

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.

Overview of Sexual Enslavement in International Law

Sexual Enslavement in the International Criminal Court

The IHT Statute and Elements of Crimes are virtually the same as the Rome Statute and ICC Elements of Crimes.

Rome Statute

The Rome Statute was the first to codify sexual slavery.

- Sexual slavery is a crime against humanity under Article 7(1)(g).
- “Enslavement” is defined under Article 7(2)(c) as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” “Sexual slavery” is not defined.
- Sexual slavery is also a war crime under Article 8(2)(b)(xxii) and Article 8(2)(e)(vi).

ICC Elements of Crimes

Article 7(1)(g)-2: Crime Against Humanity of Sexual Slavery

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 8(2)(b)(xxii)-2: War Crime of Sexual Slavery

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.*
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

* Article 8(2)(3)(vi)-2 similarly lists sexual slavery as a war crime substituting “the conduct took place in the context of and was associated with an armed conflict not of an international character” for point three.

International Criminal Tribunal for the Former Yugoslavia (ICTY) *Prosecutor v. Kunarac et al. (“Foca”) – February 22, 2001*

Facts

The accused’s criminal conduct was part of a systematic attack on the non-Serb civilian population which included the specific targeting of Muslim women, who were detained in “rape camps” where they were held in sexual slavery and repeatedly raped.

Law

- Crime against humanity under Article 5(c) (enslavement) of the ICTY Statute.
Article 12(First)(c) of the IHT Statute is equivalent to Article 5(c) of the ICTY Statute. Article 12(First)(g) of the IHT Statute specifically lists sexual slavery as a Crime Against Humanity, while Article 13(Second)(v) lists sexual slavery as a War Crime.

Note

The ICTY Statute does not define “enslavement.” The Trial Chamber looked to international humanitarian law and human rights law that address it (including the 1926 Slavery Convention, 1956 Supplementary Slavery Convention, 1957 Forced Labor Convention, 1946 Nuremberg judgment, 1948 *Milch* and 1947 *Pohl* judgments of the US Military Tribunal, and 1949 Geneva Conventions). The Trial Chamber also looked to international human rights treaties that address slavery without explicitly defining it (the 1948 Universal Declaration of Human Rights, 1966 International Covenant on Civil and Political Rights, 1950 European Convention on Human Rights, 1969 American Convention on Human Rights, and 1981 African Charter on Human and Peoples’ Rights).

***** *The Trial Chamber noted that the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes an obligation that states parties suppress all forms of traffic in women. The Trial Chamber also acknowledged that the 1989 Convention on the Rights of the Child forbids trafficking in children.***

Reasoning: Indications of Enslavement

- Elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator.
- The consent or free will of the victim is absent.
- Exploitation; the exaction of forced or compulsory labor or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.
- Control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor.

OPINION LANGUAGE

Paragraph 539 – In summary, the Trial Chamber finds that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person.

Paragraph 540 – Thus, the Trial Chamber finds that the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.

Paragraph 541 – This definition may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law. This is evidenced in particular by the various cases from the Second World War referred to above, which have included forced or compulsory labour under enslavement as a crime against humanity. The work of the ILC, discussed above, further supports this conclusion.

Paragraph 542 – Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The “acquisition” or “disposal” of someone for monetary or other compensation is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.

Paragraph 543 – The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

**Women's International War Crimes Tribunal for the Trial on
Japan's Military Sexual Slavery (Tokyo Tribunal)
*The Prosecutors and the Peoples of the Asian Pacific
v. Hirohito Emperor Showa et al.*
December 4, 2001**

On December 3-4, 2001, the Women's International War Crimes Tribunal held a legal hearing in The Hague about Japan's role in setting up brothels to service Imperial Army soldiers during World War Two. The exercise—a repeat of a hearing held in 2000 in Tokyo—was convened by a group of women's rights activists. Although the Tribunal lacks legal authority, it has nonetheless forced the Japanese government to acknowledge its culpability, and provided a sense of justice for the wartime victims.

Facts

Imperial Army soldiers raped and sexually enslaved an estimated 200,000 Korean, Indonesian, Chinese, Filipino, Dutch, Malaysian and Taiwanese women in Japanese brothels during World War Two.

Finding

- Crime against humanity (rape and sexual slavery) under Article 3 of the Tribunal Charter.

Reasoning

- Designed and maintained to facilitate the rape and sexual slavery of tens of thousands.
- The scale of the “comfort system” was so enormous, the conditions so inhumane, the operations so consistent.

OPINION LANGUAGE

Paragraph 794 – In sum, the Judges find that the “comfort system” was designed and maintained to facilitate the rape and sexual slavery of tens of thousands of young girls and women from occupied or conquered territories in the Asia-Pacific region. The scale of the “comfort system” was so enormous, the conditions so inhumane, and the operations so consistent, that no other conclusion can be reached but that the highest level political and military officials must have known of the criminal nature of the system which they set in motion and sustained. Indeed, a system so vast required the planning and knowing participation of a large number of actors at all levels of the hierarchy. Military and government leaders responsible for organizing and supervising the movement and activities of troops had to have approved of the “comfort stations” or other facilities for rape and sexual slavery and/or known of the criminal nature of the system. Indeed, from the lowest level soldier visiting the stations, to the top military and government officials who devised and oversaw the regulation of the system, to midlevel actors who procured women and girls for the stations and supplied the necessities, officials at all levels participated in facilitating and maintaining the system of rape and sexual slavery. In light of the fact that there were regulations distinguishing between visits to the “comfort stations” by officers and soldiers, it is the view of the Judges that many superiors also used the “comfort stations,” which would also serve to condone and encourage the system.

The Special Court For Sierra Leone Indictment of Charles Taylor

The Prosecutor against Charles Taylor

Amended Indictment:

Count 5: Sexual Slavery and any other form of sexual violence, a CRIME AGAINST HUMANITY, punishable under Article 2.g. of the statute.

The Prosecutor against Alex Tamba Brima et al

Further Amended Consolidated Indictment

Counts 6-9 Sexual Violence:

Para 51. Widespread sexual violence committed against civilian women and girls included brutal rapes, often by multiple rapists, and forced ‘marriages’.

Para 54. Between about 1 May `998 and 31 November 1998, members of the AFRC/RUF raped an unknown number of women and girls in locations in Bombali District... In addition, an unknown number of abducted women and girls were used as sex slaves and/or forced into “marriages”...

Sexual Enslavement in the Iraq High Tribunal

IHT Statute

- Sexual slavery is a crime against humanity under Article 12(First)(g).
- “Enslavement” is defined under Article 12(Second)(c) as “the exercise of any or all of the powers attached to the right of ownership over a person and includes the exercise of such power in the course of human trafficking, in particular women and children.” “Sexual slavery” is not defined.
- Sexual slavery is also a war crime under Article 13(Second)(v) and Article 12(Fourth)(f).

IHT Elements of Crimes

9. Article 12(a)(7): Crime Against Humanity of Sexual Slavery

- a. The perpetrator willfully exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty, including, but not limited to, exacting forced labor or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, or the trafficking in persons, in particular women and children;
- b. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
- c. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- d. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

39. Article 13(b)(22): War Crime of Sexual Slavery

- a. The perpetrator willfully exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty, including, but not limited to, exacting forced labor or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, or the trafficking in persons, in particular women and children;
- b. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
- c. The conduct took place in the context of and was associated with an intentional armed conflict; and *
- d. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

* Article 13(d)(6) similarly lists sexual slavery as a war crime substituting “the conduct took place in the context of and was associated with an armed conflict not of an international character” for point c.