

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 INTERNATIONAL LAW ON RAPE AS TORTURE

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.

Overview of International Law on Rape as Torture

Rape can be torture under international law. The Iraq High Tribunal is bound by the precedents set by other international war crimes tribunals. Examples of their decisions, as well as reports from other international bodies, are outlined below.

International Bodies Finding Rape to be Torture

The International Criminal Tribunal for Yugoslavia ruled in *Furundzija, Celebici, and Kunarac* that the accused committed torture by means of rape.

The *Akayesu* Judgment (ICTR): “Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (1998)

Report of the Special Rapporteur on Torture to the Commission on Human Rights: “Since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.” (1992)

Report of the Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: “The Committee on the Elimination of Discrimination against Women has recognized that violence directed against a woman because she is a woman, including ‘acts that inflict physical, mental or sexual harm or suffering,’ represents a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. Accordingly, in many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture.” (1998)

Definition of Torture

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment:

Article 1 - “the term ‘torture’ means as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity.”

Case Summaries and Opinion Language

Elements of Torture as a Crime against Humanity before the ICTY and ICTR

- (1) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (2) The act or omission must be intentional.
- (3) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.

In 2001, the ICTY Trial Chamber held in *Foca* that pursuant to customary international law, torture does not have to be committed by an official, at the instigation of an official or with the consent of an official or a person acting in an official capacity.

Rape constitutes torture when the elements of torture are met.

Examples of Case Law Detailed Below

- ***Furundzija*** (ICTY), finding a violation of the laws or customs of war (torture) under Article 3 of the ICTY Statute.
- ***“Celebici”*** (ICTY), finding a grave breach of the Geneva Conventions under Article 2(b) (torture) and a violation of the laws or customs of war under Article 3 of the ICTY Statute.
- ***“Foca”*** (ICTY), finding a crime against humanity under Article 5(f) (torture) and a violation of the laws or customs of war under Article 3 of the ICTY Statute.
- ***Semanza*** (ICTR), finding a crime against humanity under Article 3(f) (torture) of the ICTR Statute.
- ***Aydin*** (ECHR), finding a violation of Article 3 (prohibition of torture) of the European Convention on Human Rights (ECHR).
- ***Mejía*** (Inter-Am. C.H.R.), finding a violation of Article 5 (right to humane treatment) of the American Convention on Human Rights.

International Criminal Tribunal for the Former Yugoslavia (ICTY) ***Prosecutor v. Furundzija – December 10, 1998***

Facts

A soldier forced Witness A to undress and remain naked in front of a substantial number of soldiers while he interrogated her. The accused left Witness A in the soldier's custody, who repeatedly raped, sexually assaulted, physically abused and degraded her.

Law

- Violation of the laws or customs of war (torture) under Article 3 of the ICTY Statute.
Article 13(Second) of the IHT Statute is equivalent to Article 3 of the ICTY Statute.

OPINION LANGUAGE

Paragraph 163 – International case law, and the reports of the United Nations Special Rapporteur evince a momentum towards addressing, through the legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person.

Paragraph 267(i) – The Trial Chamber finds that in relation to Witness A, the elements of torture have been met. Within the provisions of Article 7(1) and the findings of the Trial Chamber on liability for torture, the accused is a co-perpetrator by virtue of his interrogation of her as an integral part of the torture. The Trial Chamber finds that the accused tortured Witness A.

Paragraph 269 – The Trial Chamber therefore finds the accused, as a co-perpetrator, guilty of a Violation of the Laws or Customs of War (torture).

International Criminal Tribunal for the Former Yugoslavia (ICTY) ***Prosecutor v. Delalic et al. (“Celebici”) – November 16, 1998***

Facts

In the Celebici prison-camp one of the accused, Hazim Delic, in uniform, raped two women prisoners during interrogations and throughout their detention.

Law

- Grave breach of the Geneva Conventions under Article 2(b) (torture) of the ICTY Statute.
Article 13(First)(b) of the IHT Statute is equivalent to Article 2(b) of the ICTY Statute.
- Violation of the laws or customs of war under Article 3 of the ICTY Statute.
Article 13(Second) of the IHT Statute is equivalent to Article 3 of the ICTY Statute.

Reasoning for Finding Rape to be Torture

- Strikes at the very core of human dignity and physical integrity
- Committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official and therefore involves punishment, coercion, discrimination or intimidation
- May be exacerbated by social and cultural conditions and can be particularly acute and long lasting

OPINION LANGUAGE

Paragraph 495 – “The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.”

Paragraph 496 – “Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.”

International Criminal Tribunal for the Former Yugoslavia (ICTY) ***Prosecutor v. Kunarac et al. (“Foca”) – June 12, 2002***

Facts

Kunarac took victims FWS-75, FWS-87, FWS-50 and D.B. to Ulica Osmana Dikica no 16 where he and three other soldiers raped FWS-87, while FWS-75 and FWS-50 were raped by other soldiers. Kunarac was originally charged with both rape and sexual enslavement as sexual enslavement was not amongst the crimes enumerated in the statute.

Law

- Crime against humanity under Article 5(f) (torture) of the ICTY Statute.
Article 12(First)(f) of the IHT Statute is equivalent to Article 5(f) of the ICTY Statute.
- Violation of the laws or customs of war under Article 3 of the ICTY Statute.
Article 13(Second) of the IHT Statute is equivalent to Article 3 of the ICTY Statute.

Reasoning for Finding Rape to be Torture

- The accused acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls
- The rapes resulted in severe mental and physical pain and suffering for the victims

OPINION LANGUAGE

Trial Chamber

Paragraph 669 – The rapes resulted in severe mental and physical pain and suffering for the victims. The Trial Chamber is satisfied that the victims were taken to Ulica Osmana Dikica no 16 by Dragoljub Kunarac for the very purpose of rape and that they were chosen for this purpose on the basis only of their Muslim ethnicity.

Appeals Chamber

Paragraph 150 – The Appeals Chamber holds that the assumption of the Appellants that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.

Opinion Language (continued)

Paragraph 151 – Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering. The Appeals Chamber thus holds that the severe pain or suffering, whether physical or mental, of the victims cannot be challenged and that the Trial Chamber reasonably concluded that that pain or suffering was sufficient to characterise the acts of the Appellants as acts of torture. The Appellants’ grounds of appeal in this respect are unfounded and, therefore, rejected.

Paragraph 670 – The Trial Chamber is satisfied that, on 2 August 1992, Dragoljub Kunarac went to Partizan Sports Hall where he took out FWS-75, FWS-87, FWS-50 and D.B. and drove them to the house in Ulica Osmana Dikica no 16, where some women who had been taken out of the Kalinovik school had already arrived. The Trial Chamber is also satisfied that Kunarac took these women to this house in the knowledge that they would be raped by soldiers during the night. The Trial Chamber finds that Kunarac took FWS-87 to one of the rooms of the house and forced her to have sexual intercourse in the knowledge that she did not consent. The Trial Chamber also finds that, on that occasion, FWS-75 and FWS-50 were repeatedly raped by other soldiers while Kunarac raped FWS-87. The Trial Chamber further finds that FWS-87 was also raped by other soldiers that same night. The fact that Kunarac took the girls to the house and left them to his men in the knowledge that they would rape them constituted an act of assistance which had a substantial effect on the acts of torture and rape later committed by his men. He therefore aided and abetted in that torture and rape.

Paragraph 816 – In the Final Trial Brief of the Defence, the accused Zoran Vukovic argued that, even if it were proved that he had raped a woman, the accused would have done so out of a sexual urge, not out of hatred. However, all that matters in this context is his awareness of an attack against the Muslim civilian population of which his victim was a member and, for the purpose of torture, that he intended to discriminate between the group of which he is a member and the group of his victim. There is no requirement under international customary law that the conduct must be *solely* perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose. The Trial Chamber has no doubt that it was at least a predominant purpose, as the accused obviously intended to discriminate against the group of which his victim was a member, ie the Muslims, and against his victim in particular.

International Criminal Tribunal for Rwanda (ICTR)
Prosecutor v. Semanza – May 15, 2003

Facts

The Accused, in the presence of commune and military authorities, encouraged a crowd to rape Tutsi women before killing them. Victim A was raped immediately thereafter by one of the men from this crowd.

Law

- Crime against humanity under Article 3(f) of the ICTR Statute.
Article 12(First)(f) of the IHT Statute is equivalent to Article 3(f) of the ICTR Statute.

Reasoning for Finding Rape to be Torture

- The perpetrator inflicted severe mental suffering sufficient to form the material element of torture
- The rape was committed on the basis of discrimination
- The Accused acted intentionally and with the awareness that he was influencing others to commit rape for a discriminatory purpose as part of a widespread attack on the civilian population on ethnic grounds

OPINION LANGUAGE

Paragraph 482 – Noting, in particular, the extreme level of fear occasioned by the circumstances surrounding the event and the nature of the rape of Victim A, the Chamber finds that the perpetrator inflicted severe mental suffering sufficient to form the material element of torture. It is therefore unnecessary to determine whether this rape also inflicted *severe physical* pain or suffering, for which the Prosecutor only adduced evidence of the fact that non-consensual intercourse occurred.

Paragraph 483 – The Chamber finds that the rape was committed on the basis of discrimination, targeting Victim A because she was a Tutsi woman. The Chamber recalls that severe suffering inflicted for the purposes of discrimination constitutes torture and, therefore, finds that the principal perpetrator tortured Victim A by raping her for a discriminatory purpose.

Opinion Language (continued)

Paragraph 484 – The Chamber also finds that the torture formed part of the widespread attack on the civilian population since the victim was raped because she was a Tutsi, the ethnicity targeted by the attack. The Chamber finds that the perpetrator was aware of the larger context of his actions, since he acknowledged that he was acting on the encouragement of the Accused to rape women as part of their broader work of killing Tutsis and he knew that others from the crowd were similarly targeting Tutsis for rape and murder. The Chamber therefore finds that the principal perpetrator committed torture as a crime against humanity.

Paragraph 485 – The Chamber finds that by encouraging a crowd to rape women because of their ethnicity, the Accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes. Therefore, he was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture. The Chamber finds that his words were causally connected to and substantially contributed to the torture of Victim A because immediately after the Accused made his remarks to the crowd, the assailant went to a nearby home and tortured Victim A by raping her because she was a Tutsi woman. The Chamber notes that the Accused's general influence in the community and the fact that his statements were made in the presence of commune and military authorities gave his instigation greater force and legitimacy. The Chamber finds that the Accused acted intentionally and with the awareness that he was influencing others to commit rape for a discriminatory purpose as part of a widespread attack on the civilian population on ethnic grounds. Therefore, the Chamber finds that the Accused is criminally responsible for instigating torture as a crime against humanity.

European Court of Human Rights

Aydin v. Turkey – August 26, 1997

Facts

The applicant was taken to an interrogation room in the gendarmerie headquarters and raped by an individual in military clothing.

Law

- Violation of Article 3 (prohibition of torture) of the European Convention on Human Rights (ECHR).

Article 13(First)(b) of the IHT Statute is equivalent to Article 3 of the ECHR.

Reasoning for Finding Rape to be Torture

- An especially grave and abhorrent form of ill-treatment
- The offender [an official] can exploit the vulnerability and weakened resistance of his victim with ease
- Leaves deep psychological scars on the victim
- Acute physical pain of forced penetration

OPINION LANGUAGE

Paragraph 83 – “Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.”

Paragraph 86 – “Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amount to torture in breach of Article 3 of the Convention.”

Note

Article 13 of the ECHR imposes an obligation on states to carry out a thorough and effective investigation of incidents of torture. This obligation is implicit in the notion of an “effective remedy” (see *Aksoy v. Turkey* 1 BHRC 625 at 646-647 para. 98 (1996)). Here, it appeared that the Public Prosecutor’s primary concern in ordering medical examinations was to establish whether the applicant had lost her virginity. Instead, the focus of the examinations should have been whether the applicant was a rape victim. No attempt was made to psychologically evaluate whether her attitude and behavior conformed to that of a rape victim. Accordingly, *Aydin* also concludes that no thorough and effective investigation was conducted into the applicant’s allegations. This failure undermined the effectiveness of any other remedies which may have existed given the centrality of the Public Prosecutor’s role to the system of remedies as a whole. There was therefore a violation of Article 13 of the Convention.

Inter-American Commission on Human Rights ***Raquel Martí de Mejía v. Perú* – March 1, 1996**

Facts

A Peruvian soldier told Raquel Mejía that she was considered a subversive and raped her. The soldier returned, dragged her into her room and raped her again.

Law

- Violation of Article 5 (right to humane treatment) of the American Convention on Human Rights.
Article 13(First)(b) of the IHT Statute is equivalent to Article 5 of the American Convention.
- The Commission defined torture and established three elements that must be satisfied for a finding of torture under Article 5 of the American Convention:
 - 1) It must be an intentional act through which physical and mental pain and suffering is inflicted on a person;
 - 2) it must be committed with a purpose; and
 - 3) it must be committed by a public official or by a private person acting at the instigation of the former.

Reasoning for Finding Rape to be Torture

- Causes physical and mental suffering in the victim
- The victims are commonly hurt or, in some cases, are even made pregnant
- Psychological trauma that results from having been humiliated and victimized and from suffering the condemnation of the members of their community if they report what has been done to them

OPINION LANGUAGE

“Regarding the first element, the Commission considers that rape is a physical and mental abuse that is perpetrated as a result of an act of violence... Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them... [Regarding the second element,] Raquel Mejía was raped to personally punish and humiliate her... [Regarding the third element,] the man who raped Raquel Mejía was a member of the security forces... Accordingly, the Commission, having established that the three elements of the definition of torture are present in the case under consideration, concludes that the Peruvian State is responsible for violation of Article 5 of the American Convention.”