RAPE IN CONTEXT: LESSONS FOR THE UNITED STATES FROM THE INTERNATIONAL CRIMINAL COURT

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"Sex without consent is rape. Full-stop."[1]

—Joe Biden

"Consent is a pathetic standard of equal sex for a free people."[2]

—Catharine MacKinnon

The law of rape is getting a rewrite. Domestically and internationally, major efforts are underway to reform rape laws that have failed to live up to their promises of seeking justice for victims and deterring future sexual violence. The cutting edge of international criminal law on rape eschews inquiries into consent and instead embraces an examination of coercion or a coercive environment. By contrast, in the United States, rape reform discussions typically center on consent. The American Law Institute's proposed overhaul of the Model Penal Code's provision on sexual assault carves out a middle ground and introduces, in addition to the traditional crime of forcible rape, separate sexual assault offenses based on coercion and lack of consent. This Article compares these two trajectories of rape reform and asks whether, as Catharine MacKinnon has suggested, U.S. law ought to follow the lead of international criminal law and define rape in terms of coercive inequalities.

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1 Sarah Ashley O'Brien, *Joe Biden: 'Sex Without Consent Is Rape. Full-Stop*.,' CNN (June 14, 2017, 5:23 PM), http://money.cnn.com/2016/06/14/news/joe-biden-united-state-of-women/index.html (quoting then Vice-President Joe Biden's speech at the White House's inaugural United State of Women Summit).

2 Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 465 (2016) [hereinafter MacKinnon, *Rape Redefined*]. MacKinnon is a leading feminist scholar, typically associated with "radical feminism," also known as "dominance" or "structural" feminism. She also served as the Special Gender Adviser to the International Criminal Court Prosecutor from November 2008 to June 2012. *See* INT'L CRIMINAL COURT: OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES, 42 n.92 (June 2014) [hereinafter *OTP Policy Paper on Sexual and Gender-Based Crimes*], https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

Ultimately, this Article concludes that adopting the international criminal coercion test in U.S. rape law would do more harm than good. Instead, it outlines more modest, but workable, lessons the United States can learn from the international law of rape.

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INTRODUCTION

Change is everywhere in rape law, and this is largely a good thing. Reflecting what Catharine MacKinnon calls a "new era" in international criminal law's treatment of gender crimes,[3] the International Criminal Court (ICC) has issued its first conviction of a defendant for sexual violence in *Prosecutor v. Bemba Gombo*.[4] The court's judgment in *Bemba* embraced a definition of rape that eliminated consent from the equation and instead relied on sexual penetration stemming from use of coercion or a "coercive environment."[5]

In the United States too, change is in the air, but it seems to be headed in a different direction. The #MeToo movement and recent high profile cases of sexual predation in the workplace and by people in positions of authority (e.g., Hollywood,[6] U.S. gymnastics[7]) may be

3 Catharine A. MacKinnon, *Creating International Law: Gender as Leading Edge*, 36 HARV. J.L. & GENDER 105, 110–11 (2013).

4 Prosecutor v. Bemba Gombo, No. ICC-01/05-01/08, Judgment (Mar. 21, 2016) [hereinafter Bemba Trial Judgment], https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.

5 *Id.* ¶¶ 102–04.

6 *See, e.g.*, Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (discussing allegations not only of forcible rape or even non-consensual sex, but also of coercion stemming from Weinstein's power in Hollywood); Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's*

broadening the public's conception of sexual assault,[8] but the clear trend in the United States has been to equate rape or sexual assault with non-consensual sex.[9] Within the past few years, California, New York, Connecticut, and Illinois have passed affirmative consent laws in an attempt to address the issue of sexual assaults on college campuses,[10] and colleges nationwide have been scrambling to keep pace with Title IX and other federal requirements for handling alleged sexual misconduct.[11] Meanwhile, in the realm of criminal law, the American Law Institute (ALI)[12] is in the midst of revising the 1962 Model Penal

Accusers Tell Their Stories, NEW YORKER (Oct. 23, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories.

7 USA Gymnastics Doctor Faces 25 Years in Prison After Guilty Plea to Molesting Girls, GUARDIAN (Nov. 22, 2017, 11:49 PM), https://www.theguardian.com/us-news/2017/nov/22/usa-gymnastics-doctor-larry-nassar-plea-deal-25-years ("'He convinced these girls that this was some type of legitimate treatment,' assistant attorney general Angela Poviliatis told a judge last summer. 'Why would they question him? Why would they question this gymnastics god?'").

8 *Compare* Anne M. Blaschke, *#MeToo Is Undoing the Devil's Bargain of the 1990s*, WASH. POST (Dec. 7, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/12/07/metoo-is-undoing-the-devils-bargain-of-the-1990s/?utm_term=.97ac70330b0b (discussing #MeToo in terms of coercion and power inequality), *with* Mary Elizabeth Williams, *Aziz Ansari and #MeToo Backlash: We Won't Stop Talking About Consent*, SALON (Jan. 16, 2018, 12:11 PM), https://www.salon.com/2018/01/16/aziz-ansari-and-metoo-backlash-we-wont-stop-talking-about-consent (defending the #MeToo movement but, despite acknowledging that consent is a low bar, retaining the framing device of consent: "A slew of columnists say #MeToo has gone too far—it hasn't. The conversation about consent won't be shut down").

9 Amanda Taub, *Trump Recording Narrows Divide on Sexual Assault*, N.Y. TIMES (Oct. 22, 2016), https://www.nytimes.com/2016/10/23/us/trump-recording-narrows-divide-on-sexual-assault.html; *see also* Deborah Tuerkheimer, *Rape on and off Campus*, 65 EMORY L.J. 1, 8 (2015) (arguing that the "settled cultural consensus" is that "consent is now generally viewed as the essence of lawful sex"); Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 571–75 (2015) (noting that "[t]he chief legal development in [law reform of rape] has been the placement of consent at center stage of virtually all law reform discussions and some newer statutes and doctrine").

10 *See* AFFIRMATIVE CONSENT, http://affirmativeconsent.com/affirmative-consent-laws-state-by-state (last visited Oct. 29, 2017); Kevin de León & Hannah-Beth Jackson, *Why We Made "Yes Means Yes" California Law*, WASH. POST (Oct. 13, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/?utm_term=.0fc2c8586644; Bonnie Miller Rubin, *To Combat Sexual Assault, Colleges Say Yes to Affirmative Consent*, CHI. TRIB. (Oct. 29, 2015), http://www.chicagotribune.com/news/ct-college-sexual-assault-affirmative-consent-met-20151029-story.html.

11 *See generally* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 889 (2016) (arguing that as "nonconsent increasingly became the line separating legal and illegal sexual conduct, the concept expanded: lack of consent grew to mean more than physical or verbal resistance or objection to sexual conduct, and today there is a live debate over whether consent should mean 'affirmative consent' as opposed to lack of objection").

12 The ALI is an independent organization in the United States whose mission is to clarify, modernize, and otherwise improve the law. The ALI attempts to articulate model laws, including the Model Penal Code, for legislatures to consider adopting. Courts, in turn, consult the Model Penal Code in interpreting criminal statutes. *About ALI*, AM. LAW. INST., https://www.ali.org/about-ali (last visited Oct. 29, 2017) (stating that the ALI "drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of Law that are

Code's (MPC) outdated provisions on rape. Thus far, consent has been the center of attention. After heated debate, the ALI has approved a definition of consent for proposed crimes of non-consensual sexual penetration and contact.[13] Like the ICC, the ALI appears to be contemplating a model code that would criminalize at least some forms of sexual contact stemming from coercion, but it remains to be seen what the coercion provision will include.[14]

The international criminal law (ICL) of rape focuses on coercion and coercive circumstances, rather than consent. Catharine MacKinnon sees in the emerging ICL[15] recognition of coercive rape a nascent recognition of "sexual abuse . . . on the international level as the crime of inequality to and by individuals on the collective basis—gender hierarchy—that it is."[16] MacKinnon argues that international law is increasingly recognizing that rape is about gendered inequality and that domestic law should too. Janet Halley, a critic of the radical feminist camp, seems to agree that international criminal tribunals have embraced "radical feminist"[17] visions of rape reform.[18]

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enormously influential in the courts and legislatures, as well as in legal scholarship and education").

13 *See infra* text accompanying notes 48–49. The ALI's proposed sexual assault provisions also include important defendant-friendly reforms, including systematizing, narrowing, and shortening sexual offender registration requirements (§ 213.11(1)), and prohibiting evidence of the defendant's prior sexual conduct to show character, contrary to the new Federal Rules of Evidence 412–15 and its state equivalents, for the purposes of proving conformity therewith.

14 *See infra* text accompanying notes 55–57.

15 Although this Article focuses on the ICL of rape, this same international law focus on coercion and coercive dynamics, rather than consent, appears in the area of human trafficking as well. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) (defining trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" and noting that "(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used"); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 358–59 (2006) [hereinafter Halley, *From the International to the Local*] (Chantal Thomas, co-author of the article, arguing that the United Nations' trafficking definition's statement that coercion (and other things) makes consent irrelevant is an example of a "central structuralist [or radical] feminist tenet . . . written into law").

16 MacKinnon, *Rape Redefined*, *supra* note 2, at 477.

17 This Article uses the term "radical feminist" not in the sense of "extreme," but rather as a shorthand label to identify the branch of feminism that promotes the notion of coercive rape rooted in issues of inequality. Not all feminists support this understanding of rape. *See* Halley, *From the International to the Local*, *supra* note 15, at 380 ("Feminists in th[e] ['structural or

This Article asks whether, as MacKinnon suggests, ICL's coercion inquiry really represents the victory of radical feminism in international law and what, if anything, the United States should take from the international criminal example. Would the coercion or coercive-circumstances analysis of international law work in the domestic context? Since the United States is not a State Party to the Rome Statute, the treaty creating the ICC,[19] the United States is not bound to change its domestic laws to comport with the international law of rape.[20] Therefore, this analysis is a comparative and normative exercise—does ICL have something to teach the United States in its domestic rape law reform efforts?[21] In short, this Article concludes that ICL's focus on coercion and coercive circumstances is reflective of the ICL context more than it is an embrace of radical feminism and that a radical redefinition of American rape law exclusively in terms of coercive inequality would be a mistake. Instead, this Article proposes other

radical'] traditions have long argued that, in rape trials, force, resistance, and consent/nonconsent are the wrong issues because of coercive circumstances.").

18 *Compare* Valerie Oosterveld, *The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals*, 2 CAMBRIDGE J. INT'L & COMP. L. 825, 825 (2013) [hereinafter Oosterveld, *Influence*] ("International criminal law is often seen as more progressive than many domestic legal traditions in its consideration of gender-based crimes such as rape."), *with* 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, 6 (2008) [hereinafter Halley, *Rape at Rome*] ("My most important finding about the substantive politics of feminism in the formation of the ICTs and the ICC: almost without exception, the consensus feminist stance that almost completely dominates the law review literature and pervades the activist literature is structuralist-feminist. Overwhelmingly, the structuralist-feminist worldview animates both argumentation and rule preference.").

19 Rome Statute of the International Criminal Court art. 58(1)(b)(i)–(iii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

20 Given that the ICC's jurisdiction is merely "complementary" to national jurisdictions and the Preamble recognizes states' obligations to prosecute international crimes, States Parties must ensure that their criminal codes adequately incorporate international crimes. Rome Statute, *supra* note 19, pmbl., art. 1; *see also* OVO CATHERINE IMOEDEMHE, *National Implementation of the Rome Statute of the International Criminal Court: Obligations and Challenges for States Parties*, *in* THE COMPLEMENTARITY REGIME OF THE INTERNATIONAL CRIMINAL COURT 55, 58 (2017) (arguing that the Rome Statute implicitly requires states to "adopt both cooperation and complementarity legislation to ensure domestic implementation of the Rome Statute").

21 For States Parties to the Rome Statute, this comparison may be less abstract. They are bound to incorporate the crimes of the Rome Statute into their domestic criminal laws, and a very high percentage of ICC States Parties have engaged in some law reform in the rape and domestic violence contexts. *See* Fionnuala Ni Aoláin, *Gendered Harms and Their Interface with International Criminal Law: Norms, Challenges and Domestication* 9 (Univ. of Minn. Law Sch. Legal Studies Research Paper Series, Paper No. 13-19, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247623. Only in the rather unlikely event of a U.S. defendant (facing charges of rape as a crime against humanity, war crime, or genocide) coming before the ICC under a Security Counsel referral could the U.S. law of rape come under ICC scrutiny. *See* Oosterveld, *Influence*, *supra* note 18, at 847–48 (noting that, under the Rome Statute's complementarity regime, arguably, a state could be found unwilling or unable to investigate or prosecute a case if it defined rape too narrowly).

lessons from international rape law reforms better suited to the complexities of the domestic context.

The Article proceeds in four main parts. Parts I and II set the stage for the comparison between the international and the domestic. Part I offers an overview of U.S. law on rape and sexual assault and describes the ALI's draft proposal on revisions to the MPC's sexual assault provisions. Part II describes the evolution of the ICL of rape and the emergence of a rape definition that focuses on coercion or coercive environments, rather than consent.

Part III takes on Catharine MacKinnon's claim that ICL's coercion test provides a template for domestic jurisdictions to redefine rape in terms of structural inequality. It details the benefits of the approach, both in the international and domestic context, as well as the challenges such a model would present domestically. Ultimately, this Part concludes that a wholesale rejection of the consent paradigm in favor of a coercion inquiry rooted in dynamics of inequality is unwise. It argues that ICL has a number of built-in narrowing devices that reduce, albeit do not eliminate, the risk of burdening socially beneficial sexual contact. Using MacKinnon's proposed coercion test, it illustrates that applying a coercion test across a broad array of domestic contexts runs the risk of overbreadth—in the sense of denying sexual agency and of burdening socially beneficial sexual contact—and under-inclusion—in that it will fail to capture some socially harmful sexual contact. This Part also contends that a coercion standard is likely to be impracticable, to exacerbate existing problems of under-enforcement, and to create a significant risk of arbitrary enforcement, particularly against minority groups.

Part IV proposes more modest, but workable lessons for the United States from the ICL of rape. First, the ALI, legislators, and, ultimately, courts should fold a coercion inquiry into consent. They should clarify that coerced consent is not consent. Second, just as coercion should inform a more robust notion of consent, so too should it be used to inform notions of force or threat of force. In particular, indirect and implied threats of force should suffice to constitute rape. Third, as in the international criminal context, U.S. law should recognize that there are certain contexts that inherently preclude the possibility of meaningful choice.[22] Thus, although this Article does not endorse the

22 Many U.S. jurisdictions already recognize this idea in the context of statutory rape and in the prison context. *See generally* Michelle Oberman, *Regulating Consent with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 709 (2000) (on statutory rape); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV 45, 46–47 (2007) ("Congress and forty-four states have criminalized all sexual contact between guards and prisoners, regardless of consent," but that, nevertheless, "within women's prisons guards routinely commit serious sexual offenses against the women in their custody. Government administrators know that such abuse is occurring and acknowledge their duty to prevent it.").

transplantation of a broad coercion-based sexual assault offense to the United States, it does support the recognition of coercion-based rape or sexual assault crimes in certain contexts determined ex ante to be inherently coercive. The ALI is contemplating this very possibility.[23] Another important lesson from ICL is to question the wisdom of creating a strict hierarchy of sexual assaults. In its current draft sexual assault provisions, the ALI has created a clear hierarchy of sexual offenses ranging from first-degree felonies to misdemeanors and puts the coercion-based offenses close to the bottom of this hierarchy. ICL illustrates quite powerfully that, sometimes, coercion-based rape is every bit as grave as forcible rape. Perhaps the most important lesson from ICL is the importance of training in any meaningful enforcement of rape law. The "new era" in ICL rape is the product of long-standing efforts at educating investigators and prosecutors about rape myths, cultural context, and investigation methods and conscious prioritization of sexual violence. Any meaningful domestic reforms will require the same.

I. THE EVOLUTION OF U.S. LAW OF RAPE AND THE CONSENT REVOLUTION

The law of rape in the United States is undergoing a transformation. In stark contrast with ICL, much of the reform discussion centers on a greater role for consent. Few jurisdictions recognize coercion-based sexual assault as a crime, and the proposed ALI sexual assault provisions recognize only a narrow form. This Part attempts to give the lay of the land.

Unlike in ICL, where the cutting edge of ICL has embraced a vision of rape in which consent is all but irrelevant, in U.S. law, the prevailing strand of reform is for a greater role for consent. Certainly the radical (or structuralist) feminist conception of rape as a function of coercive inequalities has its American proponents too, including Catharine MacKinnon. However, a reshaping of American rape law in favor of an inquiry into coercive inequalities has not taken hold, and the dominant conception of rape is as a violation of sexual or individual autonomy.[24]

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23 *See infra* text accompanying notes 55–57.

24 MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES ch. II (AM. LAW INST., Preliminary Draft No. 5 2015) [hereinafter *ALI Preliminary Draft No. 5*] (describing "a tectonic shift in the basic conception of what rape is: from an offense concerned with the infliction of physical harm to one penalizing the interference with sexual autonomy—the right of every person to choose freely whether and when to be sexually intimate with another person"). A rare voice for this "sexual autonomy" conception of rape in ICL is Kiran Grewal. *See* Kiran Grewal, *The Protection of Sexual Autonomy Under International Criminal Law*, *The International Criminal Court and the Challenge of Defining Rape*, 10 J. INT'L CRIM. JUST. 373, 391 (2012) (arguing that there is an emerging consensus at the domestic and international levels in a right

In the United States, rape and sexual assault are predominantly charged in state court, and states define the offenses in widely varying ways. Traditionally, American criminal law defined rape in terms of force, and a victim was required to resist.[25] All jurisdictions have done away with a formal resistance requirement,[26] and "[v]irtually all modern rape scholars want to modify or abolish the force requirement as an element of rape."[27] Many still require force or threat of force, even when their statutes define rape or sexual assault as unconsented to sexual penetration or contact.[28] A few states embrace an inquiry into certain forms of coercion for certain sexual assault offenses. The ALI commentary notes: "a handful of states go beyond physical force or domination to penalize forms of coercion that are purely psychological or exploitative in nature."[29]

Consistent with the bulk of scholarship and the current cultural zeitgeist for consent, outside of the ALI's revisions to the MPC, the

to sexual autonomy and that the ICC "should explicitly articulate and endorse the concept of sexual autonomy as being at the heart of the international prohibition on rape"). *But see* Tuerkheimer, *supra* note 9, at 40 & 40 n.248 (advocating justifying a consent standard based on sexual agency, rather than autonomy and explaining that "[t]his turn from the more traditional autonomy norm is rooted in feminist attention to subordination and its consequences for women in particular"); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1426–27 (2013) (arguing that rape by deception shows that rape is not about sexual autonomy, but rather, like torture or slavery, about sexual possession); Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault*, 41 AKRON L. REV. 957, 969 (2008) ("Despite occasional reaffirmations of a robust force requirement, the trend toward basing liability entirely, or at least primarily, on the absence of consent appears to be strong."); A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 21–22 (Keith Burgess-Jackson ed. 1999) (noting the "essential contestedness of the concept of rape. The law of rape is in a state of flux *because* there are difference theories or understandings of the nature of the underlying offense").

25 *See ALI Preliminary Draft No. 5*, *supra* note 24, at ch. II ("The classic definition of rape, in Blackstone's formulation, is still reflected in the law of many jurisdictions: 'Carnal knowledge of a woman forcibly and against her will.'"); *see also* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320–21, 356–60 (2000) (stating "[t]raditionally, the elements of adult rape have been (1) sexual intercourse; (2) between a man and a woman who is not his wife; (3) achieved by force or a threat of severe bodily harm; and (4) without her consent" and noting the traditional resistance requirement).

26 Decker notes however that "resistance continues to be a decisive indicator of both a victim's non-consent and force." John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1101 (2011).

27 Bryden, *supra* note 25, at 322; *see also* Rubenfeld, *supra* note 24, at 1378.

28 Decker & Baroni, *supra* note 26, at 1091.

29 *ALI Preliminary Draft No. 5*, *supra* note 24, at ch. III (noting that "[f]ormulations along these lines include statutes that penalize intercourse obtained by: 'extortion,' 'intimidation,' or 'coercion'[;] 'threats of public humiliation or intimidation'[;] threats to accuse the victim or any other person of a crime[;] threats to 'expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule'[;] 'a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss'[;] 'use of physical, intellectual, moral, emotional, or psychological force, either express or implied'").

dominant thrust of reform movements in the United States is a demand for a more front-and-center role for consent in the criminal law of rape.[30] While the law among the states is varied on the relevance of consent, and force remains a requirement in about half of U.S. jurisdictions, there is a "settled cultural consensus: consent is now generally viewed as the essence of lawful sex."[31] The epitome of this movement towards consent is seen in state affirmative consent laws requiring colleges to educate students about affirmative consent, but even in criminal law, consent-based definitions are on the rise. According to the ALI,

> [i]n recognition of this development, the FBI recently eliminated all reference to force in the criteria it uses to define rape for statistical purposes, changing the definition from "vaginal penetration by physical force" to "[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[32]

Quoting the European Court of Human Rights, the ALI drafters observed: "'[there is] a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse' and recognized 'the evolution of societies towards . . . respect for each individual's sexual autonomy.'"[33]

The ALI Reporters set out to define rape in a way that recognizes the complex array of contexts in which wanted sexual contact and unwanted sexual violence arise domestically. The proposed commentary to an ALI draft is more alert to the double-edged nature of sexual autonomy than is typical of ICL.[34] Although they need not worry about legality issues in forging new grounds, since they do not decide cases,

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30 *Id.* at ch. II ("Overall, the evolution of reform toward a more consent-based conception of the offense has been unmistakable, not only in the United States but throughout the world."). Tuerkheimer laments that the move in the United States is too slow and explains the problems with the gap between the cultural understanding of nonconsensual sex as rape and a legal standard that in half of states still requires force or coercion. *See* Tuerkheimer, *supra* note 9, at 5.

31 *See* Tuerkheimer, *supra* note 9, at 8; *see also* sources cited *supra* note 9 (citing scholarship recognizing the dominant cultural trend of equating rape or sexual assault with non-consensual sexual contact).

32 *ALI Preliminary Draft No. 5*, *supra* note 24, at ch. II (footnote omitted).

33 *Id.* (quoting the European Court of Human Rights (ECtHR) case M.C. v. Bulgaria, 2003 Eur. Ct. H.R. 39272/98, ¶¶ 163, 165–66 and noting that the ECtHR viewed "protection of each person's sexual autonomy through *criminal law enforcement* is a fundamental human right"). The ECtHR cited precedent from the International Criminal Tribunal for the former Yugoslavia (ICTY) in ascertaining whether Bulgaria's rape law lived up to ECtHR standards. M.C. v. Bulgaria, 2003 Eur. Ct. H.R. 39272/98, ¶¶ 99–107, 128, 163.

34 *See ALI Preliminary Draft No. 5*, *supra* note 24, at ch. II ("A Model Code aimed at protecting sexual autonomy accordingly must strike a *contextually sensitive balance*, establishing well-defined safeguards against undesired sexual intrusion, without creating excessive impediments to mutually sought intimacy and sexual fulfillment." (emphasis added)).

the ALI Reporters seem conflicted on just how aspirational a standard to set:

> Because criminal law is the site of the most afflictive sanctions that public authority can bring to bear on individuals, it necessarily must and will reflect prevailing social norms. But for the same reason, it must often be called upon to help shape those norms by communicating effectively the conditions under which commonplace or seemingly innocuous behavior can be unacceptably abusive or dangerous.[35]

The ALI Reporters thus acknowledge that criminal law plays a role not only in reflecting and enforcing existing societal norms but also in shaping norms. However, the Reporters received significant pushback from ALI members on setting too aspirational a standard, particularly with respect to the issue of affirmative consent.[36]

The current draft[37] offers a taxonomy of sexual assault offenses, which it ranks in severity. It includes: forcible rape (section 213.1); rape or sexual assault of a vulnerable person (section 213.2) (reserved); sexual assault by coercion or exploitation (section 213.3) (reserved); sexual penetration or oral sex without consent (section 213.4).[38] Some of the

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35 *Id.* ("On the one hand, it is customary—at least for serious felonies—to reserve the social opprobrium and strong penalties of the criminal law for conduct that is universally condemned as intolerable. By this measure it would be acceptable, perhaps even obligatory, to define the sexual offenses quite narrowly, restricting them to clearly aberrational behavior and declining to attach penal sanctions to conduct that significant segments of our society regard as predictable, harmless, or even valuable in some circumstances. On the other hand, a vitally important function of the criminal law is to identify and seek to deter behaviors that pose unjustifiable risks, even when those risks are not yet universally understood.").

36 MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, Reporters' Memorandum at 15 (AM. LAW INST., Tentative Draft No. 2, 2016) [hereinafter *ALI Tentative Draft No. 2*] ("The treatment of consent and associated offenses in Preliminary Draft No. 5 provoked great controversy at the last Annual Meeting and at the 2015 October meetings of the Advisors/MCG and also the Council. Many argued that the proposed definition of consent adopted an ideal of 'affirmative consent' at the expense of the largely tacit ways that people engage in sexual behavior in the real world. There was concern expressed that the definition covered behavior that was innocent, and that the criminal law should not dictate sexual mores in this evolving area.").

37 *Project Life Cycle*, AM. LAW. INST., https://www.ali.org/projects/project-life-cycle (last visited Sep. 14, 2017) ("A project is developed in a series of drafts prepared by the Reporters and reviewed by the project's Advisers and Members Consultative Group, the Council, and the ALI membership. Preliminary Drafts and Council Drafts are available only to project participants and to the Council. Tentative Drafts, Discussion Drafts, and Proposed Final Drafts are made available to the public after the Annual Meeting. Once it is approved by the membership at an Annual Meeting, a Tentative Draft represents the most current statement of the Institute's position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (AM. LAW INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.").

38 MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES §§ 213.1–.4, at app. A (AM. LAW INST., Tentative Draft No. 3, 2017) [hereinafter *ALI Tentative Draft No. 3*].

provisions, including the provisions defining "sexual penetration," "oral sex," and "consent," have been approved by ALI membership, and others, including the provision on coercion, are pending further consideration.[39]

Notwithstanding the cultural zeitgeist for consent, the ALI still includes an offense of forcible rape. In fact, as it stands, forcible sexual penetration (along with the not yet defined proposed crime of "rape or sexual assault of a vulnerable person") is the only sexual assault offense to be called "rape."[40] Section 213.1 outlines the most serious sexual assault crime of forcible rape. Forcible rape is defined as:

> caus[ing] another person to engage in an act of sexual penetration or oral sex by knowingly or recklessly: (a) using physical force or restraint, or making an express or implied threat of bodily injury or physical force; or (b) making an express or implied threat to inflict bodily injury on someone else.[41]

Forcible rape, which is a second degree[42] felony, is aggravated to "aggravated forcible rape," a first degree felony, where the actor

> (a) knowingly uses a deadly weapon to cause the other person to engage in the act of sexual penetration or oral sex; or (b) knowingly acts with one or more other persons who participate in the sexual penetration or oral sex, or who assist in the use of force, threat, or restraint when it occurs; or (c) knowingly or *recklessly* causes serious bodily injury to the other person or to someone else.[43]

In a nod to the consent revolution, though a fairly tentative one, the latest ALI draft proposes an offense for non-consensual sexual penetration.[44] Section 213.4 provides: "[a]n actor is guilty of Sexual

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39 *See Model Penal Code: Sexual Assault and Related Offenses*, AM. LAW. INST., https://www.ali.org/projects/show/sexual-assault-and-related-offenses (last visited Oct. 27, 2017). Section 213.0(3) on consent has been renumbered to 213.0(4). *ALI Tentative Draft No. 3*, *supra* note 38, at xi.

40 *ALI Tentative Draft No. 3*, *supra* note 38, app. A.

41 *Id.*

42 *Id.*, at Reporters' Memorandum, at xvii–xviii ("For reference, the maximum levels of imprisonment authorized at the various offense levels, as provided in the sentencing provisions proposed for the revised Model Code, are as follows: First-degree felony: life[;] Second-degree felony: 20 years[;] Third-degree felony: 10 years[;] Fourth-degree felony: five years[;] Fifth-degree felony: three years[;] Misdemeanor: one year").

43 *Id.* § 213.1(2) (emphasis added).

44 *Id.* § 213.4. A prior discussion draft distinguished between "sexual penetration against the will" and "sexual penetration without consent." The former was defined as

> engag[ing] in an act of sexual penetration, and know[ing] or recklessly disregard[ing] a risk that the other person has: (a) expressed by words or conduct his or her refusal to consent to the act of sexual penetration; a verbally expressed refusal establishes such refusal in the absence of subsequent words or actions indicating positive agreement; or (b) not given consent to the act of sexual penetration, and is wholly or partly undressed, or is in the process of undressing, for the purpose of receiving nonsexual professional services from the actor.

Penetration or Oral Sex Without Consent if he or she knowingly or recklessly engages in an act of sexual penetration or oral sex without the consent of the other person."[45] The offense is punished less severely than forcible rape. It starts as a felony of the fifth degree but can rise to a fourth degree felony "when the act occurs in disregard of the other person's expressed unwillingness, or is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs."[46]

In a discussion draft of the proposed consent definition, the ALI Reporters seemed to be embracing a more robust definition of consent that excluded coerced consent. This earlier proposed definition of consent provided:

> (a) "Consent" means a person's positive, freely given agreement to engage in a specific act of sexual penetration or sexual contact.
>
> (b) Consent is absent until such agreement is communicated by conduct, words, or both.
>
> (c) Consent can be revoked at any time by communicating unwillingness by conduct, words, or both. Any verbal expression of unwillingness suffices to establish the lack of consent, in the absence of subsequent words or actions indicating positive agreement.
>
> (d) Lack of physical or verbal resistance does not by itself constitute consent to sexual penetration.
>
> (e) *Consent is not "freely given" when it is the product of force, restraint, threat, coercion, or exploitation under any of the circumstances described in this Article, or when it is the product of any force or restraint that inflicts serious bodily injury*.[47]

Thus, consent would have to be "positive" and "freely given." Moreover, coercion would have vitiated consent.

The definition of consent approved by the ALI Council in December 2016, which "represents the position of the Institute and may be used and cited as such,"[48] makes the relationship between coercion and consent somewhat less clear. The revised section 213.0 consent definition provides:

> (a) "Consent" for purposes of Article 213 means a person's

ALI Preliminary Draft No. 5, *supra* note 24, § 213.2(1). The latter, sexual penetration without consent, is defined as "engag[ing]" in an act of sexual penetration and know[ing] or recklessly disregard[ing] a risk that the other person, not the actor's spouse or intimate partner, has not expressed consent to such act." *Id.* § 213.2(2).

45 *ALI Tentative Draft No. 3*, *supra* note 38, § 213.4(1).

46 *Id.* § 213.4(2).

47 *ALI Preliminary Draft No. 5*, *supra* note 24, § 213.0(3) (emphasis added).

48 Jennifer Morinigo, *Updated "Consent" Definition*, ALI ADVISOR (Dec. 19, 2016), http://www.thealiadviser.org/sexual-assault/updated-consent-definition.

> willingness to engage in a specific act of sexual penetration or sexual contact.
>
> (b) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.
>
> (c) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.
>
> (d) Notwithstanding subsection (3)(b) of this Section, consent is ineffective when it occurs in circumstances described in Sections [*reserved*].
>
> (e) Consent may be revoked or withdrawn any time before or during the act of sexual penetration or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent.[49]

This consent definition rejects the earlier objective definition in favor of an inquiry into the victim's subjective "willingness." It also gets rid of the language requiring consent be "positive" and "freely given."

The role of coercion in the consent inquiry is unclear. Coercion could be considered as part of the "the context of all the circumstances" in determining whether consent existed per section 213.0(3)(b).[50] However, it is unclear whether the analysis of "the context of all the circumstances" means that coercive circumstances may vitiate consent or merely that context may move ambiguous statements of consent from non-consent to consent. The language in 213.0(3)(d) states "consent is ineffective when it occurs in circumstances described in Sections [reserved]." 213.0(3)(d) presumably will enumerate coercive circumstances that vitiate consent, but it remains to be seen what the reserved section includes.

The ALI Reporters seem conflicted on the degree to which the consent paradigm, particularly in the form of affirmative consent so dominant in the university disciplinary context and, increasingly, American culture, should be embraced as a matter of criminal law. They note the difficulty of translating the consent paradigm into a workable law of rape.[51] The draft commentary also recognized that "sexual autonomy must be understood as two-sided, involving both a negative,

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49 *Id.*

50 *Id.*

51 *ALI Preliminary Draft No. 5*, *supra* note 24, ch. II ("The challenge in drafting a Model Code is to determine whether this emerging paradigm warrants legislative endorsement and, if so, to translate it into statutory language that is workable and clear.").

protective dimension (a shield against coercive pressures) and a positive, enabling dimension (freedom to act on genuine, fully mutual choices)."[52] The recognition of a specific offense based on lack of consent evinces a decision that this is an important category of sexual assault, but that, in light of these concerns, non-consent may not be the appropriate framing of all sexual assaults.

The latest draft of the MPC sexual assault provision retains a placeholder not only for the coercion provision, but also for "rape and sexual assault of a vulnerable person."[53] An earlier draft provision for "rape or sexual penetration of a vulnerable person" addressed sexual penetration with specific categories of vulnerable persons, such as people who are unconscious, unable to communicate refusal or consent due to mental disorders or disabilities, who have been drugged, or who are passing in and out of consciousness.[54] In this instance, the Reporters seem to be proposing to address these contexts head on, rather than attempting to use them to vitiate consent or demonstrate coercion for broader definitions framed in those terms. Again, what will become of the provision remains to be seen.

The latest ALI draft, Draft No. 3, includes a reserved provision that may lead to recognition that sexual penetration achieved by coercion or exploitation[55] is criminal. Although the latest draft provides no content for the offense,[56] earlier drafts contemplated certain areas where coercion vitiates consent. An example of one such form of coercion was "knowingly or recklessly obtain[ing] that person's consent by threatening to" report someone to law enforcement or immigration officials or sex with someone in detention or under criminal supervision.[57]

This earlier draft also included a couple of potentially broad

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52 *ALI Preliminary Draft No. 5*, *supra* note 24, ch. II.

53 *ALI Tentative Draft No. 3*, *supra* note 38, §§ 213.2–.3.

54 *ALI Tentative Draft No. 2*, *supra* note 36, § 213.3.

55 *ALI Tentative Draft No. 3*, *supra* note 38, § 213.3.

56 ALI Tentative Draft No. 3 currently includes only a placeholder for the offense with the offense number and name and the words "reserved." *Id.*

57 *See ALI Tentative Draft No. 2*, *supra* note 36, app., § 213.4; *ALI Preliminary Draft No. 5*, *supra* note 24, ch. III, § 213.4 (contemplating a coercion offense where a person "knowingly or recklessly obtains that person's consent by threatening to (i) accuse anyone of a criminal offense or of a failure to comply with immigration regulations; or (ii) take or withhold action in an official capacity, whether public or private, or cause another person to take or withhold action in an official capacity, whether public or private; or (iii) inflict any substantial economic or financial harm that would not benefit the actor; or (b) knows or recklessly disregards a risk that the other person, who is neither the spouse nor intimate partner of the actor: (i) is detained in a hospital, prison, or other custodial institution, in which the actor holds a position of authority; or (ii) is under arrest or is on probation, parole, pretrial diversion or treatment program, or any other status involving state-imposed restrictions on liberty, and the actor holds any position of authority or supervision with respect to such person's status or compliance with such restrictions").

categories of coercion stemming from a threat to "take or withhold action in an official capacity, whether public or private, or cause another person to take or withhold action in an official capacity, whether public or private"[58] or to "inflict any substantial economic or financial harm that would not benefit the actor . . . ."[59] If retained, these provisions appear to mean expanding coercion's reach into the employment and domestic realms. This would be a major step. Nevertheless, Draft No. 2 categorized sexual penetration achieved by coercion as a less grave offense than forcible rape (a second degree felony). Interestingly, it still ranked higher than nonconsensual sexual penetration, which Draft No. 2 categorized as a fourth degree felony[60] and Draft No. 3 as a fifth degree felony.[61]

In keeping with this context-based approach, Draft No. 2 also proposed an offense called "sexual penetration by exploitation," a fourth degree felony, which applies to the narrow context where a person engages in sexual penetration with another and knowingly is engaged in providing treatment to the person (other than sex-based therapy), misrepresents that the penetration has "curative or preventative medical properties,"[62] or leads the other person to believe that they are someone else known to the person.

Although the latest ALI draft does not reach as far as defenses, Draft No. 2 contemplated a greater role for consent as a defense to charges than, as will be seen in the next Part, is permitted at the ICC. The draft proposal not only would permit the defendant to bring a defense of consent, but also permits a defense based on a mistaken belief that the other party consented, as long as the belief is reasonable. Under section 213.9's provision, entitled, "Consent to the Use of Force," the actor has a defense where they "[p]rove by a preponderance of the evidence that he or she reasonably believed that the other person gave explicit prior verbal consent to the use of physical force, threats, or restraint, or gave the actor prior verbal permission to ignore general expressions of unwillingness . . . ."[63]

However, this defense only applied "in connection with an act of penetration or sexual contact otherwise proscribed by sections 213.1 [forcible rape], 213.2 [sexual penetration without consent[64]], or 213.6(1)

58 *ALI Preliminary Draft No. 5*, *supra* note 24, ch. III, § 213.4.

59 *Id.*

60 *ALI Tentative Draft No. 2*, *supra* note 36, app., § 213.2.

61 *See supra* text accompanying note 46; *see also ALI Tentative Draft No. 3*, *supra* note 38, § 213.4(2) (categorizing nonconsensual sexual penetration as a fifth degree felony "except that it is a felony of the fourth degree when the act occurs in disregard of the other person's expressed unwillingness, or is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs").

62 *ALI Tentative Draft No. 2*, *supra* note 36, app., § 213.4.

63 *ALI Preliminary Draft No. 5*, *supra* note 24, ch. I, § 213.9.

64 Now renumbered as § 213.4. *See ALI Tentative Draft No. 3*, *supra* note 38, § 213.4.

[aggravated criminal sexual contact]"[65] and "is unavailable for acts that occur at any point after which the actor knows or recklessly disregards that consent was withdrawn, or if the actor knowingly or recklessly caused serious bodily injury."[66]

Unlike the 1962 MPC, which recognized spousal immunity for rape, the latest draft proposal sets out a very limited defense for spouses. It clarifies that a spousal relationship "is not in itself a defense to any charge under this Article that involves the use or threat of physical force, physical restraint, bodily injury, or any other crime of violence within the meaning of Section 213.1 [forcible rape provision], or coercion within the meaning of Section 213.4(1)(a)."[67] It also permits spouses to assert a reasonable belief defense in cases based on non-consensual sexual contact.[68]

In sum, the ALI seems to be moving toward recognizing a sexual assault offense centering on lack of consent, but there remains the possibility through the reserved provisions for separate sexual assault offenses based on coercion. If earlier drafts are any indication, it may restrict the offense to certain specified contexts and rank it relatively low on the sexual assault totem pole. Although the provisions on consent do not go as far as many domestic reformers would like—non-consensual sex is sexual assault not rape and the ALI has rejected affirmative consent as the standard for consent—the ALI's hierarchy seems to contemplate a significant role for questions of consent. It is an element of one offense and a defense to several others and thus captures, at least in part, the prevailing domestic reform trend emphasizing consent.

II. THE EVOLUTION OF THE LAW OF RAPE AND THE EMERGENCE OF "COERCIVE ENVIRONMENT" RAPE IN INTERNATIONAL CRIMINAL LAW

In the ICL of rape, yes often means no. The cutting edge of ICL on rape eschews inquiries into consent and instead embraces an examination of coercion or a coercive environment. The ICC has read consent out of the rape equation almost entirely.

The ICC, of course, does not weigh in on all rapes worldwide. The ICC, like other international tribunals before it, only has jurisdiction over defendants charged with rape when the rape meets the requirements for crimes against humanity (rape committed as part of a widespread or systematic attack against a civilian population), war

65 *ALI Tentative Draft No. 2*, *supra* note 36, app., § 213.9(1).

66 *Id.*

67 Section 213.9(2)(a) ends with the sentence: "The fact that the actor is the spouse or other intimate partner of the complainant is a defense only as specifically provided." *Id.* § 213.9(2).

68 *Id.*

crimes (rapes connected to an armed conflict), or genocide (rapes committed with the intent to destroy in whole or in part certain enumerated groups).[69] The ICC also has limited personal jurisdiction. It only has jurisdiction over crimes committed on the territory of States Parties or by nationals of States Parties, unless referred to the court by the Security Council.[70] The Rome Statute further cabins the ICC's reach through the doctrine of complementary jurisdiction—the ICC may only take a case if another State is unwilling or unable to do so—and through a gravity requirement.[71] Despite its limited reach, the ICC is a forum, like the United States, that has increasingly turned its attention to addressing and defining sexual violence.[72]

Others have canvassed the topic in more detail,[73] but a brief sketch of the treatment of rape and sexual violence in ICL may help to understand the significance of the ICC's recent articulation of the crime of rape. The trajectory of the reform runs from ignoring and minimizing sexual violence, to increasing engagement with the issue (borrowing heavily from domestic laws on rape), to the current focus on sexual violence as grave international crimes.

In the post–World War II international criminal trials, sexual violence received relatively scant attention.[74] Although the International Military Tribunal at Nuremberg saw prosecution of some crimes against women, including sterilization and forced abortion, rape was neither

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69 Having received the thirty ratifications needed for the amendment on aggression to take effect, the ICC also may soon have jurisdiction over the crime of aggression. *See* Beth Van Schaack, *International Justice Day Round-Up II: Bemba, the Crime of Aggression, and More Justice for Chile*, JUST SECURITY (July 19, 2016, 8:05 AM), https://www.justsecurity.org/32084/international-justice-day-round-up-ii-bemba-crime-aggression. This change, however, is unlikely to have any bearing on sexual violence offenses since it relates to the decision to go to war in the first place and not conduct committed during war (*jus ad bellum* as opposed to *jus in bello*).

70 Rome Statute, *supra* note 19, arts. 12–15.

71 *Id.* art. 17.

72 *See OTP Policy Paper on Sexual and Gender-Based Crimes*, *supra* note 2, at 5 (noting that "[r]ecognising the challenges of, and obstacles to, the effective investigation and prosecution of sexual and gender-based crimes, the Office elevated this issue to one of its key strategic goals in its Strategic Plan 2012-2015").

73 *See generally* 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, 295 (2003); Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, 54 B.C. L. REV. 1207 (2013); Catharine A. MacKinnon, *Defining Rape Internationally: A Comment On Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940, 943 (2006) [hereinafter MacKinnon, *Defining Rape Internationally*]; Grewal, *supra* note 24; *see also* CHILE EBOE-OSUJI, INTERNATIONAL LAW AND SEXUAL VIOLENCE IN ARMED CONFLICT 153 (2012).

74 Askin, *supra* note 73, at 295 ("Women and girls have habitually been sexually violated during wartime, yet even in the twenty-first century, the documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention these crimes. Until the 1990s, men did the drafting and enforcing of humanitarian law provisions; thus, it was primarily men who neglected to enumerate, condemn, and prosecute these crimes.")

listed in the statute nor prosecuted.[75] By contrast, the Charter of the International Military Tribunal for the Far East (IMTFE) included the crime of rape as a crime against humanity and a war crime, and the IMTFE prosecuted some defendants for rape, but accusations of sexual violence played a minor role in the prosecutions.[76]

The muted response to sexual violence in the ICL of the post-war era was reflected in the humanitarian conventions of the times as well. In the Geneva Conventions of 1943 and the Additional Protocols of 1977, only one article prohibits rape, and each article on sexual violence was framed as an attack on women's honor, rather than an act of sexual violence, as it is now seen under ICL.[77]

The ad hoc international criminal tribunals of the 1990s,[78] due in no small part to work of feminist groups,[79] brought attention to and legal clarification of sexual violence crimes in ICL.[80] The International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) had jurisdiction over rape and sexual violence, but not as directly as feminists would have liked.[81] In

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75 Ni Aoláin, *supra* note 21, at 3; *see also* Askin, *supra* note 73, at 295.

76 Askin, *supra* note 73, at 295 ("In the five supplementary indexes to the twenty-two-volume set documenting the Tokyo Trial, 'rape' is only included under the subheading 'atrocities.' Even then, a mere four references are cited, representing but a minuscule portion of the number of times rape and other forms of sexual violence were included within the International Military Tribunal for the Far East (IMTFE) transcripts."); *see also* Ni Aoláin, *supra* note 21, at 4 (noting that the IMTFE's efforts to address sexual violence were limited because it only has jurisdiction over defendants also charged with crimes against the peace).

77 Askin decries this focus on a woman's honor, though it replaced an even more antiquated vision of rape as an affront to the honor of a man (husband or father). Askin, *supra* note 73, at 304 ("[T]he Conventions expressly include rape and forced prostitution, although they erroneously link rape with crimes of honor or dignity instead of with crimes of violence. Such a demarcation grossly mischaracterizes the offense, perpetuates detrimental stereotypes, and conceals the sexual and violent nature of the crime.").

78 The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are referred to as the "ad hoc" tribunals. *See, e.g.*, Askin, *supra* note 73, at 305–06 (referring to the ICTY and ICTR as the ad hoc tribunals).

79 *See, e.g.*, Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN'S L.J. 171, 192 (1994) ("Rape is any form of forced sexual intercourse. The requisite coercion can be shown through evidence of force, deceit, deprivation, or threats of any of the above, as well as promise of better treatment"). *See generally* Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, *in* HUMAN RIGHTS ADVOCACY STORIES 193 (Deena R. Hurwitz & Margaret L. Saatherthwaite eds., 2009) (discussing the critical role of "advocates for gender justice" in getting the ICTR to adjudicate genocidal rape charges and in the drafting of the Rome Statute).

80 *See* Halley, *Rape at Rome, supra* note 18; Askin, *supra* note 73, at 288 (lauding as "[o]ne of the most revolutionary advances" in ICL the ad hoc tribunals' work in "redressing crimes committed disproportionately against women and girls, particularly rape and sexual slavery").

81 *See* Askin, *supra* note 73, at 108–10 (describing one of the key efforts of feminist groups as pushing sexual violence crimes up the hierarchy of international crimes, such that they would be prosecuted independently, rather than merely as the actus reus for some other crime

the ICTY statute, rape was listed only as a crime against humanity.[82] To charge it as a war crime or genocide, the prosecution had to reframe rape as the actus reus behind other international crimes, such as the war crimes of torture and inhumane treatment.[83] The ICTR statute recognized rape as a crime against humanity and also as a war crime but did not expressly include rape as a basis for a genocide charge.[84] It was not until 1998, in the landmark *Akayesu* case, that the ICTR concluded that rape could serve as the actus reus for genocide.[85]

For a couple of decades these international tribunals flip-flopped on the definition of rape. Judges at the ad hoc tribunals wrote on a fairly blank slate in defining crimes. Neither the ICTY statute nor the ICTR statute defines the crime of rape, and international law had little to say on the matter.[86] Thus, trial chambers and the Appeals Chamber of the tribunals[87] attempted to piece together the definition of the crime as they went, and differently constituted panels of the Appeals Chamber landed on different definitions.[88] These courts, as well as the internationalized "hybrid" courts that sprung up around the world,[89] bit by bit created an international law of rape. In the modern international tribunals, rape came to be understood as "sexual violence," rather than as a crime against a woman's honor, dignity or morality, or, worse, an affront against men (husbands, brothers, and fathers of victims).[90]

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and concluding that this effort was less successful than other feminist reforms); Ni Aoláin, *supra* note 21, at 5 ("What then (and still now) concerned many observers is that the status of prohibition for sexual violation was low within the hierarchy of humanitarian law offenses.").

82 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5(g) (Sept. 2009) [hereinafter *ICTY Statute*]; *see also* Laurel Baig et al., *Connecting Sexual Violence to the Context Through the Selection of Crimes Charged*, *in* PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 174, 175 (Michelle Jarvis & Serge Brammertz eds., 2016).

83 *See generally* PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY, *supra* note 82; *see also* Askin, *supra* note 73, at 309–10; Ni Aoláin, *supra* note 21, at 5.

84 At the ICTR rape was listed not only as a crime against humanity under Article 3(g), but also as the war crime of "outrage upon personal dignity" under Article 4(e). Statute Establishing the International Tribunal for Rwanda, S.C. Res. 955, arts. 3(g), 4(e) (Nov. 8, 1994) [hereinafter *ICTR Statute*].

85 Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998). *Akayesu* was the first genocide conviction in an international court.

86 Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT'L L. 121, 121–24 (2007) ("When they began their work, the ad hoc Tribunals encountered a lack of definition of sexual violence under international treaty and customary law.").

87 The ICTY and ICTR shared an Appeals Chamber.

88 *See* Weiner, *supra* note 73, at 1209–24.

89 *See generally* Valerie Oosterveld, *The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments*, 44 CORNELL INT'L L.J. 49 (2011); Thekla Hansen-Young, *Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone*, 6 CHI. J. INT'L L. 479 (2005); Rachel Killean, *An Incomplete Narrative: Prosecuting Sexual Violence Crimes at the Extraordinary Chambers in the Courts of Cambodia*, 13 J. INT'L CRIM. JUST. 331 (2015).

90 Halley, *Rape at Rome, supra* note 18, at 58–59 (citing Askin, *supra* note 73).

One early and influential proposal written by Rhonda Copelon and the International Women's Human Rights Clinic at the City University of New York and submitted to ICTY judges, proposed defining rape as forced sexual intercourse, which should include non-consensual sexual conduct, as well as sexual conduct stemming from coercion.[91] The proposal explained:

> In determining whether the charged sexual conduct is forced or coerced, it is sufficient if the woman says "no" or if the act(s) were committed under conditions where the victim reasonably believed that she was not free to leave or refuse without risk of harm to herself or another person. Coercion may be established by the fact of detention, the appearance of authority, or the conduct of the accused and others acting in concert with him. The victim need not resist to establish coercion.[92]

Coercion, it argued, should:

> [I]nclude[] force, threats of force, deceit, deprivation, or promise of reward or better treatment, [and] can be established by evidence of the totality of the circumstances of the war, detention, occupation, and other acts of terror against the civilian population. It also may be established by evidence of coercive conduct directed at particular victims or witnesses.[93]

They advocated a rule whereby coercion gives rise to a presumption against consent. The Office of the Prosecutor (OTP) at the ICTY and ICTR likewise advanced this argument that coercion rendered consent irrelevant.[94]

In the early ICTR case, *Akayesu*, a trial chamber offered a broad, progressive definition that focused on coercion, rather than consent.[95] Characterizing rape as "a form of aggression" and stating "that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts," the trial chamber defined "rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[96] MacKinnon and other feminists rejoiced, not only at the recognition that rape could

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91 Green et al., *supra* note 79, at 192 ("Rape is any form of forced sexual intercourse. The requisite coercion can be shown through evidence of force, deceit, deprivation, or threats of any of the above, as well as promise of better treatment.").

92 *Id.* at 201.

93 *Id.* at 202.

94 *See* Michelle Jarvis & Najwa Nabti, *Developing Effective Legal Strategies for Prosecuting Sexual Violence Crimes*, *in* PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY, *supra* note 82, at 90, 94.

95 Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998). Akayesu was the first international genocide conviction, based in part on the crime of genocidal rape. *See* Van Schaack, *Engendering Genocide*, *supra* note 79, at 1.

96 *Id.* ¶¶ 597–98; *see also* MacKinnon, *Defining Rape Internationally*, *supra* note 73, at 943.

serve as the actus reus for a genocide conviction, but also at the definition reached.[97] The definition was broad in terms of the physical acts it included and also sensitive to the "context of inequality" in which the acts occurred.[98]

Concerned with issues of legality and specificity of the law,[99] later chambers of the ICTY and ICTR retreated from this novel, conceptual definition and to rape definitions more familiar from domestic law. Specifically, they returned to mechanical descriptions revolving around penetration and reintroduced the element of non-consent.[100] In the ICTY's *Kunarac* case, which centered on a couple of notorious rape houses in Foča, Bosnia, the ICTY held that the absence of consent was an element of the crime of rape, but still recognized that coercion vitiated consent.[101] *Kunarac*'s reintroduction of the element of consent, even with its analysis of coercion, received mixed reviews.[102] In

97 MacKinnon, *Defining Rape Internationally*, *supra* note 73, at 950 ("Simply put, the ICTR grasped that inquiring into individual consent to sex for acts that took place in a clear context of mass sexual coercion made no sense at all."); *see also* RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 2 (Clare McGlynn & Vanessa E. Munro eds., 2010) (heralding *Akayesu* as a feminist victory and praising the court for its condemnation of sexual violence against women and for the rape definition they used, which eschewed inquiries into a list of sexual acts and consent and instead focused on the coercive circumstances in which the act took place).

98 MacKinnon, *Defining Rape Internationally*, *supra* note 73, at 954–56.

99 Catharine MacKinnon is dismissive of the concern about specificity and accuracy of the law (and, seemingly, of Latin): "This rationale was supported by the implication (in Latin) that without such specification, the defendants—guards of concentration camps charged with sexual assault on prisoners in their custody—might not have known with sufficient precision that what they were accused of doing was a crime." MacKinnon, *Defining Rape Internationally*, *supra* note 73, at 946.

100 *See id.* (citing Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 177 (Dec. 10, 1998); Prosecutor v. Semanza, Case No. ICTR 97-20-T, Judgment (May 15, 2003); Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment (Dec. 1, 2003)).

101 Prosecutor v. Kunarac et al., Case No. IT-96-23, ¶ 131–33 (June 12, 2002) [hereinafter Kunarac Appeals Judgment] (agreeing "with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible"). The Appeals Chamber noted that,

> [f]or the most part, the Appellants in this case were convicted of raping women held in de facto military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.

Id. ¶ 132; *see also* Priya Gopalan et al., *Proving Crimes of Sexual Violence*, *in* PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY, *supra* note 82, at 135 (questioning the continued validity of the consent requirement in ICL).

102 *See* Oosterveld, *Influence*, *supra* note 18, at 831–32 (citing Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 674–75 (2001)); Michelle Jarvis & Elena Martin Salgado, *Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice*, *in* SEXUAL

Kunarac, one of the defendants asserted that the victim was in love with him and had consented to sex.[103] The trial chamber rejected this argument, but, to the dismay of prosecutors and feminist non-governmental organizations, did not spare the victim invasive and insulting questioning on the matter of consent and prior sexual conduct.[104]

In a later ICTR case, *Prosecutor v. Gacumbitsi*,[105] the Appeals Chamber attempted to reconcile the competing definitions, to the satisfaction of some but not all,[106] by acknowledging that non-consent was an element of the crime of rape, but that it could be met with proof of coercive circumstances.[107]

> [I]t is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.[108]

Though some lauded the inquiry into coercive circumstances to overcome consent, other commentators have argued that the Appeals Chamber should have simply rejected lack of consent as an element of the offense.[109]

VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 101, 119–24 (Anne-Marie de Brouwer et al. eds., 2013).

103 Prosecutor v. Kunarac et al., Case No. IT-96-23-T, Judgment, ¶ 141 (Feb. 22, 2001) [hereinafter Kunarac Trial Judgment]; *see also* Kunarac Appeals Judgment, *supra* note 101, ¶¶ 130–34, 280, 290 (rejecting the defense).

104 Gopalan et al., *supra* note 101, at 132–33 (citing Prosecutor v. Kunarac et al., IT-96-23-T, Testimony of Witness 87, 6132–34 (Oct. 23, 2000)); *see also* Hansen-Young, *supra* note 89, at 491 (describing Kunarac's consent defense and commenting that "these antics contribute to the degradation of women and human dignity").

105 Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgment (July 7, 2006) [hereinafter Gacumbitsi Appeals Judgment].

106 *Compare* Weiner, *supra* note 73, at 1216 ("*Gacumbitsi* finally reconciled the two divergent definitions of rape used in the ICTY and ICTR"), *and* Grewal, *supra* note 24, at 381 ("the Appeals Chamber ultimately seems to be attempting to reconcile the Akayesu and Kunarac approaches"), *with* EBOE-OSUJI, *supra* note 73, at 157 (arguing that *Gacumbitsi* helped to reconcile these cases, but that judges probably should have just explicitly rejected the element of nonconsent), *and* Schomburg & Peterson, *supra* note 86, at 140 ("A definition of sexual violence that includes nonconsent unnecessarily points to the behavior of the victim and ultimately contradicts itself. It is therefore questionable whether it was adequate to 'refine' the *Akayesu* definition to the point of introducing nonconsent as an element of the crime, and, moreover, whether it was appropriate to do so on the basis of national laws meant to apply to sexual violence in times of peace.").

107 In *Gacumbitsi*, the Appeals Chamber still considered lack of consent to be an element of the crime of rape, but clarified: "The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible." Gacumbitsi Appeals Judgment, *supra* note 105, ¶ 155.

108 *Id.*

109 EBOE-OSUJI, *supra* note 73, at 157; *see also* Schomburg & Peterson, *supra* note 86, at 140;

In addition to retaining lack of consent as an element, the Appeals Chamber in *Gacumbitsi* also recognized consent as a possible defense but flagged evidentiary and substantive restrictions. Pursuant to the ICTY's rules of evidence and procedure, evidence of consent is inadmissible when "the victim: (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear."[110] Moreover, the Appeals Chamber noted the substantive requirement that consent be "genuinely voluntary."[111]

At the same time as these ICTY and ICTR cases were being litigated in The Hague, negotiations for the new ICC were underway in Rome. The discussions on rape in these two processes informed one another.[112]

The ICC's Rome Statute explicitly enumerates rape as a crime against humanity and a war crime.[113] Although the Rome Statute, like the statutes of the ICTY and ICTR, is silent on the definition of rape, the companion document, the Elements of Crimes lists coercion as an alternative to force and omits non-consent from the proposed definition of the crime of rape as a crime against humanity, war crime, or genocide.[114] The Elements of Crimes provides an example of the kind of

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Gopalan et al., *supra* note 101, at 135 (stating "[n]otwithstanding the ICTY's common sense approach to inferring non-consent from coercive circumstances, a real question remains about the validity of requiring non-consent as an element of rape under international criminal law").

110 Gacumbitsi Appeals Judgment, *supra* note 105, ¶ 156.

111 *Id.* ("Additionally, even if it admits such evidence, a Trial Chamber is free to disregard it if it concludes that under the circumstances the consent given was not genuinely voluntary.").

112 Halley, *Rape at Rome*, *supra* note 18, at 12 (noting the contemporaneity of the ICTY and ICTR prosecutions and the negation of the Rome Statute and that "[a]rguments and 'law' jumped from one forum and document to another constantly").

113 Rome Statute, *supra* note 19, arts. 7–8. The definition of genocide leaves room for rape as genocide on the basis of "(b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group . . . ." *Id.* art. 6.

114 *See* Report of the Preparatory Comm. for the International Criminal Court, Addendum: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter *Elements of Crimes*]. The Elements of Crimes sets out the following elements for rape as a crime against humanity:

> The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. . . . The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. . . . The conduct was committed as part of a widespread or systematic attack directed against a civilian population. . . . The perpetrator knew that the conduct was part of or intended the conduct to be part of a

coercion envisioned: "coercion, such as that caused by *fear of violence, duress, detention, psychological oppression or abuse of pow*er, against such person or another person, or *by taking advantage of a coercive environment, or the invasion [of the body] was committed against a person incapable of giving genuine consent.*"[115]

The definition went untested until the recent trial chamber decisions in *Prosecutor v. Bemba* and *Prosecutor v. Katanga.*[116] In both cases, the ICC embraced the conception of rape set out in the Elements of Crimes. This judicial stamp of approval is more significant than it may appear. The legal status of the Elements of Crimes, a companion document to the Rome Statute, is somewhat unclear. It is but one of many sources judges are to consult in determining the definition of a

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widespread or systematic attack directed against a civilian population.

Id. art. 7(1)(g)-1. The definition of the "war crime of rape" is identical save for the context elements of war crimes. *Id.* art. 8(2)(b)(xxii)-1 ("The conduct took place in the context of and was associated with an international armed conflict. . . . The perpetrator was aware of factual circumstances that established the existence of an armed conflict.").

115 *See Elements of Crimes*, *supra* note 114, art. 7(1)(g)-1 ("Crime against humanity of rape Elements 1. The perpetrator invaded the body of a person by conduct resulting in *penetration*, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed *by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent*. 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population." (emphasis added)); *id.* art. 8(2)(b)(xxii) ("War crime of rape Elements 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed *by force, or by threat of force or coercion*, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. 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." (emphasis added)); *id.* art. 8(2)(e)(vi)-1 ("War crime of rape Elements 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. 3. The conduct took place in the context of and was associated with an armed conflict not of an international character. 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.").

116 The trial chamber in *Katanga* likewise followed the definition of rape articulated in the Elements of Crimes but acquitted the defendant of rape and sexual slavery charges. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment, ¶ 659 (Mar. 7, 2014) [hereinafter Katanga Trial Judgment].

crime.[117] Though ICC decisions on the law do not bind judges in other tribunals, or even judges in other cases before the ICC,[118] it is a strong indication of the state of ICL and evidence of customary international law.[119]

The ICC's definition of rape is more traditional than some definitions before it. The ICC's recent decision in *Bemba*, like the Elements of Crimes, retreats from the broad *Akayesu* formula of "physical invasion of a sexual nature" and instead adopts the Elements of Crimes formula involving penetration[120] but notes that the penetration requirement is gender neutral.

The seemingly radical feminist step in the ICC law of rape, endorsed in *Bemba,* is that it embraces rape based in coercion and "coercive environments" and all but reads consent out of the equation.[121] The ICC includes coercion and "taking advantage of a coercive environment" as alternative material elements that "give the invasion of the victim's or perpetrator's body a criminal character"[122]:

> [F]or the invasion of the body of a person to constitute rape, it has to be committed under one or more of four possible circumstances: (i) by force; (ii) by threat of force or *coercion*, such as that caused by *fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person; (iii) by taking*

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117 *See* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 414 n.194 (2006) (stating that the view that the Elements of Crimes document is merely persuasive authority for the interpretation of the Rome Statute is the majority one (citing Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605, 627 (2004))).

118 Article 21(2) of the Rome Statute provides: "The Court may apply principles and rules of law as interpreted in its previous decisions." Rome Statute, *supra* note 19, art. 21(2).

119 *See* Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1918 (2016) ("While the United States is not bound to the unratified treaties as such, the courts treat as binding the CIL that these agreements may have played a substantial role in creating."); Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 175 (2010) ("The jurisprudence of these international criminal tribunals, on a wide range of international legal questions, has slowly begun to be elevated into norms of customary international law."); *see also Customary IHL*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#refFn_16_22 (last visited Feb. 13, 2017) ("A finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions, international courts can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of States and international organisations.").

120 Bemba Trial Judgment, *supra* note 4, ¶ 99 ("Rape requires 'invasion' of a person's body by 'conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.'").

121 *See* Boon, *supra* note 102, at 648 (arguing that the ICC's elimination of consent as an element of rape is a "welcome departure from the common law model").

122 Bemba Trial Judgment, *supra* note 4, ¶ 102 (citing Katanga Trial Judgment, *supra* note 116, ¶ 964)).

> *advantage of a coercive environment*; or (iv) against a person incapable of giving genuine consent.[123]

In interpreting the term "coercive environment," the trial chamber turned to *Akayesu*'s analysis on "coercive circumstances":

> [C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.[124]

Acknowledging that "the military presence of hostile forces among the civilian population" is not the only coercive environment, the trial chamber then identified factors that suggest a coercive environment, including "the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes."[125] More is required than just the existence of a "coercive environment"; the trial chamber "emphasi[zed]" that "it must be proven that the perpetrator's conduct involved 'taking advantage' of such a coercive environment."[126]

The trial chamber also attempted to explain the mens rea for the coercive form of rape. Pursuant to the ICC's default requirements of intent or knowledge,[127] the trial chamber explained: "As to the requirement of 'intent,' it must be proven that the perpetrator intentionally committed the act of rape. Intent will be established where it is proven that the perpetrator meant to engage in the conduct in order for the penetration to take place."[128] It is not entirely clear what "conduct" means here, but it seems to be something other than "penetration." Therefore, the most logical reading is that the "conduct" the defendant must intend to engage in is the use or threat of force or the coercion or the "taking advantage of a coercive environment." The knowledge requirement is clearer: "As to the requirement of 'knowledge', it must be proven that the perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of

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123 Bemba Trial Judgment, *supra* note 4, ¶ 102 (emphasis added) (citing Elements of Crimes, arts. 7(1)(g)-1, 8(2)(e)(vi)-1).

124 Bemba Trial Judgment, *supra* note 4, ¶ 103 (quoting Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998)).

125 *Id.* ¶ 104.

126 *Id.*

127 Rome Statute, *supra* note 19, art. 30.

128 Bemba Trial Judgment, *supra* note 4, ¶ 111.

giving genuine consent."[129] Thus, for liability based on coercion, a defendant satisfies the mens rea of knowledge where they are "aware that the act was committed by . . . coercion [or], by taking advantage of a coercive environment . . . ."[130]

Bemba did not address the availability or contours of a consent defense, because Bemba, a commander and not the physical perpetrator, did not raise one. However, the ICC Rules of Procedure and Evidence,[131] like those of the ICTY, circumscribe consent defenses. Rule 70 provides:

> In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:
>
> (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
>
> (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
>
> (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
>
> (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.[132]

It remains for future trial chambers to clarify the relationship between these provisions on consent and the ICC's coercive rape offenses.

There is also a procedural hurdle to raising the defense of consent—the defendant must argue the admissibility of the evidence in an in camera hearing and convince the trial chamber that the evidence warrants admission in light of the probative value of the evidence and "any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness . . . ."[133] If the trial chamber decides to admit the evidence it must "state on the record the specific purpose for which the evidence is admissible." Finally, if the trial chamber decides to admit the evidence, "[i]n evaluating the evidence during the proceedings," the chamber is to "apply principles (a) to (d) of rule 70."[134]

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129 *Id.* ¶ 112.

130 *Id.*

131 Report of the Preparatory Comm. for the International Criminal Court, Addendum: Finalized Draft Text of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000) [hereinafter *ICC Rules of Procedure and Evidence*].

132 *See ICC Rules of Procedure and Evidence*, *supra* note 131, r. 70; Grewal, *supra* note 24, at 376–77.

133 Rome Statute, *supra* note 19, art. 69(4); *ICC Rules of Procedure and Evidence*, *supra* note 131, r. 72.

134 *ICC Rules of Procedure and Evidence*, *supra* note 131, r. 72(3).

It bears noting that the ICC's definition of rape and evidentiary and procedural rules on consent are but a few pieces of the ICC's approach to pursuing accountability for sexual violence. The ICC Prosecutor has made the prosecution of sexual violence a stated priority. In her 2014 Policy Paper on Sexual Violence, the ICC Prosecutor explained: "[t]he Office recognises that sexual and gender-based crimes are amongst the gravest under the Statute. Consistent with its positive complementarity policy, and with a view to closing the impunity gap, the Office seeks to combine its efforts to prosecute those most responsible with national proceedings for other perpetrators."[135]

The ICC Prosecutor has explained the need to support this prioritization of sexual violence through training, investigations, and victim consultation and support measures. The OTP Policy Paper on Sexual Violence states:

> The Office has committed to integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities. It will increasingly seek opportunities for effective and appropriate consultation with victims' groups and their representatives to take into account the interests of victims.[136]

These measures are designed to be part of a comprehensive strategy to ensure that sexual violence be given the attention it deserves.

Thus, the ICC's embrace of a definition of rape that includes rape that is the product of coercion or coercive circumstances does not operate in isolation. It is backed up with evidentiary and procedural rules that also curtail inquiries into consent in contexts in which no meaningful consent is possible and a prosecutorial strategy to prioritize prosecution of sexual violence and incorporate a gender perspective into its work.

III. TRANSLATING COERCION INTO DOMESTIC LAW

What of this difference in rape law trajectories? Should the international coercion inquiry be brought stateside? There is some evidence that part of the feminist agenda in the international arena was in fact the eventual domestication of the international rape law reforms, at least to jurisdictions with less progressive laws.[137] This Part explores

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135 *OTP Policy Paper on Sexual and Gender-Based Crimes*, *supra* note 2, at 5.

136 *Id.*

137 *See* Green et al., *supra* note 79, at 177–78 ("Our goal [in a proposal submitted to ICTY

the benefits of a coercion framework in the international context and assesses whether the same benefits apply in the domestic one, in particular in the United States. It then describes the relevant differences between the international and domestic contexts and the difficulties of adopting a coercion approach domestically. These observations illustrate quite concretely Fionnuala Ni Aoláin's warning that "the translation of abstract international legal norms may not be entirely straightforward."[138]

A. *Merits of a Coercion Analysis in the International Context*

An inquiry into coercion and coercive environments offers advantages over an inquiry into consent in the ICL context. Arguably, it better describes the experiences of victims. It also prevents painful questioning of survivors on consent in environments where the possibility of meaningful consent is fanciful. And it does so with a relatively low risk of burdening wanted sexual contact.

Many argue that a focus on coercion or a coercive environment better reflects the realities of wartime rape. A coercion test recognizes the context of violence in which women often have no meaningful choice.[139] According to Chile Eboe-Osuji,

> [w]hile the circumstances of the inquiries in domestic law situations

judges] was to propose rules specific to the wars in the former Yugoslavia. At the same time, given the increasing attention in the U.N. system to gender violence, we recognized that the Tribunal rules would serve as a model for future international and national prosecutions of sexual crimes against women and provide international standards for national law reform regarding the prosecution of sex crimes in civil society."); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 420 (2006) (arguing that feminists often strategize to bring international reforms "back home"); *id. at* 346–47 (describing MacKinnon's view that strong international enforcement of sexual violence would prompt states to act in the domestic realm and noting that some feminists argued against eliminating the consent defense to rape in the international context because it might impede the domestic adoption of international rape law reforms); *see also* Halley, *Rape at Rome*, *supra* note 18, at 77–78.

138 Ni Aoláin, *supra* note 21, at 9.

139 Anne-Marie de Brouwer et al., *Interdisciplinary Approaches to Recognizing, Investigating and Prosecuting Sexual Violence as an International Crime*, *in* SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES, *supra* note 102, at 5 ("The traditional burden of proof of the lack of consent [puts] an unjustifiable burden on the victim/witness, notably in the context of conflict situations where conditions of force and threat preclude any freedom to consent."); *see also* Boon, *supra* note 102, at 670 (arguing that "circumstances of war are such that effective consent to sexual encounters will not always be possible in times of armed conflict," particularly "when sex is used as a military strategy by opposing forces, soldiers, and state agents, or when victims are in captivity"). Boon laments that the ICC does not go far enough in eliminating the consent inquiry because "they do not exclude consent and impose strict liability on the defendant where the perpetrator places the victim in detention or captivity, or uses violence." *Id.*

> might make the inquiry into consent more appropriate (such as date rape and acquaintance rape, for instance), the very nature of the circumstances in which rape occurs in the context of international law makes inquiry into consent almost wholly out of place.[140]

Although a few scholars have questioned whether ICL goes too far in this respect—it comes awfully close to making all sex in wartime rape[141]—the coercive context in ICL cases is typically rather extreme and thus the difficulty of establishing any meaningful form of consent quite obvious.

Beyond this conceptual argument, a coercion-based definition arguably leads to better treatment of victims in court, because it takes the focus off of the victim's thoughts and actions. As MacKinnon has argued: "[w]hether defined as against her will in the negative, or in terms of her willingness in the positive, *consent is the reason the rape complainant is put on trial.*"[142] The victim's thoughts, actions, and rape shield rules notwithstanding, often even sexual history are put on trial, since "[t]he distinction between whether someone was raped or just had sex, when seen in consent terms, is ultimately defined by how B felt about it, rather than in terms of what A did to B."[143] Without consent as an element or a defense, victims will be spared potentially humiliating and traumatic questioning on the topic.

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140 EBOE-OSUJI, *supra* note 73, at 153; *see also* Schomburg & Peterson, *supra* note 86, at 128–30.

141 *See* Karen Engle, *Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 784 (2005) ("As the criminalization of wartime rape marches forward, however, there has been little reflection on the debates of the past, on whether more criminalization is necessarily better than less, or on whether women will ultimately be benefited by procedures and case law that minimize opportunities for defendants to raise defenses of consent or even to deny the acts of which they are accused. In particular, few have considered what negative effects such criminalization might have on the understanding of women's agency, especially during wartime."); Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELB. J. INT'L L. 78, 86–90 (2008) (asking whether making all sex in coercive environments criminal may wind up harming women).

142 MacKinnon, *Rape Redefined*, *supra* note 2, at 452; *see also* EBOE-OSUJI, *supra* note 73, at 150 (arguing that "to those who hold the modern view, it is improper for the traditional view to focus the inquiry in rape trials on the conduct of the victim, which is necessarily the case where the inquiry is to find out whether or not sex was had with her without her consent"). Interestingly, Eboe-Osuji defines the "modern" view as one that eschews inquiry into consent and characterizes "the traditional view" as the one focusing on consent. He asserts that "many domestic jurisdictions have now reformed their rape law in line with this modern view" but cites Canada and the American state of Michigan as his only example. *Id.* In fact, in Canada, sexual assault is classified as a form of assault, and consent is the dividing line between criminal and noncriminal behavior. *See* Canada Criminal Code, R.S.C. 1985, c. C-46, §§ 265, 271 (categorizing "sexual assault" under the crime of "assault"); *see also* Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. GENDER & L. 395 (2012). The ECtHR and the ALI reach the opposite conclusion that the dominant trend in rape reform is towards a greater role for consent. *See supra* note 33.

143 MacKinnon, *Rape Redefined*, *supra* note 2, at 452.

The ready acceptance of the coercion model in the ICL context likely stems, at least in part, from the fact that consent is typically a nonissue. Since the ICC is to focus on those "most responsible" for crimes, most defendants, as in *Bemba*, are likely to be senior figures who often are not the physical perpetrators of the rapes.[144] Often, though not always,[145] the fight is not over whether rape happened, but whether the rape can be tied to the actions of the military commander or political leader.[146] It thus makes little difference in most cases how rape is defined because the rape is not contested, only the link to the defendant.

In any attempt to try to draw lessons from the international criminal law of rape, it is essential to recognize that ICL does a lot of up front narrowing. As noted above, international courts only have jurisdiction over sexual violence that also meets the requirements of genocide, crimes against humanity, or war crimes, all of which, in one way or another, "presume[] that they are committed in the context of a systematic or large-scale use of force."[147] International criminal courts, unlike domestic ones, typically deal with exceptionally violent factual scenarios set amidst a broader context of violence.[148] It is not hard to spot the coercive dynamics in place in a rape camp or brutal forced sexual penetration preceding mass slaughter.[149] And though ICL shows increasing sensitivity to gender dimensions of sexual violence,[150] the coercion at issue in ICL cases go far beyond gender inequality. It involves force, threat of force, detention, a context of mass violence,

144 Gopalan et al., *supra* note 101, at 139.

145 *See id.*

146 *See id.*

147 Schomburg & Peterson, *supra* note 86, at 128.

148 *Id.* at 126 (noting "[t]he ad hoc Tribunals have frequently had to take on situations in which individuals were publicly exposed to acts of sexual violence. Many victims suffered from multiple attacks, sometimes over a prolonged period of time. In particular during the conflict in Rwanda, individuals were also subjected to conduct such as deliberate infection with the AIDS virus and the insertion of sharp objects into their genitals"); *see also* Sherrie Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 353 (2003) (quoting Peter Landesman, *A Woman's Work*, N.Y. TIMES (Sept. 15, 2002), http://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html (explaining that the rapes in the Rwandan genocide were committed "by many men in succession, were frequently accompanied by other forms of physical torture and often staged as public performances to multiply the terror and degradation")).

149 To be fair, the context of ICL may be more nuanced than courts, prosecutors, and feminists would like to admit, and there may be downsides to the dominant narrative of coercion and inherently coercive dynamics in ICL as well. Karen Engle wrote a compelling critique of the feminist rape narrative at the ICTY, which, she contended, risks perpetuating rape myths by characterizing women as damaged goods and cementing ethnic divisions through a narrative that people from opposing sides (and ethnic groups) could never possibly engage in consensual sex. In the former Yugoslavia, there is, and in fact was, a great deal of marriage between the ethnic groups prior to the conflict. *See* Engle, *supra* note 141.

150 *See, e.g.*, *OTP Policy Paper on Sexual and Gender-Based Crimes*, *supra* note 2; PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY, *supra* note 82 (describing lessons learned from the ICTY).

persecution of ethnic groups, and the like.[151]

By contrast, coercive inequalities at issue in the domestic context are far more complex and the contexts far more varied. Far from the quite clear-cut rape camp or rape in the context of mass slaughter scenarios so typical of ICL, U.S. courts would be dealing with far more complex "inequalities"—financial, racial, age, social status among them—in a significantly greater array of contexts—dating, college campuses, employment, familial relations, to name a few.

ICL further narrows the universe of coercive rape through heightened mens rea requirements. At the ICC, the mens rea required for rape and other sexual violence crimes is intent or knowledge. In American law, it is typical to see criminal liability based on recklessness, negligence or even strict liability.[152] The ICC also has explicit gravity requirements, which cabin jurisdiction and prosecutorial discretion in bringing cases. Finally, resource constraints promote even more narrowing by prosecutors.

The easy acceptance of rape based on coercion or exploitation of a coercive environment in ICL stems at least in part from all of the narrowing devices inherent in ICL, and the fact that the coercion test does not stray very far from traditional notions of force. The coercive environment at issue is typically a violent one, often an extremely violent one. Extending coercion-based offenses to less overtly violent contexts in domestic jurisdictions is the far trickier move that may go too far in burdening sexual conduct and is likely to meet with more resistance from legislators, prosecutors, and juries.

B. *Merits of a Coercion Analysis in Domestic Rape Law*

Defining rape in terms of coercion offers many of the same benefits domestically as it does internationally. It arguably takes the focus off of the victim, which brings rape law in line with the rest of criminal law in

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151 *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) (rapes occurred in the midst of the killings of Tutsis in the Rwandan genocide); Bemba Trial Judgment, *supra* note 4, ¶¶ 2, 380 (relating to rapes committed by soldiers during a military attacks in the Central African Republic); Kunarac Appeals Judgment, *supra* note 101, ¶¶ 2–3 (rapes of Bosnian Muslim women and girls detained by Bosnian Serb soldiers and paramilitary members in the context of the ethnic cleansing of the town of Foca, Bosnia); Gacumbitsi Appeals Judgment, *supra* note 105, ¶¶ 103, 107 (rapes, including by use of foreign objects, committed in the context of the killings of Tutsis in the Rwandan genocide after the defendant used a megaphone calling on Hutus to rape Tutsi girls and to kill those who resisted).

152 In fact, an earlier draft ALI provision on coercion would have permitted conviction based on a recklessness mens rea. *See* sources cited *supra* note 57. For statutory rape, consent is irrelevant, and negligence or strict liability often suffices on the issue of the victim's age. *See generally* Catharine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003).

focusing on the defendant's thoughts and actions.[153] This shift of focus, at least in theory, could help with problems of under-enforcement, as victims may feel more comfortable coming forward. A rape test centering on coercion may better reflect dynamics of some forms of sexual violence. It also arguably criminalizes a larger array of unwanted and harmful behavior than does a consent paradigm.

One of the most vocal critics of consent framework for sexual violence domestically, as well as internationally, is Catharine MacKinnon.[154] MacKinnon rejects the consent-paradigm because "sex under conditions of inequality can look consensual when it is not wanted—at times because women know that sex that women want is the sex men want from women."[155] Defining the crime of rape in terms of consent, she contends "exonerates sexual interactions that are one-sided, nonmutual, unwanted, nonvoluntary, nonreciprocal, constrained, compelled, and coerced."[156]

One of MacKinnon's central arguments for coercion recalls the argument employed in the international context: coercion better captures the essence of rape and sexual assault than does a consent model. She argues that "the existing legal definitions of sexual assault do not appear to have described the criminalized experience in a way most victims or perpetrators recognize from their lived experience."[157] MacKinnon contends that consent "makes a systemic problem into an exceptional individual interaction."[158] She posits that this disconnect may explain the ineffectiveness of existing rape law in deterring or preventing rape.[159] The right question, according to MacKinnon, is: "what would a rape law look like that understood sexual assault as a practice of inequality."[160] She contends that "it would recognize that rape is a physical attack of a sexual nature under coercive conditions, and inequalities are coercive conditions."[161]

At least in theory, framing the question in terms of coercion in domestic law, as in international law, would offer the benefit of reducing victim-bullying in court and in turn, encouraging more victims to

153 *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (criticizing the dissonance between rape law, where the focus is on the victim, and other areas of criminal law, where it is on the defendant).

154 Catharine A. MacKinnon, *A Sex Equality Approach to Sexual Assault*, *in* SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT 265, 267 (Robert A. Prentky et al. eds., 2003) (lamenting that "[o]utside settings of war and genocide, little to no legal attention is paid to whether the parties enter sexual intercourse as social equals").

155 CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 246–47 (2005) [hereinafter MACKINNON, WOMEN'S LIVES].

156 MacKinnon, *Rape Redefined*, *supra* note 2, at 443.

157 *Id.* at 439.

158 *Id.* at 453.

159 *Id.* at 439.

160 MACKINNON, WOMEN'S LIVES, *supra* note 155, at 247.

161 *Id.*

report sexual violence. A coercion inquiry takes the focus off of the victim's internal thought processes and puts it on the context or "surrounding conditions."[162] Of course, consent can be defined as a subjective inquiry into whether the victim actually consented or an objective one into whether she indicated consent to the defendant, which may or may not make a difference in the evidence that gets presented in a rape case.[163]

MacKinnon thus proposes to define rape in the domestic context in a manner reminiscent of the broad ICTR *Akayesu* formula as "a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability."[164] Using this as the working definition of ICL's coercive rape test translated into the American context, the next Section will explore some of the difficulties of a wholesale replacement of rape law's force or consent requirements with coercion.

C. *The Challenges of Using a Coercion Standard in the Domestic Context*

Although a coercion paradigm for rape offers benefits even in the domestic context, its application in the domestic one is enormously more complicated than in ICL. A broad coercion inquiry wherein the use of any inequality, including inequality based on gender, suffices for coercion runs the risk of deterring a great deal of desired sexual contact. It also raises a panoply of third generation feminist concerns: denial of sexual agency,[165] substituting the judgments of educated liberals over that of the less educated presumed victim, and risking being used unfairly against people of color and the poor.[166] Embracing a definition of rape centering on coercion rather than consent, at least if exclusive of inquiries into consent, also runs the risk of under-inclusion. The standard arguably excludes some conduct that would be criminalized

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162 MacKinnon, *Rape Redefined*, *supra* note 2, at 469. ("A coercion standard does require victims be believed concerning the force used, but the reference point for the evidence supporting them begins in the external physical world, in surrounding conditions, not primarily in the internal psychological one.").

163 *Compare* Aya Gruber, *Not Affirmative Consent*, 47 U. PAC. L. REV. 683 (2016), *with* Stephen Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665 (2016).

164 MacKinnon, *Rape Redefined*, *supra* note 2, at 474. She adds: "In settings outside recognized zones of armed conflict or genocide, circumstances of coercion in domestic so-called peacetime could, by analogy, include psychological, economic, racial, and other hierarchical circumstances of compulsion." *Id.* at 470.

165 Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 608 (2009).

166 *See generally* Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1337 (2013) (citing Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601 (1990)); I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1367 (2010)).

under a consent rubric. It also raises enforcement concerns. There seems a real risk that coercion will be equated with force or threat of force. The coercion standard seems to be out of sync with the cultural zeitgeist, which, in the United States at least, focuses on consent. It is far from clear that swimming upstream of this current is a good idea.

First, there is the obvious potential problem of overbreadth. As many have noted, inequalities abound in our society, and criminalizing all sexual contact that stems from the exploitation of an inequality may encompass a lot of behavior, particularly when such broad categories as gender can suffice as an inequality. MacKinnon argues that this concern is overblown, since, under her test, "the unequal factors argued to effectuate the sexual overpowering need to be accepted as functioning as a form of force between two individuals."[167] She adds: "As in the international context of war and genocide, for a criminal conviction, it would be necessary to show the exploitation of inequalities—their direct *use*—not merely the fact that they contextually existed."[168]

This restriction of inequality-based coercion to inequalities that function "as a form of force" narrows the field, but it does not do so in a very specific way. This lack of specificity seems antithetical to the principle of specificity (or avoidance of vagueness), a corollary of the legality principle, so central to U.S. criminal law. International criminal courts have been rather loose on the legality principle, some say justifiably due to the gravity of the crimes and the absence of any real concern about notice,[169] but it is far from clear that flexibility on the legality principle is as justified in domestic criminal law jurisdictions.

Relatedly, there is the issue of line drawing. In *Rape Redefined*, MacKinnon argues that if an employer can get an employee to suck his penis to keep her job, he can get her to sign a contract allowing him to do it.[170] In this example, the inequalities presumably are based on gender and unequal power in the employment relationship. This argument seems to make a good case for coercion outside of the

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167 MacKinnon, *Rape Redefined*, *supra* note 2, at 473.

168 *Id.* at 474 (emphasis added).

169 *Compare* David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* PHILOSOPHY OF INTERNATIONAL LAW 569, 586–87 (Samantha Besson & John Tasioulas eds., 2010), *and* Beth Van Schaack, *Crimen Sine Lege: Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 120–21 (2008) (arguing that "today's defendants were on sufficient notice of the foreseeability of ICL jurisprudential innovations in light of extant domestic penal law, universal moral values expressed in international human rights law, developments in international humanitarian law and the circumstances in which it has been invoked, and other dramatic changes to the international order and to international law brought about in the postwar period"), *with* Dov Jacobs, Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories (Aug. 31, 2012) (unpublished paper) (manuscript at 18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311 (advocating that parts of the Rome Statute be read strictly in light of their statutory qualities).

170 MacKinnon, *Rape Redefined*, *supra* note 2, at 454.

contexts recognized in the draft ALI proposal—a threat being used in a reprehensible manner, arguably equivalent to force, to induce a person to engage in a sexual act. But what if the threat is implicit, not explicit? What if it is just a suggestion that she will rise faster if she does it? What if the boss says nothing, but, given the climate of the office, she thinks she will rise faster if she does it? The further down the continuum away from a defendant's actions and into a societal context of inequality, the broader the potential application of this standard.

MacKinnon cabins the wide reach of a coercion definition by recognizing a defense of wantedness. According to MacKinnon, "[t]o counter a claim that sex was forced by inequality, a defendant could (among other defenses) prove the sex was wanted—affirmatively and freely wanted—despite the inequality, and was not forced by the socially entrenched forms of power that distinguish the parties."[171]

The availability of a wantedness defense mitigates the potential breadth of the coercion definition but potentially obviates the primary benefit of framing rape in terms of coercion rather than consent of avoiding the grilling of the victim. As MacKinnon recognizes, an "[e]xpression of disinclination would be among the evidence that the listed means were used to secure compliance."[172] So, again, we are relying on what the victim did to oppose the sex—saying no, fighting, crying, and the like. Concededly, MacKinnon may set the bar very low for what amounts to an "expression of disinclination," but it seems far from clear that a prosecutor or jury would. As the ALI notes, "the issue of consent often proves inescapable, implicitly if not explicitly, regardless of how the formal elements of the offense are phrased."[173]

Absent from MacKinnon's proposed definition is any discussion of the defendant's mens rea.[174] With what mens rea must the defendant use inequality in a manner akin to force to "effectuate the sexual overpowering"? MacKinnon uses the verbs "use" or "exploit," which arguably imply a mens rea of knowledge, but it is far from clear that that is what the verbs require.

One could imagine a scenario where a work supervisor was aware of the risk that a subordinate was engaging in sexual acts based on their power inequality, let's say in the abstract, but genuinely and, perhaps, even reasonably believed that that was not what was happening. Should that be a crime? Reasonable minds may disagree on the merits, but it is worth noting that, under ICL, intent or knowledge is required. Under domestic law, we often set the mens rea requirement far lower than

171 MACKINNON, WOMEN'S LIVES, *supra* note 155, at 247–48.

172 MacKinnon, *Rape Redefined*, *supra* note 2, at 474.

173 *ALI Preliminary Draft No. 5*, *supra* note 24, ch. II, at 21.

174 Nowhere in *Rape Redefined* do the terms "mens rea" or "mental state" appear. *See* MacKinnon, *Rape Redefined*, *supra* note 2.

knowledge in the context of sexual assault.[175] U.S. law often recognizes no mistake of fact defense on the issue of consent (and thus imposes strict liability with respect to consent).[176] States often recognize strict liability on the issue of age in cases of statutory rape.[177] If we are this permissive on the mens rea for inequalities, we have ourselves a very broadly defined crime.

Related to the concern about overbreadth is the third generation feminist concern that this coercion framework denies the sexual agency of women and too readily substitutes the judgment of liberal elites for the judgment of women, often poor women of color.[178] Define the coercive contexts too broadly and you have state regulation of sex, not just at universities, as Suk and Gersen compellingly illustrate in *The Sex Bureaucracy*,[179] but nationwide in a wide array of settings. And, now, not just with threat of suspension or expulsion from a university but with the risk of jail time and sex offender status.

Although MacKinnon has attempted to define inequalities broadly to include race and economic disparities, and thus to avoid the accusation that this framework prioritizes gender over other societal inequalities, she has failed to resolve the sticky question of how to reduce competing and complex dynamics of inequality to a workable criminal law standard.

Moreover, a broadly defined coercion offense equates to police and prosecutorial discretion, and discretion in the American criminal justice system often is hard to disentangle from racism. Unlike in ICL, where prosecutorial discretion is significantly curtailed by jurisdictional limits, procedural hurdles, resource constraints, and international politics, in the United States, prosecutors enjoy significant discretion over charging decisions. There is thus a risk that a broad coercion standard will be used disproportionately against the poor and minorities.[180] Of course, the potential for overbreadth exists under ICL,[181] but the risk is significantly smaller than in the wide range of sexual contacts and contexts to which MacKinnon's coercion framework might apply. As

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175 Dripps, *supra* note 24, at 963–64 (discussing the confusion over and potentially low bar for *mens rea* in contemporary American rape law).

176 *Id.* at 962 ("Only a minority—but a substantial minority—of U.S. jurisdictions endorse this per se prohibition of instructing the jury on any defense of mistake about consent. Other jurisdictions recognize a reasonable-mistake-about-consent defense, typically by statute, but these defenses, only recently recognized at all, have been cut back dramatically in their application.").

177 *Id.* at 974 (in statutory rape cases, "[t]he majority view is that mistake of age is no defense").

178 *See* Gruber, *supra* note 166, at 1337; *see also* Gruber, *supra* note 165, at 614 (noting the conflict between recognizing women's sexual agency and recognizing conditions of subordination).

179 *See* Gersen & Suk, *supra* note 11, at 892.

180 *See* Gruber, *supra* note 165, at 615; *cf.* Gersen & Suk, *supra* note 11, at 914–15.

181 *See* Halley, *From the International to the Local*, *supra* note 15; Engle, *supra* note 141.

discussed above, ICL does a lot of narrowing of rape offenses.[182]

Importantly, ICL does not avoid the badgering of victims on consent through the coercion-based definition of rape alone. It relies as well on evidentiary and procedural rules that permit judges to foreclose questioning on the issue of consent where the prosecution shows coercion.[183] To reap this particular benefit, domestic jurisdictions would likewise need to restrict defenses on the issue of consent where there is evidence of coercion or a coercive environment. Canada has gone the route of foreclosing a consent defense in certain coercive contexts, and the United Kingdom has taken steps in that direction through evidentiary presumptions.[184] These steps are not without due process concerns,[185] but they warrant serious consideration.

Every bit as worrying as the risk of overbreadth and arbitrary enforcement is the risk of unduly narrow interpretation of the coercion standard that winds up excluding conduct that would and should be criminalized under a consent standard. In U.S. jurisdictions that currently define rape in terms of coercion, the bar is often set very high.[186] In the scant case law on the issue, "courts often conflate coercion with forcible compulsion."[187] The experience of other countries that define rape in terms of coercion likewise bolsters this concern. In Sweden, where coercion is in fact the legal test for rape—there is a problem with prosecutors dropping cases where the victim did not resist, even though resistance is not technically a requirement of the crime.[188] The problem thus is that too narrow a conception of coercion and threat of force will lead to under-enforcement. It seems likely that prosecutors and juries will balk at a standard that requires them to assign criminal responsibility for sex that stems from a power imbalance, at least outside of extreme contexts.

Under-enforcement of rape law is already a big issue in the United States, but it is worth considering whether a move to a coercion definition of rape will exacerbate the problem. Will juries really convict

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182 *See supra* text accompanying notes 147–49.

183 *See supra* text accompanying notes 131–34.

184 *See infra* text accompanying notes 198–202.

185 *See* Gruber, *supra* note 165, at 614 (noting the conflict between realistic rape reforms, the defendant's civil rights and arguing that existing rape shield laws are ineffective in shielding women since rape myths creep in anyway).

186 *See infra* text accompanying notes 200–04.

187 *See* Decker & Baroni, *supra* note 26, at 1122–23. Decker argues that the lack of case law is in itself a bad sign of the enforcement of these offenses. It means that either the case was never prosecuted or that the defendant was acquitted or that there was no appeal from a conviction, "an unlikely proposition." *See id.* at 1125.

188 Monica Burman, *Rethinking Rape Law in Sweden: Coercion, Consent or Non-voluntariness*, *in* RETHINKING RAPE LAW, *supra* note 97, at 196, 200–01 (discussing rape by coercion, whereby "it is a crime to force a person—by assault, other forms of violence or threats—to have intercourse or to engage in a sexual act that, with reference to the character of the violation and the circumstances of the crime, is comparable to intercourse").

based on use of a gender inequality? In ICL the inequality is rather obvious—the perpetrators and their cronies have guns, have you surrounded, and will kill you if you try to leave. These dynamics may be a lot less obvious in the manifold contexts with which domestic law must contend. Thus, prosecutors and juries steeped in the same ethos of male dominance as the society that created the inequality may be disinclined to prosecute and convict.[189] As Elizabeth Iglesias has argued, "rape processing practices are embedded in a network of discretionary decisions, [in which] legal agents will enforce the culturally dominant narratives of race and sexuality."[190] It seems likely that some narrowing must happen to make the standard easier for the public to swallow.

Relatedly, there may be some contexts in which lack of consent, and not coercion, better describes the crux of the wrong. Unlike in ICL, where a lack of meaningful choice stemming from a context of violence is an apt description of many, if not all, rapes, in domestic law, sometimes lack of consent and not inequality is the root of the problem. Take the *Berkowitz* case discussed in first year criminal law casebooks—where a male college student sexually penetrated a female college student in a dorm room despite her repeated statements of "no."[191] Pennsylvania's first degree rape statute defined rape as "sexual intercourse" by "forcible compulsion," and Pennsylvania courts defined the latter broadly to include not only "physical force," but also "a threat of physical force, or psychological coercion."[192] Despite this broad reading of force, which encompasses at least one form of coercion, psychological coercion, the Pennsylvania Supreme Court overturned Berkowitz's conviction, in large part due to a lack of any obvious power differential between the defendant and the victim.[193] Of course, the obvious inequality to which one could point is gender, but it is far from clear that the "inequality" of gender would or even should be the basis of conviction in such a case. If we wish to criminalize sexual contact of this nature, lack of consent seems a more natural fit.

This is not to say that defining rape in terms of consent, even a definition of consent informed by inquiries into coercion, is easy or solves all problems. There remains the question as to defaults—does

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189 *Cf.* Gruber, *supra* note 165, at 615, 644 (making the same argument in the context of affirmative consent).

190 *Id.* at 615–16 (citing Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 890 (1996)).

191 Commonweath v. Berkowitz, 641 A.2d 1161, 1164 (1994); *see also* Buell, *supra* note 9, at 572–75 (discussing *Berkowitz* and using it as an example to support his argument that consent cannot be treated "as if it were only a general concept about human cognitive processes," but rather requires "confront[ing] the question of culpability towards social norms, whatever those norms might be").

192 *Berkowitz*, 641 A.2d at 1163–64.

193 *Id.* at 1164.

consent require an affirmative yes, and, if so, need it be verbal? Or does it require a no?[194] Is it defined as a "state of mind" or in terms of "action"?[195] And, of course, there is the classic problem of whom to believe. These significant difficulties notwithstanding, there remains some zone of nonconsensual sexual contact likely not captured by inquiries into coercive inequalities that we may want to criminalize and punish.

IV. PROPOSAL

Although the wholesale importation of a rape definition centering on coercion rather than lack of consent may not be advisable in domestic law, more modest lessons can be drawn from ICL. The ALI Reporters demonstrate a laudable sensitivity to context. However, this Article proposes a few ways in which the contextual analysis could be tweaked for the better, incorporating lessons from the ICL of rape.[196]

First, American rape law needs a more robust consent definition that builds in an inquiry into coercion. As Kiran Grewal notes, "many jurisdictions have retained the concept of consent while seeking to clarify its definition as requiring 'free' or 'voluntary' agreement and incorporating categories of coercion which vitiate consent."[197] The United Kingdom, for example, has defined rape as non-consensual sexual penetration[198] but created a series of evidentiary presumptions of

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194 *See generally* Gruber, *supra* note 163; Schulhofer, *supra* note 163; Gersen & Suk, *supra* note 11.

195 *See Tuesday Morning Session [May, 19, 2015]*, 2015 A.L.I. PROC. 112 (professor Stephen J. Schulhofer noting the choice between the two notions of consent and that the "overwhelming consensus among our Advisers that we should not think about consent as a subjective state of mind, rather think about consent as an action"). In a recent article, Buell argues that consent is a normative and relational concept, which likewise raises difficult mens rea issues. *See* Buell, *supra* note 9, at 579 ("If consent to sex is normative [and thus defined by context, as he argues it is] and the defendant must be culpable with respect to consent, then arguably the defendant has to be culpable with respect to norms. When the law says, 'He knew he did not have consent,' it means, 'He knew this was not a situation that society recognizes as consensual sex.' When norms about sexual behavior are evolving, and the law is dealing with a crime that presents difficult evidentiary problems in general, the culpability analysis can be challenging in at least some cases.").

196 The ALI's approach seems consistent with the ideas of one of its drafters in a "feminism of particulars." Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2154, 2206–07 (1995) ("The sweeping generalizations of high theory provide excitement in preaching to the choir, but too often they prove inapt, unhelpful, or positively counterproductive when the time comes to address the problems of working institutions and the task of producing real improvement for women . . . . What has been missing from the dialogue, and is now most needed, is a feminism of process and particulars, a recognition that real solutions are likely to lie very deeply embedded in the details.").

197 Grewal, *supra* note 24, at 387.

198 Sexual Offenses Act 2003, c. 42, § 1 (Eng.) ("A person (A) commits an offence if—(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B

non-consent in certain coercive contexts, including, among other things, direct or indirect threats of violence, unlawful detention, and administering of stupefying drugs.[199] Likewise, the Criminal Code of Canada categorizes all rape and sexual assault under the rubric of "assault," which is defined inter alia as nonconsensual application of force, and defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question."[200] In Canada, as in the United Kingdom, "to be legally effective, consent must be freely given."[201] The Code also defines a series of situations that do not amount to consent for sexual assault offenses.[202]

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does not consent to the penetration, and (c) A does not reasonably believe that B consents.").

199 *Id.* § 75(2). These circumstances include that:

> (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
>
> (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
>
> (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
>
> (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
>
> (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
>
> (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

Id.

200 Canada Criminal Code, R.S.C. 1985, c. C-46, §§ 265, 273.1(1). In Canada, consent has a subjective and objective dimension. Consent for the purposes of the *actus reus* of unwanted sexual contact is a subjective inquiry into the victim's state of mind. By contrast, the *mens rea* element of "intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched" introduces an objective inquiry into whether "the complainant . . . affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused," at least where a defendant introduces the failure of proof defense of mistaken belief of consent. R. v. Ewanchuk, [1999]1 S.C.R. 330 (Can.) (discussing actus reus and mens rea).

201 *Ewanchuk*, [1999]1 S.C.R. 330, § B(1)(c).

202 These include where:

> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) *the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority*;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

The proposed ALI definition of consent falls short. Again, an early draft definition of consent defined consent as "a person's *positive, freely given agreement* to engage in a specific act of sexual penetration or sexual contact" and clarified that: "[c]onsent is not 'freely given' when it is the product of force, restraint, threat, coercion, or exploitation under any of the circumstances described in this Article, or when it is the product of any force or restraint that inflicts serious bodily injury."[203] However, as noted above, the final consent definition omits this "positive, freely given agreement" language and leaves unclear under what circumstances the coercion vitiates consent.[204] The ALI may be opting to address coercive sexual contact as a crime unto itself, rather than the negation of a broader notion of "positive and freely given" consent. One way or another though, it needs to address the issue of sex resulting from coercion or coercive circumstances.

This approach resembles the ICC's decision to reject the framing device of consent in situations where the possibility of meaningful consent is very low. However, due to the relatively narrow breadth of situations covered in the ALI's early draft provisions on coercion and vulnerable person offenses, combined with the relatively low ranking of the offenses, there is reason to be concerned that wrongful conduct worthy of a criminal sanction will fall outside of the ambit of all of these offenses. The ALI's narrow definition of consent for an alternative offense revolving around the absence of consent increases this risk.

Another lesson from ICL is that force and threat of force should be read broadly to include threats of force from people other than the defendant. If the defendant threatens violence—including, violence at the hands of others—to get a victim to engage in sexual acts, it is criminal.[205] Whether it does so under the label coercion or threat of force, U.S. law should criminalize sexual penetration stemming from implied and indirect threats of violence.

> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Canada Criminal Code, R.S.C. 1985, c. C-46, § 273.1(2) (emphasis added). The ALI tackles some of these issues in separate sexual assault offenses, but has not yet clarified how they interact with consent for the purposes of the sexual assault against the will or without consent.

203 *See supra* text accompanying note 47 (discussing *ALI Preliminary Draft No. 5*, *supra* note 24, § 213.0(3)).

204 *See supra* text accompanying notes 48–50.

205 *Cf.* EBOE-OSUJI, *supra* note 73, at 154–55 (arguing that the prosecution should not be required to prove lack of consent and thus the elements are sex plus presence of force but that "the proof of force should be deemed discharged if established at the overarching level of, say, a war in progress" and noting that "[m]ore precisely 'force' in this equation is synonymous with 'coercive circumstances', if you will"). Eboe-Osuji's formula seems to make all sex in wartime into rape, which is problematic. Schomburg contends that one avoids this reduction of all sex during wartime to rape through rigorous application of the umbrella requirements of ICL. Schomburg & Peterson, *supra* note 86, at 130.

The ALI's proposed definition of forcible rape is amenable to this more expansive notion of force. It provides: "An actor is guilty of Forcible Rape if he or she knowingly or recklessly: (a) uses physical force, physical restraint, or an implied or express threat of physical force, bodily injury, or physical restraint to cause another person to engage in an act of sexual penetration . . . ."[206]

Knowingly using an implied threat of physical force, bodily injury, or physical restraint arguably includes an implied threat that *someone else* will use physical force or injure or physically restrain the victim. The proposed model code does not seem to require that the defendant do the threatening or be the subject of the threat.

Another lesson from the ICC is that, in some contexts, inquiries into consent miss the point. In the wartime context of mass violence with which ICL must contend, a recognition of rape stemming from coercion, coercive circumstances, and a coercive environment makes sense. War is not the only such context, and legislators, and possibly courts, should be open to recognizing other inherently coercive contexts domestically. Still, in light of the wide range of contexts with which domestic law contends, some narrowing up front likewise may make coercion-based rape offenses more fair to defendants, more workable, and more politically palatable, in the domestic context.

One way to narrow the ambit of a coercion-based sexual rape offense is through a list of factors. In *Bemba*, for example, the court articulated factors that are indicative of coercion or a coercive environment. These included: position of authority, age difference, number of alleged perpetrators, other controlling behavior, the commission of other crimes, and a context of violence.[207] Although the factors may vary slightly in the domestic context, some up front guidance on how to identify coercion could help in narrowing the field of a broad coercion-based offense, should legislatures opt to reform in coercion terms rather than employ the ALI approach. Still, these factors may not go far enough in guiding discretion.

Alternatively, restricting coercion-based sexual assault offenses to particular contexts achieves many of the benefits of a coercion approach, without the panoply of difficulties described above.[208] Although the current draft leaves open the content of coercion-based offenses, in an earlier draft the ALI offered a few such contexts—including prisons, post-prison supervision, threat of immigration enforcement, as well as, it seems, employment and domestic contexts.[209]

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206 *ALI Preliminary Draft No. 5*, *supra* note 24, § 213.1(2).

207 *See* Bemba Trial Judgment, *supra* note 4, ¶¶ 104–07.

208 Here again, Canadian law provides an example. *See* Canada Criminal Code, R.S.C. 1985, c. C-46, §§ 265, 273.1(1).

209 *ALI Preliminary Draft No. 5*, *supra* note 24, § 213.4(a)–(b).

MacKinnon notes the ALI proposal's piecemeal recognition of hierarchies, but criticizes it for not calling these hierarchies "inequalities."[210] Whatever the label, legislators should be alert to the possibility that other inherently coercive contexts, where victims have no meaningful choice, exist. Making these decisions up front makes the law less nimble—a coercion-based offense will not exist in some contexts where there is the possibility for coercion—but we trade this under-inclusiveness for the benefit of greater notice, fairness, and a reduced risk of arbitrary enforcement.

One potential context for a coercive style rape offense, not included in earlier ALI draft coercion offenses, is domestic abuse. In 2015, for example, the United Kingdom and Wales, passed a law for a new offense of "controlling or coercive behaviour in intimate or familial relationships." This offense is not restricted to conduct relating to sexual contact. The newly enacted law provides:

> Controlling or coercive behaviour in an intimate or family relationship
>
> (1) A person (A) commits an offence if—
>
> (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
>
> (b) at the time of the behaviour, A and B are personally connected,
>
> (c) the behaviour has a serious effect on B, and
>
> (d) A knows or ought to know that the behaviour will have a serious effect on B.[211]

Thus, the United Kingdom has enacted a statute that focuses on coercion, but limits it to a pre-defined context rife with recognized coercive dynamics. It also narrows the offense further through a requirement of "repeated or continuous behaviour," which, as Vanessa Bettinson notes, "alleviates concerns that the offence will criminalise individuals in healthy relationships."[212]

The provision is not without difficulties. As various British commentators have noted, some of the key provisions, including the meaning of "serious alarm or distress" and "substantial adverse effects," are far from clear and "will both require interpretation by the court."[213]

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210 MacKinnon, *Rape Redefined*, *supra* note 2, at 462–63.

211 Serious Crime Act 2015, c. 9, § 76 (Eng.). The statute states "(4) A's behaviour has a 'serious effect' on B if— (a) it causes B to fear, on at least two occasions, that violence will be used against B, or (b) it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities." *Id.*

212 Vanessa Bettinson, *Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?*, CRIM. L. REV. 165, 171 (2016).

213 Susan S.M. Edwards, *Coercion and Compulsion—Re-Imagining Crimes and Defences*, CRIM. L. REV. 876, 884 (2016).

There is also some fear that it will be interpreted too narrowly, despite its low *mens rea* bar of negligence. As Susan Edwards has noted:

> [e]ven with the obvious benefit of an "ought to know" test it is likely that the magistrate or jury will draw on their own experience and decide on the basis of what "they think" even though directed that the test is what the "reasonable person" thinks amounts to coercion. Magistrates and judges will require training, the jury will have directions from the judge.[214]

Absent these educational efforts, her prognosis for this coercion provision is not good: "It is anticipated that there will be a universal failure to recognise coercion unless in its grossest form."[215] She cautions: "The mere existence of the provision will not compensate for the ingrained conditioning of fact finders who may consider that under certain circumstances men are entitled to coerce."[216] Thus, the United Kingdom example, like that of international criminal courts, illustrates that a coercion framework is not a panacea for the failings of rape or—in the United Kingdom case—domestic violence law, absent education of police, prosecutors, judges, and juries.

Legislators should be careful to address the question MacKinnon leaves open—the mens rea for a coercion-based offense. The ICC's coercion offense, like other international crimes, requires purpose or knowledge. If legislators opt for a broad coercion-based offense, they should consider a similarly heightened mens rea to help restrict its ambit. Since the defendant may or may not be the one creating the coercive environment, we are not only shifting the focus off of the victim's actions in such cases, we are also shifting the focus off of the defendant's actions. To compensate for the relatively low burden on the defendant's actions, we should consider requiring a heightened mens rea—the defendant must intend to use or know that they were using a context of inequality to get the victim to engage in sexual conduct.

Another important lesson from ICL is to question the wisdom of creating a strict rape hierarchy. ICL's treatment of coercive rape demonstrates that some coercion or coercive environment–based sexual

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214 *Id.* at 885.

215 *Id.*

216 *Id.* at 898 ("The effectiveness of this provision will depend on the robustness of police and prosecutors with regard to investigating, case building and pressing charges with regard to the offence of coercion and using other evidential provisions for example hearsay CJA 2003 s.116, and s.118, in order to ensure such cases are proceeded with."). Edwards also voices concern about the provision's "best interests" defense. *See id.* at 885–86; *see also* Bettinson, *supra* note 212, at 173 ("This defence has the potential to deprive a particularly vulnerable category of domestic violence and/or abuse victims from the protection of the criminal law."). The best interests defense would at any rate be unavailable in the context of sexually coercive behavior, since the defense is "not available to A in relation to behaviour that causes B to fear that violence will be used against B." Serious Crime Act 2015, c. 9, § 76(10) (Eng.).

assaults may be every bit as grave as forcible assaults and punished accordingly. ICL does not treat coercion-based or coercive environment–based rape as inherently any less severe than forcible rape. By contrast, early ALI drafts recognized coercion-based sexual assault only as lower-level felonies or misdemeanors.[217] This ranking sends a message about how serious we believe the crimes to be—for coercion and consent offenses, apparently, not very—and limits the discretion of judges to punish according to the gravity of the defendant's actions in the context of the assault. Cabining the discretion of actors in the criminal justice system is important to avoid arbitrary and discriminatory enforcement, but this hierarchy may go too far in tying the hands of judges.[218]

Finally, the experience of the ICC, like other international criminal courts before it, demonstrates that rape reform does not stem from changes to crime definitions alone. The ICC has combined its progressive rape definitions with a great deal of training of investigators, prosecutors, and other actors on how to avoid overlooking sexual violence due to rape myths, how better to support victims, and how to build a stronger case. Any U.S. reforms must do the same.

CONCLUSION

In sum, the United States can learn from the world of ICL in the prosecution of rape cases, but this does not mean transposing a broad crime of coercive rape into U.S. law and doing away with consent altogether. Indeed, ICL illustrates powerfully the need for criminal law to be sensitive to context and to address matters of coercion in defining rape or sexual assault, but it is also important to acknowledge differences between the types of conduct at issue in ICL cases and those seen in the domestic context. Nevertheless, sensitivity to context and coercive dynamics demands a more robust definition of consent than the one recently adopted by the ALI or typically recognized in American law. ICL also provides lessons on the conception of force in defining rape and sexual assault offenses. A more contextually sensitive definition of force should include implicit and indirect threats of force. Likewise, ICL raises questions about the merits of any strict hierarchy of sexual assault offenses. Sexual contact resulting from coercion or lack of consent, even absent physical force, may sometimes deserve the strongest of condemnation. Finally, the experiences of the ICC and other international criminal courts illustrate the need for reforms that

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217 *See* discussion *supra* Part I.

218 It also may be used by prosecutors to charge bargain in order to secure a conviction in an otherwise weak case.

go beyond the definition of the crime. Definitional changes will amount to little if not accompanied by broader reforms in the criminal justice system. As in international criminal courts, the training of police, prosecutors, and other actors in the criminal justice system is necessary.