

Defining Rape: Coercion- or Consent-Based Approach? Towards a Definition of Rape in Wartime in International Criminal Law (ICL)

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Abstract

The legal definition of rape still causes debate and unsolved problems in both domestic jurisdictions and in International Criminal Law (ICL). This essay is concerned with the definition of rape in wartime in ICL, as a uniform statutory definition does not yet exist. I will focus specifically on the debate whether a coercion or a consent-based approach should be favoured in defining rape in ICL. This essay argues in favour of a consent-based approach because the element of consent gives women agency. Nevertheless, the special circumstances of war should not be disregarded. This is why I suggest a shifting of the burden of proof in wartime, regarding the element of non-consent. Non-consent is assumed, and the defendant would need to prove consent. This approach enables a balance between the wish of the victim to prosecute the crime committed against him/her effectively and the rights of the defendant.

I. Introduction

Over the past forty years, both international and domestic law have seen significant developments in the jurisprudence on the crime of rape.¹ Nevertheless, the legal definition of rape still causes debate and unsolved problems in both domestic jurisdictions and in International Criminal Law (ICL). At first, the debates surrounding the definition of rape occurred on the domestic level only, however with the emergence of ICL this problem needs to be addressed on the international level as well. This is why this paper is concerned with it.

Rape occurs in the context of peace- and wartime. However, it happens more often in the latter and is used as a weapon in wartime.² This essay will focus on the definition of rape in wartime in ICL, as a uniform statutory definition does not yet exist.³ A hotly contested issue within ICL has been the place of consent in the definition of rape.⁴ Therefore, even though many aspects of the definition of rape are controversial, this essay will focus specifically on the debate surrounding whether a coercion or a consent-based approach should be favoured in defining rape in ICL. This debate has been highly dominated by feminist scholars which is why a section of this essay will be dedicated to their thoughts on the definition of rape.

¹ Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 54 B. C. L. Rev. 1207, 1208.

² Wolfgang Schomburg/Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 AJIL 121, 121; Weiner (n 1), 1207.

³ Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff Publishers 2012), 145.

⁴ Kiran Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23 Fem. Leg. Stud. 149, 151.

I will argue that a consent-based approach should be given preference over the coercion-construct of rape. Even though most feminists have supported the definition of rape by coercion, the element of consent gives women agency and serves the feminist cause. The special circumstances of war should not be disregarded. This is why I suggest a shifting of the burden of proof in wartime, regarding the element of non-consent.

This essay poses the following research question:

Should rape in wartime be defined according to the coercion or the consent-based approach in ICL?

In order to contextualize the above-defined research question, rape in peacetime will be discussed shortly and the two main concepts of how rape is defined at the domestic level are introduced, as well as their pros and cons. Then, to show the issues surrounding the legal definition of rape, a brief historical synopsis of the different approaches and the important cases will be given, focusing on the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC). Afterwards, the feminist critique on how ICL deals with rape in wartime is discussed. Finally, the research question is answered by discussing and contrasting the different possible definitions of rape in wartime and making my own suggestions as to how a possible definition might look.

II. Rape in Peacetime

1. Definition of Rape in Peacetime

Rape in peacetime is not regulated by ICL, rather each national jurisdiction defines rape in its national law(s) and prosecutes it domestically.⁵ Two concepts can be distinguished broadly: the definition which emphasizes compulsion and the one which stresses lack of agreement.⁶ Some jurisdictions permit one or the other alternately or simultaneously, others require proof of both and yet others still weigh one to the relative exclusion of the other.⁷

Laying the emphasis on coercion suggests that rape is mostly a crime of inequality, whether of physical, relational or status-based. Having non-consent as the element of rape focuses on the deprivation of sexual freedom.⁸ Most Civil-Law-states define rape by mentioning coercive measures of the offender or coercive circumstances that lead to a breach of the victim's will and thereby facilitate the sexual act. The Common Law-states establish the offence of rape by proving an inner state of mind, namely the lack of consent of the victim to the sexual act.⁹ Many jurisdictions have moved towards a model of affirmative consent, meaning consent is not assumed. Rather a positive obligation is placed on the individuals to ensure that the other party is consenting.¹⁰

Not only in ICL but also in national jurisdictions, it is debated which of the two concepts should be favoured: in Switzerland, there are lively debates surrounding the question of whether the coercion-based definition should be changed to a consent-based one.¹¹ Internationally speaking, increasingly more states are moving towards a consent-based approach.¹² Since there is not even a uniform definition of rape in peacetime at the national level, it certainly does not exist on the international level for rape in wartime as it is always more difficult to reach consent on the international level.

⁵ Weiner (n 1), 1224.

⁶ Alexandra Adams, 'The First Rape Prosecution before the ICC: Are the Elements of Crimes Based on a Source of International Law?' (2015) 15 Int'l Crim. L. Rev. 1098, 1112; Catharine A. MacKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' (2005) 44 Colum. J. Transnat'l L. 940, 940f.

⁷ MacKinnon (n 6), 941.

⁸ *ibid.*

⁹ Adams (n 6), 1105.

¹⁰ Kiran Grewal, 'The Protection of Sexual Autonomy under International Criminal Law, The International Criminal Court and the Challenge of Defining Rape' (2012) 10 JICJ 373, 387.

¹¹ See e.g. Carlos Hanimann, 'Nein!' *Republik (Swiss Newspaper)* (Switzerland, 22 August 2018), <www.republik.ch/2018/08/22/nein> accessed 25 November 2019; Angelika Hardegger, 'Expertin für Strafrecht: «Die Unschuldsvermutung bleibt bestehen»' *NZZ (Swiss Newspaper)* (Switzerland, 21 May 2019), <www.nzz.ch/schweiz/expertin-fuer-strafrecht-die-unschuldsvermutung-bleibt-bestehen-ld.1483497> accessed 25 November 2019.

¹² Margo Kaplan, 'Rape beyond Crime' (2017) 66 Duke L. J. 1045, 1056; Vivian Berger, 'Rape Law Reform at the Millennium: Remarks on Professor Bryden's Non-Millennial Approach' (2000) 3 Buff. Crim. L. Rev. 513; Lois Pineau, 'Date Rape: A Feminist Analysis', (1989) 8 Law & Phil. 217.

2. Taking a Coercion- or a Consent-Based Approach?

The advantages and challenges of the two approaches should be outlined briefly.

The Common Law-states may argue that the lack-of-consent-doctrine provides wider protection, as it is not only the victims who are forced to commit or endure a sexual act who are protected but also those who have difficulties in forming or exercising their counter-will.¹³ However, the consent-based approach is vaguer as it is unclear what the victim has to do in order to demonstrate his/her counter-will.¹⁴ Furthermore, one point of divergence is the conceptualization of consent as a state of mind or a performative act. It is debated to which extent the defendant must have knowledge or concerns about the victim's lack of consent in order to be criminally liable.¹⁵

A further disadvantage lies in the fact that attention is drawn to the behaviour of the victim before the sexual act and thus the defence tries to portray the image of a victim as being a sexual predator who had wanted the sexual act. The victim's erotic behaviour or her clothes are examined in order to slander her reputation. Thus, during the trials, the victims are victimized for a second time.¹⁶ Also, an unwanted focus is put on the will and behaviour of the complainant rather than on the conduct and intentions of the perpetrator.¹⁷ It is claimed that the highly abstract conception of consent in rape laws disguises the extent to which men and women do not operate in, choose from, or communicate on the basis of an equal and mutually respectful terrain. It is questionable whether there can be a choice in a patriarchal society in which women experience systematic disempowerment and inequality.¹⁸

Because of these and other limitations, reformulations of rape laws, incorporating coercion-elements, are demanded by e.g. feminists. An argument for the inclusion of coercive means is that the impairment of the victim's will embodies a more severe legal wrong and higher guilt of the perpetrator than a sexual act only performed without the consent of the victim.¹⁹ However, it is also argued that some concept of consent is necessary to allow people to act and be respected as, moral agents who have a say over their bodies.²⁰ It is not clear whether reforms aiming to abandon the consent threshold at the level of the doctrine can avoid its reinsertion in trial proceedings.²¹ Research conducted by *Regina Graycar* and *Jenny Morgan* has illustrated the extent to which legal reforms that formally relegate consent to the status of a defence in rape have failed to prevent disputes about its presence from arising in the courtroom. These reforms have done little to prevent dubious claims about 'proper' female socio-sexual behaviour from informing both judicial and jury reasoning.²² Further, it is argued that models of rape law grounded in coercion can also be interpreted in narrow and restrictive terms, giving rise to a return to an essentially force-based framework.²³

III. Rape in Wartime

3. Brief Synopsis of the Jurisprudence of Rape in Wartime in ICL

a. General Trends of the International Jurisprudence on Rape

Examining the international jurisprudence regarding rape, one can observe that international courts and tribunals are inconsistent in the way they define this crime.

¹³ Adams (n 6), 1112.

¹⁴ *ibid*, 1114; Alexandra Adams, 'The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape' (2018) 29 EJIL 749, 764.

¹⁵ Vanessa E. Munro, 'From consent to coercion, Evaluating international and domestic frameworks of the criminalization of rape' in McGlynn C/Munro V (eds), *Rethinking Rape Law, International and Comparative Perspectives* (Routledge 2011), 19f.

¹⁶ Adams (n 14), 766; Donald A. Dripps, 'Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent' (1992) 92 CLR 1780, 1794. See further Julie Mertus, 'Shouting from the Bottom of the Well, The Impact of International Trials for Wartime Rape on Women's Agency' (2004) 6 IFJP 110, examining the agency of the victims in the *Foca*-case.

¹⁷ Munro (n 15), 20.

¹⁸ *ibid*; Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).

¹⁹ Adams (n 6), 1113.

²⁰ John Gardner/Stephen Shute, 'The wrongness of rape' in Horder J (ed), *Oxford Essay in Jurisprudence* (Oxford University Press 2000), 207-8.

²¹ Munro (n 15), 21.

²² Regina Graycar/Jenny Morgan, *The Hidden Gender of Law* (2nd edn., Federation Press 2002).

²³ Munro (n 15), 22.

Inconsistencies exist mainly: 1) whether coercion or non-consent is an element of the crime; 2) whether a mechanical or a more general description of the sexual act must be used in the definition and; 3) how the consideration between the fairness for the victim and the rights of the accused should be made.²⁴ In this essay, the focus lies on the first point, namely on the discussion of whether the element of coercion or of consent should be favoured.

1) Definition of Rape by the ICTR and by the ICTY

In September 1998, within the context of the case of *Prosecutor v. Akayesu* the elements of rape in an international setting were defined for the first time by the ICTR.²⁵ The trial chamber defined rape as «a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.»²⁶ Interestingly enough, the ICTR's decision provided significant latitude in determining what constitutes coercion. The tribunal noted that coercive circumstances maybe deemed inherent in the mere fact that there is fear of the enemy and victims will do whatever it takes to survive, including enduring acts of sexual violence.²⁷ The ICTR did not address the element of lack of consent.²⁸ In *Akayesu*, the ICTR departed from the idea of consent and made clear that it is no prerequisite for rape that the victim physically or verbally communicated their lack of consent to the perpetrator regarding the physical invasion of the sexual nature.²⁹

In December 1998, a trial panel of the ICTY in *Prosecutor v. Furundžija* charged the crime of rape as a violation of Common Article III of the Geneva Conventions.³⁰ The ICTY recognized the absence of a universally accepted definition of rape in international law.³¹ Hence, it drew «upon the general concepts and legal institutions common to all the major legal systems of the world»³² to ensure an «accurate definition of rape».³³ In *Furundžija* the ICTY trial panel defined rape as a sexual penetration by coercion or force or threat of force against the victim or a third person.³⁴

In 2001, the ICTY in *Prosecutor v. Kunarac, Kovac & Vokovic* (also called the *Foca*-case), removed the «coercion or force or threat of force» from the *Furundžija* case and instead adopted «lack of consent» for the definition of rape.³⁵ The trial panel also added a two-part *mens rea* requirement: proof needs not only to establish a general intent to perform the sexual act but also proof that the accused knew the sexual act was taking place without consent.³⁶ On appeal, the panel reasoned «force or threat of force provide clear evidence of non-consent, but force is not an element per se of rape.»³⁷ The panel significantly changed the elements of rape by excluding force as an element of this crime.³⁸ The way the court defined consent and lack of consent is quite progressive, as it takes into account all the circumstances in assessing whether the victim could exercise his/her will freely.³⁹

In 2005, in *Prosecutor v. Muhiman* the ICTR was once again concerned with the proper definition of rape and concluded that the definitions in *Furundžija* and in *Kunarac* «substantially aligned».⁴⁰

²⁴ Weiner (n 1), 1208.

²⁵ Case No. ICTR-96-4-T, Trial Judgment, 685-696 (2 September 1998).

²⁶ Case No. ICTR-96-4-T, Trial Judgment, 598 (2 September 1998).

²⁷ *ibid*, 688.

²⁸ *ibid*; Case No. ICTR-96-4-T, Appeal Judgment, 10 (1 June 2001).

²⁹ Fraciah Njoroge, 'Evolution of Rape as a War Crime and a Crime against Humanity' [2016] SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2813970> accessed 26 November 2019.

³⁰ Case No. ICTY IT-95-17/1-T, Trial Judgment, 43, 274 (10 December 1998).

³¹ *ibid*, 175.

³² *ibid*, 178.

³³ *ibid*, 177.

³⁴ *ibid*, 185.

³⁵ Case Nos. ICTY IT-96-23-T & IT-96-23/1-T, Trial Judgment, 460 (22 February 2001); O'Byrne (2011), 504.

³⁶ Case Nos. ICTY IT-96-23-T & IT-96-23/1-T, Trial Judgment, 460 (22 February 2001).

³⁷ Case Nos. ICTY IT-96-23 & IT-96-23/1-A, Appeal Judgment, 129 (12 June 2002).

³⁸ Weiner (n 1), 1214.

³⁹ Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 Case W. Res. J. Int'l L 305, 319.

⁴⁰ Case No. ICTR-95-1B-T, Trial Judgment and Sentence, 549 (28 April 2005).

However, the ICTR did not go into details regarding how it reconciles the two different definitions.⁴¹ In 2006, in *Gacumbitsi v. Prosecutor*, the ICTR appeals chamber adopted and reconciled the two divergent definitions of rape used by the ICTR and ICTY.⁴² The chamber adopted the *Kunarac*-definition of rape⁴³ by stating that the *Kunarac*-decision «established that consent and knowledge thereof are elements of rape as a crime against humanity.»⁴⁴

2) Definition of Rape by the ICC

When formulating the definition of rape in the Rome Statute of the ICC (RS), the above-discussed cases of the ICTY and ICTR were reviewed and considered.⁴⁵ However, the ICC utilises «force or coercion» as an element and not «absence of consent». In order to anticipate the full range of circumstances arising in wartime, the ICC's definition gives plenty of scope to the terms «coercion» and «force».⁴⁶ The ICC's position on the consent-element of rape is not entirely clear.⁴⁷ Some argue that the drafters had the intention to exclude non-consent as a necessary element for rape to be established by the prosecution. Non-consent would only be relevant insofar as that it is raised by the accused as a defence.⁴⁸ Most likely, the ICC will consider the lack of consent as a defence and not as an element of the offence.⁴⁹

b. Rape – A Separate Crime?

There is an ongoing controversy about whether rape should be understood as a stand-alone crime or whether it should be included in another crime.

Two diverging opinions can be identified in this debate: Those who argue that rape should stand as an international crime on its own and not as a subsection of another crime, as this might suggest rape is somehow a less important crime.⁵⁰ Others, want to define rape as a subset of a genocide or a crime against humanity.⁵¹

In the ICTY-Statute rape constitutes a crime against humanity.⁵² Furthermore, the ICTR-Statute lists rape as a war crime and not only as a crime against humanity.⁵³ In the *Akayesu*-judgement the ICTR explicitly acknowledged the possibility of genocidal rape, even though rape and sexual violence have not been specifically enumerated as an act of genocide in the application of the Genocide Convention by the ICTR.⁵⁴

Under the RS of the ICC, rape has been recognized as a crime under Article 6 which expounds on the crime of genocide; under Article 7 which understands rape as a crime against humanity and under article 8 where rape is seen as a war crime in an armed conflict.⁵⁵

c. Intermediate Conclusion

Even though there has been a great deal of jurisprudence discussing the definition of rape, there is still no consensus concerning the appropriate definition in ICL.⁵⁶ The tribunals acknowledged the specific circumstances in wartime that make rapes in this environment quite different from the ones committed in a national jurisdiction in peacetime.⁵⁷

⁴¹ Weiner (n 1), 1216.

⁴² Case No. ICTR-2001-64-A, Appeal Judgment, 152 (7 July 2006).

⁴³ *ibid.*

⁴⁴ *ibid.*, 153.

⁴⁵ Weiner (n 1), 1217.

⁴⁶ *ibid.*, 1218.

⁴⁷ Grewal (n 10), 376.

⁴⁸ Pam Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' (2003) 28 *Signs* 1233, 1241; See further Grewal (n 10), 376ff.

⁴⁹ Grewal (n 10), 391.

⁵⁰ Mark Ellis, 'Breaking the Silence: Rape as an International Crime' (2007) 38 *Case W. Res. J. Int'l L* 225, 246.

⁵¹ *ibid.*, 247.

⁵² See Art. 5 (g) ICTY-Statute.

⁵³ See Art. 4 (e) and 3 (g) ICTR-Statute.

⁵⁴ Case No. ICTR-96-4-T, Trial Judgment, 731 (2 September 1998).

⁵⁵ See further: Njoroge (n 29).

⁵⁶ Weiner (n 1), 1223.

⁵⁷ *ibid.*, 1224.

In such a coercive environment, the question may be raised whether true consent is even possible.⁵⁸ In a nutshell, the ICTY/ICTR decided for the consent-criteria, whereas the ICC adopted the element of coercion.

4. Feminist Critique of the Definition of Rape in Wartime

Over the last three decades, feminist critique and presence in ICL have grown.⁵⁹ Documentation of sexual abuse of women during war has increased, which makes it easier for feminists to bring across their concerns.⁶⁰ As a starting point, they argue that even though men are raped, in terms of numbers it is primarily a crime committed against women.⁶¹ The main objective of the feminist critique is to secure the criminalization of sexual and gender-based violence against women in times of conflict.⁶² In their eyes, sexual autonomy must lie at the heart of every definition of rape.⁶³ Some feminist scholars have specifically criticized the consent-based approach in ICL⁶⁴ as they have challenged its appropriateness in the context of ICL.⁶⁵ Furthermore, they argue for a better understanding of the gendered nature of mass atrocities.⁶⁶ In the following, the opinions of the feminist scholars most present in ICL will be outlined briefly.

Feminist scholars have suggested different approaches towards an adequate definition for rape. *Lois Pineau* argued for a reversal of the burden of proof in cases involving a sort of sex a woman is not expected to like. In such circumstances, it should be the defendant to show that contrary to every reasonable expectation the victim did consent.⁶⁷ However, the question remains of how sex of a sort women are not expected to like should be defined.

Catharine MacKinnon strongly supports the *Akayesu*-decision of the ICTR. Especially the claim that analysing the individual consent in a context of mass sexual coercion does not make any sense.⁶⁸ The idea that some circumstances do not allow for consent is also known by some national jurisdictions, as e.g. Switzerland.⁶⁹ She argues that in an extreme coercive context consent is not possible. *Adrienne Kalosieh* supports the idea that coercion inherent in situations of war replace discussions on the victim's consent.⁷⁰ Once the coercive environment is shown, rape could be proven relatively easily.⁷¹ The focus is not laid on the individual interaction between two people, but on the context. *MacKinnon* insists that the approach taken in the *Akayesu*-decision is not only preferable at the international level, in responding to wartime rape, but it should serve as a template to be adopted at the domestic level as well. She highlights the extent to which the return to non-consent in *Kunarac* ignores the collective and contextual dimension of rape. By focusing on an atomistic, one-at-a-time model of sexual negotiation, the *Kunarac*-decision ignores the foundational patterns of gender inequality that frame the parameters within which (hetero)sexual agency is exercised and this both, in times of peace and war.⁷²

⁵⁸ Schomburg/Peterson (n 2), 138.

⁵⁹ Eithne Dowds, 'Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective' (2018) 20 IFJP 624, 624.

⁶⁰ Judith Gardam/Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 HRQ 148, 155.

⁶¹ Christine Chinkin, 'Symposium, The Yugoslav Crisis: New International Issues, Rape and Sexual Abuse of Women in International Law' (1994) 5 EJIL 326, 326; Kas Wachala, 'The tools to combat the war on women's bodies: rape and sexual violence against women in armed conflict' (2012) 16 IJHR 533, 533.

⁶² See Kelly D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 BJIL 288; Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press 2016); Catharine A. MacKinnon, 'Rape, Genocide and Women's Human Rights' (1994) 17 Harv. Women's L. J. 5.

⁶³ Grewal (n 10), 393.

⁶⁴ Nicola Henry, 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law' (2014) 23 Social & Legal Studies 93, 102.

⁶⁵ See Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, 2005), 117-29; Schomburg/Peterson (n 2).

⁶⁶ Fionnuala Ní Aoláin, 'Feminism facing international law' (2015) 22 EJWS 457, 458.

⁶⁷ Pineau (n 12), 233.

⁶⁸ MacKinnon (n 62), 950.

⁶⁹ See Art. 27 Civil Code of Switzerland. However, this article is not concerned with CL, but with consent in contracts.

⁷⁰ Adrienne Kalosieh, 'Consent to Genocide?: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca' (2003) 24 Women's Rts. L. Rep. 121, 121 f.

⁷¹ MacKinnon (n 62), 955.

⁷² Munro (n 15), 18.

Kiran Grewal argues that consent in a coercive context does not exist and goes against the very idea of sexual autonomy. Thus, allowing consent or mistaken belief in consent as an affirmative defence, would be highly inappropriate. Taking the sexual autonomy approach to rape seriously, this would mean that no such defence exists where the prosecutor has established force, threat of force, the victim was being detained by the accused or suffered from certain types of incapacity.⁷³ However, *Grewal* is also aware that establishing a shorthand binary system of peacetime (within which women presumably chose to engage in sexual activities) and war (when they do not), undermines broader feminist efforts to criticize the justice system's attempts to protect women in *all* situations.⁷⁴ Depicting women automatically as victims, having no agency does little to recognize women's autonomy.⁷⁵

5. Towards an Appropriate Definition of Rape

It becomes clear that consent and coercion are both limited concepts and that the strict distinction between the two approaches is an artificial one.⁷⁶ In order to establish whether consent is given, one draws conclusions from the coercive context. Thus, the two concepts are interlinked.

Both approaches have their downsides. Focusing on coercion may exclude many situations from being prosecuted as rapes where there is no force involved, nevertheless the victim did not want the sexual act, and this was also known to the defendant. To avoid this, one could extend the definition of coercion, thereby risking the term becoming too vague for legal interpretation.

The concept of consent raises many questions: Does real consent exist? This problem is inherent in the legal figure of consent in general, however, in wartime, the exercise of free will seems even more contested. The ultimate essence of consent is that it grants exclusionary permission, also in the normative sense.⁷⁷ Nevertheless, it is extremely hard to prove consent, as this is an inner state of mind.⁷⁸ In order to examine it, one has to draw conclusions from the context, which in this case are the coercive circumstances. The real parameters of consent and how consent can be proven, remains highly controversial. However, preferring the coercion-element for the definition of rape, just because it is not an inner state of mind and thus easier for the law to deal with, is not a supportable argument.

MacKinnon is right in highlighting the coercive context of rapes in wartime, making genuine consent almost impossible. However, her assumption that there cannot be real consent in wartime, deprives women of all agency and portrays them as weak victims. What about couples having consensual sex in times of war? Would every sexual intercourse which occurs in a coercive context be rape? Surely, it cannot be assumed that any sexual contact in a coercive context constitutes a crime.⁷⁹ Also, the question arises, whether it is always clear if one lives in wartime. This is essential. The perpetrator needs to know this in advance in order to be aware of the reversal of the burden of proof and he/she must take precautionary measures in order to be able to prove consent in case there is a trial.

As both concepts do not convince entirely, a combined approach is necessary:

In a context where sexual contact is likely to involve physical force or occurs under circumstances that are inherently coercive, consent is almost impossible, which is why the law may presume non-consent.⁸⁰

I argue that in such a context the burden of proof should be reversed, rather than denying that consent can even be given, as suggests *MacKinnon*. Shifting the burden of proof would mean that once the *actus reus* is established by the prosecution beyond reasonable doubt, the defendant would need to prove that there was consent.

⁷³ Grewal (n 10), 393 f.

⁷⁴ Kiran Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33 *Austl. Feminist L. J.* 57, 70.

⁷⁵ Engle Karen, 'Feminism and its (Dis)consents: Criminalizing Wartime Rape' (2005) 99 *AJIL* 778.

⁷⁶ Grewal (n 10), 386.

⁷⁷ Jonathan Herring/Michelle Madden Dempsey, 'Rethinking the criminal law's response to sexual penetration: on theory and context' in McGlynn C/Munro V (eds), *Rethinking Rape Law, International and Comparative Perspectives* (Routledge 2011), 35.

⁷⁸ Kim Lane Scheppele, 'The Re-Vision of Rape Law' (1987) 54 *U. Chi. L. Rev.* 1095, 1108 ff.

⁷⁹ Schomburg/Peterson (n 2), 125.

⁸⁰ Schomburg/Peterson (n 2), 138.

However, this idea might collide with the principle of *in dubio pro reo* and criticised from the point of view of the rule of law as it is difficult for the defendant to produce evidence of consent. This solution would allow for effective convictions of rape, without depriving victims of all agency.

The solution proposed in this essay sees the coercion-element in the definition of rape in the context the rape is happening and the consent-element in the sexual interaction itself. Once, the coercive context is proven (which should be rather easy), there is the reversal of the burden of proof described above. As ICL is concerned only with rapes that are committed in wartime, the coercive context is inherently given.

The elements of coercion and consent are combined: if the general coercive circumstances are proven and the individual act happens because of coercion, it is clearly rape and the consent-element is not used. However, if under general coercive circumstances, the individual act lacks coercion, the mechanism of the reversal of burden of proof comes into play and the consent-element is considered as well.

Instead of reversing the burden of proof for the consent-criteria, the burden of proof could be lowered. This would mean the plaintiff would still need to prove the non-consent, however, the standard for burden of proof would be lowered. The problem here is that in Criminal Law the standard for proving is beyond reasonable doubt and it is crucial not to question this as every criminal conviction is a strong encroachment on the individual's fundamental rights.

Into a similar direction goes the idea of consent as an affirmative defence.⁸¹ Non-consent as an element of crime is rejected, otherwise, the victim must prove beyond reasonable doubt that she/he did not consent, which is extremely difficult (if the burden of proof is not reversed). If consent is an affirmative defence, it is for the accused to establish on a balance of probabilities that the victim agreed to have sex.⁸² In a coercive context, consent is best regarded as a defence, to be invoked only where relevant to the facts.⁸³ The only difference to the shifting of the burden of proof is whether the element of consent is regarded as part of the offence, or at the level of the defence.

The ultimate difference whether non-consent is part of the *actus reus* of rape, or whether the *actus reus* refers to sex during wartime and consent comes into play as an affirmative defence, is whether one regards sex during wartime only a crime when no consent is given (non-consent is part of the *actus reus*), or whether sex in wartime is always seen as a crime, however in certain instances, namely when having consent, it is justified (consent as an affirmative defence). Hence, the wrongfulness of the crime is not quite the same.⁸⁴

I conclude that thinking of the element of consent when defining rape in wartime is vital, as women should not be portrayed as victims without agency. Thus, I do not support a mere coercive-based approach, as suggested by many feminists, as I do not think this will support their goal, namely empowering women in wartime. Also, not every sexual intercourse in wartime should be considered rape, and only justified if there is consent (principle of affirmative defence). From a dogmatic point of view, my claim is that a shifting of the burden of proof in wartime for the crime of rape is needed; non-consent should be part of the *actus reus* of rape. Hence, I argue against an affirmative defence of consent considering the crime of rape.

IV. Conclusion

The definition of rape is highly controversial. The two possible components of the definition of rape, coercion and lack of consent, have a complex relationship and it is difficult to capture the essence of this relation. The feminist critique on the definition of rape in ICL highlights the importance of a reasonable and effective definition of rape for the victims, who are mostly women. In this essay, I argued that a consent-based approach should be favoured, as it underlines women's agency. However, not to neglect the coercive context of wars, which challenge women's agency to some extent, I suggest the reversal of the burden of proof in wartime, even though I am aware of the problematic aspects of this, which were illustrated above.

⁸¹ See Dan Subotnik, 'Hands Off: Sex, Feminism, Affirmative Consent, and the Law of Foreplay' (2007) 16 S. Cal. Rev. L. & Soc. Just. 249.

⁸² Schomburg/Peterson (n 2), 124, 139.

⁸³ Katie O'Byrne, 'Beyond Consent: Conceptualizing Sexual Assault in International Criminal Law' (2011) 11 Int'l Crim. L. Rev. 495, 511.

⁸⁴ Noel Cross, *Criminal Law & Criminal Justice, An Introduction* (Sage Publications 2010), 50.

Non-consent is assumed, and the defendant would need to prove consent. The coercive component of rape is included in the definition insofar as that a general coercive environment must be proven (which will not be difficult in times of war) in order to reverse the burden of proof. Having this mechanism does not victimize women completely, but it considers the coercive context and thus is not diminishing that women might get into situations where their free will is questioned. This approach enables a balance between the wish of the victim to prosecute the crime committed against him/her effectively and the rights of the defendant. The claim of the feminists is met, namely, to secure that rape is prosecuted effectively.

Abbreviations

AJIL	American Journal of International Law
Art.	Article
Austl. Feminist L. J.	Australian Feminist Law Journal
B. C. L. Rev.	Boston College Law Review
BJIL	Berkeley Journal of International Law
Buff. Crim. L. Rev.	Buffalo Criminal Law Review
Case W. Res. J. Int'l L	Case Western Reserve Journal of International Law
Civil Code of Switzerland	Civil Code of Switzerland, SR 210, (adopted 10 December 1907, status as of 1 January 2019), < www.admin.ch/opc/en/classified-compilation/19070042/201901010000/210.pdf > (accessed 30 November 2019)
CL	Criminal Law
CLR	Columbia Law Review
Colum. J. Transnat'l L	Columbia Journal of Transnational Law
Duke L. J.	Duke Law Journal
e.g.	for example
ed(s)	editor(s)
edn.	Edition
EJIL	European Journal of International Law
EJWS	European Journal of Women's Studies
f./ff.	following page(s)
Fem. Leg. Stud.	Feminist Legal Studies (Journal)
Harv. Women's L. J.	Harvard Women's Law Journal
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTR-Statute	Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994), < https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf > (accessed 29 November 2019)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY-Statute	Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993), < www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf > (accessed 29 November 2019)
id.	identical
IFJP	International Feminist Journal of Politics
IJHR	International Journal of Human Rights
Int'l Crim. L. Rev.	International Criminal Law Review
JICJ	Journal of International Criminal Justice
Law & Phil.	Law and Philosophy (Journal)
n	footnote number
No./Nos.	number(s)
NZZ	Neue Zürcher Zeitung (Swiss Newspaper of Zurich)

RS	The Rome Statute of the International Criminal Court, U.N.T.S., Vol. 2187, No. 38544 (adopted 17 July 1998, in force since 1 July 2002)
S. Cal. Rev. L. & Soc. Just.	Southern Californian Review of Law and Social Justice
Signs	Signs: Journal of Women in Culture and Society
SR	Systematische Rechtssammlung des Bundes (Systematic collection of Swiss federal laws)
SSRN	Social Science Research Network
U. Chi. L. Rev.	University of Chicago Law Review
U.N.T.S.	United Nations Treaty Series
v.	versus
Vol.	volume
Women's Rts. L. Rep.	Women's Rights Law Reporter