

A CALL FOR A MORE PERMANENT
INTERNATIONAL DEFINITION OF RAPE

MEGAN LUTZ-PRIEFERT*

I. INTRODUCTION

Imagine a husband kidnapping his wife, accusing her of an affair—an affair he imagined—raping her, and then choking her to death.¹ Next imagine a reporter saying this was a story where a husband and wife made love before the husband was overcome by a jealous passion and strangled his wife.² Society's view of rape is framed by how media depicts rape.³ The above story is a true story, reported by a USA Today Reporter, a husband really did rape and choke his wife; the media even called his rape making love to his wife.⁴ Then consider Norway, where most rapes are relationship rape, so a significant other (usually male) has raped his partner.⁵ Unfortunately, relationship rape is fairly common worldwide, with 127 countries not recognizing marital rape.⁶ Rape occurs worldwide and is viewed differently throughout the world.⁷

Throughout the world, there are different definitions and rules for what constitutes rape.⁸ To address these differences this Note proceeds in three sections: first is the background section which covers world statistics of rape, cultural relativism, definitions of rape, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for Yugoslavia, the United States, and Denmark.⁹ The Note then proceeds to the

* J.D. Creighton University School of Law, 2015.

¹ Susan Caringella, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 43 (Columbia University Press, 2009).

² *Id.*

³ *See Id.*

⁴ *Id.*

⁵ Katrin Benhold, *In Norway, Gender Equality Does Not Extend to the Bedroom*, N.Y. TIMES, (Oct. 24, 2011), http://www.nytimes.com/2011/10/25/world/europe/in-norway-gender-equality-does-not-extend-to-the-bedroom.html?pagewanted=all&_r=0.

⁶ *Id.*

⁷ *See infra* notes 13–95 and accompanying text.

⁸ *See infra* notes 13–95 and accompanying text.

⁹ *See infra* notes 13–95 and accompanying text.

argument section, which discusses the best way to define rape based on defining consent and penetration, and the gender of the victim and perpetrator.¹⁰ Finally, the Note proceeds to a brief summary of the argument.¹¹ This Note only deals with the issue of a lack of definition for rape; it does not discuss issues such as the lack of reporting of rape, rape shield laws, marital rape, or the possibility of an attorney for a rape victim.¹²

II. BACKGROUND

A. RAPE STATISTICS AROUND THE WORLD

Rape, like many crimes, transcends the decades, culture, gender, and race.¹³ It is estimated that over 150,000,000 girls and 73,000,000 boys experience some form of sexual violence each year.¹⁴ However, this is only an estimate, as problems exist with reporting rape and rape statistics on a global level.¹⁵ Many countries only recognize that males can rape females, - the countries do not recognize men as rape victims or women as rapists.¹⁶ In 2013, there was a Joint Official Statistics Bulletin on sexual violence compiled by “the Ministry of Justice (MOJ), Office for National Statistics (ONS), and Home Office.”¹⁷ The report found in England and Wales that approximately more than 400,000 women are sexually assaulted a year.¹⁸ In India in 2012,

¹⁰ See *infra* notes 96–140 and accompanying text.

¹¹ See *infra* notes 141–46 and accompanying text.

¹² See *infra* notes 13–140 and accompanying text.

¹³ See Independent Expert, *Rights of the Child*, para. 28, transmitted by Note of the Secretary-General, U.N. Doc. A/61/299 (Aug. 29, 2006); U.N. Office on Drugs and Crime and the European Institute for Crime Prevention and Control, Affiliated with the United Nations (HEUNI), *International Statistics on Crime and Justice*, 24 (Stefan Harrendorf et. al. eds., 2010), available at http://www.unodc.org/documents/data-and-analysis/Crime-statistics/International_Statistics_on_Crime_and_Justice.pdf. [hereinafter *International Statistics on Crime and Justice*]; Babalola Abegunde, *Re-Examination of Rape and Its Growing Jurisprudence under International Law*, 6 J. OF POL. & L. 187, 193 (2013).

¹⁴ *Rights of the Child*, *supra* note 13, para. 28.

¹⁵ Abegunde, *supra* note 13, 193 (2013).

¹⁶ *Id.* See also *International Statistics on Crime and Justice*, *supra* note 13, at 24.

¹⁷ Abegunde, *supra* note 13, at 193.

¹⁸ *Id.* at 193–94.

there were over 240,000 crimes against women reported.¹⁹ However, South Africa has one of the highest rates of sexual violence in the world.²⁰ In 1998, 4,000 South African women were questioned about rape, and one-third of the women reported they were raped.²¹ The highest recorded rapes are in Southern Africa, Oceania, and North America while Asia has the lowest reported rapes.²²

B. CULTURAL RELATIVISM – WHO’S STANDARD

Cultural relativism is the idea that the rights and rules society follows are determined by each society’s individual culture.²³ Relativists believe that the notions of right or wrong vary based on the culture that someone was brought up in and therefore we cannot have universal rules.²⁴ A group cannot dictate its laws or rules onto another group of people because common ground between diverse groups of people does not always exist.²⁵ When trying to dictate standards the question of ‘whose standards’ is raised because groups and societal norms differ.²⁶

C. DEFINE RAPE

Rape comes from the Latin word *rapere*, which means, “to seize or take by force.”²⁷ Rape is defined in common law as “unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will.”²⁸ The more modern definition of rape used by *Black’s Law Dictionary* is “unlawful sexual activity ([especially] intercourse) with a person ([usually] a female) without consent and [usually] by force or threat of injury.”²⁹ While the Oxford Dictionary defines rape as a

¹⁹ *Id.* at 194.

²⁰ *Id.*

²¹ *Id.*

²² *International Statistics on Crime and Justice*, *supra* note 13, at 24.

²³ PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 531 (Oxford University Press, 2013).

²⁴ *Id.*

²⁵ *Id.* at 532.

²⁶ *Id.* at 535.

²⁷ Abegunde, *supra* note 13, at 188.

²⁸ BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁹ *Id.*

crime most often committed by a man that forces another person to have sexual intercourse with the perpetrator against the victim's will.³⁰

D. RAPE AS DESCRIBED BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In 1994, genocide occurred in Rwanda, which had terrible effects on the female Rwanda population, “particularly the Tutsi and moderate Hutu women and girls.”³¹ This was due to the large amounts of rape and sexual violence, which were planned, and instigated by the “Rwanda senior military and government officials.”³² During a three-month period in 1994, over 800,000 people were killed in Rwanda.³³ The number of women raped will never be known; however, estimates show that thousands of women were raped during the conflict.³⁴ The mass killings led to the United Nations Security Council creating the International Criminal Tribunal for Rwanda (ICTR).³⁵ The purpose of the ICTR is to prosecute the individuals that committed violations of international humanitarian law in Rwanda.³⁶ However, in 2015 the tribunal is scheduled to close after the final appeal is completed.³⁷

In 1998, the ICTR concluded in *Prosecutor v. Jean-Paul Akayesu*³⁸ that coercion was an element of rape; however, coercion can lack physical force because in circumstances like armed conflict the mere presence of a military may be threatening

³⁰ *Rape Definition*, OXFORDDICTIONARIES.COM, http://www.oxforddictionaries.com/us/definition/american_english/rape (last visited June 21, 2014).

³¹ Alex Obote-Odora, *Rape and Sexual Violence In International Law: ICTR Contribution*, 12 NEW. ENG. J. INT'L. COMP. L. ANN. 135, 136 (2005).

³² *Id.*

³³ *Id.* at 139.

³⁴ HUMAN RIGHTS WATCH, *Shattered Lives Sexual Violence During the Rwandan Genocide and its Aftermath*, (Sept. 1996), <http://www.hrw.org/reports/1996/Rwanda.htm>.

³⁵ *About ICTR*, ICTR, <http://www.unicttr.org/en/tribunal> (last visited Feb. 21, 2015).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Case No. ICTR-96-4-T, Judgment, (Sept. 2, 1998), available at <http://www.unicttr.org/sites/unicttr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

enough.³⁹ Jean-Paul Akayesu was tried for his crimes in Rwanda; he aided and abetted rape and sexual violence against women and girls near the commune of which he was the mayor.⁴⁰ Further, Akayesu made history by being the first person convicted of rape and sexual violence under the 1948 Genocide Convention in an international court.⁴¹ Initially, Akayesu was not charged with rape or sexual violence.⁴² However, when Akayesu's trial began, the witnesses discussed being raped or being victims of other forms of sexual violence while at Akayesu's communal.⁴³ Many of the women at Akayesu's communal were Tutsi and were regularly taken by law enforcement and "subjected to sexual violence."⁴⁴ As a result the charges against Akayesu were amended to include rape and sexual violence; stating Tutsi Women, who were at his communal, were subjected to repeated sexual violence that Akayesu knew of and encouraged.⁴⁵ The *Akayesu* Trial Chamber found that rape is a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive."⁴⁶ Rape, in international law, is committed "as part of a widespread or systematic attack on a civilian population on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds."⁴⁷ The court found that because Akayesu was present while sexual violence was happening to these women, he influenced the sexual violence that happened to these women, and he did nothing to stop the sexual violence, therefore he encouraged these activities.⁴⁸

³⁹ Catherine A. MacKinnon, *What Counts as Rape In International Crimes*, Ctr. on Law & Globalization (Sept. 24, 2014), available at https://clg.portalm.com/library/keytext.cfm?keytext_id=182, noted in CATHERINE A. MACKINNON, *ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES*, 237–246, (Belknap Press, 2007).

⁴⁰ Obote-Odora, *supra* note 31, at 137.

⁴¹ *Id.*

⁴² Abegunde, *supra* note 13 at 191.

⁴³ *Id.*

⁴⁴ Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 415, 452, 460 (Sept. 2, 1998), available at <http://www.unict.org/sites/unict.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

⁴⁵ See generally Abegunde *supra* note 13.

⁴⁶ *Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 598.

⁴⁷ *Id.*

⁴⁸ *Id.* paras. 415, 452, 460.

In 2003, the *Prosecutor v. Laurent Semanza*⁴⁹ Court held that rape has a mental element when the intention is to have prohibited sexual penetration with someone who is non-consenting.⁵⁰ The *Semanza* Trial Chamber also adopted the definition of rape as approved by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which is “the non-consensual penetration . . . of the vagina or anus of the victim by the penis of the perpetrator or by another object used by the perpetrator or of the mouth of the victim by the penis of the perpetrator.”⁵¹ Under this definition of rape, consent must be voluntarily given and looking at the surrounding circumstances assesses whether consent was given.⁵² In the *Semanza* case it was found that Semanza encouraged a crowd to rape Tutsi women, in the presence of commune and military authorities, which instigated the crowd to rape women.⁵³ In 2005, the *Prosecutor v. Mikaeli Muhimana*⁵⁴ decision found coercion is an element in international prosecutions, and when coercion is present consent usually does not exist.⁵⁵ Events, such as “genocide, crimes against humanity, or war crimes,” will usually be presumed to be coercive and therefore consent cannot be freely given.⁵⁶

⁴⁹ Case No. ICTR-97-20-T, Judgment (May 15, 2003), available at <http://www.ictrcaselaw.org/docs/doc37512.pdf>.

⁵⁰ *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment para. 346 (May 15, 2003), available at <http://www.ictrcaselaw.org/docs/doc37512.pdf>; MacKinnon, *supra* note 39 (discussing how the trial chamber held that “the mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.”) This basically takes rape from being a physical act performed on the body of the “victim to a psychic act committed in the mind of the perpetrator.” *Id.*

⁵¹ *Semanza*, Case No. ICTR-97-20-T, Judgment, paras. 344, 345

⁵² *Id.* para. 344.

⁵³ *Id.* paras. 476-78.

⁵⁴ Case No. ICTR 95-1B-T, Judgment and Sentence, (Apr. 28, 2005), available at <http://www.unict.org/sites/unict.org/files/case-documents/ictr-95-1b/trial-judgements/en/050428.pdf>.

⁵⁵ MacKinnon, *supra* note 39.

⁵⁶ *Prosecutor v. Mikaeli Muhimana*, Case No. ICTR 95-1B-T, Judgment and Sentence, ¶546 (Apr. 28, 2005), available at <http://www.unict.org/sites/unict.org/files/case-documents/ictr-95-1b/trial-judgements/en/050428.pdf>.

E. RAPE AS DESCRIBED BY THE INTERNATIONAL CRIMINAL
TRIBUNAL FOR THE FORMER YUGOSLAVIA

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in 1993 by the United Nations Security Council to deal with war crimes that took place in the Former Yugoslavia since 1991.⁵⁷ This was the first court created by the United Nations to deal with war crimes, and the first court created since the Nuremberg and Tokyo Tribunals.⁵⁸ The United Nations Security Council created the ICTY in 1993 under Resolution 808 to prosecute those responsible for “serious violations of international humanitarian law.”⁵⁹ The ICTY was created as a court specifically for the purpose of the war crimes in the Balkans.⁶⁰ The Security Council approved the ICTY completion strategy; this plan allows for an ordered closure of the Court.⁶¹ The court was supposed to finish work in 2010; however, the winding down procedure has been halted because not all defendants have been apprehended.⁶² The ICTY is known for laying the foundation for “conflict resolution and post-conflict development across the globe.”⁶³

In 1998, the ICTY decided in *Prosecutor v. Anton Furund'ija*,⁶⁴ that some form of penetration had to be shown either by the penis or another object used by the accused.⁶⁵ *Furund'ija* was a pivotal point for the ICTY in regards to forming how rape

⁵⁷ *About the ICTY*, ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited Feb. 23, 2015); BETH VAN SCHAACK & RONALD C. SLYLE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT CASES AND MATERIALS 41 (Robert C. Clark et. al. eds., 2nd ed. 2010).

⁵⁸ *About the ICTY*, *supra* note 57.

⁵⁹ SCHAACK & SLYLE, *supra* note 57, at 42.

⁶⁰ *About the ICTY*, *supra* note 57.

⁶¹ *Id.*

⁶² SCHAACK & SLYLE, *supra* note 57, at 61.

⁶³ *About the ICTY*, *supra* note 57.

⁶⁴ Case No. IT-95-17/1-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *available at* <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

⁶⁵ *Prosecutor v. Anton Furund'ija*, Case No. IT-95-17/1-T, Judgment, paras. 174, 185 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *available at* <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

cases would be handled in the ICTY.⁶⁶ The Trial Chamber looked at “the ICTR definition of rape,” but ultimately decided a more narrow definition should be applied in the ICTY.⁶⁷ The court found rape was defined as sexual penetration of the vagina or anus by the penis or another object used by the perpetrator or “the mouth of the victim by the penis of the perpetrator,” or by coercion or threat of force against the victim or another person.⁶⁸ This definition fits better with the traditional definition in the common law of rape than did the definition developed by the ICTR in *Akayesu*.⁶⁹ In the definition adopted by the ICTY, the perpetrator has to be male, unless a female uses another object.⁷⁰

In 2001, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*⁷¹ was decided, and in 2002, it was appealed.⁷² In *Kunarac*, the Appeals Chamber looked at and adopted the 1998 *Furund'ija* test.⁷³ This test requires that the victim did not consent to the sexual act, and the prosecution has the burden of proof.⁷⁴ Non-consensual penetration includes penetration after a threat to retaliate “against the victim or any other person,” non-consent of the victim, or the victim is unable to consent based on the “context of the surrounding circumstances.”⁷⁵ The court noted that a person’s sexual autonomy is violated if the person is subjected to an involuntary sexual act.⁷⁶ The trial

⁶⁶ Obote-Odora, *supra* note 31, at 150.

⁶⁷ *Furund'ija*, Case No. IT-95-17/1-T, Judgment, paras. 176, 185.

⁶⁸ *Id.* para. 185. *Accord* Obote-Odora, *supra* note 31, at 150-51; Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law* 54 B.C. L. REV. 1207, 1211 (2013).

⁶⁹ Weiner, *supra* note 68, at 1211.

⁷⁰ *See id.*; *Furund'ija*, Case No. IT-95-17/1-T, Judgment, para. 185.

⁷¹ Case No. IT-96-23/1-A, Judgment (June 12, 2002), *available at* <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

⁷² MacKinnon, *supra* note 39.

⁷³ Obote-Odora, *supra* note 31 at 152.

⁷⁴ *Id.*

⁷⁵ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, Case No. IT-96-23/1-A, Judgment, paras. 127, 129, 130 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), *available at* <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> [hereinafter *Kunarac*].

⁷⁶ *Prosecutor v. Dragoljub, Radomir Kovac, and Zoran Vukovic*, Case No. IT-96-23/1-T, Judgment, para. 457 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), *available at*

chamber understood that under international law in order to be guilty of rape there has to be some level of sexual penetration of the vagina, anus, or mouth by the penis or another object used by the perpetrator without the victim's consent.⁷⁷ The court also noted that consent must be voluntarily given through the victim's free will; which is determined on a case-by-case basis.⁷⁸ However, the Appeals Chamber also presumed non-consent in situations like genocide.⁷⁹

F. RAPE IN THE UNITED STATES OF AMERICA

The FBI does collect statistics for the United States on rapes; this information is included in the Uniform Crime Reports.⁸⁰ The FBI formerly defined rape as "the carnal knowledge of a female forcibly and against her will."⁸¹ Carnal knowledge can be defined as sexual intercourse.⁸² When has carnal knowledge the person is said to have sexual intercourse with someone else.⁸³ The problem with this particular definition was many other agencies were interpreting it to exclude many sexual offenses such as oral or anal penetration or rapes against men.⁸⁴ The FBI changed the definition to "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."⁸⁵ The FBI definition is the closest the United States has to having a

<http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>
[hereinafter *Kovac*].

⁷⁷ *Id.* para. 437

⁷⁸ *Id.* para. 460.

⁷⁹ MacKinnon, *supra* note 39.

⁸⁰ Marilyn Rubin & Michael C. Walker, *Cross-National Comparisons of Rape Rates: Problems and Issues*, 2 (Joint UNECE-UNODC Meeting on Crime Statistics, Working Paper No. 18, 2014), <http://www.unece.org/fileadmin/DAM/stats/documents/2004/11/crime/wp.18.e.pdf>.

⁸¹ Frequently Asked Questions about the Change in the UCR Definition of Rape, at 1, (Dec. 11, 2014), <http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions>.

⁸² COLLINS ENGLISH DICTIONARY (2012), *available at* <http://dictionary.reference.com/browse/carnal+knowledge>.

⁸³ *Id.*

⁸⁴ Frequently Asked Questions, *supra* note 81, at 1.

⁸⁵ *Id.*

uniform definition for rape.⁸⁶ The FBI includes any time where the victim cannot give consent based on age, “or temporary or permanent mental or physical incapacity” in its definition of rape.⁸⁷ The FBI defines sodomy as oral or sexual intercourse without consent; which is very similar to the definition of rape.⁸⁸ When someone uses an object to penetrate the genital or anal opening of another person without consent this is considered sexual assault with an object.⁸⁹

G. DENMARK

Originally, Rape was defined in Denmark as violation of a man’s right to his property; however, in 1866 it was “seen as a violation of the woman.”⁹⁰ Rape today is defined by §216 of the Penal Code as forcing an unwilling party to have sexual intercourse.⁹¹ This can be achieved through violence or threats of violence.⁹² If the victim is unable to consent because of something she herself has done, this is not considered rape according to §218 of the Denmark Penal Code.⁹³

III. ARGUMENT

Certain changes are necessary to prosecute rape worldwide.⁹⁴ Currently none of the worldwide international

⁸⁶ *See id.*

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* (“11B Sodomy *Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.*”).

⁸⁹ *Id.* (“11C Sexual Assault With An Object *To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.*”).

⁹⁰ *Case Closed Rape and Human Rights in the Nordic Countries*, AMNESTY INT’L, 16 (Sept. 2008), <http://www.amnesty.dk/sites/default/files/mediafiles/44/case-closed.pdf>.

⁹¹ *Id.* at 17.

⁹² *Id.*

⁹³ *Id.* at 18.

⁹⁴ *See Prosecutor v. Anton Furund’ija*, Case No. IT-95-17/1-T, Judgment para. 175 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10,

documents, such as the Geneva Convention or Declaration on the Elimination of Violence, have a definition for rape; the only international definitions are in courts of limited jurisdiction and duration.⁹⁵ Therefore, rape must be defined in international law in a more permanent manner.⁹⁶ The things to consider when defining rape are consent, penetration, and the gender of the perpetrator and victim.⁹⁷

Many international documents discuss rape; however, they do not define rape.⁹⁸ Nowhere does the Geneva Convention or The Declaration on the Elimination of Violence Against Women define

1998), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> (discussing how there is no international definition of rape).

⁹⁵ See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, 75 U.N.T.S. 287, 1958 A.T.S. No. 21, available at <http://www.cil.nus.edu.sg/1949/1949-geneva-convention-iv-relative-to-the-protection-of-civilian-persons-in-time-of-war/> (select PDF) [hereinafter Geneva Convention (IV)]; Declaration on the Elimination of Violence Against Women, Doc. A/RES/48/104 (Dec. 20 1993); *Resolutions adopted by the General Assembly at its 48th session*, Research Guides, available at <http://research.un.org/en/docs/ga/quick/regular/48> (last visited Oct. 5, 2014) (select A/RES/48/104 about half-way down the page, the resolutions are listed in descending order) [hereinafter Declaration on the Elimination of Violence Against Women]; *Furund'ija*, Case No. IT-95-17/1-T, Judgment para. 175; Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Judgment, (Sept. 2, 1998), available at <http://www.unictr.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>.

⁹⁶ See generally *supra* notes 13-95 and accompanying text.

⁹⁷ See Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgment, paras. 344, 345 (May 15, 2003), available at <http://www.ictcaselaw.org/docs/doc37512.pdf>; Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, Case No. IT-96-23/1-T, Judgment, para. 460 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), available at <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [hereinafter *Kovac*]; Frequently Asked Questions about the Change in the UCR Definition of Rape, at 6, (Dec. 11, 2014), <http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions> [hereinafter Frequently Asked Questions].

⁹⁸ See generally Geneva Convention (IV), *supra* note 95; Declaration on the Elimination of Violence Against Women *supra* note 97 (neither of these sources defines rape).

rape.⁹⁹ In its opinion in *Prosecutor v. Anton Furund'ija*¹⁰⁰ the Court stated, “[n]o definition of rape can be found in international law.”¹⁰¹ Rape has been defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); however, these courts are courts of limited jurisdiction and duration.¹⁰² Therefore, in international law, and specifically international humanitarian law, no definition of rape exists; which in part results from different countries having different definitions of rape.¹⁰³ Further rape is something that affects many people, such as an estimated 223,000,000 children worldwide; however, this number could be low because of the lack of a consistent definition of rape and therefore inconsistent reporting of rape crimes.¹⁰⁴ All of this demonstrates that rape is an international problem that is at least mentioned in many international documents, but has no uniform definition.¹⁰⁵ For international documents to have force after the international tribunals have closed, the international community must have a consistent definition of rape.¹⁰⁶

Part of any definition of rape should include an element of consent.¹⁰⁷ Consent must be an element of rape because whether the victim said yes is crucial to understanding the situation

⁹⁹ See Geneva Convention (IV), *supra* note 95; Declaration on the Elimination of Violence Against Women *supra* note 95.

¹⁰⁰ Case No. IT-95-17/1-T, Judgment para.175 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998) *available at* <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

¹⁰¹ *Furund'ija*, Case No. IT-95-17/1-T, Judgment para.175.

¹⁰² See *Semanza*, Case No. ICTR-97-20-T, Judgment; *Kovac*, Case No. IT-96-23/1-T, Judgment, *About the ICTY*, ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited Feb. 23, 2015); *About ICTR*, ICTR, <http://www.unictr.org/en/tribunal> (last visited Feb. 21, 2015).

¹⁰³ See PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 531 (Oxford University Press, 2013); SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 21-22 (Columbia University Press, 2009).

¹⁰⁴ Independent Expert, *Rights of the Child*, transmitted by Note of the Secretary-General, U.N. Doc. A/61/299 (Aug. 29, 2006).

¹⁰⁵ See *supra* notes 98-104 and accompanying text.

¹⁰⁶ See *supra* notes 98-105 and accompanying text.

¹⁰⁷ See *Kovac*, Case No. IT-96-23/1-T, Judgment.

between these two people.¹⁰⁸ Consent is something that must be freely given by the victim and must be determined using a case-by-case analysis.¹⁰⁹ However, there are some surrounding circumstances where a victim is always unable to consent which includes: (1) when the victim is drugged, (2) when the victim is unconscious, (3) when the victim is led to believe the victim is having sex with the victim's partner, (4) when there is a mental disorder or disability, or (5) when the victim is unable to consent because of the victim's age.¹¹⁰ Other factors that may contribute to a victim's inability to freely consent are when the accused uses force or threat of force toward a victim or third party.¹¹¹

In order to establish non-consent the victim should only need to show that they refused the advances of the accused.¹¹² Non-consent is presumed by the International Tribunals during times of genocide, war, or violations of international humanitarian law.¹¹³ This is because during times of genocide, war, or violations of international humanitarian law, the International Tribunals presume coercion, and therefore non-consent.¹¹⁴

Another important element in rape is penetration.¹¹⁵ The definition of penetration varies slightly from jurisdiction to jurisdiction.¹¹⁶ Under common law, penetration was strictly the

¹⁰⁸ *See id.*; Prosecutor v. Mikaeli, Case No. ICTR 95-1B-T, Judgment and Sentence, para. 546 (Apr. 28, 2005), available at <http://www.unict.org/sites/unict.org/files/case-documents/ictr-95-1b/trial-judgements/en/050428.pdf>.

¹⁰⁹ *Kovac*, Case No. IT-96-23/1-T, Judgment, para. 460.

¹¹⁰ *See id.* para. 451; Frequently Asked Questions, *supra* note 97, at 2.

¹¹¹ *See* Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT'L COMP. L. ANN. 135, 152 (2005).

¹¹² *See* Caringella, *supra* note 103, 110-11.

¹¹³ *Muhimana*, Case No. ICTR 95-1B-T, Judgment and Sentence, para. 546.

¹¹⁴ *See id.*

¹¹⁵ *See* Frequently Asked Questions, *supra* note 97, at 1.

¹¹⁶ *See Kovac*, Case No. IT-96-23/1-T, Judgment, para. 460; *Semanza*, Case No. ICTR-97-20-T, Judgment, paras. 344-45; *Case Closed Rape and Human Rights in the Nordic Countries*, AMNESTY INT'L, 17 (Sept. 2008), <http://www.amnesty.dk/sites/default/files/mediafiles/44/case-closed.pdf>; Frequently Asked Questions, *supra* note 97; Obote-Odora, *supra* note

penetration of a vagina by a penis.¹¹⁷ Today the best definition of penetration is that by the Federal Bureau of Investigation (FBI) in the United States.¹¹⁸ The FBI defines penetration as any amount of penetration of the vagina or anus by a body part or object used by the perpetrator or oral penetration by a sexual organ of another person without the victim's consent.¹¹⁹ This definition is best because it recognizes that both males and females can commit and be victims of rape.¹²⁰ The FBI's definition is similar to the ICTR definition found by the *Semanza* Court and the ICTY definition found by the *Kunarac* Court.¹²¹ The FBI's definition also does not care how much penetration there was, as long as some amount of penetration occurred.¹²²

Another important thing to consider is who is the victim and who is the perpetrator.¹²³ Under the common law the perpetrator is always male, and the victim is always female.¹²⁴ However, this creates a problem because 22% of men experience some level of sexual violence.¹²⁵ Therefore, the ICTY, ICTR, and

111, at 150–51; Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law* 54 B.C. L. REV. 1207, 1211, 1213, 1217 (2013); Catherine A. MacKinnon, *What Counts as Rape In International Crimes*, Ctr. on Law & Globalization (Sept. 24, 2014), available at https://clg.portalxm.com/library/keytext.cfm?keytext_id=182, noted in CATHERINE A. MACKINNON, *ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES*, 237-46, (Belknap Press, 2007).

¹¹⁷ See generally Weiner, *supra* note 116, at 1209–10 (discussing rape as only being committed by males to females, by deduction one gets to the idea of penal to vaginal intercourse).

¹¹⁸ See generally Frequently Asked Questions, *supra* note 97 (explaining the FBI's definition of rape).

¹¹⁹ *Id.* at 1.

¹²⁰ See generally *id.* (explaining the FBI's definition of rape).

¹²¹ Compare *Kovac*, Case No. IT-96-23/1-T, Judgment, para. 460, and *Semanza*, Case No. ICTR-97-20-T, Judgment, paras. 344–45, with Frequently Asked Questions, *supra* note 97, at 1.

¹²² See Frequently Asked Questions, *supra* note 97, at 1.

¹²³ See *Kovac*, Case No. IT-96-23/1-T, Judgment, para. 460; *Semanza*, Case No. ICTR-97-20-T, Judgment, paras. 344–45; Frequently Asked Questions, *supra* note 97, at 1.

¹²⁴ See Weiner, *supra* note 111, at 1210.

¹²⁵ See American Bar Association Commission on Domestic Violence, *Domestic Violence Statistics*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/domestic_violence/resources/statisti

FBI have the better definitions because they recognize that rape can occur against men, and that women can commit rape.¹²⁶ They recognize that men can be raped by allowing any amount of penetration of the anus by a sexual organ or object, and of the mouth by a sexual organ of another person.¹²⁷ They also recognize that women can rape by allowing sexual penetration to include a foreign object.¹²⁸ Therefore international law should recognize that a rapist can be either gender, and likewise, rape victims can be either gender.¹²⁹

Cultural relativists believe groups cannot dictate their laws or rules to another group.¹³⁰ However, we have many laws or rules that are supported by most countries, such as the Geneva Convention or the Universal Declaration of Human Rights.¹³¹ Further, anthropologists have found that many countries want change, especially Third World countries; these countries are disadvantaged without change, and some values that can be applied to all countries.¹³² Therefore, while some critique the idea that universal rules can work, sometimes universal rules are necessary to help third world countries.¹³³ However, many cultures around the world are very conservative and the issue of rape is sensitive.¹³⁴

cs.html (last visited Mar. 11, 2015) (citing Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey at iv (2000)*, available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm>).

¹²⁶ See *Kovac*, Case No. IT-96-23/1-T, Judgment, para. 460; *Semanza*, Case No. ICTR-97-20-T, Judgment, para. 344-45; Frequently Asked Questions, *supra* note 97, at 1.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *supra* notes 123-28 and accompanying text.

¹³⁰ See Elvin Hatch, *Culture and Morality: The Relativity of Values in Anthropology*, reprinted in INTERNATIONAL HUMAN RIGHTS THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 535, 535 (Philip Alston & Ryan Goodman 2013).

¹³¹ Hatch, *supra* note 130, at 532.

¹³² See *id.* at 535.

¹³³ See generally *id.*

¹³⁴ See Bayan Itani, Elain Yusuf, and Ahmed ElShamy, *Incest rapes in the Middle East – spiral of silence on a rising crime*, YOUR MIDDLE EAST, (Dec. 9, 2013), http://www.yourmiddleeast.com/features/incest-rapes-in-the-middle-east-spiral-of-silence-on-a-rising-crime_20062.

An example is how in Egypt, Lebanon and Jordan incest rapes occur on a daily basis but is not addressed because society would disgrace the family as a whole.¹³⁵ These are the types of countries that are disadvantaged without change, but they would also resist change.¹³⁶ The challenge would be determining how to present the earlier described definition of rape in such a way that culturally these countries would accept it.¹³⁷ Therefore the best way to incorporate such a law into our international community would be an amendment to the Geneva Convention or other such resolution through the United Nations.¹³⁸

IV. Conclusion

The entire world has a different idea as to what constitutes rape.¹³⁹ This first section of the Note was the Background Section, which covers world statistics regarding rape, statistics regarding male rape as compared to female rape, the Geneva Convention, the Declaration on the Elimination of Violence Against Women, the ICTY, the ICTR, the United States, and Denmark.¹⁴⁰ The Background Section provided that there is not a consistent definition of rape in international law, and the definition that does exist is only temporary.¹⁴¹ The Note then proceeded to the argument section where it defined rape based on defining consent and penetration, determining who can be the perpetrator and the victim, as well as some criticisms to having anything universal in international law.¹⁴² This Note only dealt with the lack of a definition for rape, it does not discuss issues such as the lack of reporting of rape, rape shield laws, marital rape, or the possibility of an attorney for a rape victim.¹⁴³

The rape laws around the world need to be changed to provide the best prosecution against the accused. By following the recommendations in this Note, the laws and courts are ensuring the victim is protected and not on trial. The laws and courts are

¹³⁵ *Id.*

¹³⁶ *Id.*; see Hatch, *supra* note 130, at 537.

¹³⁷ *See id.*

¹³⁸ *See supra* notes 94–137 and accompanying text.

¹³⁹ *See supra* notes 11–93 and accompanying text.

¹⁴⁰ *See supra* notes 11–93 and accompanying text.

¹⁴¹ *See supra* notes 11–93 and accompanying text.

¹⁴² *See supra* notes 94–137 and accompanying text.

¹⁴³ *See supra* notes 11–137 and accompanying text.

ensuring the accused is on trial. As Angelina Jolie said at her summit on rape in 2014, “[i]t has nothing to do with sex, [but] everything to do with power. . . . We must send a message around the world that the shame is on the aggressor.”¹⁴⁴

¹⁴⁴ Hollie McKay, *Hollywood can actually help solve complex global problems: Just ask Angelina Jolie*, FOX NEWS (June 19, 2014), <http://www.foxnews.com/entertainment/2014/06/19/hollywood-can-actually-help-solve-complex-global-problems-just-ask-angelina/>.