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DEFINING RAPE IN WAR: CHALLENGES AND DILEMMAS

Dr Olivera Simić[*] & Jean Collings[**]

This paper is an analysis of the International Criminal Court ('ICC') decision in the case of The Prosecutor v Jean-Pierre Bemba, handed down in 2016. This case was the first at the ICC to deliver a conviction for the crime of rape during armed conflict and marks the most recent attempt to accurately and comprehensively define the crime of wartime rape. In assessing the ICC's definition, we have drawn significantly from the case law in relation to wartime rape that emerged from the International Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia. These international tribunals provided a space for significant development in this area of law and were the catalyst for rich feminist academic discourse. We argue that the ICC has inadequately addressed gender stereotypes that have dominated the process of criminalising wartime rape since it was first introduced into international law.

We base this argument on the ICC's decision to adopt a definition of wartime rape that is over-reliant on a consideration of the surrounding circumstances of the act and does not link these circumstances to a consideration of the victim's lack of consent. We identify three ways in which the Bemba definition has failed to challenge the generalising and over-simplification of gender roles in armed conflict. The first is that it has diminished female sexual agency by representing armed conflict as a zone in which consensual sexual penetration is a legal impossibility. Second, this

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has contributed to the perpetuation of the ideal victim archetype that plagues narratives of wartime rape and sexual violence. The representation of victims as powerless, female civilians or refugees creates a dangerous binary construct of the victim and perpetrator roles that only serves to flatten the complex and nuanced ways in which sexual agency is exercised during times of war. Finally, the perpetuation of the ideal victim/perpetrator archetype also threatens the ICC's ability to appropriately protect the right of the accused to a fair trial and a presumption of innocence.

CONTENTS

I INTRODUCTION 186

II DEFINING RAPE THROUGH INTERNATIONAL JURISPRUDENCE 188

A *The International Criminal Tribunal for Rwanda ('ICTR')* 188

B *The International Criminal Tribunal for the Former Yugoslavia* 190

C *The International Criminal Court* 192

III THEORISING WARTIME RAPE AND ITS TREATMENT IN ICL 197

A *The Criminalisation of Rape in Armed Conflict* 197

B *Consent and Coercion: The Feminist Discussion* 200

C *Capturing the Complexity of Female Sexual Agency* 203

D *Creating an Ideal Victim/Perpetrator Dichotomy* 207

IV RE-CONSIDERING WHAT BEMBA MEANS 209

A *The Impacts of Removing Consent* 209

B *Recognising Sexual Agency* 213

C *Re-Enforcing the Ideal Victim Subject* 215

D *The Effects of the False Dichotomy on the Rights of the Accused* 218

V CONCLUSION 221

I INTRODUCTION

This article will critically analyse the International Criminal Court's ('ICC') definition of rape in armed conflict, specifically within the case of *The Prosecutor v Jean-Pierre Bemba* ('*Bemba*').[1] The ICC *Bemba* judgment has brought the crime of rape during armed conflict ('wartime rape') into ICC case law and provided a precedent for potential future ICC prosecutions. The purpose of examining the definition of this crime within the *Bemba* judgment is to assess the ICC's progress in addressing some of the pertinent issues that arose during the criminalisation of wartime rape and the subsequent international case law. This can be used as a measure for how responsive international criminal law ('ICL') is in addressing gender-based violence and violations of women's rights during armed conflict.

It has been acknowledged that the crime of rape is a gender-based crime that is disproportionately committed against women.[2] This is not to say that there are no male victims of rape and sexual violence. However, due to the disproportionate number of female victims of rape and the specific effects that rape has on women, such as pregnancy and other bodily harms, rape is considered a female gender-based offence.[3]

Sexual violence is a global problem that is not confined to circumstances of armed conflict or the level of development in a region.[4] It is not necessarily constituted by a purely sexual act but is also an act of aggression and not always perpetrated for sexual gratification.[5] It is arguable that the parameters of sexual violence are only limited by the human imagination and include, but are not limited to, instances of rape, sexual slavery, genital mutilation, enforced pregnancy, and forced prostitution.[6]

Throughout history, there have been reports of women being subjected to sexual violence during periods of armed conflict.[7] It is undisputed that rape, sexual slavery, forced

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[1] *Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016).
[2] Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288.
[3] Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford Scholarly Authorities on International Law, January 2009).
[4] Stuart Casey-Maslen (ed), *The War Report* (Oxford University Press, 2012) 295.
[5] Ibid.
[6] Ibid.
[7] Askin, above n 2, 297.

pregnancy, sexual mutilation, and multiple other sexually violent crimes have been used as weapons of war and genocide.[8] Despite this long history of sexual violence that occurs during armed conflicts, wartime rape has largely been ignored on the international level of criminal prosecution.[9] During World War II, the use of rape was widespread by Nazi and Japanese forces as a policy of war; however, this was not reflected in the Charter of either the Nuremberg or Tokyo War Tribunals.[10] Further, while the Tokyo Tribunal included the crime of rape within public records and an indictment for war crimes, it failed to adequately address the crime given its pervasive occurrence within the conflict.[11]

Rape has only begun to be seriously prosecuted at the international level as recently as the 1990s, but international humanitarian law has a long history of prohibiting rape, reaching back to the 1863 Lieber Code.[12] This Code made violence, including rape, against inhabitants of an invaded region punishable by death.[13] However, it was only in 1949 with the creation of the Geneva Conventions that a codified set of international humanitarian law principles was universally accepted.[14] In 1949, a universal obligation to prosecute rape was created under Article 27 of the Fourth Geneva Convention.[15]

Further, in response to the outcry from human rights activists about the exclusion of rape from the list of grave breaches within the Geneva Conventions, the International Committee of the Red Cross ('ICRC') adopted Rule 93 which explicitly recognises rape as a grave breach of human rights.[16]

During the 1990s, rape and other sexual violence was used as a means of ethnic destruction in conflicts in Rwanda and the former Yugoslavia.[17] As a result, rape was incorporated into the Statutes of the International Criminal Tribunal for Rwanda ('ICTR')

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[8] Ibid.
[9] Cassese, above n 3, 478
[10] Kelly D Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, 1997).
[11] Ibid 203.
[12] Ibid.
[13] Ibid.
[14] Askin, above n 2, 302.
[15] Kiran Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33 *The Australian Feminist Law Journal* 57.
[16] Casey-Maslen, above n 4, 303.
[17] Catharine MacKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' (2006) 44 *Columbia Journal for Transnational Law* 940, 942.

and the International Criminal Tribunal for the Former Yugoslavia ('ICTY') respectively.[18] The subsequent prosecutions of rape in the ICTR and ICTY resulted in two diverging definitions of the crime and further advanced the criminalisation of rape and other gender-based offences in ICL. The recent judgment in *Bemba* has re-defined the crime of wartime rape that was previously established in the ICTR and ICTY. This paper will argue that the *Bemba* judgment has undermined female sexual agency and has potentially reinforced the authentic victim stereotype that has plagued international prosecutions of wartime rape. In doing so, the *Bemba* definition has perpetuated the false dichotomy of the ideal victim and perpetrator roles resulting in a failure to challenge gender stereotypes and impinging on an accused's right to fair trial.

II DEFINING RAPE THROUGH INTERNATIONAL JURISPRUDENCE

A *The International Criminal Tribunal for Rwanda ('ICTR')*

The offence of rape was first explicitly defined in the International Criminal Tribunal for Rwanda ('ICTR') within the Trial Chamber Judgement of *The Prosecutor v Jean Paul Akayesu* (*Akayesu*).[19] Jean Paul Akayesu was charged on 15 counts including rape as a crime against humanity and as a violation of Article 3 to the Geneva Conventions (conflicts not of an international character) and Additional Protocol II.[20] Akayesu was politically active within the community and eventually became area president of a new political party called Mouvement Democratique Republican ('MDR').[21] At least 2000 Tutsi were killed in Taba during the conflict and the Trial Chamber considered that there was sufficient evidence to show that Akayesu had ordered, instigated, and done nothing to prevent the crime of rape occurring, therefore being convicted of command responsibility for his crimes.[22]

In defining rape, the Trial Chamber took the same conceptual approach that is applied to torture under international law. This approach consists of using the essential

[18] Ibid.
[19] *The Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998).
[20] Ibid.
[21] Ibid [52].
[22] Ibid.

characteristics of a crime rather than exhaustively listing mechanical elements.[23] The Chamber specifically rejected a mechanical description of rape and instead defined it as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[24] Despite the reference to the 'sexual nature' of the offence, the Chamber noted that rape is ultimately a crime of aggression that is unable to be captured through a mechanical description of possible objects and body parts.[25]

In addition to the Chamber's decision to avoid mechanical descriptions of rape, it removed the element of consent from the definition and instead set the parameters of its criminality as sexual penetration that occurs during circumstances that are coercive. The ICTR *Akayesu* definition identified that any form of implied consent to sexual penetration is inapplicable in an environment as coercive as that during armed conflict.[26] The *Akayesu* definition did not reappear in the ICTR until *Prosecutor v Gacumbitisi,*[27] in which the Appeals Chamber returned to the core insight of *Akayesu*: non-consent should be implied from the surrounding circumstances of the crime rather than being an element to be proven by the prosecution.[28] While the issue of non-consent was not a substantial ground of appeal, the Appeal Chamber chose to consider the matter as a point of significance for the jurisprudence of the ICTR.[29]

The Prosecutor appealed to the Chamber on the grounds that non-consent should not have been considered as an element of the crime but instead could be used as an affirmative defence.[30] This was argued on the basis that the crime of rape is only brought before the ICTR when it occurs in the context of genocide or armed conflict and that this should make genuine consent impossible.[31] The Appeal Chamber agreed with the Prosecutor's argument that the matter was significant for the ICTR's jurisprudence and

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[23] Alison Cole, '*Prosecutor v Gacumbitsi:* The New Definition for Prosecuting Rape under International Law' (2008) 8 *International Criminal Law Review* 55.
[24] *The Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998), [597] - [598].
[25] Ibid [597].
[26] Cassese, above n 3, 79.
[27] *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-2001-64-T, 17 June 2004).
[28] Catharine MacKinnon, 'The Recognition of Rape as an Act of Genocide — *Prosecutor v Akayesu*' (2008) 14(2) *New England Journal of International and Complementary Law* 101, 102.
[29] Cole, above n 23, 63.
[30] *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006), [47].
[31] Ibid [48].

therefore sought to further elucidate the issue.[32] The Appeal Chamber confirmed that the ICTY Trial Chamber had adopted a definition of rape that established non-consent as an element of the crime of rape and that this shifted the burden to the Prosecution to prove non-consent beyond a reasonable doubt.[33] Further, it was mentioned that Rule 96 of the ICTR *Rules of Procedure and Evidence* provides that consent may be used as a defence to rape but that this did not necessarily rule it out as an element of the crime.[34] The Appeals Chamber tended towards the argument that consent was vitiated in coercive circumstances and that non-consent can be inferred by the Chamber in circumstances such as genocide or detention of the victim, rather than requiring the Prosecution to introduce evidence.[35]

B *The International Criminal Tribunal for the Former Yugoslavia*

The armed conflict in the former Yugoslavia erupted in April 1992, and rape became an integral part of the Serb campaign of ethnic cleansing.[36] The conflict continued until 1995 and included systematic sexual violence and gender-based assaults including rape, sexual slavery, castration, forced pregnancy, and sexual torture.[37] Serb forces were the principal aggressors and responsible for overwhelming numbers of human rights violations; however, violations were committed by all sides of the conflict.[38] Reports of rape being used as a weapon of war on a mass scale emerged towards the end of 1992.[39] Frequently, rapes were committed in front of relatives or neighbours and rape survivors were often subjected to forced pregnancy and maternity.[40] In February 1993, the United Nations Security Council ('UNSC') authorised the creation of an international tribunal to hold accountable those responsible for human rights violations.[41] In May 1993, UNSC Resolution 827 established the ICTY for the prosecution of genocide, war crimes, and

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[32] Ibid.
[33] Ibid [153].
[34] Ibid [154].
[35] Ibid [155].
[36] Krishna R Patel, 'Recognising the Rape of Bosnian Women as Gender-Based Persecution' (1994) 60 *Brooklyn Law Review* 929, 930.
[37] Hilmi M Zawati, 'Book Review: Rethinking Rape Law' (2014) 10 *Journal of International Law and International Relations* 31.
[38] Women in the Law Project, 'No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia' (1994) 5(1) *Hastings Women's Law Journal* 91, 94.
[39] Ibid.
[40] Ibid 95.
[41] Ibid 99.

crimes against humanity occurring in the former Yugoslavia.[42] The temporal jurisdiction extended back to 1991.[43]

The first rape prosecution to occur in the ICTY was in the *Celebici case*,[44] which affirmed the *Akayesu* definition, but this was not re-affirmed in subsequent rape trials within the ICTY. The next trial for rape in the ICTY presented an alternate definition for rape in armed conflict and so began a series of cases that took the international definition of rape back into the direction of including non-consent and mechanical descriptions of rape.[45] In *Furundžija*,[46] the Trial Chamber considered that in defining rape, the prominent principles of criminal law that are common to major domestic legal systems were necessarily required to determine an accurate definition.[47]

The Trial Chamber settled on a definition that lists the physical mechanics of rape as penetration 'of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator',[48] or 'of the mouth of the victim by the penis of the perpetrator.'[49] This description of sexual penetration combined with the requirement for coercion or force became the requisite elements for rape in *Furundžija*. The Trial Chamber rationalised this particular definition through considering that without such specification, alleged perpetrators may not have sufficient *mens rea* to satisfy the crime.[50] The ICTY Trial Chamber in *Kunarac* applied the *Furundžija* definition more broadly and found that 'sexual penetration will constitute rape if it is not truly voluntary or consensual' for the victim.[51] The substitution of coercion or force with voluntariness or

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[42] Nadya Nedelsky and Lavinia Stan (eds), *Encyclopedia of Transitional Justice* (Cambridge University Press, 2012) 233, 237.
[43] Women in the Law Project, above n 38, 99.
[44] *The Prosecutor v Delalic, Mucic, Delic, and Landzo (Judgment)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) ('*Celebici* Trial Judgment').
[45] MacKinnon, above n 17, 944.
[46] *The Prosecutor v Anto Furundžija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998).
[47] Cole, above n 23.
[48] *The Prosecutor v Anto Furundžija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998).
[49] *The Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998).
[50] MacKinnon, above n 17, 946.
[51] *The Prosecutor v Kunarac, Kovac, and Vukovic (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001) [440].

consent was intended to broaden the definition and bring it into alignment with what is required by international law.[52]

The *Kunarac* definition of rape re-introduced non-consent as an element of the crime. The Trial Chamber's argument behind this re-introduction in *Kunarac* was that in surveying principles common to domestic definitions of rape, *Furundžija* erred in not recognising the concept that rape occurs if sexual violation is not truly voluntary or consensual.[53] The Appeals Chamber addressed the re-definition by the Trial Chamber in the *Kunarac* appellate decision. The Chamber did not hold against the non-consent definition but strongly and explicitly stated the need to presume non-consent in circumstances such as those in *Kunarac*. On the facts of the case, the Appeal Chamber held that consent was impossible given that the victims were held in detention by the perpetrators and the language of coercive circumstances from *Akayesu* was echoed in the judgment.[54] The mechanical description of sexual penetration remained in *Kunarac's* definition and this approach was affirmed in the Appeals Chamber.[55]

The *Kunarac* and *Akayesu* definitions became the two leading approaches to be adopted in subsequent ICTY and ICTR, and in some cases a merge of the two was attempted.[56] These two cases, while significant in ensuring that rape is treated as a serious offence, are also seen as representing a divide between consent-based definitions of rape and coercive-circumstances approaches to defining rape.[57]

C *The International Criminal Court*

The ICC Statute (Rome Statute) was adopted in Rome in 1998. Twenty-two months later, the Elements of Crimes and the Rules of Procedure and Evidence ('RPE') were adopted with full consensus from the State parties.[58] The ICC has jurisdiction over sexual crimes when there is a contextual nexus to crimes against humanity, war crimes, genocide, and

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[52] Ibid [438].
[53] Ibid 950.
[54] Ibid 951.
[55] *The Prosecutor v Kunarac, Kovac, and Vukovic (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Case No IT-96-23-I & IT-96-23/1-A, 12 June 2002).
[56] Cole, above n 23, 63.
[57] Kiran Grewal, 'The Protection of Sexual Autonomy under International Criminal Law' (2012) 10 *International Criminal Justice* 373, 374.
[58] Roy S Lee, 'An Assessment of the ICC Statute' (2001) 25(3) *Fordham International Law Journal* 750.

crimes of aggression.[59] The ICC recognised in its *Policy Paper on Sexual and Gender-Based Crimes* (*Policy Paper*) that 'sexual and gender-based crimes are amongst the gravest under the Statute'.[60] This policy identifies that the Rome Statute is the first instrument to include into international law an expansive list of gender-based crimes in relation to both international and non-international armed conflicts.[61] One of the core objectives of the policy for gender-based and sexual crimes is to contribute to the development of international jurisprudence in this area.[62]

The ICC delivered its first conviction for the offence of rape in *Bemba*,[63] in which it attempted to merge the two divergent definitions from the ICTY and ICTR. The ICC Trial Chamber found Jean-Pierre Bemba guilty of murder and rape under crimes against humanity and murder, rape, and pillaging under war crimes.[64] He was charged with command responsibility as he was president of a political party, *Mouvement de liberation du Congo* ('MLC') and was, during a violent military operation, Command-in-chief of the *Armée de libération du Congo*.[65] Article 21 of the Rome Statute provides a hierarchy of external sources which the Court can use to interpret and apply the crimes in the State.[66] The first among these is the Rome Statute itself and the Element of Crimes.[67] In considering the crime of rape in criminal trials, the ICC has drawn the definition from the Elements of Crimes. This definition is:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

[59] Marie-Alice D'Aoust, 'Sexual and Gender-Based Violence in International Criminal Law: A Feminist Assessment of the *Bemba* Case' (2017) 17 *International Criminal Law Review* 208, 211.
[60] International Criminal Court, 'Policy Paper on Sexual and Gender-Based Crimes' (Policy Paper, June 2014) 5.
[61] Ibid 9.
[62] Ibid 10.
[63] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016).
[64] Ibid.
[65] D'Aoust, above n 59.
[66] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').
[67] International Criminal Court, *Elements of Crimes*, Doc No ICC-RC/11 (adopted 31 May–11 June 2010) ('*Elements of Crimes*').

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[68]

The first case to consider rape before the ICC and apply the Elements of Crimes definition was *Prosecutor v Katanga*.[69] While the defendant in the case was not convicted, the Trial Chamber did identify that the requisite elements of the crime of rape were found within the Elements of Crimes. The ICC identified that the mechanical description within the definition extends to instances in which the perpetrator has not physically penetrated a victim but has caused or prompted another individual to either penetrate the perpetrator or a third party.[70] The Trial Chamber in *Katanga* did establish beyond reasonable doubt that combatants had committed rape constituting crimes against humanity and war crimes under Articles 8(2)(e)(vi) and 7(1)(g) of the Rome Statute. However, the Chamber could not sufficiently establish Katanga's hierarchal power over all combatants and therefore found that there was not sufficient evidence to establish command responsibility under Article 25(3)(a) of the Rome Statute.

As in *Katanga,* the *Bemba* judgment applied the definition adopted from the Elements of Crimes to the factual circumstances. In determining the material elements of the offence of rape, the *Bemba* judgement identified and applied the two limbs of the definition.[71] The first limb draws directly from the definitions adopted in *Furundžija* and *Kunarac* that rejected the conceptual approach taken up by the Trial Chamber in *Akayesu*. It narrows the scope of rape to a particular set of physical actions done by and to the perpetrator and victim. An explicit statement about the gender neutrality of the definition follows the list of mechanical requirements for the crime of rape.[72] The Chamber states, 'the term invasion is intended to be broad enough to be gender-neutral' and can include same-sex penetration, encompassing both male and female perpetrators.[73] In adopting their

[68] *Elements of Crimes* arts 7(1)(g)-1, 8(2)(e)(vi)-1.
[69] *The Prosecutor v Germain Katanga (Judgment)* (International Criminal Court, Judgment, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014).
[70] Ibid [963].
[71] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [99].
[72] Ibid [100].
[73] Ibid.

definition, the ICC Trial Chamber relied on the ICC Elements of Crimes, specifically Article 7(1)(g)-1 which specifies that invasion is intended to be gender-neutral.

According to the ICC's *Policy Paper*, the explicit gender-neutral statement regarding the Elements of Crimes, was part of an effort to 'consolidate important advancements with respect to the definition of these crimes'.[74] It appears to be in response to an integration of gender perspective and analysis that involves examining underlying inequalities and the ways in which gender norms and inequalities relate to gender-based crimes.[75] The second limb draws from *Akayesu* in order to identify the criminal nature of the physical invasion. *Bemba* sets out four circumstances, taken from the Elements of Crimes, in which a rape may occur. These are by force, by threat or coercion, by taking advantage of a coercive environment, or against a person who is incapable of giving genuine consent.[76] The Trial Chamber interpreted the concept of a coercive environment in relation to the *Akayesu* conceptualisation of coercive circumstances. The scope of coercive circumstances was extended to include not only armed conflict or military presence but also the number of people involved in the conduct, the context in which the rape occurs, or whether it is committed at the same time as other crimes.[77]

The Trial Chamber in *Bemba* described the second limb of the definition as circumstances in which the act of penetration or invasion is given its criminal nature.[78] In considering this limb of the definition, the Chamber emphasised that 'the victim's lack of consent is not a legal element of the crime of rape'.[79] Instead, the Chamber relied on the application of Rule 70 of the RPE, which provides that consent cannot be inferred from the words, conduct, silence, or lack of resistance of the victim in situations where the physical elements of rape are shown.[80] It also drew from 'preparatory works' that indicate the intention of the drafters of the Rome Statute to exclude consideration of

[74] International Criminal Court, 'Policy Paper on Sexual and Gender-Based Crimes' (Policy Paper, June 2014) 9.
[75] Ibid 13.
[76] *Elements of Crimes* arts 7(1)(g)-1, 8(2)(e)(vi)-1.
[77] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [103].
[78] Ibid.
[79] Ibid [105].
[80] International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 70 ('*Rules of Procedure and Evidence*').

consent from the definition of wartime rape.[81] The criminal nature of the sexual penetration, therefore, arises from whether the perpetrator used force, threat, or coercion or took advantage of coercive circumstances as opposed to a violation of the victim's voluntary or genuine consent. This was applied in alignment with the reasoning in the previous ICC case, *Katanga*, where the Chamber noted that if the element of criminality within the Elements of Crimes was established, sexual penetration would amount to rape.[82] The ICC has treated the surrounding circumstances of the sexual penetration as important in their own right and removed from a consideration of how they limit or vitiate an individual's ability to give genuine consent.[83]

The *Bemba* definition in fact hardly referenced the concept of consent in its discussion of wartime rape and instead reinforced the distinction between coercive circumstances and the consent-based definition set out in the Elements of Crimes. This distinction is created by the difference in nature of the first three instances of criminal nature set out in the Elements of Crimes, which do not include the concept of consent, from the fourth.[84] The fourth is intended to cover circumstances in which an individual is unable to give consent due to natural, induced, or age-related incapacity.[85] This definition reflects the discussion within *Akayesu* in the ICTR that required the Trial Chamber to look at broader factors contributing to situational coercion. However, in considering the third circumstance, the ICC avoided linking the concept of coercive circumstances with that of consent as was done in *Kunarac*.[86] *Kunarac* found rape was penetration that occurs without the consent of the victim and determined that the *Furundžija* definition, 'coercion, force or threat of force against the victim or third person', was too narrow to encompass all factual circumstances in which penetration is non-consensual or non-voluntary. While *Kunarac* endorsed a consideration of circumstances, this was in order to determine whether consent could be freely given in the context.

[81] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [105].
[82] *The Prosecutor v Germain Katanga (Judgment)* (International Criminal Court, Judgment, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014).
[83] Janine Natalya Clark, 'The First Rape Conviction at the ICC: An Analysis of the *Bemba* Judgment' (2016) 14 *Journal of International Criminal Justice* 667, 677.
[84] Ibid 678.
[85] Ibid.
[86] Ibid.

Consent remained the fundamental element for consideration in the *Kunarac* definition whereas the Trial Chamber in *Bemba* reinforced the clear distinction made in the Elements of Crimes between consent and coercive circumstances. The Chamber did this by treating the circumstances of the penetration as a consideration in its own right rather than in terms of whether the circumstances vitiate consent. Further, the *Bemba* judgment determined that there is no need for the Prosecution to prove non-consent where 'force, threat of force or coercion or taking advantage of a coercive environment' are established.[87] The Trial Chamber also noted that the inclusion of non-consent as an element of the crime of rape could 'undermine efforts to bring perpetrators to justice'.[88] The *Bemba* judgment, rather than strengthening the relationship between coercive circumstances and an individual's ability to consent, reinforced the existing dichotomy in international case law and commentary. In the event that coercive circumstances are established, which is far more likely during armed conflict, the consent or non-consent of the "victim" is irrelevant. In terms of contributing to case law for the prosecution of rape in armed conflict, the *Bemba* judgment appears to have moved the definition of wartime rape even further away from a non-consent-based consideration.

III THEORISING WARTIME RAPE AND ITS TREATMENT IN ICL

A *The Criminalisation of Rape in Armed Conflict*

The intense work of feminist theorists and scholars towards the criminalisation of rape within ICL has led to international law containing some of the most feminist rules and procedures relating to rape.[89] The Statutes of the ICTY and ICTR are evidence of feminist intervention particularly in relation to the definitions of rape, scope of available defences, allocations of burdens of persuasion, and the accompanying rules of evidence.[90] It is also evident that the experiences of the ICTY and ICTR in applying and prosecuting the law informed the drafting of the Rome Statute for the ICC. While there has been a partial feminist success with the crime of rape having evolved from mere evidence to an

[87] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [106].
[88] Ibid [105].
[89] Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in International Law of Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 78.
[90] Ibid 81.

individual, nominated crime and therefore being moved up the hierarchy of ICL criminality, there remain some concerns regarding the criminalisation of rape.[91]

Kiran Grewal examined the ways in which the international process makes distinct the act of rape during wartime from the act during peacetime. This purposeful distinction, she argues, limits ICL's positive impact on broader women's rights outside the context of armed conflict.[92] While Grewal acknowledges that the case law from the ICTY and ICTR represents relatively ground-breaking advances for women's rights in ICL, she warns that there remains much work to be done. Grewal highlights that there has been a dearth of rape indictments across international criminal case law and that this reflects the struggle feminist scholars and advocates have faced in the process of criminalising rape.[93] This struggle has been to address the counter-productive nature of law to historically prohibit rape but simultaneously and implicitly condone and legitimise it by failing to prosecute.[94]

Advocates for ICL have celebrated the development of the criminalisation of wartime rape as a success for human rights and the advancement of women's rights.[95] The focus of feminist advocates has been on the development of sexual violence and rape crimes due to the disproportionately large number of women victims.[96] Grewal posits three areas that feminist scholars hoped ICL would contribute to the broader movement for women's rights. These are in deterrence, impunity, and advancement of women's rights more generally.[97] Grewal identifies the hope of feminist legal scholars for the prosecution of rape to contribute to the long-term deterrence of the crime for future armed conflicts.[98] One of the central issues for the feminist legal project of criminalising wartime rape has been the need to re-cast women's bodies from passive to active legal subjects in order to provide a way for women to assert agency and underline the seriousness of crimes committed against women's bodies.[99] Grewal states that it appeared this project was beginning to bear fruit, particularly with the final version of the Rome Statute reflecting

[91] Ibid 110.
[92] Grewal, above n 15.
[93] Ibid 67.
[94] Ibid.
[95] Ibid 60.
[96] Ibid.
[97] Ibid 62.
[98] Ibid 61.
[99] Ibid.

the focus in its provisions relating to gender-based crimes such as rape and the possibility of future prosecutions.[100]

Grewal also links the continuing prosecution of rape as an indicator of ICL's challenge to impunity.[101] The frequent criticism of feminist scholars in the past that rape and sexual violence in conflict zones have been trivialised or ignored began to be challenged with the emergence of prosecutions from the ICTR and ICTY. For this reason, the judgments emerging from the ICTY and ICTR such as *Akayesu* and *Kunarac* were held to be representative of a positive shift in the characterisation of wartime rape.[102] The nature of wartime rape had finally been re-characterised from an inevitable facet of armed conflict to an act of significant violence. Finally, it was hoped by legal scholars that the criminalisation of wartime rape would have far-reaching consequences for the advancement of women's rights more broadly.[103] According to many feminist scholars, international prosecutions have the potential to advance women's rights both in and out of the context of armed conflict, particularly in relation to the ICC.[104] This has contributed to the considerable effort that has gone into attempting to establish a best practice in international prosecutions and judgments.

The criminalisation of rape in ICL has unarguably been an overall positive step towards the legal recognition of women's rights and the ending of impunity for crimes committed against women's bodies. There are, however, issues that have either been preserved or have arisen from the criminalisation process and outcome. Some feminist advocates, such as the Women's Initiatives for Gender Justice, have declared that the Rome Statute represents a victory for the over-arching feminist mission of criminalising wartime rape.[105] Karen Engle offers a critique of this blanket positivity about the criminalisation of wartime rape. She points out that this declaration of success is problematic because the ICTY has continued the tendency of women's rights advocacy and jurisprudence to diminish female sexual agency within its approaches to prosecuting wartime rape.[106] This has occurred through the perpetuation of assumptions surrounding sexual agency,

[100] Ibid.
[101] Ibid 63.
[102] Askin, above n 2.
[103] Grewal, above, n 15, 63.
[104] Ibid.
[105] Karen Engle, 'Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778, 784.
[106] Ibid 785.

for example, the traditional, dominant understandings of what it means to be a victim, which is not to be on the same side as the perpetrator.[107]

While feminist theorists largely put aside their different opinions in favour of unified lobbying for the rules and procedures to be adopted by the ICTY, Engle argues that the problematic assumption about victim agency continued to emerge in the subsequent ICTY prosecutions for rape. She states that this assumption manifested in the approaches taken by the ICTY, which unwittingly denied sexual and political agency to victims of rape.[108] It also appears that this assumption has now been transferred into the case law of the ICC through the *Bemba* judgment. This has been done through the exclusion of the element of consent from considerations of criminal nature in relation to sexual penetration in wartime rape prosecutions.

B *Consent and Coercion: The Feminist Discussion*

One of the main areas in which ICL has shown to be inconsistent in defining the crime of wartime rape is in determining whether lack of consent is an element of the crime.[109] The dichotomy between non-consent-based and coercive-circumstance approaches has been a controversial topic among feminist legal theorists and appears to have had a significant impact on the formulation of the ICC's definition of rape in armed conflict. The role of consent within the definition of wartime rape was a contentious issue even during the drafting of the ICC's Elements of Crimes and RPE. It took six weeks to reach a consensus on the issue, and the delay was largely due to the differences in cultural and legal assumptions about the relationship between women and sex.[110] During the negotiations over the ICC materials regarding rape, two legal principles emerged. The first is that individuals should be free from violence, and the second is that individuals should be free to exercise autonomy by consenting to sexual relations.[111] However, with these principles in mind, the standards of consent within domestic legal traditions could not just be implanted into ICL.

[107] Ibid 796.
[108] Ibid.
[109] Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 54(3) *Boston College Law Review* 1207, 1208.
[110] K Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2000) 32 *Columbia Human Rights Law Review* 625, 639.
[111] Ibid 641.

Non-consent has not always been treated as an element of the crime of rape in armed conflict in ICL, but instead affirmative consent has been used as a defence to rape in armed conflict.[112] This is because it is argued that in the circumstances of armed conflict involving genocide, war crimes, and crimes against humanity, genuine consent on the part of the victim is impossible.[113] The exclusion of non-consent as an element of the crime also aligns it further with crimes such as torture and enslavement where non-consent must not be proven for the crime to be established. In each case, to consider the crime of rape during armed conflict, the relationship between the establishment of non-consent and contextual circumstances has been considered.[114] It has generally been agreed that there may be coercive circumstances in which genuine consent to sexual intercourse cannot be given and that there are numerous factors which could vitiate consent and establish coercion.[115] So far, ICL has not effectively established a mandatory presumption of non-consent or coercion in factual circumstances relating to detention or other war crime situations.[116]

Nicola Henry emphasises the importance of considering the individual/collective nature of sexual violence when examining wartime rape.[117] Henry identifies that rape committed as part of a genocide or a crime against humanity — in that it is part of a broader, widespread, or systematic attack — are not individual crimes and argues that victims are targeted based on their membership of a targeted group.[118] Therefore, wartime rape must also be considered as part of a crime against a collective as well as its individual dimension. Henry, however, does not use this logic to undermine the centrality of consent to the determination of criminality of sexual penetration during armed conflicts. Instead, she uses it as a stepping off point for discussing the ways in which feminist discourse has contributed to a more complex understanding of the victim experience of wartime rape. Henry critiques the existing feminist jurisprudence in the

[112] Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) The *American Journal of International Law* 121, 123
[113] Ibid.
[114] Weiner, above n 109, 1224.
[115] Ibid.
[116] Ibid 1226.
[117] Nicola Henry, 'Theorizing Wartime Rape: Deconstructing Gender, Sexuality and Violence' (2016) 30(1) *Gender and Society* 44.
[118] Ibid 45.

area on the basis that it does not address the individual perpetrator or the underlying determinants of sexual aggression in conflict.[119]

The Rome Statute imposes an obligation on the ICC to ensure that the accused retains the right to the presumption of innocence and the right to an adequate defence.[120] The ICC's approach to defining wartime rape must, therefore, ensure that balance is maintained between protecting the victim during prosecution and preserving the accused's rights. According to Grewal, an approach that attempts to protect women during the prosecution process can limit or remove the defence possibilities for the perpetrator and ultimately undermine the rights of both the accused and the victim.[121] She argues that this is because conservative provisions perpetuate the traditional authentic victim subject construction of women as passive subjects without agency.[122]

Grewal believes that the way in which the rights of the accused, gender inequality, and individual agency during armed conflict can best be achieved is through ensuring that the protection of sexual autonomy is at the heart of rape laws.[123] Grewal also posits that making sexual autonomy the focus for the definition of rape in armed conflict will reveal the artificiality of the dichotomy of consent-based and coercive-circumstances approaches to defining wartime rape. She identifies an individual's right to sexual autonomy as being a common element at both the international and national level.[124]

For Grewal, sexual autonomy combines the consent-centric approach that was favoured in *Kunurac,*[125] with the coercive-circumstances approach that developed in *Akayesu*,[126] and is reflective of the definition adopted in the ICTR Trial Chamber judgment in *Gacumbitsi*.[127] Grewal cites the Trial Chamber in *Kunarac* as identifying sexual autonomy as 'the true common denominator that unifies the various systems'.[128] The Trial Chamber

[119] Ibid 48.
[120] *Rome Statute* arts 66–7.
[121] Grewal, above n 57, 390.
[122] Ibid.
[123] Ibid.
[124] Ibid 375.
[125] *The Prosecutor v Kunurac (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001).
[126] *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998).
[127] *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-2001-64-T, 17 June 2004).
[128] Grewal, above n 57, 379.

viewed sexual autonomy as being violated whenever an individual subjected to the act is not a voluntary participant or has not freely agreed to it.[129] Grewal picks up on this application of sexual autonomy as the measure for the crime of rape and argues that it encompasses consideration of contextual, coercive circumstances and the impact of these circumstances on an individual's ability to give free and informed consent.[130] Grewal argues that the determination of whether an individual's sexual autonomy has been violated necessitates a consideration of the wishes of the individual that is generally ascertained through the matter of consent.[131] The distinction between consent-based definitions of wartime rape and coercive-circumstances approaches is therefore largely artificial as both "sides" are necessarily applicable to effectively defining wartime rape. Further, the inclusion of the victim's consent within the consideration provides acknowledgement not only of the violation of sexual agency but also that the victim has sexual agency to exercise and is not merely a harmed body.

C *Capturing the Complexity of Female Sexual Agency*

The *Akayesu* judgment marked the first international prosecution for rape and sparked discussion among feminist legal theorists about the appropriateness of the ICTR's definition of rape in armed conflict. The Trial Chamber had definitively stepped away from a non-consent-based approach to defining wartime rape, and this was a clear divergence from the approach taken by many domestic legal systems. *Akayesu* also developed a principle that was not consistently reflected in subsequent judgments of the ICTR and ICTY or the recent *Bemba* judgment of the ICC.

Feminist lawyers and activists, such as Catharine MacKinnon, played a large role in the feminist contribution to the work of the ICTY and ICTR.[132] MacKinnon views the definitions of wartime rape that emerged from the ICTY and ICTR as existing in a binary where non-consent is either an element of the crime or not worth considering in light of the establishment of coercive circumstances. MacKinnon's discussion on the role of consent in defining the crime of rape set the foundation in the early 1990s for a robust

[129] *The Prosecutor v Kunurac (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001) [457].
[130] Grewal, above n 57, 380.
[131] Ibid 386.
[132] Doris E Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 *Feminist Legal Studies* 145, 149.

feminist discussion concerning sexual agency during armed conflict. Importantly, MacKinnon accepted that coercive circumstances are established whenever the nexus crimes of genocide, crimes against humanity, or war crimes are found.[133] Rape, therefore, is seen to occur whenever sexual penetration of one person by another happens within an armed conflict that has resulted in establishing these crimes.

MacKinnon's argument is that non-consent as an element of the crime is damaging to the achievement of gender equality because consent obviates the inherent inequality of the genders by relying on an artificial equality for its very operation.[134] She states that consent should be eliminated completely from the rape definition because gender inequality is the foundation of rape and the definition should be reflective of the power imbalance between victims and the accused.[135] Therefore, the consideration of circumstances of coercion that may surround a sexual assault is more likely to address and reflect the existing gender imbalance. MacKinnon supports her argument by comparing the crime of rape to other violent crimes and asserting that no other violent crime requires an element of non-consent to be established. She relies on the example of homicide and states that it would be implausible for murder trials to take into account whether the victim provided consent to be killed.[136] It would indeed be implausible for this to be an element of a crime in which, no matter the circumstances, the taking of human life is prohibited. However, as MacKinnon views rape as a manifestation of the 'gendered war of aggression of everyday life',[137] it may seem that consideration of the criminal nature of sexual intercourse, placed in this context, is not contingent on consent.

MacKinnon further distinguishes the dichotomy of consent-based and coercive-circumstances ICL approaches through her dissection of the nature of each. She views the consideration of non-consent as an element of the crime of rape as a representation of sexual penetration involving love and passion gone wrong.[138] MacKinnon also argues that the element of non-consent focusses on the mental state of the victim and perpetrator.[139] In contrast, she positions the focus of coercive circumstances on the

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[133] Catharine MacKinnon, 'Rape Redefined' (2016) 10 *Harvard Law and Policy Review* 431.
[134] Ibid.
[135] Ibid 474.
[136] Ibid.
[137] Catharine MacKinnon, 'Rape, Genocide, Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5, 8.
[138] MacKinnon, 'Rape Redefined', above n 133.
[139] Ibid.

external and physical acts of the sexual penetration and as representing power acted out through domination. MacKinnon sees the ICTR *Akayesu* definition of rape in armed conflict as a breakthrough definition and that 'arguably, for the first time, rape was defined in law as what it is in life'.[140] She asserts that the ICTY's following judgments in *Furundžija* and *Kunarac* were ill-conceived and regressive as they returned to a focus on non-consent as definitive of the crime of rape.[141] In contrast to the definition of wartime rape used by the ICTR in *Akayesu*, the *Furundžija* definition required the prosecution to prove the existence of coercion rather than non-consent. While the ICTY retained discussion of coercive circumstances in *Kunarac*, it was still considered within the paradigm of non-consensual penetration. The Appeal Chamber in *Kunarac* found that where coercive circumstances were established, it would be presumed that the sexual penetration of the victim was non-consensual.[142]

The consideration of individual sexual agency, particularly that of women, does not fit within the definition endorsed by MacKinnon because her focus is on the external power dynamics rather than the internal experiences of sex, desire, and autonomy that are expressed by women during armed conflict. The re-engagement with non-consent as an element of wartime rape in *Furundžija* and *Kunarac* therefore becomes symptomatic of a reluctance to recognise the everyday gender imbalance that affects women. Further, in relation to the Appeals Chamber in *Kunarac*, Karen Engle argues that this determination effectively makes consensual sexual intercourse a legal impossibility during circumstances such as armed conflict.[143]

Engle points out that in the former Yugoslavia before the outbreak of armed conflict, intimate relationships between members of different ethnic or religious groups was not uncommon.[144] However, if the *Kunarac* definition were to be applied, sexual relations between people of different groups would likely be legally viewed as rape once armed conflict existed in the region, despite the apparent consent of the victim. While it has been posited that prosecutorial discretion would prevent non-valid cases being elevated to the

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[140] MacKinnon, 'Defining Rape Internationally', above n 17, 944.
[141] Ibid.
[142] *The Prosecutor v Kunurac, Kovac, and Vukovic (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Case No IT-96-23-I & IT-96-23/1-A, 12 June 2002).
[143] Engle, above n 105, 804.
[144] Ibid 809.

level of international criminal law,[145] the implication this has for the acknowledgement of sexual agency during armed conflict is significant. For example, for Engle, the Appeals Chamber in *Kunarac* effectively made consensual sex during armed conflict a legal impossibility due to its determination that non-consent is established by proving that coercive circumstances, such as armed conflict, exist.[146] Janet Halley describes this as a process of flattening and collapsing 'the political and moral ambiguities of sexual violence, sexual desire and sexual conjunction of civilians with armed combatants'.[147] The preference of a coercive circumstance-based definition over a consent-based approach emphasises the external environment of the sexual penetration over the internal experience of the victim; therefore, this disempowers and makes irrelevant the decisions and actions of the victim. This removes the focus of the crime from its underlying principle of the protection of sexual autonomy.[148]

Halley also comments on the approach of the Appeals Chamber in the case of *Kunarac*. The Trial Chamber determined that coercive circumstances and non-consent could be *inferred* in the event that it occurred between a combatant and an enemy civilian.[149] The Appeals Chamber, however, applied a *presumption* of coercive circumstances and non-consent in the event of these factual circumstances.[150] It, therefore, increased the reliance of establishing the crime on the identity of the victim and perpetrator and perpetuates the misplaced value of the authentic victim subject in rape prosecutions. In interviews conducted by Olivera Simić with Bosnian women who had engaged in sexual relationships during and after the conflict, the prevailing image of Bosnian women as victims only became fractured.[151] While the focus of these interviews was on sexual relationships between Bosnian women and UN peacekeepers, it remains evident that the experiences of individuals within a specific cultural group cannot be generalised and removed of sexual agency on the basis of the surrounding circumstances in which they made their decisions.[152] These decisions may, in fact, be driven by desires such as sexual

[145] Interview with Patricia Viseur Sellers, legal advisor to the ICTY, 17 May 2004.
[146] Engle, above n 105, 804.
[147] Halley, above n 89, 101.
[148] Grewal, above n 57, 375.
[149] Halley, above n 89, 89.
[150] Ibid.
[151] Olivera Simić, 'Challenging Bosnian Women's Identity as Rape Victims, as Unending Victims: The "Other" Sex in Times of War' (2012) 13(4) *Journal of International Women's Studies* 129, 130.
[152] Ibid.

attraction, love, or friendship and not in need of the paternalistic protection that a presumption of non-consent would afford women during armed conflict.[153]

Halley argues that the ambivalence between approaches to defining wartime rape in armed conflict within ICL has been brought forward into the Rome Statute and the ICC's RPE.[154] The Rome Statute permits the RPE to 'guide' the Court in its application of the law, and the RPE, particularly Rule 70, is an attempt to mediate between the 'permitted inference' of the non-consent approach of the ICTY Trial Chamber and the 'mandatory presumption' of non-consent from the Appeals Chamber.[155] This ambivalence results in a flattening of victim subject acknowledged by the ICC and silences the complex and nuanced experiences of rape and sexual intercourse during wartime.

D *Creating an Ideal Victim/Perpetrator Dichotomy*

The concept of the "Raped Woman" has been a historically recurring subject of ICL either as a method of regulating wartime conduct, constructing propaganda, or identifying rape narratives.[156] This construct of a female victim, when combined with the notion of rape as an instrument of war that is used by 'one side' of the armed conflict against the other,[157] creates what Shana Tabak labels a 'false dichotomy' that emerges from ICL's treatment of wartime rape. One of the false dichotomies that Tabak identifies within ICL consists of the ideal representation of the female victim and the male perpetrator.[158] Tabak examines the complex reality of female agency, accountability, and the danger of false dichotomies when attempting to reconcile armed conflict. The complex roles that women played in the armed conflict in Columbia are used by Tabak as an example of the ways in which false dichotomies only generalise and homogenise the experiences of women in wartime.[159] The reality is that female experiences of war are far more nuanced and that the efficacy of ICL is limited by its ability to address the false dichotomy of the female victim, male perpetrator narrative.[160] According to Tabak, this false dichotomy

[153] Ibid 131.
[154] Halley, above n 89.
[155] Ibid.
[156] Buss, above n 132, 154.
[157] Ibid 155.
[158] Shana Tabak, 'The False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Columbia' (2011) 44 *International Law and Politics* 103, 126.
[159] Ibid 105.
[160] Ibid.

has emerged from the criminalisation process of wartime rape and that the focus on women as perpetual victims has ultimately positioned men as the perpetual perpetrators. This is, as Tabak proposes, an oversimplification of the complex roles and experiences of men and women during armed conflict and an over-reliance on a false dichotomy.[161] There is a tendency to ignore the involvement of women as combatants by the media and human rights discourse despite the fact that women have taken up arms in numerous armed conflicts.[162]

An example of the reliance of ICL on the victim/perpetrator false dichotomy is evident in the case law and feminist discourse arising from the conflict in the former Yugoslavia. Muslim women were the ideal victim subjects during the conflict in the former Yugoslavia, and the concept of Serb women as rape victims did not fit within the ideal narratives of mass rapes used as a weapon of war during the conflict.[163] The feminist research that emerged from this conflict was focused on the voices and experiences of these ideal victim subjects and, as a result, failed to acknowledge the more diverse experiences of wartime rape.[164] The idea that victimhood may be realistically complex enough to include elements of complicity, responsibility, or agency appears to challenge ICL's ability to protect victims when there is suspicion of guilt or inauthenticity.[165]

This difficulty in recognising instances in which agency or responsibility may exist has re-emerged in the *Bemba* judgment's definition of wartime rape. The nuanced and complex ways in which sexual agency is violated or exercised during armed conflict, has been silenced in favour of protecting those that comfortably fit within the ideal victim subject construct.[166] For example, in considering circumstances in which rape occurs, the focus of the judicial reasoning lies on a discussion of coercive circumstances and the

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[161] Ibid.
[162] Ibid 126.
[163] Olivera Simić, 'Feminist Research in Transitional Justice Studies: Navigating Silences and Disruptions in the Field' (2016) 17 *Human Rights Review* 95, 99.
[164] Ibid 104.
[165] Elissa Helms, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia-Herzegovina* (The University of Wisconsin Press, 2013), 7.
[166] Erin Baines, *I am Evelyn Amony: Reclaiming My Life from the Lord's Resistance Army* (University of Wisconsin Press, 2015); Mats Utas, 'Victimcy, Girlfriending, Soldiering: Tactic Agency in a Young Woman's Social Navigation of the Liberian War Zone' (2005) 78(2) *Anthropological Quarterly* 403; Maria Eriksson Baaz and Maria Stern, 'The Complexity of Violence: A Critical Analysis of Sexual Violence in the Democratic Republic of Congo' (Working Paper on Gender Based Violence, The Nordic Africa Institute and SIDA, May 2010).

environmental factors that could create such circumstances.[167] The Chamber did not take the opportunity to elaborate on how those circumstances relate to the victim but instead directed attention to setting out when and how coercive circumstances may be shown.[168] This reinforces the idea that there is a seductive quality to the acknowledgement of how vulnerable the powerless are when an armed conflict breaks out and that the ICC has allowed itself to be seduced.

IV RE-CONSIDERING WHAT BEMBA MEANS

A *The Impacts of Removing Consent*

The Trial Chamber in the *Bemba* judgment stated that Article 21 of the Rome Statute obliges the Chamber to apply 'the provisions of the Statute, Elements of Crimes and Rules of Procedure and Evidence' and further requires the Elements of Crimes to be applied subject to any conflicts with the Rome Statute. [169] These sources apply before consideration can and should be turned towards the case law of other international courts and tribunals such as the ICTY and ICTR.[170] The Trial Chamber even has discretion to apply its own case law for making determinations but, while not bound by ICC precedents, the Trial Chamber acknowledges the desirability of following previous ICC case law in the 'interests of expeditiousness, procedural economy, and legal certainty'.[171]

As a result of the Trial Chamber's hierarchy of applicable legal documents and principles, it has directly adopted the definition of rape set out within the ICC's Elements of Crimes without any apparent influence from the wealth of feminist legal jurisprudence or the case law that has emerged since its creation. This resulted in the *Bemba* judgment defining wartime rape as sexual penetration that occurs by force, by threat of force, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.[172] The Chamber elaborated the concept of a coercive environment as being guided by the *Akayesu* judgment in which it was found that the presence of hostile

[167] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [102]–[103].
[168] Ibid [103–104].
[169] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [66].
[170] Ibid [72].
[171] Ibid [74].
[172] Ibid [102].

forces among the civilian population would satisfy the requirements of coercive circumstances.[173]

In relation to the treatment of rape by the ICC, the Elements of Crimes does not expressly include non-consent as an element of the crime of rape in armed conflict and Rule 70 of the RPE provides restrictions on when consent may be inferred from a set of circumstances.[174] Previous international cases involving the crime of wartime rape have, despite discussing the coercive circumstances surrounding the physical invasion, maintained a link between circumstances and an individual's non-consent. The ongoing critique among ICL commentators about the essentiality of non-consent in judicial consideration has been reflected in the drafting of ICC materials and ultimately in the definition adopted by the Trial Chamber in *Bemba*.[175] The Chamber relied on the finding of the ICC Pre-Trial Chamber that military forces had committed rape as part of a widespread attack directed against the civilian population.[176] The threshold of the *Akayesu* requirement for coercive circumstances is therefore satisfied, and it remained for the Trial Chamber to determine whether the alleged acts that occurred amounted to sexual penetration done by force, coercion, or by taking advantage of the established coercive circumstances. In doing so, the Chamber notes that the perpetrators of the alleged rapes 'were of the same group and possessed the same identifying characteristics' as soldiers who had murdered civilians.[177] This evidence is used to establish that the perpetrators were hostile soldiers as opposed to civilian perpetrators.

The element of non-consent is discussed by the Chamber in relation to it not being a legal element of the crime of rape under the Rome Statute and that, where the second limb of the definition is established, lack of consent need not be proven.[178] The Chamber also notes that this is indicative of the intention of the drafters of the Rome Statute for the Prosecution not to have to establish non-consent so that efforts to bring perpetrators to justice are not undermined.[179] The ICC Chamber in the *Bemba* judgment identified that it was guided by Rule 70 of the RPE when considering the elements constituting the crime

[173] Ibid [103].
[174] *Elements of Crimes*; *Rules of Procedure and Evidence* r 70.
[175] Grewal, above n 57, 374.
[176] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [631].
[177] Ibid [634].
[178] Ibid [106].
[179] Ibid [105].

of wartime rape and for analysis of the relevant evidence.[180] However, Rule 70 provides that in cases where it has been established that a perpetrator used force or coercion or took advantage of coercive circumstances to undermine a victim's ability to give voluntary or genuine consent, the individual's consent cannot be inferred by their words or conduct.[181] It would appear that this necessarily requires the Chamber to consider whether the victim's lack of consent is due to the surrounding circumstances and therefore binds the consideration of coercive circumstances with that of consent.

Yet, the ICC Chamber stated in *Bemba* that the Rome Statute did not identify a victim's lack of consent as an element of the crime of wartime rape.[182] The ICC's determination that deliberation of lack of consent is irrelevant is reliant only on the basis of secondary sources that demonstrate the intention of the drafters of the Rome Statute.[183] The ICC was able but unwilling to apply a consideration of the victim's lack of consent to the elements of the crime of wartime rape as detailed in the Elements of Crimes. Instead of following the precedent that had been established in *Furundžija*, *Kunarac*, and *Gacumbititsi*, the ICC chose to explicitly severe the link between the consideration of a victim's lack of consent and the consideration of coercive circumstances. This decision has ramifications for the representation of female sexual agency: it perpetuates ideal constructs of the victim and perpetrator roles of wartime rape, and it potentially conflicts with an accused's right to a fair trial.

The consideration of the circumstances surrounding penetration or invasion is necessary to contextualise the choice and consent of the victim involved. Given the presentation of a dichotomy of definitions of wartime rape within the relevant jurisprudence, the *Bemba* judgment should have effectively articulated the artificiality of this dichotomy and reinforced the important relationship between these approaches. Instead, the Trial Chamber attempted to sever the link between consideration of the coercive circumstances of the case and how this affects a victim's ability to give genuine consent. It should be noted that while the ICC is guided by the Elements of Crimes and the RPE, neither document specifically excludes non-consent from being considered as an element

[180] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [109].
[181] *Rules of Procedure and Evidence* r 70(a).
[182] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [105].
[183] Ibid.

of the crime. The Elements of Crimes does not refer to consent, and the RPE only limits the circumstances in which consent can be inferred.[184] Therefore, the exclusion of non-consent from the consideration of wartime rape was a discretionary decision made by the ICC in defining the crime.

There are two prominent ways in which the definition of wartime rape adopted by the ICC in the *Bemba* judgment will impact on the conceptualisation of women during armed conflict. The dismissal of the relevance of non-consent to the criminal nature of sexual penetration will have a considerable impact on how sexual autonomy and agency is viewed during armed conflict. If the consent of individuals to sexual intercourse is relegated to an affirmative defence of the crime of rape in armed conflict, then this essentially elevates any sexual intercourse during armed conflict to potentially meeting the threshold of being an indictable offence of rape at the ICC.

One argument raised by Patricia Viseur Sellers, legal advisor to the ICTY, during an interview in 2004, is that wrongful prosecution of consensual sexual relations will be unlikely due to prosecutorial discretion.[185] The Prosecutor of the ICC will, therefore, be responsible for determining which sexual intercourse during armed conflict is more likely to satisfy coercive-circumstances requirements. This argument only raises the second issue that stems from an over-emphasis on the coercive circumstances for establishing the criminal nature of sexual intercourse. Prosecutorial discretion will become the means by which intercourse is classified as rape, which is problematic due to the multiple other considerations that prosecutors will need to take into consideration before prosecuting a rape charge. The relevance of the identity of the victim and the perpetrator will become a central issue for consideration given that coercive circumstances may be more easily proven if the identities conform to the stereotypical "aggressor" and "persecuted" roles. The exercise of prosecutorial discretion may become dictated by the characteristics and roles that the victim and perpetrator occupied during the armed conflict.[186]

[184] *Elements of Crimes*; *Rules of Procedure and Evidence*.
[185] Engle, above n 105, 806.
[186] Doris Buss, 'Knowing Women: Translating Patriarchy in International Criminal Law' (2013) 23(1) *Social and Legal Studies* 23, 73–92; Buss, above n 132; Grewal, above, n 15; Engle, above n 105.

This will only increase the problematic "ideal victim" conceptualisation that already exists and became a significant challenge to overcome within feminist discourse during the conflict in the former Yugoslavia. Further, the perpetuation of the ideal victim subject within prosecutions of wartime rape creates a binary representation of the ideal perpetrator that creates a serious and legitimate risk to an accused's right to a fair trial.

B *Recognising Sexual Agency*

The presence of armed conflict should not be held to immediately vitiate individual sexual autonomy. ICL has given preference to the protection of perceived powerless women over the acknowledgement of female sexual agency by placing consideration of coercive circumstances beyond the paradigm of a victim's capacity to give genuine consent. While it is important to protect the rights of the victim and attempt to deter future atrocities committed during armed conflict, the ICC has failed to account for the complexity of female sexual autonomy and the nuanced ways that it is expressed during armed conflicts. The *Bemba* judgments move away from a consent-linked consideration of coercive circumstances means that the ICC has in fact taken a step back towards a protectionist and paternalistic treatment of wartime rape victims rather than progressing forward to a definition that is representative and reflective of female experiences of sexual autonomy during armed conflict. The same women that the ICC is intending to protect can be inadvertently harmed by a construction of women during armed conflict as mere victims, deficient of sexual agency and unable to exercise sexual autonomy.[187]

The reliance on the establishment of coercive circumstances to provide the necessary criminality of sexual penetration is an attempt to mediate and resolve the complexity of sexual agency in armed conflict. Instead of successfully representing or progressing the issues of sexual violence, rape, and sexual agency in armed conflict, the *Bemba* definition acts as a 'flattening of the rape-war dilemma' and prevents ICL from accurately reflecting wartime experiences of violence and sexual agency.[188] In forcefully rejecting consent-based approaches to defining wartime rape, feminist theorists have marginalised the experiences of individuals living through armed conflict. While the generic and universal

[187] Simić, above n 151, 132.
[188] Halley, above n 89.

application of female agency is a problematic, western, secular forced consciousness, coercive circumstances-based approaches that sever any connection to the sexual agency of the victim are dismissing the reality of non-criminal sexual intercourse. There must be recognition of the middle ground between the victim or agent roles. Otherwise, individuals are provided recognition of agency up until the point that an armed conflict emerges within the region in which they reside. At this point, all individuals must either become perpetrators or victims if the paradigm of consent is removed from the conceptualisation of wartime sexual penetration.

The move away from a consent-based definition also places emphasis on the external circumstances of a crime that is, essentially, a violation of an individual's sexual autonomy.[189] The Chamber determined that coercive circumstances sufficiently established that the perpetrators 'knowingly and intentionally invaded the bodies of the victims by forcefully penetrating their vaginas and/or anuses, and/or other bodily openings with their penises'.[190] The reason that this is problematic is because there is no consideration of the agency for the victim. The victim becomes a body against which harms are committed, and their experience of the crime, although discussed earlier in the judgment, is silenced. It is no longer a violation of an individual's sexual autonomy and freedom that is being prohibited but instead a physical assault of a powerless body that occurs within a set of external circumstances.

The ICC has, by excluding a consideration of the link between consent and coercive circumstances, denied female sexual agency and therefore the existence of consensual sexual relationships during armed conflict. The denial of sexual agency is gendered, despite the ICC's explicit disclaimer of gender neutrality, because of the reliance by the ICC on force, coercion, or the taking advantage of coercive circumstances to establish the criminal nature of the sexual penetration. This positions the penetrated as the subject without agency against whom the sexual agency is exercised. The perception of the female as the penetrated and, therefore, devoid of sexual agency in the ICC's definition of

[189] Engle, above n 105.
[190] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [637].

wartime rape is linked to traditional assumptions of gender, sexuality, and sexual intercourse, which construct a 'naturally gendered' victim of rape as female.[191]

The ICC's lack of acknowledgement of female sexual agency also re-enforces the idea of an ideal victim subject. This is a victim who is vulnerable, powerless, innocent, and at the mercy of the surrounding circumstances. Without consideration of consent, an individual must either be a victim or a perpetrator during armed conflict because there is no middle ground in which sexual penetration is removed of its criminality.

C *Re-Enforcing the Ideal Victim Subject*

The ICC has positioned women as victims during armed conflict by adopting a definition of wartime rape that assumes consent as irrelevant when given in the context of armed conflict. The subsequent diminishment of female sexual agency results in the perpetuation of a narrative that endorses a false dichotomy of an ideal victim/perpetrator archetype. The efficacy of ICL will be limited if the role that the *Bemba* definition of wartime rape plays in perpetuating these false dichotomies is not adequately addressed.[192] The *Bemba* judgment included a thoughtful and well-executed account of the varying harms that victims of wartime rape can experience, but the precedent that it set in terms of legally defining the crime is problematic for the continued consideration of the complexities of sexual violence in armed conflict. The way in which the ICC reflected the victim experiences of trauma, social stigma, and ongoing physical issues resulting from wartime rape are important for its function as a means of transitional justice. The ICC has shown that it will provide a means of visibility for victim narratives and acknowledgement of the harms they have suffered. While these are positive aspects of the ICC's treatment of wartime rape, the legal definition adopted by the ICC does not support the progress achieved in other areas of the judgment.

The ICC expressly identified the gender-neutral application of the legal definition; however, the exclusion of consent from the consideration of wartime rape opens the gates for the perpetuation of the ideal victim subject. This is done by an over-reliance being placed on the external circumstances in which the sexual penetration occurs in order for the act to pass the criminality threshold for the crime of wartime rape. If the

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[191] Buss, above n 132.
[192] Tabak, above n 158, 113.

Prosecution becomes focussed on instances of sexual penetration that fit the preconceived notion of coercive circumstances, then there is a risk that many legitimate experiences of wartime rape will be silenced.

The premise of an "ideal" or "popular" victim is not new to ICL and much of the previous attention within international, feminist discourse regarding rape and sexual violence has been predicated on a victim perceived as belonging to the "innocent" nation and attacked by the "aggressor" nation.[193] The ICC was presented with an opportunity to deliver a judgment in *Bemba* that set a new definition of wartime rape that would end the previous inconsistency and provide for a more nuanced understanding of victims of wartime rape. Instead, the decision not to link the establishment of coercive circumstances with a consideration of how these circumstances have vitiated the victim's ability to give voluntary or genuine consent has only strengthened ICL's reliance on the false dichotomy of the victim and perpetrator narratives.

In reinforcing the false dichotomy of the victim and perpetrator roles, the *Bemba* definition of wartime rape has marginalised the experiences of victims that do not fit the ideal archetype of the victim and perpetrator role. If, as Patricia Viseur Sellers argues, prosecutorial discretion is the safeguard against the international prosecution of consensual sexual penetration, then it is the Prosecutor who determines what instances of sexual penetration are likely to satisfy the required coercive circumstances. In instances of wartime rape with factual circumstances that fit outside the ideal narrative, the likelihood of prosecution may be reduced due to a reasonable belief that it is less likely to result in a conviction. An instance of wartime rape in which the victim is male or a female combatant is likely to be less sure of conviction than one in which the victim is a non-armed, civilian female and assaulted by a male combatant. The involvement of women as combatants in numerous armed conflicts challenges the stereotype of female victimhood during armed conflict and threatens the certainty of a conviction reliant on the establishment of coercive circumstances.

Armed conflict affects men and women in ways that can challenge preconceived assumptions about gender roles and experiences.[194] Despite the gender-neutral

[193] Olivera Simić, 'Engendering Transitional Justice: Silence, Absence and Repair' (2016) 17 *Human Rights Review* 1, 6. See also Olivera Simić, *Silenced Victims of Wartime Sexual Violence* (Routledge, 2018).
[194] Tabak, above n 158, 127.

intention of the *Bemba* judgment, in explicitly removing consent from the consideration of the criminal nature of sexual penetration, the ICC has failed to challenge preconceived assumptions of gender and victimhood. The *Bemba* definition of wartime rape does not allow for the recognition of non-consensual sexual penetration that falls outside the false dichotomy of civilian, female victim and combatant, male perpetrator. For instance, in a situation in which one combatant sexually penetrates another combatant during an armed conflict, without their consent, only the surrounding circumstances will be taken into account to determine whether this is wartime rape. It may appear logical that this would still amount to a case of wartime rape, but the current definition, as set by the *Bemba* judgment, does not allow for such clarity. The victim's consent is irrelevant and, therefore, the weight of the prosecution's argument must go to establishing the use of force or coercion or that the perpetrator took advantage of coercive circumstances. However, if both the alleged victim and perpetrator are from the same "side" of the armed conflict and both are male, how can evidence of coercive circumstances or force not be seen as relevant to establishing non-consent?

Further, what does it say about the current definition that, if the victim was female, it may be easier to establish the use of force or coercive circumstances without the necessary link to consent? The answer is that the definition is reliant on the prosecution establishing the existence of the ideal victim and perpetrator archetype to satisfy the requisite criminal nature of wartime rape. The perpetuation of this archetype further marginalises the experiences of male victims of wartime rape because it reinforces the construct of men as perpetrators and silences the far more complex ways that men experience armed conflict. This hypothetical situation reveals that the *Bemba* definition, in relying on the establishment of external circumstances to determine the criminal nature of sexual penetration, is insufficient to address the range of experiences of wartime rape. It also reveals that, despite the explicit statement of the definition's gender-neutrality, it in fact perpetuates gender stereotypes and false dichotomies that undermine the achievement of gender equality within ICL. While this clearly perpetuates the construct of female victimhood, it also has ramifications for the ICC's duty to protect the right of the accused to a fair trial.

D *The Effects of the False Dichotomy on the Rights of the Accused*

In the event that cases fitting the ideal archetype are brought to trial, a significant consequence is that the reliance on the characteristics and role of the accused in the armed conflict threatens the balance between the rights of the accused and those of the victim. If the identity of the accused correlates to the identifying characteristics of a combatant of the conflict, then the acknowledged 'coercive circumstances' present during an armed conflict operate to create a presumption of rape in the event that the mechanical elements are proven. In considering coercive circumstances, the Trial Chamber in *Bemba* cited *Akayesu*, specifically in that 'coercion may be inherent in certain circumstances, such as armed conflict or the military presence'.[195]

The reliance of the ICC on the *Akayesu* consideration of established coercive circumstances contributes to the issues that arise from the exclusion of non-consent as an element of the crime of wartime rape. This is because it essentialises all sexual penetration that occurs during an armed conflict to rape with the caveat being that the perpetrator must have sufficiently 'taken advantage' of the coercive circumstances.[196] The Chamber does not, however, elaborate on what "taking advantage" may embody.

This leaves a gap in the case law that may be seen to provide a threshold of conduct that protects the rights of the accused to a fair trial but in fact has negative implications for the rights of a specific type of alleged perpetrator. The ICC's perpetuation of the ideal victim subject necessarily creates the over-simplified binary discussed by Tabak as the false dichotomy of the victim/perpetrator roles. This means that it is not only an ideal victim subject that is created by the removal of the element of non-consent from the crime, but it is also the creation of an ideal perpetrator subject.

The ICC's provision, that when sexual penetration is not done by force or coercion but instead by 'taking advantage of coercive circumstances',[197] contributes further to the construct of an ideal perpetrator because it suggests that, in the event that coercive circumstances are established by combatant forces being present among female civilian

[195] *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [103].
[196] Ibid [104].
[197] Ibid.

refugees,[198] a combatant may have sufficiently taken advantage of those circumstances by engaging in sexual intercourse with one of the female civilian refugees. This has implications for the accused's right to a fair trial as it suggests that whether the perpetrator has taken advantage of coercive circumstances may be determined based on characteristics by which they can be identified as belonging to the combatant group. For example, an individual's race, ethnicity, or gender become tools to determine not only their role in the armed conflict but also their role as either perpetrator or victim in the event of sexual intercourse. Once an individual's characteristics are found to align with those of the combatant group, the effect of excluding non-consent from the definition of wartime rape is to create a bias against the presumption of that individual's innocence.

Common Article 3 of the Geneva Convention establishes an international standard for a right to a fair trial.[199] This right has been incorporated into the Rome Statute and, therefore, operates at the ICC to ensure that the accused receives a fair, impartial, and public hearing.[200] In Article 66(a) of the Rome Statute, the accused is provided with the right to the presumption of innocence and that the accused's guilt must be established beyond a reasonable doubt.[201] The decision by the Chamber in the *Bemba* judgment to exclude consent and rely solely on the establishment of coercive circumstances to satisfy the criminality of sexual penetration, therefore, has ramifications for the ICC's ability to comply with Article 66 of the Rome Statute. This is because an individual who easily fits within the ideal perpetrator role has less access to a presumption of innocence than one who does not**.**

This is relevant to the rights of the accused as the ICC's decision to construct the definition of wartime rape in this way conflicts with Article 21 of the Rome Statute. Article 21 provides for the sources that the ICC may draw from to determine the applicable law for a crime. It states that the ICC should first apply the Rome Statute, then the Elements of

[198] This example is similar to that used by the Trial Chamber in *Akayesu* which determined that coercion may be inherent in circumstances such as 'military presence of Interahamwe among refugee Tutsi women at the bureau communal': *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) [688].
[199] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).
[200] David Weissbrodt and Kristin K. Zinsmaster, 'Protecting the Fair Trial Rights of the Accused in International Criminal Law: International Criminal Court and the Military Commissions in Guantanamo' in *Research Handbook on International Criminal Law* (Edward Elgar Publishing Ltd, 2011) 261, 265.
[201] *Rome Statute* art 66.

Crime and the RPE. It may then, if appropriate, look to treaties and the principles and rules established by international law as well as those that arose in previous ICC decisions.[202] Finally, under Article 21(3), the application of these sources of law must be consistent with internationally recognised human rights and not have an adverse distinction based on 'age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin'.[203] Given the impact of the exclusion of non-consent on the accused's right to a fair trial and its potential for adverse distinction on the basis of a number of characteristics outlined in Article 21(3), it is relevant to consider Article 51(5) of the Rome Statute. Article 51(5) requires that in the event that there is a conflict between the Rome Statute and the Rules of Procedure, the Statute shall prevail.[204] This is an explicit indication of the intent of the drafters of the Rome Statute that its provisions should prevail over other, secondary sources of law.

The ICC stated that it was relying on the Elements of Crimes and secondary sources that provided insight into the intentions of the drafters of the Rome Statute to formulate the definition for wartime rape. Therefore, in this instance, it is not a conflict between the RPE and the Rome Statute; however, Article 51(5) still provides guidance as to managing conflicting sources of law. In this instance, the ICC has relied on documents to the extent that it has defined wartime rape in a way that has diminished an accused's right to a fair trial under Article 64 of the Rome Statute and their right to the presumption of innocence under Article 66.[205]

If the guidance provided by Article 51(5) is complied with, the rights of the accused should prevail over the sources relied upon by the ICC to exclude a consideration of the victim's ability to consent from the broader consideration of coercive circumstances. A re-introduction of non-consent to the definition of wartime rape would acknowledge the complexity of identity and sexual agency that exists in conflict, including the understanding that identity does not uniformly dictate the exercise of sexual agency. The effect of the ICC's decision in *Bemba* may be that the wartime definition of rape is contrary to the Rome Statute which provides the opportunity for future prosecutions to reconsider

[202] *Rome Statute* art 21.
[203] Ibid art 21(3).
[204] Ibid art 51(5).
[205] Ibid arts 64, 66.

how the consideration of consent may maintain a balance between the rights of the accused and the rights of the victim.

V CONCLUSION

Through examining the ICC's definition of wartime rape in the *Bemba* judgment, this paper has revealed how this definition has failed to address two key issues that arose during the criminalisation of wartime rape and in previous ICL definitions. These issues are not new to feminist critique or analyses of ICL's treatment of wartime rape. The tendency to diminish female sexual agency and create a false dichotomy of ideal victim/perpetrator roles has been both identified and perpetuated within feminist discourse, and the ICC has fallen into the same problematic pattern of attempting to de-homogenise the wartime rape victim but protecting those that are disproportionately affected by the crime.

In attempting to avoid generalisation of the victim narrative, the ICC explicitly articulated the gender neutrality of the crime and detailed its socio-cultural effects on the victim. However, the decision to exclude the victim's non-consent from the elements of the crime of wartime rape has contradicted the ICC's initial intention, and instead the construct of the powerless, rapeable woman, devoid of sexual agency, has been perpetuated. The ICC relied heavily on the Elements of Crimes and the preparatory works of the Rome Statute to ensure that efforts to bring perpetrators of this crime to justice were not undermined. In doing so, the *Bemba* judgment undermined the work of certain feminist campaigners to challenge stereotyped portrayals of the victim and perpetrator binary.

Starting with the ICTR's landmark prosecution of wartime rape in the *Akayesu* judgment, the definition of the crime has been inconsistent within ICL. While this first case established a coercive circumstances-based definition that did not rely on the non-consent of the victim, subsequent cases at the ICTY such as *Furundžija* and *Kunarac* reintroduced a consideration of a victim's capacity to give genuine consent to international case law. The ICTR also moved towards a definition that linked consent and coercive circumstances in the Appeal Chamber's consideration of the *Gacumbitsi* case where it was determined that an affirmative defence of non-consent does not rule it out as an element of the crime but that, on the facts of the case, the coercive circumstances

would vitiate a victim's ability to give genuine consent.[206] This effectively linked the consideration of coercive circumstances with a consideration of a victim's ability to give consent and attempted to link the ICTR's previous *Akayesu* coercive circumstances-based definition with the ICTY's consent-based *Kunarac* definition.

The previous inconsistencies within ICL definitions of wartime rape indicate the difficulties that have arisen in attempting to address the range of factual circumstances in which wartime rape can occur. It is also reflective of the inconsistency and conflict within feminist discourse regarding the criminalisation of wartime rape. This paper has attempted to canvas some of the significant arguments for and against the inclusion of consent within the consideration of wartime rape; however, there is a wealth of research and academic discussion on the topic that reveals the diverse range of views among scholars. Any rape committed in armed conflict should be capable of being prosecuted at the ICC if it is tied to war crimes, crimes against humanity, or genocide that fall within the ICC's jurisdiction. This is an inherently different concept to any act of penetration between one person and another that occurs during armed conflict being considered as rape. The fundamental difference between these two concepts is the consent of both parties. If one party to the penetration does not consent, then it is rape occurring during armed conflict. In order to then be prosecuted at an international level, the rape must be related to war crimes, crimes against humanity, or genocide.

In failing to address the recurring diminishment of female sexual agency and perpetuating the ideal victim subject within narratives of wartime rape, the ICC has reinforced traditional patriarchal notions within ICL's treatment of rape victims. This has had the effect of diminishing female sexual agency, perpetuating the ideal victim construct, and threatening the balance of the rights of the accused and those of the victim. While the arguments against the requirement of the prosecution to prove non-consent contain validity, the refusal to consider a victim's capacity to provide genuine consent is not the answer as this only creates or reinforces problematic gender assumptions. A consideration of coercive circumstances is fundamental to the understanding of rape during armed conflict, but this should not necessitate the reduction of all sexual interactions during armed conflict to abuses of power. Coerced consent is not genuine

[206] *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006) [154].

consent because the victim is placed in a position where he or she must act in a way that may be contrary to how they would have acted without the element of coercion. The argument should not be whether to include coercive circumstances or non-consent within the definition of rape. Instead, future feminist legal discourse concerning the ICL treatment of wartime rape should focus on how to place the consideration of coercive circumstances within the framework of non-consensual sexual penetration.

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CONTENTS

THERESE WILSON	*THE PRIVATE PROVISION OF ESSENTIAL FINANCIAL SERVICES AND THE CORPORATE SOCIAL RESPONSIBILITIES OF BANKS AND INSURANCE COMPANIES*	1
JACOB DEBETS	*THE INTERNATIONALISATION OF AUSTRALIA'S HIGHER EDUCATION SYSTEM: TRADING AWAY HUMAN RIGHTS*	23
K ABRAHAM THOMAS	*AFFIRMATIVE ACTION IN PIERCING THE BAMBOO CEILING WITHIN THE AUSTRALIAN LEGAL PROFESSION — UTOPIAN IDEAL OR DYSTOPIAN NIGHTMARE?*	65
Dr ELISE KLEIN	*ECONOMIC RIGHTS AND A BASIC INCOME*	102
COLLEEN DAVIS	*PRE-PLANNED STARVATION AND ADVANCED DEMENTIA — IS THERE A CHOICE?*	116
JAKE BUCKINGHAM	*A CRITICAL ANALYSIS OF LEGAL REPRESENTATION IN QUEENSLAND'S MENTAL HEALTH REVIEW TRIBUNAL*	133
AIRDRE MATTNER	*RAPE IN SOUTH KOREA: BREAKING THE SILENCE*	161
Dr OLIVERA SIMIĆ & JEAN COLLINGS	*DEFINING RAPE IN WAR: CHALLENGES AND DILEMMAS*	184
MARK A DRUMBL	*THE KAPO ON FILM: TRAGIC PERPETRATORS AND IMPERFECT VICTIMS*	229
ELIZABETH ENGLEZOS	*AG-GAG LAWS IN AUSTRALIA: ACTIVISTS UNDER FIRE MAY NOT BE OUT OF THE WOODS YET*	272