



ICRC

ADVISORY SERVICE

ON INTERNATIONAL HUMANITARIAN LAW

Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts

Rape and other forms of sexual violence cause physical and psychological harm to their victims (women, girls, men and boys) and have a direct impact on their families and communities. Rape and other forms of sexual violence, when committed in the context of an armed conflict either international or non-international, constitute violations of international humanitarian law (IHL). In line with their obligation to respect and ensure respect for IHL, States must prevent and criminalize rape and other forms of sexual violence in their domestic legal systems. States also have an obligation to investigate and prosecute or, as applicable, to extradite authors of such crimes, and to ensure that victims have access to health care, justice, and reparations. International criminal law provides criminalization and a basis for jurisdiction at the international level.

Definition of rape and other forms of sexual violence under international law

Rape and other forms of sexual violence are prohibited by numerous international treaties. However, no international treaty, including the four Geneva Conventions of 1949 and their Additional Protocols of 1977, contains a precise definition of rape or sexual violence.

The statutes of ad hoc international criminal tribunals recognize rape as a crime but do not provide a specific definition. Therefore, the tribunals have, in their jurisprudence, developed their own definitions. The Statute of the International Criminal Court (ICC) contains its own definition. Both men and women can, under all definitions, be victims or perpetrators of rape or sexual violence.

Rape

The International Criminal Tribunal for Rwanda (ICTR) first defined rape, in the *Akayesu* case in 1998, as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” The

Tribunal recognized the coercive circumstances as an element of the crime that did not need to be evidenced by physical force: “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.” It also recognized that coercion may be inherent in certain situations, such as armed conflict. On the other hand, **the International Criminal Tribunal for the former Yugoslavia (ICTY)**, in the *Kunarac et al* case in 2001, defined rape as being constituted by: “the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.”

The appeals chamber of the ICTY confirmed this definition the following year and added that “[f]orce or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.” It also stated that in certain cases, the victim’s consent can simply not be given freely; and that this is the case where the victim is subjected to or threatened with, or has reason to fear, violence, duress, detention or

psychological oppression or reasonably believes that if he or she did not submit, another might be so subjected, threatened or frightened.

In 2008, **the ICTR**, in the *Bagosora* case, adopted that part of the ICTY definition that was based on the absence of consent rather than on the coercive circumstances.

The Special Court for Sierra Leone, in the *Brima, Kamara and Kanu* case in 2007, also based its judgments on the ICTY definition used in the *Kunarac* case.

The ‘Elements of Crimes’ of the ICC Statute, adopted in 2002 and revised in 2010, define rape as “invasion” or “penetration” that is “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, or by taking advantage of a coercive environment.” This definition of rape is based on coercion rather than on the absence of consent.

Sexual violence

Sexual violence can be defined as acts of a sexual nature that do not necessarily require penetration; this covers a much broader range of acts than rape. Examples of such acts can be found in the **four Geneva Conventions (GC I, II, III and IV) of 1949, their Additional Protocols (AP I and II) of 1977, and the ICC Statute, as well as in the jurisprudence of international criminal tribunals.** They can take various forms, such as: enforced prostitution, indecent assault, sexual slavery, forced public nudity, sexual harassment such as forced stripping, and mutilation of sexual organs.

The prohibition against rape and other forms of sexual violence under IHL and international human rights law (IHRL).

Some **IHL treaty provisions** explicitly prohibit rape and/or other forms of sexual violence; other provisions do so implicitly.

International armed conflicts

In situations of international armed conflict, the following provisions are of relevance to the prohibition against rape and other forms of sexual violence:

- **Art. 12, GC I** and **Art. 12, GC II**, on the general protection of the wounded and sick and the shipwrecked of the armed forces, with a special reference to women
- **Arts 13 and 14, GC III**, on the general protection of prisoners of war, with a special reference to women (Art. 14(2))
- **Art. 27(2), GC IV**, which explicitly provides that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”
- **Art. 75(2)(b), AP I**, which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”
- **Art. 76(1), AP I**, which explicitly provides that

“[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”

- **Art. 77(1), AP I**, which provides that “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault.”

It should be noted that rape and other forms of sexual violence can, depending on the circumstances, also fall under other prohibitions of IHL, such as the prohibitions against violence to person, against torture and against inhuman treatment.

Non-international armed conflicts

In situations of non-international armed conflict, **Article 3 common to the four Geneva Conventions of 1949** (common Article 3) contains no specific prohibition against rape or other forms of sexual violence, but it categorically demands that persons not (or no longer) taking active part in hostilities be treated humanely, in all circumstances, without any adverse distinction based on sex, for example. It therefore equally protects women and men. As a consequence of the absolute obligation regarding humane treatment, common Article 3 particularly prohibits violence to life and person, including cruel treatment and torture, and outrages upon personal dignity, especially humiliating and degrading treatment. Rape and other forms of sexual violence, depending on the circumstances, can fall under one or more of those prohibitions.

Art. 4.2(e), AP II, when applicable, explicitly prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” with regard to any person not or no longer directly participating in hostilities, women and men alike.

Rape and other forms of sexual violence are also prohibited under **customary IHL** during both international and non-international armed conflict (Rule 93 of the ICRC study on customary IHL).¹

Under **international human rights law**, as applicable, the prohibition against rape and other forms of sexual violence has been found to fall under

the prohibition against torture and other forms of ill-treatment. More specifically, the prohibition against rape and other forms of sexual violence can be found explicitly in regional instruments. (Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Arts 4 and 11; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Arts 2 and 7)

Rape and other forms of sexual violence in detention

When deprived of their liberty in connection with an armed conflict, women, girls, men and boys are particularly vulnerable to rape and other forms of sexual violence.

During **international armed conflict**, persons who are entitled to prisoner-of-war (POW) status benefit from protection under **GC III**. POWs must, in particular, at all times be humanely treated and protected, particularly against acts of violence or intimidation and against insults and public curiosity (**Arts 13 and 14, GC III**). Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men (**Art. 14(2), GC III**). Women deprived of their liberty are particularly vulnerable, for example when they are not physically separated from male detainees or when they are under the supervision of men. GC III therefore requires that specific measures be taken by the authorities in charge of their detention. Women shall be provided with separate dormitories/quarters and separate sanitary conveniences, and shall be under the immediate supervision of women (**Arts 25(4), 29(2), 97(4) and 108(2), GC III**).

Throughout internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment (**Art. 82(2), GC IV**); wherever possible, interned members of the same family shall be housed in the same premises (**Art. 82(3), GC IV**); when it is necessary to accommodate women who are not members of a family unit in the same place of internment as men, separate quarters and sanitary conveniences shall be provided (**Art. 85(4), GC IV**); women shall not be searched except by other women (Art. 97(4), GC IV); women accused of offences and women undergoing disciplinary punishment shall be confined in separate quarters from male internees

¹ See: <http://www.icrc.org/customary-ihl/eng/docs/home>

and be under the immediate supervision of women (Art. 76(4), GC IV and 124(3), GC IV).

AP I also provides that – unless families are accommodated as family units – women be held in quarters separated from men's quarters, that they be under the immediate supervision of women, and that children be held in quarters separate from the quarters of adults (Arts 75(5) and 77(4), AP I)

During *non-international armed conflict*, AP II provides that “except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women” (Art. 5 (2)).

Corresponding rules also exist under **customary IHL**, for both international and non-international armed conflict (see Rules 119 and 120 of the ICRC study on customary IHL).

Further provisions and standards that can be of relevance include Articles 10(2)(b) and 10(3) of the ICCPR; Article 37(c) of the Convention on the Rights of the Child; Article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Rules 8(a) and (d), 23, 53 and 85(2) of the UN Standard Minimum Rules for the Treatment of Prisoners; Rules 19, 20, and 21 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules); see also Para. 8 of the UN Human Rights Committee's General Comment 16 on Article 17 of the ICCPR.

Rape and other forms of sexual violence as international crimes

Both the Statute of the ICTY and that of the ICTR recognize that rape can constitute a **crime against humanity** (Art. 5(g), ICTY Statute and Art. 3(g), ICTR Statute). Both tribunals' jurisprudence also recognized that acts of sexual violence can be constituent elements of other crimes. For instance, the ICTR, in the *Akayesu* case, recognized that sexual violence could fall within the scope of **inhumane acts, outrages upon personal dignity and serious bodily or mental harm**, thereby violating common Article 3. It also recognized that sexual violence could constitute **genocide** when committed with the intent to destroy wholly or in part a national, ethnic, racial or religious group. In the *Kunarac* case, the ICTY recognized that sexual violence could constitute an **outrage upon personal dignity**, as well as **enslavement and torture**.

The Special Court for Sierra Leone recognized that the abduction of women by members of the armed forces to turn them into ‘bush wives’ constituted a crime against humanity. It recognized that sexual violence committed against the civilian population amounted to an **act of terror**, which is prohibited by IHL.

The ICC Statute explicitly recognizes that crimes of a sexual nature can constitute **crimes against humanity** (Art. 7(1)(g) and/or **war crimes** in both international (Art. 8(2)(b)(xxii)) and non-international armed conflict (Art. 8(2)(e)(vi)).

More specifically, the Statute also recognizes the following as criminal acts: **rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization**. It also recognizes as war crimes any **other forms of sexual violence** that constitute a grave breach of GC I-IV or a serious violation of common Article 3.

By virtue of the **principle of complementarity**, the jurisdiction of the ICC is intended to come into play only when a State is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction. To benefit from this principle, States must already have adequate legislation enabling them to prosecute such criminals.

States' obligations under IHL to prevent and repress sexual violence related to armed conflicts and to protect the victims thereof

Criminalization and repression

In the context of **international armed conflict**, GC I-IV and AP I contain lists of ‘**grave breaches**’ of those instruments (see Art. 50, GC I; Art. 51, GC II; Art. 150, GC III; Art. 147, GC IV; Arts 11 and 85, AP I). A State party to GC I-IV and AP I has the obligation to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of these instruments. Every State Party must also “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another [State party] concerned. ...” (Art. 49, GC I; Art. 50, GC II; Art. 129, GC III; Art. 146, GC IV and Art. 85(1), AP I).

Rape or other forms of sexual violence are not specifically listed as grave

breaches. However, when **an act of rape or some other form of sexual violence amounts to one of the grave breaches listed** (such as torture, inhuman treatment, or wilfully causing great suffering or serious injury to body or health), **it must be investigated and the perpetrators prosecuted** as required by the grave breaches system.

In addition to the specific obligations regarding grave breaches, every State party to GC I-IV must also “take measures necessary for the suppression of all acts contrary to the provisions of the [Conventions] other than the grave breaches” (see Arts 49, 50, 129, 146, GC I-IV; Art. 85(1), AP I). Such **suppression** can, for example, take the form of penal sanctions or of disciplinary sanctions.

Under **customary IHL**, serious violations of IHL, whether committed in **international or non-international armed conflict**, constitute war crimes (for details, see Rule 156 of the ICRC study on customary IHL). As evidenced by international case law and the ICC Statute as well, sexual violence can be such a serious violation of IHL both in international and non-international armed conflict. As identified in Rule 158 of the **ICRC study on customary IHL**, “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.” In this context, Rule 157 of the ICRC study on customary IHL has found that: “States have the right to vest universal jurisdiction in their national courts over war crimes.”

UN Security Council Resolution S/RES/2106 (2013), on sexual violence in conflict, states that sexual violence can constitute a crime against humanity and a constitutive act of genocide, and that other forms of serious sexual violence in armed conflicts are war crimes. It also “*calls upon* Member States to comply with their relevant obligations to continue to fight impunity by investigating and prosecuting those subject to their jurisdiction who are responsible for such crimes; *encourages* Member States to include the full range of crimes of sexual violence in national penal legislation to enable prosecutions for such acts,” and “*recognizes* that effective investigation and documentation of sexual violence in armed conflict is instrumental both in bringing perpetrators to justice and ensuring access to justice for survivors.” Finally, it calls for ceasefire agreements to explicitly prohibit acts of

sexual violence and stresses that peace agreements and amnesty laws should not include rape and acts of sexual violence in their criminal liability exemptions.

Dissemination and training

In order to comply with their obligation to ensure respect for IHL, **States are required to disseminate IHL (Art. 47, GC I; Art. 48, GC II; Art.127, GC III; Art. 144, GC IV; Art. 83, AP I; and Art. 19, AP II)**. This includes the prohibition against rape and other forms of sexual violence. Such dissemination should take place both during peacetime and in time of war, and should target, among others, military personnel, civil servants and law enforcement agents. The prohibition against rape and other forms of sexual violence should also be taken into account in military training and included in military and police manuals or their equivalent.

Access to health care, assistance, justice, and reparations for victims of rape and other forms of sexual violence

It is important for victims of rape and other forms of sexual violence **to have access to medical, psychosocial and psychological care**. Such services should be provided without interference and with respect for the principle of medical confidentiality.²

Rape and other forms of sexual violence are medical emergencies, with potentially severe physical and psychological consequences for victims. It is thus crucial **that victims have unimpeded access to good-quality, timely and impartial medical care** within 72 hours to reduce, for example, the risk of infections.

Moreover, **economic assistance should be made available for victims** to ensure that their immediate basic needs are met, since rape and other forms of sexual violence in armed conflict can have devastating effects on victims' lives, including their ability to earn a living and to provide for themselves.

It should be made possible for victims of rape and other forms of sexual violence **to seek justice without any adverse consequences** for themselves. They should have easy access to a lawyer and be able to initiate proceedings – ideally, free of charge, but if that is not feasible, at a reasonable cost. Law enforcement authorities, prosecutors and judges should be adequately

trained to take the specific vulnerability of victims of rape and other forms of sexual violence into account. **Protective measures, such as closed door hearings and written depositions, should be provided while ensuring a fair trial and due process.**

Under IHL and IHRL, as applicable, reparations must be made available for victims. More specifically, in situations of armed conflict, AP I recognizes the obligation of States to compensate victims for violations of GC I-IV and AP I, including when these have been committed by members of their armed forces (Art. 91, AP I). Rule 150 of the ICRC study on customary IHL has found thus: "A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused."

² For more information on respect and protection for health care, please refer to the ICRC Advisory Service fact sheet,