A CALL FOR A MORE PERMANENT INTERNATIONAL DEFINITION OF RAPE

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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

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

2 Id.

3 See Id.

4 Id.


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. Finally, the Note proceeds to a brief summary of the argument. 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.

II. BACKGROUND

A. Rape Statistics Around the World

Rape, like many crimes, transcends the decades, culture, gender, and race. It is estimated that over 150,000,000 girls and 73,000,000 boys experience some form of sexual violence each year. However, this is only an estimate, as problems exist with reporting rape and rape statistics on a global level. Many countries only recognize that males can rape females, - the countries do not recognize men as rape victims or women as rapists. 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.” The report found in England and Wales that approximately more than 400,000 women are sexually assaulted a year. In India in 2012,
there were over 240,000 crimes against women reported. However, South Africa has one of the highest rates of sexual violence in the world. In 1998, 4,000 South African women were questioned about rape, and one-third of the women reported they were raped. The highest recorded rapes are in Southern Africa, Oceania, and North America while Asia has the lowest reported rapes.

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. 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. 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. When trying to dictate standards the question of ‘whose standards’ is raised because groups and societal norms differ.

C. DEFINE RAPE

Rape comes from the Latin word *rapere*, which means, “to seize or take by force.” 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.” 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.” While the Oxford Dictionary defines rape as a

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19 Id. at 194.
20 Id.
21 Id.
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.  

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.” 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.” During a three-month period in 1994, over 800,000 people were killed in Rwanda. The number of women raped will never be known; however, estimates show that thousands of women were raped during the conflict. The mass killings led to the United Nations Security Council creating the International Criminal Tribunal for Rwanda (ICTR). The purpose of the ICTR is to prosecute the individuals that committed violations of international humanitarian law in Rwanda. However, in 2015 the tribunal is scheduled to close after the final appeal is completed.

In 1998, the ICTR concluded in Prosecutor v. Jean-Paul Akayesu 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

32 Id.
33 Id. at 139.
36 Id.
37 Id.
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. Further, Akayesu made history by being the first person convicted of rape and sexual violence under the 1948 Genocide Convention in an international court. Initially, Akayesu was not charged with rape or sexual violence. 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. Many of the women at Akayesu’s communal were Tutsi and were regularly taken by law enforcement and “subjected to sexual violence,” 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. The Akayesu Trial Chamber found that rape is a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” 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.” 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.

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40 Obote-Odora, *supra* note 31, at 137.
41 *Id.*
42 Abegunde, *supra* note 13 at 191.
43 *Id.*
45 See generally Abegunde *supra* note 13.
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 Semenza 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 Semenza case it was found that Semenza 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.\(^56\)


\(^{50}\) 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.*

\(^{51}\) *Semenza*, Case No. ICTR–97–20–T, Judgment, paras. 344, 345

\(^{52}\) *Id.* para. 344.

\(^{53}\) *Id.* paras. 476–78.


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. 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. The United Nations Security Council created the ICTY in 1993 under Resolution 808 to prosecute those responsible for “serious violations of international humanitarian law.” The ICTY was created as a court specifically for the purpose of the war crimes in the Balkans. The Security Council approved the ICTY completion strategy; this plan allows for an ordered closure of the Court. The court was supposed to finish work in 2010; however, the winding down procedure has been halted because not all defendants have been apprehended. The ICTY is known for laying the foundation for “conflict resolution and post-conflict development across the globe.”

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

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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.


cases would be handled in the ICTY. The Trial Chamber looked at “the ICTR definition of rape,” but ultimately decided a more narrow definition should be applied in the ICTY. 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. This definition fits better with the traditional definition in the common law of rape than did the definition developed by the ICTR in Akayesu. In the definition adopted by the ICTY, the perpetrator has to be male, unless a female uses another object.

In 2001, Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic was decided, and in 2002, it was appealed. In Kunarac, the Appeals Chamber looked at and adopted the 1998 Furund’ija test. This test requires that the victim did not consent to the sexual act, and the prosecution has the burden of proof. 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.” The court noted that a person’s sexual autonomy is violated if the person is subjected to an involuntary sexual act. The trial

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66 Obote-Odora, supra note 31, at 150.
67 Furund’ija, Case No. IT–95–17/1–T, Judgment, paras. 176, 185.
69 Weiner, supra note 68, at 1211.
70 See id.; Furund’ija, Case No. IT–95–17/1–T, Judgment, para. 185.
72 MacKinnon, supra note 39.
73 Obote-Odora, supra note 31 at 152.
74 Id.
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.  
\(^83\) *Id.*  
\(^84\) Frequently Asked Questions, *supra* note 81, at 1.  
\(^85\) *Id.*
uniform definition for rape. 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. The FBI defines sodomy as oral or sexual intercourse without consent; which is very similar to the definition of rape. 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.

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.” Rape today is defined by §216 of the Penal Code as forcing an unwilling party to have sexual intercourse. This can be achieved through violence or threats of violence. 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.

III. ARGUMENT

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

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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.”).
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


\(^{96}\) See generally supra notes 13–95 and accompanying text.


\(^{98}\) 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.\textsuperscript{99} In its opinion in \textit{Prosecutor v. Anton Furund’ija}\textsuperscript{100} the Court stated, “[n]o definition of rape can be found in international law.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{105} For international documents to have force after the international tribunals have closed, the international community must have a consistent definition of rape.\textsuperscript{106}

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

\textsuperscript{99} See Geneva Convention (IV), \textit{supra} note 95; Declaration on the Elimination of Violence Against Women \textit{supra} note 95.


\textsuperscript{101} \textit{Furund’ija}, Case No. IT–95–17/1–T, Judgment para.175.


\textsuperscript{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).


\textsuperscript{105} See \textit{supra} notes 98–104 and accompanying text.

\textsuperscript{106} See \textit{supra} notes 98–105 and accompanying text.

\textsuperscript{107} See \textit{Kovac}, Case No. IT–96–23/1–T, Judgment.
between these two people.\textsuperscript{108} Consent is something that must be freely given by the victim and must be determined using a case-by-case analysis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{111}

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

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


\textsuperscript{109} Kovac, Case No. IT–96–23/1–T, Judgment, para. 460.

\textsuperscript{110} See id. para. 451; Frequently Asked Questions, supra note 97, at 2.

\textsuperscript{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).

\textsuperscript{112} See Caringella, supra note 103, 110–11.

\textsuperscript{113} Muhimana, Case No. ICTR 95–1B–T, Judgment and Sentence, para. 546.

\textsuperscript{114} See id.

\textsuperscript{115} See Frequently Asked Questions, supra note 97, at 1.

\textsuperscript{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.\textsuperscript{117} Today the best definition of penetration is that by the Federal Bureau of Investigation (FBI) in the United States.\textsuperscript{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.\textsuperscript{119} This definition is best because it recognizes that both males and females can commit and be victims of rape.\textsuperscript{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.\textsuperscript{121} The FBI’s definition also does not care how much penetration there was, as long as some amount of penetration occurred.\textsuperscript{122}

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

\textsuperscript{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).

\textsuperscript{118} See generally Frequently Asked Questions, supra note 97 (explaining the FBI’s definition of rape).

\textsuperscript{119} Id. at 1.

\textsuperscript{120} See generally id. (explaining the FBI’s definition of rape).


\textsuperscript{122} See Frequently Asked Questions, supra note 97, at 1.


\textsuperscript{124} See Weiner, supra note 111, at 1210.

\textsuperscript{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. 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. They also recognize that women can rape by allowing sexual penetration to include a foreign object. Therefore international law should recognize that a rapist can be either gender, and likewise, rape victims can be either gender.

Cultural relativists believe groups cannot dictate their laws or rules to another group. 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. 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. Therefore, while some critique the idea that universal rules can work, sometimes universal rules are necessary to help third world countries. However, many cultures around the world are very conservative and the issue of rape is sensitive.

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127 Id.
128 Id.
129 See supra notes 123–28 and accompanying text.
131 Hatch, supra note 130, at 532.
132 See id. at 535.
133 See generally id.
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.\textsuperscript{135} These are the types of countries that are disadvantaged without change, but they would also resist change.\textsuperscript{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.\textsuperscript{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.\textsuperscript{138}

IV. Conclusion

The entire world has a different idea as to what constitutes rape.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{135} Id.
\textsuperscript{136} Id.; see Hatch, supra note 130, at 537.
\textsuperscript{137} See id.
\textsuperscript{138} See supra notes 94–137 and accompanying text.
\textsuperscript{139} See supra notes 11–93 and accompanying text.
\textsuperscript{140} See supra notes 11–93 and accompanying text.
\textsuperscript{141} See supra notes 11–93 and accompanying text.
\textsuperscript{142} See supra notes 94–137 and accompanying text.
\textsuperscript{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