0018, P-0019, and a nine-year old girl who was taken to a camp and raped by FPLC soldiers. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶¶ 957–958, 981–982.

bor, and yet I will argue that her proposal to redraft the first element is still unsatisfactory. Section (a) will restate her analysis and provide further arguments in support of her critique. Section (b) will explain her proposal and show how it would be inconsistent with the fundamental principles of criminal law included in the Rome Statute. Section (c) will argue that her proposal still presents theoretical limits, and results in a reaffirmation of the wrongful focus on economic exploitation that both her and the *Ntaganda* opinion exposed.

A. *Argibay's Solution and the "Identity Crisis" of ICL*

In 2003—before the Court effectively entered into full operations[87]—Argibay claimed that the definition of sexual slavery in the Rome Statute is too narrow and focused on the economic component of slavery:

> The Elements Annex adopts an unreasonably narrow definition of enslavement which it then extends to sexual slavery. [. . .] It defines the actus reus of sexual slavery thus: "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of liberty." [. . .] While this definition contains potential flexibility in the phrase "such as," it puts the emphasis on commercial exchange or similar deprivation of liberty, which is not only antiquated but also contrary to the lived experience of women and men coerced or deceived into enslavement situations and sexual slavery. [. . .] The 1926 Slavery Convention's definition encompasses both kinds of slavery, and thus provides the seminal definition of the crime. The ICC and the Preparatory Commission should adopt that definition instead of using an unnecessarily narrow definition.[88]

What Argibay disagrees with are the "qualifications" included after the language taken from the 1926 Convention, that only referred to "exercise of powers attaching to the rights of ownership," without the "such as" and the footnote featured in the ICC definition. She argues that the 1926 Convention's "unqualified," or "broad," definition was able to capture both the chattel and the forced labor dimensions of slavery,[89] and that the ICC Elements of Crimes should reproduce it.

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87. The first public court record is only dated April 13, 2004. *See* Prosecutor v. Dyilo, ICC-01/04-01/06, Designation De Me. Jean Flamme Comme Conseil De La Defense De M. Thomas Lubanga Dyilo [Appointment of Defense Counsel] (Apr. 13, 2004), https://www.icc-cpi.int/CourtRecords/CR2006_02266.PDF.

88. Argibay, *supra* note 7, at 388–89 (second emphasis added).

89. *Id.* at 384.

The principle of *eiusdem generis* ("of the same kind or class") further supports her claim, though she herself did not make reference to it. This principle, seemingly left in the background of Argibay's critique, is defined by Black's Law Dictionary as "a canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."[90]

The idea originated as an interpretative paradigm in common law systems, but has now been adopted by several international tribunals, including the International Court of Justice, and by the ICTY itself in *Tadić* and *Kupreškić*.[91] According to this principle, and in line with Argibay's contention, the "other similar deprivation of liberty" in the first element would be informed by the four examples "purchasing, selling, lending or bartering," and could be interpreted as carrying the same economic nature.[92] This possibility was raised as a concern at the drafting stage:

> 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 [. . .] 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".[93]

Argibay points her critique in the right direction. However, her proposal to redefine the crime by referring to the broader, unqualified definition of the 1926 Slavery Convention has two major problems. First, it does not account for the shift that occurred in ICL with the adoption of the Rome Statute. The system acknowledged a need to ground itself in fundamental principles of criminal law that require crimes to be defined in detail and to be narrowly construed, following interests that are complementary but separated from these of international human rights law. Second, Argibay's claim that the Modern Slavery Conventions, through their broad language, cap-

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90. *Ejusdem Generis*, BLACK'S LAW DICTIONARY (11th ed. 2020).

91. Freya Baetens, *Ejusdem Generis and Noscitur a Sociis in Municipal and International Law: Interpretative Cross-Fertilisation?*, *in* BETWEEN THE LINES OF THE VIENNA CONVENTION 133, 141–42 (J. Klingler, Y. Parkhomenko & C. Salonidis eds., 2019). The same conclusion could be reached adopting the interpretative tool of *noscitur a sociis*, providing that "the meaning of an unclear word or phrase, esp. one on a list, should be determined by the words immediately surrounding it." *Id.*

92. Indeed, although courts have repeatedly said that commercial *transactions* are not required to satisfy the first element, they seem to be focused on labor exploitation, and therefore on the economic aspect of slavery. *See infra* Section IV.c.

93. Oosterveld, *supra* note 8, at 632. The result of that discussion may have removed the *pecuniary* element from the crime, but by including references to forced labor and human trafficking failed to go beyond the economic nature of slavery. *See infra* note 137 and accompanying text.

tured all dimensions of slavery and were therefore the appropriate paradigm to define sexual slavery fails to acknowledge that the conventions themselves, and the domestic legislation that they triggered, are mostly focused on forced labor. Therefore, they inherently refer to labor exploitation and its economic nature. The following sections will elaborate these two critiques to Argibay's approach.

B. *Argibay's Solution and Fundamental Principles of Criminal Law*

The first problem with Argibay's proposal is ascribable to what Darryl Robinson defined as "the identity crisis of International Criminal Law."[94] Robinson claimed that tension within the system is due to the fact that ICL was conceived as a point of intersection between disciplines—International Human Rights and Humanitarian Law, and criminal law—that stem from contradicting fundamental assumptions.[95] ICL was conceived as an enforcement device for international human rights and humanitarian law, fields that require a "broad and liberal construction to maximize protection for beneficiaries, and are not accustomed to the special moral restraints which arise when fixing guilt upon an individual actor."[96] At the same time, ICL aims to attach individual criminal responsibility.[97] It claims to be grounded on principles of liberal criminal systems that necessarily require a narrow construction of the offense, that must be defined in detail.[98] The Roman principle of *nullum crimen sine lege* ("no crime without law"), one of the main declensions of the principle of legality, was indeed a major challenge for the early international criminal jurisprudence.[99] Yet, the debate is still ongoing. Even today, the residual category of crimes labeled under "other inhumane act"—a category recognized by both the ICTY and ICTR courts,[100] as well as codified in the Rome Statute[101]—has received criticism for being inconsistent with the principle.[102]

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94. *See generally* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008).

95. *Id.* at 962.

96. *Id.* at 928–29.

97. That individual criminal responsibility is the focus of ICL is clear from the origins of the discipline, as reported by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in 1919. *See* M. Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 116 (1920).

98. Robinson, *supra* note 94, at 926–27.

99. *See, e.g.*, L. C. Green, *The Maxim of* Nullum Crimen Sine Lege *and the Eichmann Trial*, 38 BRIT. Y.B. INT'L L. 457 (1962). Note, for example, that some judges sitting on the Nuremberg trials did not believe that such principle should apply to international law at all. CASSESE, *supra* note 13, at 143.

100. ICTR Statute, *supra* note 14, art. 3; ICTY Statute, *supra* note 14, art. 3; *see, e.g.*, Prosecutor v. Jovica Staniši & Franko Simatovi , Case No. IT-03-69-A, Judgment, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 9, 2015).

Robinson's critique was centered on the ICTY and ICTR jurisprudence: He extensively cited to cases from these tribunals as examples to prove his theory.[103] The few references to the ICC statute were marginal or through other authors.[104] By the time Robinson published his article, the ICC had not rendered its first judgment, which was published in 2012.[105] The ICC showed a much higher responsiveness to the principles of a liberal criminal system that, Robinson claimed, were hindered in the *ad hoc* tribunals. The Rome Statute explicitly incorporates the principles of *nullum crimen sine lege* and *nulla poena sine lege*.[106]

The Elements of Crimes enlist and define over one hundred offenses, providing a direct and primary source of substantive law to the court, similar in many respects to a domestic criminal code.[107] The Rome Statute at article 22 further refers to the principle of legality providing that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy."[108] Further in line with Robinson's theory, article 22 provides that "[t]his article shall not affect the characterization of any conduct as criminal under international law independently of this Statute,"[109] as a further expression of the (partially) independent status that ICL needed from the other bodies of international law.[110]

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101. Rome Statute, *supra* note 3, art. 7(1); ICC Elements of Crimes, *supra* note 4, art. 7(1)(k).

102. Jennifer Lincoln, Nullum Crimen Sine Lege *in International Criminal Tribunals Jurisprudence*, 7 EYES ON ICC 137, 142–55 (2011).

103. *See, e.g.,* Robinson, *supra* note 94, at 933 n.28 (citing to Prosecutor v. Tadic, Case No. IT-94–1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Delalic´, Case No. IT-96-21-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), 935 n.39–40, 941 n.89, 951 n.150).

104. *See, e.g.*, *id.* at 928 n.13, 937, 955 n.176.

105. Prosecutor v. Dyilo, ICC-01/04-01/06-2842, Judgment (Apr. 5, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

106. Rome Statute, *supra* note 3, art. 22. Part III (arts. 22–33) of the Rome Statute, called "General Principles of Criminal Law," is indeed altogether grounding the ICC jurisprudence on firm principles of criminal law that the drafters themselves perceived as being necessary to move ICL forward. *Id.* arts. 22–33.

107. *See* ICC Elements of Crimes, *supra* note 4.

108. Rome Statute, *supra* note 3, art. 22.

109. *Id.*

110. Note that, for example with respect to the category of "other inhumane acts," *supra* notes 101–102 and accompanying text, the shift undertaken by the ICC is telling. In *Kenyatta*, the ICC Pre-Trial Chamber II held that "the language of the relevant statutory provision and the Elements of Crimes, as well as the *fundamental principles of criminal law*, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity." Prosecutor v. Kenyatta, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 269 (Jan. 29, 2012).

It is a matter left to speculation whether the specificity in the Rome Statute and the Element of Crimes was due to widespread agreement on the general principles of criminal law,[111] or—more cynically—to the fact that different interests were on the table.[112] Part 2 of the statute, addressing the applicable law and the crimes covered, was the most difficult to negotiate.[113] Within the gender crimes negotiation, for example, the negotiation around the enlisting of "enforced pregnancy" as a crime against humanity raised concerns among parties that it would interfere with "national laws concerning either the right to life of the unborn child or a woman's right to termination of pregnancy."[114]

The diverging interests among the negotiators certainly played a role in the way sexual slavery was defined. The resulting language carried these specifications that Argibay claims unnecessarily narrow the scope of the crime. Some delegations did not feel the need to enlist sexual slavery separately from the already agreed crimes of enforced prostitution and enslavement,[115] and others were worried that a broad definition like the 1926 Convention would have interfered with marriage practices in their territories.[116] Of course, if this was the only reason the definition was narrowed and linked to economic aspects, Argibay's critique represent an exhaustive demonstration of how the different interests generated an unsatisfactory definition.

However, we should also acknowledge another, more challenging reason for the stricter definition of crimes throughout the whole statute: a narrow, detailed definition is necessary to comply with the principle of legality. In Oosterveld's first-hand recollection, various delegates negotiating the gender crimes agreed "that there [was] a need to include an accurate and specific listing" and to "ensure that the categories of crimes are clear enough to satisfy the doctrine of *nullem* [sic] *crimen sine lege*."[117] The list of examples that qualify the "powers attaching to the right of ownership" at the center of Argibay's critique originated from a proposal by the United States, whose delegation "was concerned that simply reproducing the definition of enslavement found in the Rome Statute might be too imprecise to satisfy the

111. Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 3 n.2 (1999) (Philippe Kirsch chaired the Committee of the Whole of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and John T. Holmes, served as a member of the Canadian delegation and assisted the chairman of the Committee of the Whole throughout the conference.).

112. *See id.* at 4–5.

113. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 25 (1999).

114. *Id.* at 31.

115. Oosterveld, *supra* note 8, at 615–25.

116. *Id.* at 636–37.

117. *Id.* at 623.

doctrine of *nullem* [sic] *crimen sine lege*."[118] In light of these considerations, Argibay's critique is well directed. Her proposal to restore the broader, open-ended definition of the 1926 Slavery Convention without qualifications, however, contravenes the attempt of the drafters to ground the new jurisprudence of the court in the principle of legality, and to avoid what Robinson later defined as the "identity crisis" of ICL: Criminal law must respond to stricter principles of culpability than human rights protection.

International human rights law may define the essence of the crime (as argued by Argibay) and yet not be specific enough to attach individual criminal culpability. After all, international human rights and humanitarian law are primarily directed at states,[119] and their "responsibility to protect."[120] The call for criminalization in the two slavery conventions left it open for the member states to define the crime.[121] Argibay's proposal does not acknowledge or address this issue.

C. *Argibay's Solution, Slavery, and Economic Exploitation*

The second shortcoming of Argibay's proposal is her claim that the 1926 Slavery Convention offered a "seminal definition" that covered both dimensions of slavery—chattel and forced labor—and that these dimensions properly encompass sexual slavery.[122] However true, the Convention has is focus on economic exploitation. Article 1 defines slavery *and* slave trade, with the latter being recalled in articles 2, 3 and 4; article 5 then elaborates on forced labor and how it can only be exacted for "public purposes."[123] Article 3 provides that the parties should "undertake to negotiate as soon as possible a general Convention with regard to the slave trade [modeled after] the Convention of June 17th, 1925, relative to the International Trade in Arms."[124] Even if the broad definition of article 1 does not have an economic accent as Argibay argued, there are many treaty references that do.

The Supplementary Convention of 1956 on the Abolition of Slavery, built upon the 1926 Convention, has similar features.[125] Debt bondage, serf-

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118. *Id*. at 631 ("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.").

119. Robinson, *supra* note 94, at 957 (differentiating human rights law, which "limits state behavior," from international criminal law, which applies to individuals).

120. *See generally* Aidan Hehir, *The Responsibility to Protect and International Law*, *in* CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT 84 (Philip Cunliffe ed., 2011).

121. Slavery Convention of 1926, *supra* note 49, art. 6; Supplementary Convention on the Abolition of Slavery, *supra* note 50, art. 5.

122. Argibay, *supra* note 7, at 388–89.

123. Slavery Convention of 1926, *supra* note 49, arts. 1–5.

124. *Id.* art. 3.

125. Supplementary Convention on the Abolition of Slavery, *supra* note 50 (the preamble, *inter alia*, states that the parties "[have] decided, therefore, that the Convention of 1926, which remains operative, should now be augmented by the conclusion of a supplementary

dom, and slave trade are recurring themes in the treaty.[126] Even the "sexual" qualification—although the term "sexual" is not used—carries an economic focus. The parties agreed to prohibit instances where "[a] woman, without the right to refuse, is promised or given in marriage *on payment of a consideration in money or in kind* [to any third person]," where "[t]he husband of a woman, his family, or his clan, has the right to transfer her to another person *for value received* or otherwise," and where "[a] woman on the death of her husband is liable to be *inherited* by another person."[127] Not only is the emphasis recurrently on economic exploitation, even the closest link to sexual slavery in the treaty does not speak of sexual violence (or sex).

Moreover, to the extent that modern slavery is now being addressed by domestic legislations, the link with forced labor remains central. The only positive duties of the British Modern Slavery Act of 2015 are imposed on companies. Companies of a certain revenue are required to publish a yearly report describing their efforts to eliminate slavery from their supply chain.[128] Notably, the Act does not define slavery according to the 1926 Convention. Article 1 provides that "the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the [European Convention on Human Rights],"[129] which defines slavery in terms of forced labor.[130] Similar measures are imposed on corporations by French Corporate Duty of Vigilance Law passed in 2017.[131] Generally, modern slavery has become a more central problem in business management theory and practice.[132] When sexual slavery is addressed in the framework of modern slavery, it is framed as

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convention designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery).

126. *Id.* arts. 1, 3, 5–7.

127. *Id.* art. 1 (emphasis added).

128. Modern Slavery Act 2015, c. 30, § 54 (Gr. Brit.).

129. *Id.* § 1; *see also* Modern Slavery Bill 2015 and European Convention on Human Rights, Memorandum by the Home Office, https://www.gov.uk/government/publications/modern-slavery-bill-overarching-documents; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948) (prohibiting slavery and servitude without qualifications) [hereinafter Universal Declaration of Human Rights]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 8 (defining slavery and servitude equally to the European Convention on Human Rights).

130. *Compare* Council of Europe, European Convention on Human Rights, Nov. 4, 1950, art. 4, *with* Slavery Convention of 1926, *supra* note 49, art. 1.

131. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law n. 2017-399 of March 27, 2017 on the duty of vigilance owed by parent and contracting companies (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 28, 2017, n. 0074 text 1.

132. *See, e.g.*, Stefan Gold, Alexander Trautrims & Zoe Trodd, *Modern Slavery Challenges to Supply Chain Management*, 20 SUPPLY CHAIN MGMT. 485 (2015); Andrew Crane, *Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation*, 38 ACAD. MGMT. R. 49 (2013).

human trafficking and forced prostitution,[133] carrying a direct economic component.[134] The International Labour Organization labels the practice as "forced sexual exploitation."[135]

In sum, Argibay claims that the framework of slavery defined by the 1926 Convention was the right one to specify the essence of sexual slavery. However, the discourse on modern slavery has, since then, focused on economic exploitation. The definition of sexual slavery in the Rome Statute is part of this broader legislative movement towards an economic understanding of sexual exploitation, rather than an isolated exception. The movement started from a place, the 1926 Convention, that did not have sexual violence prevention as its primary objective. After sexual slavery as a war crime originated in the ICTY jurisprudence,[136] the drafters of the Rome Statue had a system of reference centered on economic aspects of sexual slavery. The qualifications of the first element ("purchasing, selling, lending or bartering") and a footnote that refers to human trafficking and forced labor, and indirectly to the actions against modern slavery undertaken by the International Labour Organization,[137] demonstrate that they intended to overcome a pecuniary limitation.[138] But, the footnote remains well within the framework of slavery as economic exploitation. Even if judges have expressly noted that "commercial transactions" are not necessary to satisfy the elements of sexual slavery as a war crime,[139] their reasoning remains influenced by that framework—as Argibay predicted,[140] and *Ntaganda* demonstrated.[141]

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133. Both addressed, for example, in the Modern Slavery Act of 2015, *supra* note 128. Note that, in the Rome Statute, enforced prostitution was intentionally listed separately from sexual slavery as it carried a form of commercial exploitation that the drafters did not intend for sexual slavery, Oosterveld, *supra* note 8, at 616, and the references to human trafficking are precisely what led Argibay, *supra* note 7, at 375, to claim that even the definition of sexual slavery ended up having an economic accent.

134. *See generally* SIDDHARTH KARA, SEX TRAFFICKING (2009).

135. INTERNATIONAL LABOUR ORGANIZATION ["ILO"], GLOBAL ESTIMATES ON MODERN SLAVERY 38 (2017).

136. In *Kunarac*, which was not focused on trafficking or economic exploitation but presented some instances thereof. *See* Askin, *supra* note 10, at 333–41 (noting however that "[r]egrettably, the term 'sexual slavery' was never used in the Judgement" against Kunarac et al.); Askin, *supra* note 29, at 18; Prosecutor v. Kunarac, Kovac & Vukovi , Case Nos. IT-96-23-T & IT-96-23/I-T, Trial Judgment, ¶¶ 9, 42, 73, 75, 87, 189 (Feb. 22, 2001) (at least five survivors testified of being trafficked for money, although the case revolved around the rape camps in the Fo a region).

137. Oosterveld, *supra* note 8, at 634–35 n.131; ICC Elements of Crimes, *supra* note 52 and accompanying text.

138. *See supra* note 93.

139. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶ 952 (Jul. 8, 2019); Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute, ¶ 975 (Mar. 7, 2014); Prosecutor v. Taylor, SCSL-03-01-T, Trial Judgment, ¶ 420 (May 18, 2012).

140. *See supra* Section IV.a.

141. *See supra* Part III.

This calls us to consider whether the current framework of slavery is the best one to define a crime of sexual slavery—even with the present economic qualifications. The drafters considered, yet rejected the idea of defining sexual slavery drawing from the definition provided by Gay J. McDougall, Special Rapporteur for systematic rape, sexual slavery and slavery-like practices during armed conflict:[142] "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."[143] This would have erased economic qualifications while remaining anchored in the structure of slavery as *genus* and sexual violence as *difference* that Argibay endorsed. This approach was rejected in part due to the fact that, as proposed by Costa Rica, Hungary, and Switzerland, it was limited to chattel slavery.[144] Yet, it would have most likely not satisfied the requirements of legality on which the discussion turned immediately thereafter.[145] If sexual violence is in itself an exercise of power of ownership (essentially condensing elements one and two), what differentiates sexual slavery from other forms of sexual violence? This, more than anything, exposes the limits if the current structure because we may (and we do) agree with McDougall's claim that any form of sexual violence is an exercise of power of ownership.[146] Yet, we deem such definition proper from a human rights perspective but unfit for a liberal system of criminal law. The structure of this "seminal definition" must be called in question.

This issue—that of a seminal, or fundamental definition of sexual slavery—is a threshold in the present inquiry. It is so both in an Aristotelean sense of "definition" as a declaration of essence,[147] as well as in the Latin etymology that presupposes a definition by exclusion (*de-finitio*, "I set a limit"): What sexual slavery is not.[148] Agreed that sexual slavery cannot be

142. McDougall's reports were extremely influential in the negotiations involving sexual violence at the Rome Conference. *See* Oosterveld, *supra* note 8, at 614–15, 621, 629, 631.

143. Gay J. McDougall (Special Rapporteur) *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, ¶ 27, U.N. Comm'n on Hum. Rts., Sub-Comm'n on the Promotion and Protection of Hum. Rts., U.N. Doc. E/CN.4/Sub.2/1998/13 (Jun. 22, 1998); Oosterveld, *supra* note 8, at 629–30.

144. Oosterveld, *supra* note 8, at 629–30.

145. *Id.* at 630–31.

146. *See infra* note 185 and accompanying text.

147. 1 ARISTOTLE, *II Posterior Analytics I*, *in* ORGANON 316 (Octavius Freire Owen trans., George Bell & Sons 1908) ("When however we know that a thing is, we inquire what it is [*τί ἐστιν*] [. . .].").

148. Roman Law posits an interesting dilemma regarding the term. Whereas Javolenus warned us that legal definitions are dangerous insofar as they can easily be subverted, see 4 THE DIGEST OF JUSTINIAN 483 (Alan Watson ed. 1985) ("*Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti possit*"). In a later imperial period *definitio* assumed the technical meaning of "judgment in a trial," suggesting that the goal of legal proceedings was indeed to "define" the accused based on what he did (and did not do). *Definitio*, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW (Adolf Berger ed., 1953).

reduced to economic exploitation, the questions of what sexual slavery then *is*, and why its limits do not overlap with those of enslavement,[149] remain to be addressed. If it is true that the "powers attaching to the right of ownership" correctly define slavery, then we must understand what *powers* this definition refers to, and what conclusions we can derive. Part V will argue to invert the current scheme: sexual violence as *genus*, slavery as difference.

V. The Reform Proposal and the Theory Behind It

Part III section (b) showed how the language adopted by the drafters of the Rome Statute undercut their intent by failing to provide an independent standing to the crime of sexual slavery. As discussed, that was because the drafters viewed sexual slavery as a subset of enslavement. This section will argue that sexual slavery and labor/chattel slavery are two *essentially* different crimes because the form of power involved has different nature: They represent two separate (perhaps coexisting) power relations.[150] Section (a) will analyze the concept of power and reach two conclusions: that power and resistance are relational terms that define each other, and that they exist in specific material instances, so that a specific form of resistance defines a specific form of power. Section (b) elucidates how the power relation involved in sexual crimes can but need not have an economic nature. It concludes that a shift in the structure of the definition is necessary to avoid a framing that necessarily remands to the politico-economic interest of the perpetrator.

A. *Dialectics: Absolute Power and Resistance*

Already in the fifth century B.C., Thucydides noted that "of men we know, that by a necessity of their nature wherever they have power they always rule."[151] His realist claim that "the most powerful dominates, within the limits of possibility"[152] posits the dialectic interplay between who exercises power and the subject upon whom power is exercised. "Dialectic" in

149. An issue that, as mentioned above, was directly addressed at the negotiation stage. *See* Oosterveld, *supra* note 8, at 622–25.

150. This note can well proceed limiting a definition of power to Robert Dahl's "intuitive idea": "A has power over B to the extent that he can get B to do something that B would not otherwise do." Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957).

151. 3 THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR V 167 (C. F. Smith trans., Harvard Univ. Press 1921) (note that in the original Greek text, the word here and elsewhere translated with power is "*krathe*," which also means strength or force as exemplified by the god *Kratos*, its divine personification).

152. Guido Bonelli, *La concezione tucididea dell'esercizio del potere [The Thucydid Conception of the Exercise of Power]*, 64 L'ANTIQUITÉ CLASSIQUE [CLASSICAL ANTIQUITY] 27, 27 (1995) (Belg.) (original quote notes "*il più forte domina, nella misura del possibile; si tratta di una legge di natura*").

the Hegelian sense, for the two elements of the relation—*power* and *resistance*—define each other, or are defined in function of each other.[153] When the few rule over the many, they "have gotten this for power by no other means than by overcoming in fight" the resistance opposed to them.[154] The implication is that if power is defined as the capacity to overcome a resistance, it needs that resistance to be in place to exist. And if the materialization of the dialectic between two opposites that define each other, which remained purely abstract in the *Science of Logic* (framed between *being* and *nothing*),[155] was ultimately the purpose of Marx's and Engel's work,[156] it is really with Max Weber and Walter Benjamin that it becomes fully and coherently expressed in terms of power and resistance.

In his masterpiece *Economy and Society*, Max Weber defines power (*Macht*) as "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance,"[157] thereby making power and resistance "as distinct but interdependent aspects, or phenomena within the power relation."[158] Barbalet explains how, in Weber, power and resistance define each other in a dialectic relation:

> The efficacious influence of those subordinate to power is resistance. The influence on social relationships exerted by powerless agents derives precisely from their resistance to power. Resistance limits the effects of power and in doing so materially influences the 'conditions of reproduction of those social systems' in which those resisting power have subordinate positions.[159]

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153. *See* GEORG WILHELM FREDRICH HEGEL, ENCYCLOPEDIA OF THE PHILOSOPHICAL SCIENCES IN BASIC OUTLINE 128–29 § 81, 149 § 93 (Klaus Brinkmann & Daniel O. Dahlstrom eds., Cambridge Univ. Press 2010) (1812).

154. 1 THUCYDIDES, THE PELOPONNESIAN WAR 302 (David Grene ed., Thomas Hobbes trans., Univ. of Michigan Press 1989).

155. GEORG WILHELM FREDRICH HEGEL, THE SCIENCE OF LOGIC 49, 59–60 (George di Giovanni ed. & trans., Cambridge Univ. Press 2010). Hegel himself however provided for multiple realizations of dialectic oppositions in his *Philosophy of History* and *Elements of Philosophy of Law*.

156. KARL MARX, LE CAPITAL 821–22 (Etienne Balibar et al. trans., 1872). Class struggle is perhaps the most obvious dialectical instance in Marx, see, e.g., T. B. BOTTOMORE, ELITES AND SOCIETY 40 (Penguin, 1966) ("the upper class in Britain has been able to resist [. . .] the attacks upon its economic interests, and that in this sense of having the power to defend its interests it has maintained itself [. . .] as a ruling class."). Walter Benjamin's understanding of power and resistance in *Critique of Violence* indeed features traits of historic materialism, through the recurrent theme of post-war workers' strikes. 1 WALTER BENJAMIN, *Critique of Violence*, *in* SELECTED WRITINGS 1913-1926 at 236, 239 (Marcus Bullock & Michael W. Jennings eds., Harvard Univ. Press 1996).

157. MAX WEBER, ECONOMY AND SOCIETY 53 (Guenther Roth & Claus Wittich eds., Univ. of California Press 1978).

158. J. M. Barbalet, *Power and Resistance*, 36 BRIT. J. SOC. 531, 535 (1985); *see also* Dahl, *supra* note 150, at 202–04.

159. Barbalet, *supra* note 158, at 542.

Contemporary to *Economy and Society*, Walter Benjamin published the essay *Critique of Violence*, in which he defined two instances of violence: *Lawmaking violence*, exemplified by the French revolution and referring to the form of violence that posits a new legal order, and *law-preserving violence*, exemplified by the military (or the police) and referring to the state's monopoly of the use of force necessary to maintain the order under an established legal rule.[160] In this scheme, that became an archetypal figure of critical theory,[161] the dialectic relation expressed by Weber is intrinsic: Law-preserving violence exists *because* it needs to suppress the individual violence aimed at subverting the juridical order, aiming to become a new law-making violence. In Benjamin's words:

> [A] dialectical [*dialektisches*][162] rising and falling in the lawmaking and law-preserving forms of violence. The law of this oscillation rests on the fact that all law-preserving violence, in its duration, *indirectly weakens the lawmaking violence represented by it, through the suppression of hostile counterviolence*. . . . This lasts until either new forces or those earlier suppressed triumph over the violence that had posited law until now and thus found a new law destined to a new decay.[163]

This passage highlights a fundamental feature of the power/resistance relationship: If power is defined as the capacity to overcome a resistance,

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160. BENJAMIN, *supra* note 156, at 236–41. The word used by Benjamin is *Gewalt*, which means both *violence* and *force*, *id.* at 252 n.1, different from the word *Macht* (properly "power"), used by Max Weber and by Carl Schmitt in *Political Theology*, another contemporary landmark work. *See generally* CARL SCHMITT, POLITICAL THEOLOGY (George Schwab trans., Univ. of Chicago Press 2005) (originally published in Germany in 1922 as POLITISCHE THEOLOGIE: VIER KAPITEL ZUR LEHRE VON DER SOUVERÄNITÄT). Using the word *Gewalt* (meaning both *violence* and *force*), Benjamin's work can be put in perspective with Thucydides, who—in the passage reported above—used the Greek word *krathe*, referring to both *power* and *force*. *See* THUCYDIDES, *supra* note 151 and accompanying text. Although never mentioned in *Critique of Violence*, in Greek mythology the god *Kratos* (personification of *krathe*) performs both instances of *violence-force* identified by Benjamin. In Hesiod's *Theogony*, Kratos (in his lawmaking capacity) is crucial in aiding Zeus to defeat the Titans and establishing his reign. *See* HESIOD, THEOGONY 35 (Harvard Univ. Press 2006); Diana Burton, *Nike, Dike and Zeus at Olympia*, *in* THE STATUE OF ZEUS AT OLYMPIA: NEW APPROACHES 51, 58 (J. McWilliam, S. Puttock, T. Stevenson & R. Taraporewalla eds., 2011) (claiming that in the *Theogony*, Kratos and his siblings represent "the means by which [Zeus' hierarchy] is attained" and "the work needed to get" to Zeus' rule). As for law-preserving violence, at the opening of Aeschylus' tragedy *Prometheus Bound* it is indeed Kratos that—on Zeus' orders—leads to chain the Titan Prometheus, who subversively "stole bright fire [from the Gods], the origin of every art: stole, and handed to mortals." AESCHYLUS, PROMETHEUS BOUND 1 (James Davies ed., 1871).

161. *See, e.g.*, GIORGIO AGAMBEN, HOMO SACER 63–67 (Daniel Heller-Roazen trans., 1998).

162. Benjamin uses the same word (*dialektik*) used by Hegel and Marx.

163. BENJAMIN, *supra* note 160, at 251 (emphasis added).

then by the suppression of such resistance power indirectly weakens itself. The expression of its capacity runs the risk of reducing it.[164]

Importantly for this inquiry, the relational aspect of power is further stressed at the core of Michel Foucault's *History of Sexuality*:

> Where there is power, there is resistance, and yet, or rather consequently, *this resistance is never in a position of exteriority in relation to power*. [The existence of power relationships] depends on a multiplicity of points of resistance: these play the role of adversary, target, support, or handle in power relations. These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead *there is a plurality of resistances*, each of them a special case: resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant, or violent; still others that are quick to compromise, interested, or sacrificial; by definition, they can only exist in the strategic field of power relations. But this does not mean that they are only a reaction or rebound. . . . They are the odd term in relations of power; they are inscribed in the latter as an *irreducible opposite*.[165]

This passage clarifies three points. First, power and resistance are not just relational concepts: They are inevitably interdependent, "never in a position of exteriority" from each other—in a word, the power-resistance relation is *dialectic*. The poles exist in function of each other, they define each other. Second, Foucault shows how this dialectic relation is extremely tangible, as it takes place in a plurality of practical instances: Power-resistance relations are material and historically placed.[166] Third, Foucault illustrates

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164. Although in many camps in Bosnia detainees were killed daily, some women were detained and kept alive for the purpose of being raped by soldiers and at times forcibly impregnated. Final Rep. of the Comm'n of Experts Established Pursuant to Security Council Resolution 780 (1992), transmitted by Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, ¶¶ 230, 248, U.N. Doc. S/1994/674 (May 27, 1994). This is an expression of power that can keep its place because it does not erase the (nominal) resistance opposed to it.

165. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 95–96 (Robert Hurley trans., Pantheon Books 1978) (emphasis added). Another notorious argument on power and resistance as relational terms was raised in Hans Jonas, *The Concept of God after Auschwitz*, 67 J. REL. 1, 3 (1987) (lecture originally delivered in German in 1984).

166. In this sense Foucault fully joins the tradition preceded by Hegel, Marx and Benjamin. On the same pages in which Foucault describes the power-resistance relation, he most likely refers to Benjamin's work when writing that:

> it is doubtless the strategic codification of these points of resistance that makes a *revolution* possible, somewhat similar to the way in which the state relies on the institutional integration of power relationships. It is in this sphere of force relations that we must try to analyze the mechanisms of power. In this way we will escape

that when taking place, resistance is not one: "there is a plurality of resistances, each of them a special case."[167] Therefore, the specific form of resistance that takes place in a certain power relation defines the power exercised over it—and at the same time is defined by it. Further, it allows that power to exist and be exercised—and at the same time it exists because of it.

Under this perspective one can understand the debate highlighted by Oosterveld, Argibay and Askin around the definition of the crime of sexual slavery,[168] and its nature,[169] its interest,[170] and its focus.[171] To distinguish between economic and non-economic nature is to distinguish between specific power relations based on their *nature*, *interest*, *focus*—so that an "economic power relation" is one where power and resistance define each other in economic terms.[172] We can reframe Argibay's and our critique to the current definition and the related caselaw: To say that the definition carries an economic focus such that the crime can be interpreted to be primarily dealing with forced labor and economic exploitation,[173] is to say that it focuses on these instances where a certain economic capacity of an individual—her labor, her trafficking value—represents a resistance that a form of power (economic) is able to exploit.

If the framework of modern slavery is mostly interested in identifying ways an individual's economic capacity (i.e., *resistance*) can be exploited,[174]

> from the system of *Law-and-Sovereign* which has captivated political thought for such a long time. FOUCAULT, *supra* note 165, at 96–97 (emphasis added).

Foucault indeed read Benjamin and even cited his work on Baudelaire in the second volume of the *History*. 2 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 11 (Robert Hurley trans., Vintage Books 1990).

167. And if the "special cases" are defined in this passage as a potential compass within the same power relation, they can of course vary with the taking-place of a power-resistance relation: "parents and children, adults and adolescents, educator and students, doctors and patients, the psychiatrist with his hysteric and his perverts [. . .]." FOUCAULT, *supra* note 165, at 45.

168. *See supra* Part II.

169. *E.g.*, Askin, *supra* note 44 and accompanying text; Oosterveld, *supra* note 8, at 632; ICC Elements of Crimes, *supra* note 4, at 34 n.52 (referring to "the *complex nature* of this crime.").

170. *E.g.*, Argibay, *supra* note 45 and accompanying text; Oosterveld, *supra* note 8, at 624.

171. *E.g.*, Argibay, *supra* note 54 and accompanying text; Oosterveld, *supra* note 8, at 640.

172. *Cf.* FOUCAULT, *supra* note 165, at 94 ("Relations of power are not in a position of exteriority with respect to other types of relationships (economic processes, knowledge relationships, sexual relations), but are immanent in the latter.").

173. *See supra* Part IV.

174. *See supra* notes 132–135 and accompanying text (domestic legislations targeting supply chain). In Marx, for example, it is the worker's economic capacity that allows the capitalist to exploit his labor, exercising economic power. 1 KARL MARX, CAPITAL 235–43 (Fred-

the question of whether such language is appropriate to define the crime of sexual slavery requires to ask in what sense sexual slavery is an economic power relation, and in what sense (if any) it is not.

B. *Economics of Power and Resistance*

Economic resistance can certainly be *a* form of resistance involved in sexual crimes. That commanders promise their soldiers the chance to sexually exploit civilian women in exchange for their military service is an example of how women's bodies carry economic value in situations of conflicts.[175] Among the four objectives that led the Japanese empire in World War II to establish a system of "comfort women" for its army, at least one was directly economic: "[T]o keep its military personnel healthier and reduce medical expenses."[176] The International Labour Organization asked Japan to take "the initiative of holding meetings with the trade unions concerned, the representative organizations of the women who had been the victims of these acts and the governments of the various countries concerned, in order to find an effective solution responding to the *expectations* of the majority of the victims,"[177] demonstrating that forced labor and economic exploitation has been pervasive in that context too.[178]

Enforced prostitution, also defined as a War Crime and as a Crime Against Humanity,[179] and its relationship with human trafficking, is a form of economic exploitation of the victims' sexual capacity.[180] The discussion at the Rome Conference as to why sexual slavery and enforced prostitution should be enlisted as separate offences turned into a question of "degree" and did not address a difference in economic aspects,[181] rendered impossible by the references to "purchasing, selling, bartering, lending" and human

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erick Engels ed., Random House 1906) (Section called "The Degree of Exploitation of Labour-Power").

175. *See* Reed M. Wood, *Rebel Capability and Strategic Violence Against Civilians*, 47 J. PEACE RES. 601, 603 (2010); Jonathan Gottschall, *Explaining Wartime Rape*, 41 J. SEX RES. 129, 132 (2004).

176. Argibay, *supra* note 7, at 377.

177. International Labour Conference, *Report of the Committee on the Application of Standards*, ¶ 8, Eighty-Seventh Session (June 1999).

178. To the extent that the issue is treated in the report submitted by the Special Rapporteur McDougall in 2000, it seems that even if the "comfort women" had been paid for their services, their condition would still have amounted to enforced prostitution under the Rome Statute. *See* Gay J. McDougall (Special Rapporteur to the Commission on Human Rights) *Update to the Final Rep. on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, ¶¶ 71–78, U.N. Comm'n on Hum. Rts., Sub-Comm'n on the Promotion and Protection of Hum. Rts., U.N. Doc. E/CN.4/Sub.2/2000 /21 (June 6, 2000) [hereinafter McDougall 2000 Report].

179. ICC Elements of Crimes, *supra* note 4 arts. 8(2)(b)(xxii)-3, 8(2)(e)(vi)-3, 7(1)(g)-3.

180. Nadia Alhadi, *Increasing Case Traffic: Expanding the International Criminal Court's Focus on Human Trafficking Cases*, 41 MICH. J. INT'L L. 541, 557–59 & n.97 (2020).

181. *Id.* at 554–56.

trafficking in the definition of sexual slavery. Argibay, once again, points to the right direction: "enforced prostitution tends to reflect the male view: that of the organizers, procurers, and those that *take advantage of the system* by raping the women"—it tends, in other words, to focus on the economic interest of who exercises the power.[182] And yet, she falls back saying that "[t]he term 'forced prostitution' describes essentially the same conduct as 'sexual slavery,' but it does not communicate the same level of egregiousness."[183]

Blurred lines emerge. Often, sexual violence at war can be characterized by an economic power relation, through sexual slavery, enforced prostitution, systematic rape, or forced pregnancy. The distinction between chattel and forced labor, so crucial in Argibay's argument, is insufficient to provide an understanding of sexual slavery that goes beyond this kind of power relation—chattel can, after all, be purchased, sold, bartered, trafficked.[184] The exercise of "powers of ownership," with or without an economic qualification, is identifiable under any of these forms of sexual violence, even without relying on feminist theory: In McDougall's 1998 report "sexual access through rape or other forms of sexual violence" are *in themselves* an exercise of such powers.[185]

Not only is the "exercise of power of ownership" (of a woman, of her labor, of her body, of her child) potentially present in these sexual crimes, it can also always take the form of an economic power relation. That is because the body of a woman, and crucially her reproductive capacity, can always form an economic resistance ready to be overcome.[186] In this sense, MacKinnon's claim retains all its strength—"women are violated in many ways that men are not, or rarely are; many of these violations are *sexual* and *reproductive*."[187] The paradigm shift from slavery to sexual violence requires abandoning the logic of power that renders impossible to focus on the victim exclusively, since her resistance always dialectically returns to the interests of power exercised over her.[188]

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182. Argibay, *supra* note 7, at 387 (emphasis added).

183. *Id.*

184. Oosterveld, *supra* note 8, at 629–30 ("Many delegations felt that the reference to chattel was outdated, inappropriate' and imprecise, and unduly linked the concept of sexual slavery to the issue of ownership of *saleable property*.") (emphasis added).

185. *See* McDougall, *supra* note 143 and accompanying text.

186. *See generally* MARIA ROSA DALLA COSTA & SELMA JAMES, THE POWER OF WOMEN AND THE SUBVERSION OF THE COMMUNITY (3d ed. 1975) (highlighting how "capitalism was first and foremost dependent on processes of generation and regeneration").

187. MacKinnon, *supra* note 23, at 60 (citing to CENTER FOR WOMEN'S GLOBAL LEADERSHIP, 1991 WOMEN'S LEADERSHIP INSTITUTE REPORT app. C at 77–80.) (emphasis added). Analogically, women can be enslaved in many ways men are (as chattel or to perform forced labor), but there are ways in which they can be enslaved for reasons that men rarely are, or can't be ("sexual and reproductive").

188. A consideration should at this point be sketched in the background. Hobbes suggests a distinction between the form of "causal power" framed by Dahl, *supra* note 150, for

VI. DETAILS OF THE PROPOSED REFORM

A. *From Powers of Ownership to Sexual Autonomy*

To escape from the vicious circle that anchors slavery to economic exploitation, the paradigm must shift from a focus on the interests of who exercised power, to a focus on the effect the exercise of power had on the victims. By analogy, this traces the shift of rape laws in the United States. There the law is moving from the force-resistance interplay towards a consent-centered focus because it perceives that violation of the sexual autonomy of the victim is where the fundamental condemnation of rape rests.[189]

Language referring to control of sexuality and sexual autonomy has been adopted by scholars and courts in describing sexual slavery. In *Furundžija* and *Kunarac*, the ICTY determined that, with respect to sexual violence, "the true common denominator which unifies the various [national] systems may be a wider or more basic principle of penalising violations of sexual autonomy."[190] The ICC in *Ntaganda*, summarizing the applicable law on the crime of sexual slavery, enlisted "control over sexuality" among the other factors considered to establish the exercise of powers of ownership.[191] Carmen Argibay refers to sexual autonomy as the right interpretative paradigm for sexual slavery, claiming that in sexual slavery "[t]he victim is deprived of control over not only his or her body, but also sexual activity and

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which he uses the word *potentia*, and the sovereign power, for which he uses the word *potestas*. Sandra Field, *Hobbes and the Question of Power*, 52 J. HIST. PHIL. 61, 61 (2014). This distinction would probably be rejected by Foucault, who intends power as "the multiplicity of force relations immanent in the sphere in which they operate," rather than as a unitary form of sovereignty. FOUCAULT, *supra* note 165, at 92. Agamben shows that the two are actually indistinct: the origin of the "power over life and death" that Foucault addresses in the last chapter of the *History of Sexuality* originates in the formula of "*vitae necisque potestas*, which designates not sovereign power but rather the unconditional authority [*potestas*] of the *pater* over his sons." The true indistinction is then accomplished by the juridical and linguistic references that, in roman law, defined the magistrate's authority as *vitae necisque potestas* ["power over life and death"] over all citizens. AGAMBEN, *supra* note 161, at 87–89.

189. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 187 (2002) ("the central value protected by sexual offense provisions is sexual autonomy."); STEPHEN J. SCHULHOFER, UNWANTED SEX LAW 19–20 (1998); Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 27–35 (2015). *See generally* Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. PHIL. 35 (1992). In the judicial practice, two exemplary cases leading this shift are State in Interest of M.T.S., 609 A.2d 1266 (N.J. 1992) and Judge Wilner's dissent in Rusk v. State, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (Wilner, dissenting), *rev'd*, 424 A.2d 720 (Md. Ct. Spec. App. 1981).

190. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/I-T, Trial Judgment, ¶ 440 (Feb. 22, 2001). In the same paragraph, the court notes in fact that sexual autonomy is a better common denominator than "force, threat of force or coercion", suggesting an intention to shift the focus similar to that described *supra* note 189 and accompanying text.

191. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶ 952 (July 8, 2019).

autonomy."[192] In fact, she argues that "[c]ontrol over a person's sexuality or sexual autonomy may *in and of itself constitute a power attaching to the right of ownership*."[193]

Similarly, Kelly Askin reports the reasoning of the *Furundžija* judgment reported above and concludes that "these factors focus on violations of sexual autonomy, which should be the standard for determining when sexual activity constitutes rape."[194] The drafters of the elements of crimes, too, had these considerations in mind, to the point that Kristen Boon argues,

> 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.[195]

If it is true that "[t]he 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,"[196] it is even more striking that no language related to sexual autonomy appears in the whole statute. To this extent, if in the intentions of the drafters "the crime of sexual slavery is clearly a part of that paradigm shift,"[197] then the language adopted in the statute does not fully reflect that intention.[198]

Not only is an autonomy-based definition of sexual slavery already endorsed in the reasoning of scholars and courts, it also provides a useful link to international human rights and humanitarian instruments. The right to freedom is already recognized by the Universal Declaration of Human Rights,[199] and the Supplementary Convention on Slavery of 1956.[200] But even more, an autonomy-based definition of sexual slavery recalls more recent instruments affirming rights to *sexual* freedom and *sexual* autonomy,

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192. *See* Argibay, *supra* note 7, at 384.

193. *Id.* at 384 (emphasis added).

194. Askin, *supra* note 10, at 334–35.

195. 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) (cited in Oosterveld, *supra* note 8, at 608 n.15).

196. Oosterveld, *supra* note 8, at 609.

197. *Id.* at 608 n.15.

198. *Cf. supra* Part II.

199. Universal Declaration of Human Rights, *supra* note 129, pmbl., arts. 2, 4.

200. Supplementary Convention on the Abolition of Slavery, *supra* note 50, pmbl. ("Considering that freedom is the birthright of every human being").

thereby creating a parallel between sexual rights and prosecution of sexual violence.[201]

Although human rights law lacks a binding, universal instrument recognizing sexual autonomy as a fundamental human right, the first step in this direction has been taken by the Report of the International Conference on Population and Development in 1995. The declaration failed to adopt the term "sexual rights,"[202] but nonetheless recognized that "*autonomy* of women and the improvement of their political, social, economic and health status is a highly important end in itself."[203] It further addresses "reproductive rights" as "the right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children."[204] Putting this language in perspective with the contemporary practice of the rape camps in Yugoslavia,[205] for example, one can discern an intent to oppose the systematic enslavement and forced impregnation of Bosnian and Croatian women through a framework of human rights based on autonomy and freedom of choice. A year later, the Beijing Declaration and Platform for Action recognized "[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality [. . .]."[206]

More recently, the right to sexual autonomy has been reiterated by the Human Rights Council's Working Group on Discrimination against Women and Girls. The Council stated that "[t]he right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy" granted by the ICCPR.[207] To the extent that ICL aims to be linked to international human rights, a reference to sexual autonomy in the language of the crime of

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201. A parallel allowing the "coextensiveness of the humanitarian law norm and the criminal law norm." *Cf.* Robinson, *supra* note 94, at 954.

202. Sarah Lai & Regan Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 201–02 (1995).

203. International Conference on Population and Development, *Programme of Action*, ¶ 4.1, U.N. Doc. A/Conf.171/13, (Sept. 13, 1994).

204. *Id.* ¶ 7.1. For the pre-existing instruments originating this language, see Lai & Ralph, *supra* note 202, at 209 n.38.

205. The breakout of the stories raising global awareness on the rape camps started in 1993. *See, e.g.*, Robert Fisk, *Bosnia War Crimes: 'The Rapes Went on Day and Night': Robert Fisk, in Mostar, Gathers Detailed Evidence of the Systematic Sexual Assaults on Muslim Women by Serbian 'White Eagle' Gunmen*, INDEPENDENT (Feb. 8, 1993), https://www.independent.co.uk/news/world/europe/bosnia-war-crimes-the-rapes-went-on-day-and-night-robert-fisk-in-mostar-gathers-detailed-evidence-of-1471656.html.

206. Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 96, UN Doc. A/CONF.177/20, (Sept. 15, 1995).

207. U.N. Working Group on Discrimination against Women and Girls, Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends, at 1 (Oct. 2017), https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf.

sexual slavery would move the law towards a truly independent standing of sexual crimes, not to be derived by analogy or extensions from broader provisions in human rights treaties.[208]

B. *The New Language*

There is a tempting option for reform: to maintain the hierarchy that sees slavery as *genus* and sexual violence as *specific difference*, and to redraft the first element of sexual slavery as the "exercise of powers attaching to the right of ownership, including the exercise of control over a person's sexuality or sexual autonomy, and similar deprivations of liberty." This option would get rid of the economic qualifications currently present in the first element, keeping the footnote referring to human trafficking.[209] This option, however, is exposed to the same limit as McDougall's definition[210]: Any form of sexual violence can fall within that definition, and rightfully so, because any violation of a person's sexual autonomy—through rape, sexual slavery, forced pregnancy, enforced prostitution—is an exercise of power of ownership. As discussed above, this all-encompassing language is not enough to differentiate sexual slavery from other forms of sexual violence. Thus, it runs afoul of the legality requirements of a liberal system of criminal law included in the Rome Statute.[211]

Hence, the proposal for a reformed element (1) in the definition of sexual slavery:

> (1) The perpetrator deprived one or more persons of their liberty by controlling their sexuality or sexual autonomy, including by exercising any or all of the powers attaching to the right of ownership over them.[212]

This definition effectively inverts the hierarchy, making sexual violence the *genus* of the crime, and slavery the *difference* of this crime from the other forms of sexual violence. It does not have an economic focus; it is in this sense responsive to Argibay's argument.[213] It reflects McDougall's suggestion that control over sexuality is in itself an exercise of powers of owner-

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208. *Cf. supra* Section IV.c.

209. *Cf.* ICC Elements of Crimes, *supra* note 4, art. 8(2)(b)(xxii)-2 n.53.

210. *See supra* notes 142–146 and accompanying text.

211. *See supra* Section IV.b, Part V.

212. The other elements, reported here for reference in the version of war crimes in international armed conflict, would remain unvaried: (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature; (3) The conduct took place in the context of and was associated with an (international) armed conflict; (4) The perpetrator was aware of factual circumstances that established the existence of an armed conflict. *Cf.* ICC Elements of Crimes, *supra* note 4, art. 8(2)(b)(xxii)-2.

213. *Supra* Section IV.a.

ship.[214] It maintains a reference to the framework of sexual slavery, necessary for two reasons. First, if the "exercise of powers of ownership" is the correct theoretical explanation of the interaction forming this crime, the definition should reflect that. This reason is not conclusive because, as we argued, the "exercise of powers of ownership"—identified by McDougall—happens in virtually every form of sexual violence, and yet remains implied in the respective definitions. Second, the principle of "fair labeling" in a liberal criminal system demands for a crime whose label includes the word "slavery" to have a reference to the instruments that define what slavery is.[215] Finally, it creates a link with emerging human rights instruments that represent the grounds for universally recognized sexual rights.[216]

A footnote can be added to help clarify the scope of the crime and to guide judges in their reasoning.[217] The footnote should include a non-exhaustive list of factors that the court should look at to determine whether such deprivation of liberty occurred, drawing from factors now consolidated in the relevant caselaw:

> [C]ontrol of the victim's movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, [. . .] forced labour, and the victim's vulnerability. The exercise of the right of ownership over someone need not entail a commercial transaction.[218]

The factors would remain virtually unchanged as an interpretive tool, but they would lose the current focus on economic exploitation. The same footnote could also include the references to human trafficking instruments featured in the current footnote to element (1).[219]

Duration of the deprivation of liberty is one of the factors considered. Element (2) already provides that for a finding of sexual slavery the "act of sexual nature" can occur even just once.[220] In a new definition based on deprivation of liberty through control of sexual autonomy, the duration of such deprivation cannot coincide with the duration of the single occurrence of sexual violence itself: Otherwise, sexual slavery would collapse into the definition of rape or sexual violence. This would expose the definition to

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214. McDougall, *supra* note 143, ¶ 27

215. *Cf.* Robinson, *supra* note 94, at 927.

216. *See supra* notes 206–207

217. Cf. Oosterveld, *supra* note 8, at 634.

218. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Trial Judgment, ¶ 952 (Jul. 8, 2019) (alteration added to exclude "control over sexuality," which would be redundant since it is already part of the re-drafted element (1))

219. ICC Elements of Crimes, *supra* note 4, at art. 8(2)(b)(xxii)-2 & n.53.

220. *Id.*

critiques from a legality standpoint. ICC judges seem equipped to understand that the issue requires a case-by-case analysis. A strict duration rule would inevitably be arbitrary and uncapable of capturing different instances of sexual slavery in practice.[221] To reflect the need for an individual analysis, the statute could refer to a standard. For example, the American Model Penal Code includes in the crime of kidnapping a "*substantial period* in a place of isolation."[222] Similarly, the footnote to element (1) could provide that the deprivation of liberty should occur over a substantial period, leaving the courts to define it in the cases before them.

VII. CONCLUSION

This note examined the practical and theoretical implications of a definition of sexual slavery defined through the language of "powers attaching to the right of ownership" found in human rights instruments and identified several shortcomings. First, the current language undercuts the intent of the drafters to establish a crime with an independent standing from enslavement. Second, it gives the crime an economic focus that is unwarranted and criticized by scholars and practitioners. Third, even in its non-economic formulation, it defines sexual slavery through a power relation that characterizes every form of sexual violence. This serves a wrong expressive function (i.e., that other forms of sexual violence are not an exercise of power of ownership) and runs afoul of the fundamental principles of criminal law on which the Rome Statute was grounded.

The proposed reform, inverting the structure of the definition and focusing on the sexual autonomy of the victim, is better able to capture the unique nature of the crime, to provide a link to instruments discussing sexual and reproductive rights, and still maintains the necessary connection to slavery definitions. Thus, sexual violence is defined as a sexual crime accomplished through slavery practices, independent from economic exploitation, and the definition complies with the legality requirements of a liberal system of criminal law.

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221. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384–85 (1985) ("rules draw a sharp line between forbidden and permissible conduct" while "standards allow the addressees to make individualized judgments about the substantive offensiveness" of conducts).

222. MODEL PENAL CODE § 212.1 (AM. L. INST., Official Draft and Explanatory Notes 1962) (emphasis added).