THE CASE FOR ELIMINATING CONSENT AS AN AFFIRMATIVE DEFENSE TO RAPE IN INHERENTLY COERCIVE ENVIRONMENTS AND REINTERPRETING THE ROME STATUTE'S ELEMENTS OF CRIMES

Sierra Gonzales*

* J.D., Southwestern Law School, 2024.

INTRODUCTION

Rape of civilians during an armed conflict has long been grounds for criminal prosecution.[1] However, instances of sexual coercion remain less well documented, although they occur just as frequently during armed conflicts. What if a prison guard asks a prisoner on a date and the prisoner later agrees to an ongoing sexual relationship with the prison guard? Is that a consensual relationship? Should a prosecutor have to prove the victim did not consent in order to charge the prison guard with rape? Further, could the defendant use the fact that the prisoner engaged in a long-term sexual relationship as evidence of consent and assert an affirmative defense to escape the charge? The answer to these questions requires a nuanced and careful analysis of how coercion operates on consent.

Sex crimes, both under domestic and international law, are uniquely characterized by the fact that a defendant may use an affirmative defense of consent to avoid conviction. In some jurisdictions, the defense is valid even if the defendant only had a reasonable belief that the victim consented,

[1] Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 Ethics 50, 55-56 (2016).

regardless of the fact that the belief was mistaken.[2] International criminal law also allows defendants to raise the affirmative defense of consent.[3] However, this is an inconsistency that leaves those victims who may have been coerced into sex with the defendant without legal recourse when the facts may be construed to say that the victim consented.

Instead, international law must recognize the effect of coercion on a victim's ability to give consent. An inherently coercive environment, like a prisoner of war camp or an invasion of one's homeland, makes genuine consent impossible. This note proposes both the elimination of an affirmative defense when circumstances are so coercive as to render genuine consent impossible. Further, this note argues that the Rome Statute's Elements of Crimes should be interpreted as prohibiting defendants from raising an affirmative defense of consent when circumstances are inherently coercive.

The Rome Statute defines rape through a lens of coercion, convicting defendants who take advantage of a person incapable of genuine consent in

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[2] The basic principle of consent as an affirmative defense is exemplified by what is sometimes known as the "Mayberry Defense," taking its name from *People v. Mayberry*, 542 P.2d 1337, 1346 (Cal. 1975). *See* Rosana Cavallo, *A Big Mistake: Eroding the Defense of Mistake of Fact about Consent in Rape*, 86 J. Crim. L. and Criminology 815, 816 (1996) (explaining that the defendant may raise an affirmative defense of the victim's consent to the charge of rape against him if the belief was bona fide and reasonable; further explaining that the defendant need only raise a reasonable doubt in the jury's mind as to whether he held that belief). Other U.S. states, besides California, allow an affirmative defense of consent as a mistake of fact defense (the mistake being the defendant's incorrect belief that the victim consented), *Id.* at 817 n.6 (citing to *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983); *People v. Lowe*, 565 P.2d 1352 (Colo. Ct. App. 1977); *State v. Smith*, 554 A.2d 713 (Conn. 1989); *In Interest of J.F.F.*, 341 S.E.2d 465 (Ga. Ct. App. 1986); *State v. Dizon*, 390 P.2d 759 (Haw. 1964); *State v. Williams*, 696 S.W.2d 809 (Mo. Ct. App. 1985); *Owens v. Nevada*, 620 P.2d 1236 (Nev. 1980); *People v. Crispo*, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1988); *Green v. State*, 611 P.2d 262 (Okla. Crim. App. 1980) as other U.S. states who have adopted an approach similar to California.

Other jurisdictions across the world also utilize the reasonable belief defense (*see also, e.g.* Strafgesetzbuch [STGB] [Criminal Code], §177, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html; Sexual Offenses Act 2003, c.42, §1 (governing Eng. and Wales); The Sexual Offenses (N. Ir.) Order 2008 No. 1769 (N.I. 2), §5.

[3] In some international law, even if they presume non-consent of the victim from coercive circumstances, they still do not explicitly prohibit the defendant from raising an affirmative defense of consent. *See* Prosecutor v. Kunarac, Case No. ICTY 96-23, Judgement (Int'l Crim Trib. for the Former Yugoslavia (Feb 22, 2001); *see also* Michael Cottier, *art. 8 ¶ 2(b)(xxii): Rape and other forms of sexual violence*, 440 n.836 in *Comment. on the Rome Statute of the Int'l Crim. Ct.: Observers' Notes, Article by Article*, (Otto Triffterer, ed., Hart Publishing 2d ed. 2008) (discusses the report by UN Special Rapporteur on Forms of Slavery (1998)); *see also* Wolfgang Schomburg and Ines Peterson, *Genuine Consent to Sexual Violence Under Int'l Crim. Law*, 101 AM. J. INT'L L. 121, 124.

a coercive environment.[4] However, its language does not explicitly prohibit defendants from raising an affirmative defense of consent.[5] Thus, there is a gap where defendants may still be able to assert facts that seem to indicate the victim consented. Thus, this note argues that the Rome Statute should prohibit defendants from raising the affirmative defense of consent under inherently coercive circumstances. Doing so would allow for the more just and efficient prosecution of sexual coercion and rape in future armed conflicts. While some may argue that refusing to recognize the affirmative defense of consent deprives the defendant of essential rights, doing so: (1) recognizes the reality of coercion and its effect on a victim's ability to genuinely consent, (2) creates a better mechanism for bringing justice to victims of sexual violence, and (3) may deter relationships based on severe power imbalances.

This note will begin with an examination of examples from various armed conflicts that illustrate the subtle nature of sexual coercion and the challenges it poses to prosecutors. Next, it will provide a brief background on the existing jurisprudence of international criminal tribunals on sexual violence. This note will then argue for a solution that addresses the gaps in the tribunals' current jurisprudence, which still lacks proper legal recourse for victims of sexual coercion. Finally, this note will make the case for why denying defendants the use of an affirmative defense of consent through a specific interpretation of the Rome Statute[6] will be more consistent with the reality of coercion and lead to more successful prosecutions of rape by sexual coercion in the future.

This article primarily utilizes examples and references to female victims and survivors. The reason is that the female experience of rape and sexual violence during war and armed conflict is distinctly linked to

[4] Rome Statute of the Int'l Crim. Ct., art. 7(1)(g), July 17, 1998, 2187 U.N.T.S 3844 (rape as a crime against humanity); *Id.* at art. 8(2)(b)(xxii) (rape as a war crime); Elements of a Crime of the Int'l Crim. Ct., art. 8(2)(b)(xxii)-1, Sept. 10, 2002, 2187 U.N. No. E.03.V.2 (defining the elements of rape as a war crime); Cottier, *supra* note 3 at 438-40.

[5] Rome Statute of the Int'l Crim. Ct., art. 7(1)(g), July 17, 1998, 2187 U.N.T.S 3844 (rape as a crime against humanity); *Id.* at art. 8(2)(b)(xxii) (rape as a war crime); Elements of a Crime of the Int'l Crim. Ct., art. 8(2)(b)(xxii)-1, Sept. 10, 2002, 2187 U.N. No. E.03.V.2 (defining the elements of rape as a war crime); Cottier, *supra* note 3 at 438-40.

[6] The Rome Statute and the International Criminal Court will likely be the source of international criminal law on rape in the future, *see* Preface, *The Rome Statute of the International Criminal Court: A Commentary (Vol. 1)*, v (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, ed. 2002).

societal attitudes toward women, gender, and masculinity.[7] The explicit targeted rape of female civilians as a political means of humiliating and subjugating the local population leans heavily on attitudes towards women that aggressors often show, mainly the belief that defiling women is a means of humiliating their nation or community.[8] This is a poignant reality that this article also seeks to highlight. However, the relevance of the historical subjugation of women should not detract from the concurrent reality that men may also be victims of wartime rape and sexual violence. This article intends to provide a solution that brings justice to victims regardless of their gender.

I. REALITY OF COERCION

Rape is recognized under criminal law in jurisdictions across the world.[9] One of the primary elements of rape, at least in a number of jurisdictions, is the lack of consent to sexual activity by the victim.[10] Sexual coercion challenges common sensibilities of what genuine consent is. One scholar offers the following helpful definition for coercion that outlines the dynamics of power between two parties:

> Coercion is best understood as a use of asymmetric power that one sort of agent may hold over another sort based in the former's ability to inhibit broadly the ability of the latter to act, by means such as killing, injuring, disabling, imprisoning, or drugging. When a party demonstrates an ability and willingness to use such means against another, that party is then in a position to threaten in order to induce compliance with demands he might make.[11]

When someone is coerced into having sex, the person does not genuinely consent to the act. However, sexual coercion often operates so subtly that a single instance of seemingly consensual sex is in fact, part of a larger context of coercion that destroys the victim's ability to offer genuine consent. The same author offers a helpful paradigm through which to understand the mechanism of coercion: "If P is able to use direct force or

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[7] Sara E. Davies and Jacqui True, *Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In*, 46 Sec. Dialogue 495, 497 (2015).

[8] *Id.* at 496-98.

[9] *See supra* note 2 for other jurisdictions that recognize rape as a crime (albeit some allow the defendant to raise the affirmative defense of consent).

[10] Anderson, *supra* note 1 at 56; *see also* Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L. J. 2687, 2691-92 (1991) for a discussion on the force requirement in rape that some jurisdictions require.

[11] Anderson, *supra* note 1, at 58.

violence that Q is unable to defend against (or retaliate against afterward), then that can be used to constrain Q's actions or impose other disadvantages on Q (pain and injury) that may convince Q of P's powers and willingness to use them."[12] Often, the question of whether someone was coerced into sex requires an intensely fact-specific analysis.

A. Examples of Sexual Coercion in Armed Conflicts

The following examples illustrate the kind of facts that might give rise to sexual coercion. All examples are taken from countries during a period of armed conflict because sexual coercion is inherently bound up with the idea of power imbalance. The presence of an occupying army creates an imbalance of power between the citizenry under occupation and the occupying army. The same power imbalance manifests itself between a prisoner and a captor. The examples below offer a brief context for each armed conflict, focusing on the voice of a victim of sexual violence that resulted from coercion by a stronger party.

1. Argentina

The sexual abuse of female prisoners at Argentina's Navy Mechanics School (known as ESMA) illustrates the problematic gray area between consent and coercion. A military coup toppled Argentina's government in 1976 and lasted until 1983.[13] Many civilians suspected of involvement with communism were captured, tortured, and killed. Many more "disappeared" while the military government denied all connection with their disappearances.[14] Survivors remember ESMA as one of the largest centers for these horrors.[15] Here, many female prisoners were sexually assaulted and tortured in cases that were obviously blatant instances of rape.[16]

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[12] *Id.* at 76.

[13] JOHN CHARLES CHASTEEN, BORN IN BLOOD AND FIRE: A CONCISE HISTORY OF LATIN AMERICA 294-96 (Third ed. 2011); *see also* Alfonso Daniels, Chasten, *Argentina's Dirty War: The Museum of Horrors*, The Tel. (London), (May 17, 2008), https://www.telegraph.co.uk/culture/3673470/Argentinas-dirty-war-the-museum-of-horrors.html.

[14] Daniels, *supra* note 12.

[15] *Id.*

[16] *Id.*

However, a particularly disturbing aspect of life at ESMA was the occasional "date" with the officers assigned there. As one survivor of ESMA recalled:

> We would be sleeping in the middle of the night and a guard would shake us and say, "Wake up, you have to go." We didn't know if we were going out for a meal or to die. A girlfriend of mine was taken dancing by the guy who had killed her husband two weeks earlier.[17]

This striking description highlights the precarious situation of female prisoners at ESMA. These "dates" may blur the line between consent and coercion. However, this survivor, as is evident from her account, and those of numerous women imprisoned at ESMA[18] recognized the consequences of denying these officers a "date" (and presumably, the officers expected sex on these dates given the prevalence of sexual assault within the walls of ESMA). Refusing an officer may have meant physical punishment or even death. Thus, many women, like the survivor who offered this story, did not truly have a choice. It may seem that they consented because they agreed to go out on the date. Even so, the threat they faced if they refused to go and entertain the officers clearly makes the situation a highly coercive one. This level of coercion makes genuine consent impossible. However, under current international law, a prosecutor may have trouble proving that these women did not consent to any sexual activity that followed because they did agree to go on these "dates."

2. Peru

A second poignant example is the rape and consequent marriage of women to army soldiers living near the Manta and Vilca military bases in Peru.[19] Between 1980-1997, the people of Peru struggled under the weight of a civil conflict between the national government and a Marxist/Leninist guerrilla force called the Shining Path.[20] The local community around the Manta and Vilca bases is just one of the many that the national army and guerilla forces abused. The women of that community were primarily

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[17] *Id.*

[18] *Id.*

[19] PASCHA BUENO-HANSEN, FEMINIST AND HUMAN RIGHTS STRUGGLES IN PERU: DECOLONIZING TRANSITIONAL JUSTICE 108-09 (2015).

[20] Chasten, *supra* note 12, at 312, 326-27; *see also* Center for Justice and Accountability, "Peru," https://cja.org/where-we-work/peru/ (last visited Sept. 4, 2023).

indigenous and had a primary school education.[21] The power imbalance created by the occupation particularly devasted this already vulnerable population.

The community of Manta challenges the traditional assumptions about consent and coercion because it forces the law to look beyond the narrow scope of a single act of consent and to a broader context of coercion. For the women of Manta and Vilca, genuine consent to sexual relations with the soldiers occupying their homes was impossible. As Pascha Bueno-Hansen notes, "These kinds of cases become very complicated to prove since the victim 'consented' to maintaining a relationship after the violation."[22]

In her article, Pascha Bueno-Hansen[23], a professor and scholar, expresses the dire circumstances facing women and the horrific choices they were forced to make (or rather, were forced into making).[24] One resident of Manta at the time of the army's occupation, known as Aurelio, told the story of his sister and daughter.[25] Both women were raped by soldiers from the base.[26] His sister agreed to become the girlfriend of her assailant. She became pregnant during the course of their relationship but not as a result of the initial rape.[27] The soldier later abandoned her to raise the child on her own.[28] A situation like this posed challenges to prosecutors because Aurelio's sister's agreement to a relationship with the man who had raped her could be construed as consent if viewed narrowly. She chose to remain with her assailant, and in the eyes of some, she may have lost her legitimacy as a victim by doing so.[29] But viewed in the broader context of the military occupation, no one would believe Aurelio's sister could genuinely consent to any kind of sexual relationship with a soldier who had raped her and remained more than capable of hurting her again.

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[21] BUENO-HANSEN, *supra* note 18, at 115.

[22] *Id.* at 117.

[23] Pascha Bueno-Hansen is an associate professor of Women and Gender Studies and Political Science and International Relations at the University of Delaware. Her work primarily focuses on gender and sexuality in Latin America, sometimes within the context of armed conflict and political oppression. For her full biography, *see* University of Delaware, *WGS Faculty,* University of Delaware, (date last visited Aug. 28, 2023), https://www.wgs.udel.edu/faculty/wgs-faculty/pbh?uid=pbh&Name=Pascha%20Bueno-Hansen.

[24] BUENO-HANSEN, *supra* note 18, at 116.

[25] *Id.* at 118-19. *The author changed the real names of all subjects to protect their privacy.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 119.

Bueno-Hansen points to the relative lack of understanding of the realities of sexual coercion as a challenge to seeing cases prosecuted.[30] She points out that under domestic law in Peru, "marriage between perpetrator and victim resolves sexual violence and the children of rape… therefore, individual cases of sexual violence that have the goal of seeking justice do not receive much support."[31] This lack of understanding, while discussed in the context of domestic law in Peru, undoubtedly also still in some ways permeates international law despite the progress that has been made in recent decades.

3. Sierra Leone

The civil war in Sierra Leone offers a final example of sexual coercion. The Revolutionary United Front (RUF) committed numerous atrocities against women during the civil war in Sierra Leone.[32] These horrors include rape, human trafficking, and even the carving of RUF initials into the bodies of women, giving government army officials the impression the women were part of the RUF and leaving them vulnerable to retribution. However, not every instance of sexual coercion involved that level of violence. As with the examples above from Peru and Argentina, coercion operated so subtly in the lives of victims of sexual violence that even their own narratives describing the incident nearly erase all traces of it.

Zoe Marks, who set out to chronicle the stories of women in Sierra Leone and their interactions with RUF, prefaced her research by saying, "Women's stories, and the words and phrases used to tell them, carry intrinsic value for analysing power structures in the highly subjective realm of violent and non-violent sexual relations."[33] This focus on the specific facts, context, and conditions under which sexual relations happen is necessary to understand how coercion operates so subtly in these interactions.

One woman, Elizabeth, told Marks the story of her relationship with her RUF husband:[34]

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[30] *Id.* at 120-21.

[31] *Id.* at 120.

[32] Elisabeth Wood, *War and Sexual Violence*, in *Cultures of Fear: A Critical Reader* 222, 226-227 (Uli Linke & Danielle Taana Smith eds., 2009).

[33] Zoe Marks, *Sexual Violence in Sierra Leone's Civil War: 'Virgination', Rape, and Marriage*, 113 Afr. Aff. 67, 70 (2014).

[34] *Id.* at 79. * The author altered the names of subjects to protect their privacy.

> …I came to the next village, [and] I was captured by Commander D. In the RUF they gave me medicine, and I explained my story to them. After some time he asked me to have sex with him and to have his baby. I told him we're not staying in one place, we are just moving location to location and so it's not good to be pregnant… at first the sex was every day, and after some time I refused and then it was only every two days.[35]

Marks points out that while Elizabeth's capture against her will seems to suggest she had little choice but to acquiesce to her new husband's request for sex, Elizabeth still paints his delay in approaching her after her arrival as a positive.[36] She also highlights the ways she negotiated the terms of their relationship and her fertility.[37] Marks notes that in light of a prior violent rape Elizabeth had survived, this treatment by her RUF husband seemed relatively kind.[38]

Marks' emphasis on these nuances and her attempts to contextualize Elizabeth's story are commendable. However, they also underscore the point that coercion operates very subtly. Upon reading Elizabeth's story, one cannot help but conclude that her position as a captive of the RUF still left her without the power to genuinely consent to sex. Although the sexual encounters that occurred after the initial capture may well have been consensual, they still occurred in the context of captivity. Again, if viewed in that larger context of coercion, no one could believe that Elizabeth could genuinely consent to a sexual relationship with a man who had captured her and consistently disregarded her attempts to deny him. Her story is representative of that of numerous women affected by the RUF, and likely of women all over the world whose lives have been touched by armed conflict. These examples from Argentina, Peru, and Sierra Leone expose the prevalence of victims who were coerced into sex and the glaring need for a legal solution that adequately redresses their unique injury.

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

II. CURRENT JURISPRUDENCE AND REMAINING CHALLENGES

A. Brief Explanation of the Relationship Between Consent and the Reasonable Belief Standard

The law's current failure to fully address sexual coercion is at least partially the result of the reasonable belief standard. In jurisdictions across the world, a defendant may raise the affirmative defense of consent, which is measured under a reasonable belief standard. In other words, if the defendant can prove that he or she could have reasonably believed the victim consented, their defense succeeds. This defense survives even a finding that the victim did not in reality consent.[39] The danger is that a court, if it chooses to take a narrow view of the facts before it, will see that the defendant could have reasonably believed the victim consented, when in fact a broader view of the facts will reveal coercive circumstances made consent impossible. A brief explanation of the reasonable defense standard's place in the law is necessary to understand how deeply entrenched it is in rape law generally and the problems it can create when applied to inherently coercive circumstances.

The law's prioritization of a victim's consent is a relatively recent development in rape law. Historically, rape prosecutions were concerned primarily with proving that the defendant used force (or the threat of force) to make the victim submit.[40] Along with proving force, the prosecution needed to show that the victim resisted in order to prove she had not consented to sex with the defendant.[41] This approach places an inappropriately heavy concentration on the victim's actions, leading to an intensive inquiry into the particulars of the victim's behavior, "using her actions as evidence of her lack of consent, the defendant's use of force, and his intent."[42] This intense focus on the victim's actions (rather than on the actions of the defendant, the person actually being charged with a crime) led some courts to interpret a victim's submission or lack of resistance as consent.[43] In other words, the lack of resistance meant there must have been a lack of force, and thus the defendant had not done anything to overpower the victim's will.

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[39] *See supra* note 2 (providing a fuller explanation of the affirmative defense of consent); *see generally* Ashlee Gore, *It's All or Nothing: Consent, Reasonable Belief, and the Continuum of Sexual Violence in Judicial Logic,* 30(4) SOC. & LEGAL STUD. 522, 522-40 (2014).

[40] Berliner, *supra* note 9.

[41] *Id.*

[42] *Id.*

[43] *Id.*

More recently, several jurisdictions have adopted an approach that asks whether the defendant had sex with the victim without the victim's consent.[44] The prosecution of rape and related sexual assault crimes then centers on the defendant's disregard for the victim's will in carrying out the assault. Other jurisdictions still require a showing of force to prove a charge of rape.[45] The force requirement approach is inadequate as it fails to recognize those instances of rape and sexual assault where the defendant takes advantage of the victim with little explicit force, but instead does so through more subtle and coercive methods. The force requirement approach is slowly being abandoned in favor of the approach that focuses more on whether the victim gave consent or not.

However, some scholars still insist that the consent approach does not adequately redress the harm of sexual violence but instead perpetrates dangerous stereotypes. Some argue that a legal approach emphasizing consent "reinforces the idea of women as property, concerned primarily with the unsanctioned use of the body" and "reduces sex to a transaction" where consent is given by one party and taken by another.[46] Others harbor concerns that a legal focus on consent "may produce new sexual subjects who comply with these standards out of fear of criminalization 'rather than insistence on sexual autonomy or recognition of the harmful consequence of coerced sex.'"[47] Scholars also worry that such a mechanical approach to consent may fail to adequately emphasize the fluidity of consent that, once given, can still be withdrawn at any point.[48] While scholars maintain concerns about the use of the consent-focused approach to rape and sexual violence prosecution, the approach far outshines the once widely used force requirement approach and is one step closer to a comprehensive legal approach that properly recognizes the reality of coercion in rape and sexual assault prosecutions.

Countries across the world vary in their approach to the prosecution of rape and sexual assault. A number of them apply the reasonable belief

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[44] *See* Anderson, *supra* note 1, at 52 (discussing the standard in the Canadian Criminal Code); Anderson, *supra* note 1, at 58 (describing how the UK Sexual Offenses Amendment Act of 1976 explicitly omitted any mention of force as a required element of rape).

[45] IONL ZAMFIR, DEFINITIONS OF RAPE IN THE LEGISLATION OF EU MEMBER STATES 2, 8 (Eur. Parl. Rsch. Serv. eds. 2024).

[46] Eithne Dowds, *Redefining Consent: Rape Law Reform, Reasonable Belief, and Communicative Responsibility,* 49 J. L. AND SOC'Y 633, 834 (2022).

[47] *Id.* at 833, (quoting Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women* 41 AKRON L. REV. 865, 876 (2008)).

[48] Dowds, *supra* note 41, at 834.

standard when evaluating the defendant's actions toward the victim. Germany is just one jurisdiction that utilizes the reasonable belief standard.[49] Germany's Criminal Code defines rape as:

> (1) Whoever, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs a penalty of imprisonment for a term of between six months and five years.[50]

This definition's explicit use of the term "discernable will" places an emphasis on the victim's ability to discernably verbalize or otherwise indicate consent. This indicates that the defendant's guilt hinges on whether he had a reasonable belief that the victim consented. Similarly, England, Wales, and Northern Ireland also evaluate the defendant's actions under the reasonable belief standard.[51] There, the courts ask the jury to consider any steps taken by the defendant to obtain the victim's consent when determining whether the defendant's belief that the victim consented was reasonable, which still leaves the defendant free to present evidence of consent.[52]

However, allowing defendants to use consent as an affirmative defense where consent is impossible denies the reality of coercion. As one author points out, "…Such oppositions like…rape/not rape are completely inappropriate to the ambiguity of sexual violence…Women's experiences of such violence include a range of connected sexual acts involving different levels of consent, coercion, or force."[53] Again, coercion may operate incredibly subtly. The law's failure to recognize this fact ignores victims who are subjected to sexual abuse through coercion so subtly that a defendant may overcome it through an affirmative defense of consent. The elimination of consent as an affirmative defense under inherently coercive circumstances would eliminate the problems created by this reasonable belief standard on which the affirmative defense of consent is based.

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[49] *Id.* at 829.

[50] Strafgesetzbuch [StGB] [German Crim. Code], § 177 (1998), as last amended by art. 2 of the Act of 22 Nov. 2021.

[51] Sexual Offenses Act 2003, c.42, §1 (governing Eng. and Wales); The Sexual Offenses (N. Ir.) Order 2008 No. 1769 (N.I. 2), §5; *see generally*, Dowds, *supra* note 41, at 829-830.

[52] Dowds, *supra* note 41, at 829-830.

[53] Gore, *supra* note 36, at 531.

B. History and Existing State of International Law Jurisprudence on Sexual Violence

International criminal law and international human rights law undoubtedly condemn rape and all forms of sexual violence. Following World War II, the Geneva Conventions were among the first bodies of law to universally condemn sexual violence.[54] Article 27 of the Fourth Geneva Convention represents international law's first modern attempt to criminalize sexual violence. It reads: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[55] The Fourth Convention also defines which crimes constitute "grave breaches" under the Convention. The grave breaches, which include heinous crimes like wilful killing, torture, unlawful deportation and confinement, and the taking of hostages, are a specific enumerated list that the Convention drafters regarded as particularly egregious (and were obviously conceptualized specifically in the wake of WWII).[56] While rape and sexual violence meet the qualifications for a grave breach (since the crime of "wilfully causing great suffering or serious injury to body or health" is on the list), they still are not specifically enumerated.

Since the Geneva Convention's creation, sexual violence has commanded ever greater attention, and scholars have endeavored to understand its complexities better. Both international criminal law and international human rights law condemn any form of sexual violence, and it has been prosecuted as genocide, a crime against humanity, and a war crime.[57] The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) produced landmark sexual violence jurisprudence.[58] The ICTY was the first international tribunal to recognize an individual instance of rape as a crime against humanity.[59] Both criminal tribunals developed case law for other national and international institutions, and perhaps most importantly,

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[54] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, U.N.T.S. 170.

[55] *Id.* at 177.

[56] *Conventions and Additional Protocols,* INT'L COM. OF THE RED CROSS, (author's access date/time needed), https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm.

[57] Triffterer, *supra* note 4 at 434.

[58] *Crimes of Sexual Violence,* U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, (author's access date/time needed), https://www.icty.org/en/features/crimes-sexual-violence.

[59] *Id.*

created norms that shape the practice of international criminal law in the International Criminal Court.[60]

In 2002, the Rome Statute created the International Criminal Court (ICC), which investigates and tries individuals charged with crimes of concern to the international community under four categories: genocide, war crimes, crimes against humanity, and the crime of aggression.[61] The Rome Statute represents another significant step forward in sexual violence jurisprudence for its recognition of rape specifically as a crime against humanity and a war crime. Article 7(1)(g) of the Rome Statute includes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" as a crime against humanity.[62] Article 8(2)(b)(xxii) similarly condemns rape as a war crime.[63] These two provisions, read together, reflect a condemnation of rape during armed conflict and an intention to prosecute it seriously.

C. Challenges Remaining in Sexual Violence Jurisprudence

While the body of international criminal law has developed dramatically since the Geneva Convention, significant gaps continue to leave certain victims without legal recourse. International criminal law and international human rights law undoubtedly condemn rape and all forms of sexual violence. However, there is still not completely adequate legal recourse for victims under the existing laws. Some have noted that the phrase, "indecent assault" in the Geneva Convention is too broad a term to be effective in prosecuting the crime and undercuts the severity of the crime by framing acts of sexual violence as assaults merely against a woman's honor.[64] The Convention clearly wrote this language during this time because it alludes to traditional gender norms and conceptions of felinity and women's bodies.

The other notable problem with Article 27 is that nowhere in the text does it address sexual relations resulting from coercion. While the term "indecent assault" in Article 27[65] may be broadly construed to encompass such instances, an instance of sexual activity as a result of coercion may not

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[60] *Id.*

[61] *About the Court,* INT'L CRIM. CT., (author's access date/time needed), https://www.icc-cpi.int/about/the-court.

[62] Rome Statute of the Int'l Crim. Ct., art. 7, July 17, 2002, 90 U.N.T.S 2187.

[63] Rome Statute of the Int'l Crim. Ct., art. 7, July 17, 2002, 90 U.N.T.S 2187.

[64] Aileen S. Kim, Note, *Sexual Violence in Armed Conflict under International Law*, 36 CONN. J. INT'L L. 2, 12 (2020).

[65] *See supra* note 49.

qualify under even this part of the Convention because sexual coercion is not explicitly prohibited in the text of the Convention.[66] Article 27's protections do not extend far enough to cover victims of sexual relations that resulted from coercive control.[67] The specific enumeration of rape as a crime against humanity in the Rome Statute largely solved this problem. However, not every country has yet signed onto the Rome Statute, including major geopolitical powers like the United States, Russia, and China. Thus, crimes committed by the militaries of those countries do not fall under the jurisdiction of the ICC, leaving only the Geneva Convention (to which many more countries are a party) as a means of recourse for victims of crimes by members of those countries. Further, the Convention does not explicitly include rape or sexual violence in its list of "grave breaches."[68] Again, some have advocated having rape added to the list of grave breaches in order to ensure greater protection for victims[69] but this has yet to come to fruition. This would indeed be a step in the right direction toward protecting victims.

Finally, and perhaps most importantly, there is no consensus among international criminal tribunals on whether "non-consent" should be an element of rape. The ICTR and ICTY have announced different definitions of rape through their respective case law. When the ICTR decided the *Akayesu* case, it eliminated "non-consent" as an element, meaning the Prosecutor no longer needed to prove beyond a reasonable doubt that the victim did not consent.[70] That Chamber reasoned that the inherently coercive circumstances during which the rape occurred (during the genocide in Rwanda) made genuine consent impossible.[71] However, the ICTY announced in its *Kunarac* decision that the Prosecutor must prove consent. However, it explained that consent, for purposes of the law, could be "assessed in the context of the surrounding circumstances."[72] Thus, the ICTY acknowledged the effect of coercion on consent but did not rule out

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[61] Kim, *supra* note 59, at 11.

[67] *Id.*

[68] *Id.* at 12.

[69] *Id.*

[70] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgement, ¶ 488-489 (Sept. 2, 1998); *See also* Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, 21 (Nov. 6, 1997), https://www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf.

[71] Sellers, *supra* note 65, at 20.

[72] Prosecutor v. Kunarac, Case No. ICTY 96-23, Trial Chamber Judgement, ¶ 460 (Feb. 22, 2001).

the possibility of genuine consent under coercive circumstances. The ICTR's *Gacumbitisi* decision similarly recognized the need for the court to examine background circumstances and held that a trial chamber was "free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim."[73] This patchwork of decisions does admittedly recognize the effect of coercion on consent and the necessity of broadening the scope of the inquiry when examining the facts of a rape charge. However, none of these cases carries more legal weight than another because they exist concurrently. Therefore, no one of them is the controlling precedent.[74]

In recent years and in response to the criminal tribunals' decisions, legal scholars have debated the best approach to the consent element of rape and other crimes of sexual violence.[75] Three approaches to prosecuting sexual violence have emerged as the clearest elucidation of the debate. The first approach treats non-consent as an element that the prosecution must prove to get a conviction.[76] A second approach eliminates non-consent as an element.[77] A third approach incorporates the second, yet allows the defendant to use consent as an affirmative defense.[78] The latter two approaches are grounded in the increasingly recognized idea that victims may not be able to genuinely consent in an inherently coercive environment like a prisoner of war camp.[79] There is still dispute on which approach international law ought to take in its view of consent.[80]

While the international criminal tribunals offer helpful examples for courts like the ICC, they still exist simply as a patchwork of suggestions that lack the force to effectively shape future case law in this area. If applied to a set of facts similar to the examples from Argentina, Peru, and Sierra Leone, it is unclear how an international criminal court would treat the issue of coercion. Clearly, some of the above criminal tribunal decisions treat non-consent as an element to be proved, while others presume non-consent under coercive circumstances. However, none are clear on whether the defendant may still raise an affirmative defense of consent. Thus, the Geneva Convention, the ICTY, and ICTR still fail to fully recognize the reality of coercion in their application of the law.

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[73] Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgment, ¶ 153 (July 7, 2006).
[74] Sellers, *supra* note 65, at 27.
[75] *See* Schomburg, *supra* note 3, at 123.
[76] *See* Schomburg, *supra* note 3, at 123-24; Anderson, *supra* note 1, at 52.
[77] *See* Schomburg, *supra* note 3, at 123-24; Anderson, *supra* note 1, at 52.
[78] *See* Schomburg, *supra* note 3, at 123.
[79] *Id.*
[80] *Id.*

III. A STRONGER MECHANISM IS NECESSARY FOR VICTIMS OF SEXUAL COERCION

International criminal law and sexual violence jurisprudence can better redress the harm to victims now than at any other point in history. Nonetheless, prosecutors still face glaring inconsistencies in how the law treats rape and sexual violence, which cripple their prosecutions. The fact that a defendant may bring forward the affirmative defense of consent under inherently coercive circumstances creates a barrier to justice for victims of sexual coercion. Victims of rape perpetrated under circumstances like those of the examples from Argentina, Peru, and Sierra Leone may be left without legal recourse. Eliminating this defense when circumstances are inherently coercive creates a stronger mechanism for prosecuting crimes involving sexual coercion.

A. Eliminating an Affirmative Defense of Consent Resolves a Legal Loophole in the Current Structure of the Law

The third scholarly approach to non-consent mentioned above allows the defendant to use consent as an affirmative defense. Despite being the most progressive of the three, it still contains a glaring inconsistency: if the prosecution is not required to prove consent under inherently coercive situations, why is the defendant permitted to use consent as an affirmative defense under the same set of inherently coercive circumstances? This loophole that leaves victims of sexual coercion without legal redress.

A further explanation of the ICTR statute will better illustrate this inconsistency. The ICTR, in a leading precedent, recognized rape as a crime against humanity. A single instance of rape was used to secure convictions under ICTR Article 3(c) enslavement, 3(e) torture, 3(h) persecution, and 3(i) other inhumane acts.[81] The prosecution did not have to prove the victim did not consent to the acts under any of those charges. However, if that same instance of rape were to be prosecuted under 3(g) rape, it would then be necessary for the prosecution to prove that the victim did not consent.[82]

This necessity to prove consent leaves victims of sexual coercion without adequate legal recourse. Under a set of facts similar to the above

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[81] S.C. Res. 955 art. 3 (Nov. 8, 1994).
[82] Schomburg, *supra* note 3, at 126.

examples from Argentina, Peru, and Sierra Leone, where there were no acts of violence that could constitute torture, a victim's only option may be to bring a claim under Article 3(g). But in cases where the defendant obtained "consent" through more subtle coercion, a defendant may walk away simply because a court may construe the victim's agreement to continue a sexual relationship with their captor as consent. Refusing defendants an affirmative defense of consent under inherently coercive circumstances would resolve this inconsistency.

Both the ICTY and ICTR have proven that cases of sexual assault can be successfully prosecuted in the international criminal context. The ICTY provided a landmark moment for sexual violence jurisprudence as the first instance in which rape was prosecuted as a crime against humanity. Likewise, at the ICTR, Jean-Paul Akayesu, a Hutu leader, was charged and ultimately convicted of the crime of genocide based on his and his subordinates' acts of rape and sexual violence against Tutsi victims.[83] These convictions demonstrated that sexual violence, even if perpetrated by individuals, can and should be considered as an act of genocide and a crime against humanity when perpetrated in the context of war.[84] Breakthrough convictions like these demonstrate all the more reasons the barriers to justice for victims who have suffered under coercive circumstances must be removed. Barring defendants from utilizing consent as an affirmative defense in cases fraught with coercive circumstances is vital to securing convictions and clearing the way to justice for victims.

The examples from Peru, Argentina, and Sierra Leone illustrate the necessity to fill this gap. The gap will very well persist during future armed conflicts. The victims of the sexual assaults that took place under intense coercion and were framed to look consensual have limited access to legal recourse because of this gap in the sexual violence jurisprudence of international criminal tribunals.

Some may argue that the Rome Statute and the ICC have replaced the need to rely on the jurisprudence of past international criminal tribunals like the ICTY and ICTR. However, as the next section will show, the same gap persists in the Rome Statute. The following pages will thus also advocate for an interpretation of the Rome Statute that will address and resolve this gap.

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[83] Kim, *supra* note 59, at 13.
[84] Kim, *supra* note 59, at 13-14.

IV. DETERRING RELATIONSHIPS BASED ON SEVERE POWER IMBALANCES BY REINTERPRETING THE ROME STATUTE

A. Implications for Future Prosecutions of Rape Under International Law

The international criminal tribunals of the past already serve as a model for the ICC's jurisprudence on sexual violence.[85] They will likely also serve as a model for the prosecution of future crimes that occur during armed conflicts. This underscores the need for consistent case law that adequately addresses the claims of victims of sexual coercion. A legal approach that fully recognizes the impossibility of consent under coercive circumstances could have important implications for the next criminal rape trials when they take place.

The next opportunity for real change in sexual violence jurisprudence may be in the eventual prosecution of Russian soldiers for crimes committed during the invasion of Ukraine. The atrocities perpetrated against Ukrainian citizens demonstrate the continuing reality of sexual violence. Reports of women being raped, sometimes by multiple offenders, are already well publicized.[86] These violent incidents, which obviously constitute rape, could still be challenging to prosecute. Imagine the even greater challenge in prosecuting any subtle cases of sexual coercion in Ukraine that mirror the cases of women in Argentina, Peru, and Sierra Leone.

Thankfully, the ICC will have jurisdiction over crimes against humanity committed by Russian soldiers in Ukraine, including rape.[87] In 2015, Ukraine, although not a party to the Rome Statute, placed itself under the jurisdiction of the ICC indefinitely.[88] But the affirmative defense gap in international criminal tribunal jurisprudence will still bear heavily on the future prosecution of Russian soldiers for crimes against Ukrainians.

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[85] *See generally* Cottier, *supra* note 3, at 434-440 (describing the jurisprudence of the ICTY and ICTR to explain its effect on the drafters of the Rome Statute).

[86] Laura Wamsley, *Rape has reportedly become a weapon in Ukraine. Finding justice may be difficult*, NPR (Apr. 30, 2022, 9:00 AM), https://www.npr.org/2022/04/30/1093339262/ukraine-russia-rape-war-crimes.

[87] Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, Just Security (Sept. 20, 2022), https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/.

[88] *Id.*

Reinterpreting the Rome Statute as prohibiting the defendant from bringing an affirmative defense of consent when circumstances are inherently coercive will resolve this gap.

B. Reinterpreting The Rome Statute's Elements of Crimes to Prohibit an Affirmative Defense of Consent Under Inherently Coercive Circumstances

The Rome Statute can be read to better address the subtle nature of sexual coercion. The Rome Statute contains a supplement known as Elements of Crimes ("EoC") that defines the crimes addressed in the Statute itself. Article 9 of the Rome Statute explains that "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8, and 8 *bis*," and that "Elements of Crimes and amendments thereto shall be consistent with this statute."[89] The drafters of the Rome Statute, therefore, intended for the EoC to be read as part of the Statute although not directly included in it. Article 8(2)(b)(xxii)-1 of the EoC explains that sexual assault can be perpetrated "by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[90] This clarification is a powerful acknowledgment of the reality of coercion and its effect on genuine consent during armed conflict.

A reading of the Rome Statute that bars the affirmative defense of consent is consistent with the goals of the drafters. The Rome Conference, which ultimately developed the Rome Statute and the EoC that exists today, was particularly dedicated to addressing the issue of rape.[91] Multiple delegates from countries all over the world unequivocally expressed support for stronger protections for women through the ICC's jurisdiction and a need to recognize rape specifically as a crime against humanity and a war crime.[92] This focus on punishing perpetrators of sexual violence against women in wartime most certainly influenced not only the drafting of the Rome Statute itself, but also of the accompanying EoC. The choice by the drafters to recognize coerced sex as sexual assault in the elements highlights the reality that violence against women can take many shapes and subtle coercive forms.

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[89] Rome Statute of the Int'l Crim. Ct., *supra* note 4, at 8.

[90] Elements of Crimes, *supra* note 4, at 28.

[91] Cottier, *supra* note 3 at 432; *See also* TUBA INAL, LOOTING AND RAPE IN WARTIME: LAW AND CHANGE IN INTERNATIONAL RELATIONS, at 133-34 (Uni. of Penn. Press, 2013).

[92] Inal, *supra* note 84, at 141-142.

However, the Rome Statute and the Elements of Crimes do not go so far as to explicitly eliminate the affirmative defense of consent for the defendant. This note instead insists on a strict approach rather than a fact-specific inquiry into the case by eliminating the affirmative consent defense entirely. Suppose the defendant had a sexual relationship with the victim in inherently coercive circumstances where genuine consent was impossible. In that case, he or she should not be able to mount the affirmative defense of consent no matter the particulars of the case. However, the Rome Statute's EoC can be read as a bar to the affirmative defense of consent when circumstances are inherently coercive.

The drafting of both rape laws in Articles 7 and 8 of the Rome Statute was largely influenced by the case law of international criminal tribunals before it.[93] None of the ICTY or ICTR's decisions outright bar defendants from raising an affirmative defense of consent.[94] The closest any of those decisions reach to barring consent as an affirmative defense is the *Kunarac* Appeals Chamber, which noted that several national legislatures which imposed strict liability on a person in power who engaged in sexual acts with a victim by exploiting that victim's particular vulnerability.[95] However, the Chamber itself did not announce a rule prohibiting an affirmative defense of consent.[96]

One commentator on the drafting of the Rome Statute notes that at least one influential source on the drafters actually allowed room for defendants to raise an affirmative defense of consent.[97] The UN Special Rapporteur on Contemporary Forms of Slavery (1998) concluded that coercive situations "establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime."[98] However, the UN Special Rapporteur also clarified that, "the issue of consent may, however, be raised an affirmative defense as provided for in the general rules and practices established by the International Criminal Tribunal for the Former Yugoslavia."[99]

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[93] Cottier, *supra* note 4, at 438.

[94] Cottier, *supra* note 4, at 440.

[95] Prosecutor v. Kunarac, Case No. ICTY 96-23, Appeals Judgement, ¶ 131 (June 12, 2002); *See also* Cottier, *supra* note 4, at 440.

[96] Kunarac, Case No. ICTY 96-23, ¶ 131.

[97] Cottier, *supra* note 3, at 440 n.836.

[98] *Id.*

[99] Gay J. McDougall (Special Rapporteur on Forms of Slavery), *Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict: Final Report,* para. 25, U.N. Doc

Ultimately, the Preparatory Committee, which drafted the Rome Statute and the Elements of Crimes, seems silent on the affirmative defense issue specifically. Instead, the Committee laid out four alternative circumstances in the Elements under which a sexual act could constitute rape as a war crime under Article 8:

1. The invasion was committed by force,
2. [O]r 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,
3. [O]r by taking advantage of a coercive environment,
4. [O]r the invasion was committed against a person incapable of giving genuine consent.[100]

Despite its silence on the issue of whether to allow an affirmative defense of consent, the Rome Statute and its accompanying EoC could be read as allowing an affirmative defense given the influences the drafters considered as they developed the EoC. That is why this note seeks to show that the Rome Statute and its Elements should instead be read as to bar defendants from raising consent as an affirmative defense when circumstances are inherently coercive. This reinterpretation is equally supported by the drafting history of the Statute and the Elements and reflects the drafters' desire to prosecute rape committed under coercive circumstances.

C. Future Prosecutions of Rape under Inherently Coercive Circumstances by Domestic Tribunals

The ICC's power to adjudicate only goes as far as the parties subject to the Rome Statute. Again, not every country has signed onto the Rome Statute, including major geopolitical power players like the United States and China. Thus, if the perpetrator of rape is a citizen of one of the countries not party to the Statute, the Rome Statute is not binding on that defendant. Other countries, unlike Ukraine, have not subjected themselves to the ICC's jurisdiction will not be so lucky as to benefit from its protection if neither they nor the perpetrator's country are parties to the Statute. Victims are then left only with the existing jurisprudence laid down by international criminal tribunals like the ICTY and ICTR. Therefore, the change this note proposed earlier in the legal approach to the consent

E/CN.4/Sub.2/1998/13 (June 22, 1998); *see also* Cottier, *supra* note 4, at 440 (particularly footnote 836 on that page).

[100] Elements of Crimes, *supra* note 4, at 28.

element in a charge of rape (i.e., the elimination of consent as an affirmative defense) will almost certainly have deep implications for future prosecutions of rape during armed conflicts that do not come under the jurisdiction of the ICC.

Article 17 of the Rome Statute grants the court jurisdiction over certain domestic cases in the event that they were not adequately prosecuted.

> (1) The Court shall determine that a case is inadmissible where: (a) The case is being investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.[101]

Allowing an affirmative defense of consent is arguably not a genuine prosecution, as articulated under Article 17. This is because a consent defense is logically impossible due to the coerced victim's inability to offer genuine consent. As illustrated above in the cases in Argentina, Peru, and Sierra Leone, a defendant may escape conviction on the basis that victim seemingly consented. Suppose a member State allows the defendant to do so. In that case, the ICC should consider this an "inability to genuinely prosecute" the case because such an approach is inconsistent with the reality of coercion. If domestic war tribunals would prefer to keep their cases out of the jurisdiction of the ICC, they should refuse to allow defendants to use the affirmative defense of consent.

If allowing an affirmative defense is considered an inability to genuinely prosecute, the ICC gains jurisdiction over even more cases than it would otherwise have. This arguably expands the jurisdiction of the ICC far beyond what member States may be comfortable with or envisioned when they signed onto the Rome Statute. However, if domestic tribunals decided not to allow the affirmative defense of consent, then the ICC would no longer be able to take jurisdiction over those domestic cases through the "genuine prosecution" exception. Prohibiting the consent defense would keep more cases within the exclusive jurisdiction of domestic tribunals that are arguably better equipped to litigate them and eliminate the need to expand the jurisdiction of the ICC. Therefore, this note also calls for domestic tribunals prosecuting cases under international law to prohibit

[101] Rome Statute of the Int'l Crim. Ct., *supra* note 4, at 10-11.

defendants from raising an affirmative defense of consent when circumstances are inherently coercive.

CONCLUSION

While much of this note deals with a proposed modification to international criminal law, there may also be applications for domestic law. This note argues that consent should be unavailable as an affirmative defense under inherently coercive circumstances. While coercive circumstances certainly prevail during armed conflicts where towns are invaded, and people are taken prisoner, coercion still exists in all kinds of circumstances that are normally governed by domestic law. Some authors have called for a greater emphasis on this through the use of a coercion standard when it comes to a legal approach to rape.[102]

Scott Anderson, one proponent of the coercion standard, argues that approaching the crime by asking whether a victim was coerced more accurately captures the wrong central to the crime of rape and recognizes the role that power dynamics play in the crime.[103] Anderson goes on to argue that where an imbalance of power creates a coercive situation, "it is possible to see these cases of acquaintance rape as employing coercion as well, and thus justifiably prohibited on the same basis as more stereotypical cases."[104] The coercion standard that Anderson and other advocate for aligns with the third approach mentioned above that calls for eliminating non-consent as an element of rape.

But even Anderson would not go as far as to eliminate consent as an affirmative defense that the defendant may raise at trial.[105] However, once again, allowing an affirmative defense remains inconsistent with the reasoning behind eliminating non-consent as an element in the first place. While not specifically addressed in this note, the solution proposed here could also be applied to rape under inherently coercive circumstances under domestic law in the U.S. and other common law systems.

In conclusion, rape and sexual violence during armed conflict remain a consistent threat to the safety of citizens affected by conflict, particularly women. While international criminal law has evolved to better protect and redress the serious harm done to victims of sexual violence, it still fails to adequately address the harm of sexual coercion. While approaches that

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[102] *See also* Anderson, *supra* note 1, at 73.
[103] *Id.* at 58-59, 74.
[104] *Id.* at 79.
[105] *Id.* at 52.

expand the definition of consent to include an examination of the background circumstances and power dynamics at play between two parties, there still remains a lack of consistent or controlling jurisprudence on the consent element. While some would argue that prosecutors should still have to prove non-consent, this ignores the reality of coercion and how it affects a victim's ability to give genuine consent. Even those who advocate for eliminating the non-consent element would still allow the defendant to raise consent as an affirmative defense, which stands inconsistent with the whole rationale for eliminating non-consent as an element in the first place. Completely eliminating consent as an affirmative defense when circumstances are inherently coercive both recognizes the reality of coercion and resolves this inconsistency in the existing jurisprudence. Thus, doing so will create a stronger mechanism for successfully prosecuting sexual coercion that has powerful implications for rape victims in the international criminal context.