

1. DEFINITION OF RAPE IN IHT AND INTERNATIONAL LAW ARTICLES 12(First)(G), 13(Second)(V) and 13(Fourth)(F)

Rape is defined in the IHT Elements of Crimes as:

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

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

2. OVERVIEW OF RAPE AS TORTURE IN INTERNATIONAL LAW

In certain circumstances, rape has been found to be torture under international law by the ICTY and ICTR.

Rape is often used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person and can and should be tried as rape as a means of torture.

3. OVERVIEW OF SEXUAL VIOLENCE IN INTERNATIONAL LAW ARTICLES 12(First)(G), 13(Second)(V) and 13(Fourth)(F)

Sexual violence covers crimes that the definition of “rape” fails to encompass yet are of a sexual nature and can be equally painful and degrading to the victim.

4. OVERVIEW OF SEXUAL ENSLAVEMENT IN INTERNATIONAL LAW ARTICLES 12(First)(G), (C), 13(Second)(V) and 13(Fourth)(F)

Sexual enslavement involves exercise “of ownership” over the victim by the perpetrator and the subsequent coercion to engage in one or more acts of a sexual nature.

5. HONOUR CRIMES

International bodies have declared that the failure to punish perpetrators of honour crimes violates international law and nullifies the victim’s freedom and enjoyment of human rights. Honour crimes are condoned by the Iraqi Penal Code No. 111 of 1969, and deter women from coming forward to testify.

Honour crimes are acts of violence against female relatives who are perceived to have brought dishonour upon the family for a variety of reasons, including: refusing to enter into an arranged marriage, being the victim of a sexual assault, seeking a divorce, or allegedly committing adultery.

Definition of Rape for Iraq High Tribunal and in International Law

RAPE DEFINITION in the Elements of Crimes for Iraqi High Tribunal and the Rome Statute of the International Criminal Court

Definition:

1. The perpetrator invaded¹⁵ 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.

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.¹⁶

¹⁵*The concept of "invasion" is intended to be broad enough to be gender-neutral.*

¹⁶*It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7(1)(g) - 3, 5 and 6.*

International Criminal Tribunal for Rwanda

Definition:

- Rape is a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” In *Prosecutor v. Jean-Paul Akayesu* “coercion” was inherent b/c of the hostile military presence.

Charged as:

- **Crime against humanity:** where rape was “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”. *Prosecutor v. Jean-Paul Akayesu*
- **Genocide:** Rape crimes “constitute genocide in the same way as any other act so long as they were committed with specific intent to destroy, in whole or in part, a particular group, targeted as such. ... These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities.” *Prosecutor v. Jean-Paul Akayesu*

International Criminal Tribunal for the Former Yugoslavia

Definition

- “[t]he sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person.” *Prosecutor v. Furundzija*, Dec. 10, 1998.
- Foca Trial definition of rape: “the sexual penetration, however slight: (a) of a vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.” *Prosecutor v. Kunarac, Kovac, & Vukovic*, (Feb. 22, 2001) ¶ 460.

Charged As:

- Article 5 (Crimes Against Humanity) is the only article to specifically include rape as an offense:
“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (g) rape.”

Sierra Leone and Cambodia Tribunals

The Statutes of the Sierra Leone and Cambodia Tribunals, like the IHT, are based on the Rome Statute of the ICC. Neither Tribunal has issued any decisions yet, therefore, there is no case law on how they will define rape.

Is Lack of Consent an Element of Rape?

IHT 2005 Rules of Procedure and Evidence

Rule 63: Rules of Evidence in Cases of Sexual Assault

First: In cases of sexual assault and if there is reasonable cause, no corroboration of the victim's testimony shall be required.

Second: Consent shall not be allowed as a defense if the victim

A. Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or reasonably believed to be the victim, submittance, threat or fear.

Third: The evidence submitted by the accused should prove the victim's consent without shortcomings.

Elements of Crimes of the Rome Statute

Crime against humanity of rape

Article 7 (1) (g)-1 and War Crime of Rape Article 8 (2) (b) (xxii)-1

Elements

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. (It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity)

Prosecutor v. Kunarac et al. (IT-96-23 & 23/1)
Appeals Chamber's Judgment

127.the Trial Chamber concluded:

the *actus reus* of the crime of rape in international law is constituted by : the sexual penetration, however slight: **where such sexual penetration occurs without the consent of the victim.** Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

128.It is worth emphasizing two points. First, it rejects the Appellants' "resistance" requirement, an addition for which they have offered no basis in customary international law. The... assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.

129.... in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape....there are "factors [other than force] which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim". A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

130. ... in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of force...

132.Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.