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## **Submission to the United Nations Special Rapporteur on violence against women's thematic report on rape as a grave and systematic human rights violation and gender- based violence against women**

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**Submission to the United Nations Special Rapporteur on violence against women's thematic report on rape as a grave and systematic human rights violation and gender-based violence against women**

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**Executive Summary**

This submission addresses issues relating specifically to the definitional construction of the crime of rape in international and domestic criminal law. It makes concrete recommendations in relation to the role of consent and coercion in defining rape based on the author's significant published research in the area, to aid the Special Rapporteur in her quest to harmonise criminal laws on rape.

The key recommendations are as follows:

- Combine both consent and coercion-based models of rape
- Define consent with reference to the context within which it should be given and include an affirmative component requiring communication
- Where reference is made to steps taken by the defendant provide some indication as to what amounts to a 'step'
- Include within the list of coercive circumstances factors such as the use of psychological oppression or abuse of power; taking advantage of a coercive environment; the use of intimidating or coercive conduct
- Include a provision stating that submission or lack of resistance does not constitute consent
- Include a provision stating that consent can be withdrawn at any time
- Design procedural rules to control questioning on consent similar to those at the International Criminal Court (ICC)

This note is a response to the call for submissions to the United Nations Special Rapporteur on violence against women's thematic report on rape as a grave and systematic human rights violation and gender-based violence against women.

According to the call, a key aim of the thematic report to be presented to the UN General Assembly in September 2020 by the United Nations Special Rapporteur on violence against women, its causes and consequences, Ms. Dubravka Šimonović, is to collect as much information as possible on the criminalization and prosecution of rape, and to thereby support and encourage a process of harmonization of national criminal laws and systems and practice with international standards on rape and sexual violence in both peacetime and during conflicts.

To facilitate such harmonization, the Special Rapporteur intends to provide recommendations to States and other stakeholders on key international human rights standards that should be integrated in national criminal justice responses; to provide access to justice and support for

victims of rape; to break the cycle of impunity; and to prosecute perpetrators, ensuring that they are not protected by hidden domestic norms that are still part of criminal law or criminal procedure.

Although the call addresses a number of issues, this note focuses on the particular issues surrounding the definitional elements of the crime of rape. Rape, as detailed by the Special Rapporteur, has been recognized as a crime of sexual violence, a war crime, a crime against humanity and/or genocide in specific circumstances and it has been criminalized and prosecuted in a large number of States and jurisdictions but in different ways: a key difference being the focus on consent versus force, and more recently, coercion in the definitional construction of the crime.

In drawing from my own significant research in this area,<sup>1</sup> where I have drafted legislative amendments to definitions of rape at the level of international and domestic criminal law, this note provides important insights that may inform any recommendations made by the Special Rapporteur. The note is split into four sections: the first section, canvasses key human rights standards relating to the definition of rape, although the Special Rapporteur will be familiar with these standards they are set out here to provide context to the remainder of the paper and its position in relation to the centrality of consent within definitions of rape. The second section sets out the definition of rape at the International Criminal Court (ICC), highlighting the background to this definition and the controversy surrounding the appropriateness of the elements of consent versus coercion. The third section engages with domestic definitions of rape, identifying various models of consent-based definitions and highlighting their strengths. The final section draws the paper together by suggesting that rape definitions can be harmonised by combining the consent and coercion-based approaches to defining rape into one definition with consent at the centre and a variety of consent vitiating factors contained within a broad list of coercive circumstances. Some suggestions are also made in relation to specifying the element of consent and creating rules of procedure and evidence to control legal questioning on this element.

## **I. International Human Rights Provisions**

There is no universal approach to defining the crime of rape, instead there are numerous different formulations of rape across domestic legal systems as well as within the legal texts and jurisprudence of international criminal courts such as the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR).

Nonetheless, within the realm of international human rights law there has been an attempt to prescribe clearer normative limits on the content and application of rape laws within individual states. Developments in this area are also of relevance to international criminal law, and particularly the ICC which provides at section 21(3) of its statute that the law applied by the Court must be consistent with human rights standards.<sup>2</sup>

<sup>1</sup> See specifically, E. Dowds, *Feminist Engagement with International Criminal Law: Norm Transfer, Complementarity, Rape and Consent*. (Oxford: Hart Publishing, 2020); E. Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force' (2019), *The Modern Law Review*, 83(1): 35-63; E. Dowds, 'Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective' (2018) *International Feminist Journal of Politics*, 20(4): 624-643.

<sup>2</sup> Art 21(3) UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

A key case of relevance to defining rape is the 2003 case of *M.C. v Bulgaria*.<sup>3</sup> In this case the applicant argued that the domestic legal framework, which required proof of physical resistance by the victim, and the practice of the Bulgarian authorities in relation to the investigation of the case, constituted a violation of Bulgaria's positive obligations under the European Convention on Human Rights (ECHR).<sup>4</sup> Specifically, the victim alleged a breach of Article 3, the prohibition of torture, and of Article 8, the right to respect for private and family life. In relation to Article 3, the Court explained that States must take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals. Under Article 8 it was noted that positive obligations may involve the adoption of measures in the sphere of relations between individuals and that in the context of rape, 'where fundamental values and essential aspects of private life are at stake', this requires efficient criminal-law provisions.<sup>5</sup> As such it was asserted that States are obliged 'to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution'.<sup>6</sup>

While acknowledging that States enjoy a wide margin of appreciation, the European Court of Human Rights (ECtHR) explained that this is circumscribed by the ECHR provisions and, in interpreting them, the ECtHR must have regard to 'any evolving convergence' between Contracting States as to the standards to be achieved.<sup>7</sup> As such, the ECtHR conducted a survey of domestic and international criminal approaches to defining rape.<sup>8</sup> The purpose of this survey was to identify any 'evolving convergence' in relation to standards that must be achieved if the crime of rape is to be effectively criminalised.<sup>9</sup> Consequently the ECtHR noted a 'universal trend towards regarding lack of consent as the essential element of rape and sexual abuse',<sup>10</sup> and explained that any 'rigid' approach to prosecuting these crimes, such as those where physical resistance is required:

[R]isks leaving certain types of rape unpunished and thus *jeopardising the effective protection of the individual's sexual autonomy*. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of *any non-consensual sexual act*, including in the absence of physical resistance by the victim.<sup>11</sup>

Thus, the ECtHR acknowledged that a limited focus on violence and resistance is detrimental to the criminalisation and punishment of *all* forms of rape.

<sup>3</sup> *M.C. v Bulgaria* (Application no 39272/98) 4 December 2003.

<sup>4</sup> Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

<sup>5</sup> *M.C.* n 3 above, para 150.

<sup>6</sup> *Ibid.*, para 153.

<sup>7</sup> *Ibid.*, para 155.

<sup>8</sup> *Ibid.*, paras 88–108. Jurisdictions surveyed included: Belgium, Czech Republic; Denmark, Finland, France, Germany, Hungary, Ireland, Slovenia, England and Wales. The Court also looked at Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence, General Recommendation 19 United Nations Committee on the Elimination of Discrimination against Women and jurisprudence from the ICTY including *Prosecutor v Furundžija*, Case No. IT-95-17/1, Judgment (Dec 10, 1998); *Prosecutor v Kunarac, Kovac, Vukovic* No. IT-96-23&23/1, Judgment (Feb 22 2001).

<sup>9</sup> *ibid.*, para 155.

<sup>10</sup> *ibid.*, para 163. Trend evident at Inter-American Court Human Rights also, see *Case of the Miguel Castro-Castro Prison v Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs) para 306.

<sup>11</sup> *ibid.*, paras 164–66 (emphasis added).

The Committee on the Elimination of Discrimination against Women (CEDAW) contributed to this discussion in the 2010 case of *Vertido v the Philippines*.<sup>12</sup> This communication was based on the acquittal of the accused in the Regional Court of Davao City, Philippines, where the regional Court had expressed that ‘should the [complainant] really have fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties’.<sup>13</sup> As well as criticising the reliance on gender-based myths in this case,<sup>14</sup> the CEDAW asserted that the Philippines must review its definition of rape so as to place the lack of consent at its centre.<sup>15</sup> The CEDAW further stated that this may be achieved by enacting a definition that either: ‘requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or requires that the act take place in “coercive circumstances”, including a broad range of circumstances’.<sup>16</sup>

Attempts within human rights law have also been made to mediate between the two approaches and guide domestic law in this regard. Indeed, while the 2010 CEDAW Communication was specific to the Philippines, the individual opinion of the CEDAW member, Yoko Hayashi, recognised the potential for this case to universalise rape laws as it identified two approaches to defining rape, what could be described as the consent-based and coercion-based models of rape law, which *both* retain lack of consent as the central element.<sup>17</sup> This sentiment is reflected in the Explanatory report to the Council of Europe’s Convention on Preventing and Combating Violence Against Women and Domestic Violence.<sup>18</sup> The Explanatory Note provides that while the Convention itself defines rape with explicit reference to consent, states are free to decide the particular wording of their definitions. However, it asserted that where alternative terms such as force are used, states are *required* to interpret them in a way that encompasses the notion of a lack of freely given consent.<sup>19</sup>

Although these efforts are to be commended, and indeed both models have subsequently been placed on an equal footing and used by the United Nations and non-governmental organisations, such as Equality Now, as a benchmark against which to measure the

<sup>12</sup> *Vertido v The Philippines* (Communication No. 18/2008) Committee on the Elimination of Discrimination against Women July 2010.

<sup>13</sup> *Ibid*, para 2.9.

<sup>14</sup> See also human rights jurisprudence condemning states who allow myths and stereotypes to influence judicial assessments of rape and consent: *I.P. v. the Republic of Moldova* (Application no. 33708/12) 28 July 2015; *M.G.C. v. Romania* (Application no. 61495/1115) March 2016.

<sup>15</sup> *Vertido* n 12 above, para 8.9 (b)(ii). Article 266-A of the Revised Penal Code of the Philippines, as amended by Republic Act No. 8353 of 1997, reads “Rape: When and How Committed. Rape is committed: 1. By a man who shall have carnal knowledge of a woman under any of the following circumstances: (a) Through force, threat, or intimidation; (b) When the offended party is deprived of reason or otherwise unconscious; (c) By means of fraudulent machination or grave abuse of authority; and (d) When the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present. 2. By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person’s mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.”

<sup>16</sup> *Ibid*.

<sup>17</sup> Individual opinion by Committee member Yoko Hayashi (concurring), *ibid*.

<sup>18</sup> Council of Europe, Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 11 May 2011; Council of Europe Treaty Series – No 210, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*.

<sup>19</sup> Council of Europe Treaty Series, *ibid*, para 193.

effectiveness of domestic legal frameworks on rape,<sup>20</sup> questions remain over the precise way in which consent should operate under both models. For instance, I have argued elsewhere<sup>21</sup> that, in relation to the consent-based model, there is no indication of what precisely is meant by ‘unequivocal and voluntary agreement’. Under the coercion-based model, although the CEDAW has emphasised the importance consent, this element does not feature explicitly and no definition of consent is provided despite research evidencing consent itself as a contested concept.<sup>22</sup> In terms of *mens rea*, it might be assumed that consent will play a role under the coercion-based approach, but again this role is not explicit. Nor is it clear whether knowledge of the coercive circumstances under which the acts takes place would be required as part of the *mens rea* of this second model.

In light of this, the remainder of the paper provides a fuller exploration of these models in their international and domestic criminal contexts.

## II. International Criminal Law

Defining rape at the level of international criminal law has been fraught with difficulties, especially in relation to the elements of consent and coercion. While there is a significant body of case-law on this matter I will provide a summary below, paying particular attention to the International Criminal Court (ICC), as I have canvassed the case-law across different international criminal courts in more detail elsewhere.<sup>23</sup>

At the ICC, the crime of rape is defined in the courts ‘Elements of Crimes’ document as:

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.<sup>24</sup>

This definition develops an earlier definition constructed at the International Criminal Tribunal for Rwanda (ICTR) in the 1998 case of *Akayesu*,<sup>25</sup> prioritising issues of coercion and it also incorporates the provisions contained within the rules of procedure and evidence for the

<sup>20</sup> United Nations, *Handbook for Legislation on Violence Against Women*, Department Economic and Social Affairs Division for the Advancement of Women, 2010, 26; Equality Now, *The Worlds Shame the Global Rape Epidemic How Laws Around the World are Failing to Protect Women and Girls from Sexual Violence*, February 2017. See however, Campaign by Amnesty International, ‘Rape is rampant in Europe. That's why we need to talk about consent’ <https://www.amnesty.org/en/latest/campaigns/2018/11/rape-in-europe/> (last accessed 28 April 2020) and Amnesty International, Right to be free from Rape: Overview of Legislation and State of Play in Europe and International Human Rights Standards, 19 January 2018 Internal Index No: EUR 01/7757/2018.

<sup>21</sup> Dowds 2019 n 1 above.

<sup>22</sup> *Ibid.*

<sup>23</sup> See Dowds 2020 n 1 above, chapter 4 and Dowds 2018 n 1 above.

<sup>24</sup> Article 7(1)(g)-1, Article 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1, International Criminal Court (ICC), *Elements of Crimes*, 2002.

<sup>25</sup> *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) para 598: ‘a physical invasion of a sexual nature, committed on a person under circumstances that are coercive’.

International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR,<sup>26</sup> only mentioning consent in relation to incapacity. The ICC's definition is accompanied by Rules of Procedure and Evidence, with Rule 70 created to govern the procedure through which evidence of consent may be considered. It provides that:

- (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.<sup>27</sup>

Additionally, Rule 72 provides that where evidence of consent is to be adduced, notice must be provided to the Court regarding 'the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case'.<sup>28</sup> There shall then be an *in camera* hearing to hear the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, to determine the probative value of such evidence and the prejudice it may cause. Where such evidence is found to be admissible the Chamber must state, on record, the specific reasons for allowing the evidence.<sup>29</sup> Rule 71 is also noteworthy as it provides that 'a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness'.<sup>30</sup>

There have been mixed reactions to this definition. Some have applauded it due to oppressive context within which international criminal law operates rendering questions of consent inappropriate. Others, including this author, argue the ICC has omitted a central element of rape resulting in a definition that is both over and under inclusive i.e., does not include all non-consensual activity, while at the same time creating the impression that all sexual activity within situations of war/mass violence is coercive, and thus rape.<sup>31</sup>

In reflecting on the ICC's definition of rape it is interesting to note that this definition was constructed in 2000, not long after *Akayesu*,<sup>32</sup> above, but one year before the *Kunarac* case at

<sup>26</sup> International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995. Rule 96 provides: i) consent shall not be allowed as a defence if 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; ii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible.

<sup>27</sup> Rule 70, Rules of Procedure and Evidence of the International Criminal Court UN Doc PCNICC/2000/1/Add.1 (2002).

<sup>28</sup> Rule 72(1)(2)(3), *ibid*.

<sup>29</sup> *ibid*.

<sup>30</sup> *ibid*, Rule 71.

<sup>31</sup> For overview of literature see Dowds 2020 n 1 above, chapter 6.

<sup>32</sup> The *Furundžija* case, n 8 above, was also within this time frame and defined rape with reference to force at para 185: i) The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.

the ICTY, a case that substantially altered the legal landscape on rape by defining the crime with reference to consent.<sup>33</sup> International criminal tribunals that had the benefit of these different approaches to defining rape, such as the Special Panel for Serious Crimes East Timor (SPSC) and the Special Court for Sierra Leone (SCSL), amended the ICC Elements of Crimes definition in their jurisprudence to incorporate a non-consent element.<sup>34</sup> For instance, in 2003 the Special Panel for Serious Crimes East Timor (SPSC), in the case of *Cardoso*, adopted the Elements of Crimes definition of rape, yet stated that it was persuaded by the *Kunarac* Trial Chamber's assertion that absence of consent was the central element of the definition of the crime of rape.<sup>35</sup> As a result the SPSC supplemented the Elements of Crimes definition with the following *mens rea* element: 'the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim', providing that consent was to be assessed in the context of the surrounding circumstances.<sup>36</sup>

While the ICC does not explicitly centre its definition around consent it could be argued that, on the basis of the above developments, and in light of human rights standards, consent should be viewed as an implicit element of the ICC definition. However, the ICC has declared that save in the very specific situation of a person whose 'incapacity' was 'taken advantage of', the Elements of Crimes definition does not refer to the victim's lack of consent, and therefore this need not be proven.<sup>37</sup>

Nonetheless, the ICC definition has triggered some important discussions about how the terms contained within the definition should be interpreted and applied. For instance, the ICC has stated that in interpreting a 'coercive environment', it would be guided by the *Akayesu* case where the notion of 'coercive circumstances' was discussed:

[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.<sup>38</sup>

The ICC has also provided that there may be several factors which contribute to a coercive environment, such as the number of people involved in the commission of a crime; whether the rape is committed during a combat situation or immediately following one; or the rape is committed together with other crimes.<sup>39</sup> In addressing the specific requirement that an individual has taken 'advantage' of a coercive environment the ICC explained that, in the context of the 2019 *Ntaganda* case, when the soldier's took control of the different territories

<sup>33</sup> *Kunarac* n 8 above, criticised the *Furundžija* definition as being too narrow and defined rape at para 460 as: The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.

<sup>34</sup> *Jose Cardoso* Case No 04/2001 5 April 2003, paras 449–52; *Sesay et al* case Special Court for Sierra Leone, Trial Chamber, Judgment (SCSL- 04-15-T) 2009.

<sup>35</sup> *The Prosecutor v Jose Cardoso* Case No 04/2001 5 April 2003, para 449.

<sup>36</sup> *ibid*, para 452 quoting *Kunarac*.

<sup>37</sup> See *The Prosecutor v. Germain Katanga* ICC-01/04-01/07-3436 (March 7. 2014), para 965; *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/0501/08 (March 22 2016) para 105-6.

<sup>38</sup> *Bemba* *ibid*, para 103.

<sup>39</sup> *ibid*.



they were in a ‘position of authority *vis-à-vis* the local population’.<sup>40</sup> The court explained that, given the young age of many of the victims and the fact that the rapes coincided with the commission of other crimes, the soldiers had abused their power and taken advantage of a coercive environment by, for example, standing in front of their camp, picking out girls whose appearance they liked and calling them in for sexual intercourse. According to witnesses, the local population had ‘no choice but to endure’ these acts.<sup>41</sup>

The court has also given some indication as to the type of evidence the Court would take into consideration in determining whether force or threat of force or coercion has been established, suggesting that factors such as the number of perpetrators involved, whether they were carrying any weapons, the victims’ awareness or knowledge of violence in the surrounding area, words and conduct of the perpetrator and of witnesses to the crime, will all form part of the considerations.<sup>42</sup>

Defining rape at the level of international criminal law has thus been fraught with difficulties, especially in relation to the elements of consent and coercion. Interestingly, the controversy surrounding these elements can also be found in domestic contexts. In the following section I focus primarily on consent-based definitions in domestic criminal law and seek to demonstrate how the parallel debates occurring within the context of international and domestic criminal law can inform one another.

### III. Domestic Criminal Law

In the context of domestic criminal law, there are again different approaches to defining rape and they are also dominated by the elements of consent, force, and coercion.<sup>43</sup> Within my work, I have made the case that consent-based definitions are preferable to those that centre force or coercion due to the potential for the latter definitions to be narrowly interpreted.<sup>44</sup> However, there is a lot of variation amongst consent-based approaches and this can lead to confusion. Such confusion is heightened in light of the contemporary turn to affirmative models of consent: that is, models emphasising the need for positive affirmation before a sexual encounter is considered consensual, in both consent education and legal reform.<sup>45</sup>

For instance, in Belgium and New Zealand, consent is defined only in negative terms, that is, setting out the circumstances under which consent should be considered absent, such as where violence, threats of force/violence, coercion or deceit is used or where the complainant is asleep, so affected by drugs or alcohol or mentally impaired so as they cannot consent to or refuse sexual activity.<sup>46</sup> Whereas jurisdictions such as Canada, England and Wales, and South Africa, provide what could be described as ‘mixed’ definitions, containing a positive definition of what consent is, for example, ‘free’ or ‘voluntary’ agreement,<sup>47</sup> as well as a negative

<sup>40</sup> See *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06 (8 July 2019), para 945.

<sup>41</sup> *Ibid.*, para 945 and 548. See also para 979.

<sup>42</sup> *The Prosecutor v Jean-Pierre Bemba Gombo* (Case No ICC-01/05-01/08) Decision on the Confirmation of Charges (15 June 2009), para 171.

<sup>43</sup> For an overview of models in European context see European Institute for Gender Equality, Analysis of the National Definitions of Rape, October 2016 and Amnesty International n 20 above. In the United States see RAINN: <https://www.rainn.org/about-sexual-assault>.

<sup>44</sup> See Dowds 2019 n 1 above and Dowds 2020 n 1 above chapters 4 and 6. See also Amnesty 2018 n 20 above.

<sup>45</sup> See E. Dowds, ‘Rethinking Affirmative Approaches to Consent: A Step in the Right Direction’ in Killean, R., Dowds, E., and McAlinden, A.M. *Sexual Violence on Trial*. (Routledge Forthcoming 2021).

<sup>46</sup> Criminal Code 1867, Art 375 (Belgium); The Crimes Act 1961 of New Zealand, s 128A.

<sup>47</sup> See the Canadian Criminal Code 1985, s 273.1(1) requiring ‘voluntary agreement’; the 2007 Sexual Offences Act of South Africa requires ‘voluntary or uncoerced agreement’; the Sexual Offences Act 2003 (England and

definition setting out circumstances, similar to those described above, in which consent would be vitiated. The definition in England and Wales, which mirrors the definition in Northern Ireland, splits such situations into evidential and conclusive presumptions. The evidential presumptions include instances where, for example, the defendant uses force or where the complainant is unlawfully detained,<sup>48</sup> and provide that once the prosecution has proven these elements it will be presumed that the victim did not consent and that the defendant knew that the victim did not consent. The defence may, however, produce evidence to rebut the prosecution's case. The conclusive presumptions include instances where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act for instance.<sup>49</sup> Once the prosecution has proven this element it will have established that the victim did not consent and that the perpetrator did not reasonably believe the victim consented.

In terms of assessing consent for the purpose of establishing the *actus reus* and *mens rea* of the crime, there are again different approaches. For instance, jurisprudence from Canada and England and Wales provide that, for the *actus reus*, consent must be considered from the complainant's state of mind,<sup>50</sup> as opposed to any acts of resistance.<sup>51</sup> Ireland, New Zealand and the Australian State of New South Wales also include a statement in their statutory definition of rape to the effect that a lack of resistance does not constitute consent.<sup>52</sup> Recently, a review into serious sexual offences in Northern Ireland led by the Lord Chief Justice Sir John Gillen (the Gillen Review) recommended Northern Ireland introduce a provision stating that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent.<sup>53</sup> Some jurisdictions have concentrated their efforts on the statutory definition of what consent is and how we identify its presence, taking more affirmative approaches to consent. For instance, the law in the Australian State of Tasmania contains a provision explaining that consent does not exist if the person 'does not say or do anything to communicate consent'.<sup>54</sup> Similarly, the US State of Wisconsin provides that the absence of 'words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact' can be used to establish the *actus reus* for rape,<sup>55</sup> and in California, consent is defined as 'positive co-operation in act or attitude pursuant to an exercise of free will'.<sup>56</sup> Recently, Iceland reformed its law of rape opting for a provision stating that 'consent is considered present if it is expressed by free will',<sup>57</sup> and Sweden adopted a definition of rape which provides that a person commits rape if they have sex with 'a person who is not participating freely' and that 'in assessing whether the participation is voluntary or not, particular consideration shall be given to whether the voluntariness was expressed through words or deed or in some other way'.<sup>58</sup>

Wales) s 74 provides that a person consents if he agrees by choice, and has the freedom and capacity to make that choice' (England and Wales provisions mirrored in Northern Ireland: Sexual Offences (NI) Order 2008, art 3).

<sup>48</sup> *ibid*, Sexual Offences Act 2003, s 75; Sexual Offences (NI) Order 2008 art 9.

<sup>49</sup> 2003 Act *ibid*, s 76; 2008 Order *ibid* art 10.

<sup>50</sup> See *R v Ewanchuk* [1999] 1 SCR 330; *R v Olubgoja*, [1982] QB 320, 5.

<sup>51</sup> Historically, in many jurisdictions, consent was assumed in the absence of resistance. See S Ehrlich, *Representing Rape: Language and Sexual Consent*, (London, Taylor and Francis, 2002) 67.

<sup>52</sup> Criminal Law (Rape) (Amendment) Act, 1990 Ireland, s 9; The Crimes Act 1961 of New Zealand, s 128A; Crimes Act 1900 New South Wales, s 61HE(9).

<sup>53</sup> The Gillen Review. Report into the law and procedures in serious sexual offences in Northern Ireland. 2019. 377.

<sup>54</sup> Section 2A,2(a) Criminal Code Act 1924

<sup>55</sup> Wisconsin Criminal Code, s 940.225(4).

<sup>56</sup> California Penal Code 1872, s 261.6.

<sup>57</sup> Act on the amendment of the Criminal Code, no 19/1940, with subsequent changes (sexual offences) 2018

<sup>58</sup> Criminal Code (Sweden) Brottsbalk (1962: 700) as amended in 2018.

Turning to the *mens rea*, legislation in Canada, New Zealand, England and Wales, Northern Ireland as well as some Australian territories provides that, to establish rape, the prosecution must prove that the defendant did not ‘reasonably believe’ that the victim was consenting, and that the reasonableness of this belief will be considered in light of the surrounding circumstances, including any steps taken by the perpetrator to ascertain whether the complainant was consenting.<sup>59</sup> Case law from the Canadian Supreme Court injects an affirmative dimension, providing that ‘the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no”, but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes”’.<sup>60</sup> Thus, when raising consent as a defence, rather than pointing to a lack of refusal, the defendant must demonstrate the presence of consent. Additional developments have occurred in Northern Ireland in relation to this aspect of the definition with the Gillen Review recommending an amendment to the definition as to what constitutes a reasonable belief in consent so as the jury are now asked to take account of all the circumstances, including a **failure** by the defendant to take any steps to ascertain whether the complainant was consenting.<sup>61</sup> However, there is no obligation on the defendant to have taken steps. The approach taken in Tasmania goes further providing that a belief in consent will not be considered honest or reasonable if the accused ‘did not take reasonable steps in the circumstances’<sup>62</sup> to ensure the other person was consenting, thus creating an in-built obligation.

There is thus a trend towards placing responsibility on the accused to have in some way ascertained, or attempted to ascertain, consent. In this regard, empirical research I conducted in Northern Ireland on community and professional worker perceptions of the reasonable belief in consent threshold and the steps requirement can provide some further insights.<sup>63</sup> A key finding from this research was that the element of reasonable belief in consent does not feature during trial proceedings and is often left to the judge to explain to the jury during summing up.<sup>64</sup> Participants to the research stated that the recommendation made in relation to this aspect in the Gillen Review might make it more of a focus during the trial due to the language of a ‘failure’ to take steps, but that there remains a lack of understanding around what amounts to a ‘step’. Essentially, asking that the defendant take steps is asking that some sort of communication occur. In New South Wales, where reform to their law on sexual consent is currently being considered, it has been suggested that ‘steps’ is defined as ‘whether the accused person said or did anything to ascertain if the other person consented’.<sup>65</sup>

Further specification to the element of consent has been provided where the question of revocation has been considered. The Canadian Supreme Court, for instance, has explained that consent must be ‘present’ and ‘ongoing’.<sup>66</sup> Thus acknowledging that someone can change their

<sup>59</sup> Canadian Criminal Code 1985, s 2732(b); The Crimes Act 1961 of New Zealand, s 128; Sexual Offences Act 2003 (England and Wales) s 1; Sexual Offences (Northern Ireland) Order 2008 art 5; Crimes Act 1900 New South Wales, s 61HE(3)(c) and (4)(a).

<sup>60</sup> *R v Park* (1995) 2 SCR 836, para 39.

<sup>61</sup> Gillen Review, n 53 above.

<sup>62</sup> Section 14A(c) Criminal Code Act 1924.

<sup>63</sup> See E. Dowds. ‘Sexual Consent in Northern Ireland: The legal and Social Dimensions’. Queen’s Policy Engagement. Policy Paper 6. May 2020.

<sup>64</sup> Similar findings from court observations in England and Wales where it was reported that the requirement to take steps was only implicitly referred to in 1 out of the 18 sexual offence cases observed: Smith, O. *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (United Kingdom: Palgrave Macmillan 2018) 138

<sup>65</sup> New South Wales Law Reform Commission. (2019) Consent in Relation to Sexual Offences: Draft Proposals. 23.

<sup>66</sup> *R v JA* (2011) 2 SCR 440, para 39.

mind as to whether they want to engage in sexual activity. Similarly, the California Supreme Court has explained that '[A] withdrawal of consent effectively nullifies any earlier consent and subjects a male to forcible rape charges if he persists in what has become non-consensual intercourse'.<sup>67</sup> Case law from England and Wales has also established consent as person and situation specific, as noted by Lady Hale: 'One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place'.<sup>68</sup> In Scotland there is a provision stating that penetration is a continuing act from entry until withdrawal and another provision providing that consent can be withdrawn.<sup>69</sup> In Northern Ireland another recommendation from the Gillen Review was to include a provision stating that consent can be withdrawn at any time.<sup>70</sup> Such pronouncements help to delineate the boundaries of the element of consent, in terms of removing any assumptions about consent to one interaction being transferrable to another, and thus assisting in its application.

#### **IV. Final Remarks and Recommendations**

Substantive discussions around the appropriate definitional elements of the crime of rape in international and domestic criminal law have often been viewed as separate in nature. However, I have argued that the parallel debates occurring in each arena, regarding the consent and coercion-based models, can inform one another because, rather than being mutually exclusive, these models are supplementary in nature: while the element of consent, or lack thereof, should be the core consideration in determining whether the crime of rape has been committed, the other elements, such as coercion or 'coercive environments', as well as more traditional factors such as force, constitute evidence of lack of consent.

In this regard, international criminal law can provide important insights on coercion, while attention to domestic law can help develop a more precise definition of consent. For instance, it is important to specify the context within which consent may be given i.e., that individuals must have the freedom to consent. Further to this, there is merit in thinking through different conceptions of affirmative consent as such conceptions can be used to develop more participatory models of consent. In emphasising communication, and in some cases paying attention to the actions or inactions of the defendant in ascertaining consent, there is potential to add more specificity to the concept of consent. Where active signals of consent (as opposed to non-consent) are also required, affirmative consent moves away from asymmetric conceptions of sexual relations,<sup>71</sup> to one where both parties are viewed as active participants.

Tying to coercion, supplementing consent-based definitions with a broad list of coercive circumstances under which consent may be deemed absent helps to identify problematic behaviour, beyond physical force, that might have been missed or minimised if not explicitly included in the definition. In this respect, the language of a 'coercive environment' allows for a subtle shift in analysis: from discrete instances of coercion, to patterns, behaviours and surrounding conditions. Attention to the broader picture may help to expose subtle forms of

<sup>67</sup> *People v John Z.*, 60 P.3d 183, 184 (Cal 2003). See, however *State v Way*, 254 S.E.2d 760 (NC 1979) Supreme Court of North Carolina: 'if the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape'.

<sup>68</sup> *R v C* [2009] UKHL 42, para 27.

<sup>69</sup> Sexual Offences (Scotland) Act 2009 section 1(2) and (3).

<sup>70</sup> Gillen Review, n 53 above.

<sup>71</sup> See eg, A. Taslitz, *Rape and the Culture of the Courtroom* (USA: New York University Press 1999); S Leahy, 'Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes Upon the Conviction Rate for Rape in Ireland' (2014) 14 *Irish Journal of Applied Social Studies* 18.

power and oppression, such as that found in relationships categorised by coercive control.<sup>72</sup> Indeed, in recent times legislation on domestic abuse has shifted towards an acknowledgement of psychological or economic harms as evidenced in the approach taken by the Council of Europe, the United Kingdom and some Australian territories, criminalising coercive and controlling behaviour.<sup>73</sup> In relationships categorised by this form of abuse a complainant may give what has been described as ‘apparent’ consent.<sup>74</sup> The inclusion of a ‘coercive environment’ within domestic definitions of rape may thus help to align this offence with such legislation and the types of abuse it entails.

Key recommendations, in terms of the role of consent and coercion, that can help to harmonise definitions of rape are as follows:<sup>75</sup>

- Combine both consent and coercion-based models of rape. Consent should be considered the main element in differentiating legal from illegal sexual activity and a range of coercive circumstances that can undermine consent should be included.
- Define consent with reference to the context within which it should be given i.e., freely and willingly by individuals who have the capacity to consent, and, drawing from the affirmative approaches, require some sort of communicative interaction between the parties i.e., include attention to the actions of the accused in ascertaining consent.
- Where reference is made to steps taken by the defendant provide some indication as to what amounts to a ‘step’.
- Include within the list of coercive circumstances factors such as the use of psychological oppression or abuse of power, against the complainant or another person; taking advantage of a coercive environment; the use of intimidating or coercive conduct to induce consent.
- Include a provision stating that submission or lack of resistance does not constitute consent.
- Include a provision stating that consent can be withdrawn at any time.
- Design procedural rules to control questioning on consent similar to the ICC i.e., judicial filter to restrict questioning when consent vitiating factors have been established and requiring a written record, including reasons, where a decision is made to allow such questioning.

<sup>72</sup> E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford, Oxford University Press, 2007); V Bettinson, ‘Coercive Control: In the Commission of Sexual Violence and Domestic Violence’ (2017) 14 *Contemporary Issues in Law* 85.

<sup>73</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) 2011; Serious Crimes Act 2015, s 76; The Domestic Abuse (Scotland) Bill 2017; Department of Justice Northern Ireland, Domestic Abuse Offence and Domestic Violence Disclosure Scheme – a Consultation’ (2016); G Wilson and N Tognini, *Australia’s approach to domestic violence: Focus on coercive control* (HopgoodGanim, February 2014).

<sup>74</sup> *R v AC* [2012] EWCA Crim 2034

<sup>75</sup> Draft legislative amendments to the ICC definition of rape and the definition of rape for England and Wales, as well as amendments to procedural law, can be found in Appendix I and II of my book, see Dowds 2020 n 1 above.