



CONSENT-BASED RAPE DEFINITIONS

INTRODUCTION

Definitions of rape need to be based on voluntary, genuine, and willing consent and recognize a broad range of coercive circumstances where consent cannot be voluntary, genuine, or willing and where the victim is incapable of giving consent. Concerningly, however, countries around the world, including in the Americas, have definitions of rape which are based on force or the threat of force, as opposed to lack of consent. In Equality Now's recent study, 23 of the 43 jurisdictions surveyed in the Americas require the use of additional violence, threat or using the victim's physical helplessness, incapacity or inability to resist as elements of rape.

This sheet explores why consent-based definitions are necessary, why forced-based definitions fail survivors, outlines the key elements of a consent-based rape definition, offers a standard to which governments

can align their laws, and presents the international and regional human rights standards that provide the framework on which this information is based. For more regional and country-specific information on sexual violence laws in the Americas, Eurasia, and South Asia, please consult Equality Now's reports:¹

- [Failure to Protect: How Discriminatory Sexual Violence Laws and Practices are Hurting Women, Girls, and Adolescents in the Americas](#) (2021),
- [Roadblocks To Justice: How The Law Is Failing Survivors Of Sexual Violence In Eurasia](#) (2019),
- [Sexual Violence In South Asia: Legal And Other Barriers To Justice For Survivors](#) (2021).

¹ Available at equalitynow.org

What Are The Key Elements Of A Consent-based Rape Definition?

A legal definition of rape and sexual assault should be centered on an individual's voluntary, genuine, and willing consent to participate in the sexual act and the consent must be assessed in the context of the surrounding circumstances.² To that end, a broad range of coercive circumstances should be considered and special attention should be paid to any dynamics of power and authority and the exploitation of positions of vulnerability, trust, influence and dependence. It is critical to realize that consent cannot be voluntary, genuine, or willing, and participation in a sexual act is not of an individual's free will or agency, in contexts where coercive circumstances exist or positions of dependence or vulnerability are exploited.

Furthermore, the focus should be on **the genuine efforts the alleged perpetrator made** to ensure the victim gave voluntary, genuine, and willing consent. It is essential to recognize that voluntary, genuine, and willing consent may be modified or rescinded at any time during the course of the sexual interaction. Additionally, voluntary, genuine and willing consent must encompass all the sexual acts engaged in; for example a woman may consent to vaginal penetration but not oral penetration or penetration, but not without a condom. The criminalization and prosecution of rape should be guided by the understanding that, while rape could affect all persons and therefore provisions on rape should cover and protect all persons without any discrimination, it predominantly affects women and girls. Therefore, it constitutes a form of gender-based violence against women that requires a gender-sensitive application of criminal law provisions.³ Sexual violence laws should offer protection equally in the context of **marriage or intimate partnerships, incest** and at times of, and in the context of, **conflict or other civil disturbance**.

Examples of power and authority dynamics that could lead to the exploitation of positions of vulnerability, trust, influence and dependence:

- Teacher and student
- Care provider and patient
- Coach and athlete
- Boss and employee
- Priest and congregant
- Family member and dependent family member (e.g. Incest)

² The Model Rape Law drafted by the UN Special Rapporteur on Violence against Women states that: "Rape is an act of sexual nature committed without consent. Definitions of rape should explicitly include lack of consent and place it at its centre, stipulating that rape is any act of sexual penetration of a sexual nature by whatever means committed against a person who has not given consent. Report of the Special Rapporteur on violence against women, its causes and consequences, A framework for legislation on rape (model rape law), A/HRC/47/26/Add.1, 15 June 2021, p. 6

³ Ibid p.4

Why Must Force-based Definitions Of Rape Be Changed?

Definitions of rape that are based on force or the threat of force, as opposed to lack of consent, fail to meet international human rights standards⁴ and are problematic for a number of reasons. Force-based definitions often leave certain types of rape unpunished, contribute to rape myths and perceptions that it is the responsibility of victims to protect themselves from being raped, and gravely limit the extent to which crimes of rape can be successfully prosecuted. Overall, force-based definitions ignore the realities that many women and girls face in the context of rape or sexual assault and enable significant impunity for perpetrators.

Force-based definitions are problematic for a number of reasons. Four key reasons are:

- **Definitions centered on force contribute to rape myths.** They perpetuate the perception that it is the responsibility of victims to protect themselves and if a victim does not fight back she must be a willing participant in the sexual act. Rape victims who may freeze, remain passive, for example out of fear of further harm, or who respond by shutting down when they are attacked, have not physically resisted and therefore cannot benefit from the protection of the law despite the violence done to them.
- **Definitions based on the demonstration of force significantly limit the extent to which crimes of rape can successfully be prosecuted and leave room for significant impunity.** For a variety of reasons, including fear of retaliation, loss of family support, or social stigma, victims do not always immediately report sexual violence. This is particularly true in the case of young and adolescent girls, who may not realize that the acts done to them constitute a crime or who may find it difficult to report or raise the issue at the time, particularly when the perpetrator is a relative or other trusted person. As a result, victims who report much later often find it difficult or close to impossible to procure physical or medical evidence, such as bodily injuries, to prove that additional physical violence was used during the rape (as they no longer exist at the time of reporting).
- **A person can rape without the use of physical force or violence.** There are a number of circumstances in which perpetrators can and do use coercion or exploit their position of power, maturity or undue advantage to rape, including and particularly, young or other vulnerable women. Examples include cases of incest, and other unequal power relationships such as teacher-pupil, coach-athlete, counsellor-patient, prison warder-prisoner to name but a few.
- **The focus should be on whether voluntary, genuine, and willing consent was given** and not on whether the victim was forced to engage in the sexual activity. It is critical to recognize that a victim may acquiesce to a sexual act but the act is un-welcomed and/or engaged in unwillingly. For example, it is possible that through physical or non-physical force, coercion, pressure or exploitation of vulnerability, a woman or girl agrees to have sex. That type of consent to engage in an otherwise unwanted sexual act is not voluntary, genuine, or willing. Force definitions distract from the central focus on whether consent was given freely, as the result of the person's autonomous free will, and the consideration of a broad range of coercive circumstances.

⁴ See Inter-American Court of Human Rights, *Sentence in the Caso J. vs. Peru*, 27 November 2013, https://www.corteidh.or.cr/docs/casos/articulos/seriec_275_esp.pdf at para. 358; Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/35, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, §5.

International And Regional Human Rights Standards

International and regional human rights law require that definitions of rape should be based on voluntary, genuine, and willing consent and recognize a broad range of coercive circumstances⁵:

- General Recommendation 35 as well as jurisprudence of the **the Committee on the Elimination of Discrimination against Women (CEDAW Committee)** provides that the definition of sexual crimes, including rape, marital and acquaintance/date rape, should be based on lack of freely given consent and take account of coercive circumstances.⁶ **The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)** also defines rape based on the lack of consent, which must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
- **The UN Women Virtual Knowledge Centre to End Violence Against Women and Girls (UN Women Guidelines)**,⁷ states that laws should provide a broad range of circumstances in which consent is immaterial, such as sexual assault by an individual in a position of authority such as in a correctional facility, a religious or school setting, or by individuals in certain professional relationships to the survivor, such as an ongoing psychotherapist-patient relationship, and provide for a broad range of coercive circumstances around consent such as intimidation or fraud.⁸
- **The UN Special Rapporteur on Violence against Women** highlights circumstances when consent is not possible or should not be required⁹ and recommends a comprehensive list of aggravating circumstances, such as when the perpetrator is a current or former spouse or intimate partner, or a family member.¹⁰
- Both the **European Court of Human Rights** and the **Inter-American Court** have interpreted sexual violence as any act of a sexual nature committed without the person's consent.¹¹ The Inter-American Court has also found that rape only need involve coercion of some sort and that physical resistance is not necessary.¹²
- **The Declaration on Violence against Women, Girls and Adolescents and their Sexual and Reproductive Rights** issued by MESECVI¹³, specifically declares that the consent of the victim cannot be inferred by reason of any words or conduct in a coercive situation, nor from her silence or lack of resistance.¹⁴

5 For more information on international and regional human rights standards, please consult Equality Now's reports. *Failure to Protect: How Discriminatory Sexual Violence Laws and Practices are Hurting Women, Girls, and Adolescents in the Americas* (2021); *Roadblocks To Justice: How The Law Is Failing Survivors Of Sexual Violence In Eurasia* (2019); *Sexual Violence In South Asia: Legal And Other Barriers To Justice For Survivors* (2021).

6 CEDAW General Recommendation No. 35, supra note 45, para 5; *Karen Tayag Vertido v. The Philippines*, CEDAW, Communication No.18/2008, UN Doc CE-DAW/C/46/D/18/2008 (2010).

7 United Nations Women, Handbook for Legislation on Violence against Women, 2012, <https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>

8 UN Women, Legislation should define consent as unequivocal and voluntary agreement, UN Women, Virtual Knowledge Centre to End Violence against Women and Girls, 2011, <https://www.endvawnow.org/en/articles/469-consent.html>.

9 This includes when the victim is permanently or temporarily incapacitated because of the use of alcohol or drugs.

10 Report of Dubravka Šimonović - Special Rapporteur on violence against women, its causes and consequences, on Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention, 19 April 2021, A/HRC/47/26 para.90(b)

11 *M.C. v. Bulgaria*, App. no. 39272/98, (ECHR, 4 December 2003), paras. 102-107; Inter-American Court of Human Rights, *Sentence in the Caso J. vs. Peru*, 27 November 2013, https://www.corteidh.or.cr/docs/casos/articulos/seriec_275_esp.pdf at para. 358; Inter-American Court of Human Rights, *Caso del Penal Miguel Castro Castro vs. Perú* at para. 306.

12 Inter-American Court of Human Rights, *Sentence in the Case of Fernández Ortega et al v. Mexico*, 30 August 2010, https://www.corteidh.or.cr/docs/casos/articulos/seriec_215_ing.pdf, at para. 105.

13 Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention.

14 Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention (CEVI), Declaration on Violence against Women, girls and adolescents and their sexual and reproductive rights, MESECVI/CEVI/DEC.4/14

Section 1. Rape

- (1) A person ("the perpetrator") commits rape when he:
 - (a) penetrates, by body part or object, the vagina, urethra, or anus of another ("the victim") or, by sexual organ, the oral cavity of the victim or causes a third person¹⁵ to do so;
 - (b) without the voluntary, genuine and willing consent of the victim.For the purposes of this Section penetration can also be slight¹⁶ and through clothing.
- (2) The provisions of section 1 also apply, non-exclusively, to:
 - (c) acts committed against former or current spouses or partners;
 - (d) acts committed against a minor in a family setting;
 - (e) acts committed in the context of conflict, war crimes, widespread or systematic attack, or national disturbances;
 - (f) all persons regardless of the sex, gender or sexual orientation of the victim or the perpetrator.
- (3) An alleged perpetrator must demonstrate the genuine efforts taken to ensure that voluntary, genuine and willing consent was given by the victim for the entirety of the sexual act.

Section 2. Consent.¹⁷

- (1) Voluntary, genuine and willing consent means knowingly, willingly and actively agreeing to participate in sexual intercourse or acts with another person.
- (2) Voluntary, genuine and willing consent must be given freely, as the result of the persons' free will, and assessed in the context of surrounding circumstances.
- (3) For the purposes of this section, voluntary, genuine and willing consent —
 - (a) must be affirmatively perceived by all parties and can be expressed through words, actions, conduct or otherwise;
 - (b) cannot be inferred from silence by the victim;
 - (c) cannot be inferred from non-resistance, verbal or physical, by the victim;
 - (d) cannot be solely inferred from the suggestion, request, or communication by the victim regarding the use of a condom or birth control;
 - (e) cannot be inferred from the victim's past sexual behaviour;
 - (f) cannot be inferred from the victim's past or present relationship, sexual or otherwise, with the alleged perpetrator;
 - (g) must encompass the entirety of the sexual act(s) engaged in;
 - (h) may be rescinded or modified at any time; and
 - (i) must be assessed in the context of the surrounding circumstances.
- (4) Contexts in which a victim is considered incapable of voluntarily, genuinely and willingly consenting include but are not limited to:
 - (a) when the victim is a minor below the age of 16 except as provided in Section 4 below;
 - (b) when the victim is unconscious, asleep, or intoxicated as a result of drugs or alcohol consumed voluntarily, involuntarily or unknowingly;
 - (c) when the victim is ill, suffering from a bodily injury, or otherwise rendered particularly vulnerable;
 - (d) when the victim lacks the capacity to give consent because of the victim's physical, mental or intellectual impairment or disability;
 - (e) when the perpetrator is an adult and the victim is a minor related to the perpetrator by blood, marriage, adoption, fostering or other analogous familial affiliation; or
 - (f) when the participation is a consequence of the perpetrator taking advantage of a position of power, trust, influence or dependency.

¹⁵ Istanbul Convention, Article 36.1

¹⁶ Rome Statute, Article 7(1)(g)(1); FBI definition, [6 January, 2012 Update](#); FBI definition, [2013 update](#), *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, [Appeal Judgment](#), 12 June 2002, para 127; [Guidelines for medico-legal care for victims of sexual violence](#), WHO. 2003, p.8.

¹⁷ Istanbul Convention, Article 36.2

Section 3. Coercive Circumstances.¹⁸

- (1) When coercive circumstances are in place, consent cannot be voluntary, genuine or willing and is rendered void.
 - (a) Coercive circumstances of section 3.1 include a broad range of circumstances including, but not limited to, circumstances in which:¹⁹
 - [i] the victim was subject to abuse, violence, duress, deceit, detention or psychological oppression, intimidation or pressure that contributed to the victim's subjugation or acquiescence; or
 - [ii] the victim was subject to a threat (expressed or implied) of present or future physical or non-physical harm to the victim or a third person.
- (2) Where the perpetrator is in a position or relationship of power or authority over the victim, consent is presumed to not be voluntary, genuine or willing.²⁰
 - (a) The positions and relationships of section 3.2 include but are not limited to situations in which the perpetrator is in a position of power or authority, influence or dominance over the victim:
 - [i] in a school, hospital, religious, correctional or care facility setting;
 - [ii] in a professional or occupational setting;
 - [iii] in a residential care facility, community home, voluntary home, children's home or orphanage;
 - [iv] in the context of providing the victim medical, psychological or psycho-social support or treatment;
 - [v] in a guardian-ward relationship;
 - [vi] where the victim is a minor, in the context of a significant age difference between the perpetrator and victim;
 - [vii] by exploiting the victim's physical, mental or intellectual impairment or disability;
 - [viii] by acting as a social worker, probation officer, coach, instructor, minister of religion, babysitter, child-minder or in any other position of welfare in relation to the victim;
 - [ix] by otherwise being generally involved and responsible for the care, training or supervision of the victim; or
 - [x] as a result of the victim being in a position of dependency (including financial, legal, professional, familial and/or personal) on the perpetrator, or any other type of contextual relationship that gives rise to a risk of exploitation.

18 *M.C. v. Bulgaria*, App. no. 39272/98, (ECHR, 4 December 2003), para. 181; ICC Rules of Procedure and Evidence, Rule 70; ICC Elements of the Offences, Articles 7(1)(g)-(1)(2), 8(2)(e)(vi)-(1); *Katanga* ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 440, https://www.icc-cpi.int/Court-Records/CR2008_05172.PDF; The Administration of Justice on Sexual Violence Crimes, p. 13, <https://rm.coe.int/-web/1680a0a3e3>; *Bemba* ICC-01/05-01/08-3343, 21 March 2016, para. 105-106: 'The Chamber notes that the victim's lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice. Therefore, where "force", "threat of force or coercion", or "taking advantage of a coercive environment" is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent; *Kunarac Appeal Judgment*, IT-96-23&IT-96-23/1-A, 12 June 2002, para. 126, <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>. NB: Nine European common and civil law countries have enacted consent-based rape legislation: Amnesty International: <https://www.amnesty.org/en/latest/news/2019/11/only-nine-europe-an-countries-recognise-sex-without-consent-is-rape-this-must-change/>. See also: Canada Criminal Code, Articles 271, 273.

19 The Hague Principles – Master Document, p. 45; ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6; *Ntaganda*, ICC-01/04-02/06, *Trial Judgment*, 8 July 2019, para 944; *Kunarac et al.* IT-96-23& IT-96-23/1-A, *Appeal Judgment*, 12 June 2002, para 130.

20 Report of the Special Rapporteur on violence against women: A framework for legislation on rape (model rape law) A/HRC/47/26/Add.1, 15 June 2021, para 21.

Section 4. Close in Age Defence²¹

Close in age defence: victim age 12 to 14

Where an alleged perpetrator is charged with rape or sexual assault of the victim in respect of a victim who is twelve years of age or over but under fourteen years of age, it is a defence that the victim voluntarily, genuinely and willingly consented to the activity if the alleged perpetrator—

- (a) is also less than two years older than the victim; and
- (b) is not in a position of trust or authority towards the victim, is not a person with whom the victim is in a relationship of dependency, is not in a relationship with the victim that is exploitative of the victim and did not in any other way coerce or exploit the vulnerability of the victim.

Close in age defence: victim age 14 to 16

Where an alleged perpetrator is charged with rape or sexual assault of the victim in respect of a victim who is fourteen years of age or over but under sixteen years of age, it is a defence that the victim voluntarily, genuinely and willingly consented to the activity if the alleged perpetrator—

- (a) is also less than four years older than the victim; and
- (b) is not in a position of trust or authority towards the victim, is not a person with whom the victim is in a relationship of dependency, is not in a relationship with the victim that is exploitative of the victim and did not in any other way coerce or exploit the vulnerability of the victim.

²¹ Cases of experimentation, in general, among minors close in age and development, should not be regarded as criminal offences in the absence of coercion, exploitation or abuse of trust. See, Crown Prosecution Service Guidelines, CPS Legal Guidance on Rape and Sexual Offences - Chapter 12: Sexual Offences and Youths

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